

**POLICE USE OF FORCE:
AN EXAMINATION OF MODERN
POLICING PRACTICES**

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING
REPORT



NOVEMBER 2018

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.¹

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¹ 42 U.S.C. §1975a.

*Denotes Commissioner’s recusal from the report.

Police Use of Force: An Examination of Modern Policing Practices

**Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC**

Briefing Report

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

November 15, 2018

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Paul Ryan

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Police Use of Force: An Examination of Modern Policing Practices*. The report is also available in full on the Commission’s website at www.usccr.gov.

In this report, the Commission investigated rates of police use of force; whether rates and instantiations of that use of force violate civil rights of persons of color, persons with disabilities, LGBT communities, and low-income persons; promising or proven policies and practices worth replicating to minimize unnecessary use of force; and the perception and reality of discrimination in police use of force. The Commission considered evidence from law enforcement and court officials, community leaders and police reform advocates, scholars, legal experts, as well as testimony taken in by the Commission’s State Advisory Committees in Minnesota, New York, Maine, and Delaware.

The Commission majority approved key findings including the following: While police officers have the difficult and admirable job of providing crucial services to the communities they protect and serve, their job sometimes puts them in harm’s way and may require the use of force. Accordingly, police officers must operate with the highest standards of professionalism and accountability. Every community resident should be able to live, work, and travel confident in an expectation that interactions with police officers will be fair, consistent with constitutional norms, and guided by public safety free from bias or discrimination. Unfortunately, too many communities are not confident in these expectations, and so these communities have called for reforms to foster better community-police relations and prevent unjustified and excessive police uses of force.

Accurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public. No comprehensive national database exists that captures police uses of force. The best available evidence reflects high rates of uses of force nationally, with increased likelihood of police use of force against people of color, people with disabilities, LGBT people, people with mental health concerns, people with low incomes, and those at the intersection of these communities. Lack of sufficient training—and funding for training—leaves

officers and the public at risk. Repeated and highly publicized incidents of police use of force against persons of color and people with disabilities, combined with a lack of accurate data, lack of transparency about policies and practices in place governing use of force, and lack of accountability for noncompliance foster a perception that police use of force in communities of color and the disability community is unchecked, unlawful, and unsafe.

The Commission majority voted for key recommendations, including that the United States Department of Justice should return to vigorous enforcement of constitutional policing, including under its authority pursuant to 42 U.S.C. § 14141, and the use of consent decrees where necessary to ensure that constitutional policing standards are upheld. The Department of Justice should robustly support local efforts to develop and institute constitutional policing practices, including through the Office of Community Oriented Policing Services (COPS) and maintaining the Community Relations Service (CRS) to focus on building community trust and reducing excessive or unauthorized uses of force, in coordination with police departments.

The Commission majority also called on Congress to fund grants, facilitated by the Department of Justice, to incentive evidence-based practices that, when employed, reduce incidents of excessive or unauthorized force. These practices may include increased training on de-escalation tactics and alternatives to use of force. Congress should also fund grants that support effective external police oversight and research regarding best practices for such oversight.

The Commission majority called for practical reforms to stem the tide of perceived conflict between police officers and their communities, and to recommit this nation to the principles of fairness and equal treatment, including at the hands of police, that are core to democracy. These recommendations for forward progress are measured, appropriate, and urgent; our nation's communities need their implementation.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

A handwritten signature in blue ink, appearing to read 'C. Lhamon', is positioned above the printed name.

Catherine E. Lhamon
Chair

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ACKNOWLEDGEMENTS

The Office of Civil Rights Evaluation (OCRE) produced the final version of this report under the direction of Katherine Culliton-González, Esq, OCRE Director. Dr. Marik Xavier-Brier, Civil Rights Analyst, performed principal research and writing.

Interns Madison Hubbard, Michigan State University, Krista Painter, University of Texas, Sabrina Escalera-Flexhaug, American University, Washington College of Law, and Aaron Hurd, Indiana University, Maurer School of Law also provided valuable research and legal assistance.

Commissioners and Commissioner Special Assistants Sheryl Cozart, Jason Lagria, Carissa Mulder, Amy Royce, Rukku Singla, and Alison Somin conducted research, edited, and examined the report.

The Commission's General Counsel Maureen Rudolph reviewed and approved the report for legal sufficiency.

State Advisory Committees in Delaware, Maine, Minnesota, and New York collected and provided testimony, findings, and recommendations to the Commission on policing issues with their jurisdictions.

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EXECUTIVE SUMMARY

The relationship between law enforcement and many communities in the U.S. is fraught and challenging, particularly for those who experience violent crimes coupled with intensive police presence and surveillance. A number of recent developments suggest a renewed commitment to resolving this issue. For the first time in decades, the country has witnessed ubiquitous and sustained protests by young people, communities of color, and other impacted populations in cities all across the country.¹ Further, in hope of fostering better community-police relationships, many law enforcement and city officials around the country have started implementing reform strategies to allay communities' concerns about actual or perceived unfair and unequal policing. Reform advocates often acknowledge the positive steps that some jurisdictions are undertaking, but reported cases of excessive force remain a national concern.² Furthermore, the Bill of Rights of the U.S. Constitution guarantees the fundamental rights of both law enforcement and the communities they serve, whose rights are protected under the Fourth, Eighth, and Fourteenth Amendments.³

While allegations that some police force is excessive, unjustified, and discriminatory continue and proliferate, current data regarding police use of force is insufficient to determine if instances are occurring more frequently. The public continues to hear competing narratives by law enforcement and community members, and the hard reality is that available national and local data is flawed and inadequate.

A central contributing factor is the absence of mandatory federal reporting and standardized reporting guidelines. Former FBI Director James Comey stated that:

Not long after riots broke out in Ferguson [in 2014], I asked my staff to tell me how many people shot by police were African-American in this country. I wanted to see trends. I wanted to see information. They couldn't give it to me, and it wasn't their fault. Demographic data regarding officer-involved shootings is not consistently reported to us . . . [b]ecause reporting is voluntary, our data is incomplete and therefore, in the aggregate, unreliable.⁴

¹ See, e.g., Sara Sidner and Mallory Simon, "The rise of Black Lives Matter: Trying to break the cycle of violence and silence," *CNN*, Dec. 28, 2015, <http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/index.html>; Cristina Flesher Fominaya, *Social Movements and Globalization: How Protests, Occupations and Uprisings are Changing the World* (New York: Palgrave MacMillan, 2014).

² Maya Rhodan, "Why President Obama's Police Reform Is a Work in Progress," *Time*, July 8, 2016, <http://time.com/4398392/obama-police-reform-report-task-force-on-21st-century-policing/>.

³ U.S. CONST. amends. IV, VIII, and XIV.

⁴ James B. Comey, "Hard Truths: Law Enforcement and Race" (speech delivered at Georgetown University, Washington, D.C., Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

Until recently, data on officer-involved shootings were extremely rare; moreover, the data that are available is most frequently compiled by grassroots organizations, nonprofits, or media sources.⁵ Data are not only lacking regarding fatal police shootings, but data regarding all use of force are scant and incomplete:

Data on lower level uses of force, which happen more frequently than officer-involved shootings, are virtually non-existent. This is due, in part, to the fact that most police precincts don't explicitly collect data on use of force, and in part, to the fact that even when the data is hidden in plain view within police narrative accounts of interactions with civilians, it is exceedingly difficult to extract.⁶

Without accurate data on police use of force, allegations by community members and actions by law enforcement not only sow distrust among communities and the police, making policing more dangerous, but also jeopardize public safety. Research consistently shows that positive relationships between community members and law enforcement are essential for safer communities.⁷ Citizens are more likely to aid in crime reduction and partner with police if they believe that law enforcement are engaging in equitable treatment and are impartial towards all.⁸

⁵ Kimberly Kindy, "FBI to Sharply Expand System for Tracking Fatal Police Shootings," *Washington Post*, Dec. 8, 2015, https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html?wpisrc=nl_draw; Jon Swaine and Oliver Laughland, "Eric Garner and Tamir Rice among those missing from FBI record of police killings," *Guardian*, Oct. 15, 2015, <https://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>; Wesley Lowery, "Aren't more white people than black people killed by police? Yes, but no," *Washington Post*, July 11, 2016, <https://www.washingtonpost.com/amphhtml/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/>; *Guardian*, "The Counted: People Killed by the Police in the U.S.," 2016, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (database collecting number of deaths caused by police); Mapping Police Violence, "2017 Police Violence Report," <https://policeviolencereport.org/> (last accessed Nov. 3, 2018); We Charge Genocide, *The Counter-CAPS Report: The Community Engagement Arm of the Police State*, 2015, <http://wechargegenocide.org/wp-content/uploads/2015/10/CAPSreport-final.pdf>.

⁶ Roland G. Fryer, "An Empirical Analysis of Racial Differences in the Use of Force," National Bureau of Economic Research, revised in 2018, <http://www.nber.org/papers/w22399>.

⁷ Tom Tyler, *Why People Obey the Law* (Princeton: Yale University Press, 2006); Ben Bradford and Jonathan Jackson, "Cooperating with the Police as an Act of Social Control: Trust and Neighborhood Concerns as Predictors of Public Assistance," May 19, 2016, <https://ssrn.com/abstract=1640958>.

⁸ See Police Executive Research Forum, *Legitimacy and Procedural Justice: A New Element of Police Leadership*, ed. Craig Fisher, 2014, at 6-32, http://www.policeforum.org/assets/docs/Free_Online_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf (citing Tom Tyler, "What are Legitimacy and Procedural Justice in Policing? And Why Are They Becoming Key Elements of Police Leadership?"); Jason Sunshine and Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC'Y REV.* 513 (2003); Nancy La Vigne, Jocelyn Fontaine, and Anamika Dwivedi, *How Do People in High-Crime, Low-Income Communities View the Police?*, Urban Institute, 2017, https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf; Senator Mark Leno, "Police Transparency and Accountability," ACLU of Northern California,

Communities are calling for greater transparency and accountability on the part of the police.⁹ Similarly, law enforcement officials are calling for better data on current practices, and instituting policies aimed at reducing bias and improving community relationships.¹⁰ All citizens in every community in this country live subject to police enforcement practices, and therefore benefit from effective, constitutionally sound police practices.

Against this backdrop, the U.S. Commission on Civil Rights (Commission) investigated rates of police use of force; questioned whether rates and instantiations of that use of force violate the civil rights of persons of color, persons with disabilities, LGBT¹¹ communities, and low-income persons; and evaluated promising or proven policies and practices worth replicating to minimize unnecessary use of force and the perception and reality of discrimination in police use of force. The Commission held a briefing on April 20, 2015, on police practices and the use of deadly force in the U.S. The panels consisted of community leaders and police reform advocates, law enforcement and court officials, scholars, and legal experts. These experts convened to discuss the longstanding and emergent causes of the recent police-involved fatal shootings of people of color and other disadvantaged populations. Since 2015, several of the Commission's state advisory committees have also investigated police practices, and testimony and findings from their briefings are incorporated throughout the report. No single solution stands out as an immediate fix to the complex problem of police unauthorized use of force. After examining the literature and data available regarding police use of force in Chapters 1-3, the Commission highlights the following findings and recommendations, discussed in full in Chapter 4:

Highlighted Findings:

Police officers have the difficult and admirable job of providing crucial services to the communities they protect and serve. Their job sometimes puts them in harm's way and may require the use of force. Accordingly, police officers must operate with the highest standards of professionalism and accountability.

Every community resident should be able to live, work, and travel confident in an expectation that interactions with police officers will be fair, operate consistent with constitutional norms, and be guided by public safety free from bias or discrimination. Unfortunately, today, too many

<https://www.aclunc.org/our-work/legislation/police-transparency-accountability-sb-1286> (last accessed Oct. 25, 2018).

⁹ President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, Office of Community Oriented Policing Services, 2015, at 12, <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf>; U.S. Dep't of Justice, *Importance of Police-Community Relationships and Resources for Further Reading*, Community Relations Services Toolkit for Policing, at 2, <https://www.justice.gov/crs/file/836486/download>.

¹⁰ See e.g., Tyler, *Why People Obey the Law*, *supra* note 7; The Police Foundation and The U.S. Dep't of Justice, Office of Community Oriented Policing Services, "Police Data Initiative," <https://www.policedatainitiative.org/> (last accessed Oct. 25, 2018); Samuel Walker, "Police Accountability: Current Issues and Research Needs" (paper presented at the National Institute of Justice (NIJ) Policing Research Workshop: Planning for the Future, Washington, D.C., Nov. 28-29, 2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/218583.pdf>.

¹¹ LGBT is an acronym used to refer to lesbian, gay, bisexual, and transgender communities.

communities are not confident in that expectation and do not trust fair police-community interactions. Communities have demanded reforms to foster better community-police relations and to prevent unjustified and excessive police uses of force.

Accurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public. No comprehensive national database exists that captures rates of police use of force.

The best available evidence reflects high rates of use of force nationally, and increased likelihood of police use of force against people of color, people with disabilities, LGBT people, people with mental health concerns, people with low incomes, and those at the intersections of these groups.

Lack of training and lack of funding for training leave officers and the public at risk. Critical training areas include tactical training, de-escalation techniques, understanding cultural differences and anti-bias mechanisms, as well as strategies for encounters with individuals with physical and mental disabilities.

Repeated and highly publicized incidents of police use of force against persons of color and people with disabilities, combined with a lack of accurate data, lack of transparency about policies and practices in place governing use of force, and lack of accountability for noncompliance foster a perception that police use of force in communities of color and the disability community is unchecked, unlawful, and unsafe.

Highlighted Recommendations:

The Department of Justice should return to vigorous enforcement of constitutional policing, including pursuant to 42 U.S.C. § 14141 and use of consent decrees as necessary where constitutional policing standards are not being upheld.

The Department of Justice should robustly support local efforts to develop and institute constitutional policing practices. Such support should include reinstating the Office of Community Oriented Policing Services (COPS) and maintaining the Community Relations Services office (CRS) to focus on building community trust and reducing excessive uses of force in coordination with police departments. DOJ support also should include grant support as well as generation of federal guidance supporting development of effective training, policies, and internal accountability measures that promote expanded strategies and tactics that safeguard the lives of officers and citizens.

Congress should fund grants that support effective external police oversight through, for example, independent monitors or police commissions or community oversight. Congress should also fund grants for research regarding best practices for such oversight, to develop replicable models that communities could follow to ensure constitutionally sound policing in their jurisdictions.

Congress should fund grants, facilitated by the Department of Justice, to incentivize evidence-based best practices that, when employed, reduce incidents of excessive force. The following practices deserve serious consideration as policy makers pursue mechanisms to keep communities safer:

- Officers should be trained on de-escalation tactics and alternatives to use of force. Tactical training should include strategies to create time, space, and distance, to reduce the likelihood that force will be necessary and should occur in realistic conditions appropriate to the department's location.
- Courts and legislatures should require judges to preside over grand jury proceedings and open the records of these proceedings in police use of force cases to the public, in cases where the identity of the subject of the investigation is already public.
- Investigation and prosecution of use of force cases should be made as independent and public as possible. The agencies investigating and determining whether to move forward with prosecution should not have an ongoing relationship with the department.
- Departments should provide aggregate information to the public regarding the numbers of allegations and type of use of force and what steps, if any, departments take to address use of force concerns when they arise. These data should be disaggregated by race, gender and disability status.

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CHAPTER 1: INTRODUCTION: DEFINITIONS, DATA, AND MAJOR THEORETICAL PERSPECTIVES

The issue of police use of excessive force (both non-lethal and lethal) has been a central concern for researchers, community advocates, and law enforcement for many decades. The negative effects of uneven policing practices against particular communities (e.g., racial and ethnic, LGBT, immigrant, disability) are well documented in the social science literature;¹² however, there is scant research that has analyzed the psychological or social effects of uneven policing practices on these communities. Phillip Atiba Goff, president of the Center for Policing Equity, states that one of the challenging issues about policing practices is that researchers have primarily focused on how these practices affect crime and crime rates, instead of also investigating the social and psychological effects on individuals.¹³ The National Academies of Sciences report on proactive policing found that it is likely that some forms of police practices (e.g., targeting “high-risk” areas) may lead to large racial disparities, however few studies have been able to conclude the causes of these disparities or the social consequences of police-civilian contact. These gaps in research leave police departments and communities concerned about the treatment of individuals without sufficient evidence from which to make informed decisions.¹⁴ Thus, while reform advocates have decried instances, patterns, and practices where police have not treated civilians equitably, without comprehensive data on policing, it is difficult to fully determine any trends and how to address them.

¹² See e.g., Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination and Harassment by Law Enforcement in the LGBT Community*, The Williams Institute, 2015, at 4, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>; We Charge Genocide, *The Counter-CAPS Report: The Community Engagement Arm of the Police State*, 2015, at 5-6, <http://wechargegenocide.org/wp-content/uploads/2015/10/CAPSreport-final.pdf>; see generally Phillip Atiba Goff, Tracey Lloyd, Amanda Geller, Steven Raphael, and Jack Glaser, *The Science of Justice: Race, Arrests, and Police Use of Force*, Center for Policing Equity, 2016, http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf; Mike King, “Disruption is Not Permitted: The Policing and Social Control of Occupy Oakland,” *Critical Criminology*, vol. 21 (2013); Jonathan Hutto and Rodney Green, “Social Movements Against Racial Police Brutality and Department of Justice Intervention in Prince George’s County, Maryland,” *Journal of Urban Health*, vol. 96 (2016), at 89-121, <https://link.springer.com/article/10.1007/s11524-015-0013-x>; Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of African Americans*, Robert Wood Johnson Foundation, 2017, at 4 (including a survey of 802 African-American U.S. adults conducted January 26-April 9, 2017. The margin of error for the full African American sample is +/- 4.1%); David Perry and Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, Ruderman Family Foundation, 2016, http://www.rudermanfoundation.org/wp-content/uploads/2016/03/MediaStudy-PoliceDisability_final-final1.pdf.

¹³ Phillip Atiba Goff, “On Stop-and-Frisk, We Can’t Celebrate Just Yet.” *New York Times*, Jan. 7, 2018, <https://www.nytimes.com/2018/01/07/opinion/stop-and-frisk-celebrate.html>.

¹⁴ David Weisburd and Malay K. Majmundar, eds., *Proactive Policing: Effects on Crime and Communities*, National Academies of Sciences, Engineering, and Medicine, Division of Behavioral and Social Science and Education, Committee of Law and Justice, 2018, at 13, <https://www.nap.edu/catalog/24928/proactive-policing-effects-on-crime-and-communities>.

Enacting needed reforms has also been difficult for law enforcement agencies around the country due to the fact that there are over 18,000 police departments nationally—which are all subject to significant and variable state and local rules.¹⁵ Private organizations and government agencies like the Police Executive Research Forum (PERF)¹⁶ and the Department of Justice’s Office of Community Oriented Policing Services (COPS)¹⁷ have made many recommendations and issued guidelines to aid law enforcement agencies. They have offered suggestions on how departments can update their use of force policies and change officers’ actions in hope of creating safer interactions between individuals and police officers. In response, many law enforcement agencies have started to rewrite or revise procedures and protocols that focus on respecting the sanctity of all lives, and are working to implement sustainable and lasting practices. In addition, departments that have successfully exited from or are in the midst of reform under the Justice Department’s (DOJ) oversight offer promising practices that could guide other police agencies. Several departments have stood out as exemplars in bringing about reform, such as the East Haven, Connecticut Police Department. In 2016, in its 36-month Justice Department Compliance Report, the police department received high marks for changing public perception and meeting “each and every benchmark for success specified [by] the Department of Justice both on-time and under budget.”¹⁸ Former Attorney General Loretta Lynch praised their efforts stating: “[W]e’re hoping other cities can look to and see how this change is implemented here. It does take a lot of work. It takes a lot of will. It takes a lot of effort, but it can be done.”¹⁹

¹⁵ U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Sources of Law Enforcement Employment Data*, 2016, at 1, <https://www.bjs.gov/content/pub/pdf/nsleed.pdf>; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). In the U.S. constitutional system of federalism, local “police power” falling under state sovereignty includes the ability to legislate and regulate to ensure public safety, education, health and welfare, and for police to regulate and act accordingly; however, local police power is limited by the mandates of the Bill of Rights and related civil rights law. The Supreme Court has reasoned that “states traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” While there is significant state and local authority, there are also numerous instances of police departments being held accountable under federal constitutional and civil rights law. *Id.*

¹⁶ The Police Executive Research Forum (PERF) is a private, police research and policy organization and a provider of management services, technical assistance, and executive-level education to support law enforcement agencies.

¹⁷ The Office of Community Oriented Policing Services (COPS Office) is the component of the U.S. Department of Justice that is responsible for advancing the practice of community policing by the nation’s state, local, territorial, and tribal law enforcements agencies through information and grant resources.

¹⁸ While reform to the department is promising, it is important to note that these reforms follow a DOJ investigation and negotiation of a consent decree requiring reform of the department. Thus, these actions taken by the police department are separate and apart from a voluntary revelation from the police department itself. See Jamie Wilkins, “Maturo Praises Police Department 4 Years After Department of Justice Agreement,” *East Haven Patch*, Dec. 26, 2016, <https://patch.com/connecticut/easthaven/maturo-praises-police-department-4-years-after-department-justice-agreement-0>.

¹⁹ *Ibid.*

Defining Excessive Use of Force

One of the central issues concerning police's use of force is how to define the boundary between when force may be necessary or reasonable, versus when it becomes excessive.²⁰ While the majority of interactions between police and civilians are peaceful, there are instances where force may be necessary. The Supreme Court has held that an objective reasonableness standard should apply to claims that police officers used excessive force.²¹ Even under an objective reasonableness standard, quantifying the appropriate amount of force in a given situation can be difficult and debatable.²²

According to the National Institute of Justice, force is permitted at certain times, such as in self-defense or in defense of another individual or group.²³ Even in these circumstances, there is no single, definitive answer for how much force is "necessary" in any given situation.²⁴ According to the International Association of Chiefs of Police, the appropriate amount of force is the "amount of effort required by police to compel compliance from an unwilling subject."²⁵ While there are guidelines, there is not a universal set of rules governing law enforcement's use of force policies. To determine if force is "excessive" requires judging that the amount of force used was unwarranted, and that the officer overstepped the limits of his or her authority. Researchers Alpert and Dunham argue that "since the use of force and excessive force can be defined or measured in a variety of ways, it is impossible for researchers to state definitively the frequency with which the police use force, justifiably or to excess."²⁶

In 1989, in the case of *Graham v. Connor*, the United States Supreme Court held that police use of force should be evaluated based on "objective reasonableness" and explained that reasonableness

must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-

²⁰ The National Institute of Justice, "Police Use of Force," Office of Justice Programs, <https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx> (last accessed Oct. 26, 2018).

²¹ *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (stating that in "determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake") (internal citations omitted).

²² Geoffrey Alpert and Roger Dunham, *Understanding Police Use of Force: Officers, Suspects, and Reciprocity* (London: Cambridge University Press, 2010).

²³ The National Institute of Justice, "Police Use of Force," Office of Justice Programs, <https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx> (last accessed Oct. 26, 2018).

²⁴ *Ibid.*

²⁵ International Association of Chiefs of Police, *Police Use of Force in America* (2001), <http://www.theiacp.org/Portals/0/pdfs/Publications/2001useofforce.pdf>.

²⁶ Alpert and Dunham, *Understanding Police Use of Force*, *supra* note 22 at 20.

second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.²⁷

While *Graham* established the constitutional floor for excessive use of force, many jurisdictions have chosen to move beyond these bare minimums and adopt a more exacting and detailed set of policies and training procedures such as rules on shooting at moving vehicles, rules on pursuits, and other use of force issues.²⁸ Similarly, members of the public have commented that the great degree of discretion left to police departments by the Supreme Court’s decision in *Graham* means their concerns are not being addressed by the courts, leaving the legislature and police departments to take the initiative in addressing excessive police force.²⁹

At the same time, another main issue with trying to determine whether force was excessive or appropriate is that community perceptions do not necessarily follow the same standard as the legal one.³⁰ While a police officer may be acting within the legal confines laid out by *Graham*, the public may perceive the officer behaving badly or illegitimately. This significant disconnect can reduce community confidence in the legitimacy of the police, which ultimately reduces the efficacy of police work by making members of the community less responsive in future interactions with the police and less likely to assist officers in investigations. UCLA law professor Devon Carbado argues that the amount of latitude police legally have under Fourth Amendment law can be dangerous and misguided.³¹ In an attempt to address these issues, some departments have begun to implement policies that are more community-centered, in hope of building trust.³²

PERF states that law enforcement departments should go beyond the minimum requirements laid out by *Graham* in hope of fostering community trust and to implement policies to help prevent officers from putting themselves in situations where they have no choice but to make split-second decisions that may result in injury or death of either the person or officer.³³ For example, some departments have implemented policies such as restricting officers from putting their hands on a suspect after a foot pursuit or shooting into motor vehicles.³⁴ Milwaukee Police Chief Edward

²⁷ *Graham*, 490 U.S. at 396-97.

²⁸ Police Executive Research Forum, *Guiding Principles on Use of Force, Critical Issues in Policing Series*, 2016, at 16, <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>; see also *Hillsborough Cty. v. Automated Med. Lab.*, 471 U.S. 707, 719 (1985) (“Police powers” to protect health and safety are “primarily, and historically... matter[s] of local concern”); *Metropolitan Life*, 471 U.S. at 756 (reasoning that “states traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons”) (internal quotation marks omitted).

²⁹ *Graham*, 490 U.S. at 396-97.

³⁰ Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017).

³¹ *Id.* at 134 (citing *Maryland v. Garrison*, 480 U.S. 79 (1987)).

³² Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, 2014, at 19-20, https://www.policylink.org/sites/default/files/pl_police_use%20of%20force_111914_a.pdf.

³³ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28 at 16-17.

³⁴ *Ibid.* at 84-85.

Flynn asserts that police also need to be held accountable for the decisions that *lead up to* the use of deadly force.³⁵ He argues that officers should be reprimanded (if not fired) for instigating “officer-created jeopardy” or placing themselves in a situation where lethal force is their only choice.³⁶ Similarly, at the Commission’s briefing, David Klinger, Professor of Criminology at the University of Missouri, observed that when incidents of excessive force arise, it is not only a failure on the part of the officer, but also a failure of supervision that needs to be addressed.³⁷

Many police departments utilize what is known as the “use of force continuum.”³⁸ These are guidelines that provide officers with a range of options during confrontations with individuals, and acknowledge that the level of force used will vary depending on the situation. As an example, the National Institute of Justice defines the levels of officer response in a use of force continuum as follows:

- **Officer Presence:** No force is necessary. The mere presence of an officer is suitable to deter crime or diffuse a situation. Considered the best way to resolve a situation.
- **Verbalization:** Force is not physical. Officers use calm, nonthreatening commands, e.g., “Let me see your identification and registration.” May increase volume and shorten commands in an attempt to gain compliance (“stop” or “don’t move”).
- **Empty-Hand Control:** Officers use bodily force to gain control of a situation. There are *soft techniques* (grabs, holds, joint locks) and *hard techniques* (punches and kicks) used to restrain an individual.
- **Less-Lethal Methods:** Officers use less-lethal technologies to gain control of a situation. These can be in the form of *blunt impact* such as using a baton or projectile to immobilize a combative person. *Chemical:* chemical sprays or projectiles embedded with chemicals to restrain an individual (e.g., pepper spray). *Conducted Energy Devices* (CEDs): These devices discharge a high-voltage, low-amperage jolt of electricity at a distance (e.g., Tasers), officers may use conducted energy devices to immobilize an individual.
- **Lethal Force:** Officers use lethal weapons to gain control of a situation. This is the last and most severe response in the continuum and should only be used if a suspect poses a serious threat to the officer or another individual.³⁹

³⁵ Ibid. at 37-38 (emphasis in original).

³⁶ Ibid.

³⁷ David Klinger, University of Missouri, testimony before the U.S. Commission on Civil Rights, briefing, New York City, N.Y., April 20, 2015, transcript, at 334-35 [hereinafter *Briefing Transcript*].

³⁸ National Institute of Justice, “Use of Force Continuum,” Office of Justice Programs, <https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/Pages/continuum.aspx> (last accessed Oct. 26, 2018).

³⁹ Ibid.

PERF recommends that proportionality is a good measure to determine the legal use of force.⁴⁰ This means that a civilian's level of resistance is a key legal factor in the continuum.⁴¹ Therefore, "excessive force" is when an officer uses a more extreme method on the continuum than what the situation called for.⁴² In 1968, Albert Reiss, Professor Emeritus of Sociology at Yale University and prominent criminologist, offered "one of the first situational definitions of excessive force by constructing conditions where the use of force would be considered unnecessary."⁴³ Reiss suggests that force is excessive when used without subsequent arrest, when a citizen did not verbally or physically resist, or when an officer continued using force after a civilian was in custody.⁴⁴ Using this paradigm, Los Angeles police force veteran and expert Richard Lichten built on Reiss' definitions and provided more concrete examples to aid in police officer training.⁴⁵ One such example is if an officer tells a suspect that he or she is under arrest, but the suspect threatens to punch the officer. The officer pulls out a baton and threatens to strike the suspect. If the suspect backs down, but the officer hits the suspect anyway, this would be defined as "unnecessary force" because the suspect had already complied with the officer's order and the threat had ended. In the same scenario, if the suspect instead lunges to punch the officer and the officer strikes the suspect with a baton, that level of force would be justified. If the suspect stops and cooperates, but the officer continues to strike the person repeatedly, this would be understood as "excessive."⁴⁶

But the problem is, these examples are absolute and concrete, and sometimes situations in the real world are not as clear. Most civilian-officer confrontations cannot be placed into such rigid categories. Thus, PERF contends that the use of force continuum is outdated and needs to be revised.⁴⁷ They suggest that officers need to be trained to evaluate the entire situation at the moment when police are called, and to start developing a plan even before they arrive on the scene.⁴⁸ This way, they can be better prepared to make decisions within the wide range of available options, including defusing a situation without resorting to using excessive force.⁴⁹

State of National Data Collection

More than 20 years ago, Congress mandated that the Justice Department shall collect national data on police use of force and DOJ directed the FBI and Bureau of Justice Statistics (BJS) to do so,

⁴⁰ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28 at 38-39.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Alpert and Dunham, *Understanding Police Use of Force*, *supra* note 22 at 22 (citing Albert J. Reiss, *Police Brutality: Answers to Key Questions*).

⁴⁴ *Ibid.*

⁴⁵ Richard Lichten, "Unnecessary/Excessive Use of Force—A Working Definition," Police and Jail Procedures, Inc., 2014, http://www.policeandjailprocedures.com/live/excessive_use_of_force.html (last accessed Oct. 26, 2018).

⁴⁶ *Ibid.*

⁴⁷ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28 at 19-20.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

but the federal mandate does not require local law enforcement to provide the data.⁵⁰ Under the federal mandate, the Department of Justice surveys every law enforcement agency in the country to collect data on the use of force,⁵¹ but not all such agencies offer data to DOJ, and some agencies that do offer data only offer incomplete data. Of those that do reply, some departments lack tracking systems in place to track nonfatal incidents; other departments report only limited information (e.g., if the suspect was armed); and others do not provide any demographic data.⁵² Separate from this effort, in 2017 the FBI began a new data collection effort relying on voluntarily submitted reports from state and local law enforcement, the National Use-of-Force Data Collection.⁵³

A separate data set on police use of force used by researchers is found in the National Vital Statistics System (NVSS).⁵⁴ The Centers for Disease Control and Prevention conduct the NVSS based on state death certificate data, including deaths resulting from injuries inflicted by law enforcement officers. These data are housed at the National Center for Health Statistics.⁵⁵

Additionally, the Bureau of Justice Statistics conducts data collection programs that provide data on police use of force. BJS collects data on police use of force by surveying individuals about their interactions with police as part of the Police Public Contact Survey, as a supplement to the National Crime Victimization Survey.⁵⁶ It also collects data through its Mortality in Correctional Institutions program through the voluntary collection of death records for persons who died in

⁵⁰ 42 U.S.C. § 136.

⁵¹ 42 U.S.C. § 14142 (transferred to 34 U.S.C. § 12602) (requiring the Department of Justice to collect data on excessive force by police and to publish an annual report from the data (Title XXI, Subtitle D, Police Pattern or Practice)); *see also Id.*

⁵² Rob Arthur, Taylor Dolven, Keegan Hamilton, Allison McCann, and Carter Sherman, “Shot by Cops and Forgotten,” *Vice News*, Dec. 11, 2017, <https://news.vice.com/story/shot-by-cops>.

⁵³ According to the FBI, this data collection will aid in the understanding of national trends in police use of force. It has explained that data collection will occur voluntarily from law enforcement agencies: “For the national data collection, each agency will be responsible for reporting information for their own officers connected to incidents that meet the criteria of the data collection. Submission of data is entirely voluntary. Most law enforcement agencies in the United States already report various types of law enforcement data to the FBI, either directly or through their state agencies. Part of the plan for the National Use-of-Force Data Collection includes an opportunity for agencies to report use-of-force incidents electronically, either individually or via bulk submission, through a web application in the Law Enforcement Enterprise Portal (LEEP).” FBI: Uniform Crime Reporting, “National Use-of-Force Data Collection,” <https://ucr.fbi.gov/use-of-force> (last accessed Oct. 26, 2018).

⁵⁴ The NVSS is a database kept by the Centers for Disease Control and Prevention that is responsible for aggregating all annual deaths in the U.S. and it has been collected since the late 1800s. *See* Justin Feldman, Sofia Gruskin, Brent Coull, Nancy Krieger, “Quantifying underreporting of law-enforcement-related deaths in the United States vital statistics and news-media-based data sources: A capture-recapture analysis,” *PLoS Med*, vol. 14 (2017), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.019293>.

⁵⁵ *See* National Center for Health Statistics, National Vital Statistics System, “Public-Use Data Files and Documentation,” Centers for Disease Control and Protection, https://www.cdc.gov/nchs/data_access/ftp_data.htm (last accessed Oct. 26, 2018).

⁵⁶ U.S. Dep’t of Justice, “Data Collection: Police Public Contact Survey (PPCS),” Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=251> (last accessed Oct. 26, 2018).

prisons and local jails and who died in the process of arrest.⁵⁷ BJS also collaborated with the International Association of Chiefs of Police on a database of police use of force, completed in 2001.⁵⁸ This voluntary data collection over 36 months included 564 state and local enforcement agencies.⁵⁹

Two new data transparency initiatives aim to provide additional insights into police use of force. The Police Data Initiative is a nonprofit partnership between the Police Foundation and the COPS Office at the Department of Justice, begun in 2015.⁶⁰ It does not collect its own data, but rather gathers and makes public data that state and local departments have already made available to the public.⁶¹ California recently began a statewide data transparency initiative called OpenJustice.⁶² The California Department of Justice publishes reports on criminal justice statistics and also makes available some data sets on a public website.⁶³ Law enforcement agencies are required to report use of force incidents that result in serious bodily injury, death of a civilian or officer, and all discharges of a firearm. Although data collection is mandatory, not all law enforcement agencies reported in 2016, the first year of data collection.⁶⁴

None of these data programs are comprehensive. Not only is the FBI's Uniform Crime Report (UCR) data incomplete, but studies have shown that it may also be selectively reported.⁶⁵ Researchers have found that the majority of the 18,000+ police departments only selectively file fatal police shootings reports, and some do not at all.⁶⁶ In a 2017 Harvard study, researchers found

⁵⁷ U.S. Dep't of Justice, Data Collection: Mortality in Correctional Institutions (MCI), Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243> (last accessed Oct. 26, 2018). Mortality in Correctional Institutions (MCI) collects data on deaths that occur while inmates are in the custody of local jails, state prisons, or the Federal Bureau of Prisons (BOP). The Bureau of Justice Statistics began the MCI (formerly the DCRP) in 2000 in response to the passage of the Death in Custody Reporting Act (DCRA) of 2000.

⁵⁸ International Association of Chiefs of Police, *Police Use of Force in America 2001*, 2001.

⁵⁹ Ibid.

⁶⁰ The Police Data Initiative is an Obama administration program meant to aid in transparency about policing. While the PDI reports that 130 law enforcement agencies have released more than 200 datasets, the information these agencies report greatly vary between departments. While 35 departments release data on officer involved shootings, only 24 departments release data on use of force incidents that can include verbal, physical, chemical, impact, electronic, and firearm. The Police Foundation and The U.S. Dep't of Justice, Office of Community Oriented Policing Services, "Police Data Initiative," *supra* note 10.

⁶¹ Ibid. According to the initiative's website: "The agencies participating in this community of practice have chosen to release their data to the public, therefore anyone can collect the data. However, it is important to note that this initiative, the DOJ COPS Office, nor The Police Foundation are collecting this data at the national level. This website only provides an index to these agency's webpages where the data can be downloaded by the public."

⁶² California Dep't of Justice, "Use of Force Incident Reporting 2017," OpenJustice <https://openjustice.doj.ca.gov/2016/use-of-force> (last accessed Oct. 26, 2018).

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ryan Gabrielson, Eric Sagara, and Ryann Grochowski Jones, "Deadly Force, in Black and White," *ProPublica*, Oct. 10, 2014, <https://www.propublica.org/article/deadly-force-in-black-and-white>.

⁶⁶ Ibid.

that over half of all fatal police shootings in 2015 were misclassified as not being the result of interactions with law enforcement in the death records compiled by the NVSS.⁶⁷

Despite technological advancements in case management and data reporting capabilities, many police departments fail to report on the number of police-involved killings within their jurisdictions in a given year.⁶⁸ Some jurisdictions do not have reliable data on use of force cases because many departments do not have an objective measure for “use of force,” thus officers are not reporting the incidents.⁶⁹ Other departments attach force incidents to police reports, whereas others may keep separate databases, and others may only record data on paper.⁷⁰ When the Justice Department surveyed police departments nationwide in 2013, they found that about one-fifth refused to comment on how they kept their data.⁷¹ Moreover, they found that in many departments, even in large jurisdictions such as New York City, Houston, Baltimore, and Detroit, law enforcement officials either refused to answer the question altogether or answered that they did not know how many times their officers used force.⁷² Further, in private conversations, some police officials told the Justice Department that they were reluctant to turn over data that the department could use to vilify them.⁷³

Stephen Fischer, an FBI spokesperson, told the *Guardian* that exclusions were inevitable because the program remained voluntary. He stated: “We have no way of knowing how many incidents may have been omitted.”⁷⁴ Moreover, the extent of the data collection and reporting activities vary widely across jurisdictions. For instance, several Florida departments have failed to file reports since 1997.⁷⁵ Cody Ross, postdoctoral fellow at the Max Planck Institute, posits that this fact is particularly troubling since Florida has some of the most racially biased police shooting rates in

⁶⁷ Justin Feldman, Sofia Gruskin, Brent Coull, Nancy Krieger, “Quantifying underreporting of law-enforcement-related deaths in the United States vital statistics and news-media-based data sources: A capture-recapture analysis,” *PLoS Med*, vol. 14 (2017), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0192932>.

⁶⁸ Brian Reaves, *Local police departments, 2013: Personnel, policies, and practices*, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2015, <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf>; Brian Reaves, *Local police departments, 2013: Equipment and technology*, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2015, <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf> (noting that in 2013, over 60% of departments submitted criminal incident reports using electronic means); Matt Apuzzo and Sarah Cohen, “Data on Use of Force by Police Across the U.S. Proves Almost Useless,” *New York Times*, Aug. 11, 2015, http://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html?_r=0.

⁶⁹ Joel Garner, Matthew Hickman, Ronald Malega, and Christopher Maxwell, “Progress toward national estimates of police use of force,” *PLoS One*, vol. 13 (2018).

⁷⁰ Reaves, *Local police departments, 2013: Equipment and technology*, *supra* note 68.

⁷¹ *Ibid.*

⁷² Apuzzo and Cohen, *supra* note 68.

⁷³ *Ibid.*

⁷⁴ Jon Swaine and Oliver Laughland, “Eric Garner and Tamir Rice among those missing from FBI record of police killings,” *Guardian*, Oct. 15, 2015, <https://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>.

⁷⁵ Gabrielson et al., “Deadly Force, in Black and White,” *supra* note 65.

the U.S.⁷⁶ The information reported can also vary widely since there are not any federally imposed standards. For instance, some cities included incidents of physical assault by an officer, where others did not. Some include use of less lethal weapons such as beanbag guns, where others did not.⁷⁷

According to reporters from the *Guardian*, an analysis of FBI's Uniform Crime Reporting data between 2004 and 2014 show that:

- No police departments from Florida reported any homicides by officers, meaning deaths caused by police in the country's third-most populous state were not logged by the FBI.
- The New York City police department, by far the country's biggest, submitted data for just one year during the decade.
- The FBI recorded only basic personal details of each person killed and no information such as whether those persons were armed with a weapon—a critical factor in ongoing debates over the use of force by police around the country.
- Police departments applied unsystematic approaches to recording many high-profile deaths over recent years. Some were logged, some were filed to a separate category with general homicides without noting that the subjects were killed by police, and others were ignored.
- Details of other controversial deaths that prompted protests were entered incorrectly in the FBI database, which damaged government efforts to monitor demographic information about people killed by police.⁷⁸

⁷⁶ Cody Ross, "A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014," *PLoS ONE* vol. 10 (2015). The work that researchers are undertaking to access these data sources can be quite intensive and often relies upon compiling several sources together (as discussed previously). For instance, in Ross' study, he utilized data from the U.S. Police Shootings Database from Kyle Wagner. U.S. Police Shootings Database, <http://goo.gl/Su60Cm> (last accessed Oct. 26, 2018); the county-level census population data and county-level covariates on income and inequality from AIDSVu maintained by the Rollins School of Public Health at Emory University in partnership with Gilead Sciences, Inc.; racial animus data from S. Stephens-Davidowitz, "The cost of racial animus on a black candidate: Evidence using Google search data," *Journal of Public Economics*, vol. 118 (2014), at 26-40; crime rate data from the U.S. Department of Justice Office of Justice Programs, FBI: Uniform Crime Reporting Program Data, "Arrests by Age, Sex, and Race, 2012"; and geographic data from R. Hijmans, N. Garcia, J. Wiecek, "GADM: Database of Global Administrative Areas," 2010. Other sources such as an investigation by the *Tampa Bay Times* reviewed hard copy files on police-involved shootings from 2009-2014 for every police department in the state of Florida to collect their data. The investigation took over a year to complete, which further demonstrates how the lack of a national database and departments not self-reporting contributes to the complexity of this issue. See Ben Montgomery, Natalie Watson, Connie Humburg, Katie Mettler and Neil Bedi, "Why Cops Shoot: The Stories," *Tampa Bay Times*, 2016, <http://www.tampabay.com/projects/2017/investigations/florida-police-shootings/database/>.

⁷⁷ Apuzzo and Cohen, *supra* note 68.

⁷⁸ Analysis based on FBI's Uniform Crime Reporting data obtained by the *Guardian* as reported in their article: Swaine and Laughland, "Eric Garner and Tamir Rice among those missing from FBI record of police killing," *supra* note 74.

Responding to public pressure for better data collection, the FBI announced in 2016 that it would launch a new data collection program, the National Use-of-Force Data Collection.⁷⁹ The agency stated it will now track any incident in which an officer causes serious injury or death to civilians, including through the use of stun guns, pepper spray, and even fists and feet.⁸⁰ The FBI's new "more granular" data collection effort also includes details on the demographics of officers and suspects involved in these encounters, the level of threat or danger the officer faced, and the type of weapon wielded by either party.⁸¹ According to Department of Justice officials, the data are expected to be collected and shared with the public in "near real-time."⁸² The FBI announced that a data collection pilot study began on July 1, 2017 and ended on December 31, 2017. Following this pilot period, the live data collection would be open to agencies that wanted to participate.⁸³ While this step by the FBI to obtain more adequate and comprehensive data is positive, the fact that reporting is voluntary will likely continue to be a significant hurdle to access reliable data.

At the Commission's briefing in 2015, William J. Sabol, Former Director of the Bureau of Justice Statistics, stated that four of their data collection programs would also be enhanced to better capture information on police use of force:

- ***Police-Public Contact Survey***—a nationally representative sampling of persons 16 and older that asks about their past-year contacts with police.
- ***Survey of Inmates in Local Jails***—a national sample of inmates held in local jails which aggregates information on nonfatal uses of force by police in the arrest leading up to their incarceration.
- ***Law Enforcement Management and Administrative Statistics***—survey of sample law enforcement agencies, including citizen complaints about use of force.
- ***Arrest-Related Deaths program***—a component of Bureau of Justice Statistics' larger Deaths in Custody Reporting Program, in which the Bureau of Justice Statistics obtains descriptions of deaths occurring in state prisons, local jails, and deaths that occur in the process of arrest.⁸⁴

Sabol mentioned that while these changes would likely enhance the nation's understanding of police use of force, he acknowledged that "none of these efforts can, by itself, fully address the

⁷⁹ FBI: Uniform Crime Reporting, "National Use-of-Force Data Collection," *supra* note 53.

⁸⁰ See U.S. Dep't of Justice, "Justice Department Outlines Plan to Enable Nationwide Collection of Use of Force Data," Oct. 13, 2016, <https://www.justice.gov/opa/pr/justice-department-outlines-plan-enable-nationwide-collection-use-force-data>; Oliver Laughland and Ciara McCarthy, "FBI to begin collecting self-reported data on fatal police encounters in 2017," *Guardian*, Oct. 13, 2016, <https://www.theguardian.com/us-news/2016/oct/13/fbi-police-use-of-force-data-obama-administration>.

⁸¹ Kindy, "FBI to sharply expand system for tracking fatal police shootings," *supra* note 5.

⁸² See FBI: Uniform Crime Reporting, "National Use-of-Force Data Collection," *supra* note 53.

⁸³ *Ibid.*

⁸⁴ See William Sabol, Former Director, Bureau of Justice Statistics, written statement for the "Police Use of Force: An Examination of Modern Policing Practices" Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 2 [hereinafter Sabol Statement].

complex set of issues associated with measuring police use of force due to relevance, timeliness, completeness, and costs.”⁸⁵ Since this announcement, no new information has been released clarifying whether these changes have been implemented, however the program was included in the 2018 Presidential Budget request.⁸⁶

Due to the limitations of federal data collection, several newspapers, non-profit organizations, and universities have helped provide an understanding of the nature of police-involved killings across the country. For instance, data reported in the *Washington Post* and the *Guardian* are among those most widely cited and frequently used by researchers in cross-racial analyses of police-involved shootings, due to being some of the most comprehensive databases on fatal police shootings.⁸⁷ Cato Institute’s National Police Misconduct Reporting Project provides another dataset, which is more focused on providing policymakers with detailed information on the nature and circumstances of police misconduct rather than the raw data.⁸⁸

Moreover, even though a database compiled directly from local police data by the *Guardian* was more accurate than the NVSS and other national data sets, it still missed up to 7 percent of cases.⁸⁹ Feldman et al. argue that “to effectively address the problem of law enforcement-related deaths, the public needs better data about who is being killed, where, and under what circumstances.”⁹⁰ The *Washington Post* and the *Guardian* databases have consistently reported more than twice the number of people killed by police than official FBI statistics show since the newspapers began tracking in 2015.⁹¹

Additionally, in an effort to standardize data collection on police violence and use of force, the Center for Policing Equity has developed a national police profiling and use-of-force database, which is the nation’s first database tracking national statistics on police behavior with demographic

⁸⁵ Ibid. at 15.

⁸⁶ See U.S. Dep’t of Justice, Office of Justice Programs, Criminal Justice Statistics Program, *FY 18 Program Summaries*, Law Enforcement Statistics Program, 2017, at 11 (identifying the LEMAS, ARD, and PPCS surveys), <https://ojp.gov/newsroom/pdfs/2018ojpprogramsummary.pdf>.

⁸⁷ See *Washington Post*, “2018 Police Shootings database,” https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.7ab40d4f7a98 (last accessed Oct. 26, 2018); *Guardian*, “The Counted,” <https://www.theguardian.com/us-news/series/counted-us-police-killings> (last accessed Oct. 26, 2018).

⁸⁸ See Jonathan Blanks, Cato Institute, written statement for the “Police Use of Force: An Examination of Modern Policing Practices” Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 1 [hereinafter Blanks Statement].

⁸⁹ Justin Feldman, Sofia Gruskin, Brent Coull, Nancy Krieger, “Quantifying underreporting of law-enforcement-related deaths in the United States vital statistics and news-media-based data sources: A capture-recapture analysis,” *PLoS Med*, vol. 14 (2017), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.019293>.

⁹⁰ Ibid.

⁹¹ See, e.g., Franklin E. Zimring, “How Many Killings by Police?” *University of Chicago Legal Forum*, vol. 2016 (2016), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1579&context=uclf>.

information on racial impacts.⁹² However, like federal data, participation is voluntary. Currently, more than 40 police departments and law enforcement agencies have signed on to participate in the database, which accounts for more than half of all major cities and more than a quarter of the nation's population.

At the Department of Justice's *Summit on Violent Crime Reduction* in Washington, D.C., on October 7, 2015, former FBI Director James Comey stated:

It is unacceptable that The Washington Post and the Guardian newspaper from the U.K. are becoming the lead source of information about violent encounters between police and civilians. That is not good for anybody . . . You can get online today and figure out how many tickets were sold to 'The Martian,' which I saw this weekend . . . The CDC can do the same with the flu. It's ridiculous—it's embarrassing and ridiculous—that we can't talk about crime in the same way, especially in the high-stakes incidents when your officers have to use force.⁹³

Comey's remarks represent a growing concern across the country regarding the paucity of information on fatal police shootings and the federal government's inability to fix the problem. Several representatives from public advocacy groups, government agencies, local police departments, and experts on the topic all proclaim that the lack of national data on police use of force incidents serves as one of the most significant impediments to identifying problems and implementing solutions.⁹⁴ For instance, Michele Jawando and Chelsea Parsons from the Center for American Progress stated that too many police departments choose not to submit data or submit incomplete data, therefore leaving an incomplete picture.⁹⁵ Researcher Geoffrey P. Alpert referred to it as "a national embarrassment."⁹⁶ At the Commissions' briefing, witnesses Jonathan Blanks,

⁹² Center for Policing Equity, "National Justice Database," <http://policingequity.org/national-justice-database/> (last accessed Oct. 26, 2018).

⁹³ Aaron Davis and Wesley Lowery, "FBI director calls lack of data on police shootings 'ridiculous,' 'embarrassing,'" *Washington Post*, Oct. 7, 2015, https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html.

⁹⁴ Michel Martin, "'Washington Post' Tracks More Than 500 Police Shootings in 2016," *NPR*, July 9, 2016, <https://www.npr.org/2016/07/09/485388407/washington-post-tracks-more-than-500-police-shootings-in-2016>; The Cato Institute, *2010 Annual Report*, National Police Misconduct Reporting Project, <https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf>; Apuzzo and Cohen, *supra* note 68.

⁹⁵ Michele L. Jawando and Chelsea Parsons, "4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations," Center for American Progress, Dec. 18, 2014, <https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>.

⁹⁶ Geoffrey Alpert, University of South Carolina, "What We Know and Don't Know about Police Use of Force" (presentation delivered to the Committee on Law and Justice, National Academy of Sciences), April 2016.

John Shane, Fritz Umbach, and David Klinger all testified to the need to establish a comprehensive national database on police use of force.⁹⁷

Researchers have also found the lack of national data and lack of mandated police reporting to be critical issues when trying to determine if there are systemic patterns of police using excessive force against civilians. Even the Department of Justice has begun to rely more on open information sources, such as media sources, to identify arrest-related deaths, rather than solely relying on law enforcement agencies to report deaths.⁹⁸ Some researchers choose to aggregate police data sets in an attempt to obtain national data.⁹⁹ Other researchers choose to compile related data sets such as using force and arrest data,¹⁰⁰ national survey data,¹⁰¹ and national hospital admissions data¹⁰² in an attempt to determine excessive use of force rates. None of these strategies are without flaws. But Lorie Fridell, Associate Professor at the University of South Florida, states that analyzing information from more jurisdictions rather than fewer is certainly better, and having national data is the epitome of that aspiration.¹⁰³

The lack of a comprehensive database can pose challenges for researchers, policy makers, community members, and police officials trying to investigate not only the scope of the problem, but also the potential causes for excessive use of force, and related civil rights issues. Regardless of which methodological strategy a researcher utilizes, variations between agencies, jurisdictions, and geography can be exceedingly complex. These variations can make it challenging to pin down why some studies have incongruent findings, especially in studies that are investigating if biases are a motivating factor in excessive use of force cases.¹⁰⁴ Fridell examined seven different databases and found that these inconsistencies could reflect the “variation in the actual phenomenon across agencies and/or geographic areas or could reflect different research methods used to study the same phenomenon.”¹⁰⁵

⁹⁷ Blanks, *Briefing Transcript* at 198; Fritz Umbach, John Jay College of Criminal Justice, *Briefing Transcript* at 305; John Shane, John Jay College of Criminal Justice, *Briefing Transcript* at 316; Klinger, *Briefing Transcript* at 352.

⁹⁸ Duren Banks, Paul Ruddle, Erin Kennedy, and Michael Planty, *Arrest-Related Deaths Program Redesign Study, 2015-16: Preliminary Findings*, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2016, <https://www.bjs.gov/content/pub/pdf/ardprs1516pf.pdf>.

⁹⁹ Justin Nix, Bradley Campbell, Edward Byers, Geoffrey Alpert, “A Bird’s Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias,” *Criminology & Public Policy*, vol. 16 (2017), at 309-40.

¹⁰⁰ Goff, et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12.

¹⁰¹ Roland Fryer, “An empirical analysis of racial differences in the use of force,” NBER Working Paper 22399, National Bureau of Economic Research, revised in 2018, <http://www.nber.org/papers/w22399>.

¹⁰² Ted Miller, Bruce Lawrence, Nancy Carlson, Delia Hendrie, Sean Randall, Ian Rockett, Rebecca Spicer, “Perils of police action: A cautionary tale from US data sets,” *Injury Prevention*, vol. 23 (2017), at 27-32, <http://injuryprevention.bmj.com/content/injuryprev/23/1/27.full.pdf>.

¹⁰³ Lorie Fridell, “Explaining the Disparity in Results Across Studies Assessing Racial Disparity in Police Use of Force: A Research Note,” *American Journal of Criminal Justice*, vol. 42 (2016), at 502-13.

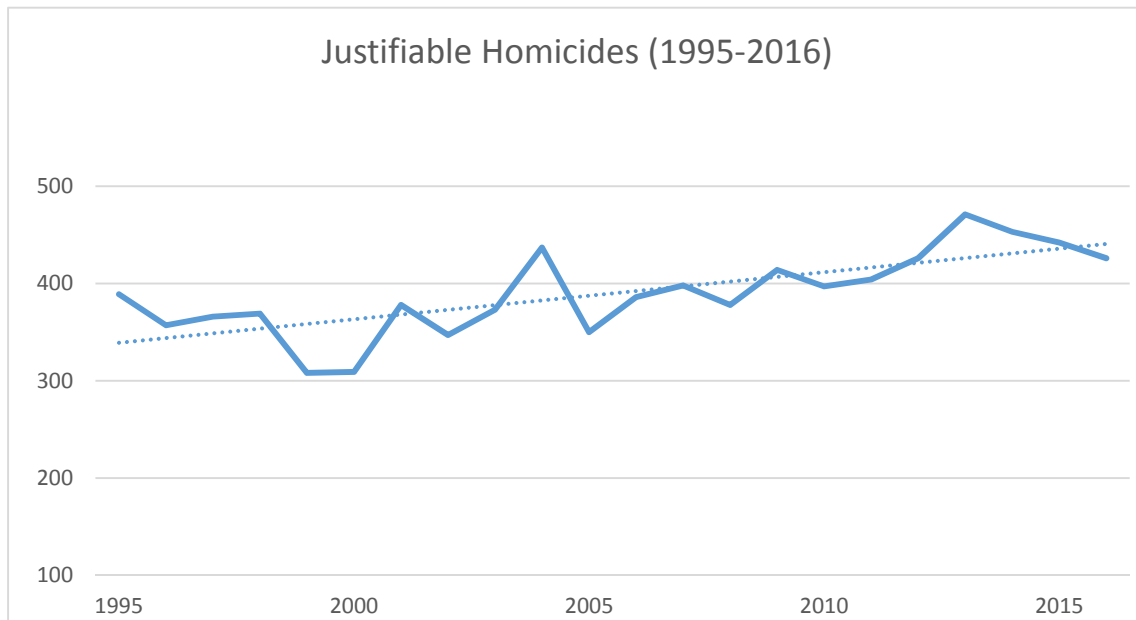
¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

Existing Data on Lethal and Non-Lethal Use of Force

While many police departments around the country have worked to foster trust and create better relationships with community members, reported allegations about the inappropriate use of force, harassment, and misconduct continue to be substantial. These reports seem to have some support by the FBI's Uniform Crime Report statistics showing that "justifiable homicides"¹⁰⁶ committed by law enforcement are at a high level relative to the last two decades (see Chart 1).

Chart 1: Justifiable Homicides, involving the killing of a suspected felon by a law enforcement officer in the line of duty



Source: FBI Uniform Crime Report, <https://ucr.fbi.gov/crime-in-the-u.s>, chart created by USCCR staff

While the chart does show a steady increase in the number of justifiable homicides reported in the U.S., some of the increase may be due to efforts by some law enforcement agencies to have better reporting practices.¹⁰⁷ These statistics may also suggest that the overall level of conflict between

¹⁰⁶ Justifiable homicide is "defined as and limited to: the killing of a felon by a peace officer in the line of duty and the killing of a felon, during the commission of a felony, by a private citizen." See FBI: Uniform Crime Reporting, "2015 Crime in the United States," <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/expanded-homicide> (last accessed Oct. 26, 2018). Further, according to reporters for the *Guardian*, only 224 agencies (or approximately 1% of all agencies) reported a killing to the FBI in 2014. See Swaine and Laughland, "Eric Garner and Tamir Rice among those missing from FBI record of police killing," *supra* note 74.

¹⁰⁷ Analysis based on FBI's Uniform Crime Reporting data obtained by the *Guardian* as reported in their October 2015 article titled: Swaine and Laughland, "Eric Garner and Tamir Rice among those missing from FBI record of police killing," *supra* note 74; Kevin Johnson, "FBI Will Overhaul Tracking Report and Add Missing Crimes," *USA Today*, April 2, 2015, <https://www.usatoday.com/story/news/nation/2015/04/02/fbi-crime-report/70393428/>; Dara

police and citizens has increased, even as trends in violent crime rates continue to decrease.¹⁰⁸ Moreover, as many researchers, databases, and studies have pointed out, data reporting the numbers of citizens fatally shot by law enforcement each year do not convey the entire picture of police shootings.¹⁰⁹ Thus, the data underreports the severity of the issue. Studies suggest when excessive force occurs, communities of color, transgender communities, the poor, and people with disabilities are groups of Americans who particularly bear the brunt of police force.¹¹⁰

While there are many police departments and officers who actively work towards constitutional policing¹¹¹ with better training, communication, and protocols, some officers—and sometimes whole units within departments or departments themselves—overstep their authority, disregard individuals’ civil rights, and cause entire communities to fear the same people sworn to protect them.¹¹²

Disparities in Use of Force

In the absence of full and complete data on the use of lethal and non-lethal force, which would include the demographics of all persons, this report utilizes a combination of academic and media sources to assess the extent of (and racial disparities in) excessive of force. Data collected by

Lind, “The FBI is Trying to Get Better Data on Police Killings. Here’s What We Know,” *Vox*, April 10, 2015, <https://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black> (FBI altered its system of tracking police killings in 2015, this may have contributed to the shifts in reports of justifiable homicides).

¹⁰⁸ Trends in 5- and 10-year violent crime data show: 2015 total was 0.7% below 2011 and 16.5% below 2006; 2014 total was 6.9% below 2010, and 16.2% below 2005. See FBI: Uniform Crime Reporting, “2015 Crime in the United States,” *supra* note 106. However, 2016 did see a 5.3% increase of violent crime according to the UCR’s January-June numbers. See FBI: Uniform Crime Reporting, “2016 Crime in the United States,” <https://ucr.fbi.gov/crime-in-the-u.s/2016/preliminary-semiannual-uniform-crime-report-january-june-2016/tables/table-3> (last accessed Oct. 26, 2018). At the time of this report, the FBI had only released preliminary data for 2017, and did not have statistics related to justifiable homicides.

¹⁰⁹ Davis and Lowery, “FBI director calls lack of data on police shootings ‘ridiculous,’ ‘embarrassing,’” *supra* note 93. See e.g., Radley Balko, “Why It’s Important to Calculate the Percentage of Police Shootings That Are Legitimate,” *Washington Post*, July 14, 2016, https://www.washingtonpost.com/news/the-watch/wp/2016/07/14/why-its-impossible-to-calculate-the-percentage-of-police-shootings-that-are-legitimate/?hpid=hp_hp-top-table-main-police-shootings%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-police-shootings%3Ahomepage%2Fstory; Tiffany R. Murphy, *When Numbers Lie: The Under-Reporting of Police Justifiable Homicides*, 21 BERKELEY J. CRIM. L. 42 (2016).

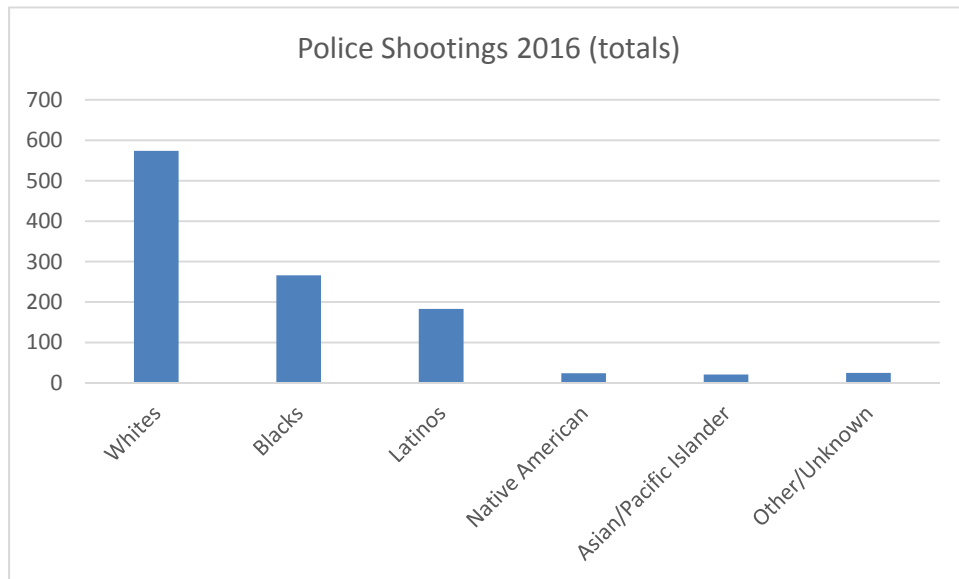
¹¹⁰ See e.g., National Center for Transgender Equality, *Reforming Police and Ending Anti-Transgender Violence*, 2015, at 24, https://transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_June2015.pdf; German Lopez, “Police Shooting and Brutality in the US: 9 Things You Should Know,” *Vox*, May 6, 2017, <https://www.vox.com/cards/police-brutality-shootings-us/us-police-racism>; Elise Hansen, “The Forgotten Minority in Police Shootings,” *CNN*, Nov. 13, 2017, <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html>; Ted Miller, et al., *supra* notes 1-2.

¹¹¹ See Police Executive Research Forum, *Constitutional Policing as a Cornerstone of Community Policing*, U.S. Dep’t of Justice, Community Oriented Policing, 2015, at 1, <https://ric-zai-inc.com/Publications/cops-p324-pub.pdf>.

¹¹² See generally *ibid.* See e.g., Consent Decree, *United States v. Police Dep’t of Baltimore City, et al.*, Case No. 1:17-CV-00099-JKB (D. Md. Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download>; Complaint, *State of Illinois v. City of Chicago*, Case No. 17-CV-6260 (N.D. Ill. Aug. 29, 2017), http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/01/City_of_Chicago_lawsuit_filedcomplaint.pdf.

various sources show consistent patterns of racial disparities in police use of force. For instance, *Guardian* reporters found that although most police-involved killings in 2016 involved white people, death rates were much higher for black, Latino, and Native American people based on their percentage of the overall population (see Chart 2).¹¹³ Police-involved killings of white people occurred at a rate of 2.9 per million people versus 3.23 per million for Latino people, 6.66 per million for black people, and 10.13 per million for Native American people. This means that black and Native American people were fatally shot by officers—over twice and three times compared to white people, respectively¹¹⁴ (see Chart 2).

Chart 2: Police-Involved Shootings 2016



Source: <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>, chart created by USCCR staff

Data collected by *Guardian* reporters also revealed pronounced racial disparities in the number of unarmed suspects killed by police in the first half of 2015. Thirty-two percent of black people killed by police in 2015 were unarmed, as were 25 percent of Latino people, compared to 15 percent of white people.¹¹⁵ This means that while people of color make up fewer than 38 percent

¹¹³ Due to the issues of data collection and reporting discussed above, these are the best data available and thus, do not represent true totals. See e.g., *Guardian*, “The Counted,” *supra* note 87. At the time of this report the *Guardian* did not have 2017 data available; Mapping Police Violence, <https://mappingpoliceviolence.org/> (last accessed Oct. 26, 2018); *Washington Post*, “Fatal Force: Police Shooting Database,” https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.6e404ccf9b28 (last accessed Oct. 26, 2018); Center for Policy Equity, “National Justice Database,” <http://policingequity.org/national-justice-database/> (last accessed Oct. 26, 2018).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

of the U.S. population, they make up almost 63 percent of unarmed people killed by police.¹¹⁶ According to data collected by the *Washington Post*, looking at the total number of unarmed people fatally shot that year, black men accounted for 40 percent, despite only representing approximately 6 percent of the total US population.¹¹⁷

Moreover, Mapping Police Violence found that officers were not charged with a crime in 99 percent of the cases in 2015.¹¹⁸ Their research team also found that in 2017, relative to the overall U.S. population, black civilians whom police killed were more likely to be unarmed and less likely to be threatening someone compared to Latino and white people.¹¹⁹ Cody Ross, postdoctoral fellow at the Max Planck Institute, found that on average across counties in the U.S., an individual is as likely to be black, *unarmed*, and shot as being white, *armed*, and shot.¹²⁰

The *Washington Post* reported that some disparities seemed to have decreased in 2017, despite that year-to-year patterns overall remain consistent.¹²¹ Some suggest that national attention on excessive use of force may have contributed to the decrease in the number of unarmed civilians shot and killed each year—94 in 2015, 51 in 2016, and 68 in 2017—due to officers being more cautious in unarmed situations, as well as increased attention on de-escalation techniques for police officers.¹²² Yet, experts are uncertain why the annual total of civilians fatally shot tended to show little fluctuation (995 in 2015 compared to 987 in 2017). Geoff Alpert, professor at University of South Carolina, argues that:

the numbers indicate that this is not a trend, but a robust measure of these shootings. We now have information on almost 3,000 shootings, and we can start looking to

¹¹⁶ Jon Swaine, Oliver Laughland, and Jamiles Lartey, “Black Americans killed by police twice as likely to be unarmed as white people,” *Guardian*, June 1, 2015, <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

¹¹⁷ Lowery, “Aren’t more white people than black people killed by police? Yes, but no,” *supra* note 5. *Guardian* database combines reporting by staff with verified crowdsourced information. See *Guardian*, “The Counted,” *supra* note 87.

¹¹⁸ Mapping Police Violence, “There is no accountability,” <https://mappingpoliceviolence.org/> (last accessed Nov. 3, 2018). It is important to note that the original data source did not specify whether these homicides were justified. Mapping Police Violence’s data sources include three crowdsourced databases and some original research for verification purposes. See Mapping Police Violence, “About the Data,” <https://mappingpoliceviolence.org/aboutthedata/> (last accessed Oct. 26, 2018).

¹¹⁹ Mapping Police Violence, “2017 Police Violence Report,” <https://policeviolencereport.org/> (last accessed Nov. 3, 2018); *Ibid.*

¹²⁰ Ross, “A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014,” *supra* note 76 (emphasis in original).

¹²¹ John Sullivan, Zane Anthony, Julie Tate, and Jennifer Jenkins, “Nationwide, police shot and killed nearly 1,000 people in 2017,” *Washington Post*, Jan. 6, 2018, https://www.washingtonpost.com/investigations/nationwide-police-shot-and-killed-nearly-1000-people-in-2017/2018/01/04/4eed5f34-e4e9-11e7-ab50-621fe0588340_story.html?utm_term=.997acf98c2f0.

¹²² *Ibid.*

provide the public with a better understanding of fatal officer-involved shootings.¹²³

In sum, while there are currently no definitive figures on how many people are fatally shot by the police every year, the data discussed above suggest striking differences when comparing race and socioeconomic status. In addition, data show that from 2010 to 2012, black men were 21 times more likely than their white peers to be killed by police.¹²⁴ David Klinger posits that these disparities in the data could result from a “measurement error” that means unreported fatal shootings could alter the study’s results.¹²⁵ However, he also stated that since the disparities are so significant, “I doubt the measurement error would account for that.”¹²⁶ Reuben Fischer-Baum finds that fatal shootings by police tend to take place in neighborhoods that are more socioeconomically disenfranchised and have a higher percentage of black residents than the U.S. as a whole.¹²⁷ Utilizing data collected by *Guardian* reporters on fatal police shootings combined with Census data, Fischer-Baum found that about 30 percent—139 of the 467 shootings (between January and June 2015)—occurred in census tracts that are in the bottom 20 percent nationally in terms of household income.¹²⁸ Rob Arthur and colleagues further found that when examining both fatal and nonfatal incidents in the 50 largest local police departments, law enforcement shot at least 3,631 people from 2010 to 2016, which is more than 500 people a year.¹²⁹ However, those numbers do not account for the other over 700 incidents where officers fired on citizens but missed.¹³⁰

Explanations for and Analysis of Rates of Police Use of Force

Due to the sensitive and often politicized nature of this issue, discussions about police use of force often seem polarized, with law enforcement on one side and communities of color on the other. However, this severe polarization may not be a true or accurate reflection of the entire debate. This section of the Commission’s report first examines arguments about the “inevitability” of police violence by analyzing relevant data and leading expert opinions. It is followed by an evaluation of systemic perspectives regarding similar data, and a preliminary discussion of civil rights issues.

¹²³ Ibid.

¹²⁴ Ryan Gabrielson, Ryann Grochowski Jones, and Eric Sagara, “Deadly Force, in Black and White,” *ProPublica*, Oct. 10, 2014, <https://www.propublica.org/article/deadly-force-in-black-and-white> (discussing FBI data).

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ben Casselman, “Where Police Have Killed Americans in 2015,” *FiveThirtyEight*, June 23, 2015, <https://fivethirtyeight.com/features/where-police-have-killed-americans-in-2015/>.

¹²⁸ Ibid.

¹²⁹ Arthur, et al., “Shot by Cops and Forgotten,” *supra* note 52. *Vice News* surveyed the 50 largest police departments, as determined by the Bureau of Justice Statistics, for records on officer-involved shootings. *See also* Reaves, *Local Police Departments, 2013: Personnel, Policies, and Practices*, *supra* note 68.

¹³⁰ Arthur, et al., “Shot by Cops and Forgotten,” *supra* note 52.

Inevitability Argument

Some scholars and advocates view police-involved shootings of people of color as an unfortunate, and possibly inevitable consequence of data-driven or “smart” policing strategies that result in aggressive police deployments in neighborhoods with high crime rates.¹³¹ Police deployments and these tactics are primarily driven by a police management philosophy and organizational management tool that one author has named “PerformanceStat.”¹³² These types of tools have informed such common (albeit controversial) crime reduction strategies as hot-spot policing and stop-and-frisk.¹³³

One of the most common strategies utilized is hot-spot policing, which is a tactic used by a majority of U.S. police departments.¹³⁴ While there is not a common definition for hot spots, they are generally thought of as “small places in which the occurrence of crime is so frequent that it is highly predictable, at least over a one year period.”¹³⁵ Some argue that while hot-spot or place-based policing may be a proactive crime reduction strategy, this practice can reduce trust and diminish perceptions of legitimacy for communities who are targeted and result in negative outcomes for forging community-police relationships.¹³⁶ For instance, “stop-and-frisk” is a

¹³¹ Dennis P. Rosenbaum, “The Limits of Hot Spots Policing,” in *Police Innovation: Contrasting Perspectives*, David Weisburd and Anthony A. Braga (eds.), (2006) at 245-66; Tammy Rinehart Kochel, “Constructing Hot Spots Policing: Unexamined Consequences for Disadvantaged Populations and for Police Legitimacy,” *Criminal Justice Policy Review*, vol. 22 (2011), at 351-60, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.897.6331&rep=rep1&type=pdf>; Gloria Tso, “Police Brutality Is Not Invisible,” *The Hill*, Jan. 14, 2016, <http://thehill.com/blogs/congress-blog/civil-rights/265795-police-brutality-is-not-invisible>; Lawrence Rosenthal, “CPD can balance aggressive patrols, proactive tactics,” *Chicago Tribune*, Sept. 8, 2016, <http://www.chicagotribune.com/news/opinion/commentary/ct-shootings-police-violence-tactics-crime-perspec-0909-jm-20160908-story.html>.

¹³² Robert D. Behn, *The Seven Big Errors of PerformanceStat*, Harvard University, John F. Kennedy School of Government, 2008, <https://www.hks.harvard.edu/sites/default/files/centers/taubman/files/performancestat.pdf>, at 2 (using the same nomenclature as other similar management tools, Behn describes as a “performance strategy” that includes “an ongoing series of regular, frequent, periodic, integrated meetings during which the chief executive . . . use data to analyze the unit’s past performance, to follow-up on previous decisions and commitments to improve performance, to establish its next performance objectives, and to examine the effectiveness of its overall performance strategies”).

¹³³ David Weisburd, “Does Hot Spots Policing Inevitably Lead to Unfair and Abusive Police Practices, or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?” *University of Chicago Legal Forum* (2016), 661-89, <https://chicagounbound.uchicago.edu/uclf/vol2016/iss1/16/>. See also *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding that stop and frisk targeting “high crime neighborhoods” in New York disproportionately targeted black and Latino citizens and violated the Fourth and Fourteenth Amendments).

¹³⁴ Anthony Braga, Andrew V. Papachristos, and David M. Hureau, “The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis,” *Justice Quarterly* (2012), at 4, <https://www.tandfonline.com/doi/abs/10.1080/07418825.2012.673632>.

¹³⁵ Lawrence Sherman, “Hot Spots of Crime and Criminal Careers of Places,” in John Eck and David Weisburd, (eds.), *Crime and Place*, Police Executive Research Forum, at 36, <https://pdfs.semanticscholar.org/580e/0a9a216444faf0db9592df45076fac297d50.pdf>.

¹³⁶ Tammy Rinehart Kochel, George Burrus, David Weisburd, *St. Louis County Hot Spots in Residential Areas (SCHIRA) Final Report: Assessing the Effects of Hot Spots Policing Strategies on Police Legitimacy, Crime, and Collective Efficacy*, U.S. Dep’t of Justice, 2016, <https://www.ncjrs.gov/pdffiles1/nij/grants/249747.pdf>; Jennifer

strategy where police officers detain and frisk civilians based on the officers' belief the civilians pose a safety risk.¹³⁷ Though widely in use in some jurisdictions,¹³⁸ at least one court held that the practice as carried out in New York was unconstitutional due to evidence of racial discrimination and bias.¹³⁹ This was due to individuals being targeted whether or not they were guilty of committing a crime. Subsequent reports noted there were a higher number of arrests, but fewer convictions in these areas.¹⁴⁰

Still, some advocates of these tactics praise this performance strategy—originating in New York, then known as CompStat—for its steep reductions in urban crime.¹⁴¹ According to them, many large, urban, data-minded police departments are laser-focused on locations where people are most being victimized, which are often “poor minority neighborhoods.”¹⁴² Other advocates criticize this approach. They argue that not only are these strategies not effective due to many errors in the adaptations of the program,¹⁴³ but also, video evidence shows blatant police excessive force.¹⁴⁴ These advocates argue that policing strategies based on this philosophy do not necessarily reduce criminal activity, and that officials need to establish a cause-and-effect connection between their actions and their results, which is difficult when it comes to the matter of excessive use of force.¹⁴⁵ For instance, in a study based on New York Police Department crime statistics, researchers found that when officers refrained from engaging in proactive tactics (e.g., hot-spot policing), which

Fratello, Andres Rengifo, and Jennifer Trone, *Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications*, Vera Institute of Justice, 2013, <https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications>; Tom Tyler, Jeffrey Fagan, and Amanda Geller, “Street stops and police legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization,” *Journal of Empirical Legal Studies*, vol. 11 (2014), 751-85, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5987&context=fss_papers; Jacinta Gau and Rod Brunson, “Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy,” *Justice Quarterly*, vol. 27 (2009), 255-79, <http://cw.routledge.com/textbooks/9780415884433/instructorManual/data/Gau,%20Brunson%20-%20Procedural%20justice%20and%20order.pdf>.

¹³⁷ Becca James, “Stop and Frisk in 4 cities: The Importance of Open Police Data,” *Sunlight Foundation*, Mar. 2, 2015, <https://sunlightfoundation.com/2015/03/02/stop-and-frisk-in-4-cities-the-importance-of-open-police-data-2/>.

¹³⁸ *Ibid.*

¹³⁹ *Floyd*, 959 F. Supp. 2d at 660-64.

¹⁴⁰ New York Civil Liberties Union, “Annual Stop-and-Frisk Data,” <https://www.nyclu.org/en/stop-and-frisk-data> (last accessed Oct. 27, 2018); Eric Schneiderman, *A Report on Arrests Arising from the New York City Police Department’s Stop-And-Frisk Practices*, New York State Office of the Attorney General, 2013, http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SF_PRACTICES_NOV_2013.pdf.

¹⁴¹ See, e.g., Heather Mac Donald, The Manhattan Institute, *Briefing Transcript* at 303-04.

¹⁴² *Ibid.* at 304.

¹⁴³ Behn, *The Seven Big Errors of PerformanceStat*, *supra* note 132.

¹⁴⁴ Sarah Almukhtar, Mercy Benzaquen, Damien Cave, Sahil Chinoy, Kenan Davis, Josh Keller, K.K. Rebecca Lai, Jasmine C. Lee, Rochelle Oliverly, Haeyoun Park, Detinee-Charisse Royal, “Black Lives Upended by Policing: The Raw Videos Sparking Outrage,” *New York Times*, Apr. 19, 2018, http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?_r=0.

¹⁴⁵ Behn, *The Seven Big Errors of PerformanceStat*, *supra* note 132 at 6-7.

meant that there was a drop in low-level police activity, civilian complaints of major crimes dropped by about 3 to 6 percent during the slowdown.¹⁴⁶

As a potential strategy to improve this technology and rebuild community trust, the Vera Institute partnered with the Police Foundation to develop a new program, CompStat360, which was released as a pilot in March 2018.¹⁴⁷ According to the Vera Institute, the goal of this program is to increase data collection on police practices, and provide better training and assistance to police agencies. Rebecca Neusteter, director of the Vera Institute’s Policing Program stated that “[l]ongstanding fractured relationships between police and many communities—particularly communities of color—and an overreliance on punitive enforcement, especially for minor transgressions, has resulted in a recurring adversarial dynamic.”¹⁴⁸ Thus, Vera’s Policing Program hopes that CompStat360 can be “a tool that will help shift policing culture” to be one “that delivers and rewards public safety through community engagement and satisfaction.”¹⁴⁹

Poverty and violence are often cited as reasons why black and Latino civilians are disproportionately victims of fatal police shootings. Panelists at the Commission’s briefing discussed the intersection of poverty and violence from differing perspectives. Some scholars argued that poverty, violent crime, and police shootings are and have been intertwined, meaning that persons who live in high-poverty communities will inevitably experience increased rates of police violence so long as police are doing their jobs.¹⁵⁰ Another view is that police presence can be positive, and community members ask for and want police present to help protect their communities. These advocates argue that—with more effective community engagement—police can safeguard communities and decrease crime.¹⁵¹

Testimony before the Commission from Heather Mac Donald of the Manhattan Institute defended increased police use of force among communities of color as follows:

¹⁴⁶ Law enforcement cannot legally go on strike, thus the NYPD chose to “work-to-rule,” meaning that they intended to fulfill only the most necessary duties. For instance, they only responded to calls in pairs, only left their squad cars if they felt compelled, and did not perform certain “proactive policing tactics” such as leaving their vehicles to issue summonses or arrest people for petty crimes and misdemeanors. The authors also noted that “concerns about under reporting do not nullify the results . . . but [they] do complicate a strict causal interpretation of our results.” Christopher Sullivan and Zachary O’Keeffe, “Evidence that curtailing proactive policing can reduce major crime,” *Nature Human Behaviour*, vol. 1 (2017), 730-37.

¹⁴⁷ CompStat360, “Welcome to CompStat360,” <https://www.compstat360.org/> (last accessed Oct. 27, 2018). See also Lindsey Price Jackson, “50 Years of Police Militarization Against Communities of Color,” Vera Institute of Justice, April 23, 2018, <https://www.vera.org/blog/two-societies/50-years-of-police-militarization-against-communities-of-color>.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Mac Donald, *Briefing Transcript* at 300-01.

¹⁵¹ Ebony Ruhland, Robina Institute, testimony before the Minnesota State Advisory Committee to the U.S. Commission on Civil Rights, hearing, Minneapolis, MN, March 21, 2017, transcript at 57-64 [hereinafter *Minnesota Hearing Transcript*].

[T]he police have an infeasible obligation to treat everyone with courtesy and with respect and within the confines of the law, but while we need to make sure that the police are properly trained in the constitution and courtesy, there is a larger reality behind the issue of policing and raids that remains a taboo topic, and that is black crime. Unless we bring down the black crime and victimization rates, policing is going to be heaviest in black neighborhoods, increasing the chances that when an officer's use of force goes awry, it will have a black subject.¹⁵²

Other experts argue that this line of reasoning is inconsistent with empirical evidence about inner-city violence and police-involved killings of people of color. First, these experts argue, focusing the conversation on crime rates as opposed to examining the structural reasons (e.g., segregation, underemployment, poverty, health disparities) for the high rates of crime ignores not only the social context in which crime occurs, but also the systemic issues that allow for the continuation of the problem.¹⁵³ Second, experts also argue that bias may be increased by media outlets reinforcing the narrative of particular criminality by presenting African-American and Latino people differently than white people—both quantitatively and qualitatively.¹⁵⁴ News programs and newspapers over-represent people of color as crime suspects and white people as crime victims.¹⁵⁵ Reporters may use language such as “black-on-black crime”, but rarely phrase violent crime as “white-on-white crime”; this gives the impression that violent crime is more prevalent and uniquely an issue within the black community.¹⁵⁶ In media representations:

Black and Latino suspects were also more often presented in a non-individualized way than whites—by being left unnamed—and were more likely to be shown as threatening—by being depicted in physical custody of police.¹⁵⁷

Further, researchers with The Sentencing Project found when analyzing the public's perception of crime that:

¹⁵² Mac Donald, *Briefing Transcript* at 300.

¹⁵³ Robert Sampson, “The Place of Context: A Theory and Strategy for Criminology's Hard Problems,” *Criminology*, vol. 51 (2013); Jeffery Ulmer, Casey Harris, Darrell Steffensmeier, “Racial and Ethnic Disparities in Structural Disadvantage and Crime: White, Black, and Hispanic Comparisons,” *Social Science Quarterly*, vol. 93 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4097310/>; Paul Heideman and Jonah Birch, “The Poverty of Culture,” *Jacobin*, 2014, <https://www.jacobinmag.com/2014/09/the-poverty-of-culture/>.

¹⁵⁴ Nazgol Ghandnoosh and Christopher Lewis, “Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies,” The Sentencing Project, 2014, at 22-23, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>.

¹⁵⁵ *Ibid.* at 13-14.

¹⁵⁶ Gary Younge, “About ‘Black-on-Black Crime,’” *The Nation*, Dec. 9, 2014, <https://www.thenation.com/article/about-black-black-crime/>.

¹⁵⁷ Ghandnoosh and Lewis, “Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies,” *supra* note 154 at 23.

White Americans overestimate the proportion of crime committed by people of color, and associate people of color with criminality. For example, white respondents in a 2010 survey overestimated the actual share of burglaries, illegal drug sales, and juvenile crime committed by African Americans by 20-30%. In addition, implicit bias research has uncovered widespread and deep-seated tendencies among whites—including criminal justice practitioners—to associate blacks and Latinos with criminality.¹⁵⁸

Criminologists have found that the fact that most law enforcement are native-born citizens who have been exposed to these messages has an effect, and these messages become part of their ingrained perception on race.¹⁵⁹ Furthermore, these messages are not isolated to the media and news reports. Stereotypes and biased ideas about African Americans and Latinos are frequently part of the socializing messages young officers receive in training and by more seasoned officers.¹⁶⁰ For instance, many officers are initiated early on with an “us versus them” mentality when it comes to communities of color:

It was not uncommon to hear things like ‘he may beat the rap but he won’t beat the ride’ when a fellow officer would make a questionable arrest. I also was taught that ‘POP’ (short for pissing off the police) was apparently an arrestable offense. This was the culture I saw from the inside looking out.¹⁶¹

Third, experts argue, based on disparities in police stops, in prosecutorial charging, and in bail and sentencing decisions, that:

Implicit racial bias has penetrated all corners of the criminal justice system. Moreover, policies that are race-neutral on their surface—such as ‘hot spot’ policing and certain risk assessment instruments—have targeted low-income people of color for heightened surveillance and punishment.¹⁶²

In her testimony to the Commission, Delores Jones-Brown from the Department of Law, Police Science, and Criminal Justice at the John Jay College of Criminal Justice also challenged the notion that black neighborhoods are inherently more violent than other neighborhoods, and thus the driver for excessive force statistics. Jones-Brown states that in some years during the past decade, the

¹⁵⁸ Ibid. at 3.

¹⁵⁹ Michael Smith and Geoffrey Alpert, “Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation,” *Criminal Justice and Behavior*, vol. 34 (2007); see also German Lopez, “How systemic racism entangles all police—even black cops,” *Vox*, Aug. 15, 2016, <https://www.vox.com/2015/5/7/8562077/police-racism-implicit-bias>.

¹⁶⁰ Philip Holloway, “Policing: It’s not us against them,” *CNN*, May 27, 2015, <https://www.cnn.com/2015/05/27/opinions/holloway-cleveland-policing-us-against-them/index.html>.

¹⁶¹ Ibid.

¹⁶² Ghandnoosh and Lewis, “Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies,” *supra* 154 note at 4.

number of homicide arrests was the same for both black and white civilians, thus challenging the argument that violence in black neighborhoods can account for the disparate rates of fatal police shootings.¹⁶³

Further, data show that the level of intra-racial violence for black victims (excluding murder) was only slightly higher than the level of intra-racial for white victims (62.2 percent vs. 56.0 percent, respectively), and the difference in inter-racial violence between these two groups was even less (black on white violence—13.7 percent versus white on black violence—10.4 percent).¹⁶⁴

It is important to acknowledge that the high crime rates and violence that occur in high-poverty, inner-city neighborhoods do increase the likelihood of police-civilian interactions.¹⁶⁵ However, the argument of “black-on-black crime” as a justification for excessive use of force needs to be addressed for any type of reform to happen.¹⁶⁶ Goff et al., relay that:

[T]o the degree that there is a dominant narrative among police executives about racial disparities in use of force, it is the same as the dominant narrative around racial disparities in policing in general: They are unfortunate, they are unintentional, and they stem mostly from racial disparities in crime rates.¹⁶⁷

Many law enforcement support and further this narrative. For instance, Chief Ed Flynn of the Milwaukee Police Department argues that:

If I draw an ellipse over our poorest neighborhoods and then find an ellipse and draw it where most of our 911 calls are, and then draw the ellipse over where most of our crime victims are . . . it's the same neighborhoods and the same zip codes.¹⁶⁸

Bernard Parks, the former chief of the Los Angeles Police Department stated that:

¹⁶³ See Delores Jones-Brown, Department of Law, Police Science, and Criminal Justice, John Jay College of Criminal Justice, *Briefing Transcript* at 192. She stated that in 2011, there were approximately 4,000 whites and 4,000 blacks arrested for homicide.

¹⁶⁴ Heather Mac Donald, “The Shameful Liberal Exploitation of the Charleston Massacre,” *National Review*, Jul. 1, 2015 (citing data provided by the National Crime Victimization Survey, which excludes homicides), <http://www.nationalreview.com/article/420565/charleston-shooting-obama-race-crime>.

¹⁶⁵ See Devon Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1481-82 (2016); Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014), at 9-10; Angela J. Davis, ed., *Policing the Black Man: Arrests, Prosecution, and Imprisonment* (New York: Pantheon Books, 2017).

¹⁶⁶ Paul Butler, *Chokehold: Policing Black Men* (New York: The New Press, 2017), at 117.

¹⁶⁷ Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 5.

¹⁶⁸ Mitch Teich, “Chief Flynn Says Policing Not the Cause of High Rate of Black Male Incarceration,” *WUWM: Milwaukee Public Radio*, Dec. 20, 2013, <http://www.wuwm.com/post/chief-flynn-says-policing-not-cause-high-rate-black-male-incarceration#stream/0>.

It's not the fault of the police when they stop minority males or put them in jail. It's the fault of the minority males for committing the crime. In my mind, it is not a great revelation that, if officers are looking for criminal activity, they're going to look at the kind of people who are listed on crime reports.¹⁶⁹

The “black-on-black” crime narrative as an explanation for police excessive use of force disregards the structural and historical issues that formed these neighborhoods, as well as the social and economic factors that currently sustain them. Paul Butler explains that the violence in black communities is a symptom of historic discrimination, brutal policing practices, and mass incarceration.¹⁷⁰ Thus, if we want to decrease “black-on-black crime” we first need to address the systemic issues that maintain it. Paul Butler posits that:

Two factors explain what's going in places like Chicago, Baltimore, Los Angeles—if you have high-poverty, segregated neighborhoods and easy access to guns, that's a recipe for violence. The reason why white men don't commit some street crimes at the same level as black men is about the privilege that they have, even as low-income white folks, to not live in these areas. So, if we look at the data, white poor people live in areas that are much closer to middle-class people than black poor people do.¹⁷¹

While some neighborhoods statistically have more incidents of violence, the “black-on-black crime” narrative does not reflect how these concentrations of poverty developed; how this narrative results in incorrect ideas, beliefs, and stereotypes about black people and black criminality more broadly; or how these statistics are internalized by law enforcement.¹⁷² Butler argues that in order to address the issue of “black-on-black crime,” structural, institutional remedies are necessary. For instance, implementing federal policies and programs intended to help people move out of concentrations of high-poverty areas would be one of the first steps to decrease the crime rate in black communities.¹⁷³

This narrative is also problematic because there is not an empirically sound way to “take a true measure of criminality within a population.”¹⁷⁴ Therefore, it becomes difficult for researchers to

¹⁶⁹ Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 5 (citing Jack Glaser, *Suspect race: Causes and consequences of racial profiling*, (Oxford, UK: Oxford University Press, 2014, at 96)).

¹⁷⁰ Butler, *Chokehold: Policing Black Men*, *supra* note 166 at 119.

¹⁷¹ Bill Moyers, “Michelle Alexander and Paul Butler Talking About ‘Chokehold: Policing Black Men,’” an event presented in conjunction with *The Legacy of Lynching: Confronting Racial Terror in America* by the Brooklyn Museum and the Equal Justice Institute, October 16, 2017, <https://billmoyers.com/story/paul-butler-policing-black-men/>.

¹⁷² *Ibid.*

¹⁷³ Butler, *Chokehold: Policing Black Men*, *supra* note 166 at 145-46; *see also* Jill Leovy, *Ghettoside: A True Story of Murder in America* (New York: Spiegel & Grau, 2015), at 58 (noting a Los Angeles detective's view that “catching killers built law—that successful homicide investigations were the most direct means at the cops' disposal of countering [] informal self-policing and street justice . . .”).

¹⁷⁴ Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 5.

have an accurate measure of bias that may be occurring in a police department. Researchers argue that the “nearest approximation [of criminality] is problematic” since

arrest data, which provide the closest estimate of criminal activity within a population (short of direct observation), are compromised by the very nature of who makes arrests. That is, because police arrest people and our concern is with the possibility that police behave in a biased manner when applying force, there is the strong likelihood that arrest data would be biased in the same manner as use of force data.¹⁷⁵

Furthermore:

[T]he dominant narrative has been that this happens to African-Americans because they are arrested in disproportionate numbers . . . But the data really makes it difficult to say that crime is the primary driver of this. In every single category, the anti-black disparity persists.¹⁷⁶

In sum, relying upon arrest data alone to understand use of force data “likely underestimates the level of bias that may exist in police use of force.”¹⁷⁷

There is even further relevant research that debunks the correlation of crime rates and excessive use of force tactics against people of color. For example, researchers have consistently found no correlation between the level of violent crime in a city and that city’s rate of fatal police shootings.¹⁷⁸ Fewer than one in three black people killed by police in 2016 were suspected of a violent crime, or armed.¹⁷⁹ Researchers also found that even though officers use force in less than 2 percent of all civilian interactions, the use of force against black people is disproportionately high—more than three times greater, relative to white people.¹⁸⁰ At the very least, these findings indicate that no considerable difference exists between the level of violence between black people

¹⁷⁵ Ibid.

¹⁷⁶ Timothy Williams, “Study Supports Suspicion That Police Are More Likely to Use Force on Blacks,” *New York Times*, July 7, 2016 (citing Phillip Atiba Goff), <https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html>.

¹⁷⁷ Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 5.

¹⁷⁸ Mapping Police Violence, <https://mappingpoliceviolence.org/> (last accessed Oct. 27, 2018); Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 18; Ross, “A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014,” *supra* note 76.

¹⁷⁹ Mapping Police Violence, <https://mappingpoliceviolence.org/> (last accessed Oct. 27, 2018); Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12.

¹⁸⁰ Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 23; Ross, “A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014,” *supra* note 76.

and white people to warrant the heavy-handed law enforcement response that many policing advocates argue is necessary.¹⁸¹

The Center for Policing Equity researchers found that even after controlling for racial disparities in crime rates, African Americans were far more likely than white people to be victims of excessive force by law enforcement.¹⁸² It is true that due to the combination of high crime rates in impoverished areas and the history of institutional racism, African Americans are more likely to have more interactions with police officers.¹⁸³ More interactions would logically increase the likelihood of being a victim of excessive police force. At the same time, more interactions with police does not necessarily lead to more excessive force incidents; since the issue is not police presence, it is the behavior and actions officers engage in during these interactions that are the issue. UCLA Law Professor Devon Carbado makes this point clearly:

[Sandra] Bland's death, like [Walter] Scott's, is an example of how an ordinary traffic stop can be a gateway to extraordinary police violence . . . Bland was vulnerable to extreme forms of police violence the very moment she got into her car.¹⁸⁴

¹⁸¹ See e.g., Christian Davenport, Sarah A. Soule, and David A. Armstrong II, "Protesting While Black?: The Differential Policing of American Activism, 1960 to 1990," *American Sociological Review*, vol. 76 (2011); Regional News Network, "Stop and Frisk: Good Crime Fighting Policy Says Top Chief," *RNN*, 2015, <http://www.rnntv.com/content/stop-and-frisk-good-crime-fighting-policy-says-top-chief>; Mona Lynch, Marisa Omori, Aaron Roussell, Matthew Valasik, "Policing the 'progressive' city: The racialized geography of drug law enforcement," *Theoretical Criminology*, vol. 17 (2013), at 335-57, <http://journals.sagepub.com/doi/abs/10.1177/1362480613476986>; Amanda Taub, "Why America's police forces look like invading armies," *Vox*, Aug. 19, 2014, <https://www.vox.com/2014/8/14/6003239/police-militarization-in-ferguson>.

¹⁸² Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 19-27.

¹⁸³ Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014), at 93-113; German Lopez, "Police shootings and brutality in the U.S.: 9 things you should know," *supra* note 110.

¹⁸⁴ Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 150 (2017). Sandra Bland was found dead of apparent suicide in a jail cell in July 2015 after her arrest for a contested traffic stop. After her death, many people protested that the stop and the escalation to arrest were unnecessary. The arresting officer was fired, and Ms. Bland's family settled a lawsuit with Waller County, Texas for \$1.9 million. See, e.g., St. John Barned-Smith, "What we've learned from Sandra Bland's death, two years later," *Houston Chronicle*, July 13, 2017, <https://www.chron.com/news/houston-texas/article/Two-years-later-Sandra-Bland-s-suicide-still-11287622.php>; James Queally, "What happened to Sandra Bland before she died in a Texas Jail?" *Los Angeles Times*, July 28, 2015, <http://www.latimes.com/nation/nationnow/la-na-nn-sandra-bland-20150728-htmlstory.html>. Walter Scott was shot in the back in April 2015 while running away from a police officer following a traffic stop. The shooting was videotaped by a bystander and received national attention. The officer pleaded guilty to civil rights offenses and was sentenced to 20 years in prison for the underlying offense of second-degree murder. See Alan Blinder, "Michael Slager, Officer in Walter Scott Shooting Gets 20-Year Sentence," *New York Times*, Dec. 7, 2017, <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html>; Barney Blakeney, "Former North Charleston Police Officer Pleads to Violating Walter Scott's Civil Rights in Shooting Incident," *The Charleston Chronicle*, May 3, 2017, <https://www.charlestonchronicle.net/2017/05/03/former-north-charleston-police-officer-pleads-to-violating-walter-scotts-civil-rights-in-shooting-incident/>.

And the current data support his claim. For instance, Arthur et al. found that one-fifth of the shootings involving African Americans in their study began as a pedestrian or traffic stop, compared to the 16 percent for white suspects.¹⁸⁵

Moreover, studies have found that there are also racial disparities in the severity of force used by law enforcement.¹⁸⁶ The Center for Policing Equity found that when examining these disparities across six categories (i.e., lethal, less lethal and Taser, canine, weapon, OC spray, and hands and body) the average rate of force used against black civilians was higher than that for white civilians in all categories, except the use of lethal force, when controlling for arrests for all offenses.¹⁸⁷ And when analyzing both the number of interactions with officers and the severity of the action used at the time of arrests, the researchers found that African Americans have a “force score”¹⁸⁸ that is roughly 3.8 times higher than that for whites.¹⁸⁹

Another argument that attempts to explain the charges of excessive force is based on the belief that law enforcement are under attack by civilians. While policing is a difficult and dangerous profession, research shows that law enforcement fatalities are at historical lows (see Chart 3).

¹⁸⁵ Arthur, et al., “Shot by Cops and Forgotten,” *supra* note 52.

¹⁸⁶ Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 at 19-27.

¹⁸⁷ *Ibid.* at 13.

¹⁸⁸ *Ibid.* at 20-25. Researchers used a weighted calculation that included the combination of the number of interactions with law enforcement and the severity of the force used at the encounter—with more severe force on the continuum being weighted more heavily than less severe force. It is important to note that this study is consistent with other studies and investigations that show that white civilians have higher numbers of police-involved fatalities overall. However, when population size is considered, the percentage and rate of black fatalities are higher than those of white people.

¹⁸⁹ *Ibid.* at 23.

Chart 3: Law Enforcement Fatalities

Source: Factcheck.org run by the Annenberg School for Communication at the University of Pennsylvania

Data from the Officers Down Memorial Page—which tracks police deaths in real time—shows that since the 1980s, the average number of police killed in the line of duty has continued to decrease year after year.¹⁹⁰ The National Law Enforcement Officers Memorial Fund has also found that fatal shootings of officers have generally declined.¹⁹¹ The Fund provides annual data for a 13-year period, starting from 2005 to 2017. According to the Fund, “[f]irearm-related fatalities peaked in 1973, with 84 officers shot and killed that year. Since then, the annual average has decreased from 63 in the 1970s to 29 in the 2000s.”¹⁹² The Fund found that the “42 firearms-related fatalities in 2015 are 26 percent lower than the average of 57 per year for the decade spanning 2000-2009.”¹⁹³ The numbers peaked to 73 in 2011 and dropped to 43 in 2017 (see Chart 4 below). Thus, the annual average was 51.88 from 2009 to 2017, compared to 56.25 from the previous four years.

¹⁹⁰ Officer Down Memorial Page, Inc., “Remembering All of Law Enforcement’s Heroes,” <https://www.odmp.org/> (reports number of police officer fatalities every year) (last accessed Oct. 27, 2018).

¹⁹¹ National Law Enforcement Officers Memorial Fund, “Facts and Figures: Death, Assaults and Injuries,” <http://www.nleomf.org/facts/officer-fatalities-data/daifacts.html> (last accessed Oct. 27, 2018).

¹⁹² Firearm data is isolated here because it was the leading killer of officers in 2016, and tends to kill more officers every year, compared to other methods (e.g., assaults, bombings, vehicle, etc.), although 2017 data show that traffic-related fatalities were the leading cause officer death. National Law Enforcement Officers Memorial Fund, *Preliminary 2017 Law Enforcement Officer Fatalities Report*, 2017, http://www.nleomf.org/assets/pdfs/reports/fatality-reports/2017/2017-End-of-Year-Officer-Fatalities-Report_FINAL.pdf.

¹⁹³ Eugene Kiely, “Killed in the Line of Duty,” *FactCheck.org*, July 13, 2016, <http://www.factcheck.org/2016/07/killed-in-the-line-of-duty/> (citing the National Law Enforcement Officers Memorial Fund, “Facts and Figures: Death, Assaults and Injuries,” *supra* note 191).

As of December 2017, 128 law enforcement (federal, state, and local) officers died in the line of duty that year, which was a decrease of 10 percent from 2016.¹⁹⁴

These statistics may be surprising because of recent incidents that resulted in the death of several officers, e.g., in 2016 five officers were killed and nine were injured in Dallas.¹⁹⁵ But UCR research shows that these types of ambushes against law enforcement are extremely rare.¹⁹⁶ After the 2016 Dallas incident, several media outlets released reports stating that the rate of officers killed in the line of duty was up by almost 45 percent.¹⁹⁷ This type of reporting is misleading, because the annual number of officers killed is so low, the Dallas incident greatly skewed the percentage.¹⁹⁸ While any police officer killed in the line of duty is tragic, analyzing the numbers demonstrates that there is not an overall uptick on aggression towards law enforcement (see Charts 4, 5, and 6).

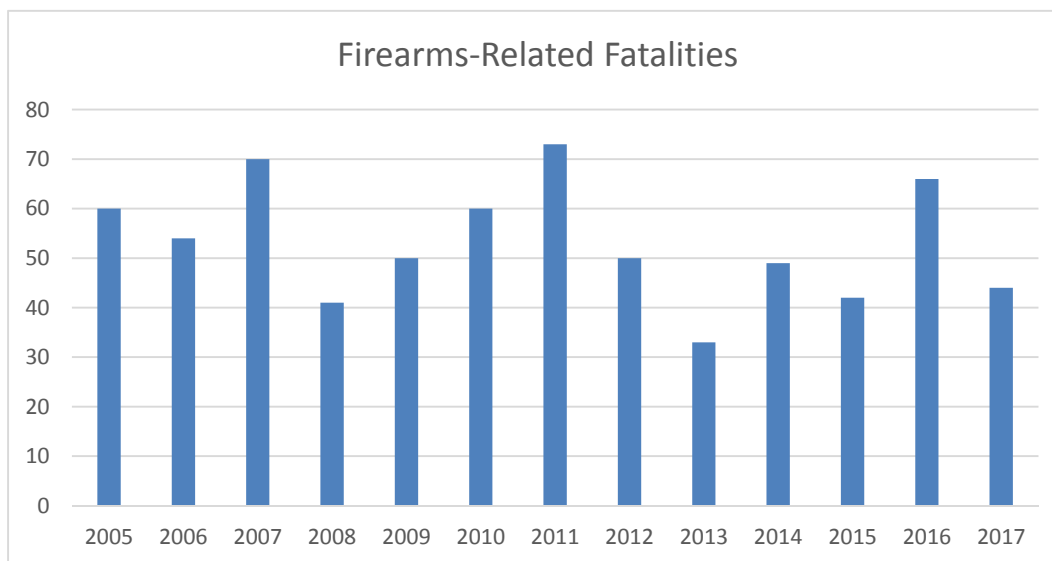
¹⁹⁴ National Law Enforcement Officers Memorial Fund, *Preliminary 2017 Law Enforcement Officer Fatalities Report*, *supra* note 192.

¹⁹⁵ Joel Achenbach, William Wan, Mark Berman, Moriah Balingit, “Five Dallas police officers were killed by a long attacker, authorities say,” *Washington Post*, July 8, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/like-a-little-war-snipers-shoot-11-police-officers-during-dallas-protest-march-killing-five/?utm_term=.9b7790739778 (reporting the incident on July 7, 2016, where Micah Xavier Johnson killed five officers and injured nine others).

¹⁹⁶ See FBI: Uniform Crime Reporting, “Law Enforcement Officers Killed and Assaulted 2017: Summaries of Officers Feloniously Killed,” <https://ucr.fbi.gov/leoka/2017/resource-pages/felonious-summaries> (last accessed Nov. 4, 2018); see also Dara Lind, “What we know about attacks on police,” *Vox*, July 8, 2016, <https://www.vox.com/2014/12/22/7430943/police-killed-statistics>.

¹⁹⁷ See e.g., Gregg Zoroya, “26 police killed so far in 2016, up 44% from 2015,” *USA Today*, July 8, 2016, <https://www.usatoday.com/story/news/nation/2016/07/08/nationwide-police-shooting-deaths/86861082/>; Max Kutner, “Number of Fatal Shootings of Police Officers is up 44 Percent,” *Newsweek*, July 8, 2016, <http://www.newsweek.com/number-police-killed-increase-dallas-478901>.

¹⁹⁸ Christopher Ingraham, “Police are safer under Obama than they have been in decades,” *Washington Post*, July 9, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/07/09/police-are-safer-under-obama-than-they-have-been-in-decades/?utm_term=.9f4fa4de2beb; see also Eugene Volokh, “Fatal shootings of police officers up from last year—but same as the average rate for 2005 to 2015,” *Washington Post*, July 8, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/08/fatal-shootings-of-police-officers-up-from-last-year-but-at-the-average-rate-for-2005-to-2015/?tid=a_inl&utm_term=.1b5582f5cb08.

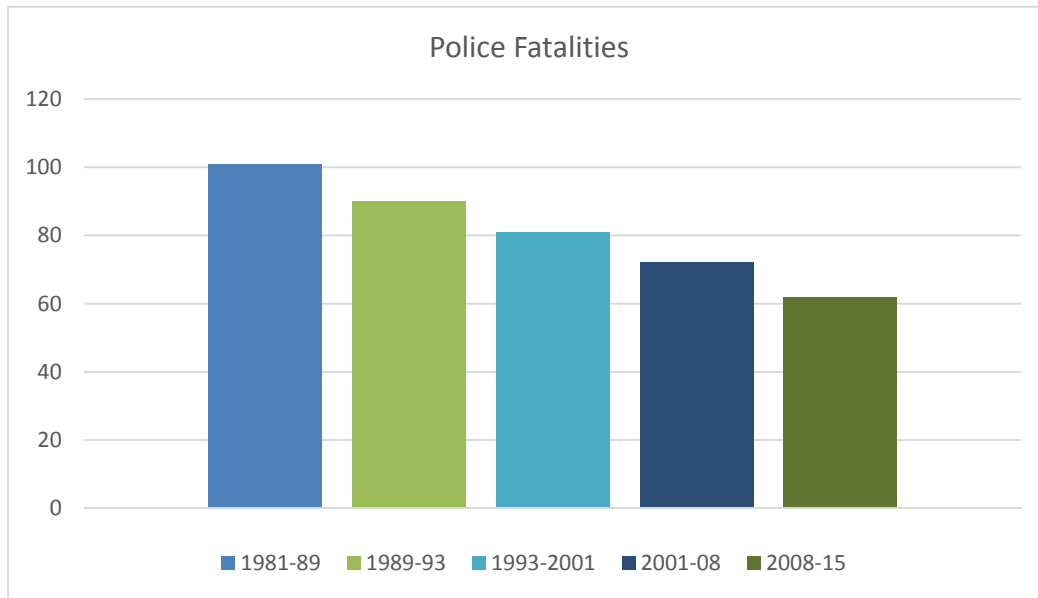
Chart 4: Firearms-Related Fatalities

Source: National Law Enforcement Officers Memorial Fund,¹⁹⁹ chart recreated by USCCR staff

Further, the data presented on Chart 5 (which includes the average number of police fatalities due to shootings, stabbings, assaults, bombings, and vehicular assaults) suggest that intentional attacks against law enforcement are at historically low levels.²⁰⁰

¹⁹⁹ National Law Enforcement Officers Memorial Fund, “Facts and Figures: Causes of Law Enforcement Deaths,” <http://www.nleomf.org/facts/officer-fatalities-data/causes.html> (last accessed Oct. 27, 2018).

²⁰⁰ While these data are reflecting averages and trends over the past several administrations, if 2016 numbers are included, the average of 62 fatalities does not change. See Ingraham, “Police are safer under Obama than they have been in decades,” *supra* note 198.

Chart 5: Police Fatalities 1980 to 2015

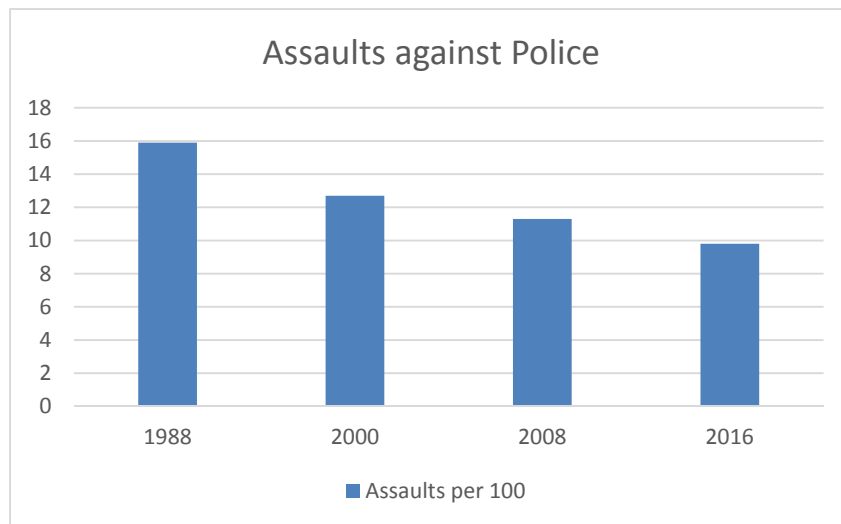
Source: Officer Down Memorial Page,²⁰¹ chart created by USCCR staff

According to FBI statistics, assaults on police officers are also down (see Chart 6). In 1988, there were 15.9 assaults for every 100 officers.²⁰² In 2000, they dropped to 12.7 assaults, in 2004 they decreased again to 11.3 per 100, and in the most recent data collected by the FBI (2014) they dropped to their lowest of 9.0 per every 100 officers.²⁰³ This trend is significant because it suggests that physical attacks on officers are also decreasing; therefore, an officer's use of excessive force should also be experiencing the same trend.

²⁰¹ Officer Down Memorial Page, Inc., *supra* note 190.

²⁰² Ingraham, "Police are safer under Obama than they have been in decades," *supra* note 198.

²⁰³ *Ibid.*

Chart 6: Assaults Against Law Enforcement

Source: FBI, *Law Enforcement Officers Killed and Assaulted*,²⁰⁴ chart created by USCCR staff

Furthermore, one study found an association between police using excessive force in the aftermath of officers being killed in the line of duty. Following a study of the New York Police Department, Joscha Legewie, Assistant Professor at Yale, found that force incidents seem to increase after an officer is fatally shot.²⁰⁵ Further, Legewie found that this correlation may have a racial component, with use of excessive force more likely to increase if the officer is killed by a black individual, compared to a white or Latino individual.²⁰⁶ He found that police officers increased their use of force against African Americans after two officers were fatally shot by black suspects; however, their behavior did not change after three other officers were killed in two separate incidents by a Latino and White suspect. Legewie concluded that “racial bias in policing and discrimination more broadly is not static but fluctuates, partly driven by significant events that provoke intergroup conflict and foreground racial stereotypes.”²⁰⁷

Legewie argues that discriminatory behavior may not arise from a single instance, but rather is the result of many interactions or even hearing about negative interactions from others.²⁰⁸ For instance, “officers who have hostile interactions with local youth (or hear about hostile interactions that other officers have had) may respond more forcefully in their next interaction even if the

²⁰⁴ FBI: Uniform Crime Reporting, “Law Enforcement Officers Killed and Assaulted (LEOKA),” <https://ucr.fbi.gov/leoka> (last accessed Oct. 27, 2018).

²⁰⁵ Joscha Legewie, “Racial Profiling and Use of Force in Police Stops: How Local Events Trigger Periods of Increased Discrimination,” *American Journal of Sociology*, vol. 122 (2016), <http://jlegewie.com/files/Legewie-2016-Racial-Profiling-and-Use-of-Force-in-Police-Stops.pdf>.

²⁰⁶ *Ibid.* at 381.

²⁰⁷ *Ibid.* at 380.

²⁰⁸ *Ibid.*

interaction is with a different individual or group of individuals.”²⁰⁹ Thus, Legewie suggests that we may be able to understand police use of excessive force and issues such as racial profiling if we examine the events, social environment, and context in which they occur. These events, in tandem, may foster more racial biases than a single action when it takes place. Lastly, examining these possible causal relationships that may explain disproportionate use of excessive force may foster better understanding of how racial bias operates in these situations. This suggests that “frequent exposure to certain events such as crimes that involve black suspects might not only trigger temporary periods of discrimination but also permanently raise the use of police force against minorities or other discriminatory acts.”²¹⁰

Systemic Perspectives

In contrast to the argument that disparities in rates of police use of force follow from data-driven policing, is the view that high rates of police-involved killings of people of color stem from explicit and implicit systemic bias against marginalized communities. Scholars have examined multiple issues surrounding the use of force debate, such as the disparate targeting of people of color by law enforcement, police stop-and-arrest decisions, and the link between implicit bias and an officer’s decision to shoot a suspect of color whom the officer perceives as “dangerous.”²¹¹ Though advocates disagree on the causes of this disproportionate impact, a prevalent theme in this body of literature is that the criminal justice system disproportionately impacts communities of color.

Communities of color

In a recent survey consisting of 802 African American adults, researchers found that 50 percent of all black Americans (57 percent of black men and 44 percent of black women) said they have personally experienced racial discrimination when interacting with the police.²¹² Further, 61 percent responded that police officers are more likely to use unnecessary force against an African-American person, compared to 26 percent who answered that police were just as likely to use unnecessary force against a white person.²¹³ These perceptions of discrimination and unfair

²⁰⁹ Ibid. at 410.

²¹⁰ Ibid. at 411.

²¹¹ We Charge Genocide, *The Counter-CAPS Report: The Community Engagement Arm of the Police State*, 2015, <http://wechargegenocide.org/wp-content/uploads/2015/10/CAPSreport-final.pdf>; Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12; Mike King, “Disruption is Not Permitted: The Policing and Social Control of Occupy Oakland,” *Critical Criminology*, vol. 21 (2013); New York Civil Liberties Union, *Stop-and-Frisk* Briefing Report, 2011, https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

²¹² NPR, Robert Wood Johnson Foundation, Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of African Americans*, 2017, <https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf> (survey of 802 African-American U.S. adults conducted January 26-April 9, 2017; +/- 4.1 percentage points margin of error for the full African American sample).

²¹³ Ibid.

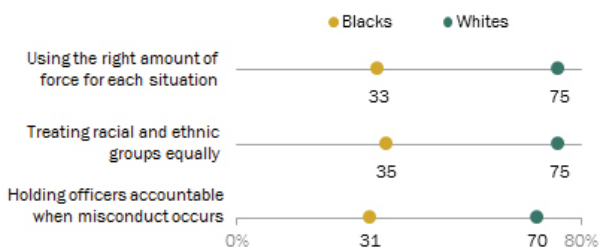
treatment by law enforcement have consequences for them personally, and on society as whole, since the survey also showed that 31 percent of the respondents said that they avoided calling the police due to fear of discrimination.²¹⁴

Discrimination and prejudice (perceived or actual) are two concepts that erode trust and confidence in the police. When surveyed, residents in low-income, high-crime areas often believe that police are biased against them. The Urban Institute found that over half of these 1,212 respondents, who were disproportionately black, agreed or strongly agreed that police officers were biased or behaved in a biased manner and believed that “police officers will treat you differently because of your race/ethnicity.”²¹⁵ In contrast, a 2016 Pew Research poll found that roughly three-quarters of white respondents stated that “police in their communities do an excellent or good job in using the appropriate force on suspects,” and 75 percent believe that law enforcement treat all ethnicities equally.²¹⁶ The same poll showed that about a third of black respondents stated that police did an excellent or good job in using the appropriate amount of force on a suspect, treating people of color equally, and holding officers accountable when misconduct occurs (see Chart 7 below).²¹⁷

Chart 7: Public Perceptions of Law Enforcement

Blacks are about half as likely as whites to have a positive view of the job their local police are doing

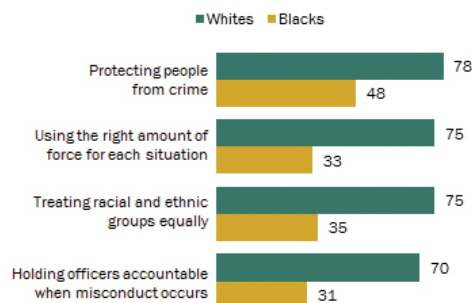
% saying the police in their community do an excellent or good job when it comes to ...



Note: Whites and blacks include only non-Hispanics.
Source: Survey of U.S. adults conducted Aug. 16-Sept. 12, 2016.
“The Racial Confidence Gap in Police Performance”

Blacks are about half as likely as whites to have a positive view of police treatment of racial and ethnic groups or officers’ use of force

% saying the police in their community do an excellent or good job when it comes to ...



Note: Whites and blacks include only non-Hispanics.
Source: Survey of U.S. adults conducted Aug. 16-Sept. 12, 2016.
“The Racial Confidence Gap in Police Performance”

Source: Pew Research Center

²¹⁴ Ibid.

²¹⁵ The sample included 3,750 households, with a total of 1,278 adults who completed the survey. Of those surveyed, 66.3 percent identified as black, 11.9 percent identified as white, and 10.6 percent identified as Latinx or Hispanic. See La Vigne et al., *How Do People in High-Crime, Low-Income Communities View the Police?*, *supra* note 8, at 9, http://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf.

²¹⁶ Rich Morin and Renee Stepler, *The Racial Confidence Gap in Police Performance*, Pew Research Center, 2016, at 5, http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/09/ST_2016.09.29_Police-Final.pdf.

²¹⁷ Ibid.

Montague Simmons, from the Organization for Black Struggle, testified at the Commission's briefing that many communities of color feel like they are heavily surveilled, devalued, and under attack by law enforcement:

Countless boys and girls grew up . . . feeling like prey because the police in our city stalked those . . . who looked like us for pleasure and for profit, but there was actually no remedy for us specifically to be sought under our democracy. I remember in my own younger days when the harassment seemed like it was daily. Just walking home from school or from the bowling alley, it could result in some form of intimidation, humiliation, or harassment. For us this was a rite of passage that our brothers, mothers, fathers, cousins, and uncles did their best to prepare us for.²¹⁸

Simmons further cites structural features (e.g., militarization, marketization) of the criminal justice system that leads to the use of law enforcement most heavily falling upon people of color, protestors, and other marginalized groups.²¹⁹ At the Commission's briefing, Ezekiel Edwards with the ACLU added that there is a sense of disparate treatment by law enforcement that leads to widespread distrust of the police.²²⁰ Edwards stated that this mistrust can reduce public safety and community members may be less likely to cooperate with police to address serious crimes or reach out to police for protection or assistance.²²¹

Existing research supports the perception that people of color, specifically black and Latino people, are more likely to be stopped and searched (in both traffic and street stops) than their white counterparts.²²² According to FBI reports, in Dearborn, Michigan more than half of the people arrested in 2011 and 2012 were black, despite representing only about 4 percent of the city's residents.²²³ Over those two years, the police department reported arresting 4,500 black people,

²¹⁸ *Briefing Transcript* at 28.

²¹⁹ *Ibid.* at 29.

²²⁰ *Ibid.* at 185.

²²¹ Ezekiel Edwards, American Civil Liberties Union, written statement for the "Police Use of Force: An Examination of Modern Policing Practices" Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 4 [hereinafter Edwards Statement].

²²² See Lynn Langton and Matthew Durose, *Police Behavior during Traffic and Street Stops*, 2011, U.S. Dep't of Justice, 2013, at 1, <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf>; Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, Center for American Progress, 2015, <https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/>; The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, 2015, at 8, http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf; New York Civil Liberties Union, *Stop-and-Frisk Briefing Report*, 2011, at 2, https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

²²³ Brad Heath, "Racial gap in U.S. arrest rates: 'Staggering disparity,'" *USA Today*, Nov. 19, 2014, <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/> (citing FBI reports).

500 more than lived in the city itself, resulting in an arrest rate of black civilians that was 26 times higher than that of other races.²²⁴ A *USA Today* analysis of over 3,500 police departments across the country found that 95 percent arrested black people at a higher rate than other racial groups,²²⁵ and often for non-violent offenses (e.g., nearly one in three people arrested for drug law violations were black) which contribute to disproportionate incarceration rates of African Americans.²²⁶

Phillip Atiba Goff with the Center for Policing Equity argues that these statistics need to be evaluated with caution, because they speak more about how racial inequities play out rather than what causes them. Goff asserts that:

There is no doubt a significant degree of law enforcement bias that is the engine for this. But there's also no controversy that educational quality and employment discrimination lead to this. It's not an indicator of how big a problem there is with a police department. It's an aggregator of what's going on in the community.²²⁷

Lance Hannon, professor of sociology and criminology at Villanova University, found racial bias in police interactions with civilians when analyzing the Philadelphia Police Department's 2014-15 stop-and-frisk data.²²⁸ Hannon found that the issue was much broader than expected, where bias affected not only black people, but entire, predominantly black neighborhoods were disproportionately impacted.²²⁹ Hannon's research showed that mostly black neighborhoods had 70 percent more frisks than nonblack areas, despite the fact that less contraband was discovered.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States*, 2009) (citing FBI UCR data), at 4, https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf. See also Katherine Beckett, Kris Nyrop, Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests," *Criminology*, vo. 44 (2016), at 129-130, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2006.00044.x>; K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six Major U.S. Cities*, U.S. Dep't of Justice, National Institute of Justice, Office of National Drug Control Policy, 1997, <https://www.ncjrs.gov/pdffiles/167265.pdf> (concluding that Black people are far more likely to be arrested on drug charges than white people, despite that whites use drugs at the same rate. Studies have actually shown that whites are more likely to sell drugs, but black people are still more likely to be arrested for them. Thus, making it *appear* that black people have higher rates of drug possession). See U.S. Dep't of Health and Human Services, *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, Substance Abuse and Mental Health Services Administration Center for Behavioral Health Statistics and Quality, 2014, <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>; Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, Brookings Institute, 2014, <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>; David Kocieniewski and Robert Hanley, "An Inside Story of Racial Bias and Denial; New Jersey Files Reveal Drama Behind Profiling," *New York Times*, Dec. 3, 2000, <https://www.nytimes.com/2000/12/03/nyregion/inside-story-racial-bias-denial-new-jersey-files-reveal-drama-behind-profiling.html>.

²²⁷ Heath, "Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'" *supra* note 223.

²²⁸ Lance Hannon, "An Exploratory Multilevel Analysis of Pedestrian Frisks in Philadelphia," *Race and Justice*, 2017.

²²⁹ Ibid.

Further, these elevated rates of frisking remained constant in both high-crime areas and low-crime areas.²³⁰ Hannon concluded that these disproportionate rates are due to African Americans being held to a

lower level of reasonable suspicion—so people who should not be perceived as dangerous or objectively not dangerous are more likely to get swept up in a stop-and-frisk initiative and be unproductively frisked due to implicit racial bias.²³¹

Fear of police among the Latino community is a significant issue as well. The W.K. Kellogg Foundation reported in November 2014 that 68 percent of Latinos worry that law enforcement will use excessive force against them.²³² Twenty six percent believe that officers will treat them fairly most of the time, 18 percent have friends or family members who were victims of police brutality, and 59 percent said there are things they would change about their local police.²³³ Moreover, LatinoJustice found that in 2018, more than 50 percent of Latinxs²³⁴ believe the police use excessive force—specifically deadly force—against community members.²³⁵ Juan Cartagena, President and General Counsel of LatinoJustice PRLDEF, stated that:

Latinos in America are significantly concerned about their public safety both at the hands of police and by their neighbors. They are convinced that they will be more subject to unlawful deadly force by police compared to whites, they believe local police treat them in ways similar to how African-Americans are treated, and they disavow the use of racial profiling by law enforcement.²³⁶

²³⁰ Ibid.

²³¹ Samantha Melamed, “Study: High rates of stop-and-frisk even in Philly’s lowest-crime black areas,” *Philly.com*, Oct. 2, 2017, <http://www.philly.com/philly/news/crime/stop-frisk-policing-philadelphia-racial-bias-lance-hannon-villanova-20171002.html>. See also Gloria Porter, University of St. Thomas, *Minnesota Hearing Transcript* at 347-49. Despite working closely with the Minneapolis police for her job as a recruiter for a Master’s program in public safety and police leadership, Gloria Porter testified she has been pulled over multiple times in her neighborhood for trivial reasons. Notwithstanding her friendly relationships with police officers, she recounted being cited for changing lanes to avoid a car driving in the wrong lane, harassed for having snow on her windshield, or stopped for having an air freshener hanging off her rear-view mirror.

²³² Press Release: W.K. Kellogg Foundation, “Poll of Latino families finds optimism despite many obstacles,” Nov. 12, 2014, <https://www.wkkf.org/news-and-media/article/2014/11/poll-of-latino-families-finds-optimism-despite-many-obstacles>.

²³³ Ibid.

²³⁴ Latinx is a gender-neutral or non-gender binary term of a person of Latin American descent. The term is often used as an alternative to Latino or Latina.

²³⁵ Press Release: LatinoJustice, “National Poll Shows Latinos Are Concerned about Police Violence, Feel Less Safe Under Trump But Insist on Increased Spending on Rehabilitation Instead of More Funding for Prisons or Police,” Jan. 10, 2018, http://latinojustice.org/briefing_room/press_releases/national_poll_shows_latinos_are_concerned_about_police_violence_feel_less_safe_under_trump_but_insist_on_increased_spending_on_rehabilitation_instead_of_more_funding_for_prisons_or_police/.

²³⁶ Ibid.

Further, these feelings are supported by patterns of racial profiling. For instance, after a three-year investigation of the Maricopa County police department, the Justice Department found that the department had repeatedly violated Latino residents' civil rights.²³⁷ In a letter to county officials, Assistant Attorney General Thomas Pérez stated that:

deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize the [Maricopa County Sheriff's Office].²³⁸

According to the civil rights lawsuit filed by the Justice Department, Maricopa County officers stopped Latino drivers four to nine times more often than non-Latino drivers among other violations.²³⁹

Moreover, data from the Center on Juvenile and Criminal Justice and *Guardian* reporters further confirm this heightened level of fear among Latinos. In 2014, the Center on Juvenile and Criminal Justice noted that the number of Latino victims of police killings is 30 percent above average and 1.9 times the rate for white people.²⁴⁰ Further, *Guardian* reporters found in 2016, 15.3 percent of Latinos whom police killed in gun-involved homicides were unarmed.²⁴¹ A 2015 CNN report noted similar police-involved killings of Latinos occurring in cities across the country.²⁴² For instance, Rubén García Villalpando was unarmed when a Texas police officer shot him twice in the chest on February 20, 2015.²⁴³ Two police officers reportedly killed 17-year-old Jessica Hernández, who was unarmed, in Denver on January 26, 2015.²⁴⁴

²³⁷ Press release: U.S. Dep't of Justice, "Dep't of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio," May 10, 2012, <https://www.justice.gov/opa/pr/department-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s>.

²³⁸ U.S. Dep't of Justice, Civil Rights Division, Findings Letter, "United States' Investigation of the Maricopa County Sheriff's Office," Dec. 15, 2011, at 2, https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

²³⁹ Press release: U.S. Dep't of Justice, "Dep't of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio," May 10, 2012, <https://www.justice.gov/opa/pr/department-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s>; See *Melendres v. Arpaio*, 695 F.3d 990, 994-95 (9th Cir. 2012).

²⁴⁰ Mike Males, "Who Are Police Killing?," Center on Juvenile and Criminal Justice, 2014, <http://www.cjcj.org/news/8113> (last accessed Oct. 27, 2018).

²⁴¹ *Guardian*, "The Counted," *supra* note 87.

²⁴² Raul Reyes, "Police brutality toward Latinos is unacceptable," *CNN*, June 19, 2015, <http://www.cnn.com/2015/06/09/opinions/reyes-police-brutality-latinos/>.

²⁴³ Catherine Shoichet, "Grand jury: No charges for Texas officer who shot Mexican immigrant," *CNN*, May 19, 2015, <https://www.cnn.com/2015/05/18/us/texas-police-shooting-immigrant-killed/index.html>.

²⁴⁴ Reyes, "Police brutality towards Latinos is unacceptable," *supra* 242.

Moreover, according to a national survey by LatinoJustice, researchers found that respondents believe there is a significant “data-gap problem.”²⁴⁵ Respondents stated that too often discussions of law enforcement and criminal justice reform primarily focus on the disparate rates between black and white people.²⁴⁶ Therefore, data on Latino communities is often lacking and insufficient.²⁴⁷

According to research gathered by *Guardian* reporters, in 2015, thirteen Native Americans and Alaska Natives were killed by or died in the custody of police throughout the country, and this number of fatalities rose to 24 in 2016.²⁴⁸ Research by the Lakota People’s Project demonstrated that Native Americans “suffer the most adverse effects of a criminal justice system which consistently reifies itself as structurally unjust.”²⁴⁹ Native American and Alaska Native communities represent less than 1 percent of the U.S. population, yet between 2001 and 2016 they were killed by police at nearly the same rate as black people, who make up approximately 13.3 percent of the overall population²⁵⁰ (0.23 per 100,000 versus 0.28 per 100,000).²⁵¹ Comparative to the percentage of the U.S. population, this makes them the racial group most likely to be killed by law enforcement.²⁵²

Simon Moya-Smith, an Oglala Lakota journalist and activist, states that the media rarely covers the number of police-involved killings that occur on tribal lands, and that these incidents are treated

²⁴⁵ LatinoJustice, *supra* note 235.

²⁴⁶ Ibid.; LatinoJustice, “Justice Reform Collaborative,” http://preview.latinojustice.org/civil_rights/JRC/ (last accessed Oct. 27, 2018); Juleyka Lantigua-Williams, “Criminal Justice is Becoming a ‘Latino Issue,’” *The Atlantic*, Sept. 20, 2016, <https://www.theatlantic.com/politics/archive/2016/09/why-criminal-justice-is-becoming-a-latino-issue/500864/>.

²⁴⁷ LatinoJustice, *supra* note 235.

²⁴⁸ Based on data collected by *Guardian*, “The Counted,” *supra* note 87.

²⁴⁹ Lakota People’s Law Project, *Native Lives Matter Report*, 2015, at 1, <https://s3-us-west-1.amazonaws.com/lakota-peoples-law/uploads/Native-Lives-Matter-PDF.pdf>.

²⁵⁰ United States Census Bureau, *Race, Combinations of Two Races, and Not Hispanic or Latino: 2010*, 2010 Census Summary File 1, 2010. (U.S. Census Data as of July 2016).

²⁵¹ Centers for Disease Control and Prevention, “Fatal Injury Data,” <https://www.cdc.gov/injury/wisqars/fatal.html> (last accessed Oct. 27, 2018).

²⁵² Mike Males, “Who Are Police Killing?,” *supra* note 240 (citing CDC data). Federal standards on racial and ethnic data require a minimum of five racial categories including, American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. See OMB, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 FED. REG. 58,582 (Oct. 30, 1997). These standards “were developed in cooperation with Federal agencies to provide consistent data on race and ethnicity throughout the Federal Government. Development of the data standards stemmed in large measure from new responsibilities to enforce civil rights laws.” *Id.* The Commission notes that Native Americans and Indian tribes also have a special government-to-government relationship with the federal government and that the Supreme Court has repeatedly held that “classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government’s relations with Indians.” *U.S. v. Antelope*, 430 U.S. 641, 645 (1977).

as isolated occurrences and largely ignored by the national media.²⁵³ Therefore, it is likely that there is less public awareness about police use of force in these communities, and in turn, considerably less public attention or outcry for reform.²⁵⁴ Moya-Smith states: “There are no white or black faces rallying around us, marching with us, protesting with us over this injustice. Why? Because we are a forgotten people.”²⁵⁵ Millet argues that of all police-involved killings of individuals from Native American and Alaskan Native communities over five years, only two have received significant media coverage outside of the local community.²⁵⁶

Actual or perceived discrimination and racial bias by police officers against communities of color can be related to these communities’ actual or perceived political marginalization. The negative consequences of the political disempowerment suffered by communities of color have been repeatedly noted by this Commission.²⁵⁷ Because “communities of color . . . often lack the political power and financial means”²⁵⁸ to influence elected government officials and hold them accountable, some perceive legitimate concerns these communities may have about police actions not given the same consideration as those voiced by their more politically powerful neighbors.²⁵⁹ Lack of political clout may render communities vulnerable to policing tactics that would not be “politically acceptable in [other] communities.”²⁶⁰

²⁵³ Simon Moya-Smith, “Who’s most likely to be killed by police?,” *CNN*, Dec. 24, 2014, <http://www.cnn.com/2014/12/24/opinion/moya-smith-native-americans>.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ Lydia Millet, “Native Lives Matter, Too,” *New York Times*, Oct. 13, 2015, <https://www.nytimes.com/2015/10/13/opinion/native-lives-matter-too.html?mcubz=0>.

²⁵⁷ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation*, 2018, at 33 [hereinafter *Public Education Funding Inequity*]; U.S. Commission on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,89*, 2016, at 4 [hereinafter *Environmental Justice*] (“Racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities and often lack political and financial clout” to fight negative decisions or to seek redress). *See also Environmental Justice*, at 6. (Industrial waste sites “that can negatively impact human health” are often situated in minority communities precisely “because they lack the political clout and resources” to fight back).

²⁵⁸ *Public Education Funding Inequity*, at 33.

²⁵⁹ Matthew Fogg, former Chief Deputy U.S. Marshal, written statement for the “Police Use of Force: An Examination of Modern Policing Practices” Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 5 [hereinafter *Fogg Statement*]. In his statements to the Commission at the briefing, Fogg alleged that police officers are reluctant to aggressively police white, politically empowered communities because they “knew legislators, judges and government officials,” and could “shut down” operations that risked officers losing “pay benefits such as overtime and asset seizures.”

²⁶⁰ NY State Advisory Committee to U.S. Commission on Civil Rights, *The Civil Rights Implications of “Broken Window” Policing in NYC and General NYPD Accountability to the Public*, at 10 (2018), <http://www.usccr.gov/pubs/2018/03-22-NYSAC.pdf>.

Disability communities

Talila Lewis, co-founder of Helping Educate to Advance the Rights of the Deaf (HEARD) points out that a considerable number of police-involved killings also involve individuals with psychological, emotional, or physical disabilities.²⁶¹ In several cases, excessive force was used when the individual was armed with some sort of implement (e.g., knife, screwdriver, rock).²⁶² More importantly, in many of these cases, police were not responding to reports of a crime being committed. Police officers were often called because relatives, neighbors, or other bystanders were worried that a mentally fragile person was behaving erratically.²⁶³ On average, “police shot and killed someone who was in mental crisis every 36 hours in the first six months of [2015]. On April 25, [2015] three mentally ill men were gunned down within 10 hours.”²⁶⁴ In 2016, 242 people with known mental illnesses were fatally shot by police; that number decreased to 236 in 2017.²⁶⁵

Many police departments do not have policies in place to prepare officers in how to safely interact and resolve encounters with people with disabilities. For instance, the Chicago Police Accountability Task Force report²⁶⁶ and the 2017 DOJ investigation²⁶⁷ report found that the Chicago Police Department did not have effective training policies in place to protect this community. The absence of such policies raises concerns for several reasons. First, without policies in place to direct officers in how to safely interact with the disability community, some officers may react with unnecessary or excessive force since they do not have specific protocol to follow. Further, if an incident were to occur, without policies in place, supervisors would not be able to hold officers accountable for their actions, if indeed they did use excessive force. Moreover, without policies in place that promote training, ensure safety, and focus on de-escalation tactics the high rates of people with disabilities being fatally shot by officers will continue. Talila Lewis asserts that:

²⁶¹ Talila Lewis, co-founder of Helping Educate to Advance the Rights of the Deaf (HEARD), *Briefing Transcript* at 15-16.

²⁶² Ibid.; Peter Holley and Wesley Lowery, “The Chicago shootings and why so many police calls involving the mentally ill end in death,” *Washington Post*, Dec. 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/12/29/why-police-calls-involving-the-mentally-ill-often-end-in-tragedy/?utm_term=.85e3da9c866b.

²⁶³ Wesley Lowery, Kimberly Kindy, Keith Alexander, Julie Tate, Jennifer Jenkins, and Steven Rich, “Distraught People, Deadly Results,” *Washington Post*, June 30, 2015, http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/?utm_term=.609046208b59.

²⁶⁴ Ibid.

²⁶⁵ Julie Tate, Jennifer Jenkins, Steven Rich, John Muyskens, Kennedy Elliott, Ted Mellnik, and Aaron Williams, “Fatal Force,” *Washington Post*, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/>.

²⁶⁶ U.S. Dep’t of Justice, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities they Serve*, 2016, https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf.

²⁶⁷ U.S. Dep’t of Justice, Civil Rights Division, and US Attorney’s Office Northern District of Illinois, *Investigation of the Chicago Police Department*, 2017, <https://www.justice.gov/opa/file/925846/download>.

It is critical to the lives of persons with many types of disabilities that the Department of Justice create national standards and police departments adopt and implement policies and practices that comply with the ADA [Americans with Disabilities Act].²⁶⁸

Another significant issue is a lack of community health support in many cities and states throughout the U.S.²⁶⁹ Therefore, if a mental health crisis arises, police are likely to become the first people on the scene, which can have fatal consequences for citizens who have disabilities due to issues such as lack of training, ineffective or nonexistent policies, and potentially bias. Due to the decreased funding and deinstitutionalization of mental health services, police work has become increasingly difficult in many ways. Law enforcement officers who are engaged in community policing²⁷⁰ efforts provide citizens with services that go beyond maintaining public safety and enforcing laws.²⁷¹ Moreover:

Law enforcement officers are first-line, around-the-clock, emergency responders, mediators, referral agents, counselors, youth mentors . . . [and] [a]mong their growing list of responsibilities is the need to effectively respond to people with mental illnesses.²⁷²

According to data collected by the *Washington Post*, 25 percent of police-involved killings in 2015 involved individuals with mental health needs.²⁷³ A large portion (45 percent) of police-involved

²⁶⁸ Talila Lewis, written statement for the “Police Use of Force: An Examination of Modern Policing Practices” Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 7 [hereinafter Lewis Statement].

²⁶⁹ See generally, National Alliance on Mental Illness, *State Mental Health Cuts: A National Crisis*, 2011, at 2, <https://www.nami.org/getattachment/About-NAMI/Publications/Reports/NAMISateBudgetCrisis2011.pdf>; Norm Ornstein, “How to Fix a Broken Mental-Health System,” *The Atlantic*, June 8, 2016, <https://www.theatlantic.com/politics/archive/2016/06/getting-mental-health-on-the-docket/485996/>; Anisha Lewis, “Incarceration and Mental Health,” The Center for Prisoner Health and Human Rights, <http://www.prisonerhealth.org/educational-resources/factsheets-2/incarceration-and-mental-health/> (last accessed Oct. 28, 2018); Alex Vitale and Owen West, “Police not adequately trained on mental health,” *USA Today*, Nov. 18, 2016, <https://www.usatoday.com/story/opinion/policing/2016/11/17/policing-the-usa-mental-health-illness-brutality-force/93823126/>.

²⁷⁰ Community Oriented Policy Services (COPS) defines community policing as an organizational strategy that supports the systematic use of partnerships and problem-solving techniques to address public safety issues such as crime, social disorder, and fear of crime. See U.S. Dep’t of Justice, *Community Policing Defined*, 2014, <https://cops.usdoj.gov/pdf/vets-to-cops/e030917193-CP-Defined.pdf>.

²⁷¹ Julian Mincer and Eric Johnson, “U.S. Police get little training to handle crises with mentally ill,” *Reuters*, Dec. 29, 2015, <http://www.reuters.com/article/us-usa-police-mentalhealth-idUSKBN0UD04K20151230>.

²⁷² Mellissa Reuland, Matthew Schwarzfeld, and Laura Draper, *Law Enforcement Responses to People with Mental Illness: A Guide to Research-Informed Policy and Practice*, Council of State Governments Justice Center, 2009, at 3, <https://csgjusticecenter.org/wp-content/uploads/2012/12/le-research.pdf>

²⁷³ Julie Tate, et al., *supra* note 265. The data shown include information on race of the deceased, circumstances of the shooting, and whether the person was armed. *Washington Post* researchers compiled these data by culling local news reports and monitoring independent databases such as “Killed by Police” and “Fatal Encounters.” In some cases, the *Post* conducted additional reporting. The *Post* documented only shootings in which a police officer, while on duty, shot and killed a civilian—circumstances that most closely parallel the 2014 killing of Michael Brown in Ferguson,

killings of individuals with mental health challenges occurred in cities located in six states: California (43), Texas (20), Florida (10), Washington (9), and Alabama and Arizona (8 each). In her written testimony to the Commission, Talila Lewis, noted that law enforcement personnel often mistake behaviors associated with disability as “threatening” or “noncompliant.”²⁷⁴ She reported that officers often feel underprepared or unprepared to safely interact with people with disabilities.²⁷⁵ At a 2017 briefing of the Maine State Advisory Committee to the U.S. Commission on Civil Rights, Maine State Police Sergeant Stevenson stated that before implementing targeted officer training, it used to be common practice in his department to respond to someone in mental health distress (e.g., threatening suicide) with a dangerous weapon, even if they did not pose a danger to anyone except themselves.²⁷⁶ Some police departments (e.g., Houston, Milwaukee) have begun to recognize the need for their officers to have increased training for mental illnesses, and have increased the number of training hours for officers.²⁷⁷

Talila Lewis’ and Richard Davis’ testimony to the Commission demonstrate mounting public concern over rising numbers of fatal interactions involving police and people with disabilities. Davis, who represents The Arc’s National Center on Criminal Justice and Disability, recounted the story of Ethan Saylor, a young man with Down syndrome whose first interaction with the criminal justice system ultimately led to his death.²⁷⁸ In 2018, the state of Maryland settled with the Saylor family for \$1.9 million.²⁷⁹ As a component of the settlement, the police deputies, the state, and Hill Management Services (the company that owns the theater where the incident happened)—“den[ie]d liability of any sort.”²⁸⁰ The attorney for the Saylor family, Joseph B. Espo

MO. The *Post* did not track deaths of people in custody, fatal shootings by off-duty officers, or deaths in which police gunfire did not kill the individual.

²⁷⁴ Lewis Statement at 3.

²⁷⁵ *Id.*; *Briefing Transcript* at 17.

²⁷⁶ Sergeant Tyler Stevenson, Maine State Police, testimony before Maine Advisory Committee to the U.S. Commission on Civil Rights, briefing, Lewiston, ME, June 14, 2017, transcript at 90 [hereinafter *Maine Hearing Transcript*].

²⁷⁷ Meg Kissinger, “Milwaukee to require mental health training for all officers,” *Journal Sentinel*, 2014, <http://archive.jsonline.com/watchdog/watchdogreports/milwaukee-to-require-mental-health-training-for-all-officers-b99411610z1-286290151.html/>; Steven Ross Johnson, “Houston Police Department Arms Its Officers with Training on Handling Mental Health Encounters,” Justice Center, The Council of State Governments, May 27, 2017, <https://csgjusticecenter.org/law-enforcement/media-clips/houston-police-department-arms-its-officers-with-training-on-handling-mental-health-encounters/>.

²⁷⁸ Richard Davis, The Arc, *Briefing Transcript* at 23-24. Furthermore, this does not appear to be an isolated incident in Frederick County, Maryland because law enforcement has been subject to other civil rights litigation. *See Santos v. Frederick County Bd. of Com’rs*, 725 F.3d 451, 465 (4th Cir. 2013) (finding Fourth Amendment violations in a case involving alleged racial profiling of a Latina immigrant), *cert. denied*, 134 S. Ct. 1541 (2014).

²⁷⁹ Theresa Vargas, “Settlement reached in police-custody death of man with Down syndrome,” *Washington Post*, April 24, 2018, https://www.washingtonpost.com/local/settlement-reached-in-police-custody-death-of-man-with-down-syndrome/2018/04/24/7d53c0ca-47fe-11e8-827e-190efaf1f1ee_story.html?utm_term=.ef5fb23713aa.

²⁸⁰ *Ibid.*; *see also* Heather Cobun, “State, deputies reach \$1.9M settlement over death of disabled man,” *The Daily Record*, April 24, 2018, <https://thedailyrecord.com/2018/04/24/ethan-saylor-death-settlement/>; Settlement Agreement, *Estate of Saylor v. Regal Cinemas, Inc.*, No. 1:13-CV-03089, slip op. (D. Md. filed Apr. 26, 2018).

stated that the settlement sends “the message that there are real consequences to failing to treat individuals with disabilities in the manner in which they are entitled.”²⁸¹

Further, Lewis testified that few departments across the country actually provide adequate training to officers working with these populations, despite that Title II of the Americans with Disabilities Act requires law enforcement compliance with and implementation of specific training policies.²⁸² For instance, Vaughn Bond, Police Chief of New Castle County, Delaware testified that his department has started to implement policies to better serve disability communities and those who suffer from mental health challenges:

We have to partner up with organizations such as a NAMI, the National Alliance on Mental Illness, to make sure that we have the best practices so that our officers are able to interact during a crisis situation in a way that would not require us to use force . . . Recently, we just instituted our first Veterans Response Team training. And that is a training . . . where we have officers who were veterans of the military who received additional training to deal with individuals who are suffering—who were in the military and who may be coming back and dealing with the effects of being in war [and] this is a significant problem that doesn’t get a lot of coverage from the media.²⁸³

Lewis stated that mental health challenges have broad societal consequences which present many problems for law enforcement, thus it is crucial that police departments continue to devise methods to work safely with community members.²⁸⁴

Lesbian, Gay, Bisexual, Transgender communities

Police use of force against lesbian, gay, bisexual, and transgender (LGBT) communities is a pervasive yet under-addressed national issue.²⁸⁵ LGBT communities have a long-troubled history with law enforcement. Despite the recent gains in civil rights for these communities, disparate treatment of LGBT individuals in the criminal justice system is a persistent problem.²⁸⁶

²⁸¹ Ibid.

²⁸² Lewis, *Briefing Transcript* at 17-18.

²⁸³ Vaughn Bond, Chief of New Castle County Police Department, testimony before the Delaware State Advisory Committee to the U.S. Commission on Civil Rights, hearing, Wilmington, DE, November 1, 2017, transcript at 260-62 (hereinafter *Delaware Hearing Transcript*).

²⁸⁴ Ibid.

²⁸⁵ Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination and Harassment by Law Enforcement in the LGBT Community*, The Williams Institute, 2015, at 6-11, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

²⁸⁶ Ibid.

The intersections of race, gender, and sexuality further expose even more unfair treatment at the hands of police.²⁸⁷ After numerous complaints about police misconduct against LGBTQ²⁸⁸ people in Queens, New York, the non-profit group, Make the Road New York, interviewed over 300 residents, a majority of whom were people of color (82 percent of the non-LGBTQ respondents and 77 percent of the LGBTQ respondents) about their experiences with police in the Jackson Heights neighborhood. In 2011, officers in the local precinct conducted 10,795 stop-and-frisks, and black and Latino people made up 90 percent of these stops.²⁸⁹ In a 2012 report, Make the Road New York found that over half (54 percent) of all LGBT respondents had been stopped by police, compared to 28 percent of non-LGBT respondents.²⁹⁰ Members of the transgender community reported frequent harassment by law enforcement. The report found that 59 percent of transgender respondents reported being stopped by police and being “profiled as sex workers when they were conducting routine daily tasks in the neighborhood.”²⁹¹ Of those individuals stopped, 51 percent of all LGBT respondents and 61 percent of transgender respondents reported that they had been physically or verbally harassed, and some also reported sexual abuse by police officers including being “forced to perform sexual acts under threat of arrest.”²⁹²

A 2013 research study by the National Coalition of Anti-Violence Programs found that 48 percent of LGBT hate crime survivors reported that they had experienced police misconduct.²⁹³ They found that transgender women were four times more likely to experience police violence compared to overall survivors. Transgender people overall were seven times more likely to experience physical violence when interacting with the police compared to cisgender²⁹⁴ survivors and victims. Further, 57 percent of LGBT survivors reported being unjustifiably arrested, 28 percent reported use of excessive force, approximately 12 percent reported physical violence, and approximately 3 percent reported sexual violence.²⁹⁵

According to one study:

²⁸⁷ The Commission recognizes and acknowledges that data on LGBT individuals and communities are sparse, thus in this report we must rely on reports of abuse.

²⁸⁸ The acronym LGBTQ refers to individuals who identify as lesbian, gay, bisexual, transgender, or queer. While this report generally uses LGBT, in the discussion of studies that use LGBTQ, the Commission remains consistent and appropriate to the respondents’ identities reflected in the primary sources.

²⁸⁹ Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson, Heights*, 2012, at 15, http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

²⁹⁰ Ibid.

²⁹¹ Ibid. at 4.

²⁹² Ibid. at 5.

²⁹³ National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, 2014, at 39, https://avp.org/wp-content/uploads/2017/04/2013_ncavp_hvreport_final.pdf.

²⁹⁴ Cisgender is a term referring to individuals whose gender identity is congruent with the sex they were assigned at birth.

²⁹⁵ National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, *supra* note 293.

a quarter of LGBT people and people with HIV who reported in-person contact with law enforcement said they experienced one form of harassment or misconduct—including profiling, verbal or physical assault, sexual harassment, or assault and false arrest.²⁹⁶

The 2015 survey by the National Center for Transgender Equality also found high rates of respondents alleging police harassment, abuse, or mistreatment, with nearly 86 percent reported being harassed, attacked, sexually assaulted, or mistreated by the police.²⁹⁷ Further, more than half of respondents stated they would not ask the police for help if they needed it, which also threatens all public safety.²⁹⁸

Moreover, LGBT complaints about police misconduct often go unaddressed. A 2014 study by Lambda Legal found that, of the 2,376 LGBT respondents, 74 percent reported having face-to-face contact with the police within the past five years.²⁹⁹ Of those, one-quarter of respondents reported at least one type of misconduct or harassment from law enforcement. One out of every five (21 percent) respondents reported that officers were hostile to them, 14 percent of respondents reported being verbally assaulted by police, 3 percent reported sexual harassment, and 2 percent reported physical assault.³⁰⁰ People of color, low-income people, and people living with HIV reported harassment and assault by police more frequently than survey respondents as a whole.³⁰¹ Four percent of respondents of color reported being physically assaulted by police, 4 percent of transgender and gender non-confirming respondents reported physical assault, 5 percent of low-income respondents, and 6 percent of HIV-positive respondents reported being physically assaulted by police in the past five years.³⁰²

²⁹⁶ This study only utilized LGBT identity categories when inquiring on participants' identity. To remain consistent to the source, staff restricted the language to only LGBT when discussing this study. Niaz Kasravi, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America*, NAACP, 2014, at 16, http://action.naacp.org/page/-/Criminal%20Justice/Born_Suspect_Report_final_web.pdf (citing Lambda Legal, "Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security," <https://www.lambdalegal.org/protected-and-served/summary> (last accessed Oct. 28, 2018)).

²⁹⁷ Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, and Ma'ayan Anafi, *Executive Summary of the Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, at 86, 2016, <http://www.transequality.org/sites/default/files/docs/usts/Executive%20Summary%20-%20FINAL%201.6.17.pdf>.

²⁹⁸ *Ibid.*

²⁹⁹ Lambda Legal, "Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security," at 6, https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.* at 7.

³⁰² Lambda Legal, "Protected and Served? Police," <http://www.lambdalegal.org/protected-and-served-police> (last accessed Oct. 28, 2018).

CHAPTER 2: POLICE OVERSIGHT AND ACCOUNTABILITY

This Chapter examines the issue of police oversight and accountability. The first section discusses the need for, and some of the challenges faced by law enforcement agencies in, holding officers accountable. The next section examines data regarding body-worn cameras and the current debates about implementing these programs nationwide. Next, we outline several proposed strategies to increase external accountability and build community trust. The chapter concludes with a discussion of federal intervention strategies between the Department of Justice and local law enforcement through the use of consent decrees, which provide the added element of long-term federal oversight.

Internal Accountability

Internal accountability can come in two forms: officers reporting if they witness another officer using inappropriate or unlawful force against civilians, and supervisors enforcing rules and policies against officers who break them. In his testimony to the Commission, Jonathan Blanks argued that without genuine accountability, police departments hold no legitimacy in the public's perception, and without legitimacy law enforcement cannot effectively function.³⁰³ Blanks argues that:

there is a perception of lack of accountability all over America [and] establishing accountability at all levels of police interaction with the public is imperative to restoring police legitimacy and increasing public safety.³⁰⁴

Evidence and expert testimony reviewed by Commission staff shows that some law enforcement agencies and associations agree, and are taking steps to reduce problematic policing through various forms of internal accountability.

As a guiding principle for police departments, PERF recommends that officers have a “duty to intervene.”³⁰⁵ They should be trained to detect warning signs that another officer might be moving toward engaging in excessive or unnecessary force, and should move to intervene before the situation escalates. Similarly, Maurice Punch, Visiting Professor at the Mannheim Center at the London School of Economics, argues that “police agencies are not held to be irredeemable when found to have committed offenses, but are assumed to be capable of reform and having public confidence in them restored.”³⁰⁶

Other policing oversight groups and even some police chiefs attribute eroding trust and growing tension between the police and communities of color to be the consequence of a “warrior

³⁰³ Blanks, *Briefing Transcript* at 197.

³⁰⁴ *Id.*

³⁰⁵ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28 at 25.

³⁰⁶ Maurice Punch, *Police Corruption: Deviance, Accountability, and Reform in Policing* (Oxfordshire: Willan Publishing, 2009), at 9.

mindset”³⁰⁷ brought on by the widespread militarization of local police units across the country over the last several decades.³⁰⁸ Several police chiefs at the 2015 PERF national conference stated that there needs to be a shift away from officers seeing themselves as “warriors” and instead toward seeing themselves as the “guardians” of the communities they serve.³⁰⁹ The Police Chief of Elk Grove, California, Robert Lehner stated that the warrior mindset of policing has been a component of policing for at least the past 40 years, with little discussion about being “guardians.”³¹⁰ Leesburg, Virginia Police Chief Joseph Price asserted that police officers need to be trained that:

at times they may need to fight like a warrior, but most of the time they need to have the mindset of a guardian. A warrior comes in, takes over, does what he needs to do, and leaves. That’s not what we want our cops to do.³¹¹

Several other law enforcement and criminal justice experts also agreed that many excessive use of force cases are a result of this type of mentality, because officers believe that they cannot back down or de-escalate a situation.³¹² Price argues that:

Many inappropriate uses of force result from officers thinking, “I can’t back down; I need to win at all costs.” But that’s not smart policing or effective tactics. We need to do a better job of training officers to control their adrenaline and try to defuse physical confrontations.³¹³

According to a Pew Research Center survey conducted by the National Police Research Platform, 72 percent of officers believe that officers who consistently do a poor job are not held accountable.³¹⁴ Barely one quarter of surveyed officers either agreed or strongly agreed that officers who consistently do a poor job are held accountable (24 percent and 3 percent, respectively).³¹⁵ But, according to Samuel Walker, a nationally recognized expert on police accountability, one of the issues is that “there’s really no good research on internal affairs units.”³¹⁶

³⁰⁷ American Civil Liberties Union, *War Comes Home*, 2014, https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf.

³⁰⁸ See e.g., Peter Kraska and Victor Kappeler, “Militarizing American Police: The Rise and Normalization of Paramilitary Units,” *Social Problems* vol. 44, no. 1 (1997); see also Peter Kraska, “Researching the Police-Military Blur: Lessons Learned,” *Police Forum* vol. 14, no. 3 (2005).

³⁰⁹ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, Critical Issues in Policing Series, 2015, <http://www.policeforum.org/assets/reengineeringtraining1.pdf>.

³¹⁰ Ibid. at 28-29.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Ibid. at 29.

³¹⁴ Rich Morin, Kim Parker, Renee Stepler, and Andrew Mercer, “Behind the Badge,” *Pew Research Center*, 2017, <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/>.

³¹⁵ Ibid.

³¹⁶ Ryan Reilly, “Here’s What Happens When You Complain to Cops about Cops,” *Huffington Post*, Oct. 9, 2015, http://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce.

Therefore, fully understanding what accountability measures are in place and enforced becomes difficult to ascertain.

Moreover, police reform advocates often argue that breaking the “blue wall of silence” is a significant obstacle for accountability.³¹⁷ Some advocates say this is an unwritten code that discourages officers from reporting or admitting to unethical behavior by their colleagues, thus shielding them from potential consequences; and when officers report unethical behavior, they may be ostracized by their colleagues. For instance, Kansas City police detective Max Seifert testified in court against a Drug Enforcement Administration agent who was accused of brutally beating a civilian. According to Seifert, he was forced into early retirement, lost part of his pension, and lost his retirement health insurance because he chose to testify for the defense.³¹⁸ Seifert went on to sue his former agency, and in the ruling the federal judge said, Seifert was

shunned, subjected to gossip and defamation by his police colleagues, and treated as a pariah . . . the way Seifert was treated was shameful and [he] was balkanized for crossing the thin blue line.³¹⁹

Similarly, in Albuquerque, former police officer Sam Costales sued his department for alleged retaliation for testifying against fellow officers after an incident with a civilian.³²⁰ His complaint alleged that the department was “discouraging other law enforcement officers from testifying truthfully and exposing the falsehoods of other ‘brothers in blue.’”³²¹ Costales’ attorney claims that the actions taken by the department and police union official “created a hostile and potentially

³¹⁷ The Marshall Project, “Blue Wall of Silence,” *Marshall Project*, July, 9, 2018, <https://www.themarshallproject.org/records/605-blue-wall-of-silence>; John Hein and John Franklin, “What is the cost of the code of silence?” *PoliceOne*, Sept. 22, 2016, <https://www.policeone.com/investigations/articles/223697006-What-is-the-cost-of-the-code-of-silence/>; Ryan Reilly, “Police Officers Overwhelmingly Agree That Bad Cops Aren’t Held Accountable,” *The Huffington Post*, Jan. 11, 2017, http://www.huffingtonpost.com/entry/police-internal-affairs_us_58740d94e4b099cdb0ff0d04; City and County of San Francisco, “Department Files Charges with the Police Commission,” May 6, 2016, <http://sanfranciscopolice.org/article/department-files-charges-police-commission>; Vivian Ho, “Internal SFPD investigation clarifies alleged offensive language,” *San Francisco Chronicle*, May 11, 2016, <https://www.sfchronicle.com/bayarea/article/SFPD-sergeant-suspended-for-alleged-sexual-7462255.php>.

³¹⁸ Radley Balko, “Why Cops Aren’t Whistleblowers,” *Reason*, Feb. 25, 2011, <http://reason.com/archives/2011/01/25/why-cops-arent-whistleblowers>; *Seifert v. Unified Government of Wyandotte Cty.*, Case No. 11-2327-JTM, *4-5 (D. Kan. June 12, 2013), https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2011cv2327-202.

³¹⁹ Radley Balko, “Why Cops Aren’t Whistleblowers,” *Reason*, Feb. 25, 2011, <http://reason.com/archives/2011/01/25/why-cops-arent-whistleblowers>.

³²⁰ *Samson “Sam” Costales v. Schultz and Albuquerque Police Dep’t*, Civ. No. 07-827 MV/ACT (D.N.M. Nov. 12, 2009), https://www.gpo.gov/fdsys/pkg/USCOURTS-nmd-6_07-cv-00827/pdf/USCOURTS-nmd-6_07-cv-00827-5.pdf.

³²¹ Carolyn Carlson, “Officer Who Testified for Unser Sues Police,” *Albuquerque Journal*, Aug. 28, 2007, <https://www.abqjournal.com/news/metro/589741metro08-28-07.htm>.

life-threatening work environment for Costales, who depends on other officers and deputies to back him up.”³²² A federal jury in Santa Fe awarded Costales \$662,000 in 2009.³²³

In Baltimore, an officer filed a lawsuit against the department claiming that he was unfairly treated after reporting that another officer had brutalized a suspect. The former detective said that he was harassed, moved onto night shifts, and denied requests for backup while on duty.³²⁴ Individual officers are not the only ones who may face criticism from reporting unethical or unlawful behavior. Former head and acting consultant for the San Francisco Police Officers Association Gary DeLagnes argues that if police officials and supervisors show a commitment to discipline, then they may be derided as “bending to outside pressures from ‘cop haters.’”³²⁵ These types of statements and behaviors show that making meaningful strides toward police accountability may be a challenging task, especially when such actions are viewed as inconsistent with policing culture, and officers are afraid to report unlawful behavior.

Police union contract provisions can pose another challenge deterring law enforcement officials from holding their officers accountable. Jonathan Smith, former senior litigator for the Justice Department’s Civil Rights Division argues that:

In big cities, where police unions have political clout, rigid union contracts restricted the ability for police chiefs and civilian oversight bodies to tackle misconduct. As a result, an officer involved in a shooting often cannot be interviewed at the scene; [and] internal affairs investigators have to wait days to get a statement.³²⁶

Separate and apart from the limitations negotiated union contracts may pose with respect to securing meaningful police accountability, state laws can pose additional obstacles. According to the Marshall Project, 14 states guarantee an officers’ bill of rights or law enforcement officer’s bill

³²² Ibid.

³²³ Scott Sandlin, “Ex-Officer Awarded \$662,000” *Albuquerque Journal*, Nov. 26, 2009, <https://www.abqjournal.com/news/metro/26224624341newsmetro11-26-09.htm>.

³²⁴ Justin Fenton, “Whistle-blower officer files lawsuit against Batts, BPD,” *Baltimore Sun*, Dec. 24, 2014, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-crystal-whistleblower-ratgate-lawsuit-20141223-story.html>; Nick Wing, “Police Union Official Calls Out ‘Snitch’ Cops, Shows Why It’s So Hard To Hold Officers Accountable,” *Huffington Post*, Dec. 28, 2016, http://www.huffingtonpost.com/entry/san-francisco-police-snitch_us_57349f17e4b060aa78197d54; Sebastian Murdock, “‘Rat Cop’ Joe Crystal Shunned from Baltimore Police Department after Reporting Officer Brutality,” *Huffington Post*, June 16, 2015, http://www.huffingtonpost.com/2015/06/16/baltimore-joe-crystal_n_7582374.html.

³²⁵ Nick Wing, “Police Union Official Calls Out ‘Snitch’ Cops, Shows Why It’s So Hard To Hold Officers Accountable,” *Huffington Post*, Dec. 28, 2016, http://www.huffingtonpost.com/entry/san-francisco-police-snitch_us_57349f17e4b060aa78197d54.

³²⁶ Jonathan M. Smith, “Opinion: Police Unions Must Not Block Reform,” *New York Times*, May 29, 2015, <https://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html>.

of rights (or LEOBoR as it is commonly called), which is “a set of due-process rights for police officers under internal investigation for alleged misconduct.”³²⁷ A standard LEOBoR states that:

[A]n officer may only be questioned for a reasonable length of time, at a reasonable hour, by only one or two investigators (who must be fellow policemen), and with plenty of breaks for food and water.³²⁸

In Baltimore, the police department’s LEOBoR came under heavy scrutiny by critics of the police force. Specifically, critics challenged the provision that state officers are permitted ten-days as a “cooling-off period” before submitting any statement to investigators.³²⁹ Samuel Walker, professor emeritus at the University of Omaha argues that LEOBoR’s offer a “special layer of due process [that] impede accountability, and truly are a key element of our lack of responsiveness to [possible excessive force] cases,” such as in the Freddie Gray case.³³⁰

At the Commission’s briefing, the Illinois Police Benevolent and Protective Association’s Sean Smoot argued that the 48-hour waiting period or waiting at least “two sleep cycles” is negotiated into police contracts because officers need time to process the situation, “particularly those that are involved in a high stress, adrenaline infused situations.”³³¹ Officer Smoot argues that memories may be inaccurate directly following an incident, thus officers need time to fully process the event before investigators question them on the circumstances.³³² However, in a review of the empirical literature, Professor Walker argues that there is no scientific evidence that supports Smoot’s claim. Walker posits that the data on the effect of stress on memory is complex and has produced

³²⁷ Eli Hager, “Blue Shield,” *Marshall Project*, April 27, 2015, <https://www.themarshallproject.org/2015/04/27/blue-shield>.

³²⁸ Ibid.

³²⁹ Md. Code Ann., Pub. Safety § 3-104 (Investigation or interrogation of law enforcement officer).

³³⁰ Eli Hager, “Blue Shield,” *Marshall Project*, April 27, 2015, <https://www.themarshallproject.org/2015/04/27/blue-shield>. On April 12, 2015, Baltimore police arrested Freddie Gray for fleeing “unprovoked upon noticing police presence” and was “arrested without force or incident,” according to court documents (*see* Statement of Charges, *State of Maryland v. Freddie Carlos Gray, Jr.*, Case No. 6B02294074, (D. Md. April 12, 2015), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1996025/freddie-gray-charging-documents.pdf>).

However, state prosecutor Marilyn Mosby said that Gray was illegally arrested, assaulted, and falsely accused of carrying an illegal switchblade. Mosby stated that the officers had put him into a tactical hold before putting him in the back of the van and ignored his requests for his inhaler. According to court documents, Gray “suffered a medical emergency” while he was being transported and that he was “immediately transported to Shock Trauma via medic,” where he arrived in critical condition and died in the hospital. After the autopsy, Deputy Commissioner Jerry Rodriguez told the media that Gray “suffer[ed] a very tragic injury to his spinal cord which resulted in his death.” BBC News, “Freddie Gray’s death in police custody- what we know,” May 23, 2016, <http://www.bbc.com/news/world-us-canada-32400497>; Kevin Rector, “Freddie Gray case: DOJ won’t charge Baltimore police officers,” *Baltimore Sun*, Sept. 13, 2017, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-doj-decline-charges-20170912-story.html>.

³³¹ Sean Smoot, Police Benevolent and Protective Association of Illinois, *Briefing Transcript* at 52-53.

³³² Ibid.

contradictory findings, with some studies showing that stress actually enhances memory.³³³ He further argues that even if the science is valid, police unions do not apply these waiting periods in a consistent manner.³³⁴ For instance, waiting periods are not extended to crime victims, witnesses, suspected criminals, or any other public employees.³³⁵

Other policies that appear in many police union contracts and police bills of rights may also hinder internal accountability. Review of contracts showed that these include: clauses that limit disciplinary consequences for officers, for example preventing an officer's history of past misconduct from being considered in future cases (appears in contracts in 64 cities and 7 states); requirements that police departments erase records of officer misconduct, in some cases after two years or less (appears in contracts in 43 cities and 3 states); and of policies disqualifying complaints from being investigated if they are submitted too many days after an incident occurs or if an investigation takes too long to complete (appears in contracts in 25 cities and 4 states).³³⁶

A 2017 *Washington Post* investigation found that since 2006, the nation's 55 largest police departments have fired at least 1,881 police officers for various forms of misconduct, including conduct unbecoming of an officer, dishonesty, and being charged or convicted of a crime, but they later reinstated 451 officers after appeals.³³⁷ In one case, the Miami Police Department fired detective Reynaldo Goyos after the city's Firearms Review Board—consisting of three assistant chiefs, a police major, and police attorney—found a deadly shooting Goyos was involved in was not justified and questioned Goyos' version of events. Miami Police later rehired Goyos after an arbitrator held he did not violate the department's use-of-force policy.³³⁸ The investigation also detailed Washington, D.C. Metropolitan Police Department's ongoing attempts—lasting over eight years—to fire an officer after he was convicted of misdemeanor sexual abuse of a teenager.³³⁹

³³³ Samuel Walker, *Police Union Contract "Waiting Periods" for Misconduct Investigations Not Supported by Scientific Evidence*, University of Nebraska at Omaha, 2015, <http://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf>.

³³⁴ It should also be noted that police unions are not the only driver; cities that negotiate and accept these provisions with police unions into their contracts likewise do not extend the same process for police officers that they extend to civilian witnesses. *Ibid.*

³³⁵ *Ibid.*

³³⁶ DeRay McKesson, Samuel Sinyangwe, Johnetta Elizie, and Brittany Packnett, "Police Union Contracts and Police Bill of Rights Analysis," *Campaign Zero*, 2016, at 3-4, <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1f0/1467217560243/Campaign%2BZero%2BPolice%2BUnion%2BContract%2BReport.pdf>.

³³⁷ Kimbriell Kelly, Wesley Lowery and Steven Rich, "Fired/Rehired: Police Chiefs are Often Forced to Put Officers Fired for Misconduct Back on the Streets," *Washington Post*, Aug. 3, 2017, https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?utm_term=.8eef74e1ea6b. Among the 451 officers reinstated, 151 were fired for conduct unbecoming of an officer and 88 for dishonesty. At least 33 of the officers were charged with crimes, and 17 of them had been convicted, mostly for misdemeanors.

³³⁸ *Ibid.*

³³⁹ *Ibid.*

At the Commission's briefing, the Cato Institute's Jonathan Blanks discussed how restriction of officers' disciplinary files negatively impact communities' trust in law enforcement.³⁴⁰ After an investigation of New York City's Civilian Complaint Review Board records, Blanks found that approximately 40 percent of the 35,000 officers have never received a complaint.³⁴¹ However, roughly 1,000 officers have more than 10 citizen complaints on file. One officer had over 50 complaints.³⁴² There is one important caveat: without investigating the complaints, it is impossible to say whether the officers in question should have been disciplined or discharged. But while these 1,000 officers represent fewer than 3 percent of the officers in New York City, if these complaints represent any misconduct, that means that these officers are

repeat offenders several times over [and] [m]ultiple complaints against a single officer over a period of months or years implies that the officer must at times operate too close to the line of impropriety.³⁴³

Blanks testified that although these officers represent only a small portion of the city's police force, they can damage the reputation of the entire department, because the public does not know if the department's supervisors have addressed these complaints. Thus, this absence of public information allows negative perceptions, and the belief that the police generally are not responsive to the complaints to fester.³⁴⁴ Conversely, releasing the officers' names and allowing access to disciplinary files could have implications for individual privacy of the officers and complainants.³⁴⁵ However, some states, such as Florida and Illinois, regularly release officer disciplinary files to the public without violating the complainants' or victims' rights.³⁴⁶ Walker argues that "the public has a right to know what our public officials are doing, and this is especially true with our police officers, who have the power to shoot to kill, use force, and deprive people of their liberty through stop or arrest."³⁴⁷

In April 2018, a new database was released to the public that contained 1,800 disciplinary files from the New York Police Department (NYPD) that covered employees who faced departmental misconduct charges between 2011 and 2015.³⁴⁸ This release was significant because these records

³⁴⁰ Blanks, *Briefing Transcript* at 199.

³⁴¹ *Ibid.*

³⁴² *Ibid.* at 200.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* at 202-03.

³⁴⁵ See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a.

³⁴⁶ Kendall Taggart and Mike Hayes, "Here's What We Learned from Thousands of Secret NYPD Disciplinary Files," *BuzzFeed News*, April 16, 2018, https://www.buzzfeed.com/kendalltaggart/nypd-police-misconduct-database-explainer?utm_term=.wbQBjK21V#.lvLW9Lyej.

³⁴⁷ *Ibid.*

³⁴⁸ The authors of the study note that these files were provided by a source who requested to remain anonymous. However, the documents' legitimacy was verified through more than 100 phone calls to NYPD employees, visits to the officers' homes, interviews with prosecutors and defense lawyers, and a review of thousands of pages of court documents. See Kendall Taggart, Mike Hayes, and Scott Pham, "Want to See How the NYPD Disciplines Its

had been off limits to the public since 2016, when the NYPD removed them from public view.³⁴⁹ While these documents are not a complete record of the disciplinary cases during these years, they provide the most in-depth and broadest view of how the NYPD has and has not held officers accountable.³⁵⁰

Through their review of the data, reporters found at least 319 officers who had committed fireable offenses yet were allowed to keep their jobs, and several only received minor repercussions. For instance, at least 250 employees faced allegations of excessive force such as threatening someone, getting into a fight, or unnecessarily firing their gun; two school safety officers lost five vacation days after using excessive force against students, and one officer lost 20 vacation days after striking an individual on the head and threatening to kill two civilians.³⁵¹ NYPD rules state that “barring exceptional circumstances” officers who lie about a “material matter” must lose their jobs; however, reporters found more than 100 officers were accused of lying on official reports, under oath, or during an internal affairs investigation.³⁵² Repercussions varied from some being fired to losing a few days to a month of vacation time.³⁵³

Many officers told the reporters that they felt that the disciplinary system was unfair and not applied equitably. Officers told reporters that supervisors often do not hold guilty officers accountable, they punish people for reporting the misconduct of fellow officers, or they have biases against their employees.³⁵⁴ For instance, an officer reportedly told her supervisor that she needed a few days to arrange child care before starting a new assignment, and he charged her with “failure to comply with an order” and she was suspended for 122 days and lost more than a month of pay.³⁵⁵ Diane Davis, a former NYPD internal affairs investigator stated that:

If 10 cops did the same exact thing that was bad, the outcome is different every time. If you’ve complained, forget about [keeping your job].³⁵⁶

Employees? Search For Yourself,” BuzzFeed News, April 16, 2018, <https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer>.

³⁴⁹ Rocco Parascandola and Graham Rayman, “Exclusive: NYPD suddenly stops sharing records on cop discipline in move watchdogs slam as anti-transparency,” *New York Daily News*, Aug. 24, 2016, <http://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145>.

³⁵⁰ Taggart and Hayes, “Here’s What We Learned from Thousands of Secret NYPD Disciplinary Files,” *supra* note 346.

³⁵¹ *Ibid.*

³⁵² New York Police Department, *Patrol Guide*, 2016, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf.

³⁵³ Taggart and Hayes, “Here’s What We Learned from Thousands of Secret NYPD Disciplinary Files,” *supra* note 346.

³⁵⁴ Kendall Taggart and Mike Hayes, “Secret NYPD Files: Officers Can Lie And Brutally Beat People—And Still Keep Their Jobs,” *BuzzFeed News*, March 5, 2018, <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious>.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

A spokesperson for the NYPD told the reporters that:

The overwhelming majority of New York City cops come to work every day to do good, fight crime, and help people, making this City the safest it has been since the 1950s. For the few who commit violations, the NYPD's disciplinary process is more rigorous today than ever before.³⁵⁷

Following this investigation, New York City Mayor Bill de Blasio vowed to pressure the state legislature to pass reforms to Civil Rights Law Section 50-a (CVR § 50-a)—the law that keeps disciplinary records secret from the public—and Police Commissioner James P. O'Neill stated that the department would start releasing reports on disciplinary actions, with the offending officers' names redacted, in hope of increasing transparency.³⁵⁸ Due to an emergency injunction filed by the Patrolmen's Benevolent Association, which is the city's largest police union, on April 11, 2018, the State Supreme Court temporarily blocked this order.³⁵⁹

Body-Worn Cameras

Body-worn cameras are generally believed to be an effective way to increase police accountability, transparency, and build community trust; however, research findings are mixed. Body cameras are a relatively recent development, and their usage has steadily increased across a number of jurisdictions since the shooting of 18-year-old Michael Brown in Ferguson in August 2014.³⁶⁰ The exact number of jurisdictions that fully utilize this technology is not known (at the time of this report), but estimates show that about 19 percent of police departments considered their body cameras "fully operational" in 2015; and nearly 77 percent either "intend to implement," were in the pilot stage, or have completed the pilot training but have not implemented the program.³⁶¹

³⁵⁷ Taggart and Hayes, "Here's What We Learned from Thousands of Secret NYPD Disciplinary Files," *supra* note 346.

³⁵⁸ Press Release: City of New York, "Mayor de Blasio Outlines Core Principles of Legislation to Make the Disciplinary Records of Law Enforcement and Other Uniformed Personnel Subject to Disclosure," Oct. 14, 2016, <http://www1.nyc.gov/office-of-the-mayor/news/820-16/mayor-de-blasio-outlines-core-principles-legislation-make-disciplinary-records-law>; Mike Hayes and Kendall Taggart, "Responding To BuzzFeed News NYPD Investigation, Top Officials Call For Change," *BuzzFeed News*, March 7, 2018, <https://www.buzzfeednews.com/article/mikehayes/nypd-police-de-blasio-investigation>; Taggart and Hayes, "Here's What We Learned from Thousands of Secret NYPD Disciplinary Files," *supra* note 346.

³⁵⁹ *Patrolmen's Benev. Ass'n of New York, Inc. v. de Blasio*, No. 153231/2018, 2018 WL 3036350 (N.Y. Sup. Ct. June 19, 2018).

³⁶⁰ See e.g., Shira A. Shiendlen, "Will the Widespread Use of Police Body Cameras Improve Accountability? Yes, Technology in Latin America," *Americas Quarterly*, Spring 2015, <http://www.americasquarterly.org/content/yes-people-behave-differently-when-theyre-being-watched>.

³⁶¹ Lafayette Group, *Major Cities Chiefs and Major County Sheriffs: Technology Needs—Body Worn Cameras*, U.S. Dep't of Homeland Security, Office of Emergency Communications, 2015, at ii, <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>.

Expert panelist Montague Simmons testified that body-worn cameras offer an easy way to hold officers accountable for their actions or clear them of any alleged wrongdoings.³⁶² The Leadership Conference on Civil and Human Rights' (LCCHR) former president Wade Henderson also issued a letter stating that:

By documenting what happens, these cameras can become a new mechanism of police accountability, and can provide an additional source of evidence for administrative and court proceedings.³⁶³

Arguably, given the lack of federal police reporting data, camera footage could offer some insight into use of force incidents, because it would supplement the flawed data already collected (or lack thereof), and because it would add visual documentation about the interactions. For example, in 2015, the *Washington Post* found 71 police shootings were recorded by body cameras. And within just the first six months of 2016, 63 shootings were captured on body cameras, which almost equals the total number as the previous year.³⁶⁴ This is new evidence arguably showing that in 2016, there was a 38 percent increase of fatal officer-involved shootings that were captured by cameras.³⁶⁵

Another example of how body-worn cameras can be used to increase public trust, transparency, and accountability came out of Asheville, North Carolina in April 2018. The city released footage from nine body-worn cameras that showed a white officer, Christopher Hickman, beating, tazing, and choking an African-American man, Johnnie Jermaine Rush, who was suspected of jaywalking.³⁶⁶ Asheville's interim City Manager Cathy Ball and Police Chief Tammy Hooper filed a petition for the release of the video, which was granted by a Superior Court Judge, in the interest of public transparency.³⁶⁷ After viewing the footage, Chief Hooper ordered Hickman's termination, and the charges against Mr. Rush were dismissed.³⁶⁸ In an open letter to the city, Ball and Hooper stated that:

³⁶² Montague Simmons, Executive Director, Organization for Black Struggle, *Briefing Transcript* at 31.

³⁶³ Wade Henderson, *Letter to President's Task Force on 21st Century Policing*, The Leadership Conference on Civil and Human Rights, 2015, at 1, <https://www.bja.gov/bwc/pdfs/2015-01-30-letter-to-task-force-on-21st-century-policing.pdf>.

³⁶⁴ *Washington Post*, "2018 Police Shootings database," *supra* note 87; Wesley Lowery, "More police shootings are being caught on camera—but many of those videos aren't released to the public," *Washington Post*, Sept. 22, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/09/22/more-police-shootings-are-being-caught-on-camera-but-many-of-those-videos-arent-released-to-the-public/>.

³⁶⁵ *Ibid.*

³⁶⁶ Eric Levenson, "North Carolina city releases bodycam videos related to beating of jaywalking suspect," *CNN*, April 3, 2018, <https://www.cnn.com/2018/04/02/us/asheville-police-body-camera/index.html>.

³⁶⁷ Open letter from Asheville City Council, Interim City Manager Cathy Ball and Chief Tammy Hooper, April 5, 2018, <http://coablog.ashevillenc.gov/2018/04/asheville-apd-excessive-use-of-force-investigation-all-press-releases-graphics-and-documents-in-one-place/>.

³⁶⁸ Levenson, "North Carolina city releases bodycam videos related to beating of jaywalking suspect," *supra* note 366.

This incident has created a loss of trust within the community, particularly among people of color. The City of Asheville understands that there is substantial work to do to restore the public's trust . . . We are dedicated to being leaders who will create a culture where all people are treated with dignity and respect, and will hold accountable any employee who does not conduct themselves in this manner.³⁶⁹

Support for the benefits of implementing body-worn camera policies are also found in existing policing literature. For instance, researcher Harold Rankin found that body-worn cameras significantly reduced citizen complaints against officers.³⁷⁰ Rankin's evaluation of the Mesa, Arizona Police Department found that during the first eight months of deployment, the officers with body cameras received three times fewer complaints filed against them than the ones without body cameras.³⁷¹ In a related study, Michael White, Professor of Criminology at Arizona State, found that body cameras reduced the overall number of citizen complaints.³⁷² He found that body-worn cameras resulted in improved behavior among both police officers and citizens, expedited resolutions of citizen complaints or lawsuits, and in turn improved evidence for arrest and prosecution.³⁷³

Research also suggests that body-worn cameras may be particularly helpful when officers inform civilians when they are recording. Early studies have shown that there may be a "civilizing effect" on both officer and civilian behavior.³⁷⁴ Although there are limits on the data, researchers have found that both parties tend to behave more calmly when recorded and if the officer continues to remind suspects that they are being recorded.³⁷⁵ Researchers also offer an important caveat: they found that cameras need to be turned on at the beginning of an encounter, because if an officer turns the camera on once an incident is underway, this action may actually escalate the situation and make people more aggressive.³⁷⁶ In sum, evidence regarding the "civilizing effect" and effectiveness of body-worn cameras is currently scarce.

³⁶⁹ Open letter from Asheville City Council, Interim City Manager Cathy Ball, and Chief Tammy Hooper, *Asheville City Source*, April 5, 2018, <http://coablog.ashevillenc.gov/2018/04/asheville-apd-excessive-use-of-force-investigation-all-press-releases-graphics-and-documents-in-one-place/>.

³⁷⁰ Lindsay Miller, Jessica Toliver, and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, Office of Community Oriented Policing Services, at 6, 2014, <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

³⁷¹ *Ibid.*

³⁷² Michael White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, Office of Community-Oriented Policing Services, 2014, https://www.bja.gov/bwc/pdfs/DiagnosticCenter_PoliceOfficerBody-WornCameras.pdf.

³⁷³ *Ibid.* White suggests interpreting these findings with caution given the possibility that the decline in complaints may have come as a result of improved citizen behavior or improved office behavior.

³⁷⁴ *Ibid.*

³⁷⁵ Miller, Toliver, and Police Executive Research Forum, *supra* note 370.

³⁷⁶ Damien Gayle, "Police with body cameras receive 93% fewer complaints—study," *Guardian*, Sept. 29, 2016, <https://www.theguardian.com/uk-news/2016/sep/29/police-with-body-cameras-receive-93-fewer-complaints-study>.

Empirical evidence on whether body cameras reduce use of force shows mixed results. For instance, Rialto, California's police department has seen a decline in complaints since they implemented their body-worn camera policy.³⁷⁷ However, in Phoenix, Arizona researchers found no significant difference in the behavior of officers who wore cameras compared to those who did not.³⁷⁸ Similarly, in a study of the Washington, D.C. police department, researchers found that body cameras did not seem to have any effect on the amount of citizen complaints or officers' use of force.³⁷⁹ Chief of D.C. Police Peter Newsham said that they were surprised at the result, since many believe that body cameras would change behavior. He also stated that perhaps the lack of a significant effect could be due to the fact that his officers "were doing the right thing in the first place."³⁸⁰ Harlan Yu, a researcher at Upturn, argues that this study may call into question whether departments should be using their resources to purchase cameras at all, especially if the cameras do not seem to be decreasing use of force incidents.³⁸¹ However, Newsham said that he does not believe this study suggests that body-worn cameras have no value, and argues that cameras are "really important for legitimacy for the police department . . . when we say something to be able to back it up with real-world view that others can see."³⁸²

But based on available research, the use of body-worn cameras generally has support from a variety of sources (e.g., activists, police officers and officials, government leaders), and consensus that they may be helpful in curtailing rude or inappropriate remarks from officers and aggressive behaviors from civilians.³⁸³ Some advocates also argue that body cameras alone cannot solve the problem of excessive use of force and biased policing, when they occur. For example, researchers at Campaign Zero, an organization working to end police violence, reviewed policies from the 30 largest cities that had publicly available body-worn camera policies (see Table 1 on page 68 below) to examine if these new technologies are being implemented in ways that ensure accountability and fairness, while protecting civilians' rights.³⁸⁴ In terms of accountability, "[a] policy is only as good as its enforcement"; thus this factor is significant because it "reflects how a department

³⁷⁷ Miller, Toliver, and Police Executive Research Forum, *supra* note 370.

³⁷⁸ *Ibid.*

³⁷⁹ Nell Greenfieldboyce, "Body Cam Study Shows No Effect On Police Use of Force or Citizen Complaints," *NPR*, Oct. 20, 2017, <https://www.npr.org/sections/thetwo-way/2017/10/20/558832090/body-cam-study-shows-no-effect-on-police-use-of-force-or-citizen-complaints>.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.* Michael White, researcher at Arizona State University who studies body-worn camera policies stated that this neutral effect in D.C. is to be expected because the department went through a decade of federal oversight to reform the department. White stated, "They're hiring the right people; they've got good training; they've got good supervision; they've got good accountability mechanisms in place. When you have a department in that kind of state, I don't think you're going to see large reductions in use of force and complaints, because you don't need to. There's no large number of excessive uses of force that need to be eliminated."

³⁸³ U.S. Dep't of Justice, Bureau of Justice Assistance, "Body-Worn Camera Toolkit," <https://www.bja.gov/bwc/topics-research.html> (last accessed Oct. 31, 2018).

³⁸⁴ Campaign Zero, *Tracking Body Camera Implementation*, 2015, <https://static1.squarespace.com/static/55ad38b1e4b0185f0285195f/t/56380ee4e4b05938aac0c6bc/1446514404671/CZBodyCameraImplementationReport.pdf>.

ensures its policy will be followed and how it uses body camera footage for discipline.”³⁸⁵ The Brennan Center found that 8 of the 23 agencies in their study did not have explicit policies requiring officers to explain why an incident was not recorded when they were required to have recorded it.³⁸⁶ Eighteen of the 24 agencies did not have disciplinary policies regarding failures to record, demonstrating a general lack of enforcement by agency officials.³⁸⁷ For instance, in Chicago, researchers found as many as 80 percent of police department dash cams were lacking audio, which the department attributed to “officer error” and “intentional destruction.”³⁸⁸ In Albuquerque, Officer Jeremy Dear (who had a history of excessive force allegations) was fired after he repeatedly failed to activate his camera just before using force against a civilian, including just before fatally shooting a teenage girl.³⁸⁹ The department’s policy states in part that:

... all sworn department personnel will record each and every contact with a citizen during their shift that is the result of a dispatched call for service, arrest warrant, search warrant or traffic stop . . . It will be the responsibility of the primary officer to ensure that the incident will be recorded in its entirety . . . Failure to record a contact under the listed specifications may result in discipline.³⁹⁰

Even after the department explicitly told Officer Dear to record all of his interactions with citizens, he still requested to use his camera in “offline” mode, meaning that he would have been able to delete footage before it was uploaded to the server—although the department denied his request.³⁹¹ But despite the repeated use of force allegations and fatal shooting, plus Dear violating department policy, in November 2015, the city’s Personnel Board voted to reinstate Officer Dear to the police force.³⁹² While Dear had been fired for violating the city’s policy regarding the use of body

³⁸⁵ Brennan Center for Justice, “Police Body-Worn Camera Policies,” <https://www.brennancenter.org/body-camera-map?splash> (last accessed Oct. 31, 2018).

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid. See also Radley Balko, “A new report shows the limits of police body cameras,” *Washington Post*, Feb. 2016, https://www.washingtonpost.com/news/the-watch/wp/2016/02/05/a-new-report-shows-the-limits-of-police-body-cameras/?utm_term=.a728925f5d0e.

³⁸⁹ Joseph Kolb, “Albuquerque policeman who shot woman fired over camera lapse,” *Reuters*, Dec. 1, 2014, <https://www.reuters.com/article/us-usa-police-new-mexico-idUSKCN0JG04N20141202>. As of June 2017, the judge trying Dear’s case in the 2014 fatal shooting of Mary Hawkes ruled that he would be tried separately from the city of Albuquerque; see KRQE News, “Judge: Former officer who shot teen will be tried separately from city,” June 23, 2017, http://www.krqe.com/news/judge-former-officer-who-shot-teen-will-be-tried-separately-from-city_20180104024702685/900209337.

³⁹⁰ Paul Guerin, Dan Cathey, Craig Pacheco, Alex Tonigan, Alex Adams, Sam Torres, and Erin Coleman, *City of Albuquerque Police Department On Body Camera System Research*, University of New Mexico, Institute for Social Research, 2016, at 5, https://www.cabq.gov/police/documents/obcs-report-draft-all-bureaus-master-final_v102022016.pdf.

³⁹¹ Jeff Proctor, “Email suggests Albuquerque Police Department cops could delete body cam videos,” *KRQE*, Oct. 13, 2015, https://www.krqe.com/news/investigations/email-suggests-albuquerque-police-department-cops-could-delete-body-cam-videos_20180308061648997/1020384212.

³⁹² Balko, “A new report shows the limits of police body cameras,” *supra* note 388.

cameras, the Personnel Board reinstated him because they found that the city's policy was unclear.³⁹³ Thus, in order to curtail excessive force, departments must enforce policies to ensure police are utilizing the cameras as required. Police Chief Miller of Topeka, Kansas told PERF:

I tell the officers every day: You usually don't get hurt by the videos you have. What hurts you is when you are supposed to have a video but, for whatever reason, you don't.³⁹⁴

Table 1: Available Body Camera Policies from the largest 30 cities

| Department | Coverage ¹ | Fairness ² | Transparency ³ | Privacy ⁴ | Accountability ⁵ |
|---|-----------------------|-----------------------|---------------------------|----------------------|-----------------------------|
| Austin | 1% | | | | |
| Baltimore | 5% | | | | |
| Charlotte | 100% | | | | |
| Chicago | <1% | | | | |
| Dallas | 2% | | | | |
| Denver | 14% | | | | |
| Fort Worth | 40% | | | | |
| Louisville | 51% | | | | |
| Los Angeles | 8% | | | | |
| Memphis | 23% | | | | |
| Milwaukee | 11% | | | | |
| New York City | <1% | | | | |
| Phoenix | 5% | | | | |
| San Diego | 50% | | | | |
| San Jose | 2% | | | | |
| Seattle | 1% | | | | |
| Washington, D.C. | 13% | | | | |
| KEY <div> <div></div> Yes </div> <div> <div></div> No </div> <div> <div></div> Unclear </div> <div> ¹ What percent of the total police force is currently wearing body cameras? ² Are officers prohibited from viewing footage of critical incidents before making initial statements or reports, a common investigative practice used with civilians suspected of a crime? ³ Can the public obtain footage of a deadly force incident once investigations have concluded without being subject to the police, the court's, or the Mayor's discretion? ⁴ Is footage deleted after six months or less if it does not depict use of force, detention, civilian complaint, or is determined to have evidentiary, exculpatory, or training value? ⁵ Are there clear guidelines for how officers who do not follow body camera policy should be disciplined? </div> | | | | | |

Source: Campaign Zero, last updated 11.2.15, recreated by USCCR staff

³⁹³ KRQE News, "City personnel board explains why APD officer should get job back," June 21, 2017, <http://krqe.com/2017/06/21/city-personnel-board-explains-why-albuquerque-officer-should-get-job-back/>.

³⁹⁴ Miller, Toliver, and Police Executive Research Forum, *supra* note 370 at 29.

One significant concern for many community advocates and researchers is the need to implement appropriate privacy protections as the usage of body-worn cameras continues to increase nationwide.³⁹⁵ A study conducted by the Brennan Center looking at body-worn camera policies found serious privacy issues when it came to utilizing cameras as a regular part of policing.³⁹⁶ They argue that body-worn cameras are going to result in a tradeoff between accountability and privacy.

Many community advocates are also concerned with the increased amount of surveillance and “big data”³⁹⁷ that these cameras make available to law enforcement.³⁹⁸ Without plans in place to handle the large amounts of recorded data and storage of potentially sensitive information, cameras increase the monitoring and tracking of citizens and in doing so, raise privacy and safety concerns for many community advocates. Senior ACLU Policy Analyst Jay Stanley argues that “[i]f they’re not helping with oversight, they’re merely another surveillance device focused especially on communities of color.”³⁹⁹ The United States Justice Department has argued that the benefits of body cameras will outweigh the concerns, but also acknowledges that the privacy issues around the storage and sharing of recordings raise legitimate concerns that has not been fully addressed.⁴⁰⁰

³⁹⁵ See Edwards Statement at 6; Barak Ariel, William Farrar, Alex Sutherland, “The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial,” *Journal of Quantitative Criminology*, vol. 31, no. 3 (2015); Lynsey Dubbeld, “Observing Bodies. Camera surveillance and the significance of the body,” *Ethics and Information Technology*, vol. 5, no. 3 (2003); Miller, Toliver, and Police Executive Research Forum, *supra* note 370.

³⁹⁶ Brennan Center for Justice, “Police Body-Worn Camera Policies,” <https://www.brennancenter.org/body-camera-map?splash> (last accessed Oct. 31, 2018).

³⁹⁷ “Big data” refers to extremely large data sets that can reveal patterns, associations, and trends about human interactions and behaviors. Commonly concerns of “big data” relate to the overreach of government monitoring and surveillance. See David Lyon, “Surveillance, Snowden, and Big Data: Capacities, consequences, and critique,” *Big Data & Society*, vol. 1, no. 2 (2014).

³⁹⁸ According to documents obtained by *Guardian* reporters, NYPD infiltrated a small group of Black Lives Matters activists during the mass protests in 2014 and 2015 over the death of Eric Garner. Attorneys for the group argue that the documents raise serious legal questions about whether the NYPD was acting in compliance with the department’s intelligence-gathering rules and if the police surveillance plan had been authorized by the formal committee meant to oversee these types of operations. Michael Price, counsel at the Brennan Center, says it is difficult to know if the NYPD’s actions are legal, because the obtained documents did not make clear if there was in fact an investigation underway. But the fact that the department retained photos and videos raises legal questions, because under New York law, police are not allowed to retain information about public events, unless it relates to unlawful activity. See George Joseph, “NYPD officers accessed Black Lives Matter activists’ texts, documents show,” *Guardian*, April 4, 2017, <https://www.theguardian.com/us-news/2017/apr/04/nypd-police-black-lives-matter-surveillance-undercover>.

³⁹⁹ Nick Wing, “Police Body Cameras are Pointless Unless Cops Use Them Correctly,” *Huffington Post*, Sept. 28, 2016, http://www.huffingtonpost.com/entry/police-body-cameras-charlotte_us_57eab405e4b0c2407cd9e77f.

⁴⁰⁰ This statement was a reflection of the Obama Administration’s Justice Department and at the writing of this report, the Trump Administration has not taken a position on the use of body cameras and their policies. See e.g., Miller, Toliver, and Police Executive Research Forum, *supra* note 370; Stav Ziv, “Study Finds Body Cameras Decrease Police’s Use of Force,” *Newsweek*, Dec. 28, 2014, <http://www.newsweek.com/amidst-debate-study-finds-body-cameras-decrease-polices-use-force-295315>.

Another debate that has been raised is whether officers should be allowed to view and delete videos before they are uploaded to the police agency's server. In a letter to the President's Task Force on 21st Century Policing (Task Force), Wade Henderson, then-President of the LCCHR, argued that police officers must be prohibited from viewing the footage before filing their reports in order to preserve the independent value of their evidence.⁴⁰¹ The more than 200 organizations that the LCCHR represents (including the ACLU) recommended that police footage should be logged in a server, and access to the footage should be limited to ensure the independent evidentiary value of an officer's recollection of the events. Further, the LCCHR letter stated that:

Officers should not see police-operated camera footage before filing their reports, because such pre-report viewing effectively eliminates the officer's independent recollection of the event as a source of evidence.⁴⁰²

In contrast, PERF found that a majority of police executives they consulted were in favor of allowing officers to review camera footage, prior to making a statement about an incident that occurred.⁴⁰³ Police executives believe that this approach provides officers and their supervisors the best evidence of what actually took place.⁴⁰⁴ Police Chief Miller of Topeka, Kansas argues that if an officer is not allowed to review the footage and it conflicts with the officer's statement after the fact, this can create unwarranted doubts about the officer's credibility. Miller stated that:

What we are after is the truth. If you make a statement that you used force because you thought a suspect had a gun but the video later shows that it was actually a cell phone, it looks like you were lying. But if you truly thought he had a gun, you were not lying—you were just wrong. An officer should be given the chance to make a statement using all of the evidence available; otherwise, it looks like we are just trying to catch an officer in a lie.⁴⁰⁵

However, police executives who favor review state that officers will be held accountable for their actions regardless if they were allowed to watch the video prior to making their statement. Police Chief Burbank of Salt Lake City, Utah stated that “[o]fficers are going to have to explain their actions, no matter what the video shows.”⁴⁰⁶ Similarly, Police Chief Frazier of Surprise, Arizona stated that “[i]f an officer has acted inappropriately, and those actions were recorded, the officer cannot change the record and will have to answer for his or her actions. What will be gained by a review of the video is a more accurate accounting of the incident.”⁴⁰⁷

⁴⁰¹ Henderson, *Letter to President's Task Force on 21st Century Policing*, *supra* note 363.

⁴⁰² *Ibid.*

⁴⁰³ Miller, Toliver, and Police Executive Research Forum, *supra* note 370 at 29.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

Other law enforcement officials were not in favor of officers viewing the footage before making their statements. They argue that “the truth—and the officer’s credibility—are better served if an officer is not permitted to review footage of an incident prior to making a statement.”⁴⁰⁸ Major Mark Person of the Prince George’s County Police Department in Maryland argues that:

In terms of the officer’s statement, what matters is the officer’s perspective at the time of the event, not what is in the video. That perspective is what they are going to have to testify to. If officers watch the video before making a statement, they might tailor the statement to what they see. It can cause them to second-guess themselves, which makes them seem less credible.⁴⁰⁹

In 2014, the Obama Administration announced the creation of a new Task Force that comprised law enforcement and community leaders working in collaboration with the DOJ’s Community Oriented Policing Services (COPS).⁴¹⁰ The Task Force was charged with “promot[ing] effective crime reduction while building public trust.”⁴¹¹ And the administration announced that it would create a new \$263 million Community Policing Initiative, which would increase the use of body-worn cameras, expand training, and provide additional resources to law enforcement agencies.⁴¹²

As a central goal of the Task Force was to increase public trust, researchers with the LCCHR and Upturn wanted to evaluate body-worn camera policies from 75 police departments to determine if agencies had policies in place to meet the Task Force’s goals.⁴¹³ The researchers evaluated each policy on eight criteria established by their “Civil Rights Principles on Body Worn Cameras.”⁴¹⁴ They found that as of November 2017, out of 69 of the major city departments in the U.S., 62 had body-worn camera programs with policies in place.⁴¹⁵ However, over a third (28 of 68) do not make these policies easily and publicly available on their department’s website, and many had to be found externally on other websites. The researchers also found that while none of the surveyed departments satisfied all criteria, many have adopted strong policies in one or more of the criteria.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Press Release: Office of the Press Secretary, White House, *Fact Sheet: Strengthening Community Policing*, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Leadership Conference on Civil and Human Rights & Upturn, *Police Body Worn Cameras: A Policy Scorecard*, at 3, 2017, <https://www.bwcorecard.org/static/pdfs/LCCHR%20and%20Upturn%20-%20BWC%20Scorecard%20v.3.04.pdf>.

⁴¹⁴ These “Civil Rights Principles on Body Worn Cameras” are defined by the organizations as among the most important factors in determining whether the proper policy safeguards are in place to protect the civil rights of recorded individuals. The eight criteria are if departments: make the policy publicly available and readily available; limits officer discretion on when to record; addresses personal privacy concerns; prohibits officer pre-report viewing; limits retention of footage; protects footage against tampering and misuse; makes footage available to individuals filing complaints; limits the use of biometric technologies. Ibid.

⁴¹⁵ Leadership Conference on Civil and Human Rights & Upturn, *supra* note 413.

Researchers at PolicyLink believe that establishing national standards to guide police departments is a critical next step to bring the use of body-worn cameras to scale in law enforcement agencies across the country.⁴¹⁶

In 2015, the Justice Department launched two initiatives to promote the use of body cameras in police departments across the country.⁴¹⁷ One was a new pilot grant program that would help local law enforcement agencies develop, implement, and evaluate body-worn camera programs. The other was an online clearinghouse of resources to help law enforcement and communities plan and implement body-worn camera programs.⁴¹⁸ The grant initiative is still ongoing through the DOJ, the Office of Justice Programs (OJP), and the Bureau of Justice Assistance (BJA). BJA estimated in 2017 that it would make up to 63 awards that will be for a two-year period with an estimated total cost of \$17 million.⁴¹⁹ The online initiative is also ongoing and is a toolkit that compiles information about body-worn camera policies and explains the developing body of knowledge on cameras for law enforcement, criminal justice professionals, advocacy organizations, and community members.⁴²⁰

In 2017, the OJP requested a budgetary increase for its Body Worn Camera Partnership Program.⁴²¹ The agency requested \$7.5 million for a total of \$30.0 million (up from \$22.5 million in 2016) to provide matching grants to state, local, and tribal governments that cover up to half of the cost of purchasing body worn cameras.⁴²² OJP stated that agencies receiving these awards will be subject to a 50 percent matching requirement and may include costs for data storage infrastructure to support body-worn camera systems as part of their matching contribution.⁴²³

The analysis of internal accountability mechanisms demonstrates that promising new ideas are developing, but the data on whether they are sufficient to prevent excessive force incidents committed by some police officers (as well as any systemic problems) is currently lacking. The Commission next turns to analyzing various forms of external accountability.

⁴¹⁶ Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, *supra* note 32.

⁴¹⁷ Press Release: Office of the Press Secretary, White House, *Fact Sheet: Creating Opportunity for All Through Stronger, Safer Communities*, 2015, <https://www.whitehouse.gov/the-press-office/2015/05/18/fact-sheet-creating-opportunity-all-through-stronger-safer-communities>.

⁴¹⁸ U.S. Dep't of Justice, Bureau of Justice Assistance, "Body-Worn Camera Toolkit," *supra* note 383.

⁴¹⁹ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Body-Worn Camera Policy and Implementation Program FY 2017 Competitive Grant Announcement*, 2016, <https://www.bja.gov/funding/BWCPIP17.pdf>.

⁴²⁰ See U.S. Dep't of Justice, Bureau of Justice Assistance, "Body-Worn Camera Toolkit," *supra* note 383.

⁴²¹ U.S. Dep't of Justice, *FY 2017 Budgetary Request, Building Community Trust*, 2016, <https://www.justice.gov/jmd/file/820796/download>.

⁴²² *Ibid.*

⁴²³ *Ibid.*

External Oversight

Many advocates call for external, independent oversight of police agencies, because they believe these entities can help build trust with the community, aid in transparency, and hold law enforcement accountable. Matthew Fogg, from Law Enforcement Against Prohibition, argues that one of the first things that is needed is to offer police officers whistleblower protections so they can feel safe coming forward and reporting an excessive force incident.⁴²⁴ Fogg further argues that establishing civilian review boards that are truly independent and separate from law enforcement and have subpoena power is also essential.⁴²⁵ Similarly, Felix Vargas, from Consejo Latino, argues that there needs to be as much transparency as possible with law enforcement in order to regain trust, especially among communities of color. Vargas argues that “[w]e need a police oversight commission . . . [because] we cannot expect the trust of the police to be restored if we don’t have visibility to how the police culture unfolds.”⁴²⁶

Further, data suggest that police departments that institute external reform measures are witnessing promising results. Reporters with *Vice News* examined 47 of the 50 largest police departments and found that since the shooting in Ferguson in 2014, police shootings have decreased.⁴²⁷ While many departments have started instituting various reform measures, in seven of the ten cities with the largest reductions in police shootings, one thing they had in common was federal intervention—either through collaborative reform agreements or consent decrees.⁴²⁸

Vice News reporters found that for the cities that voluntarily adopted the Justice Department’s recommended reforms, officer-involved shootings decreased by 32 percent in the first year.⁴²⁹ Those cities with binding (court-ordered) agreements with the Justice Department witnessed a 25 percent decrease in the year they entered into the agreement.⁴³⁰ And for some departments the decline was even more significant: in Chicago, police-involved shooting declined by more than 50 percent after the Laquan MacDonald shooting in 2014, which prompted an investigation by the Justice Department.⁴³¹ By examining the 50 largest local police departments from 2010 to 2016, the researchers were also able to determine that:

⁴²⁴ Fogg, *Briefing Transcript* at 43.

⁴²⁵ *Ibid.*

⁴²⁶ Felix Vargas, Consejo Latino, *Briefing Transcript* at 37.

⁴²⁷ Arthur, et al., “Shot by Cops and Forgotten,” *supra* note 52.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*; *State of Illinois v. City of Chicago*, Case No. 17-CV-6260, at *3 ¶ 8 (N.D. Ill. Aug. 29, 2017), http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/01/City_of_Chicago_lawsuit_filedcomplaint.pdf. While an agreement in principle was reached, Chicago and the Justice Department did not officially enter into a consent decree. Furthermore, the Administration has indicated it will not seek one, so Chicago and the Illinois Attorney General are negotiating without the Justice Department. See Mitchell Armentrout, “Community groups make demands on CPD consent decree: ‘The buck is stopping here,’” *Chicago Sun Times*, May 15, 2018,

While the remedies varied from city to city, many were the same: [c]reate a civilian review board to provide independent oversight, improve officer training, [and] update use-of-force policies to stress the importance of de-escalation and the sanctity of life.⁴³²

These provisions are typically included in DOJ consent decrees, which are discussed in further detail in the final section of this chapter. But first, the data must be disaggregated and more fully analyzed. Therefore, section (1) analyzes the data the Commission gathered regarding civilian review boards and section (2) analyzes grand juries. Next, the legal and practical issues surrounding police's qualified immunity are examined in section (3), and finally, DOJ consent decrees are reviewed in section (4).

Civilian Review Boards

Civilian Review Boards are resident-based agencies generally responsible for reviewing complaints, issuing recommendations on disciplinary actions, and holding police officers accountable for their actions.⁴³³ Many policing experts advocate for these boards, believing that they can help foster police accountability through their independent authority to investigate and audit departments facing allegations of abuse, including unconstitutional use of force, unauthorized detentions or arrests, or racial profiling. Further, these boards often include overseeing disciplinary issues, even when there is not a potential constitutional violation, which can aid in building community trust. The Task Force, Ezekiel R. Edwards, James Chanin, and the National Association for Civilian Oversight of Law Enforcement assert that alongside consent decrees, civilian review boards are an effective way to promote procedural justice and force compliance.⁴³⁴

The Commission received testimony from the Director of the ACLU's Criminal Law Reform Project Ezekiel Edwards, arguing that a citywide civilian review board (consisting of law enforcement agencies, faith-based communities, racial and ethnic minority groups, youth groups, and other community organizations) that is able to analyze data, granted independent authority, and has the ability to discipline officers would be an effective way to hold police officers accountable.⁴³⁵ The National Association for Civilian Oversight of Law Enforcement also

<https://chicago.suntimes.com/news/community-groups-make-demands-on-cpd-consent-decree-the-buck-is-stopping-here/>.

⁴³² Ibid. (discussing remedies typically included in DOJ consent decrees).

⁴³³ See West's Encyclopedia of American Law, "Civilian Review Boards," <https://legal-dictionary.thefreedictionary.com/Civilian+Review+Boards> (last accessed Oct. 31, 2018).

⁴³⁴ The President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, *supra* note 9 at 26; see also Edwards Statement at 7; Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, *supra* note 32 at 19-20; James Chanin, written statement for the "Police Use of Force: An Examination of Modern Policing Practices" Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 1 [hereinafter Chanin Statement].

⁴³⁵ See Edwards Statement at 6.

submitted testimony noting that while civilian review boards are an effective tool, there are nearly 200 of these boards across the country and they vary widely from program to program.⁴³⁶ Building on Edwards' comments, research by National Association for Civilian Oversight of Law Enforcement and Policy Link found that highly effective civilian review boards have the following elements:

- The authority to investigate or review complaints of human rights violations by the public against the police;
- The ability to conduct regular audits of police internal complaints and disciplinary process and, where necessary, conduct their own investigations;
- The power to require witnesses to appear and to insist on cooperation from police departments and individual officers;
- The authority to require police agencies to provide information on action taken in individual cases, with reasons for inaction;
- The authority to review and make recommendations on policy and training; and
- Provide detailed public reports, at least annually, giving relevant data, including the type of complaint and the race and gender of the complainant and the accused officer.⁴³⁷

James Chanin's work in Oakland, California also provides an example of some essential features for civilian review boards to act as a mechanism to ensure compliance and modify oversight if police agencies cannot initially meet community expectations. Chanin provided written testimony to the Commission stating that due to the Oakland Police Department's failure to comply with a previous consent decree, he and his colleagues filed a lawsuit to bring the department under receivership.⁴³⁸ Then, as the receivership hearing date neared, Chanin and colleagues were able to reach an agreement with the Oakland Police Department. This agreement led to the subsequent appointment of a Compliance Director to ensure that the suggested police reforms were carried out accordingly.⁴³⁹ These efforts were found to be instrumental in reducing the number of complaints against the police, the number of high-speed car chases involving the police, and the number of use of force incidents dropped from 822 to 582.⁴⁴⁰ Chanin testified that a similar strategy was also successful in Detroit, Michigan.⁴⁴¹

⁴³⁶ See National Association for Civilian Oversight of Law Enforcement, written statement for the "Police Use of Force: An Examination of Modern Policing Practices" Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 1 [hereinafter NACOLE Statement].

⁴³⁷ Ibid.; see also Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, *supra* note 32 at 19.

⁴³⁸ See Chanin Statement at 7. A federal receivership is when a trustee is appointed by the court to manage an agency that has been found to be incompetent, usually in its capacity to act constitutionally.

⁴³⁹ Ibid. at 7-8.

⁴⁴⁰ Ibid. at 8-9.

⁴⁴¹ Ibid. at 6-7.

The concern with civilian review boards however is that depending on which model (i.e., investigative, review, or auditor⁴⁴²) the level of oversight and authority may be extremely limited. Udi Ofer, former Executive Director of the ACLU of New Jersey, warns that in many ways it may be better not to have a civilian review board, if it only has little authority.⁴⁴³ He argues that having an ineffective civilian review board can give the impression of independent oversight even where independence may not actually exist. Pamela Meanes, president of the National Bar Association, argues that civilian review boards may not be as beneficial as some community advocates believe. She argues that many impacted community members have complained that these boards have merely become an extension of the police department; therefore, if there is a police or civilian review board, that board needs to represent the community and not individuals who may be connected to the department.⁴⁴⁴ As an example of the concern Ms. Meanes identified, in Baton Rouge, Louisiana, an officer who was found guilty of using excessive force by a federal jury was elected to the civil service board—a board that oversees public complaints against police.⁴⁴⁵ Corporal Robert Moruzzi was first accused of excessive force in 2008 after beating up a bar owner, which resulted in Moruzzi's termination. However, the Baton Rouge Municipal Fire and Police Civil Service Board overturned the action, giving him a 90-day suspension instead.⁴⁴⁶ The second case occurred in 2014 where Moruzzi was found guilty of using excessive force against Brett Percele, and the court awarded Percele \$25,000.⁴⁴⁷ Moruzzi is now a member of the civil service board, worrying some community members, because they are afraid that complaints against the department will not be taken seriously. Percele stated that:

It's unfathomable that in this state that could happen. There needs to be some type of review . . . If he is the standard, the leader, the person to be making these decisions, what does that say about the rest of the Baton Rouge Police community? It's bound to repeat itself. He's bound to do this again.⁴⁴⁸

⁴⁴² There are three main types of CRBs. The investigative model is charged with investigating allegations of officer abuse and creating findings which are then submitted to the chief of police or mayor. The review model reviews findings made by the police department's own investigation to determine if the findings are fair or not. The auditor model does not focus on specific complaints, rather its purpose is to audit the internal review process to ensure its fairness. Cited from The Cato Institute, PoliceMisconduct.net, National Police Misconduct Reporting Project, <https://www.unlawfulshield.com/2018/07/what-happened-to-policemisconduct-net/>.

⁴⁴³ Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033 (2015).

⁴⁴⁴ Brian Burghart, "Eyes wide open: What should citizen oversight of law enforcement look like?" *Reno News & Review*, Oct. 16, 2014, <http://www.newsreview.com/reno/eyes-wide-open/content?oid=15222461>.

⁴⁴⁵ Cheryl Mercedes, "The Investigators: Officer's election to civil service board questioned," 9 WAFB, April 27, 2018, <http://www.wafb.com/story/38031998/the-investigators-officers-election-to-civil-service-board-questioned>.

⁴⁴⁶ Ibid.

⁴⁴⁷ Maya Lau, "'I feel vindicated': Man wins police brutality case against 2 Baton Rouge officers in 2014 drug raid," *The Advocate*, March 12, 2016, http://www.theadvocate.com/baton_rouge/news/crime_police/article_71714c95-6b07-55e2-8fed-bf8bace78e7b.html.

⁴⁴⁸ Cheryl Mercedes, "The Investigators: Officer's election to civil service board questioned," 9 WAFB, April 27, 2018, <http://www.wafb.com/story/38031998/the-investigators-officers-election-to-civil-service-board-questioned>.

As an alternative to CRBs, Meanes suggests that the state's attorney's office should establish an investigation department within the office, and that state's attorneys should handle investigations of excessive force, thereby ensuring an independent investigation. Meanes argues that state oversight might be more effective and ultimately more beneficial, because it would "assure that there is no bias because the state's attorney's office is not connected to that local prosecutor."⁴⁴⁹

Tim Lynch of the Cato Institute agrees: "I think [civilian review boards] have several weaknesses—they're very vulnerable to local political manipulations."⁴⁵⁰ However, if done right, they may be helpful tools. For example, in Washington, D.C., according to Lynch, the board has been effective and taken strides to reinforce its independence. The D.C. board requires that four of the five-person board cannot have current ties to law enforcement, they oversee a staff of a dozen full-time investigators, and the board approves all policies or training recommendations to the police department.⁴⁵¹ According to Michael Tobin, executive director of the D.C. Office of Police Complaints, one of the reasons the board has been effective is because it has authority and independence, and these factors help to build community trust, which ultimately makes cities safer.⁴⁵²

Despite some public support for these boards, in March 2018, a New Jersey Superior Court judge stripped the city of Newark's Civilian Complaint Review Board (CCRB) of its subpoena and investigatory powers, but stated that it could still conduct oversight of the police department.⁴⁵³ The Fraternal Order of Police had challenged the board's subpoena power, arguing that "it violated state statute, an officer's due process rights, and the attorney general guidelines."⁴⁵⁴ The CCRB was created "in the wake of a scathing federal report that found it [the Newark police department] routinely engaged in excessive force and violated citizen's constitutional rights."⁴⁵⁵ Newark's Mayor Ras Baraka stated that the judge's decision was:

⁴⁴⁹ Pamela Meanes, President, National Bar Association, *Briefing Transcript* at 149.

⁴⁵⁰ Priyanka Boghani, "Is Civilian Oversight the Answer to Distrust of Police?" *Frontline*, July 13, 2016, <http://www.pbs.org/wgbh/frontline/article/is-civilian-oversight-the-answer-to-distrust-of-police/>.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

⁴⁵³ Thomas Moriarty and Karen Yi, "Judge strips power from civilian board created to curb police misconduct," *NJ Advance Media for NJ.com*, March 14, 2018, http://www.nj.com/essex/index.ssf/2018/03/court_rules_police_review_board_cant_have_subpoena.html.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Dan Ivers, "Baraka: Civilian Review Board Will Have the Power to Subpoena, Not Discipline Newark Police," *NJ.com*, Jan. 20, 2015, http://www.nj.com/essex/index.ssf/2015/01/baraka_civilian_review_board_will_have_power_to_su.html; Dan Ivers, "Minority, Labor Leaders Call for Civilian Oversight As Part of Newark Police Reform," *NJ.com*, July 24, 2014, http://www.nj.com/essex/index.ssf/2014/07/minority_labor_leaders_call_for_civilian_oversight_as_part_of_newark_pd_reform.html ("Among its findings was that up to 75 percent of the pedestrian 'stop and frisks' may have been unconstitutional, and that the city's black residents had their rights violated more often than any other sector of the community.").

a setback to criminal justice reform in America and to the critical need for citizens to have complete trust that incidents of police misconduct will be dealt with fairly, appropriately, and impartially. For now, our CCRB will continue to move forward using its power of oversight, but Newark will appeal the court's decision.⁴⁵⁶

Notably, one of the legal issues at stake is whether the DOJ consent decree required the civilian review board to have subpoena and other oversight powers. But before turning to the issue of DOJ consent decrees, the Commission examines other legal issues related to remedial police oversight.

Grand Juries

Grand jury reform has been suggested as a possible way to ensure fairness and justice in police accountability. Grand jury proceedings are used as a way of presenting criminal charges.⁴⁵⁷ In these proceedings, prosecutors present evidence of probable cause against the accused, and ask the grand jury to return an indictment.⁴⁵⁸ In these proceedings—which are a wholly secret process—prosecutors make decisions on their own, yet they are presented as a way to involve the public in accountability.⁴⁵⁹ Some argue that grand jury presentations and deliberations are kept secret in order to protect the identities of witnesses and people who have not yet been charged with a crime.⁴⁶⁰ However, even though the decision about whether to issue an indictment is up to the grand jury, some legal scholars argue that the secrecy of these proceedings raises questions of legitimacy and reduces community trust.⁴⁶¹

Local prosecutions of police officers for fatally shooting individuals are extremely rare events, and convicting police officers is even rarer. Researchers found that nationally, 54 officers had been charged for fatally killing a civilian while on duty in the ten years since 2005.⁴⁶² Of these officers, three-quarters were white officers and two-thirds fatally shot a black civilian; and in none of these

⁴⁵⁶ Thomas Moriarty and Karen Yi, “Judge strips power from civilian board created to curb police misconduct,” *NJ Advance Media for NJ.com*, March 14, 2018,

http://www.nj.com/essex/index.ssf/2018/03/court_rules_police_review_board_cant_have_subpoena.html. At the time of this report, the city's appeal has not moved forward, however, on March 29, 2018, grassroots leaders and community advocates held a rally against the judge's ruling. See Little Red, “Newark rallies in defense of new Civilian Complaint Review Board,” *New York Amsterdam News*, April 5, 2018, <http://amsterdamnews.com/news/2018/apr/05/newark-rallies-defense-new-civilian-complaint-revi/>.

⁴⁵⁷ Roger A. Fairfax Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 757 (2008).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ See Sara Sun Beale, William Bryson, James Felman, Michael Elston, *Grand Jury Law and Practice*, 2nd ed. (New York: Thomson Reuters, 2008).

⁴⁶¹ Colin Taylor Ross, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755 (2016).

⁴⁶² Kimberly Kindy and Kimbriell Kelly, “Thousands Dead, Few Prosecuted,” *Washington Post*, April 11, 2015, http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.2ba8507dd8a3.

cases did a black officer shoot a white civilian.⁴⁶³ White police officers have served time in prison for killing an African-American civilian in only three cases between 2007 and 2017.⁴⁶⁴ Stinson and colleagues found that between 2005 and May 2017, 82 officers had been arrested on murder or manslaughter charges for on-duty fatal shootings.⁴⁶⁵ During that 13-year time span, 39 were convicted (most on lesser manslaughter convictions), while the rest of the cases were either pending or resulted in no conviction.⁴⁶⁶ In a majority of the cases where officers were convicted, the circumstances were often considered “exceptional” (e.g., person was unarmed, victim was shot in the back, incriminating testimony by fellow officers).⁴⁶⁷

Investigative reporter Michael Harriot found that police are 33 percent less likely—compared to a civilian—to be convicted of a crime, and the conviction rate for law enforcement to be charged with some form of murder is 35 percent—half that of the general population.⁴⁶⁸ Harriot posits 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.”⁴⁶⁹ Even when the evidence seems to be clear, the majority of the officers whose cases have been resolved have not faced a conviction.⁴⁷⁰ For instance, a 2015 *Wall Street Journal* report found that approximately 1,200 people had been killed by police, but no officers were found guilty of murder or manslaughter that year.⁴⁷¹

In two recent high-profile cases, grand juries did not return indictments against the officers who killed Michael Brown and Eric Garner, and the lack of transparency on the court proceedings greatly undermined public trust.⁴⁷² These decisions caused many community advocates to question

⁴⁶³ Ibid. “

⁴⁶⁴ Michael Harriot, staff writer for *The Root*, compared data collected by the *Washington Post*, “Fatal Encounters,” *Guardian*, and the National Police Misconduct Reporting Project from 2007 through 2017. See Michael Harriot, “White Men Can’t Murder: Why White Cops Are Immune to the Law,” *The Root*, June 22, 2017, <http://www.theroot.com/white-men-cant-murder-why-white-cops-are-immune-to-the-1796309966>.

⁴⁶⁵ Philip Stinson, “Charging a Police Officer in Fatal Shooting Case is Rare, and a Conviction is Even Rarer” *Criminal Justice Faculty Publications*, vol. 80 (2017) at 1, https://scholarworks.bgsu.edu/crim_just_pub/80. See Philip Stinson, John Liederbach, Steven Lab, and Steven Brewer, *Policy Integrity Lost: A Study of Law Enforcement Officers Arrested*, U.S. Dep’t of Justice, 2016, <https://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf> (containing full report).

⁴⁶⁶ *Id.*

⁴⁶⁷ See Kindy, “FBI to sharply expand system for tracking fatal police shootings,” *supra* note 5.

⁴⁶⁸ See Harriot, “White Men Can’t Murder: Why White Cops Are Immune to the Law,” *supra* note 464.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Zusha Elinson, “More Police Go to Trial in Killings, but Convictions Remain Rare,” *Wall Street Journal*, Sept. 23, 2015, <https://www.wsj.com/articles/more-police-go-to-trial-in-killings-but-convictions-remain-rare-1443044871>.

⁴⁷² See e.g., Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205 (2017), <https://harvardlawreview.org/2017/02/restoring-legitimacy/>; Caren Morrison, “How the Justice System Fails Us After Police Shootings,” *New Republic*, Dec. 10, 2015, <https://newrepublic.com/article/125489/justice-system-fails-us-police-shootings>; Monica Davey and Julie Bosman, “Protests Flare After Ferguson Police Officer Is Not Indicted,” *New York Times*, Nov. 24, 2014, <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

the validity of the courts' decisions, specifically because they felt that the lack of checks and balances in the justice system left the door open to bias.⁴⁷³ For example, police officers often bring arrests to the District Attorney to prosecute, do investigative work on cases, serve as witnesses, and interrogate suspects.⁴⁷⁴ Some advocates and community leaders accused prosecutors of using grand jury proceedings as "political cover" regarding grand jury decisions, or as a way to slowly allow public outrage to burnout.⁴⁷⁵ Others accused prosecutors of not presenting cases aggressively enough, due to their working relationships with police.⁴⁷⁶

At the Commission's briefing, panelist Montague Simmons of the Organization for Black Struggle described the dissatisfaction with the grand jury process as follows:

The U.S. Commission on Civil Rights has now cast its eyes upon our community because the execution of Mike Brown, the corrupt and inept ways of the investigation as follows: The investigation that ended in a fiasco of a grand jury that would have amounted to business as usual, except for the anger, tenacity and determination of the people who have been in the streets over 250 days.⁴⁷⁷

At the Commission's briefing, the Chief Administrative Judge of New York State Courts, the Honorable Judge Lawrence Marks, also identified the grand jury system as an area where public trust is lacking.⁴⁷⁸ Judge Marks explained that there is a perceived conflict of interest when prosecutors are expected to both zealously investigate and prosecute police officers, while maintaining a good and symbiotic relationship with them to fulfill their professional duties.⁴⁷⁹ He clarified that while there are valid policy reasons for grand jury secrecy, that secrecy can also erode public confidence in the grand jury process.⁴⁸⁰ For instance, in the Eric Garner case that he presided over, lawyers advocated for release of the transcript of grand jury proceedings, but he felt that the law required him to deny it.⁴⁸¹ While the judge may have been justified in his decision, it did little to assuage public doubts about the grand jury process.

⁴⁷³ Joseph Doyle, Michael Rooney, and Bina Ahmad, "Eric Garner's Public Defender Says Cops and Prosecutors 'Are a Team in Every Case,'" *Vanity Fair*, Dec. 8, 2014, <https://www.vanityfair.com/news/daily-news/2014/12/eric-garner-public-defender-prosecutors-cops>.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ See, e.g., James Hill and Dean Schabner, "Ferguson Grand Jury 'Unfair,' Michael Brown Family Lawyer Says," *ABC News*, Nov. 23, 2014, <http://abcnews.go.com/US/ferguson-grand-jury-unfair-michael-brown-family-lawyer/story?id=27117993>; Matt Taibbi, "A Year Later, the Eric Garner Grand Jury Decision Still Stings," *Rolling Stone*, Dec. 3, 2015, <http://www.rollingstone.com/politics/news/a-year-later-the-eric-garner-grand-jury-decision-still-stings-20151203>.

⁴⁷⁶ See, e.g., Campaign Zero, "Independent Investigations and Prosecutions," <http://www.joincampaignzero.org/investigations> (last accessed Oct. 31, 2018); *Guardian*, "Ties that bind," Dec. 15, 2015, <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings>.

⁴⁷⁷ See *Briefing Transcript* at 29.

⁴⁷⁸ *Ibid.* at 177.

⁴⁷⁹ *Ibid.* at 179.

⁴⁸⁰ *Ibid.* at 179-80.

⁴⁸¹ *Ibid.* at 180.

Commission staff have found that some counties have added additional transparency initiatives to help assuage public concerns. For instance, in Washoe County, Nevada, the district attorney's office publishes grand jury proceedings, and prosecutors publish their reasoning when they decline to indict.⁴⁸² These reports can be accessed by the public and offer some clarity into the process.

New York Chief Judge Jonathan Lippman proposes that reforms to the grand jury process would need to take several forms. Judge Lippman argues that reforms would first require the physical presence of a judge in the grand jury room to make rulings on the evidence. Second, he believes that these systems should create a presumption of disclosure in cases where a grand jury elects not to charge an officer, if the following three factors are found: (1) the public is already aware of the criminal investigation; (2) the public already knows the identity of the subject of the investigation or the subject of the investigation consents to disclosure; and (3) there is significant public interest in disclosure.⁴⁸³

As legal scholars have documented, skepticism of the grand jury process is not new; the Ferguson and New York cases merely brought public attention to the flaws that were already apparent in the system.⁴⁸⁴ Yet since the grand jury is intended to use its power of subpoena, immunity, and contempt to act as a "screen,"⁴⁸⁵ it has been "hailed . . . as an indispensable buffer of protection from malicious and unfounded prosecution by the State."⁴⁸⁶ Further, the grand jury incorporates "the laypeople's perspective—the voice of the community—into the charging process."⁴⁸⁷ UCLA Law Professor Peter Arenella argues that the high likelihood that a defendant will plead guilty rather than go to trial when faced with prosecutorial leverage makes grand juries the main avenue for community involvement in the criminal justice system.⁴⁸⁸ As a system for external accountability, the grand jury process could be an advantageous mechanism for achieving community involvement and provide a streamlined and efficient pre-trial process that can avoid transforming the grand jury into a mini-trial,⁴⁸⁹ protecting the reputation of the accused, and

⁴⁸² Washoe County District Attorney's Office, "Officer Involved Shooting Reports," <https://www.washoecounty.us/da/newsroom/reports.php> (last accessed Oct. 31, 2018).

⁴⁸³ Chief Judge Jonathan Lippman, *Access to Justice: Making the Ideal a Reality*, The State of the Judiciary 2015, at 3-4, <http://www.nycourts.gov/whatsnew/pdf/2015-SOJ.pdf>.

⁴⁸⁴ Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, *supra* note 472; Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567 (2017); James Shannon, *The Grand Jury: Tribunal of the People or Administrative Agency of the Prosecutor?* 2 N.M. L. REV. 141 (1972), <http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1287&context=nmlr>.

⁴⁸⁵ Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, *supra* note 472 at 1207; Peter Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, 13 RUTGERS L.J. 1, 7 (1981).

⁴⁸⁶ George Edward Dazzo, *Opening the Door to the Grand Jury: Abandoning the Secrecy for Secrecy's Sake*, 3 D.C. L. REV. 139, 139 (1995).

⁴⁸⁷ Susan Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67 (1995).

⁴⁸⁸ Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, *supra* note 485 at 6-8.

⁴⁸⁹ See *United States v. Calandra*, 414 U.S. 338, 349-50 (1974).

ensuring witnesses' safety.⁴⁹⁰ In fact, George Washington University Associate Law Professor Roger Fairfax Jr. argues that rather than dismantling or aggressively reforming the grand jury process, what is needed is more transparency, so the grand jury can be properly viewed as consistent with the rule of law and acknowledge its intended function in the U.S. constitutional design.⁴⁹¹ Fairfax argues that this realization would "restore the grand jury as an engine of criminal justice, rather than merely a vehicle."⁴⁹²

Qualified Immunity

Qualified immunity may be another major impediment to holding police accountable for violating citizens' civil rights. In the case of *Mullenix v. Luna*, the Supreme Court held that:

The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."⁴⁹³

The doctrine of qualified immunity seeks to prevent police officers (or any state actor) from being held accountable for violating someone's constitutional rights unless the violated rights were clearly established at the time, and a reasonable officer would have known so.⁴⁹⁴

At the Commission's briefing, Evan Bernick from the Institute for Justice asserted that "in practice, qualified immunity provides a near-absolute defense to all but the most outrageous conduct."⁴⁹⁵ Bernick argues that qualified immunity ensures that police officers enjoy far more leeway than doctors, pilots, and others who routinely make life-or-death decisions under stressful conditions—and shields police misconduct not only from liability, but meaningful scrutiny as well.⁴⁹⁶

In the case of *Saucier v. Katz*, the Court held that all qualified immunity cases need to follow a two-step process of first asking whether the officer's conduct violated a constitutional right and, if so, turn to answering whether that constitutional right was "clearly established."⁴⁹⁷ Although this rigid requirement was later modified by *Pearson v. Callahan* to give lower courts discretion in

⁴⁹⁰ See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (1959).

⁴⁹¹ Roger A. Fairfax Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L.REV. 703, 718 (2008).

⁴⁹² *Id.* at 761.

⁴⁹³ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citations omitted).

⁴⁹⁴ Cornell Law School, Legal Information Institute, "Qualified Immunity," https://www.law.cornell.edu/wex/qualified_immunity (last accessed Oct. 31, 2018).

⁴⁹⁵ Evan Bernick, Institute for Justice, *Briefing Transcript* at 118.

⁴⁹⁶ *Ibid.* at 119.

⁴⁹⁷ *Saucier v. Katz*, 533 U.S. 194 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

determining whether this more restrictive analysis was necessary, *Saucier* still had the effect of further insulating officers from potential liability.⁴⁹⁸

UCLA Law Professor Joanna Schwartz published an empirical study which showed that the practical effect of the Supreme Court's rulings in recent qualified immunity cases means that officers are often immune from liability.⁴⁹⁹ The results of investigations of misconduct in 44 major law enforcement agencies have held that police are immune from liability if a reasonable officer could have believed that their conduct was lawful, even if the facts are proven false at a later date.⁵⁰⁰ Schwartz's research found that the great majority of officers charged with civil rights violations were personally immune from liability, and the government paid approximately 99.98 percent of all liability charges when civil rights violations were found.⁵⁰¹ This is because the Supreme Court ruled that:

If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.⁵⁰²

Thus, individual police officers are generally immune from suits, provided that their actions were objectively reasonable at the time the force was applied, regardless of any mistake of fact.⁵⁰³

Some police reform advocates argue that qualified immunity should be discarded or replaced with strict liability.⁵⁰⁴ Strict liability means that officers would be personally liable for any civil rights

⁴⁹⁸ *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

⁴⁹⁹ Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 893 (2014) (discussing the holdings of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Wilson v. Layne*, 526 U.S. 603 (1999) that officers were immune from liability unless their conduct violates "clearly established law.").

⁵⁰⁰ *Id.* at 885.

⁵⁰¹ *Id.*

⁵⁰² *Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."); see also *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (test of material facts and explanation of various types of immunities relevant to law enforcement officers and agencies).

⁵⁰³ Wayne Beyer contends that the Court combined the rulings of *Graham v. Connor* with that of *Anderson v. Creighton* to determine police officers' rights under qualified immunity. See Wayne Beyer, *Police Shootings Under the Fourth Amendment*, RICH. J.L. & PUB. INT. at 7-8 (Winter/Spring 2005), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1085&context=jolpi>.

⁵⁰⁴ William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (working paper available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2070&context=public_law_and_legal_theory); Evan Bernick, *To Hold Police Accountable, Don't Give Them Immunity*, Foundation for Economic Education, May 6, 2015, <https://fee.org/articles/to-hold-police-accountable-dont-give-them-immunity/>.

violations, whether or not they were reasonably mistaken in their assessment of the facts of the situation and thought that the “excessive force” they used was appropriate.⁵⁰⁵ In his testimony before the Commission, Bernick argues that this could be accomplished in several ways:

- Officers could be held personally liable for any rights violations. They would carry personal malpractice insurance, similar to lawyers, doctors, and other professionals.
- Police departments could be held to be more fully liable for any rights violations by officers, and punitive damages could be assessed against individual officers for particularly outrageous conduct.
- Police departments could be required to insure officers up to a certain amount, after that they would have to purchase insurance to cover any costs in excess of that amount.⁵⁰⁶

However, opposition to qualified immunity may conflict with Supreme Court precedent. In *White v. Pauly*, the Court said that:

In the last five years, this Court has issued a number of opinions reversing federal courts [holding individual officers accountable] in qualified immunity cases.⁵⁰⁷ The Court has found this necessary both because qualified immunity is important to “society as a whole.”⁵⁰⁸

Furthermore, the Court has explained that:

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.⁵⁰⁹

⁵⁰⁵ Evan Bernick, *Briefing Transcript* at 119-20; see also Bernick, *To Hold Police Accountable, Don’t Give Them Immunity*, *supra* note 504.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

⁵⁰⁸ *Id.*

⁵⁰⁹ *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982) (citations omitted).

Therefore, any reforms to hold individual officers accountable for civil rights violations will have to take into account the qualified immunity doctrine, and be carefully tailored to Supreme Court doctrine on the matter. On the other hand, since the Court's decisions on qualified immunity rely on its evaluation of "society as a whole"⁵¹⁰ and "societal costs,"⁵¹¹ the Court could theoretically consider changing conditions that could show an increasing need for police accountability.

In another recent case *Kisela v. Hughes*,⁵¹² the Court ruled in favor of an Arizona police officer, Andrew Kisela, who shot Amy Hughes outside of her Tucson home. Hughes was having a dispute with her roommate Sharon Chadwick and police responded to a 911 call reporting that a woman had been seen "acting erratically by hacking at a tree with a knife."⁵¹³ However, when the officers arrived at the scene, Hughes reportedly was acting calmly and non-threatening. Officers instructed her to drop the knife, but there is question if she heard their commands, and Officer Kisela shot her four times.⁵¹⁴ Hughes then went on to sue the officer for using excessive force. The U.S. Court of Appeals for the Ninth Circuit allowed the case to proceed; however, the Supreme Court reversed the ruling and stated that Kisela was entitled to qualified immunity.⁵¹⁵ The majority opinion did not decide if Kisela had violated the Constitution, rather the justices stated that there was no clear precedent that would have told Kisela that firing at Hughes amounted to unconstitutional excessive force. The Court analogized the situation to another Ninth Circuit case, in which the majority reasoned that officers cannot be required to foresee future judicial decisions that would deem their actions unconstitutional.⁵¹⁶

In a dissenting opinion, Justice Sonia Sotomayor argued the Court erred by "effectively treating qualified immunity as an absolute shield,"⁵¹⁷ stating that:

Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police

⁵¹⁰ *White*, 137 S. Ct. at 551.

⁵¹¹ *Harlow*, 457 U.S. at 814.

⁵¹² *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), https://www.supremecourt.gov/opinions/17pdf/17-467_bqm1.pdf.

⁵¹³ Adam Liptak, "Supreme Court Rules for Police Officer in Excessive Force Case," *New York Times*, April 2, 2018, <https://www.nytimes.com/2018/04/02/us/politics/supreme-court-rules-for-police-officer-in-excessive-force-case.html>.

⁵¹⁴ According to the Court documents: "All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots." See *Kisela*, 138 S. Ct. at 1151.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* at 1154.

⁵¹⁷ *Id.* at 1155.

encounter, he was not entitled to qualified immunity . . . [The majority's] decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished . . . there is nothing right or just under the law about this.⁵¹⁸

However, despite the obstacle that is qualified immunity, there may be other ways of ensuring accountability,⁵¹⁹ including the civil review board and grand jury reforms discussed above, as well as the court-ordered consent decrees in DOJ cases discussed below.

Consent Decrees

After the fatal police shooting of Michael Brown in 2014, the Justice Department released a report detailing the systematic civil rights violations perpetrated by the Ferguson Police Department that went beyond just investigating the case.⁵²⁰ Despite this move by the DOJ, many wondered if substantial change would follow. After filing a federal civil rights complaint and negotiating with the jurisdiction, then-Attorney General Eric Holder announced that the Justice Department would enter into a consent decree with the agency to help reform the police department. Nonetheless, many police reform advocates have been frustrated that the process has been too slow and insufficiently comprehensive.⁵²¹ On the other hand, since the consent decree was opened in

⁵¹⁸ *Id.* at 1158-62.

⁵¹⁹ Even under qualified immunity, studies show police department liability insurance may be increasing police accountability. See John Rappaport, *How Private Insurers Regulate Private Police*, 130 HARV. L. REV. 1539, 1573-79 (2017). Insurance companies exert pressure on police departments to reduce uses of force that may result in large settlements or court-ordered damages that the insurance company must then pay out. Through lower premiums and deductibles, private insurance encourages departments to engage in "better training, better use of force policies, better screening in the hiring process, and even the firing of bad cops." Radley Balko, "How the Insurance Industry Could Reform American Policing," *Washington Post*, March 1, 2016, https://www.washingtonpost.com/news/the-watch/wp/2016/03/01/how-the-insurance-industry-could-reform-american-policing/?noredirect=on&utm_term=.ce52b61c1780. While private insurance is "no panacea," especially since many large cities are self-insured and therefore lack the external pressure for reform, insurance companies may nonetheless play an important role in increasing police accountability. *Ibid.* See also Andrea Cann Chandrasekher, *Empirically Validating The Police Liability Insurance Claim*, 130 HARV. L. REV. F. 233, 234-35 (2017).

⁵²⁰ U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, March 4, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁵²¹ Monica Davey, "A Year Later, Ferguson Sees Change, but Asks if It's Real," *New York Times*, Aug. 5, 2015, <https://www.nytimes.com/2015/08/06/us/in-year-since-searing-death-ferguson-sees-uneven-recovery.html>; Kimberly Kindy and Renae Merle, "Two years after Ferguson, where is the police reform?" *Washington Post*, Sept. 25, 2016, https://www.washingtonpost.com/national/two-years-after-ferguson-where-is-the-police-reform/2016/09/25/a20112f4-8272-11e6-a52d-9a865a0ed0d4_story.html?utm_term=.a2dffe761dc2; Eric Levitz, "What Has Changed Since Ferguson?," *New York Magazine*, July 8, 2016, <http://nymag.com/daily/intelligencer/2016/07/what-has-changed-since-ferguson.html>.

Ferguson, the Department of Justice has also entered into consent decrees in other cities such as Cleveland⁵²² and Baltimore.⁵²³

Since 1994, the Justice Department has had the jurisdiction to compel law enforcement agencies that have been found to have a “pattern or practice”⁵²⁴ of civil rights abuses to reform through court-enforceable agreements, known as consent decrees.⁵²⁵ Since then, federal administrations have taken different perspectives on these decrees. President George W. Bush’s administration was more likely to negotiate reforms with police departments, rather than imposing court-ordered, binding agreements.⁵²⁶ His administration investigated about 12 excessive force cases against police departments, with two resulting in settlements, and neither were court-ordered consent decrees.⁵²⁷ In comparison, the Obama administration opened nearly two dozen investigations into various law enforcement agencies around the country. President Obama’s Justice Department entered nearly four times more consent decrees than his predecessors.⁵²⁸ According to a January 13, 2017 statement on the DOJ website:

Since 2009, the Special Litigation Section of the Justice Department has opened 25 investigations into law enforcement agencies. The section is enforcing 20 agreements with law enforcement agencies, including 15 consent decrees and one post-judgment order.⁵²⁹

⁵²² Settlement Agreement, *United States v. City of Cleveland* (N.D. Ohio May 26, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf.

⁵²³ Consent Decree, *United States v. Police Dep’t of Baltimore City, et al.*, Case No. 1:17-CV-00099-JKB (D. Md. Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download>.

⁵²⁴ See, e.g., U.S. Dep’t of Justice, Civil Rights Division, Special Litigation Section, “Conduct of Law Enforcement Agencies: Description of the Laws We Enforce,” <https://www.justice.gov/crt/conduct-law-enforcement-agencies> (last accessed Nov. 1, 2018) (“The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (re-codified at 34 U.S.C. § 12601), allows us to review the practices of law enforcement agencies that may be violating people’s federal rights. If a law enforcement agency receives federal funding, we can also use the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, and Title VI of the Civil Rights Act of 1964, which forbid discrimination on the basis of race, color, sex or national origin by agencies receiving federal funds. We may act if we find a pattern or practice by the law enforcement agency that systemically violates people’s rights. Harm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws.”).

⁵²⁵ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (42 U.S.C. § 14141, transferred to 34 U.S.C. § 12601).

⁵²⁶ Simone Weichselbaum, “Policing the Police,” *Marshall Project*, May, 25, 2015, <https://www.themarshallproject.org/2015/04/23/policing-the-police>.

⁵²⁷ *Ibid.*

⁵²⁸ Perry Chiaramonte, “Activist use of ‘consent decrees’ to police law enforcement likely to end under Trump, Sessions,” *Fox News*, Dec. 22, 2016, <http://www.foxnews.com/us/2016/12/22/activist-use-consent-decrees-to-police-law-enforcement-likely-to-end-under-trump-sessions.html>.

⁵²⁹ U.S. Dep’t of Justice, Office of Public Affairs, “Justice Department Announces Findings of Investigation into Chicago Police Department,” Jan. 13, 2017, <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-chicago-police-department/>.

Breaking with the previous administration's approach to police reform, within the first few months of the Trump administration, the Justice Department announced that it would be reviewing all consent decrees between the agency and U.S. cities.⁵³⁰ In a memorandum, Attorney General Jeff Sessions stated: "It is not the responsibility of the federal government to manage non-federal law enforcement agencies."⁵³¹ Based on available data, this is clearly a departure from the previous administration's stance. For example, in a statement released on September 15, 2017, the Justice Department announced that it would significantly scale back its Collaborative Reform Initiative, which effectively halts federal efforts to reform local police departments and improve community-police relationships.⁵³² Sessions stated that:

Changes to this program will fulfill my commitment to respect local control and accountability, while still delivering important tailored resources to local law enforcement to fight violent crimes. This is a course correction to ensure that resources to agencies that require assistance rather than expensive wide-ranging investigative assessments that go beyond the scope of technical assistance and support.⁵³³

Some criminal justice experts, law enforcement officials, and police reform advocates are concerned that Attorney General Sessions wants to overturn these decrees and what effect this might have on police reform moving forward.⁵³⁴ For instance, Baltimore Mayor Catherine Pugh and then-Police Commissioner Kevin Davis stated that they were concerned that this move could undermine the progress the police department has made thus far.⁵³⁵ Pugh argued that "[a]ny interruption in moving forward may have the effect of eroding the trust that we are working hard to establish."⁵³⁶ Moreover, while there is not current data showing whether these reforms aid in keeping officers safe, they have been shown to have some positive results. Consent decrees have been successful in police departments like Philadelphia, where police shootings have fallen by more than half. Other departments with federal oversight (either collaborative reform or consent

⁵³⁰ Office of the Att'y Gen., "Memorandum for Heads of Department Components and United States Attorneys," March 31, 2017, <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>.

⁵³¹ Ibid.

⁵³² U.S. Dep't of Justice, Office of Public Affairs, "Department of Justice Announces Changes to the Collaborative Reform Initiative," Sept. 15, 2017, <https://www.justice.gov/opa/pr/departments-justice-announces-changes-collaborative-reform-initiative>.

⁵³³ Ibid.

⁵³⁴ U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments to Ensure Constitutional Policing," April 24, 2017, http://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf; David Graham, "Can Trump's Justice Department Undo Police Reform?" *The Atlantic*, April 4, 2017, <https://www.theatlantic.com/politics/archive/2017/04/the-beginning-of-the-end-of-federal-police-reform/521847/>.

⁵³⁵ Margaret Hartmann, "Sessions Moves to Roll Back Obama-Era Police Reforms," *New York Magazine*, April 4, 2017, <http://nymag.com/daily/intelligencer/2017/04/sessions-moves-to-roll-back-obama-era-police-reforms.html>.

⁵³⁶ Ibid.

decrees) saw similar decreases in shootings: this was at a rate of 27 percent on average in the first year, which increased to 35 percent in subsequent years (see Chart 8).⁵³⁷

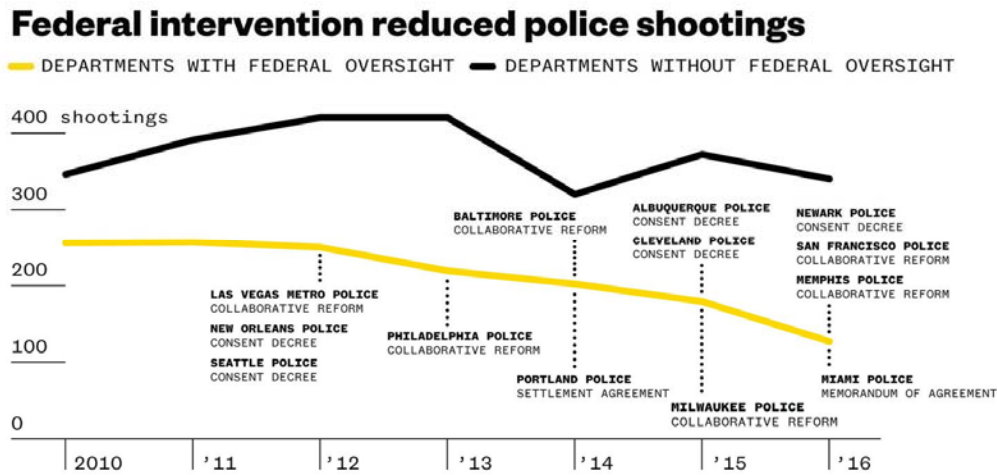


Chart 8: Federal Interventions from 2010-2016

Source: Chart created by Vice News,⁵³⁸ (utilizing DOJ data).

The previous director of the Justice Department’s COPS office, Ron Davis, described Sessions’ decision to roll back federal interventions as “incompetent” and “dangerous.”⁵³⁹ He stated, “I think it’s dangerous. Not only is that an ideological response; it’s one that’s absent of science and one that ignores evidence.”⁵⁴⁰ Many reform advocates and policing experts worry that the Justice Department’s changes in policy will leave local police departments without the resources or the impetus needed to institute substantial, cultural changes to reduce shooting incidents.⁵⁴¹ Vanita Gupta, former Principal Deputy Assistant Attorney General and head of the Justice Department’s Civil Rights Division during the Obama Administration, stated that Sessions’ decision to roll back

⁵³⁷ Rob Arthur, “Jeff Sessions is walking away from the best way to reduce police shootings,” *Vice News*, Dec. 18, 2017, https://news.vice.com/en_us/article/kznagw/jeff-sessions-is-walking-away-from-the-best-way-to-reduce-police-shootings.

⁵³⁸ *Ibid.*

⁵³⁹ Arthur, et al., “Shot by Cops and Forgotten,” *supra* note 52.

⁵⁴⁰ *Ibid.*

⁵⁴¹ Arthur, “Jeff Sessions is walking away from the best way to reduce police shootings,” *supra* note 537. On April 24, 2017, the Commission majority released a statement concerning Sessions’ memorandum, which urged the Justice Department to continuing holding police departments accountable to ensure the civil rights of all citizens and uphold the principles of constitutional policing. See U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments To Ensure Constitutional Policing,” April 24, 2017, http://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf; see also National Black Caucus of the Young Elected Officials Network, “A Joint Open Letter to End Police Violence Against Black Communities,” April 5, 2018, <http://yeonetwork.org/a-joint-open-letter-to-end-police-violence-against-black-communities/>.

reform efforts is “pitting civil rights and crime-fighting against each other. That’s to the detriment of police-community relations today.”⁵⁴²

On the other hand, critics argue that:

[C]onsent decrees have become political statements on law enforcement policy that have robbed high-crime areas of the proactive policing they deserve and pay for . . . [and] have placed a wedge between the DOJ and local law enforcement; who should be partners instead of adversaries in protecting the American public.⁵⁴³

Further, these agreements can also be lengthy and extremely costly. *Bloomberg Business* reports⁵⁴⁴ that the New Orleans Police Department consent decree has cost more than \$10 million (entered into in 2012);⁵⁴⁵ Seattle, Washington, at least \$5 million (entered in 2012);⁵⁴⁶ and Albuquerque, New Mexico, \$4.5 million (entered into 2015).⁵⁴⁷ And in Los Angeles, the reforms have cost the taxpayers an estimated \$300 million⁵⁴⁸ (entered into 2001).⁵⁴⁹ Therefore, the big question regarding this intervention is: does it work?

The Deputy federal monitor for the New Orleans Police Department consent decree, David L. Douglass argues that while “Consent decrees are costly, ad hoc, and necessarily limited responses to a historically rooted and widespread problem, one that has become more prominent, divisive, and volatile . . .” taken collectively they “constitute a compendium of best practices for constitutional, effective, community-oriented policing.” He further posits that these agreements can empower communities and strengthen community-police relationships by enforcing the elements of constitutional and effective policing and providing a foundation for reform.⁵⁵⁰

⁵⁴² Arthur, “Jeff Sessions is walking away from the best way to reduce police shootings,” *supra* note 537.

⁵⁴³ A. Benjamin Mannes, “Jeff Sessions is right to roll back Justice Department consent decrees,” *The Hill*, April 5, 2017, <http://thehill.com/blogs/pundits-blog/crime/327457-jeff-sessions-is-right-to-roll-back-justice-department-consent>.

⁵⁴⁴ Matt Stroud and Mira Rojanasakul, “A ‘Pattern or Practice’ of Violence in America,” *Bloomberg*, May 27, 2015, <http://www.bloomberg.com/graphics/2015-doj-and-police-violence/>.

⁵⁴⁵ Consent Decree, *United States v. New Orleans*, Case No. 2:12-CV-01924-SM-JCW (E.D. La. Jan. 11, 2013).

⁵⁴⁶ Settlement Agreement and Stipulated [Proposed] Order of Resolution, *United States v. Seattle*, Case No. 12-CV-1282 (W.D. Wash. July 27, 2012), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2012/07/27/SPD%20Settlement%20Agreement.pdf>.

⁵⁴⁷ Settlement Agreement, *United States v. Albuquerque*, Case No. 1:14-CV-1025-RB-SMV (D.N.M. June 2, 2015).

⁵⁴⁸ Kimbriell Kelly, Sarah Childress, and Steven Rich, “Forced Reforms, Mixed Results,” *Washington Post*, Nov. 13, 2015, http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/?utm_term=.518428c25f62.

⁵⁴⁹ Consent Decree, *United States v. Los Angeles*, Case No. 2:00-CV-11769-GAF-RC (C.D. Cal. June 15, 2001).

⁵⁵⁰ David Douglass, “Department of Justice Consent Decrees as the Foundation for Community-Initiated Collaborative Police Reform,” *Police Quarterly*, vol. 20, no. 3 (2017). For instance, the consent decree with Los Angeles, included several components that aligned with the goals of community-oriented policing. This includes: program development for response to persons with mental illnesses, training, community outreach and more public transparency of information. The consent decree also included extensive data-gathering and analytics, to measure

In 2010, the Justice Department convened a roundtable of law enforcement officials, policing experts, and advocates to discuss the efficacy of the Civil Rights Division’s “pattern-or-practice”⁵⁵¹ work. The report from that meeting noted that:

Without exception, everyone providing comments during the roundtable meeting acknowledged the efficacy of pattern-or-practice litigation to reforming policies and practices in local police organizations.⁵⁵²

In 2013, PERF issued a comprehensive review of the Justice Department’s role in monitoring law enforcement noting that:

[M]any police chiefs who have been through the process of a DOJ investigation. . . [stated] that the end result was a better police department—with improved policies on critical issues such as use of force, better training of officers, and more advanced information systems that help police executives to know what is going on in the department and manage their employees.⁵⁵³

The roundtable review also found that in several places, reform agreements provided essential leverage for the funding and political support needed for reform.⁵⁵⁴ For instance, a spokesperson for Chicago Mayor Rahm Emanuel welcomed the Justice Department’s involvement to “restore trust” in the Chicago Police Department and to improve the city’s “system of police accountability.”⁵⁵⁵ Christy Lopez, Distinguished Visitor from Practice at Georgetown Law, found that consent decrees brought about “more effective accountability infrastructure, better training, policies that reflect policing best practices . . . [and] repairing police-community fissures.”⁵⁵⁶

compliance on an ongoing basis. *See e.g.*, Consent Decree, *Unites States v. Los Angeles*, No. 2:00-CV-11769-GAF-RC (C.D. Cal. June 15, 2001); U.S. Dep’t of Justice, “LA Consent Decree, Section II,” <https://www.justice.gov/crt/la-consent-decree-section-ii> (last accessed Nov. 1, 2018).

⁵⁵¹ *See* U.S. Dep’t of Justice, Civil Rights Division, Special Litigation Section, “Conduct of Law Enforcement Agencies” (describing “pattern or practice” jurisdiction), <https://www.justice.gov/crt/conduct-law-enforcement-agencies> (last accessed Nov. 1, 2018); *Floyd*, 959 F. Supp. 2d 540.

⁵⁵² U.S. Dep’t of Justice, *Taking Stock: Report from the 2010 Roundtable on the State and Local Law Enforcement Police Pattern or Practice Program*, 2011, <https://www.ncjrs.gov/pdffiles1/nij/234458.pdf> at 2.

⁵⁵³ Police Executive Research Forum, *Civil Rights Investigations of Local Police: Lessons Learned*, Critical Issues in Policing Series, at 37, 2013, http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Sari Horwitz, Ellen Nakashima, and Wesley Lowery, “Justice Department Will Investigate Practices of Chicago Police,” *Washington Post*, Dec. 6, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/12/06/justice-department-will-launch-investigation-into-practices-of-chicago-police/?utm_term=.8b9429fa5547.

⁵⁵⁶ Christy Lopez, “Why Jeff Sessions Should Police the Police,” *Marshall Project*, Jan. 30, 2017, <https://www.themarshallproject.org/2017/01/30/why-jeff-sessions-should-police-the-police?ref=collections>.

There have been several police departments that have experienced positive changes through consent decrees with the Justice Department. Former Obama Department of Justice Acting Assistant Attorney General (AAG) Vanita Gupta cites East Haven, Connecticut, Los Angeles, California, and Seattle, Washington as having successful transformations.⁵⁵⁷ She states that these transformations are “more than just [an] enactment of specific reforms. It really is a fundamental change in how the community relates to the police department and vice versa.”⁵⁵⁸

For instance, East Haven police department rewrote and revised 95 policies, since the inception of their consent decree.⁵⁵⁹ Officers received training on various topics focusing on community policing and rebuilding community trust.⁵⁶⁰ The mayor stated that the department

met and exceeded each and every benchmark for success specified in our agreement with the Department of Justice both on-time and under budget. After four years of hard work by our officers and the entire compliance team, we have restored pride, trust, and confidence in our Police Department.⁵⁶¹

And in Los Angeles, researchers found a marked decrease in crime rates and an increase in officer morale.⁵⁶² Under the consent decree, the total number of use of force incidents declined by almost 30 percent.⁵⁶³ According to a Harvard research study, Stone and colleagues attribute some of this success to the police chief actively discouraging officers in the use of force and instituting stronger oversight procedures to increase accountability.⁵⁶⁴ Lethal and non-lethal force incidents have also declined, with “fewer officer-involved shootings, chokeholds, head strikes, and suspect hospitalizations than at any point in the previous decade.”⁵⁶⁵ Some attribute these successes to emphasizing accountability and oversight procedures, more engagement with communities of color, and building a relationship “around empathy, not antagonism.”⁵⁶⁶ Examining four agencies

⁵⁵⁷ See Kelly, et al., “Forced Reforms, Mixed Results,” *supra* note 548 (quoting former head of Civil Rights Division Vanita Gupta).

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Brian McCready, “East Haven Police Department Continues to Win Back Public’s Trust: Report,” *East Haven Patch*, May 12, 2016, <https://patch.com/connecticut/easthaven/east-haven-police-department-continues-win-back-publics-trust-report>.

⁵⁶⁰ *Ibid.*

⁵⁶¹ Jamie Wilkins, “Maturo Praises Police Department 4 Years After Department of Justice Agreement,” *East Haven Patch*, Dec. 26, 2016, <https://patch.com/connecticut/easthaven/maturo-praises-police-department-4-years-after-department-justice-agreement>.

⁵⁶² Christopher Stone, Todd Foglesong, and Christine Cole, *Policing Los Angeles Under a Consent Decree: The Dynamics of Change at the LAPD*, Criminal Justice Policy and Management, Harvard Kennedy School, at 6, 2009, <http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>.

⁵⁶³ *Ibid.* at 33.

⁵⁶⁴ *Ibid.* at 65.

⁵⁶⁵ Jamelle Bouie, “Cop Drama,” *Slate*, Jan. 8, 2015, http://www.slate.com/articles/news_and_politics/politics/2015/01/police_departments_shouldn_t_fear_reform_it_makes_their_jobs_easier_and.html.

⁵⁶⁶ *Ibid.*

with consent decrees, the *Washington Post* reporters found that the police departments had modernized their policies (e.g., emphasis on de-escalation, non-lethal force) and equipment (e.g., body-worn cameras, tasers), and overall, had better training.⁵⁶⁷

However, in 5 of the 10 departments that supplied sufficient data, use of force incidents increased during and after the agreements with the Justice Department. The other five either remained constant or decreased. The *Washington Post* investigation also found that none of the police departments completed reforms on time.⁵⁶⁸ The interventions took longer than expected, which translated to more money for taxpayers. In the 13 departments with available budget data, costs are expected to surpass \$600 million.⁵⁶⁹ Several of the reforms have been difficult to sustain after federal oversight completed, and in some cities, relationships with the community are still strained.⁵⁷⁰ Many departments experienced decreased officer morale and collectively, departments went through 52 police chiefs trying to meet federal guidelines.⁵⁷¹ In response, former Acting AAG Gupta stated that the Justice Department's goal "isn't that we have a perfect police department when we leave . . . The goal is that they actually know what to do when there's a problem."⁵⁷²

One issue with consent decrees is that federal officials may not establish adequate measures to monitor whether police departments have corrected the behaviors that initially landed them in court.⁵⁷³ In other cases, federal officials stated that the department "did not sufficiently monitor or enforce the reforms they had sought."⁵⁷⁴ Furthermore, another concern is that once the federal oversight ends, so does the Justice Department's involvement.⁵⁷⁵ Thus, it is hard to determine if these interventions are bringing about sustained reforms. For example, in 1997, the Pittsburgh Police Department became the first department to enter into a decree with the Justice Department.⁵⁷⁶ By 2002, the police department had made many changes, but the federal court continued the decree for another three years, to help continue reform measures. During this period, by the end of the decree in 2005, the Pittsburgh Police Department had a record of using force 1,900 times, which had increased to 2,727 (nearly 44 percent) in 2013, though complaints of excessive force have declined from 126 in 2006 to 48 in 2014.⁵⁷⁷ Police reform advocates argue the decrease in complaints could be the result of residents losing confidence that filing a complaint

⁵⁶⁷ Kelly, et al., "Forced Reforms, Mixed Results," *supra* note 548.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ Simone Weichselbaum, "The Problems With Policing the Police," *Time* and *Marshall Project*, <http://time.com/police-shootings-justice-department-civil-rights-investigations/>.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ U.S. Dep't of Justice, *An Interactive Guide to the Civil Rights Division's Police Reforms*, 2017, <https://www.justice.gov/crt/page/file/922456/download>.

⁵⁷⁷ Kelly, et al., "Forced Reforms, Mixed Results," *supra* note 548.

would resolve issues with police.⁵⁷⁸ Witold “Vic” Walczak, legal director of the Pennsylvania ACLU, also noted that there had been “a good amount of backsliding” and the progress that has been made was uneven due to the turnover in the chief’s office, as well as the major violent incidents in the city.⁵⁷⁹ Cameron McLay, the current police chief, similarly stated that the increase in problematic use of force was due to a “breakdown in the systems of accountability.”⁵⁸⁰

Some cities and state attorneys general have taken an active role to implement reform policies without the aid of the federal government or the binding agreement of a consent decree. One possible reason may be due to the current administration’s rollback of federal oversight, thus some state and local jurisdictions are attempting to find ways to achieve federal oversight. For instance, in August 2017, after the DOJ declined to proceed with seeking court oversight following its investigation of the Chicago Police Department, Illinois Attorney General Lisa Madigan filed a federal lawsuit for court oversight of the department.⁵⁸¹ Madigan stated: “As the state attorney general, we are essentially stepping into the shoes of the Department of Justice—shoes that the DOJ has abandoned at this point.”⁵⁸² Similarly, in Baltimore, the Mayor and the Police Commissioner sought federal court oversight to approve their consent decree with the Justice Department—this was after Attorney General Sessions sought a delay in formalizing the agreement, despite that it had already been negotiated under the Obama Administration.⁵⁸³ Other cities are initiating their own actions to try reforming local police departments. For example, in June 2017, Providence Rhode Island’s city council approved several police accountability measures that reform advocates claim could be a “national model to prevent discriminatory profiling based on race, gender identity, and immigration status.”⁵⁸⁴ The city council stated that the ordinance aims to “end racial profiling and codify into law best practices in police conduct from around the country.”⁵⁸⁵ Some of the accountability measures the city council plans to instate include:

- Prohibiting racial and other forms of discriminatory profiling;
- Mandating greater transparency and accountability in police-community relations;

⁵⁷⁸ American Civil Liberties Union, “Fighting Police Abuse: A Community Action Manual, August 1997,” <https://www.aclu.org/other/fighting-police-abuse-community-action-manual#credits> (last accessed Nov. 1, 2018).

⁵⁷⁹ Kelly, et al., “Forced Reforms, Mixed Results,” *supra* note 548.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Complaint, *State of Illinois v. City of Chicago*, Case No. 17-CV-6260 (N.D. Ill. Aug. 29, 2017), http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/01/City_of_Chicago_lawsuit_filedcomplaint.pdf; Aamer Madhani and Kevin Johnson, “Illinois attorney general in end run around Trump sues for court oversight of Chicago PD,” *USA Today*, Aug. 29, 2017, <https://www.usatoday.com/story/news/2017/08/29/illinois-attorney-general-end-run-around-trump-sues-court-oversight-chicago-pd/613043001/>.

⁵⁸² *Ibid.*

⁵⁸³ Kevin Rector, “Federal judge approves Baltimore policing consent decree, denying Justice Department request for delay,” *Baltimore Sun*, April 7, 2017, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-consent-decree-approved-20170407-story.html>.

⁵⁸⁴ Associated Press, “Police anti-profiling measure OK’d, viewed as national model,” *AP*, June 2, 2017, <https://www.apnews.com/3abc7604374f4c878d3bc02bc5614223>.

⁵⁸⁵ *Ibid.*

- Establishing new protections for juveniles, immigrants, and transgender people; and
- Establishing how police officers will document and collect data from traffic and pedestrian stops.⁵⁸⁶

In sum, this chapter examined data, studies and testimony regarding various internal and external accountability tools designed to improve problematic and potentially unconstitutional police practices when they occur. The first section examined internal measures and explored some of the challenges for police officers who seek to hold their fellow officers accountable. It also examined emerging data on body cameras. The next section of this chapter examined various external accountability measures. These are: (1) Civilian Review Boards; (2) Grand Jury reform; (3) reforms to the qualified immunity of individual officers; and (4) DOJ consent decrees. All of these internal and external measures are imperfect, but data show that some are promising. To clarify, the measures may be taken alone or in combination, and whether they are more effective in combination is subject to further study.

⁵⁸⁶ Ibid.

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CHAPTER 3: CHANGING LAW ENFORCEMENT BEHAVIOR

In addition to reviewing data about and analyzing perspectives regarding civil rights implications of police use of force, as well as major types of internal and external measures to address potentially problematic and unconstitutional policing, the Commission heard testimony and analyzed research related to comprehensive strategies for effective reform. As discussed in Chapters One and Two, all such strategies begin with effective data collection and analysis, and the discussion that follows operates from that premise as well. Advocates from all perspectives on the issue of police use of force recommend effective training (with some disagreement about areas for focus for that training) as well as deliberate steps to foster and sustain community trust in their police. This strategy is generally known as “community policing,” and its main components include community outreach as well as various forms of training and building community trust. The holistic approach of community policing is first explained, then its main components are each discussed in turn below.

A Holistic Approach to Reforming the Overall Policing System

The Justice Department has historically advocated for community policing as a best practice.⁵⁸⁷ The DOJ Community Oriented Policy Services (COPS) defines community policing as an organizational strategy that supports the systematic use of partnerships and problem-solving techniques to address public safety issues such as crime, social disorder, and fear of crime.⁵⁸⁸

According to COPS, effective community policing initiatives consist of three critical components:

- Community partnerships that include collaborative relationships between law enforcement agencies and the public in order to develop better solutions to problems and increase public trust in police;
- Organizational transformations that provide the alignment of management, structure, personnel, and information systems to support community partnerships and problem-solving techniques; and
- Problem-solving strategies which pertain to a process of active examination of identified problems in order to develop and evaluate effective responses.⁵⁸⁹

In this light, at the briefing, panelists Scrivner and Simmons offered a broad perspective on police reform in the country. They applauded the policing reforms currently underway, but questioned whether meaningful results in police practices and use of force could occur within the status quo.⁵⁹⁰ They suggested overhauling the policing system in the country in its entirety.⁵⁹¹ Ellen Scrivner

⁵⁸⁷ U.S. Dep’t of Justice, *Community Policing Defined*, at 1-2, 2014, <https://ric-zai-inc.com/Publications/cops-p157-pub.pdf>.

⁵⁸⁸ *Ibid.* at 1.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ *Briefing Transcript* at 260-61.

⁵⁹¹ *Ibid.*

from the Police Foundation argued that systemic organizational change within the framework of 21st century policing strategies are needed. She stated during the Commission’s briefing that:

What I’ve heard here today just confirms that we really need to be focusing on police reform because simply changing a particular practice, such as a different training program, implementing a new program to respond to complaints or bringing on new technology, they will all have specific results, but that will not get us to the results that we’re seeking. The reason being [that] we are really at a very pivotal point in policing in terms of the relationship of the community and we need to be talking about the need for systemic organizational change, and I’ve not really heard a lot about that today in terms of changing not just different programs and different initiatives, but really changing organizations across the country, and of course, we’re then talking about cultural change as well.⁵⁹²

Montague Simmons from the Organization for Black Struggle, presented his organization’s “Quality Policing Initiative” as a means of achieving the wholesale changes needed in policing:

The Organization for Black Struggle has designed a quality policing initiative that creates deep partnership between community and police on all levels, and specifically in equipment, training, deployment, accountability and advancement. At minimum we want to see residency requirements, conflict resolution and threat progressive training, demilitarization of all forces, including specific withdrawal from the police as collection agents, implementation of field contact cars that allow us to trace every interaction and early warning system database on police behavior, a media accountability system that includes body and dash cameras where the data is actually controlled by the civilian review board and civilian accountability project that has subpoena power, investigatory, and prosecution powers.⁵⁹³

The following sections outline strategies proposed by experts, police officials, and community activists on different trainings and practices they believe are promising for addressing the conventional needs of the police, while building community trust and legitimacy. As a helpful guide for police departments, the National Institute for Justice (NIJ) created a website, [crimesolutions.gov](https://www.crimesolutions.gov)⁵⁹⁴ that outlines some best-practices for reform. This website rates the effectiveness of programs and practices in achieving criminal justice related outcomes in order to inform practitioners and policy makers about what works, what does not work, and what is promising in criminal justice, juvenile justice, and crime victim services. The NIJ states that the website’s goal is help policy makers make practical decisions on criminal justice programs. While not all the police-based trainings and practices discussed below meet the threshold of “best-

⁵⁹² Ibid.

⁵⁹³ See *Briefing Transcript* at 30-31; see also Montague Simmons, written statement for the “Police Use of Force: An Examination of Modern Policing Practices” Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 1-2 [hereinafter Simmons Statement] (providing more details on the Organization for Black Struggle’s Quality Policing Initiative).

⁵⁹⁴ National Institute of Justice, CrimeSolutions.gov, “About CrimeSolutions.gov” <https://www.crimesolutions.gov/about.aspx> (last accessed Nov. 1, 2018).

practices” described on the NIJ’s website, the Commission examined them because they are the most widely-adopted strategies by jurisdictions across the country. Others were included in the Commission’s review because they are among the most thoughtful, innovative approaches for building community trust and reducing police use of force. In the following sections, first, increasing racial and ethnic diversity among law enforcement is considered as a community policing tool. Next, a discussion of various types of training are examined and evaluated. Lastly, the Commission presents strategies to strengthen and build community trust.

Racial Diversity

One of the main proposed strategies to possibly reduce excessive force incidents and build community trust is to hire more diverse police forces. Research shows that 70 percent of the American public wants a department that is diverse, racially-mixed, and resembles the community it serves.⁵⁹⁵ Ronald Weitzer, professor at George Washington University, stated that:

Ethnic minorities favor reforming police departments so that they reflect the composition of the local population. And this can pay dividends in terms of increasing public trust and confidence in police departments. What the public is critical of are departments that are lopsided—like Ferguson’s.⁵⁹⁶

Communities are also more likely to see a diverse force as more legitimate, and communities are more likely to take “ownership” of local police departments when they perceive their police departments to be racially diverse.⁵⁹⁷ According to the DOJ’s Bureau of Justice Statistics 2013 survey of over 12,000 law enforcement agencies, agencies have been successful in recruiting more racially diverse officers. In the past three decades, the percentage of officers of color grew from 14.6 percent in 1987 to 27.3 percent in 2013.⁵⁹⁸ Notably, only about 13 percent of local police officers were women.⁵⁹⁹

Research findings are mixed regarding whether increasing racial diversity actually decreases use of force incidents. For instance, Baltimore’s police force is fairly diverse—approximately 42 percent black, compared to 63 percent of the general population—but the Justice Department

⁵⁹⁵ Weitzer found that when asked about the diversity of their local police force, people of color more often take a “race-conscious approach” (59 percent of Latinos and 68 percent of black respondents) stating that they want officers of diverse races in their communities. Whereas, 6 out of 10 white respondents were more likely to take a “colorblind approach” stating that the race of the officer does not matter. *See* Ronald Weitzer and Steven A. Tuch, *Race and Policing in America: Conflict and Reform* (New York: Cambridge University Press, 2006) at 112.

⁵⁹⁶ Matt Fountain, “How important is racial diversity in community policing?” *Tribune*, April 18, 2015, <https://www.sanluisobispo.com/news/local/article39524391.html>.

⁵⁹⁷ Ronald Weitzer, “White, black, or blue cops? Race and citizen assessments of police officers,” *Journal of Criminal Justice*, vol. 28, no. 4 (2000), at 313-24.

⁵⁹⁸ Reaves, *Local Police Departments, 2013: Personnel, Policies, and Practices*, *supra* note 68.

⁵⁹⁹ Data USA, “Police Officers,” <https://datausa.io/profile/soc/333050/#demographics> (last accessed Nov. 1, 2018).

found a long history of unfair policing practices against black residents in the city.⁶⁰⁰ Some advocates posit that a problem with focusing on diversifying forces is that it focuses attention on individual officers, rather than directing attention to the structural and cultural issues that need to be addressed.⁶⁰¹

Studies show that generally there is not a strong correlation between an officer's race or ethnicity and how the officer treats civilians.⁶⁰² This absence of correlation is because an officer's behaviors, interactions, and opinions about the communities they serve are influenced by the other officers and the culture of the department.⁶⁰³ Many studies support the idea that socialization plays a critical role.⁶⁰⁴ Overall, when researchers compare officers' behaviors within departments, they consistently find behavior does not vary with the officer's racial or ethnic background.⁶⁰⁵ Some argue that other strategies, such as hiring officers who know and understand the community, focusing on de-escalation and reducing aggressive arrest techniques, and building better relationships with the communities they serve would be more effective in reducing use of excessive force and improving community relations.⁶⁰⁶ Others assert that in majority black or Latino cities, there are benefits if the leadership (e.g., chief of police) comes from the community, because they can help "allay suspicions when controversial incidents occur in a way that white police chiefs may not be able to do."⁶⁰⁷ Further, George Washington University professors, Ronald Weitzer and Steven Tuch found that having a racially diverse police force may help reduce discriminatory stops by officers.⁶⁰⁸

⁶⁰⁰ U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Department*, 2016, at 11, 16, <https://www.justice.gov/crt/file/883296/download>.

⁶⁰¹ Max Kutner, "The New American Cop: Smarter, More Diverse, Better Equipped and Scared," *Newsweek*, Aug. 11, 2016, <https://www.newsweek.com/2016/08/19/police-officers-training-black-lives-matter-489228.html>; Jen Fifield, Pew Charitable Trusts, "Does Diversifying Police Forces Reduce Tensions?" *Stateline*, Aug. 22, 2016, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/22/does-diversifying-police-forces-reduce-tensions>.

⁶⁰² National Research Council, *Fairness and Effectiveness in Policing: The Evidence* (Washington, D.C.: National Academies Press, 2004) at 148.

⁶⁰³ *Ibid.*

⁶⁰⁴ Seth Stoughton, "How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt," *The Atlantic*, Dec. 12, 2014, <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>; Tom Dart, "'Verbal Judo': the police tactic that teaches cops to talk before they shoot," *Guardian*, July 21, 2016, <https://www.theguardian.com/us-news/2016/jul/21/verbal-judo-police-shootings-deescalation-communication>; Benedict Carey and Erica Goode, "Police Try to Lower Racial Bias, but Under Pressure, It Isn't So Easy," *New York Times*, July 12, 2016, https://www.nytimes.com/2016/07/12/science/bias-reduction-programs.html?_r=0.

⁶⁰⁵ *Ibid.*; Ronald Weitzer, "Diversity among police officers is key, but it won't solve the problems with policing," *Guardian*, Jan. 20, 2015, <https://www.theguardian.com/commentisfree/2015/jan/20/diversity-among-police-officers-is-key-but-it-wont-solve-the-problems-with-policing>.

⁶⁰⁶ Jen Fifield, Pew Charitable Trusts, "Does Diversifying Police Forces Reduce Tensions?," *supra* note 601.

⁶⁰⁷ Weitzer, "Diversity among police officers is key, but it won't solve the problems with policing," *supra* note 605.

⁶⁰⁸ Weitzer and Tuch, *Race and Policing in America: Conflict and Reform*, *supra* note 595 at 141. Additionally, Souman Hong, associate professor at Yonsei University, studied 42 police forces in the UK from 2000 to 2010 and found that "an increase in the proportion of ethnic minorities on a police force is significantly associated with a

Training

Many contend that the growing pattern of police-involved killings of people of color is due to improperly trained officers. Some argue that police officers receive training that both underemphasizes de-escalation techniques and overemphasizes officer safety and technical skill development, such as firearms training.⁶⁰⁹ Another common argument is that some of the training overestimates the danger of interacting with black suspects relative to other groups.⁶¹⁰

At the Commission's briefing, University of Missouri Professor David Klinger argued that many states do not require a satisfactory number of hours in fundamental (e.g., scenario-based, on the ground) tactical training.⁶¹¹ He argued that departments should implement training policies that have explicit standards for oversight throughout the entire chain of command, to help build a culture of accountability. Part of this process would include implementing a non-punitive strategy for reviewing use of force incidents or a "near miss" incident, in order to determine what methods could be improved or modified in hope of keeping civilians and officers safe.⁶¹² Klinger offered this example: if there was a call that a suspect had a gun, the commanding officer would debrief the officers immediately following the incident to make sure the officers who responded to the call acted appropriately. If they did not, then the commanding officer could tell them what they did wrong (e.g., "you pulled up a bit too close, you engaged this individual too quickly").⁶¹³ This would enforce what behaviors are appropriate and that inappropriate behaviors would not be tolerated; and these actions would begin to change the culture of policing. Klinger states: "[w]hat we're going to do is, we're gonna teach you how to do it right and we're gonna hold you accountable, [] up and down the chain [of command]." ⁶¹⁴ Further, Jon Shane, assistant professor at John Jay College of Criminal Justice, stated at the Commission's briefing that the Police

decrease in the proportion of ethnic minorities that are stopped and searched by that police force." It is important to note that this study was after the U.K. government launched a program in 1999 that sought to increase the diversity of police forces around the country. Specifically, the goal was for each department to have a proportional number of officers of color, compared to the populations of the community it served. Sounman Hong, "Black in Blue: Racial Profiling and Representative Bureaucracy in Policing Revisited," *Journal of Public Administration Research and Theory*, vol. 27, no. 4 (2017) at 547-61.

⁶⁰⁹ David Klinger argued that officer safety is important given the number of officers assaulted in a given year. Klinger cited FBI statistics that reveal during the decade ending in 2013, 474 police officers were murdered by assailants who shot them (a total of 511 officers were murdered during this decade). And while fatal attacks with firearms are the most dramatic aspect of the threat environment that officers face, it should be noted that for the years 2004-2013 local and state police departments reported to the FBI well over half a million (573,456) instances in which officers were assaulted. See David Klinger, written statement for the "Police Use of Force: An Examination of Modern Policing Practices" Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 1 [hereinafter Klinger Statement].

⁶¹⁰ Stoughton, "How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt," *supra* note 604; see also, Sarah Zhang, "Police Training Is Seriously Lacking In Actual Science," *Wired*, Aug. 17, 2015, <http://www.wired.com/2015/08/police-training-seriously-lacking-actual-science/>.

⁶¹¹ Klinger, *Briefing Transcript* at 334.

⁶¹² *Ibid.*; see also Shane, *Briefing Transcript* at 337.

⁶¹³ *Ibid.* at 334-35.

⁶¹⁴ *Ibid.*

Foundation was piloting a system that would allow officers to anonymously report “near-miss accidents” to gain a better understanding of how these accidental events can change over time and the effects they have on the communities in which they occur.⁶¹⁵ Since the briefing in 2015, the system—LEO Near Miss—has launched, and the program allows law enforcement to read about and anonymously share “close calls” or “near misses” with other officers in hope of promoting learning and enhancing officer safety and wellness.⁶¹⁶ The system not only allows officers to read the “lessons learned” from other officers, but it also helps identify and report on possible underlying risk factors and other characteristics that contribute to near-miss incidents.⁶¹⁷

Police training was one of many issues discussed during President Obama’s White House Task Force on 21st Century Policing.⁶¹⁸ These national experts examined ways to restore the principles of constitutional policing⁶¹⁹ that simultaneously promoted effective crime reduction strategies while optimizing transparency and accountability.⁶²⁰ Specifically, they discussed best practices related to training and education, officer safety and wellness, community policing, technology and social media, policy and oversight, and building trust and legitimacy.⁶²¹

Considering the prominence of training as a proposed measure to guarantee constitutional policing, the following sections examine the major types of training. These are: (a) implicit bias training; (b) de-escalation training; and (c) training on mental health and disability issues.

⁶¹⁵ Shane, *Briefing Transcript* at 336-37.

⁶¹⁶ National Police Foundation, “LEO Near Miss,” <https://www.policefoundation.org/projects/leo-near-miss/> (last accessed Nov. 1, 2018).

⁶¹⁷ *Ibid.*

⁶¹⁸ The President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, *supra* note 9 at 51-60.

⁶¹⁹ Constitutional policing can also be described as “legal policing,” meaning that policing must be conducted in “accordance with the parameters set by the U.S. Constitution, state constitutions, and the many court decisions that have defined in greater detail what the text of the Constitution means in terms of the everyday practices of policing.” Police Executive Research Forum, *Constitutional Policing as a Cornerstone of Community Policing*, *supra* note 111.

⁶²⁰ The President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, *supra* note 9; *see also* Klinger Statement at 1-2 (testifying in support of this notion). Klinger states that officer safety does not have to be a zero-sum game in which enhancing officer safety means exposing citizens to elevated risk of police gunfire. Moreover, he argues that officer safety and reducing the use of deadly force by police officers are actually two sides of the same police practice coin. Thus, Klinger concludes by stating that there are specific things that police officers, police agencies, and American policing in general can do that can enhance officer safety while actually reducing the likelihood that citizens will be shot by police.

⁶²¹ The President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, *supra* note 9.

Implicit Bias Training

Implicit bias refers to the automatic association people make between groups of people, and the stereotypes associated with those groups.⁶²² These biases may distort police officers' perceptions, judgments, and decision making regarding encounters with civilians.⁶²³ For instance, former FBI Director James Comey stated that:

[P]olice officers on patrol in our nation's cities often work in environments where a hugely disproportionate percentage of street crime is committed by young men of color. Something happens to people of good will working in that environment. After years of police work, officers often can't help but be influenced by the cynicism they feel. A mental shortcut becomes almost irresistible and maybe even rational by some lights. The two young black men on one side of the street look like so many others the officer has locked up. Two white men on the other side of the street—even in the same clothes—do not. The officer does not make the same association about the two white guys, whether that officer is white or black. And that drives different behavior. The officer turns toward one side of the street and not the other. We need to come to grips with the fact that this behavior complicates the relationship between police and the communities they serve.⁶²⁴

Studies show that law enforcement officers hold many of the same biases as the general public, and in implicit bias tests, patterns are nearly universal. Black people (especially black men) are more often associated or quickly paired with being “threatening,” and this tends to hold true regardless of the race or ethnicity of the person taking the test.⁶²⁵ For instance, Plant and Peruche found that by utilizing “shoot-don't shoot” simulations, officers were initially more likely to mistakenly shoot unarmed black suspects compared to unarmed white suspects.⁶²⁶ However, Plant and Peruche also found that after repeated exposure with the program and extensive training—in which race was unrelated to the presence of a gun—this bias could be eliminated.⁶²⁷

In another study, researchers found that respondents perceived young black men as “bigger” (i.e., more muscular, heavier, taller) and “more physically threatening” (i.e., stronger, more capable of

⁶²² National Initiative for Building Community Trust & Justice, *Implicit Bias*, Trust & Justice Briefs, at 1, 2016, <https://trustandjustice.org/resources/intervention/implicit-bias>.

⁶²³ See e.g., Joshua Correl, Bernadette Park, Charles Judd, Bernd Wittenbrink, Melody Sadler, and Tracie Keessee, “Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot,” *Journal of Personality and Social Psychology*, vol. 92, no. 6 (2007); Jennifer Eberhardt, Philip Atiba Goff, Valerie Purdie, and Paul Davies, “Seeing Black: Race, Crime, and Visual Processing. Seeing Black: Race, Crime, and Visual Processing,” *Journal of Personality and Social Psychology*, vol. 87, no. 6 (2004).

⁶²⁴ James B. Comey, “Hard Truths: Law Enforcement and Race” (speech delivered at Georgetown University, Washington, D.C., Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

⁶²⁵ Carey and Goode, “Police Try to Lower Racial Bias, but Under Pressure, It Isn't So Easy,” *supra* note 604.

⁶²⁶ E. Ashby Plant and B. Michelle Peruche, “The Consequences of Race for Police Officers' Responses to Criminal Suspects,” *Psychology Science*, vol. 16, no. 3 (2005).

⁶²⁷ *Ibid.*

harm) than young white men of the same size and weight; and thus, must be controlled using more aggressive measures.⁶²⁸ Other research suggests that black children, specifically, black boys, are perceived as older, less innocent, and therefore more responsible for their actions than their same-age, white peers. This research suggests that these biases lead to actual racial disparities in police violence towards children.⁶²⁹ Researchers have found similar results in the “adultification”⁶³⁰ of black girls as well. In a study by the Georgetown Law Center on Poverty and Inequality, researchers found that black girls are consistently viewed as “less innocent” and more “adult-like” than their similarly aged white female peers.⁶³¹ This perception can then contribute to “more punitive exercise of discretion by those in positions of authority, greater use of force, and harsher penalties.”⁶³² For instance, in Texas, video footage was released showing an officer kneeling on top of a 15-year-old black girl, pinning her to the ground.⁶³³ Many critical of the officer’s actions argue that this was an example of an officer choosing to apply more force than was potentially necessary due to the “adultification” of black girls.⁶³⁴ Zeba Bay wrote that the officer “did not think he was restraining a helpless teenaged girl, but a ‘black woman,’ with all the stereotypes and stigma that includes. This, it seems, was justification enough for her treatment.”⁶³⁵

Research shows that prejudice and discrimination are not necessarily due to holding explicit or overt racist views or racial animus. Rather, due to the historical legacy of racism, these ideas have become embedded in our institutions and society, and these ingrained ideas are practiced unconsciously in our minds and may be acted upon without malice. Eduardo Bonilla-Silva argues that this type of “color-blindness” emerged as the majority of the public began stigmatizing open and overt racism; and while racism may not be as explicit as it once was, prejudice and

⁶²⁸ John Wilson, Kurt Hugenberg, Nicholas Rule, “Racial bias in judgements of physical size and formidability: From size to threat,” *Journal of Personality and Social Psychology*, vol. 113, no. 1 (2017).

⁶²⁹ Phillip Atiba Goff, Matthew Jackson, Brook Lewis, Di Leone, Carmen Culotta, and Natalie DiTomasso, “The Essence of Innocence: Consequences of Dehumanizing Black Children,” *Journal of Personality and Social Psychology*, vol. 106, no. 4 (2014).

⁶³⁰ The term adultification refers to the “perception of black girls as less innocent and more adult-like than white girls of the same age—as well as its possible causal connection with negative outcomes across a diverse range of public systems, including education, juvenile justice, and child welfare.” See Rebecca Epstein, Jamilia Blake, and Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Center on Poverty and Inequality, Georgetown Law, 2012, at 1, <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf>.

⁶³¹ Ibid. at 1-2.

⁶³² Ibid. at 1.

⁶³³ Kristine Phillips, “Black teen who was slammed to the ground by a white cop at Texas pool party sues for \$5 million,” *Washington Post*, Jan. 5, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/01/05/black-teenager-who-was-slammed-to-the-ground-at-texas-pool-party-sues-ex-cop-city-for-5m/?utm_term=.8f0c9cbab905.

⁶³⁴ Ibid.; Zeba Blay, “For Black Women, Police Brutality and Sexual Harassment Go Hand in Hand,” *Huffington Post*, June 8, 2015, https://www.huffingtonpost.com/2015/06/08/black-women-police-brutality_n_7536896.html?ncid=fcblkushpmg00000047.

⁶³⁵ Ibid.

discrimination still exist in U.S. society.⁶³⁶ Daniel Ames, postdoctoral research fellow at UCLA, argues that these implicit biases, are in some ways more dangerous, because they are harder to identify, and thus harder to rectify.⁶³⁷

Research indicates that these biases can cause individuals to perceive similar facial expressions as more hostile on black faces compared to white faces or to interpret identical behaviors as more aggressive when performed by a black individual as opposed to a white individual.⁶³⁸ These implicit biases also help to explain the unconscious tendency of some police officers to associate black people with criminality.⁶³⁹ For instance, in a study testing implicit bias with 80 officers from Spokane, Washington, researchers found that 96 percent of the officers demonstrated racial bias.⁶⁴⁰ As one component of their study, they utilized the Harvard Implicit Association Test that is designed to detect racial bias by linking pictures of black and white faces with pictures of weapons. Results from this test showed that 78 percent of the officers strongly to moderately associated black people with weapons, and remarkably, 0 percent associated white people with weapons.⁶⁴¹ Moreover, numerous studies have found that these implicit biases can manifest themselves in increased stops and searches, use of force, and incarceration.⁶⁴²

Discussions about implicit bias can also be met with skepticism. Many critics argue that while individuals may carry unconscious prejudices, trying to test or prove these biases is difficult.⁶⁴³ Some critics argue that officers' actions do not reflect any internal implicit bias, and they treat all

⁶³⁶ Eduardo Bonilla-Silva, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (Lanham: Rowman & Littlefield Publishers, Inc., 2009).

⁶³⁷ John Blake, "The new threat: 'Racism without racists,'" *CNN*, Nov. 26, 2014, <http://www.cnn.com/2014/11/26/us/ferguson-racism-or-racial-bias/>.

⁶³⁸ L. Song Richardson and Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 121 (2014).

⁶³⁹ *Id.*

⁶⁴⁰ Lois James, Stephen James, and Bryan Vila, "The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black than White Suspects?" *Criminology & Public Policy*, vol. 15, no. 2 (2016) at 13.

⁶⁴¹ *Ibid.* at 14. It is worth noting that 96 percent of participants associated Black people with weapons. Four percent had little or no association between race and weapons. Conversely, as a separate component of the study, researchers found that participants took longer to shoot armed Black suspects than armed White suspects and were less likely to shoot Black suspects versus White suspects in the simulations.

⁶⁴² Lopez, "How systemic racism entangles all police officers—even black cops," *supra* note 159; Joshua Correll, Sean Hudson, Steffanie Guillermo, Debbie Ma, "The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot," *Social and Personality Psychology Compass*, vol. 8 (2014); Jessica Sim, Joshua Correll, Melody Sadler, "Understanding Police and Expert Performance," *Pers Soc Psychol Bull*, vol. 39 (2013) at 291-304; Gina Castle Bell, Mark Hopson, Richard Craig, and Nicholas Robinson, "Exploring Black and White Accounts of 21st-Century Racial Profiling: Riding and Driving While Black," *Qualitative Research Reports in Communication*, vol. 15, no. 1 (2014).

⁶⁴³ David French, "Implicit Bias Gets an Explicit Debunking," *National Review*, Jan. 10, 2017, <https://www.nationalreview.com/2017/01/implicit-bias-debunked-study-disputes-effects-unconscious-prejudice/>; Jesse Singal, "Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job," *The Cut*, Jan. 11, 2017, <https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html>.

civilians equally.⁶⁴⁴ While most implicit bias researchers are careful to state that these biases affect everyone, regardless of profession, many officers fear that they are being labeled as racists simply because they are being law enforcement.⁶⁴⁵ That would be unfair, but law enforcement also hold significant power over the fate of civilians they encounter and are thus subject to more constitutional limitations.⁶⁴⁶

Police alone are not the problem. Studies suggest that implicit biases may be a driving force in the disparities of force incidents between people of color and white civilians.⁶⁴⁷ Yet in the context of their public service, researchers identified concerns about implicit bias among police. For example, researchers found that:

[B]lack suspects are more likely to be brutalized than white suspects despite engaging in identical behaviors . . . [Thus] officers are more likely to believe that the use of force against a black suspect is both reasonable and necessary, even if they would not make the same judgment with a white suspect acting identically.⁶⁴⁸

Emily Baxter, Director of We Are All Criminals, testified at the Commission's Minnesota State Advisory Committee briefing in 2017 that she views implicit bias as "one of the greatest barriers" in building trust and legitimacy between law enforcement and communities.⁶⁴⁹ She testified that:

[Implicit bias] is the poison that permeates this state . . . It's in the squad car and in the courtroom, it's in the legislature and city council. It's in the soil and in the water. And like carbon monoxide, it's in the air and we're all breathing it in. It's what leads state representatives to use coded language to blame the victim, and officers to pull the trigger, release the dogs, or tackle or tase someone who doesn't look like them, doesn't remind them of their sons, their sisters, their elders, themselves. When we see someone as a threat, or as another, community relations are doomed. And interactions can be deadly.⁶⁵⁰

⁶⁴⁴ Heather Mac Donald, "Are We All Unconscious Racists?" *City Journal*, 2017, <https://www.city-journal.org/html/are-we-all-unconscious-racists-15487.html>.

⁶⁴⁵ Erin Healy Gallagher, John Kim, John Markovic and Deborah Spence, eds, *The State of Policing in the United States, Volume 1* (Washington, D.C.: Office of Community Oriented Policing Services, 2016).

⁶⁴⁶ See, e.g., U.S. CONST. amends. IV, VII, and XIV.

⁶⁴⁷ See, e.g., Lopez, "How systemic racism entangles all police officers—even black cops," *supra* note 159; Lopez, "Why police so often see unarmed black men as threats," *Vox*, Sept. 20, 2016, <https://www.vox.com/2014/8/28/6051971/police-implicit-bias-michael-brown-ferguson-missouri>; Goff, et al., "The Essence of Innocence: Consequences of Dehumanizing Black Children," *supra* note 629; Sim, et al., *supra* note 642; Correll, et al., "The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot," *supra* note 642.

⁶⁴⁸ Richardson and Goff, *Interrogating Racial Violence*, *supra* note 638 at 123.

⁶⁴⁹ Emily Baxter, Director, We Are All Criminals, *Minnesota Hearing Transcript* at 37.

⁶⁵⁰ *Ibid.* at 37-38.

Due to racial biases ingrained in U.S. society, it is hard to imagine that implicit bias training can alleviate them in all law enforcement. Preliminary research on implicit bias training suggests that even after officers go through training, unless it is regularly practiced and correctly learned, biases may eventually resurface, especially in high stress situations.⁶⁵¹ And, excessive use of force is most likely to occur in these high-stress encounters.⁶⁵² Dave Wilson, professor at the University of Delaware, argues that implicit biases are effectively automatic and in conditions where an officer may be “fatigued or hungry or exhausted or highly emotional, that’s when [implicit biases] are more likely to come to the forefront.”⁶⁵³

Other studies have suggested that instituting implicit bias training may not be effective at reducing actions based on biases.⁶⁵⁴ For instance, Wilson argues that:

Training is going to have short-term effects, but without rewards or punishments in place, then just attending a training as a condition of employment won’t have much effect. Implicit biases are like bad habits. You have to be aware of the habit. You have to have a desire to break the habit. You have to have a deep understanding of when, where and why the habit occurs. You have to have a set of tools that tell you to stop and think before you act. You can’t train away implicit biases, they are implicit. They are there.⁶⁵⁵

Therefore, the goal for law enforcement officials should be focused on trying to teach officers how to recognize their biases and not act on them, while holding them accountable for inappropriate actions, if they occur.

In June 2016, the Justice Department stated that as part of basic training, all federal law enforcement agents and prosecutors must go through implicit bias training to help them recognize

⁶⁵¹ Richardson and Goff, *Interrogating Racial Violence*, *supra* note 638; Elizabeth Chuck, “Can ‘Implicit Bias’ Training Stop Police Officers From Acting on Hidden Prejudice?” *NBC News*, Oct. 1, 2016, <http://www.nbcnews.com/news/us-news/can-implicit-bias-training-stop-police-officers-acting-hidden-prejudice-n656071>; David Blake, “Unpacking implicit bias in policing,” *PoliceOne.com*, Nov. 7, 2016, <https://www.policeone.com/patrol-issues/articles/239038006-Unpacking-implicit-bias-in-policing/>.

⁶⁵² Judith Andersen, Harri Gustafsberg, “A Training Method to Improve Police Use of Force Decision Making,” *Sage Open*, 2016, <http://journals.sagepub.com/doi/pdf/10.1177/2158244016638708>; Judith Andersen, Marian Pitel, Ashini Weerasinghe, Konstantinos Papazoglou, “Highly Realistic Scenario Based Training Simulates the Psychophysiology of Real World Use of Force Encounters: Implications for Improved Police Officer Performance,” *Journal of Law Enforcement*, vol. 5, no. 4, 2016.

⁶⁵³ Dave Wilson, Professor of Political Science and Psychology, University of Delaware, *Delaware Hearing Transcript* at 22.

⁶⁵⁴ See e.g., Chuck, “Can ‘Implicit Bias’ Training Stop Police Officers From Acting on Hidden Prejudice?” *supra* note 651; Correll, et al., “The Police Officer’s Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot,” *supra* note 642 at 201-13.

⁶⁵⁵ Wilson, *Delaware Hearing Transcript* at 24.

and address the issue.⁶⁵⁶ Advocates argue that this directive is a positive step, but it does not go far enough. According to these advocates, there needs to be an effort to create policies and procedures that protect civilians from possible biases (e.g., racial, ethnic, gendered, or sexual), rather than trying to “de-bias” leaders, decision-makers, and law enforcement.⁶⁵⁷

One study that has drawn a great deal of national attention is Roland Fryer’s 2016 National Bureau of Economic Research (NBER) working paper exploring if implicit bias could account for some of the racial disparities in police use of force cases.⁶⁵⁸ His study utilized four different data sets, but the data from the Houston police force has garnered the most attention.⁶⁵⁹ In this case, Fryer found no racial differences in officers’ decisions to “shoot” or “not shoot” in cases of fatal shootings.⁶⁶⁰ At the same time, Fryer did find significant differences in terms of non-lethal use of force. Black and Latino civilians were more than 50 percent more likely to experience some form of force (e.g., being pushed against a wall or onto the ground, being pepper sprayed or baton used, have a gun pointed at them) in interactions with police. Fryer found that black and Latino people are about 53 percent more likely to experience any police use of force compared to white people.⁶⁶¹

Additionally, Fryer found that even when officers report civilians followed orders, black people were still 21 percent more likely to endure some form of police use of force compared to white people exhibiting the same compliance behavior. Fryer argues that these disparities are significant, because the use of lethal force is much rarer in police-civilian interactions than non-lethal force.⁶⁶² Thus, in analyzing the type of force that is more prevalent, there were more significant racial differences. Fryer also points out that since lesser forms of force are rarely tracked or punished, these officers are not being held accountable and these behaviors are likely to continue. He concludes that “black civilians always have a higher likelihood of force being used on them compared to white civilians.”⁶⁶³ While this conclusion is important, several researchers have offered challenges to Fryer’s main finding that claimed there was no racial bias in fatal shootings.

⁶⁵⁶ U.S. Dep’t of Justice, Office of Public Affairs, “Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel,” June 27, 2016, <https://www.justice.gov/opa/pr/departments-justice-announces-new-department-wide-implicit-bias-training-personnel>.

⁶⁵⁷ Lopez, “Why police so often see unarmed black men as threats,” *supra* note 647; International Association of Chiefs of Police, U.S. Department of Justice, Office of Community Oriented Policing Services, *Bridging the Trust Gap Between Law Enforcement and Communities of Color*, 2014, <http://www.theiacp.org/CommunitiesOfColor>; James Copple and Patricia Dunn, *Gender, Sexuality, and 21st Century Policing: Protecting the Rights of the LGBTQ+ Community*, U.S. Dep’t of Justice, Office of Community Oriented Policing Services, 2017, at 11, <https://ric-zai-inc.com/Publications/cops-w0837-pub.pdf>.

⁶⁵⁸ Roland Fryer, “An empirical analysis of racial differences in the use of force,” NBER Working Paper 22399, National Bureau of Economic Research, revised in 2018, <http://www.nber.org/papers/w22399>.

⁶⁵⁹ *Ibid.* The Fryer study relied upon 4 different datasets—the New York City’s Stop and Frisk program, the Police-Public Contact Survey (PPCS), event summaries of officer-shootings in 10 U.S. cities, and data on interactions between civilians and police in Houston, Texas.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

Justin Feldman, doctoral candidate at Harvard University, analyzed the same dataset as Fryer from 2005 to 2015 and supplemented it with census data. In contrast to Fryer's finding that "there are no racial differences in officer-involved shootings,"⁶⁶⁴ Feldman found that black civilians were over five times as likely and Latino civilians were approximately two times as likely to be shot by police, compared to white people.⁶⁶⁵ Feldman argues that these vastly different results are due to Fryer examining whether racial differences were the result of "racial bias" or "statistical discrimination."⁶⁶⁶ And in terms of fatal police-shootings, Feldman argues that Fryer's utilizing a measure of statistical discrimination was inappropriate for this type of study.⁶⁶⁷ Joshua Miller, assistant professor at Bocconi University in Italy, also challenged Fryer's conclusions based on a potential in selection bias in the Houston data set.⁶⁶⁸ Miller argues that there was selection bias because there were more non-criminal black suspects in the researcher-defined "shoot or don't shoot" scenario. Since most officers (correctly) did not view these non-criminal black suspects as more dangerous than the criminal white suspects, lethal force was unlikely to be used in those cases. As a result, this lowered the overall average of police shooting black suspects in the experiment.⁶⁶⁹

Notwithstanding these challenges to Fryer's fatal shootings findings, his study does offer a helpful analysis about non-lethal use of force. He points out that there is the

possibility that racial differences in police non-lethal force have spillovers on myriad dimensions of racial inequality. If, for instance, blacks use their lived experience with police as evidence that the world is discriminatory, then it is easy to understand why black youth invest less in human capital or black adults are more

⁶⁶⁴ Ibid. at 4.

⁶⁶⁵ Justin Feldman, "Roland Fryer is wrong: There is racial bias in police shootings," July 12, 2016, <https://scholar.harvard.edu/jfeldman/blog/roland-fryer-wrong-there-racial-bias-shootings-police>.

⁶⁶⁶ Feldman argues that this distinction is significant because "statistical discrimination occurs when an individual or institution treats people differently based on racial stereotypes that 'truly' reflect the average behavior of a racial group. For instance, if a city's black drivers are 50% more likely to possess drugs than white drivers, and police officers are 50% more likely to pull over black drivers, economic theory would hold that this discriminatory policing is rational. If, however, police were to pull over black drivers at a rate that disproportionately exceeded their likelihood of drug possession that would be an irrational behavior representing individual or institutional bias." See Ibid.

⁶⁶⁷ Ibid. This method is often utilized to study traffic stops and stop-and-frisk incidents since these practices are based on police wanting to "maximize the number of arrests for the possession of contraband (such as drugs or weapons) while expending the fewest resources. If they are acting in the most cost-efficient, rational manner, the officers may use racial stereotypes to increase the arrest rate per stop."

⁶⁶⁸ Andrew Gelman, "About that claim that police are less likely to shoot blacks than whites," *Statistical Modeling, Causal Inference, and Social Science*, July 14, 2016, <http://andrewgelman.com/2016/07/14/about-that-claim-that-police-are-less-likely-to-shoot-blacks-than-whites/>; Uri Simonsohn, "Teenagers in Bikinis: Interpreting Police-Shooting Data," *Data Colada: Thinking about Evidence and Vice Versa*, July 14, 2016, <http://datacolada.org/50>.

⁶⁶⁹ Ibid.

likely to believe discrimination is an important determinant of economic outcomes.
Black Dignity Matters.⁶⁷⁰

A study by the Center for Policing Equity supports Fryer's finding that black civilians are more likely to experience non-lethal force used against them.⁶⁷¹ Investigating the average use-of-force rate by police officers over 12 geographically and demographically diverse locations, they found that force against black civilians was 3.6 times higher than towards white civilians, and 2.5 times higher than the overall rate for all residents. Among those arrested, 46 of every 1,000 black suspects reported experiencing excessive use of force compared to 36 of every 1,000 white suspects.⁶⁷²

Ron Davis, former head of the Justice Department's COPS office, stated that activists, law enforcement, and experts can continue to argue and attempt to prove if bias exist or does not, but determining that fact may not be significant to the person impacted or to their community.⁶⁷³ Davis stated: "from the community that's receiving it . . . it doesn't feel like a disparity. It feels like bias—it feels like racism."⁶⁷⁴ Retired Police Chief, Noble Wray of Wisconsin, discussed this tension between officers and communities and strategies on implementing better practices during a briefing on police practices the Commission's Delaware State Advisory Committee held in 2017:

When we are talking to officers, you know, we talk about how [implicit bias] can impact their daily work. How it can impact how they investigate, who they stop, who they search. We don't just focus on officers, command level, we talk to them as well. How much of a police presence can affect someone? Do they consider talking to community members? Because this is in a larger context.⁶⁷⁵

Those law enforcement experts and policing critics who find detrimental effects of implicit bias agree that these disparities cannot be overcome without effective community-oriented policing strategies. According to the National Initiative for Building Community Trust and Justice, "implicit bias focuses on how largely unconscious psychological processes can shape authorities' actions and lead to racially disparate outcomes even where actual racism is not present."⁶⁷⁶ Implicit biases are even more difficult to address than explicit racial biases because they can exist without individuals realizing that they hold negative beliefs.⁶⁷⁷ Thus, implicit bias training is meant to help

⁶⁷⁰ Fryer, "An Empirical Analysis of Racial Differences in Police Use of Force," *supra* note 658 at 36.

⁶⁷¹ Goff, et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12.

⁶⁷² *Ibid.*

⁶⁷³ Arthur, et al., "Shot by Cops and Forgotten," *supra* note 52.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ Chief Noble Wray, retired Police Chief of Madison, Wisconsin, *Delaware Hearing Transcript* at 37.

⁶⁷⁶ National Network for Safe Communities at John Jay College, "National Initiative for Building Community Trust & Justice," <https://nnscommunities.org/our-work/community-trust-initiative> (last accessed Nov. 3, 2018).

⁶⁷⁷ Phillip Atiba Goff, Karin Danielle Martin, Meredith Gamson Smiedt, *Protecting Equity: The Consortium for Police Leadership in Equity Report on the San Jose Police Department*, The Consortium for Police Leadership in Equity, 2016, http://policingequity.org/wp-content/uploads/2016/07/Final-San-Jose-Report.circ_.pdf.

train officers to recognize their subconscious prejudices and bias regarding factors such as race, gender, and/or sexuality.⁶⁷⁸ But some argue that this training is no guarantee against discriminatory policing practices.⁶⁷⁹

To help address these issues, Ezekiel R. Edwards, Director of the ACLU Criminal Law Reform Project, suggests that police departments should establish strict policies that prohibit law enforcement from profiling on the basis of race, ethnicity, national origin, sexual orientation, gender, and gender identity.⁶⁸⁰ Edwards adds that police departments should adopt the policies and procedures articulated in the End Racial Profiling Act.⁶⁸¹ Andrea Ritchie, Researcher-in-Residence at the Social Justice Institute of the Barnard Center for Research on Women, and Delores Jones-Brown, Professor at John Jay College of Criminal Justice, recommend training for all police officers on how to interact with members of various groups including women of color, children, pregnant women, and LGBT people.⁶⁸² In addition, PolicyLink suggests requiring training that builds officers' skills related to problem-solving strategies, conflict mediation techniques, and de-escalation tactics.⁶⁸³

Others believe that implicit bias training is valuable and should be mandatory. Michele Jawando, Vice President, and Chelsea Parsons, Vice President of Gun Violence Prevention from the Center for American Progress suggest augmenting training with implicit bias modules—particularly for any law enforcement officers involved in federal task forces.⁶⁸⁴ Jawando and Parsons believe that

⁶⁷⁸ Wray, *Delaware Hearing Transcript* at 55-56; Ben Feist, Legislative Director, ACLU of Minnesota, *Minnesota Hearing Transcript* at 88-89; James Stuart, Sheriff of Anoka County, *Minnesota Hearing Transcript* at 217.

⁶⁷⁹ Correll, et al., "The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot," *Social and Personality Psychology Compass*, *supra* note 642 at 201-13; Chuck, "Can 'Implicit Bias' Training Stop Police Officers From Acting on Hidden Prejudice?" *supra* note 651.

⁶⁸⁰ See Edwards Statement at 4.

⁶⁸¹ H.R. 1933, 114th Cong. (2015). Introduced in the U.S. House of Representatives on April 22, 2015, the legislation would have (a) prohibited any law enforcement agent or agency from engaging in racial profiling, (b) granted the United States or an individual injured by racial profiling the right to obtain declaratory or injunctive relief, (c) required federal law enforcement agencies to maintain adequate policies and procedures to eliminate racial profiling and to cease existing practices that permit racial profiling, (d) required state or local governmental entities or state, local, or tribal law enforcement agencies that apply for grants under the Edward Byrne Memorial Justice Assistance Grant Program and the Cops on the Beat Program to certify that they maintain adequate policies and procedures for eliminating racial profiling and have eliminated any existing practices that permit or encourage racial profiling, (e) authorized the Attorney General to award grants and contracts for the collection of data relating to racial profiling and for the development of best practices and systems to eliminate racial profiling and (f) required the Attorney General to issue regulations for the collection and compilation of data on racial profiling and for the Act's implementation. U.S. Representative Sheila Jackson Lee sponsored another version of the bill in the 2017-2018 session. See H.R. 1498, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/1498>.

⁶⁸² Andrea Ritchie and Delores Jones-Brown, "Policing Race, Gender, and Sex: A Review of Law Enforcement Policies," *Women & Criminal Justice*, vol. 27, no. 1 (2017).

⁶⁸³ Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, *supra* note 32 at 13-15.

⁶⁸⁴ Michele L. Jawando and Chelsea Parsons, "4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations," Center for American Progress, Dec. 18, 2014,

such training should seek to raise awareness about personally held biases and should be linked to federal criminal justice grants.⁶⁸⁵

At the Commission's briefing, James Chanin provided an example of how implicit bias training helped the Oakland Police Department address its problems with racial profiling and implicit bias training.⁶⁸⁶ Chanin stated that the Oakland Police Department retained the services of Jennifer Eberhardt from Stanford University to assist them with this particular aspect of their reform efforts.⁶⁸⁷ Eberhardt reviewed footage from body-worn cameras as a way to understand how officers could better interact with people of color to de-escalate potentially tense encounters.⁶⁸⁸ The footage exposed greater disparities in the stop and search rates of black and Latino people than other racial or ethnic groups, despite the fact that the police discovered no contraband.⁶⁸⁹ Similarly, Chief Wray stated that Dr. Eberhardt's study helped him understand how biases are universal and can get reinforced through the police work.⁶⁹⁰ Wray stated that:

[I]f you go to the same call in the same neighborhood over and over and over again, and even though you may logically think that [] young African American men are okay, you go to that call, it's going to reinforce something. And that's what a lot of times [] what you will see with police officers . . . I recognized that it's not just the white officers, because I would go to their trainings with both my arms open and say, Hey, this is for you guys . . . But it is something that we all have, but it's reinforced a lot of times by the work that we do.⁶⁹¹

Police Chief Jeff Hadley, of the Kalamazoo, Michigan Department of Public Safety, also commissioned a study of racial profiling in traffic stops by police in his city.⁶⁹² Similar to other studies conducted around the country, results showed disparate stops of black motorists.⁶⁹³ Hadley told PERF in its 2015 *Defining Moments of Police Chiefs* report that:

<https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>.

⁶⁸⁵ Ibid. However, overly-conditioning federal grants could pose problems under the U.S. system of federalism, unless it is necessary to enforce civil rights law; See Order Granting Motion for Summary Judgement, *Santa Clara v. Trump* and *San Francisco v. Trump*, Nos. 17-CV-00574 and 17-CV-00485 (N.D. Cal. 2017) (federal government may not condition criminal justice grants on matters outside its jurisdiction); Order Denying Defendants' Motion to Dismiss, *Santa Clara and San Francisco v. Trump*, No. 17-CV-04642 (N.D. Cal. 2018).

⁶⁸⁶ See Chanin Statement at 11.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid.

⁶⁸⁹ Ibid.

⁶⁹⁰ Wray, *Delaware Hearing Transcript* at 55-56.

⁶⁹¹ Ibid.

⁶⁹² John Lamberth, *Traffic Stop Data Analysis Project: The City of Kalamazoo Department of Public Safety*, Final Report for the City of Kalamazoo Department of Public Safety, 2013, http://media.mlive.com/kzgazette_impact/other/KDPS%20Racial%20Profiling%20Study.pdf.

⁶⁹³ David Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU Special Report, 1999; Gina Castle Bell, Mark Hopson, Richard Craig, and Nicholas Robinson, "Exploring Black and White Accounts of

[T]he officers initially were unhappy. They felt that I had hung them out to dry, and that people were pointing at them and calling them racist. No one was doing that, but that is how they felt.⁶⁹⁴

As a result, Hadley decided to have his entire department go through implicit bias training with the hope to increase officer morale. Hadley stated that he wanted to learn “how our minds work and what we all can do to understand and manage our human biases.”⁶⁹⁵

At the time of this report, no studies have been conducted to see if implicit bias training has aided in permanently eliminating bias, yet research has suggested that it may be possible to address and reduce implicit bias through proper training and policy interventions.⁶⁹⁶ When surveyed, many officers have indicated training helped them with bias in written evaluations about the trainings offered in their precincts.⁶⁹⁷ Calvin Lai, a postdoctoral researcher at Harvard University, argues that while there are several interventions that have been shown to be effective in reducing bias in the short-term, often the effects disappear over time.⁶⁹⁸ Lai argues that since it is difficult to control implicit bias in real-world and often stressful situations, examining broader social interventions may be beneficial. “Rather than trying to change people at the individual level, we can think about trying to restructure the way that people make decisions.”⁶⁹⁹

De-escalation Training

De-escalation training is recognized by a number of experts as an important tool for mitigating or replacing the need for using force. The National Association for Civilian Oversight of Law Enforcement recognizes de-escalation training as a current best practice in use of force management. They have called for

police use of force management systems to include a heavy emphasis on de-escalation training and policies that increase officer safety, mitigate the overall need

21st-Century Racial Profiling: Riding and Driving While Black,” *Qualitative Research Reports in Communication*, vol. 15, no. 1 (2014); Richard Lundman and Robert Kaufman, “Driving While Black: Effects of Race, Ethnicity, and Gender on Citizen Self-Reports of Traffic Stops and Police Actions,” *Criminology*, vol. 41, no. 1 (2003).

⁶⁹⁴ Police Executive Research Forum, *Critical Issues in Policing Series: Defining Moments for Police Chiefs*, 2015, at 36-37, <http://www.policeforum.org/assets/definingmoments.pdf>.

⁶⁹⁵ Ibid.

⁶⁹⁶ National Network for Safe Communities at John Jay College, “National Initiative for Building Community Trust & Justice, Implicit Bias,” <https://trustandjustice.org/resources/intervention/implicit-bias> (last accessed Nov. 3, 2018).

⁶⁹⁷ Carey and Goode, “Police Try to Lower Racial Bias, but Under Pressure, It Isn’t So Easy,” *supra* note 604.

⁶⁹⁸ Adam Hoffman, “Can Science Help People Unlearn Their Unconscious Bias?” *Smithsonian Magazine*, July 2, 2015, <https://www.smithsonianmag.com/science-nature/can-science-help-people-unlearn-their-unconscious-biases-180955789/>.

⁶⁹⁹ Ibid.

to use force, and reduce the number of violent encounters between police and the public.⁷⁰⁰

However, most states (34) do not require de-escalation training for all officers. Even in the states that do require de-escalation training, the statewide required hours can range from no minimum requirement to three hours every three years up to four hours every year, with some localities requiring more hours.⁷⁰¹

De-escalation training focuses on trying to slow down actions before they escalate into a situation where an officer may feel that force is necessary. Fatal police shootings often unfold quickly: for instance, the shots that killed Derry Touchtone in Georgia were fired just 35 seconds after the officer's arrival; for Michael Brown in Ferguson, it was two minutes; and for 12-year-old Tamir Rice in Cleveland, it was just two seconds.⁷⁰² De-escalation techniques are meant to train officers not to automatically respond in tense situations that may lead them to act on subconscious biases and resort to using unnecessary force.⁷⁰³ At the Commission's briefing, David Klinger, Professor of Criminology and Criminal Justice at University of Missouri, argued that all law enforcement should get the appropriate tactical training that teaches them how to create distance, time and space, and how to interact with people.⁷⁰⁴ He stated that with more distance between the officer and suspect, there is less personal involvement which potentially ensure the safety of both individuals.⁷⁰⁵

In high-stress situations, emotions may get out of hand and individuals may be unable to think clearly. As a consequence, like others, police officers may act in ways that could cause them or others harm. De-escalation trainers suggest that rather than running into a situation and making split-second decisions, officers should approach a suspect calmly, try to build rapport, and have a strategy already planned out with their partner.⁷⁰⁶ Trainers teach them that only one officer should speak to a suspect—rather than multiple officers shouting directives—to avoid confusion about which directives to follow.⁷⁰⁷

⁷⁰⁰ See NACOLE Statement at 8.

⁷⁰¹ Curtis Gilbert, "Not Trained to Not Kill," *American Public Media Reports*, May 5, 2017, <http://www.apmreports.org/story/2017/05/05/police-de-escalation-training>.

⁷⁰² Ibid.

⁷⁰³ Dart, "'Verbal Judo': the police tactic that teaches cops to talk before they shoot," *supra* note 604; Drake Baer, "The Dallas Police Force Is Evidence that 'De-escalation' Policing Works," *The Cut*, July 8, 2016, <https://www.thecut.com/2016/07/deescalation-policing-works.html>; Police Executive Research Forum, *An Integrated Approach to De-Escalation and Minimizing Use of Force*, Critical Issues in Policing Series, 2012, http://samuelwalker.net/wp-content/uploads/2014/12/PERF-De-Escalation_v5.pdf.

⁷⁰⁴ Klinger, *Briefing Transcript* at 333.

⁷⁰⁵ Ibid.

⁷⁰⁶ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28; Police Executive Research Forum, *An Integrated Approach to De-Escalation and Minimizing Use of Force*, *supra* note 703.

⁷⁰⁷ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28; Naomi Martin, "Dallas police excessive-force complaints drop dramatically," *Dallas News*, Nov. 16, 2015, <https://www.dallasnews.com/news/crime/2015/11/16/dallas-police-excessive-force-complaints-drop-dramatically>.

Throughout much of the policing profession, there is a growing recognition that while force *could* be used, it does not mean it should be used.⁷⁰⁸ Washington, D.C.'s Police Chief Cathy Lanier posits that "[t]he question is not, 'can you use deadly force?' The question is: 'did you *absolutely have to* use deadly force?'"⁷⁰⁹ Highlighting this point, Lanier explains that police training should focus on what steps could be taken to reduce perceived need for use of force. Lanier questions the usefulness of the 21-foot rule being taught as a strategy to de-escalate a situation that could lead to a fatal encounter.⁷¹⁰ The 21-foot rule is a common training technique that instructs officers to remain at least 21 feet away from a suspect armed with an edged weapon (e.g., a knife) when their gun is still holstered.⁷¹¹ The "rule" states that an individual poses a potential danger to an officer once they move into that 21-foot boundary.⁷¹² Chief Lanier argues that many shootings involve people with mental health needs who may be armed with a knife and who are 30 feet away; and instead of the on-scene officers taking cover and waiting for backup, the officers approach, entering the 21-foot limit, and shoot. And when investigated they say: "[w]ell, we were justified in shooting; the person was within 21 feet and had an edged weapon."⁷¹³ Lanier argues that the mentality that this type of behavior is justified needs to change within police departments in order to reduce these incidents. Mapping Police Violence found that in 69 percent of cases where an individual was armed with a knife, police did not attempt to disarm them or de-escalate the situation before using deadly force.⁷¹⁴

Lanier and other law enforcement officials argue that the overall training and mindset of officers needs to change for reform to happen. Law enforcement officials suggest that the analysis after a fatal shooting should not focus solely on the moment when deadly force was used.⁷¹⁵ Rather, Lanier adds that:

You start from the beginning and look at each and every decision the officer made prior to using force. And you ask: Where was the first decision that went wrong that led to having to use force later?"⁷¹⁶

⁷⁰⁸ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 17 (emphasis in original).

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid.*

⁷¹¹ See Nancy Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L.J. 5 (2015). Marcus argues that some police trainings fail to instruct law enforcement officers clearly about the constitutional boundaries of permissible police force, and it is even possible that some have done so intentionally, for plausible deniability purposes.

⁷¹² Police Executive Research Forum, *An Integrated Approach to De-Escalation and Minimizing Use of Force*, *supra* note 703 at 14.

⁷¹³ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 17.

⁷¹⁴ Mapping Police Violence, "2017 Police Violence Report," <https://policeviolencereport.org/> (last accessed Nov. 3, 2018).

⁷¹⁵ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁷¹⁶ *Ibid.*

Thus, the idea is to train officers to avoid placing themselves in a situation that is potentially dangerous and where their firearm may be the only option. For instance, the Washington, D.C. police department has updated its rules for using deadly force and its mission statement, and for the first time has “incorporate[ed] the phrase ‘sanctity of life.’”⁷¹⁷ This suggests the beginning of a cultural shift in the way officers think about and are trained to handle encounters with civilians. Instead of solely focusing on if the officer felt justified in pulling his or her gun on a suspect, officials are beginning to question if the situation—where excessive force felt unavoidable—was preventable in the first place.

Police have not only come under scrutiny for how they handle incidents with individuals, but also when dealing with mass demonstrations.⁷¹⁸ The Task Force recommends national standards for policing mass demonstrations that employ a continuum of managed tactical responses.⁷¹⁹ These standards are designed to minimize the appearance of a military-like operation, and to avoid using provocative tactics and equipment that undermine civilian trust.⁷²⁰ Montague Simmons recommends conflict resolution training so police officers know how to de-escalate situations rather than deploying some level of force in order to control crowds and individuals.⁷²¹ Some recommended de-escalation strategies from Advancement Project and PolicyLink are as follows:

- Officers shall use advisements, warnings, and verbal persuasion, when possible, before resorting to force.
- Force shall be de-escalated immediately as resistance decreases.
- When feasible, officers will use disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements, and/or calling in specialized units, in order to reduce the need for force and increase officer and civilian safety.
- Officers shall allow individuals time to submit to arrest before force is used whenever possible
- Police departments shall explicitly prohibit neck holds, except where lethal force is authorized.

⁷¹⁷ Peter Hermann, “A Post reporter went to a D.C. police use-of-force training exercise. Here’s what he learned,” *Washington Post*, Dec. 15, 2017, https://www.washingtonpost.com/news/true-crime/wp/2017/12/15/a-post-reporter-went-to-a-d-c-police-use-of-force-training-exercise-heres-what-he-learned/?utm_term=.f762c62732a7.

⁷¹⁸ Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, *supra* note 32; Ben Kesling and Dan Frosch, “Justice Department Faults Police Response to Ferguson Unrest,” *The Wall Street Journal*, Sept. 3, 2015, <https://www.wsj.com/articles/justice-department-faults-police-response-to-ferguson-unrest-1441300481>; Tony Narr, Jessica Toliver, Jerry Murphy, Malcolm McFarland, Joshua Ederheimer, *Police Management of Mass Demonstrations: Identifying Issues and Successful Approaches*, Police Executive Research Forum, 2006, http://www.policeforum.org/assets/docs/Critical_Issues_Series/police%20management%20of%20mass%20demonstrations%20-%20identifying%20issues%20and%20successful%20approaches%202006.pdf.

⁷¹⁹ The President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, *supra* note 9 at 25.

⁷²⁰ *Ibid.*

⁷²¹ Simmons, *Briefing Transcript* at 30.

- Police departments shall explicitly prohibit head strikes with a hard object, except where lethal force is authorized.
- Police departments shall explicitly prohibit using force against persons in handcuffs, except as objectively reasonable to prevent imminent bodily harm to the officer or another person or persons, or, as objectively reasonable, where physical removal is necessary to overcome passive resistance.
- Un-holstering a firearm and pointing it at a person constitutes a use of force, and shall accordingly be done only as objectively reasonable to accomplish a lawful police objective.
- Officers shall not use force to attempt to effect compliance with a command that is unlawful. Any use of force by an officer to subdue an individual resisting arrest or detention is unreasonable when the initial arrest or detention of the individual was unlawful.⁷²²

Many law enforcement experts agree that training that includes more emphasis on de-escalation techniques is a positive direction in police reform.⁷²³ Some police departments have demonstrated that de-escalation can indeed work to make neighborhoods safer, reduce civilian complaints, and keep officers safe.⁷²⁴ Because every police engagement is unique, it is hard to definitively measure the effectiveness of de-escalation training. Although there are no studies that conclusively show de-escalation training lowers the likelihood of an officer's use of force, there is some evidence that suggests it can help:

- A 2014 study analyzed the use of force at six policing agencies in Georgia. Officers trained in crisis intervention techniques were more likely to verbally engage mentally ill people during interactions. The trained officers were also more likely to call for mental health transport rather than simply arresting the individuals.⁷²⁵
- In 2009, prior to the implementation of de-escalation training, the Dallas Police Department received 147 excessive force complaints.⁷²⁶ In 2014, there were only 53, and by 2016, the number of excessive force complaints had dropped to 21.⁷²⁷
- Excessive force complaints have also fallen in other major U.S. cities that have implemented de-escalation training and/or policies.⁷²⁸

Advancement Project and PolicyLink, *Limiting Police Use of Force: Promising Community-Centered Strategies*, *supra* note 32 at 11.

⁷²³ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 3; Stoughton, "How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt," *supra* note 604.

⁷²⁴ *Ibid.*

⁷²⁵ Gilbert, "Not Trained to Not Kill," *supra* note 701.

⁷²⁶ Drake Baer, "The Dallas Police Force Is Evidence That 'De-escalation' Policing Works," *Science of Us*, July 8, 2016, <http://nymag.com/scienceofus/2016/07/deescalation-policing-works.html>.

⁷²⁷ Dallas Police Department, "Response to Resistance," <http://www.dallaspolice.net/reports/Pages/response-resistance.aspx> (last accessed Nov. 3, 2018).

⁷²⁸ Baer, "The Dallas Police Force Is Evidence That 'De-escalation' Policing Works," *supra* note 726.

Other cities where de-escalation techniques seem to be making positive strides are Richmond, California; Las Vegas, Nevada; Seattle, Washington; and New York City.⁷²⁹ For example, Richmond has witnessed a significant decrease in use of force (both lethal and non-lethal) without seeing an increase in officer fatalities.⁷³⁰ The Las Vegas Metropolitan Police Department has also taken direct steps by adopting a policy stating that “the department respects the value of every human life, and the application of deadly force is a measure to be employed in the most extreme circumstances.”⁷³¹ Working with The Center for Policing Equity, the police department found that many of their use of force cases were occurring following foot chases. Thus, they implemented a new rule stating that the officer chasing a suspect on foot is not allowed to touch the suspect once they are apprehended.⁷³² After the new rules were instituted in 2012, the department saw about a 10 percent decrease in use of force in 2013, dropping from roughly 1,000 instances to about 900.⁷³³ The decline meant there were 100 fewer chances for someone to get hurt or killed. Similarly, in Dallas, Texas, the police department began implementing de-escalation training and policies as early as 2010.⁷³⁴ The available data show a significant decline in the number of officer injuries and a smaller decline in civilian injuries since de-escalation training began in Dallas.⁷³⁵

However, some police officers and law enforcement officials have cited concerns that the hesitation these techniques require may cost officers their lives, and a common motto among officers is: “complacency kills.”⁷³⁶ Seth Stoughton, a retired officer and now a professor of law who researches policing, has written that traditionally, training has emphasized officer safety above all else, and new recruits are taught that the “first rule of law enforcement” is “to go home at the end of their shift.”⁷³⁷ On the surface, this message is not problematic, due to obvious safety reasons for both law enforcement and the communities they serve. However, Stoughton argues that it is problematic when officers are taught that every encounter and every individual is a

⁷²⁹ Stoughton, “How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt,” *supra* note 604; Timothy Williams, “Long Taught to Use Force, Police Warily Learn to De-escalate,” *New York Times*, June 28, 2015, https://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html?_r=0.

⁷³⁰ Stoughton, “How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt,” *supra* note 604.

⁷³¹ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁷³² Phillip Atiba Goff and Karin Danielle Martin, *Unity Breeds Fairness: The Consortium for Police Leadership in Equity Report on the Las Vegas Metropolitan Police Department*, The Consortium for Police Leadership in Equity, 2013; Marcus Woo, “How Science is Helping America Tackle Police Racism,” *Wired*, Jan. 21, 2015, <https://www.wired.com/2015/01/implicit-bias-police-racism-science/>.

⁷³³ *Ibid.*

⁷³⁴ Dallas Police Department, *Response to Resistance*, <http://www.dallaspolice.net/reports/Pages/response-resistance.aspx>.

⁷³⁵ *Ibid.* Police/Civilian Injuries: 487/789 (2013), 436/1006 (2014), 215/560 (2015), 234/629 (2016) (data provided on website through Dallas Police Departments’ “Explore the Data” summaries).

⁷³⁶ Stoughton, “How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt,” *supra* note 604.

⁷³⁷ *Ibid.*

potential threat.⁷³⁸ When exaggerated or imbalanced, these messages can over-emphasize the possibility of threat and danger, as opposed to focusing on how best to protect communities.⁷³⁹ Stoughton explains that these messages are not just verbally explained to new officers, they are also

shown painfully vivid, heart-wrenching dash-cam footage of officers being beaten, disarmed, or gunned down after a moment of inattention or hesitation. They are told that the primary culprit isn't the felon on the video, it's the officer's lack of vigilance.⁷⁴⁰

Retired officer Stoughton argues that such messages of “hesitation can be fatal” or “complacency kills” are consistently reinforced throughout an officer’s training, and he believes that police are therefore taught to shoot before a threat is fully analyzed.⁷⁴¹ He argues that a common phrase among officers sums up this mentality: “Better to be judged by twelve than carried by six.”⁷⁴² Therefore, he argues that when a shooting happens, it is often not because an officer is angry, frustrated, or biased; instead, “they shoot because they are afraid.”⁷⁴³ Police reform experts argue that this type of formal training and informal conversations that highlight, exacerbate, and perpetuate fear increase the likelihood that an officer may use excessive force.⁷⁴⁴ And rather than focus on fear, training and changing officers’ cultural norms could counter and possibly reduce fear, while teaching officers how to effectively manage it and operate around it, instead of acting on it.⁷⁴⁵

The Justice Department’s Guide to Critical Issues in Policing notes that due to the proliferation of guns in the United States, law enforcement agencies have unique challenges in responding to incidents involving civilians armed with firearms.⁷⁴⁶ The DOJ report does not directly address gun control, but it does suggest that law enforcement officials could look to other countries that have

⁷³⁸ Ibid.

⁷³⁹ These are often cited as the “warrior” versus “guardian” training techniques. *See e.g.*, Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.; *see also* Williams, “Long Taught to Use Force, Police Warily Learn to De-escalate,” *supra* note 729.

⁷⁴² Stoughton, “How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt,” *supra* note 604.

⁷⁴³ Ibid.

⁷⁴⁴ Ibid.

⁷⁴⁵ Ibid.; *See e.g.*, Redditt Hudson, “I’m a black ex-cop, and this is the real truth about race and policing,” *Vox*, July 7, 2016, <https://www.vox.com/2015/5/28/8661977/race-police-officer>; German Lopez, “An ex-cop from Arizona was acquitted for shooting an unarmed, sobbing man,” *Vox*, Dec. 8, 2017, <https://www.vox.com/policy-and-politics/2017/12/8/16752914/police-arizona-philip-brailsford-daniel-shaver>; Roz Edwards, “Watch Police Diffuse Gun-Toting White Man Peacefully Even After Stand Off!” *Chicago Defender*, Sept. 5, 2014, <https://chicagodefender.com/2014/09/05/watch-police-diffuse-gun-toting-white-man-peacefully-even-after-stand-off/>.

⁷⁴⁶ U.S. Dep’t of Justice, *Guide to Critical Issues in Policing*, Community Relations Toolkit for Policing, 2018 at 2, <https://www.justice.gov/crs/file/836416/download>.

been successful in handling encounters with mentally ill persons or others who are behaving dangerously but are only armed with knives, rocks, or similar weapons.⁷⁴⁷ For instance, police in the United Kingdom have had remarkable success at resolving such encounters without resorting to using firearms and utilizing strategies that begin at not using force—such as communication strategies—and then gradually increase as the situation warrants it.⁷⁴⁸ Despite having similar rates of knife attacks against police officers, in all but four cases in 2017, officers in the UK handled the situation without resorting to the use of firearms.⁷⁴⁹ For example, the Assistant Police Constable of the Scotland police said at the PERF conference that:

We've shot two or three people in the last 10 years. The last police shooting was three and a half years ago. To put it in some context, we have 1.8 million emergency calls a year.⁷⁵⁰

It is understandable that police officers are concerned for their safety, because law enforcement officers face many risks. According to data collected by the FBI, over the past decade

an average of 51 officers were feloniously killed in the line of duty . . . and an average of 57,000 officers were assaulted every year (about 25 percent of those assaults resulted in physical injuries).⁷⁵¹

However, in terms of percentages

officers were assaulted in about 0.09 percent of all interactions, were injured in 0.02 percent of interactions, and were feloniously killed in 0.00008 percent of interactions.⁷⁵²

In comparison, in one study, researchers found that officers killed or injured an estimated 55,400 civilians in 2012.⁷⁵³ On average, an estimated 1 in 291 stops and arrests resulted in hospital-treated

⁷⁴⁷ Ibid.

⁷⁴⁸ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁷⁴⁹ Mapping Police Violence, “2017 Police Violence Report,” <https://policeviolencereport.org/> (last accessed Nov. 3, 2018).

⁷⁵⁰ Ibid. The DOJ report notes that a key element in the UK response is a tool called the “National Decision Model” (NDM) which helps officers “make logical, well-informed decisions about many things, including how they respond to incidents involving mentally ill persons with knives, screwdrivers, rocks, or similar weapons.” See U.S. Dep’t of Justice, *Guide to Critical Issues in Policing*, *supra* note 746.

⁷⁵¹ Stoughton, “How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt,” *supra* note 604; FBI: Uniform Crime Reporting, “2013: Law Enforcement Officers Killed & Assaulted,” https://ucr.fbi.gov/leoka/2013/officers-feloniously-killed/felonious_topic_page_-2013 (last accessed Nov. 3, 2018).

⁷⁵² Stoughton, “How Police Training Contributes to Avoidable Deaths: To save lives, cops must be taught to think beyond the gun belt,” *supra* note 604.

⁷⁵³ It is significant to note that deaths from legal police intervention are under-identified or undercounted in U.S. Vital Statistics, FBI Supplemental Homicide Reports, and Bureau of Justice Statistics Arrest-Related Deaths data;

injury or death of a suspect or bystander, a ratio of 34 per 10,000 stops and arrests. Consistent with other studies, black, Latino and Native Americans were subject to higher stop and arrest rates than white and Asian Americans.⁷⁵⁴ And the Police Public Contact Surveys (PPCS)⁷⁵⁵ found that black people are more likely than white or Latino people to experience physical force during a police stop.⁷⁵⁶ These statistics contextualize the realities that policing is inherently risky and does not minimize the very real risks that both officers and civilians face. Thus, efforts to improve knowledge about and train officers to be responsive to best practices to preserve life have material benefits to police and communities.

Hypermasculinity

Another crucial component to the excessive use of force problem is the approach to policing that centers on the idea of unquestioned authority. Researchers suggest that excessive use of force may stem from perceived societal expectations regarding masculinity.⁷⁵⁷ Research indicates that ongoing manifestation in society of support for “hypermasculinity”⁷⁵⁸ privileges men holding a socially dominant status over women and children—leaving men to persistently “prove” their

these data sources capture approximately 46-49 percent of these fatalities. Therefore, this study primarily utilized the *Guardian* data and information from the *Washington Post*. See Ted Miller, Bruce Lawrence, Nancy Carlson, Delia Hendrie, Sean Randall, Ian Rockett, and Rebecca Spicer, “Perils of police action: a cautionary tale from US data sets,” *Injury Prevention*, vol. 23 (2016) at 27-32.

⁷⁵⁴ Ibid. In addition, incidents of perceived racial profiling of Asian Americans were also reported to the Commission’s Minnesota State Advisory Committee. See Jon Vang, *Minnesota Hearing Transcript* at 368-70. Jon Vang recounted how he was pulled over by Minneapolis police in what he perceived to be an unjustified stop, at which point the officer informed Vang that he had a criminal record and therefore the officer needed to search the car. According to Vang, the officer found a salt packet, and Vang was arrested for narcotics possession, and only after taking him “all the way to jail,” did the officers release him. Ibid. at 370. See also Linda Herman, Asian Americans Organizing Project, *Minnesota Hearing Transcript* at 363-65. As Linda Herman, the executive director of Asian Americans Organizing Project in Minneapolis, testified, language barriers exacerbate interactions between Asian-Americans and police. For example, Herman relayed a story “one of the residents” she had surveyed told her, where officers drew their firearms against an older Asian man when he failed to comply with their instructions, despite the “plea from [his son] explaining that his father did not speak English.” Ibid. at 364-65.

⁷⁵⁵ The PPCS provides detailed information on the characteristics of persons who had some type of contact with police during the year, including those who contacted the police to report a crime or were pulled over in a traffic stop. The PPCS interviews a nationally representative sample of residents age 16 or older as a supplement to the National Crime Victimization Survey.

⁷⁵⁶ Shelley Hyland, Lynn Langton, and Elizabeth Davis, *Police Use of Nonfatal Force, 2002-11*, U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2015, <https://www.bjs.gov/content/pub/pdf/punf0211.pdf>. This may be in part to lack of fulsome data regarding Latinos. See, e.g., Zuleyka Latigua-Williams, “Criminal Justice is Becoming a ‘Latino Issue,’ Yet There Is Still Much More We Don’t Know About Latinos and the Criminal Justice System,” *The Atlantic*, Sept. 26, 2016, <https://www.theatlantic.com/politics/archive/2016/09/why-criminal-justice-is-becoming-a-latino-issue/500864/> (most data about policing are limited to analyses of blacks and whites).

⁷⁵⁷ Goff, et al., *Protecting Equity: The Consortium for Police Leadership in Equity Report on the San Jose Police Department*, *supra* note 677 at 3-4.

⁷⁵⁸ R.W. Connell, *Masculinities*, 2nd ed. (Berkeley: University of California Press, 2005).

manhood to other men.⁷⁵⁹ Moreover, some social scientists argue that many men perceive manhood “not as a developmental guarantee, but as a status that must be earned . . . [And] once manhood status is earned, it can be lost relatively easily.”⁷⁶⁰ Therefore, due to the anxiety of losing one’s manhood and the importance of an unquestioned masculine identity, threats to this sense of oneself as a “man” in society are a frequent (albeit often subconscious) threat to men.⁷⁶¹

Some evidence shows that this normative organization of society influences law enforcement as follows: at least a portion of law enforcement officers (who are over 86 percent male)⁷⁶² expect their orders not to be challenged and to be in control of all situations.⁷⁶³ Researchers have found that because manhood and masculinity are seen as precarious, challenges to masculine identity produce anxiety, which may then compel some to demonstrate their manhood through forceful action.⁷⁶⁴ Due to feeling like their masculinity and authority are in question, this mindset can lead some police to react negatively (and excessively) towards a civilian when confronted.⁷⁶⁵ Such encounters can then quickly escalate a situation, making it more unsafe for everyone. Ron Martinelli, a retired police detective who has been teaching de-escalation techniques since the Rodney King incident in Los Angeles in 1991,⁷⁶⁶ also warns against this perspective and argues

⁷⁵⁹ Frank Rudy Cooper, “Who’s The Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009); see also Tim Carrigan, Bob Connell, and John Lee, “Towards a New Sociology of Masculinity,” *Theory and Society*, vol. 14, no. 5 (1985) at 551-604; Connell, *Masculinities*, *supra* note 758.

⁷⁶⁰ Jonathan Weaver, Joseph Vandello, Jennifer Bosson, and Rochelle Burnaford, “The Proof is in the Punch: Gender Differences in Perceptions of Action and Aggression as Components of Manhood,” *Sex Roles* vol. 62 (2010).

⁷⁶¹ *Ibid.*

⁷⁶² Data USA, “Police Officers,” <https://datausa.io/profile/soc/333050/#demographics> (last accessed Nov. 3, 2018).

⁷⁶³ Sunil Dutta, “I’m a cop. If you don’t want to get hurt, don’t challenge me,” *Washington Post*, Aug. 19, 2014, https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/?utm_term=.ff29e2695cc5; D.K., “Policing in America: What the cops say” *Economist*, April 27, 2015, <https://www.economist.com/blogs/democracyinamerica/2015/04/policing-america>.

⁷⁶⁴ Joseph A. Vandello, Jennifer Bosson, Dov Cohen, Rochelle Burnaford, and Jonathan Weaver, “Precarious Manhood” *Journal of Personal and Social Psychology*, vol. 95, no. 6, (2008). When masculinity is challenged or considered threatened, men often respond with physical aggression because it is a cultural script that demonstrates, reinforces, and restores manhood. This does not necessarily mean that all men will behave in this fashion or utilize this cultural script, thus this response to a challenged identity should not be seen as inevitable. There are multiple masculinities that operate within society and have varying levels of dominance and power, depending on other social identities at play (e.g., race, ethnicity, sexuality). See R.W. Connell and James Messerschmidt, “Hegemonic Masculinity: Rethinking the Concept,” *Gender and Society*, vol. 19, no. 829, (2005); Jonathan Weaver, Joseph Vandello, Jennifer Bosson, and Rochelle Burnaford et al., “The Proof is in the Punch: Gender Differences in Perceptions of Action and Aggression as Components of Manhood,” *Sex Roles* 62, 2010 *supra* note 760.

⁷⁶⁵ Goff, et al., *Protecting Equity: The Consortium for Police Leadership in Equity Report on the San Jose Police Department*, *supra* note 677.

⁷⁶⁶ In 1991, videos of Los Angeles police officers brutally and excessively beating Rodney King, who is African American, swept the city and the nation. See, e.g., Chelsea Matiash and Lily Rothman, “Beating That Changed America: What Happened to Rodney King 25 Years Ago,” *TIME*, March 3, 2016, <http://time.com/4245175/rodney-king-la-riots-anniversary/>. The acquittal of the officers led to riots and protests, and the DOJ later identified a pattern and practice of racially discriminatory and excessive use of force, along with ongoing corruption, in the Los Angeles police department. In 2001, the Los Angeles Police Department entered into a consent decree to resolve these issues

“that officers need to throw away any macho beliefs that they always have to triumph over the subject[.]”⁷⁶⁷

Researchers have also found that the need to prove one’s masculinity can often take the form of harassing gay men (who are seen as a type of subjugated masculinity)⁷⁶⁸ and through the subordination and harassment of women.⁷⁶⁹ Angela Harris, Professor of Law at UC Davis, argues that excessive force and police brutality are forms of gendered violence, as they are mechanisms for officers to express their masculine identity.⁷⁷⁰ She argues that officers working in high-crime and impoverished areas may begin to see themselves as enforcers of the law in a “community of savages.”⁷⁷¹

Similarly, Frank Rudy Cooper, Professor of Law at Suffolk University, argues that another way that hypermasculinity and racial violence converge manifests in the context of racial profiling.⁷⁷² He posits that male police officers will often stage masculinity contests when a male suspect is seen as being disrespectful.⁷⁷³ Cooper argues that there becomes a “face-off between men where one party is able to bolster his masculine esteem by dominating the other.”⁷⁷⁴ And critically, since hegemonic masculinity also “incorporates an expectation that one denigrates [] racial minority males,”⁷⁷⁵ racial profiling allows officers to boost and solidify both their racial and masculine identity.⁷⁷⁶

Moreover, male police officers are not the only ones who use excessive force against civilians. The cultural mindset of unquestioned authority and institutional racism that is found in many

through “dozens of reform measures,” including frequent audits. *See, e.g.*, Joel Rubin, “Federal Judge Lifts LAPD Consent Decree,” *Los Angeles Times*, May 16, 2013, <http://articles.latimes.com/2013/may/16/local/la-me-lapd-consent-decree-20130517>.

⁷⁶⁷ David Griffith, “De-Escalation Training: Learning to Back Off,” *Police: The Law Enforcement Magazine*, March 2, 2016, <http://www.policemag.com/channel/careers-training/articles/2016/03/de-escalation-training-learning-to-back-off.aspx>.

⁷⁶⁸ Dean Lusher and Gary Robins, “Hegemonic and Other Masculinities in Local Social Contexts,” *Men and Masculinities*, vol. 11, no. 4 (2009).

⁷⁶⁹ Miller and Bonistall interviewed female police officers and found that two-thirds of the women reported discrimination from peers and supervisors within the police department and by citizens. *See* Susan Miller and Emily Bonistall, “Gender and Policing: Critical Issues and Analysis” in *Routledge Handbook of Critical Criminology*, eds. Walter DeKeserdey and Molly Dragiewicz (New York: Routledge, 2012), at 316-28.

⁷⁷⁰ Angela Harris, *Gender, Violence, Race, and Criminal Justice*, 52 *STAN. L. REVIEW* 777, 793, 797 (2000).

⁷⁷¹ *Id.*

⁷⁷² Cooper, “Who’s The Man?”: *Masculinities Studies, Terry Stops, and Police Training*, *supra* note 759.

⁷⁷³ *Id.*

⁷⁷⁴ *Id.*

⁷⁷⁵ *Id.*

⁷⁷⁶ *Id.*; *see also* Richardson and Goff, *Interrogating Racial Violence*, *supra* note 638.

police departments also leads some female officers⁷⁷⁷ to behave in aggressive ways that are traditionally coded as masculine (e.g., being physically violent).⁷⁷⁸ For instance, Redditt Hudson, a former St. Louis police officer who now works for the National Coalition of Law Enforcement for Justice, Reform, and Accountability recounts being a new officer on duty with a white female officer who physically assaulted a young black man:

My partner accused him of harboring a suspect. He denied it. He said that this was his family's home and he was home alone. My partner then forced the door the rest of the way open, grabbed him by his throat, and snatched him out of the house onto the front porch. She took him to the ledge of the porch and, still holding him by the throat, punched him hard in the face and in the groin. My partner that day snatched an 18-year-old kid off crutches and assaulted him, simply for stating the fact that he was home alone . . . ⁷⁷⁹

Research also clearly shows that hypermasculinity is in many ways encouraged and reinforced in police departments through written materials, academy training, and officer socialization.⁷⁸⁰ Therefore, these physically aggressive and hypermasculine traits are institutionalized throughout departments and many officers (especially among the rank and file) see themselves as the “brave and aggressive soldier who has mastered the art of violence.”⁷⁸¹

How De-escalation Training May Work as a Component of Reform:

An example of how de-escalation techniques can be effective, but run counter to more traditional training methods, came out of a 2018 case in West Virginia. There, an officer responded to a domestic disturbance call and found a suspect with a handgun (that was later found to be unloaded).⁷⁸² Officer Stephen Mader said that when he arrived the man looked “visibly distraught” but did not seem threatening, so he attempted to de-escalate the situation and get him to drop his

⁷⁷⁷ According to the most current demographic data from the Bureau of Justice Statistics, about 1 in 8 local officers is a woman, including about 1 in 10 first-line supervisors. See Reaves, *Local police departments, 2013: Personnel, policies, and practices*, *supra* note 68.

⁷⁷⁸ See e.g., Redditt Hudson, “I’m a black ex-cop, and this is the real truth about race and policing,” *Vox*, July 7, 2016, <https://www.vox.com/2015/5/28/8661977/race-police-officer>.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ Michael Aiello, “Policing the masculine frontier: Cultural criminological analysis of the gendered performance of policing,” *Crime, Media, Culture: An International Journal*, vol. 10, no. 1 (2014); Jennifer Hunt, “The Development and Rapport Through Negotiation of Gender in Field Work Among Police,” *Human Development*, vol. 43, no. 4 (1984); James Messerschmidt, *Masculinities and Crime: Critique and Reconceptualization of Theory*, (Lanham: Rowan & Littlefield, 1993); Richardson and Goff, *Interrogating Racial Violence*, *supra* note 638.

⁷⁸¹ Hunt, “The Development and Rapport Through Negotiation of Gender in Field Work Among Police,” *supra* note 780.

⁷⁸² Amy Wang and Kristine Phillips, “‘Just shoot me,’ an armed man told a cop. The officer didn’t—and was fired, his lawsuit claimed,” *Washington Post*, Feb. 12, 2018, https://www.washingtonpost.com/news/post-nation/wp/2018/02/12/an-officer-who-was-fired-after-refusing-to-shoot-an-armed-man-just-won-175000-in-a-settlement/?utm_term=.048a061ea811.

gun.⁷⁸³ However, when two other officers arrived on the scene, they immediately shot and killed the man. A state investigation found that the officers' actions were justified, and Mader was fired a month later for "apparent difficulties in critical incident reasoning" and "failing to meet probationary standards of an officer."⁷⁸⁴ Mader sued the police department and was awarded a \$175,000 settlement. The lead counsel in the lawsuit, Timothy O'Brien stated that:

No police officer should ever lose their job—or have their name dragged through the mud—for choosing to talk to, rather than shoot, a fellow citizen. His decision to attempt to de-escalate the situation should have been praised, not punished.⁷⁸⁵

Joseph Cohen, executive director of the ACLU-West Virginia, stated that:

We need to give law enforcement officers tools to effectively serve their communities. That means we need to invest in de-escalation training, implicit bias training and crisis intervention training. Hopefully the resolution of this lawsuit will send a message to the City of Weirton and police departments across the country that our communities deserve thoughtful, compassionate, transparent law enforcement.⁷⁸⁶

While some departments have emphasized de-escalation techniques in their trainings, others have cited financial barriers to implementing these strategies. Trainers nationwide argue that the major barrier is the lack of available funding for this training.⁷⁸⁷ Trainers also point out that police academies have always trained officers in de-escalation techniques, but there has been less emphasis on the method for the past 20 years. Rather, many police academies spent time training officers how to fight the "war on crime" and highlighted aggressive policing policies, such as "broken-window" strategies to deal with crime.⁷⁸⁸ Police academies have instead continued to emphasize "military-style exercises" with a significant amount of time spent on drills, formation, and saluting.⁷⁸⁹ Data from a PERF survey regarding the training regimens of 291 police agencies found that on average new officers received 58 hours of firearms training, 49 hours of defensive tactical training, but only 8 hours of de-escalation training.⁷⁹⁰

⁷⁸³ Ibid.

⁷⁸⁴ Ibid.

⁷⁸⁵ Amir Vera, "An officer was fired after he chose not to shoot a distraught suspect. Now he's getting a \$175,000 settlement," *CNN*, Feb. 13, 2018, <https://www.cnn.com/2018/02/12/us/west-virginia-officer-lawsuit-settlement-trnd/index.html>.

⁷⁸⁶ Ibid.

⁷⁸⁷ Griffith, "De-Escalation Training: Learning to Back Off," *supra* note 767.

⁷⁸⁸ Williams, "Long Taught to Use Force, Police Warily Learn to De-escalate," *supra* note 729.

⁷⁸⁹ Ibid.

⁷⁹⁰ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 11.

Other departments have cited concerns that the extra training pulls officers out of the field and may further strain patrol shifts.⁷⁹¹ Skeptics also argue that police use of force is a bigger issue than just implementing new training methods.⁷⁹² To address the issue of excessive force requires changing entrenched ideas about what an officer's job entails.⁷⁹³ For instance, as a part of their consent decree with the Justice Department, the Seattle Police Department had to change their training and use-of-force guidelines, which angered many veteran officers. Some filed lawsuits challenging the new use-of-force guidelines imposed by the Justice Department, while other officers abruptly retired.⁷⁹⁴

A Justice Department report, *Critical Issues in Policing*, states that officers should not be blamed for using force in the ways they have been trained to use it.⁷⁹⁵ The report states that the entire policing profession needs to overhaul its practices in use of force, starting with implementing improved policies, supervision, and accountability measures.⁷⁹⁶ In addition, reforms are needed to strengthen and reinforce training that increases officers' options, skills, and alternative resources, particularly in situations where a suspect is behaving erratically or threatening, but does not have a firearm. The DOJ stated that, "When we do these things, both our officers and our communities will be safer, and the foundation for true community policing will be stronger."⁷⁹⁷

Mental Health and Disability Training

Another area where training may be needed is with regard to interacting with persons with mental health needs or other disabilities. In 2017, the *Washington Post* reported that approximately 24 percent of people killed by police exhibited signs of mental illness (236 of 987). This percentage maintained the numbers from the prior two years: in 2016, 242 of 963 people killed by police exhibited signs of mental illness, and in 2015, 257 of 995.⁷⁹⁸ Many of these incidents involved officers who received no training in dealing with individuals with mental health challenges.⁷⁹⁹ In 2016, the Ruderman Family Foundation released a report that found individuals with disabilities

⁷⁹¹ Kevin Rector, "Baltimore Police doubling in-service training requirements for officers, commissioner says," *Baltimore Sun*, Jan. 10, 2017, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police-service-training-20170110-story.html>.

⁷⁹² Juleyka Lantigua-Williams, "How Much Can Better Training Do to Improve Policing?" *The Atlantic*, July 13, 2016, <https://www.theatlantic.com/politics/archive/2016/07/police-training/490556/>.

⁷⁹³ Williams, "Long Taught to Use Force, Police Warily Learn to De-escalate," *supra* note 729; Matt Apuzzo, "Police Rethink Long Tradition on Using Force," *New York Times*, May 4, 2015, <https://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html>.

⁷⁹⁴ Williams, "Long Taught to Use Force, Police Warily Learn to De-escalate," *supra* note 729.

⁷⁹⁵ U.S. Dep't of Justice, *Guide to Critical Issues in Policing*, *supra* note 746.

⁷⁹⁶ *Ibid.*

⁷⁹⁷ *Ibid.* at 3.

⁷⁹⁸ *Washington Post*, "Police Shootings Database," <https://www.washingtonpost.com/graphics/national/police-shootings/> (last accessed Nov. 3, 2018).

⁷⁹⁹ Lowery, et al., "Distraught People, Deadly Results," *supra* note 263.

make up one-third to one-half of all people killed by police.⁸⁰⁰ At a 2017 briefing of the Commission's Maine State Advisory Committee, Sheriff Darrell Crandall of Aroostook County, Maine testified to the challenge that mental illness can pose in terms of safety for both officers and civilians. He stated that:

The most serious and potentially dangerous of encounters for all involved are law enforcement responses to those individuals with severe and persistent mental illness who are in crisis or psychotic.⁸⁰¹

In an attempt to solve this problem, The Task Force,⁸⁰² as well as Talila Lewis of Helping Educate to Advance the Rights of the Deaf,⁸⁰³ and Richard Davis of The Arc,⁸⁰⁴ both of whom provided expert testimony at the Commission's briefing, recommend mandatory crisis intervention training (CIT). Jenna Mehnert, Executive Director of National Alliance on Mental Illness-Maine, provided further testimony stating that:

CIT is the gold standard enforced by the Bureau of Justice Assistance as well as the International Association of Chiefs of Police, to really say if we're going to equip officers with a basic understanding of some skills of when it comes to interacting with a person with mental illness . . . The intent behind CIT is a team to build the bridge between the mental health community and the law enforcement community so when the training is gone, the people still know each other and can communicate.⁸⁰⁵

In short, crisis intervention training stresses verbal intervention and other de-escalation techniques. Research shows that when implemented properly, successful completion of crisis intervention training greatly improves police officers' interactions with people suffering from mental health needs.⁸⁰⁶ Many refer to the "Memphis Model" of crisis intervention training as a standard for these programs. This model trains law enforcement officers how to recognize someone who may have a mental illness, how to de-escalate the situation, and how to safely maintain enough space until

⁸⁰⁰ David Perry and Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, Ruderman Family Foundation, 2016 at 1, http://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

⁸⁰¹ Darrell Crandall, Sheriff of Aroostook County, *Maine Hearing Transcript* at 61-62.

⁸⁰² The President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, *supra* note 9.

⁸⁰³ See Lewis, *Briefing Transcript* at 19-20, 22.

⁸⁰⁴ See Davis, *Briefing Transcript* at 25-26.

⁸⁰⁵ Jenna Mehnert, National Alliance on Mental Illness-Maine, *Maine Hearing Transcript* at 52-54.

⁸⁰⁶ Kelly E. Canada, Beth Angell, and Amy C. Watson, "Crisis Intervention Teams in Chicago: Successes on the Ground," *Journal of Police Crisis Negotiations*, vol. 10, no. 1-2 (2010), 86-100, <https://www.tandfonline.com/doi/abs/10.1080/15332581003792070>. Dr. Randolph DuPont, Chair and Professor of Criminology at University of Memphis, found that officers who had contact with these individuals felt more comfortable with them, and hospital mental health staff who participated with the officers had more positive views of law enforcement.

mental health experts arrive.⁸⁰⁷ Crisis intervention training can also teach officers how to get an individual mental health aid, thus avoiding possible arrest and incarceration.⁸⁰⁸ In 2016, there were approximately 2,800 crisis intervention training programs nationwide, meaning that only about 15 percent of police jurisdictions nationally have CIT programs.⁸⁰⁹

Best practice research suggests that successful crisis intervention training programs for reducing police-related injuries among people with disabilities have four key elements:

1. Educating officers on the various mental health diagnoses and co-occurring disorders, with an emphasis on their medical origins.
2. Distinguishing between behavior that might be unconventional or not related to a disability from situations where the police should intervene and assist the individual in getting to a treatment setting.
3. Actively uses scenario-based methodology to teach officers the skills of how to de-escalate individuals in crisis.
4. Collaborating with mental health providers, individuals with mental health disabilities, and their family members to help officers become knowledgeable about and have access to community crisis and mental health resources.⁸¹⁰

At the Commission's briefing, Talila Lewis advocated for national standards implemented through training for law enforcement agencies that focus exclusively on individuals with disabilities.⁸¹¹ Lewis suggests applying the standards set forth by the Americans with Disabilities Act (ADA)⁸¹² to arrests and detentions to protect the civil rights and well-being of our nation's disabled population.⁸¹³ She stated that the ADA and federal disability rights laws require

police departments to take appropriate steps to guarantee that people with disabilities have equal access to programs, activities, and services. It's an affirmative obligation that includes providing reasonable accommodations and modification and adequate training for police officers working with the [] population . . . All police departments should be required to adopt general orders for safe and nondiscriminatory interactions with people with disabilities.⁸¹⁴

⁸⁰⁷ Gallagher, et al., eds, *The State of Policing in the United States, Volume 1*, *supra* note 645.

⁸⁰⁸ Liza Lucas, "Changing the way police responds to mental illness," *CNN*, Sept. 6, 2016, <http://www.cnn.com/2015/07/06/health/police-mental-health-training/>.

⁸⁰⁹ *Ibid.*

⁸¹⁰ Pamila Lew, Jung Pham, Leslie Morrison, *An Ounce of Prevention: Law Enforcement Training and Mental Health Crisis Intervention*, Disability Rights California, 2014, at 39, <https://www.disabilityrightscalifornia.org/system/files?file=file-attachments/CM5101.pdf>.

⁸¹¹ Lewis, *Briefing Transcript* at 17-18.

⁸¹² Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101 *et seq.*).

⁸¹³ Lewis, *Briefing Transcript* at 19-20.

⁸¹⁴ *Ibid.*

Currently, most departments spend very little time training officers on these issues.⁸¹⁵ For instance, in the majority of states, officers are only required to have 8 hours or less of mental health training.⁸¹⁶ According to a 2015 PERF survey, eight hours was the average amount of mental health training hours new recruits received compared to the 58 hours on firearms training.⁸¹⁷ However, many departments have been increasing their CIT training requirements and implementing the 40 hours of training that the Memphis Model recommends.⁸¹⁸ For instance, at the Commission's Maine Advisory Committee meeting, Sheriff Darrell Crandall stated that:

I'm proud to say that 100 percent of my sworn personnel are trained by NAMI in their 40-hour CIT class . . . However, that is entirely voluntary on my part. In fact, my command staff and I chose to cover patrol duties for an entire week so we could get all of our deputy sheriffs trained at once without bankrupting the county . . . And CIT, I will tell you, [] has helped greatly with interdisciplinary coordination with mental health crisis workers in our area.⁸¹⁹

Some agencies are also actively working to help law enforcement institute better training. Grande Lum, previous director at the Justice Department's Community Relations Service (CRS), told the Commission that the organization is

developing a program for dealing with individuals with intellectual and developmental disabilities . . . [that] will enhance law enforcement's ability to recognize nonthreatening behaviors from those with disabilities and help prevent tragedies like the death of Ethan Saylor, a 26-year-old Maryland man with Down syndrome who died while being restrained by police. The incident was a callous case. People with cognitive disabilities are increasingly being secluded in communities and no longer confined to institutions. The world is changing and our law enforcement must be better equipped and trained to serve its community members.⁸²⁰

⁸¹⁵ Curtis Ramsey-Lucas, "Improving Police Interactions with People with Disabilities," American Association of People with Disabilities, July 22, 2016, <http://www.aapd.com/improving-police-interactions-with-people-with-disabilities/>; Lewis, *Briefing Transcript* at 19-22; Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁸¹⁶ Megan Pauly, "How Police Officers Are (or Aren't) Being Trained in Mental Health," *The Atlantic*, Oct. 11, 2013, <https://www.theatlantic.com/health/archive/2013/10/how-police-officers-are-or-aren-t-trained-in-mental-health/280485/>.

⁸¹⁷ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁸¹⁸ Aamer Madhami, "Police departments struggle to get cops mental health training," *USA Today*, Oct. 2, 2016, <https://www.usatoday.com/story/news/nation/2016/10/02/police-departments-struggle-cops-mental-health-training/91297538/>; Amy Watson and Anjali Fulambarker, "The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners," *Best Practice Mental Health*, vol. 8, no. 2 (2012).

⁸¹⁹ Crandall, *Maine Hearing Transcript* at 67.

⁸²⁰ Grande Lum, U.S. Dep't of Justice, Community Relations Service, *Briefing Transcript* at 253-54.

Both Lewis and Davis recommended increased training for all law enforcement personnel that focuses on developing safe ways for police to interact with persons with disabilities.⁸²¹ Davis demonstrated three main challenges to this problem as identified by the National Center on Criminal Justice and Disability: (1) inconsistency in training; (2) disparity in training content (such as having considerably more law enforcement training on mental illness than on intellectual/developmental disabilities); and (3) high rates of victimization.⁸²² Lewis offers other recommendations, such as collaborating with mental health professionals, the physical containment of the individuals from a distance, and patience.⁸²³

In fact, some of these recommendations that have been implemented are getting positive results. According to Jason Madore, Maine State Police Sergeant and Commander of Maine State Police Crisis Negotiation Team, their mission is to

persuade the person or persons in crisis to change their current direction in an effort to influence a safe resolution. Our primary objective is to preserve life and to mitigate the risk to our tactical assets and the general public[.]⁸²⁴

Maine State Police achieve this mission by utilizing

[d]e-escalation techniques such as using active listening skills, tone of voice, content, nonverbal communication, and equipment . . . Our overall strategy is to establish communication with a person in crisis, convey a sincere and non-threatening demeanor, build rapport with a person over time, use active listening skills to allow the person to tell their story. After trust has been developed, influence the person until their behavior has been modified.⁸²⁵

Implementing these tactics not only help to de-escalate a possible dangerous situation with a person who is having a mental or emotional health crisis, but also helps officers to address possible mental health challenges in the future.

Community advocates and police officials agree that there needs to be more community services available to help prevent the statistics showing the disproportionate policing of persons with mental health needs or persons with disabilities from continuing.⁸²⁶ But as many officers point out,

⁸²¹ Lewis, *Briefing Transcript* at 20; Davis, *Briefing Transcript* at 24-25.

⁸²² Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309.

⁸²³ *Ibid.*

⁸²⁴ Jason Madore, Maine State Police Sergeant and Commander of Maine State Police Crisis Negotiation Team, *Maine Hearing Transcript* at 81.

⁸²⁵ *Ibid.* at 82-85.

⁸²⁶ Police Executive Research Forum, *Critical Issues in Policing Series: Defining Moments for Police Chiefs*, *supra* note 694.

they are not mental health experts.⁸²⁷ Sam Cochran, a retired police officer and one of the coordinators for Memphis' crisis intervention program, asserts that for training to be successful, "law enforcement must have partnerships with and access to local mental health agencies . . . It's a community program, not just a police program."⁸²⁸ In hope of building better relationships, some law enforcement actively work with community groups. For example, the Maine State Police partners closely with National Alliance on Mental Illness' (NAMI) Maine chapter and other county intervention facilities, and also work with Togus, Virginia and receive training on Post-Traumatic Stress Disorder (PTSD) issues, in order to help veterans who are in crisis.⁸²⁹

While there are few national data-gathering efforts on successful encounters between people in a mental health or behavioral crisis and police officers, studies suggest that crisis intervention training is valuable.⁸³⁰ Crisis intervention-trained officers reported that their programs are "highly effective in meeting the needs of mentally ill people in crisis, keeping mentally ill people out of jail, minimizing the amount of time officers spend on these calls, and maintaining community safety" compared to those who had not received crisis intervention training.⁸³¹

All of the above types of training are separately analyzed, but more research is needed to see how they operate in tandem with each other, and as part of a more comprehensive, holistic approach of community policing. While research on each of these components is still in its nascent stages, some show promising preliminary results.

Building Community Trust

The Commission also reviewed the data and research on the overarching issue of needing to build trust between police and the communities they serve. Especially after a fatal shooting, lack of trust is one of the central issues that arises in debates about police use of force. At the federal level, one of the ways to address this concern was the creation of a program known as the "Collaborative Reform Initiative."⁸³² This initiative was established for police departments to voluntarily sign up

⁸²⁷ Pauly, "How Police Officers Are (or Aren't) Trained in Mental Health," *supra* note 816; Madhani, "Police departments struggle to get cops mental health training," *supra* note 818.

⁸²⁸ Lucas, "Changing the way police responds to mental illness," *supra* note 808.

⁸²⁹ Madore, *Maine Hearing Transcript* at 85.

⁸³⁰ Amanda Brown Cross, Edward Mulvey, Carol Schubert, Patricia Griffin, Sarah Filone, Katy Winckworth-Prejsnar, David DeMatteo, and Kirk Heilburn, "An Agenda for Advancing Research on Crisis Intervention Teams for Mental Health Emergencies," *Psychiatric Services*, vol. 65, no. 4 (2014); Melissa Reuland, Matthew Schwarzfeld, Laura Draper, *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice*, Council of State Governments Justice Center, 2009.

⁸³¹ Randy Borum, Martha Williams Deane, Henry J. Steadman, and Joseph Morrissey, "Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness," *Behavioral Sciences and the Law*, vol. 16 (1998) at 403, http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1567&context=mhlp_facpub.

⁸³² U.S. Dep't of Justice, Community Oriented Policing Services, *Collaborative Reform Initiative for Technical Assistance*, 2016, https://cops.usdoj.gov/pdf/technical_assistance.pdf.

to work with the Justice Department's COPS office to help reform police departments and begin building trust between communities and law enforcement.⁸³³ For instance, in 2011 COPS began working with the Las Vegas Metropolitan Police Department (LVMPD) to provide the department a five-year analysis of fatal police shootings.⁸³⁴ Since then, the police department has made considerable changes to its policies, tactics, and training through this initiative. Clark County Sheriff Joseph Lombardo told the Las Vegas Sun, "[o]ur efforts are paying off."⁸³⁵ And a fact sheet released by the COPS office showed that in 2013, the LVMPD had successfully implemented over 95 percent of the recommendations the office had identified in the report.⁸³⁶

On September 15, 2017, Attorney General Jeff Sessions announced significant changes to the initiative. In a press release he stated that:

Changes to this program will fulfill my commitment to respect local control and accountability . . . This is a course correction to ensure that resources go to agencies that require assistance rather than expensive wide-ranging investigative assessments that go beyond the scope of technical assistance and support.⁸³⁷

This directive from the Justice department was met with criticism by some advocates, congress members, and police officials. Kanya Bennett, ACLU legislative counsel, stated that "to end a program that provides resources to improve police-community relations as we know it is truly appalling."⁸³⁸ Police officials in several cities also expressed their disappointment with the sudden withdrawal of DOJ support.⁸³⁹ In North Charleston, South Carolina (where the fatal shooting of Walter Scott brought national attention to the police force), the vice-chair of the police advisory commission said they were "counting on" the Collaborative Reform recommendations and are now "sitting here twiddling our thumbs and not moving the ball forward in the right direction."⁸⁴⁰

⁸³³ Ibid.

⁸³⁴ Las Vegas Metropolitan Police Dep't, Office of Internal Oversight, *Use of Force Statistical Analysis 2011-2015: Deadly and Non-deadly Use of Force*, at 4, https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Documents/Use-of-Force-Statistical-Analysis_2011-2015.pdf.

⁸³⁵ Ricardo Torres-Cortez, "Feds praise Metro on use-of-force reforms as police shootings plummet," *Las Vegas Sun*, Jan. 19, 2017, <https://lasvegassun.com/news/2017/jan/19/feds-praise-metro-police-transparency-use-of-force/>.

⁸³⁶ U.S. Dep't of Justice, Community Oriented Policing Services, *Collaborative Reform Initiative for Technical Assistance*, *supra* note 832.

⁸³⁷ U.S. Dep't of Justice, Office of Public Affairs, "Department of Justice Announces Changes to Collaborative Reform Initiative," Sept. 15, 2017, <https://www.justice.gov/opa/pr/departments-justice-announces-changes-collaborative-reform-initiative>.

⁸³⁸ Mary Kay Mallonee and Eli Watkins, "DOJ Scaling back program to reform police departments," *CNN*, Sept. 15, 2017, <https://www.cnn.com/2017/09/15/politics/doj-police-program/index.html>.

⁸³⁹ Chiraag Bains, "When Backing the Blue Backfires," *Marshall Project*, Sept. 20, 2017, <https://www.themarshallproject.org/2017/09/20/when-backing-the-blue-backfires>.

⁸⁴⁰ Andrew Knapp, "As Michael Slager sentencing nears, demise of North Charleston police review deals blow to reform effort," *The Post and Courier*, Sept. 16, 2017, http://www.postandcourier.com/news/as-michael-slager-sentencing-nears-demise-of-north-charleston-police/article_ca264d16-98b6-11e7-a700-f76ce6d98c30.html.

One of the concerns raised by Attorney General Sessions' new directive is that it could negatively affect community-policing relationships that have been working on establishing trust. It is well discussed in the literature that many residents in communities of color and poor communities, which are among the most highly targeted and surveilled, do not trust the police, nor do they believe police officers are there to protect them and their communities.⁸⁴¹ However, most surveys have not focused on the perspectives of those who are most affected by "tough-on-crime" policies, and simultaneously are in the most need for increased public safety. More often, research on the perceptions of law enforcement tend to sample from the general population, which typically excludes those in disadvantaged neighborhoods.⁸⁴²

An example of negative police experiences that affect the public safety for all civilians came from testimony of Barbara Johnson, president of the Minneapolis City Council, at the Commission's Minnesota State Advisory Committee briefing in 2017. In her testimony she discussed this difficult relationship between civilians and law enforcement. Ms. Johnson shared a story of a woman in her district whose home had recently been shot at during a drive-by shooting. Ms. Johnson testified that despite being scared and concerned for the safety of her children, the woman was hesitant to go to the police, because when she was 13 years old a police officer accused her of a crime she did not commit, and due to that experience, she finds it difficult to trust police officers to this day.⁸⁴³ The Urban Institute conducted a study to investigate how residents in disenfranchised communities felt about the police in six cities: Birmingham, Alabama; Fort Worth, Texas; Gary, Indiana; Minneapolis, Minnesota; Pittsburgh, Pennsylvania; and Stockton, California. Researchers unfortunately found that residents of low-income, high-crime areas tend to hold a negative view of law enforcement.⁸⁴⁴ They found that less than a third of residents believe that the police respect citizens' rights, "treat people with dignity and respect," or "make fair and impartial decisions in the cases they deal with."⁸⁴⁵ Conversely, researchers also found that a majority of respondents said they respect the law and possessed a strong willingness to work with police officers to make their communities safer.⁸⁴⁶ Nearly three out of four (74.3 percent) participants agreed that laws should be strictly obeyed.⁸⁴⁷ A majority (70.8 percent) indicated that they were likely to report a crime,

⁸⁴¹ Kathleen McRae, Executive Director, ACLU of Delaware, *Delaware Hearing Transcript* at 136; Rod Brunson, Professor and Dean of the School of Criminal Justice, Rutgers University, *Delaware Hearing Transcript* at 93-96; Lawrence Livingston, Reverend, Interdenominational Ministers Action Council, *Delaware Hearing Transcript* at 159-60; Jen Fifield, "Can diverse police departments ease community tension?" *PBS News Hour*, Aug. 22, 2016, <https://www.pbs.org/newshour/nation/can-diverse-police-departments-ease-community-tension>; U.S. Dep't of Justice, *Importance of Police-Community Relationships and Resources for Further Reading*, *supra* note 9; Michelle Fine, Nick Freudenberg, Yasser Payne, Tiffany Perkins, Kersha Smith, Katya Wanzer, "'Anything Can Happen With Police Around': Urban Youth Evaluate Strategies of Surveillance in Public Places," *Journal of Social Issues*, vol. 59 (2003) at 141-58.

⁸⁴² La Vigne et al., *How Do People in High-Crime, Low-Income Communities View the Police?*, *supra* note 8, at 3.

⁸⁴³ Barbara Johnson, President, Minneapolis City Council, *Minnesota Hearing Transcript* at 320; Minnesota Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Policing Practices in Minnesota*, 2017, <https://www.usccr.gov/pubs/2018/03-22-MN-Civil-Rights.pdf>.

⁸⁴⁴ La Vigne, et al. *How Do People in High-Crime, Low-Income Communities View the Police?*, *supra* note 8 at 3.

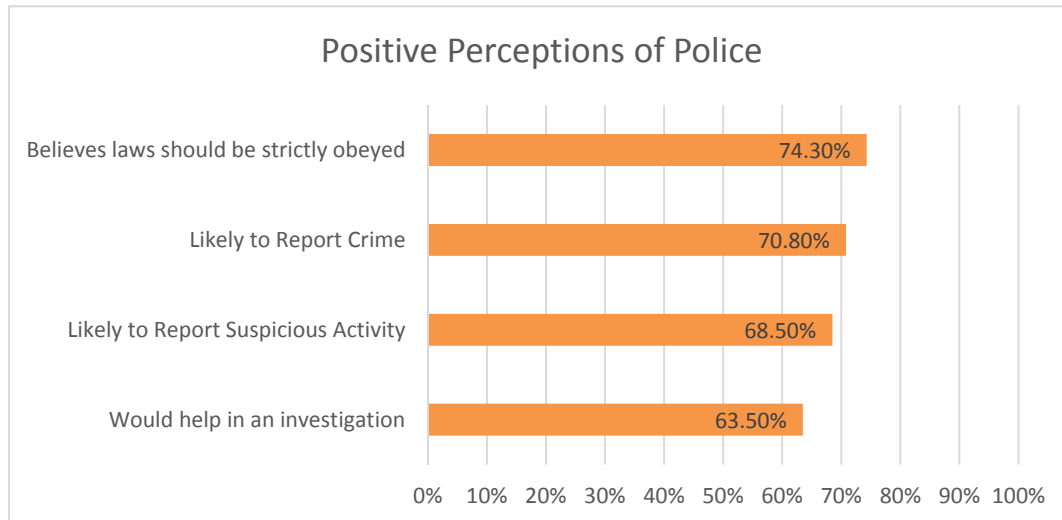
⁸⁴⁵ *Ibid.* at 7.

⁸⁴⁶ *Ibid.* at 13.

⁸⁴⁷ *Ibid.* at 11.

report suspicious activity near their home (68.5 percent), and provide information to help find a suspect (63.5 percent) (see Chart 9 below).

Chart 9: Positive Perceptions of Police by Residents



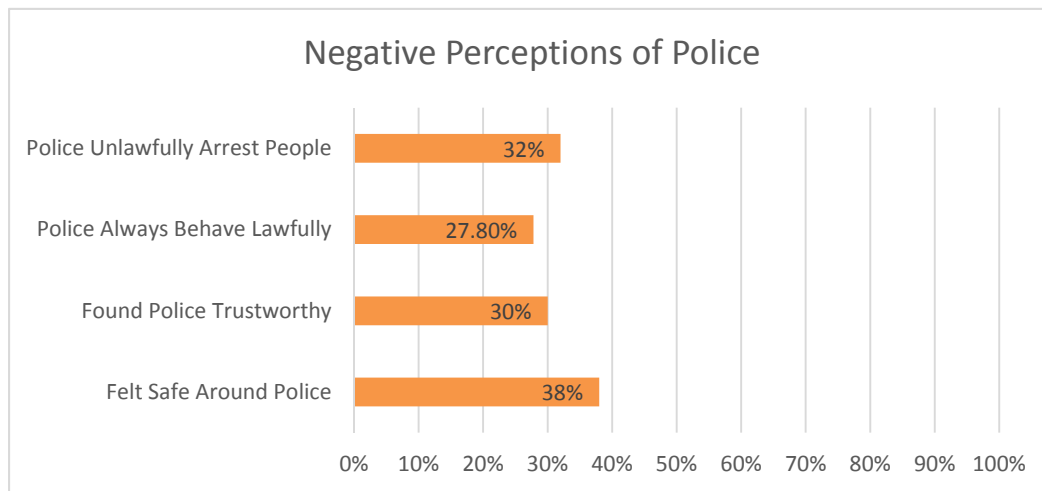
Source: Urban analysis of surveys of residents in Birmingham, AL; Fort Worth, TX; Gary, IN; Minneapolis, MN; Pittsburgh, PA; and Stockton, CA, www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf, chart created by USCCR staff.

While only a small percentage believe that their city's police departments abide by the principles of community policing, more than half were willing to attend a community meeting with police.⁸⁴⁸ But strikingly, few respondents reported feeling safe around police or found them trustworthy (37.8 percent, 30.1 percent, respectively).⁸⁴⁹ Further, less than half agreed or strongly agreed that police behave in legitimate ways. Only 27.8 percent agreed or strongly agreed that "police always behave according to the law." And 32 percent believed that "police often arrest people for no good reason" (see Chart 10 below).⁸⁵⁰

⁸⁴⁸ Ibid. at 13.

⁸⁴⁹ Ibid. at 12.

⁸⁵⁰ Ibid. at 8.

Chart 10: Negative Perceptions of Police by Residents

Source: Urban analysis of surveys of residents in Birmingham, AL; Fort Worth, TX; Gary, IN; Minneapolis, MN; Pittsburgh, PA; and Stockton, CA, www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf, chart created by USCCR staff.

Similarly, at the Commission's Minnesota State Advisory Committee briefing, Ebony Ruhland, Assistant Professor of Criminology at the University of Cincinnati, testified that in her experience, communities

want and often need a police presence . . . They often mention that in high crime areas, they can't walk to the park. They don't feel safe walking to the stores. So they want a police presence. What they don't want is the tactics that the police are currently using.⁸⁵¹

These findings are significant for law enforcement. As Ben Bradford from the University of Oxford and Jonathan Jackson from the London School of Economics found, a strong relationship exists between police legitimacy and public safety.⁸⁵² Moreover, the Urban Institute's study showed that residents who hold higher perceptions of law enforcement and believe them to be trustworthy and fair are more likely to report crimes, serve as witnesses, and comply with the

⁸⁵¹ Ebony Ruhland, Assistant Professor, University of Cincinnati, *Minnesota Hearing Transcript* at 54; Minnesota Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Policing Practices in Minnesota*, *supra* note 843.

⁸⁵² Ben Bradford and Jonathan Jackson, "Cooperating with the Police: Social Control and the Reproduction of Police Legitimacy," *SSRN Electronic Journal*, 2010, at 1-2, https://www.researchgate.net/publication/228223955_Cooperating_with_the_Police_Social_Control_and_the_Reproduction_of_Police_Legitimacy.

law.⁸⁵³ Thus, this survey demonstrates that focusing on building trust and legitimacy between communities and law enforcement is essential to addressing the police use of force controversy. These findings suggest that the “ground may be more fertile than expected for repairing relationships between community members and the police.”⁸⁵⁴ Mark Temons, a member of the Peace Action Network of Lancaster, Pennsylvania stated that “the community shouldn’t feel like they’re being policed by an outside force, an unfamiliar force.”⁸⁵⁵ And the Lancaster Chief of Police, Jarrad Berkihiser agrees that:

Our partnership with the community is important to us because it helps solve crime, it helps prevent crime and it builds trust and legitimacy with the community which is necessary if a community crisis occurs... [But the partnership] is like a successful marriage. Both parties have to work at it.⁸⁵⁶

⁸⁵³ La Vigne, et al. *How Do People in High-Crime, Low-Income Communities View the Police?*, *supra* note 8 at 13.

⁸⁵⁴ *Ibid.* at 15.

⁸⁵⁵ Tom Knapp, “Bridging the gap between police and community: Forum on Saturday aims to open lines of communication,” *Lancaster Online*, April 13, 2018, https://lancasteronline.com/news/local/bridging-the-gap-between-police-and-community-forum-on-saturday/article_c955f864-3e92-11e8-a8ba-df491b952a25.html.

⁸⁵⁶ *Ibid.*

CHAPTER 4: FINDINGS AND RECOMMENDATIONS

Findings

Community Trust

1. Tensions in relations between communities and the police have passed breaking points in many American communities, rendering both community members and the police officers sworn to serve them less safe and subject to a fraying social fabric.
2. Police officers are vitally important to the communities they serve. Police and the public share the common goal of keeping communities safe while working to eliminate excessive uses of force.
3. Police officers have the difficult and admirable job of providing crucial services to the communities they protect and serve. Their job sometimes puts them in harm's way and may require the use of force. Accordingly, police officers must operate with the highest standards of professionalism and accountability.
4. All of us live subject to police enforcement practices and therefore benefit from an accountable, well-trained police force implementing effective, constitutionally sound policing practices.
5. Use of force is a predictable component of policing and its potential underlies every police-citizen interaction; however, avoiding the use of force should be a goal for each interaction.
6. Every community resident should be able to live, work, and travel confident in an expectation that interactions with police officers will be fair, operate consistent with constitutional norms, and be guided by public safety free from bias or discrimination. Unfortunately, today, too many communities are not confident in that expectation and do not trust fair police-community interactions. Communities have demanded reforms to foster better community-police relations and to prevent unjustified and excessive police uses of force.
7. Perceived and actual lack of accountability for officers who use excessive force and lack of transparency regarding decisions on how officers should be held accountable erode public trust in the police and thereby work to make communities less safe.
8. Maximizing public confidence and trust in police is essential for public safety as effective policing depends on community co-operation.
9. Proliferating perceptions that police operate based on bias render communities as well as police officers less safe by discouraging trust in the police and responsiveness to police activities.

Data

- Accurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public. No comprehensive national database exists that captures rates of police use of force.

Congress has required the United States Department of Justice to collect data on police use of force and publish an annual report from the data, but has not required local departments to report this

data to the Department of Justice. The majority of the more than 17,000 police departments in the United States only selectively report data and some do not report at all.

There is no national repository of information documenting prior disciplinary proceedings conducted against officers by police departments.

The best available evidence reflects high rates of use of force nationally, and increased likelihood of police use of force against people of color, people with disabilities, LGBT people, people with mental health concerns, people with low incomes, and those at the intersections of these groups.

Training

- Evidence-based practices have been employed in some jurisdictions to reduce incidents of use of force and can be adopted more broadly.
- Lack of training and lack of funding for training leave officers and the public at risk. Critical training areas include tactical training, de-escalation techniques, understanding cultural differences and anti-bias mechanisms, as well as strategies for encounters with individuals with physical and mental disabilities.
- Preventable deaths have occurred because officers have not been trained in or did not initiate tactics that create time and space for decision-making that could have reduced force used.

Accountability

- Repeated and highly publicized incidents of police use of force against persons of color and people with disabilities, combined with a lack of accurate data, lack of transparency about policies and practices in place governing use of force, and lack of accountability for noncompliance foster a perception that police use of force in communities of color and the disability community is unchecked, unlawful and unsafe.
- Many departments do not have early warning procedures in place to alert supervisors and/or command staff of potential personnel issues so corrective action can be implemented.
- Internal procedures in some departments, sometimes required by state law, inhibit accountability for officers who have used excessive force. These procedures include not promptly taking officer statements after a critical incident, not allowing the initiation of disciplinary proceedings after a short period of time has passed, and allowing officers to view video footage of an incident before making a report on the incident.
- External accountability through community oversight or through the courts is not consistently available and where in use has not been consistently effective to address incidents of excessive force and bring justice for victims.
- Technological advances such as body-worn cameras adopted with the goal of increasing accountability have been deployed in some departments. These technological solutions have often been deployed without policies and enforcement ensuring they work to increase accountability in practice and address privacy concerns of recorded individuals.
- Department of Justice engagement with police departments through police-requested assistance and at times enforcement and monitoring has proved beneficial to the police and their communities. Recommendations made by the Civil Rights Division, the Office of

Community Oriented Policing Services (COPS) and the Community Relations Services office (CRS) have led to police departments implementing policies and practices that uphold constitutional standards. Departments that have undergone DOJ investigation and made agreements for reform, and those who sought voluntary engagement, continue to see improved policies on use of force, better training of officers, and implementation of more advanced internal accountability and information systems.

Recommendations

- The Department of Justice should return to vigorous enforcement of constitutional policing, including pursuant to 42 U.S.C. § 14141 and use of consent decrees as necessary where constitutional policing standards are not being upheld.
- The Department of Justice should robustly support local efforts to develop and institute constitutional policing practices. Such support should include reinstating the Office of Community Oriented Policing Services (COPS) and maintaining the Community Relations Services office (CRS) to focus on building community trust and reducing excessive uses of force in coordination with police departments. DOJ support also should include grant support as well as generation of federal guidance supporting development of effective training, policies, and internal accountability measures that promote expanded strategies and tactics that safeguard the lives of officers and citizens.
- Congress should condition cities' receipt of federal law enforcement funds on the cities' collection and reporting to DOJ of data regarding police use of force practices, in a format that is aggregable and comparable nationally, which DOJ can then report to the American public. Congress should require DOJ to create and maintain a public, national database of police use of force incidents and appropriate funds sufficient to support the creation and maintenance of the database.
- Congress should also require DOJ to release to the public twice each year the names of departments and jurisdictions that fail to report use of force information in the manner DOJ requires. The public release should be directed to the state Attorney General, City Council, County Commission, or other governing body overseeing the departments in the State and jurisdiction where the department administrative office resides, and DOJ should maintain the information on its website.
- Congress should fund grants that support effective external police oversight through, for example, independent monitors or police commissions or community oversight. Congress should also fund grants for research regarding best practices for such oversight, to develop replicable models that communities could follow to ensure constitutionally sound policing in their jurisdictions.
- Congress should fund grants, facilitated by the Department of Justice, to incentivize evidence-based best practices that, when employed, reduce incidents of excessive force. The following practices deserve serious consideration as policy makers pursue mechanisms to keep communities safer:

a. Community Trust:

Police departments should encourage officers to see themselves as guardians and protectors.

Departments should embrace a culture of safety by implementing review of use of force incidents to determine what improvement can be made and how such incidents can be prevented in the future.

b. Training:

Officers should be provided cultural competency and anti-bias training, including information about the history of discriminatory policing and implicit biases that affect all on an unconscious level.

Officers should be trained on de-escalation tactics and alternatives to use of force. Tactical training should include strategies to create time and space, and distance, to reduce the likelihood that force will be necessary and should occur in realistic conditions appropriate to the department's location.

Departments should develop partnerships with state and local mental health agencies to develop crisis intervention trainings and to support the work of mental health organizations in the community. Legislatures should fund such efforts, and allow local departments to develop crisis intervention teams which are on duty 24/7 throughout the department's jurisdiction for use with anyone in mental health crisis. Crisis intervention teams can also assist police when responding to domestic violence and other highly charged interactions.

Officers should be specifically trained in how to interact with people with mental and physical disabilities who may be in crisis. Crisis intervention training should include communication, coordination, and containment to increase the likelihood that lethal force will not be necessary. Experts with disabilities should be involved in the training process.

Officers should be trained on safe interactions with LGBTQ individuals and the history of biased policing against members of those communities.

Department policies should make clear that citizens have a constitutional right to film the police from a distance that does not interfere with the officer performing her/his duty. Officers should be trained on safe interactions with members of the public who desire to film them.

c. Accountability:

Departments should implement early intervention systems to alert supervisors and command staff where warning signs of excessive use of force may exist. Possible actions taken should include training, reassignment and/or personnel discipline.

Investigation and prosecution of use of force cases should be made as independent and public as possible. The agencies investigating and determining whether to move forward with prosecution should not have an ongoing relationship with the department. State-appointed independent prosecutors and independent investigators are preferable to local prosecutors and investigators. States should consider a permanent special independent investigator's office with the authority to prosecute where appropriate in use of force cases. States could consider forming interstate agreements to investigate these cases to preserve the investigation's independence.

Investigations of use of force should be subject to public disclosure. To this end, departments should not include nondisclosure agreements in civil settlements of use of force cases. Prosecutors should publicly explain charging or non-charging decisions in use of force cases.

If a civilian review board is put in place to monitor police, its members should have real power over investigations, including subpoena power. All actions of the community board should be public.

Courts and legislatures should require judges to preside over grand jury proceedings and open the records of these proceedings in police use of force cases to the public, in cases where the identity of the subject of the investigation is already public. Where the officer's name is not public, the above records should be released with redactions shielding the identity of the officers involved. The list of records disclosed should include, but not be limited to, the list of all potential and actual witnesses, all testimony, affidavits, documentary and physical evidence presented or withheld from presentation, all police reports from all agencies involved, and all photos, images and video in possession of any agency or department concerning the incident.

Policies that lead to the perception that there is a lack of accountability should be removed. Such provisions include a rule that officers do not have to make a statement until 48 hours or more after an incident or the use of a short personnel statute of limitations for disciplinary procedures. Departments should be conscious that such provisions have a tendency to reduce public trust in the police. The Department of Justice should encourage state and local jurisdictions to remove contract provisions, local policies, and provisions that:

- Allow officers to wait 48 hours or more before being questioned after an incident.
- Prevent investigators from pursuing other cases of misconduct revealed during an investigation.
- Prohibit civilians from having the power to discipline, subpoena, or interrogate police officers.
- Prevent officers from being investigated for an incident that happened 100 or more days prior to the discovery of the incident.

Police departments should deploy body-worn cameras and voice recorders to capture interactions between police and citizens and should develop policies for their use. The DOJ should continue to collect model policies and make them available in an easily accessible database. Body-worn camera policies should address the following:

- Clearly defined penalties should attach for the misuse of camera footage and violations of body-worn camera policies.
- Officers should not be given any knowledge of the contents and should not be given the right to view footage before making a report of the incident.
- The public should be allowed to obtain footage of use of force incidents after investigations are complete.
- Body-worn camera policies should also address privacy concerns raised by the large amounts of data recorded by those cameras containing potentially sensitive

information deserving of individual policies. These policies should include but not be limited to footage not depicting use of force, detention, an incident subject to complaint, or that has no evidentiary, exculpatory, or training value.

d. Police Data

Departments should provide aggregate information to the public regarding the numbers of allegations and type of use of force and what steps, if any, departments take to address use of force concerns when they arise. This data should be disaggregated by race, gender and disability status.

COMMISSIONERS' STATEMENTS, REBUTTALS, AND SURREBUTTALS

Statement of Chair Catherine E. Lhamon

This report rightfully addresses a searingly persistent schism in American life, with actual and perceived police misconduct seeming to pit communities against the officers sworn to protect and serve them. The recommendations for forward progress are measured, appropriate, and urgent; our nation's communities need their implementation. Most of all: I hope very much that the United States Department of Justice immediately reverses its dangerous course of refusal to use the tools available to it to drive critical reform of police practices.⁸⁵⁷

I know, from direct experience, the difference federal oversight can make both to communities and to police. Close to 20 years ago, I represented community members as intervenors in the consent decree negotiated between the Los Angeles Police Department and the United States Department of Justice, addressing unconstitutional policing practices, including unlawful use of force, that had persisted, unabated, over more than four decades.⁸⁵⁸ My clients sought to participate in the case specifically because they, and I, had concern about whether an Administration change from President Clinton to President George W. Bush would negatively impact the fervor with which the Department of Justice might press for satisfaction of the negotiated terms of the consent decree. Then, as now, the incoming presidential administration had strongly signaled disdain for federal involvement in police reform.⁸⁵⁹ As the U.S. Court of Appeals for the Ninth Circuit

⁸⁵⁷ Memorandum from the Office of the Att'y Gen. to Heads of Department Components and United States Attorneys (March 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>. See also U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Urges Department of Justice to Use All Available Tools to Work with Police Departments to Ensure Constitutional Policing," April 24, 2017, https://www.usccr.gov/press/2017/Statement_04-24-2017-Policing.pdf; Sheryl Gay Stolberg and Eric Lichtblau, "Sweeping Federal Review Could Affect Consent Decrees Nationwide," *New York Times*, April 3, 2017, <https://www.nytimes.com/2017/04/03/us/justice-department-jeff-sessions-baltimore-police.html>.

⁸⁵⁸ The transmittal letter from DOJ to the City of Los Angeles said: "'As a result of our investigation, we have determined that the LAPD is engaging in a pattern or practice of excessive force, false arrests, and unreasonable searches and seizures in violation of the Fourth and Fourteenth Amendments to the Constitution.'" Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 555 (2001) (quoting Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to James K. Hahn, Los Angeles City Attorney, Richard J. Riordan, Mayor of Los Angeles, Gerald L. Chaleff, President of the Los Angeles Board of Police Commissioners, and Bernard C. Parks, Police Chief of Los Angeles (May 8, 2000)). For a summary of the preceding four decades of calls for reform of the LAPD, see the opening brief we filed on appeal. Brief of Petitioner-Appellant at 3, 2001 WL 34091668, *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. Jun. 18, 2001).

⁸⁵⁹ *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002) (noting that "President Bush . . . expressed opposition to consent decrees between the federal government and local law enforcement agencies on several occasions during his campaign."). The Trump Administration has gone a step further, directing DOJ attorneys to reconsider all existing and contemplated consent decrees regarding police practices because, as Attorney General Sessions phrases it, "the individual misdeeds of bad actors should not impugn" police work generally.

charitably phrased it, my clients had “suffered from, and [were] likely to continue to suffer from, the unconstitutional police misconduct that forms the basis of the United States’ suit against the City defendants.”⁸⁶⁰ Given their direct experience of police use of force and unconstitutional conduct, my clients sought faithful and vigilant implementation of the terms of the consent decree negotiated between the United States Department of Justice and the City of Los Angeles on their behalf. After years of work, pursuant to the consent decree with the Bush Administration, the LAPD exited federal oversight in 2013, during the Obama Administration, when the LAPD had finally, after 40 preceding years of repeated calls for change, become a department transformed.⁸⁶¹

Through that experience, I had a front-row seat to the value of DOJ involvement, even when that involvement fell short of my—and my clients’—hoped for vigilance. The Department of Justice has a 24-year mandate from Congress, unavailable to any other entity, to address systemic patterns and practices of police abuses, protecting the nation’s citizens.⁸⁶² The benefit of the Justice Department’s involvement is not merely speculative. As this report documents⁸⁶³ and my

Stolberg and Lichtblau, “Sweeping Federal Review Could Affect Consent Decrees Nationwide,” *supra* note 857. See also Memorandum from the Office of the Att’y Gen., *supra* note 857.

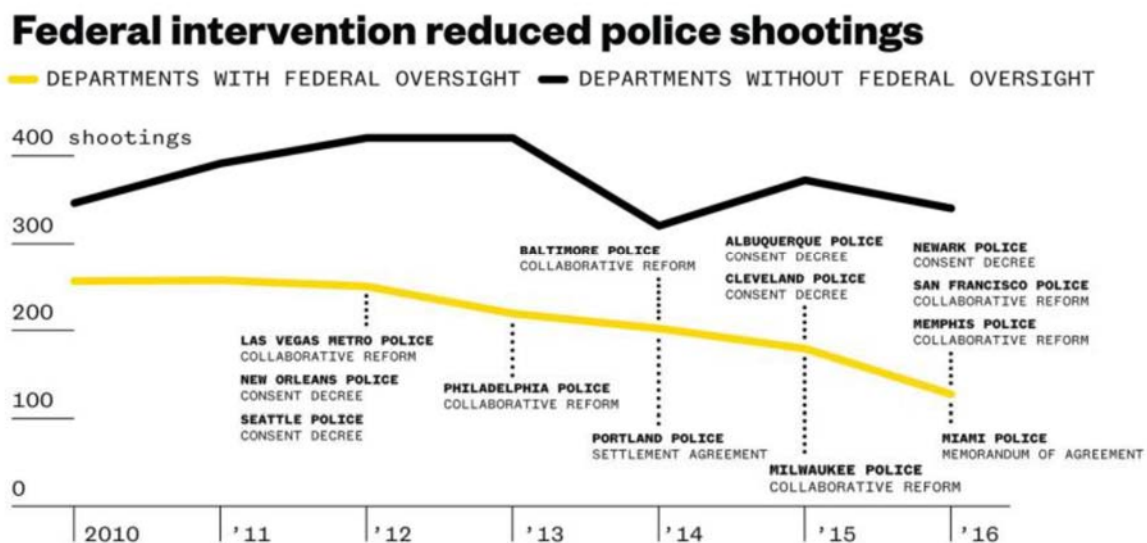
⁸⁶⁰ *City of Los Angeles*, 288 F.3d at 397.

⁸⁶¹ Joel Rubin, “Federal Judge Lifts LAPD Consent Decree,” *Los Angeles Times*, May 16, 2013, <http://articles.latimes.com/2013/may/16/local/la-me-lapd-consent-decree-20130517>.

⁸⁶² 42 U.S.C. § 14141 (transferred to 34 U.S.C. § 12601).

⁸⁶³ Report at notes 562-64 (“in Los Angeles, researchers found a marked decrease in crime rates and an increase in officer morale. Under the consent decree, the total number of use of force incidents declined by almost 30 percent”) (citing Christopher Stone, Todd Foglesong, and Christine Cole, *Policing Los Angeles Under a Consent Decree: The Dynamics of Change at the LAPD*, Criminal Justice Policy and Management, Harvard Kennedy School, 2009, at 6, 33, 65, <http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>).

See also Chart 8: Federal Interventions from 2010—2016, at notes 537-38 (illustrating average reductions in police shootings in cities subjected to federal oversight compared with cities lacking such oversight).



experience in Los Angeles confirms, federal involvement combined with federal court oversight can function as an essential backstop against longstanding police harm, repairing community and police relations and allowing for constitutional policing to take hold and become the norm. Its absence, however, communicates too clearly that unauthorized police use of force, among other unconstitutional practices, can proliferate unabated, operating to the distinct detriment of Americans subject to harm.

We don't have to wonder what cost to American rights follows from their Department of Justice turning its back on a tool within its arsenal to protect their rights. In August 2018, ProPublica published a detailed investigation of what happened in Ville Platte, Louisiana when the Trump Administration DOJ declined to negotiate a consent decree consistent with the constitutional violations the Department of Justice had found at the end of the Obama Administration regarding police practices in this isolated community.⁸⁶⁴ Although the DOJ had found Ville Platte police to have unlawfully operated based on "a view of the law that had been wrong for more than half a century," the tepid agreement it negotiated—without a consent decree or a federal judge to evaluate compliance—did not require corrective action.⁸⁶⁵ Americans deserve better.

Because I have lived in a community whose police unlawfully preyed on its members, often on the basis of race and always against our constitutional norms; because I have participated in the hard work to transform broken police-community relations;⁸⁶⁶ and because I have monitored and pushed halting progress toward meaningful change, I know in my core that, even after having been deeply frayed, effective community and police interactions are possible, attainable, and, indeed, essential to healthily functioning communities. From that work with police agencies other than the LAPD, I also know significant gains can be made without federal intervention, with sheriffs and police departments committing and recommitting themselves to constitutional practices including nondiscrimination in the manner in which they protect and serve. Very often local communities, including their police agencies, can work together to ensure delivery of policing that is effective, safe, and nondiscriminatory. And when, as had been true in Los Angeles for longer than my lifetime to date, they cannot, those communities and our constitutional norms stand to benefit

Source: Rob Arthur, "Jeff Sessions is walking away from the best way to reduce police shootings," *Vice News*, Dec. 18, 2017, https://news.vice.com/en_us/article/kznagw/jeff-sessions-is-walking-away-from-the-best-way-to-reduce-police-shootings (utilizing DOJ data).

⁸⁶⁴ Ian MacDougall, "How the Trump Administration Went Easy on Small-Town Police Abuses," *ProPublica*, Aug. 27, 2018, <https://www.propublica.org/article/ville-platte-louisiana-police-consent-decree-trump-justice-department>. In fact, the *ProPublica* piece notes that career staff in DOJ drafted a consent decree, consistent with the findings in the DOJ letter, but "[t]heir bosses rejected it." *Ibid.* See also U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ville Platte Police Department and the Evangeline Parish Sheriff's Office*, 2016, <https://www.justice.gov/opa/file/919436/download>.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ In addition to the close to a decade of work on behalf of community intervenors in the LAPD consent decree, I litigated multiple other suits regarding racially biased policing, against both the LAPD and the Los Angeles County Sheriff's Department in addition to entities in surrounding communities, resulting in important departmental reforms as well as dollar damages to redress my clients' suffering. *E.g., Gonzalez v. City of Los Angeles*, No. SACV-00-507-AHS (C.D. Cal. 2001); *Brown v. Los Angeles County Sheriff's Department* (L.A. Sup. Ct. 2009) (approving settlement agreement); *The Community Action League et al. v. Lancaster*, No. 11-CV-4817-ODW-VBK (C.D. Cal. Jan. 24, 2012) (approving settlement agreement). My experience investigating, litigating, and monitoring these and other policing cases informs the strength of my belief in the possibility of transformed practices as well as in the need for them.

significantly from federal intervention of the type that is dangerously absent in our present moment. I join my Commission colleagues in calling for practical reforms to stem the tide of perceived conflict between police officers and their communities, and to recommit this nation to the principles of fairness and equal treatment, including at the hands of police, that are core to democracy.

Statement of Vice Chair Patricia Timmons-Goodson

Introduction

Tamir Rice,⁸⁶⁷ Michael Brown,⁸⁶⁸ Alton Sterling,⁸⁶⁹ Philando Castile,⁸⁷⁰ Antwon Rose.⁸⁷¹ These names and many others⁸⁷² are familiar to us for the most tragic reason: they are African American citizens killed with deadly use of force by law enforcement in recent years. Many of these killings sparked unrest in their respective communities and across the country, leading to the prominence of groups such as Black Lives Matter.⁸⁷³

The police use of force cases — both deadly and not — led the Commission to embark upon a study on modern policing practices. The subject of the Commission's Report is important for many reasons, not least of which is because police use of force affects so many African American families.⁸⁷⁴ A 2016 report by the Center for Policing Equity found that African Americans experience three times greater police use of force than white people.⁸⁷⁵

While the force used by law enforcement in the performance of their duties affects everyone,⁸⁷⁶ excessive use of force appears to target communities of color, in particular. Thus, many Black people perceive that their lives are not valued during interactions with law enforcement. Whether the perception is accurate or not remains to be seen; the data is incomplete. "Without accurate data

⁸⁶⁷ Two police officers fatally shot Rice on November 22, 2014. *See* NewsOne Staff, "47 Black Men And Boys Killed By Police," *NewsOne*, July 14, 2018, <https://newsone.com/playlist/black-men-youths-who-were-killed-by-police/>.

⁸⁶⁸ A police officer fatally shot Brown on August 9, 2014. *Ibid.*

⁸⁶⁹ Two police officers fatally shot Sterling on July 5, 2016. *Ibid.*

⁸⁷⁰ A police officer fatally shot Castile on July 6, 2016. *Ibid.*

⁸⁷¹ A police officer fatally shot Rose on June 19, 2018. *Ibid.*

⁸⁷² *Ibid.*

⁸⁷³ In 2013, Black Lives Matter was founded by three people in response to the acquittal of Trayvon Martin's killer, George Zimmerman. In 2014, it broadened its movement after the acquittal of Michael Brown's shooter, Ferguson police officer Darren Wilson. The Black Lives Matter Global Network is "committed to struggling together and to imagining and creating a world free of anti-Blackness, where every Black person has the social, economic, and political power to thrive." Black Lives Matter Global Network, "What We Believe," <https://blacklivesmatter.com/about/what-we-believe/> (last accessed Nov. 4, 2018).

⁸⁷⁴ I understand the topic of modern policing practices from multiple viewpoints. I am an African American woman who is a mother of two African American sons. I also served on the judiciary for 28 years. Thus, I have experienced interacting with African Americans who distrust police officers and the courts. I have seen just how the lack of trust on the part of members in a minority community impairs relationships with law enforcement. I have also seen how challenging it is for law enforcement to serve and protect communities that do not trust them. But, I have also had to instruct my sons about how to behave if they interact with police officers at a traffic stop because, as much as I respect law enforcement, my ultimate goal is for my sons to come home safely.

⁸⁷⁵ Goff, et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, *supra* note 12 (noting use of force includes Tasers, batons, canine use, pepper spray, officer's hands or body, and gunshots).

⁸⁷⁶ *See* Discussion and Sources cited therein at notes 3, U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018 [hereinafter Commission Report], (noting that "All citizens in every community in this country live subject to police enforcement practices and therefore benefit from effective, constitutionally sound police practices.").

on police use of force, allegations by community members and actions by law enforcement not only sow distrust among communities and the police, making policing more dangerous, but also jeopardize public safety.”⁸⁷⁷ But, what cannot be denied is the essential role that trust plays in the “protect and serve” function performed by law enforcement.

Competing Narratives

Competing narratives operate when deadly use of force is applied against African American victims. On the one hand, video footage and newspaper reports clearly depict a police officer using deadly force against an unarmed African-American citizen. On the other hand, police officers either are not charged, or if charged, are not convicted for the killing. Consequently, a sense of confusion leads to a question of trust. Who can African Americans trust when their own narrative about excessive use of force is dismissed for a narrative that views the actions of most police officers as reasonable in the eyes of the law?

African American Community Narrative

Many in minority communities hold the narrative that law enforcement cannot be easily trusted and that justice for African Americans is often denied. This narrative is supported when video footage emerges that depicts police officers use unnecessary excessive force out of perceived fear that their own lives are in danger. For example, in the case of Alton Sterling, two Baton Rouge police officers tackled and shot him at close range because they believed he was reaching for a gun. But the video footage does not clearly depict Sterling reaching for a gun. Neither the Justice Department nor the Baton Rouge State Attorney charged the two officers because of insufficient evidence. The community was outraged that charges were not brought and distrust between the African American community and law enforcement continued. After the decision, Representative Cedric Richmond, who represents part of Baton Rouge, stated, “Trust between the Baton Rouge community and law enforcement has deeply eroded . . . We must all continue to work to bridge the divide between law enforcement and community. Until this is done, many young black men and women will be forced to fear any non-threatening action they take could be met with certain death.”⁸⁷⁸ Unfortunately, such distrust results in less public safety, less cooperation with police officers when serious crimes occur, and less outreach for protection and assistance.⁸⁷⁹

Only in the clearest instances do minority communities perceive justice for victims of police use of force. For example, former South Carolina police officer Michael Slager was convicted of the shooting death of Walter Scott, an unarmed black man.⁸⁸⁰ Slager provided testimony that he and

⁸⁷⁷ Commission Report at notes 2.

⁸⁷⁸ Mark Berman and Wesley Lowery, “Baton Rouge Police Officers Won’t Be Charged in Fatal Shooting of Alton Sterling,” *Washington Post*, March 27, 2018, https://www.washingtonpost.com/news/post-nation/wp/2018/03/27/baton-rouge-police-officers-wont-be-charged-in-fatal-shooting-of-alton-sterling/?utm_term=.4abcfdae09b5.

⁸⁷⁹ Commission Report at notes 43 (noting Ezekiel Edwards’ written statement about the results of widespread distrust of the police).

⁸⁸⁰ Blinder, “Michael Slager, Officer in Walter Scott Shooting Gets 20-Year Sentence,” *supra* note 184.

Scott struggled with a Taser after Scott ran away during a traffic stop, that Scott gained control of the Taser, and that he feared that Scott would use the Taser against him. Thus, Slager shot Scott in the back eight times. Fortunately, a bystander's video footage told a different story. Scott was 17 feet from Slager when he fired his gun, and subsequently, Slager placed his Taser beside Scott's body to plant evidence to support his testimony. Slager's testimony and the refuting footage leads one to wonder what the outcome would have been if the video footage did not exist. In other words, this is an extreme case because a police officer shot an unarmed victim in the back and, given the video footage, there was no reasonable way to believe that the victim attempted to harm the police officer.

Law Enforcement Narrative

However, in most other situations, the courts give law enforcement officers the benefit of the doubt and support their narrative: that almost any use of force is reasonable. Why is this so? Two U.S. Supreme Court cases defined the reasonableness standard for deadly use of force. In *Tennessee v. Garner*,⁸⁸¹ a Memphis police officer fatally shot an unarmed teenager for fleeing after a suspected burglary. The officer saw the victims face and hands and believed the victim was unarmed. The Court determined that the officer seized the victim by apprehending him with deadly use of force. Thus, the seizure was subject to the Fourth Amendment's reasonableness requirement that guarantees all citizens the right "to be secure in their persons . . . against unreasonable seizures." The Court opined: ". . . such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."⁸⁸² Here, the Court found that the officer's apprehension by deadly use of force violated the Fourth Amendment's reasonableness requirement because the officer did not have probable cause to believe that the victim posed any physical danger to himself or others.

In *Graham v. Connor*,⁸⁸³ the Court made explicit what it implied in *Tennessee v. Garner*: excessive force by a police officer should be analyzed under the Fourth Amendment's objective reasonableness standard. In this case, police officers injured⁸⁸⁴ a man when they used physical force during an investigatory stop. The officers believed the man was drunk, when, in fact, he was suffering from a diabetic reaction. The Court evaluated whether "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intention or motivation." The Court concluded that reasonableness must embody allowance for "split-second judgments- in circumstances that are, tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation."⁸⁸⁵

Given the diverging narratives between African Americans and law enforcement, African Americans often trust themselves and distrust law enforcement to create fair police interactions.

⁸⁸¹ 471 U.S. 1 (1985).

⁸⁸² *Tennessee v. Garner*, 471 U.S. 1, 3-4 (1985).

⁸⁸³ 490 U.S. 386 (1989).

⁸⁸⁴ The man sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and a loud ringing in his right ear. *Id.* at 390.

⁸⁸⁵ *Graham*, 490 U.S. at 397.

Thus, Black people arm themselves with the knowledge that they must be physically self-controlled when interacting with law enforcement and must be prepared to record police interactions. Practically speaking, this begins with a conversation and ends with a cell phone.

Solutions

The Talk

A unique conversation is occurring in the black community, in part because of the media coverage of police use of force against African Americans. Black parents are having “the talk” with their children about how to behave if they encounter a police officer.⁸⁸⁶ At the heart of this talk is a deep distrust of law enforcement officers. The talk is rooted in parents’ warranted concern that a police encounter could result in the arrest or death of their child. While this conversation has occurred in one form or another privately for a long time, its existence has been revealed to the public because of the deaths of unarmed black men in recent years. The talk is important because it is one African Americans’ only defenses to combat their perception of an excessive use of force against communities of color. While debate exists as to the effectiveness of “the talk” in addressing excessive use of force, there is no doubt that its mere existence and representation in the public sphere speaks to the trust issues within the Black community around police interactions.

Video Footage

In addition to “the talk,” Black people also arm themselves with the knowledge of how powerful video footage can play in aiding transparency and creating trust. While the Commission’s Report addressed transparency via court proceedings,⁸⁸⁷ available public data,⁸⁸⁸ reform measures,⁸⁸⁹ and body-worn cameras,⁸⁹⁰ some efforts at transparency will render positive results sooner rather than later.

⁸⁸⁶ SALT Project, “Get Home Safely: 10 Rules of Survival,” <http://www.saltproject.org/progressive-christian-blog/2015/1/14/get-home-safely-10-rules-of-survival> (last accessed Nov. 4, 2018) (depicting 10 survival rules to be discussed, including “(1) Be polite and respectful when stopped by the police. Keep your mouth closed; (2) Remember that your goal is to get home safely. If you feel that your rights have been violated, you and your parents have the right to file a formal complaint with your local police jurisdiction; (3) Don’t, under any circumstance, get into an argument with the police; (4) Always remember that anything you say or do can be used against you in court; (5) Keep your hands in plain sight and make sure the police can see your hands at all times; (6) Avoid physical contact with the police. No sudden movements, and keep hands out of your pockets; (7) Do not run, even if you are afraid of the police; (8) Even if you believe that you are innocent, do not resist arrest; (9) Don’t make any statements about the incident until you are able to meet with a lawyer or public defender; and (10) Stay calm and remain in control. Watch your words, watch your body language, and watch your emotions.”)

⁸⁸⁷ Commission Report at notes 79.

⁸⁸⁸ Commission Report at notes 14.

⁸⁸⁹ Commission Report at notes 73.

⁸⁹⁰ Commission Report at notes 71, 72.

A part of increased transparency is getting information out to the public in a timely manner. In particular, law enforcement must engage in the timely release of body camera and dash camera video footage. While the research results are mixed,⁸⁹¹ some of the results show there has been a decrease in allegations of excessive use of force. As Wade Henderson, former president of the Leadership Conference on Civil Rights stated: “by documenting what happens, these cameras can become a new mechanism of police accountability, and can provide an additional source of evidence for administrative and court proceedings.”⁸⁹²

Regardless of whether citizens can access the video footage held by law enforcement, they might also equip themselves with footage that they record with their own devices. In so doing, citizens should know that they have the right to film police. As the ACLU of North Carolina stated:

- You can take pictures of anything in plain view in a public space including federal buildings, transportation facilities, and the police, as long as you are not interfering with law enforcement.
- Police officers may not confiscate or demand to view your digital photographs or video without a warrant, and they cannot delete your photographs or video under any circumstances.
- [The NC ACLU offers an app which] allows you to record audio and video which is then automatically sent to the ACLU of North Carolina.⁸⁹³

Unfortunately, video footage is not a panacea for excessive use of force.⁸⁹⁴ But, such footage allows people to tell their story, to take back their power, to influence the narrative about police use of force, and to begin a conversation about police practices in America.⁸⁹⁵ It also brings a measure of transparency that is otherwise lacking in police interactions.

Conclusion

In conclusion, the story is still being written on excessive use of force by our law enforcement. The Commission's Report tells part of that story. As the story continues to unfold, hope lies in law enforcement's ability to create greater trust through the release of video footage in a timely manner. Until then, African-American parents will likely continue to have “the talk” with their children and will be equipped with fully charged cell phones to video any interactions with law enforcement.

⁸⁹¹ Commission Report at notes 63 (noting that “body cameras are a relatively recent development. . . and the exact number of jurisdictions that fully utilize this technology is not known (at the time of this report).”)

⁸⁹² Commission Report at notes 64.

⁸⁹³ Molly Rivera, “You Have the Right to Film Police,” ACLU North Carolina, July 13, 2016, <https://www.acluofnorthcarolina.org/en/news/you-have-right-film-police>.

⁸⁹⁴ Mark Berman, “What the Police Officer Who Shot Philando Castile Said about the Shooting,” *Washington Post*, June 21, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.c26bb9cf4429 (noting a statement by a University of Pittsburgh law professor that “video may give us some insight on [shootings], but it doesn’t change the fundamental standard by which police actions using force are judged.”).

⁸⁹⁵ Katie Dupere, “How to Use Your Phone to Record Police Violence Safely and Effectively,” *Mashable*, July 7, 2016, <https://mashable.com/2016/07/07/police-violence-video-phone/>.

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Statement of David Kladney

Too many citizens in this country do not feel safe in their communities or their home. They also feel unsafe calling the police.

Nine-Hundred and Eighty-Seven (987) citizens that died in 2017 were shot and killed by police.⁸⁹⁶ These encounters encompass a wide range of circumstances. Some of this number threatened the lives of officers or civilians. Some had committed violent crimes. Some did not understand police officer directives or police misunderstood their actions. Some died because of indefensible police officer actions.

In 2017, 46 police officers were shot and killed while on duty in the United States.⁸⁹⁷ A decrease from 66 in 2016.⁸⁹⁸ In the past 50 years, only the year 2013 saw fewer police deaths.⁸⁹⁹

There is a problem in America with all these deaths continuing to occur and causing deep loss to both families of police, police themselves, citizens, and society.

The extremes proffered by either side of this issue will not solve the problem. They will not move the needle. There is (or should be) a consensus in the middle that police work best when they are accountable for their actions and maintain community trust.

The testimony at the briefing and research set forth in our report covers many issues including police training, conduct, investigation and the procedure used in officer involved shootings, police interactions with citizens afflicted with mental health diagnosis, police accountability, community trust, citizen conduct, and the issues raised by the Law Enforcement Bill of Rights.

In 1989, in the case of *Graham v. Connor*, the United States Supreme Court held that police use of force should be evaluated based on “objective reasonableness” and explained that reasonableness:

must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly

⁸⁹⁶ *Washington Post*, “2017 Police Shootings Database,” <https://www.washingtonpost.com/graphics/national/police-shootings-2017> (last accessed Nov. 4, 2018).

⁸⁹⁷ Officer Down Memorial Page, “Honoring Officers Killed in 2017,” <https://www.odmp.org/search/year?year=2017> (last accessed Nov. 4, 2018).

⁸⁹⁸ Alexa Lardier, “Dramatic Drop in Police Officer Deaths in 2017,” *U.S. News and World Report*, Dec. 28, 2017, <https://www.usnews.com/news/national-news/articles/2017-12-28/dramatic-drop-in-police-officer-deaths-in-2017>.

⁸⁹⁹ *Ibid.*

evolving—about the amount of force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

When looking at the Supreme Court standard, it is a fluid standard depending on the situation. **It is not a self-defense standard.** It is a judgment standard created by each separate instance.

This standard allows for killings that are “lawful, but not necessary.”⁹⁰⁰

This is a harsh standard for civilians to understand . . . the killing of a person, the taking of a life when it is not necessary and it isn’t a crime. With a bar this low justifying the taking of a life, police administration and supervising officers must develop and install better ways of training and interacting with citizens that leads to less death and pain to both police and the citizens they serve. It is impossible for every interaction to go perfectly, but that is no reason not to make improvements. As our report and objective evidence from departments around our country show, the deaths from police use of force can be diminished by the use of new methods: policing methods, accountability, police education and training, an openness with the public, and public involvement.

While *Graham* established the constitutional floor for excessive use of force, many jurisdictions have chosen to move beyond these bare minimums and adopt a more exacting and detailed set of policies, training procedures such as rules on shooting at moving vehicles, rules on pursuits, officer education and other use of force issues that have worked to reduce injury to both citizens and police. Similarly, members of the public have commented that the great degree of discretion left to police departments by the Supreme Court’s decision in *Graham* means their concerns are not being addressed by the courts. This leaves the legislature and police departments to take the initiative in addressing excessive police force.

The decision in *Graham* leaves wide latitude for an officer in many circumstances the police find themselves. However, as our finding and recommendations show, there are many actions which can be taken by police departments to protect the officer’s rights, citizen’s rights and the right of the public to transparency while saving lives which now are taken unnecessarily. The report includes and findings and recommendations with evidence-based practices departments and lawmakers should employ to ensure everyone is safer.

INVESTIGATION OPENNESS & TRANSPARENCY

Secrecy breeds mistrust, and trust is what we need to rebuild in communities and in the police departments.

⁹⁰⁰ Michelle Rindels, Luz Gray, “Vegas police led the way in overhauling force policies, but it hasn’t been a panacea,” *Nevada Independent*, Aug. 19, 2018, <https://thenevadaindependent.com/article/vegas-police-led-the-way-in-overhauling-force-policies-but-it-hasnt-been-a-panacea> (quoting Capt. Kelly McMahon, Las Vegas Metropolitan Police Department).

The Laquan McDonald case saw extensive delay of more than a year at the direction of the city administration, the police and the prosecutor.⁹⁰¹ In addition, questions emerged about fellow police officers attempting to doctor the forensic evidence at the scene.⁹⁰² If it wasn't for activists taking action, that video and the officer's actions would never have been seen or known by the public. Prosecution of a police officer for excessive use of force, of which there are very few, begins with the grand jury. This is an ancient legal procedure first employed in England in the 1100's. Courts do not preside over the grand jury. Prosecutors do.

What appears to be occurring time and again after a shooting is the prosecutor will present the evidence she/he wishes to at the secret grand jury proceedings, the jury members will find the officer not responsible and community members do not trust that the proceeding was fair, resulting in outrage. The transcripts of the proceeding, the physical evidence admitted during the hearing and the witnesses called to testify are all secret. There is no transparency for the public.

The public is not presented with an opportunity to see the process in operation which is presided over without judicial oversight; rather, the public is left to guess at how the outcome was reached without a judge and a prosecutor who works on a daily basis with the police department with which she/he is presenting the case. It is no wonder there is outrage at the result when people have no way of knowing what went on and reason to think prosecutors might be on the side of the police. There are a number of ways to accomplish the objective of impartial, fair investigations and grand jury proceedings in which the public can be confident.

Judge Lawrence Marks of the New York Court of Appeals testified at the briefing that Chief Judge Jonathan Lippman proposed these grand jury proceedings be overseen by a trial judge to lend assurance to the public that the proceeding were conducted fairly and up to judicial standards.⁹⁰³ I agree this should be the very minimum of change.

I propose the grand jury should be conducted in a more open fashion. The prosecutor would conduct the proceedings with a judge present and allowed to exclude inadmissible evidence, but the proceeding would be open, after a fashion, to the public. The best way to accomplish this new procedure is to have the proceeding televised without the public or news media present in the grand jury room. If televising the proceeding is impracticable, then a videotaped version could be released to the public without editing content. The press and public should not be in the room so the grand proceeding will not be disrupted. The transcript would be released immediately, no more than 48 hours after the grand jury has reached a decision. This would allow the public to see what evidence the prosecutor presented, the fashion it was presented in, the witnesses called, the questions asked, and the instructions given to the grand jury on what constitutes the elements of a violation.

⁹⁰¹ See Jason Meisner, Jeremy Gorner and Steve Schmadeke, "Chicago releases dash-cam video of fatal shooting after cop charged with murder," *Chicago Tribune*, Nov. 24, 2015, <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-laquan-mcdonald-charges-20151124-story.html>.

⁹⁰² Patrick Elwood, "Officers accused in Laquan McDonald cover up allowed to return to work," *WGN 9*, June 12, 2017, <https://wgntv.com/2017/06/12/police-board-delays-discipline-for-cops-in-laquan-mcdonald-case/>.

⁹⁰³ Lawrence K. Marks, Chief Administrative Judge, New York State Courts, *Briefing Transcript* at 176-81, https://www.usccr.gov/calendar/trnscrpt/Police-Practices-and-Use-of-Force_04-20-2015.pdf.

States should also investigate the possibility of establishing a use of force investigation office that is separate and apart from the law enforcement system of the state. If states are too small to develop and fund such an endeavor, they should join together with other states and form an inter-governmental investigative unit. Most police loathe having civilian police boards review their work, perhaps they would feel better if neutral professional investigators looked at their work and a professional unattached prosecutor presented the evidence.

TRAINING & MENTAL HEALTH

Disability groups are vocal in the need for more and specific police training dealing with mental issues. Nearly a quarter (24%) those 987 deaths last year were those with mental disabilities.⁹⁰⁴

A strong push for training has come from the Autistic community and their supporters. In 2017 the Florida legislature unanimously passed and Governor Rick Scott signed into law a provision requiring special training of police officers to be able to identify and interact with people with autism. This law was the result of video of an autistic man's caretaker getting shot by an officer. The caretaker was trying to get the autistic man to comply with the police request. The bullet taken in the leg of the caretaker was meant for the man with autism.⁹⁰⁵

One in 59 children in our country place somewhere on the autism spectrum.⁹⁰⁶ This condition has a strong lobby throughout the legislative halls in our country. They were able to pass this new law.

Matt Puckett, the executive director of the Florida Police Benevolent Association said the training would help police officers be more effective and prepared.

We're having so many interactions with our law enforcement officers and people in the streets that are mentally ill, that are suffering from some kind of illness that makes their behavior abnormal, at least to what the current training standards are. We're trying to specify these things, so that officers are better equipped to handle this sort of stuff.⁹⁰⁷

It should be noted this training is occurring in only some of the 18,000 police departments throughout the country on an ad hoc basis with no coordination.

⁹⁰⁴ *Washington Post*, "2017 Police Shootings Database," *supra* note 896.

⁹⁰⁵ Elizabeth Koh, "New law requiring autism training for police officers to take effect," *Miami Herald*, Sept. 30, 2017, <https://www.miamiherald.com/news/state/florida/article176348886.html>.

⁹⁰⁶ Autism Speaks, "CDC increases estimate of autism's prevalence by 15 percent, to 1 in 59 children," April 26, 2018, <https://www.autismspeaks.org/science/science-news/cdc-increases-estimate-autism%E2%80%99s-prevalence-15-percent-1-59-children> (explaining data from the Centers for Disease Control and Prevention). The prevalence of autism among adults is not tracked. *Ibid*.

⁹⁰⁷ Sascha Cordner, "New Law Requiring Autism Training For Law Enforcement Takes Effect Sunday," *WFSU*, Sept. 28, 2017, <http://news.wfsu.org/post/new-law-requiring-autism-training-law-enforcement-takes-effect-sunday>.

To show how much officers need to learn about mental issues affecting members of the public, I've attached as Exhibit 1, a list of signs and symptoms set out by Autism Speaks for police to use in identifying those with autism.⁹⁰⁸

Many other mental conditions don't have the representative strength behind their lobby as the citizens concerned with autism. Many have no lobby at all. The specialized training for these conditions go unaddressed by many of those 18,000 police departments that still believe in the philosophy of ATM, "ask'em, tell'em, make'em" It is time for a change.

Our police officers face not only autism, but conditions ranging from language disorders, limited hearing and deafness, behavioral disorders, and mental health concerns. Their bosses in police administration, city councils, county governments and legislatures should adequately prepare them for these conditions they face every day. Each of these medical conditions present different symptoms and require difference responses when interacting with people in crisis. We cannot expect front line police officers to handle these problems in a professional manner unless they are adequately trained. That's the responsibility of the politicians, chiefs and sheriffs.

The difficult job police face is exacerbated by a lack of available mental healthcare. Legislatures throughout the country along with mental health civil rights groups combined together to close down the mental institutions of the '80s. Their closure was to be supplemented with community mental health centers. They never were.

People in mental health crisis are therefore far more likely to encounter police. For more than 30 years officers have struggled to meet this challenge. The police are men and women who are not mental health professionals. Yet, legislatures continue to fail the police in this vital area of their profession. They have turned every jail in the country into the largest mental institution in their jurisdiction, and state prisons into long-term mental institutions. It is time for this to stop. Communities must fund real mental healthcare, available to all.

In the meantime, it is time for police to get more help and specialized training. This takes time and money. POST (Police Officer Standards and Training) schools throughout the country should school their trainees and active police officers should be required to attend continuing education classes on mental illness and how to deal with it in their duties. Current training is woefully inadequate. There should be classes and the officers should meet mentally disabled people of their community and learn to interact with them. This will require the length of training for POST to be extended. Whatever the additional time and cost, the training will protect the community for the cadet's and active officer's careers. It will protect police officers too.

Legislatures should provide money so mental health professionals can accompany officers on calls. This assistance can be targeted to where it is needed most. Legislatures and local governments, who have failed to set up active and working community mental health centers in all communities,

⁹⁰⁸ Autism Speaks, "Information for Law Enforcement," <https://www.autismspeaks.org/information-law-enforcement> (last accessed Nov. 4, 2018).

should provide for a mobile mental health clinic with authorized professionals who can dispense medications to those who need it. This mobile unit would be able to assess these citizens and encourage and assist them in managing their conditions.⁹⁰⁹ Our local jails only provide medication to those who need it while they are incarcerated. When released they usually have no medications to take the next day. Senseless.

City and county jails, as stated above, have become our largest mental institutions. Rather than taking a person to jail for initial treatment, they should be allowed to voluntarily go to a community crisis center.⁹¹⁰

It would be a special center staffed with professionals or a hospital that deals with these issues.

Arkansas has set up four community crisis centers where mentally disabled which have come to the attention of police can choose whether they, the citizen, wants to go to jail or the crisis center. Most choose the center.⁹¹¹

Each community should experiment with solutions.

I am sure there are some people who will criticize this approach as being too expensive or say people with mental health disabilities should be responsible for taking their medication, or, better yet, it is their problem and not the community. This approach not only denies proper treatment, but irreparably damages the community and abandons sections of the community to hopelessness and danger.

It should also be noted, those who oppose these approaches are costing the taxpayer unnecessary expense of keeping people with mental health disabilities in jail. This is not a cheap proposition. At a reasonable estimate of \$150 a day, one year of keeping a mentally disabled person confined to jail is more than \$54,000 a year. I invite those who refuse to address this issue because of cost of taking a new approach to do the math. Both in the cost of lives and money.

Finally, if nothing is done on the treatment end, more and more individuals in mental crisis will have to interact with police, requiring police to continuously train and try to avoid fatal interactions to the citizen and law enforcement.

NEW TRAINING APPROACHES

In addition to mental health training, officers must have skills and knowledge of how to approach situations so they are less likely to be left with deadly force as their only option. As detailed in the

⁹⁰⁹ See Stephanie W. Y. Yu, Caterina Hill, Mariesa L. Ricks, Jennifer Bennet, and Nancy E. Oriol, "The scope and impact of mobile health clinics in the United States: a literature review," *International Journal of Equity Health*, vol. 16 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5629787/#>.

⁹¹⁰ Council of State Governments, "Arkansas Opens First Crisis Stabilization Unit," March 20, 2018, <https://csgjusticecenter.org/jr/arkansas/posts/arkansas-opens-first-crisis-stabilization-unit/>.

⁹¹¹ Max Bryan, "Police Response to Arkansas County's Crisis Unit Improves," *U.S. News*, June 11, 2018, <https://www.usnews.com/news/best-states/arkansas/articles/2018-06-11/police-response-to-arkansas-countys-crisis-unit-improves>.

report, evidence-based training approaches should be adopted to equip offices to interact safely in the community.

- Reality Based Training (RBT)

This realistic, situational-based training requires realistic scenarios where police officers face urban interactions with real people acting as citizens. It increases accurate decision making under stress in mock situations. It helps the officer decide whether what is occurring is a threat to the officer or other members of the public in circumstances which are tense, uncertain, and rapidly evolving. This allows the officer to make better decisions about the amount of force that is necessary in a particular situation.

The Community Oriented Policing Service (COPS office at the Department of Justice) described Reality Based Training in its final report on the Las Vegas Metropolitan Police Department:

The program was designed to prepare officers to handle dynamic, critical incidents as a team, and to use analysis of critical incidents to address emerging challenges. The program includes classroom lectures and scenarios. It was made a mandatory semi-annual requirement for all of patrol, the community-oriented policing (COP) units, and for problem solving units (PSU). In addition, all supervisors are required to complete an RBT module that is specifically designed to emphasize leadership skills in a critical incident.⁹¹²

At our briefing, David Klinger of the University of Missouri-St. Louis testified:

One of the things we know is that some states around the country do not require satisfactory number of hours in fundamental tactical training. They might get a little bit of it in the academy, but no force on force training, not appropriate scenario-based training[.]⁹¹³

Tactical training is important. It allows officers not to have to make these decisions the first time in the field with lives in the balance.

- De-escalation Training

De-escalation training allows the officer to learn to identify the situation and slow the momentum of the interaction so that using force is as unnecessary as possible. This gives the officer the opportunity to learn more about the citizen(s) being confronted. Is the citizen suffering a mental

⁹¹² George Fachner and Steven Carter, *Collaborative Reform Model: The Final Assessment Report of the Las Vegas Metropolitan Police Department*, U.S. Dep't of Justice, Community Oriented Policing Services, 2014, at 18-19, <https://ric-zai-inc.com/Publications/cops-p287-pub.pdf>.

⁹¹³ Klinger, *Briefing Transcript* at 333-34.

health crisis, intoxicated, emotionally distraught, able to hear and understand his commands, etc. This also gives time for additional resources, other officers along with a supervisor and medical/mental health personnel, to arrive on the scene.

A survey by the Police Executive Forum showed new recruits received a median of 58 hours firearm training, 49 hours defensive tactical training, and 8 hours de-escalation training.⁹¹⁴

The Las Vegas Metropolitan Police Department (LVMPD) has been teaching their officers this concept. Their experience has been very positive. They have reduced officer-involved shooting by half.⁹¹⁵ Their study did show that force will usually be used if the interaction goes longer than 6 minutes.⁹¹⁶ However, the use of this tactic has remarkably reduced the use of force throughout the department.⁹¹⁷

Now the LVMPD spends 100 hours at its academy on de-escalation training.⁹¹⁸

The San Francisco Police Department is using this tactic too. They found slowing down situations dramatically reduced the probability force would be used. Tony Chaplain, interim police chief, described their findings about interactions as follows: “In under a minute, forty five percent of the shootings occurred. When you went to a minute, you're up to ten percent. At two minutes you're at five percent. Three minutes . . . literally the graph falls off a cliff with each minute that you stall these things out. If we create this time and distance, as you can see from this graph, we save lives.”⁹¹⁹

Other departments are slowly introducing de-escalation as they learn how it functions and how successful it is. It is not a strategy which places officers in danger, it is another tool they can use besides those on their belts.

○ Fair and Impartial Policing Training

⁹¹⁴ U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018 [hereinafter Commission Report] at notes 970 (citing Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 11).

⁹¹⁵ Fachner and Carter, *Collaborative Reform Model: The Final Assessment Report of the Las Vegas Metropolitan Police Department*, *supra* note 912 at 21.

⁹¹⁶ Office of Internal Oversight, Las Vegas Metropolitan Police Department, *Use of Force Statistical Analysis 2012-2016*, at 9, <https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Documents/Use%20of%20Force%20Statistical%20Analysis%202012-2016%20-%20051117.pdf>.

⁹¹⁷ *Ibid.* at 6.

⁹¹⁸ Rindels and Gray, “Vegas police led the way in overhauling force policies, but it hasn’t been a panacea,” *supra* note 900.

⁹¹⁹ Reveal News, “What cops aren’t learning,” May 6, 2017, <https://www.revealnews.org/episodes/what-cops-arent-learning/>.

This training program is based on the assumption that most police are well-intentioned, but subconscious bias can lead to flawed decision-making. Officers throughout the country bristle at the thought they operate with some form of unconscious bias.

Experts who assert this rely on data. For instance, prior to receiving training the LVMPD data analysis concluded that 90 percent of unarmed subjects in officer-involved shootings were black or Hispanic, and all subjects shot as a result of an officer-initiated stop were black or Hispanic. This data resulted in unconscious bias training being instituted by LVMPD.⁹²⁰

Regardless of how officers personally feel, this type of training enlightens their perspective on how unknown biases affect how we view each other. It can assist officers in making more accurate assessments of whether a person is a threat. Further, the knowledge that police are undergoing this training will increase community trust, creating a virtuous cycle. All of us, including police, have biases. It is our responsibility to ensure unconscious bias does not affect police actions, particularly when those actions can have deadly consequences.

POLICIES & ACTIONS DEPARTMENTS CAN TAKE

○ Critical Incident Review

Each department should use critical incident or “near miss” review after each and every use of force incident, especially discharge of weapons, tasers and use of batons. This critical use of force review should be conducted pursuant to the same legal protections as those done in hospitals after treatment or surgery has led to an unexpected negative outcome or death. It should receive the same legal protections as well.⁹²¹

The review should include actions that were both appropriate and inappropriate according to department policy. Whether there needs to be a policy change, more training and/or supervision or whether the officers involved acted correctly and should be acknowledged for their actions. It should also review whether supervisory functions were appropriately followed.

○ Community Policing

With 18,000 police departments, 200,000 sworn officers, and so many different types of communities (urban, rural, suburban, student, etc.) community policing takes different forms.

A retired police officer described to me his actions when patrolling a neighborhood. After muster, he would drive his unit to an urban park in his district and start picking up trash. The residents got to know him from this and other actions. He would when time permitted play a game of horse with the kids on the basketball court or engage a dad in who was at the park with his kids who might be having a beer. Interestingly, under “broken windows” theory of policing the dad would be cited

⁹²⁰ Fachner and Carter, *Collaborative Reform Model: The Final Assessment Report of the Las Vegas Metropolitan Police Department*, *supra* note 912 at 32.

⁹²¹ See Klinger, *Briefing Transcript* at 313-15.

for open container or taken to jail. However, this officer thought it was a good thing the dad was with the kids spending time in the park and not creating a problem. He also engaged the basketball kids. Over time he interacted this way with many citizens in his patrol area. As a result, he not only gained trust and respect from the citizens, he also gained great sources of information.

However, there was no department consistency in this policy. The next officer on duty may have cited the dad or ignored the kids and merely patrolled in his/her prowler.

Departments should analyze their communities and how they can engage their officers into the community so that a friendship and/or relationships can grow between the police and the citizens they are sworn to protect. These relationships are valuable when crimes occur and information from the community is needed to solve crimes.⁹²²

The departments should engage with officers that patrol the different areas the different communities through outreach at the schools, community meetings, at places of worship and community centers. The police should explain how policing works, what their policies are, the legal and factual ramifications of *Graham*, and the type of response and conduct they expect when they are performing their duties.

This analysis is not a one-size-fits-all. Each community is different and police should rely on themselves and experts to develop both the strategy and tactics for a community and its policing.

- Accountability

The Las Vegas Metropolitan Police Department was the first police force to invite the COPS office to join the LVMPD in a collaborative reform effort in 2010. The final report says this collaborative effort is still an evolving effort; however, interim reports and a final report was issued. The department instituted many of the collaborative recommendations.⁹²³

Collaborative reform is a joint review of a local police department by the U.S. Department of Justice's Office of Community Oriented Policing Services and the local police department.

It is *not* an investigation of specific incidents, cases or officers, but instead an analysis of police department policies and practices that affect good policing practices and the public's trust. This is not a federal investigation. It's meant to be a big-picture look at operations, trends and the details of the system. The DOJ analysis in conjunction with the local department is intended to identify ways the department can improve policing and relationship with the community they serve.

⁹²² Important investigation is now being conducted into the failure of some police departments to solve crimes in all communities and a lack of trust in the police in those communities. See Wesley Lowery, Kimbriell Kelly, Ted Mellnik, and Steven Rich, "Where Killings Go Unsolved," *Washington Post*, June 6, 2018, <https://www.washingtonpost.com/graphics/2018/investigations/where-murders-go-unsolved/>; Leovy, *Ghettoside: A True Story of Murder in America*, *supra* note 173.

⁹²³ Fachner and Carter, *Collaborative Reform Model: The Final Assessment Report of the Las Vegas Metropolitan Police Department*, *supra* note 912 at 18-19.

It is the department's decision as to which policies, procedures or recommendations they will institute.

From the collaboration, the LVMPD instituted a Critical Incident Board. They also instituted a Use of Force Review Board. Both boards are chaired by the same deputy chief appointed by the sheriff. Membership on the Use of Force Review Board includes police officers, supervisors, and civilian members of the community.

Prior to 2010:

the accountability mechanisms that LVMPD had in place to review officer involved shootings were extremely limited. For example, the force review board could only focus its review on the moment an officer discharged his or her firearm. This narrow scope produced judgments in which the officer's actions were almost always found to be justified, even in questionable circumstances. The scope of review was greatly expanded to include not just the decision making at the moment the officers employed deadly force, but also the tactics, communications, and supervision of all personnel involved. LVMPD determined that more finding categories were needed to provide greater accountability for all involved officers. These included:

- Administrative approval
- Tactics/decision making
- Policy violation not directly related to use of force
- Policy/training failure
- Administrative disapproval⁹²⁴

This change has resulted in more accountability to the public and the police.

The 2014 evaluation noted during the past two years the Use of Force Review Board “has issued an unprecedented number of findings that are critical of the officers' actions and/or how they were managed by supervisors. Consequently, the board has recommended significant remedial action, including training, discipline, one demotion, and the termination of two officers.”⁹²⁵

VIDEO AND AUDIO RECORDINGS

Would the North Charleston shooting of Walter Scott have resulted in criminal charges if an alert citizen had not caught the back shooting on video? Would the blue line have held in that incident?⁹²⁶ It is clear capturing officer actions on video has dramatically increased public awareness of police use of force concerns and led to some needed changes to increase officer accountability. Many, including this Commission, endorse the policy solution of requiring officers to use body-worn cameras so that there is less ability to fabricate what actually happened in an encounter. However, as we note, body-worn cameras are not a silver bullet. Simply purchasing the equipment is no guarantee officers or civilians will behave differently or that accountability will

⁹²⁴ Ibid. at 18.

⁹²⁵ Ibid. at 6.

⁹²⁶ See Commission Report at FN 184.

increase. Departments must also implement policies regarding how the video is used. For example, in many places officers are permitted to view the footage *before* recounting their version of the incident. This gives them the opportunity to tailor their account so it is less likely to be contradicted. This is antithetical to the accountability purpose for which cameras were intended.

I don't recall the last time a person of interest in a possible criminal investigation was allowed to review the evidence before giving a statement as to what occurred.

Departments should not purchase technology and assume their job is done. They must thoughtfully implement camera policies that bring accountability. Otherwise they have simply spent taxpayer money but not increased safety or community trust.

SO-CALLED "BLACK ON BLACK CRIME"

Some people think, whatever the problems with police use of force, it is not a policy, training or a racial issue. They claim that any disparities in rates of use of force can be attributed to police presence in neighborhoods with high crime rates, which tend to be communities of color. I disagree that we should dismiss police use of force as not being a civil rights issue. First, it is overly optimistic and naïve to assume that police are free of any bias in the way they interact with people, up to and including the ways they use force. More importantly, if police are not given the proper tools to understand and interact with different subcultures their actions will be skewed toward certain outcomes. If you only give a person a hammer, everything they see becomes a nail.

The pervasive history of racism in our society and the present continuation of policies and attitudes formed in society mean that every person retains unconscious biases. They are pernicious. These biases influence how every one of us, including sworn officers, view behaviors and what judgments we make about what is appropriate. This is borne out by study after study that shows people of color are treated differently by law enforcement—stopped more frequently but less likely to be carrying contraband when searched, and more likely to be victims of violence at the hand of police.⁹²⁷ The greater frequency of interactions with the police experienced by people of color are caused by many systemic factors and cannot be explained away by individual behavior.⁹²⁸

⁹²⁷ See, e.g., John Sides, "What data on 20 million traffic stops can tell us about 'driving while black'," *Washington Post*, July 17, 2018, <https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/what-data-on-20-million-traffic-stops-can-tell-us-about-driving-while-black/> (discussing Frank R. Baumgartner, Derek A. Epp, and Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (Cambridge: Cambridge University Press, 2018)); Sharon LaFraniere and Andrew W. Lehren, "The Disproportionate Risks of Driving While Black," *New York Times*, Oct. 24, 2015, <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>; *Floyd*, 959 F. Supp. 2d 540, <https://archive.nytimes.com/www.nytimes.com/interactive/2013/08/12/nyregion/stop-and-frisk-decision.html>; Lance Hannon, "An Exploratory Multilevel Analysis of Pedestrian Frisks in Philadelphia," *Race and Justice* (2017), <http://journals.sagepub.com/doi/abs/10.1177/2153368717730106>; Brad Heath, "Racial gap in U.S. arrest rates: 'Staggering disparity'," *USA Today*, Nov. 18, 2014, <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>

⁹²⁸ See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016), <https://georgetownlawjournal.org/articles/216/blue-on-black-violence/pdf>.

Police presence alone does not inevitably mean or explain police must use excessive force. Presence does not require use of force. Even when police are in some areas more often, they can and should be trained to operate so that force is used as a last resort. Officers and supervisors should be held accountable when they violate that standard. Currently, this is not consistently happening.

LIMITS TO ACCOUNTABILITY

Provisions contained in state laws and collective bargaining agreements actively inhibit accountability by shielding officers from effective investigation. Of particular note, in some cities and states there is a required “cooling off period” after a use of force incident before an officer can be questioned. These periods are commonly 48 hours, but can be 10 days or longer. Advocates for allowing a cooling off period before questioning claim having “2 sleep cycles” results in more clarity in the officer’s recollection after a traumatic event. Conveniently, it also allows officers to consult with other witnesses, speak to lawyers, and in some places, view video footage before reporting their version of the incident. Current understandings of brain science do not support delaying interviews in this manner.⁹²⁹ To the contrary, immediate accounts supplemented by a later interview yields the most accurate reflection of what actually happened. In no other instance would officers wait to question witnesses, persons of interest and perpetrators after a shooting. The idea would be rejected as ludicrous.

Similarly, provisions allow officers to review all the evidence against them before being interviewed and include very short limitations periods for when officers can be disciplined for policy violations of any sort, sometimes as short as 100 days or less. This means even severe violations of law and policies are never addressed. This allows bad-acting or ill-trained officers acting improperly and against the best interests of the rest of the department to continue without correction. These limits to police accountability should be eliminated as they do not serve the best interests of the public, the department, or the community they serve.

COLLECTION OF DATA

We track what we care about. This report and many other accounts make plain the failure of the federal government, and well as local and state governments, to accurately track, categorize, and publicize police uses of force. Such data collection is necessary to analyze use of force policies, implementation, supervision, and to build community trust in law enforcement. Community trust is necessary to prevent crimes and catch perpetrators of crime. Although technical challenges exist, what is lacking in many places is the will to take on the challenge. Newspapers and non-profits should not be forced to do their own investigations and tracking of police uses of force. This information should be open and freely available.

Police departments talk of how well they track and report incidents that occur outside the departments; so it should not be very difficult to track use of force incidents by the department’s own members.

⁹²⁹ Walker, *Police Union Contract “Waiting Periods” for Misconduct Investigations Not Supported by Scientific Evidence*, *supra* note 333.

It is the only way the public will know how their police, the people who we give the ultimate power in this country are conducting our business.

INTERACTION DURING TRAFFIC STOPS

In addition to the training and accountability changes we should make to prevent police from abusing their power, driver's education courses should also address the reality that a simple traffic stop can become dangerous for a driver if an officer misunderstands the driver's actions.

Illinois, Virginia and Miami require as part of driver's education that students learn about traffic stops from the perspective of a police officer, as one step in building community trust.⁹³⁰ In Miami, officers stress that driver's shouldn't assume cops are out to get them and teach young people how to approach being pulled over. The classes teach driver protocol for behavior during stops that is just as vital as learning all the other rules of the road. Drivers should know to stay calm, keep their hands on the wheel and comply with officer's instructions.

Lives hang in the balance of this interaction, as shown in a South Carolina case where an officer confronted a young driver who was out of his truck at a gas station. The officer asked for the driver's license and then shot the driver when the driver turned to reach back into the truck to get his driver's license upon the command of the state trooper. When the man turned around the trooper fired four shots hitting the man in the leg.⁹³¹

Police bear responsibility to use force only as a last resort, and even with the best education, not all people will interact with officers in a cogent manner. For example, as detailed above people in mental health crisis, those who are under the influence, or have some other condition that causes them to react in unexpected ways should also be assured police will do all they can to keep them safe. Driver education is one way to keep people safer, and it should be part of the conversation as well.

CONCLUSION

We call on our police officers to perform all sorts of duties besides enforcing the law. They respond to robberies, burglaries, homicides, auto accidents with death or injury, domestic violence calls, lost children, lost adults, mental health crises, truancy; they deliver babies, write traffic tickets and intercept drug couriers among other duties. As they respond during their shifts, they can be called

⁹³⁰ Kyra Gurney, "In program to build trust, police teach Miami teens how to respond to traffic stops," *Miami Herald*, March 22, 2017, <https://www.miamiherald.com/news/local/education/article140179943.html>; Brendan Ponton, "Gov. McAuliffe signs bill requiring lessons on traffic stop interactions during drivers ed," *WTKR*, May 8, 2017, <https://wtkr.com/2017/05/08/gov-mcauliffe-to-sign-bill-requiring-lessons-on-traffic-stop-interactions-during-drivers-ed/>; Karen Jordan, "New law requires students to learn how to handle being pulled over by police," *ABC 7 Chicago*, Aug. 8, 2016, <http://abc7chicago.com/news/new-law-requires-students-to-learn-how-to-handle-being-pulled-over-by-police/1461899/>.

⁹³¹ See Jason Hanna, Martin Savidge and John Murgatroyd, "Video shows trooper shooting unarmed man, South Carolina police say," *CNN*, Sept. 26, 2014, <https://edition.cnn.com/2014/09/25/justice/south-carolina-trooper-shooting/index.html>.

upon to respond from one tense situation to another. This can lead to mistakes in judgement. Department leadership and supervisors need to learn to recognize this and not merely rely on officers' training to have them deal with one tense and ugly situation after another on a shift, but they must learn to take action in real time to decompress the officer.

We should adequately prepare them to carry out the duties they are directed to do. We owe them the best training to prepare them, as we do any professional, on the many different ways to interact with citizens of all types. They are professionals. We expect them to conduct their interactions in a proper manner. We as taxpayers are obliged to provide them the best training so they are prepared for what they face every day. We must also pay them better for this more complex and complicated effort and provide adequate staffing and supervision in the field.

With the low bar created by the Supreme Court in *Graham*, policing must start changing. Hook'em and book'em policing will not be the major tool used by the police in dealing with citizens moving forward.

Policing is changing from police being warriors of the 70's to being community guardians of today.

This change will be slow, but it is coming.

Despite this administration's attempt to stop reform and give police free reign over the citizens of this country, change is going to come. By dismantling collaborative reform and pattern and practice investigations by the Department of Justice, the president and the attorney general are only delaying the change toward better policing practices which protect both officers and citizens. The \$7 million provided to a non-profit organization for a technical assistance center on policing policies and methods will not be as efficient as the COPS analysis of the best practices in partnership with those local departments whose issues to be explored vary widely. No one organization can address the particular issues of communities of such differing sizes, cultures and environments.

Police must be given many tools to work with in performing their duties. Eighteen thousand individual police departments with eighteen thousand chiefs, 200,000 police officers, too numerous to number politicians, and plenty of police unions on the job will slow the inevitable, but change will come. It must.

A FINAL NOTE

The Commission undertook this project with the support of all eight Commissioners. Without the support of the staff, this project would have been impossible. The Commission staff in the Office of Civil Rights Evaluation did excellent work researching articles, writing and selecting witnesses for the briefing-held at the John Jay College of Criminal Justice in New York City on April 20, 2015. The logistics in moving our entire briefing apparatus to New York City was extremely difficult, but overcome by the excellence demonstrated by our administrative services department led by Pam Dunston. Our capable research and writing staff, in particular Marik Xavier-Brier, compiled the large amount of evidence on the topic to produce this first class report. Finally, John Jay College provided an outstanding venue to conduct the briefing. They were not only cordial but

leant a hand whenever necessary. They are an excellent example of an institution of higher education integrating with its community and the nation. All have my thanks and gratitude.

I take a special moment here to give my everlasting thanks to Amy Royce for her exceptional work on this particular project and every other project in my office. She has spent hundreds of hours reviewing, editing, coordinating, organizing, and researching this project from the beginning. She continues with her excellence in work and commitment to the Commission's mission. I am lucky to have her as my work partner. Thank you Amy.

Exhibit 1

Information for Law Enforcement

On a daily basis police officers encounter a multitude of individuals in emergency situations. Just as each emergency differs from the next, so does the individual involved, especially in regards to people with autism. Police are trained to respond to a crisis situation with a certain protocol, but this protocol may not always be the best way to interact with people with autism. Because police are usually the first to respond to an emergency, it is critical that these officers have a working knowledge of autism, and the wide variety of behaviors people with autism can exhibit in emergency situations.

Teaching first responders the signs of autism is an important first step toward preventing unfortunate situations.

A person with autism might:

- Have an impaired sense of danger.
- Wander to bodies of water, traffic or other dangers.
- Be overwhelmed by police presence.
- Fear a person in uniform (ex. fire turnout gear) or exhibit curiosity and reach for objects/equipment (ex. shiny badge or handcuffs).
- React with "fight" or "flight".
- Not respond to "stop" or other commands.
- Have delayed speech and language skills.
- Not respond to his/her name or verbal commands.
- Avoid eye contact.
- Engage in repetitive behavior (ex. rocking, stimming, hand flapping, spinning).
- Have sensory perception issues.
- Have epilepsy or seizure disorder.

If a first responder is able to identify that a child or adult may have autism, he or she can then respond in a way that best supports the individual.

When interacting with a person with autism:

- Be patient and give the person space.
- Use simple and concrete sentences.
- Give plenty of time for person to process and respond.
- Be alert to signs of increased frustration and try to eliminate the source if possible as behavior may escalate.
- Avoid quick movements and loud noises.
- Do not touch the person unless absolutely necessary.

- Use information from caregiver, if available, on how to best respond.

General training guidelines*:

- Law enforcement agencies should proactively train their sworn workforce, especially trainers, patrol supervisors, and school resource officers, to recognize the behavioral symptoms and characteristics of a child or adult who has autism, and learn basic response techniques.
- A training program should be designed to allow officers to better protect and serve the public and make the best use of your valuable time, and avoid mistakes that can lead to lawsuits and negative media scrutiny, loss of confidence from the community, morale problems, and lifelong trauma for all involved.
- A good autism recognition and response workshop is designed to inform law enforcement professionals about the risks associated with autism, and offers suggestions and options about how to address those risks.

**Dennis Debbaudt, Autism Risk & Safety Management*

<https://www.autismspeaks.org/information-law-enforcement>

Statement of Commissioner Karen K. Narasaki

This report has been many years in the making.⁹³² It is an issue with life and death consequences for both law enforcement and the communities they serve. I strongly support our findings and recommendations and seek to focus on two particular areas. One is the cultural shift that must be made within policing itself and the role that the Department of Justice can play in supporting that shift. The other is the shared interest that law enforcement and communities have in the need to address the mental health crisis we as a country have too long ignored.

Law enforcement, increasingly faced with the consequences of our country's failure to reform our nation's discriminatory drug laws, prevent gun violence, and provide adequate mental health care and housing, are not getting the investment in training and time to build partnerships essential to maintaining legitimacy and support in the communities they require to prevent and solve crimes and promote public safety. Many in communities of color have been victims of racial profiling and excessive uses of force, view police with resentment and distrust.⁹³³

Unfortunately, there are times when police must use force, sometimes deadly force. Sadly, we have had too many recent incidents, like the mass shooting last October by the white gunman targeting outdoor concertgoers on the Las Vegas strip, or the 2016 ambush in Dallas of police officers where deadly force was clearly justified. There have also been incidents where there has been clear misconduct sometimes with consequences and sometimes not. And there are incidents where it is unclear and increasingly, because of the erosion of trust in police when misconduct has not been addressed, communities are less willing to give officers the benefit of the doubt.

According to the Police Executive Research Forum (PERF), concerned law enforcement leaders are beginning to recognize that:

there is a gulf between policies and practices that meet the minimum requirements of the Constitution and those perceived as legitimate in the community.

⁹³² I would like to thank the Commission's Office of the Staff Director, Office of Management and its respective Divisions, Regional Programs Coordination Unit, Office of Civil Rights Evaluation, Office of the General Counsel, and State Advisory Committees, as well as our Special Assistants, for their collective efforts in organizing and staffing the New York briefing and SAC briefings and for researching, drafting, and revising this report. I would also like to thank my Special Assistant, Jason T. Lagria, and our summer law clerk Aime Joo from Harvard Law School for their work on this report and statement.

⁹³³ See U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018 [hereinafter Commission Report], Findings: Community Trust, Finding 6.

There is a troubling and false narrative pushed by some conservatives that excessive policing and the resulting excessive use of force is somehow justified due to "black crime," "black-on-black crime," or black neighborhoods being inherently more violent than other neighborhoods. Our report systematically rebuts and thoroughly rejects this narrative. See Discussion and Sources cited in Chapter 1, Inevitability Argument section. Most importantly, "the 'black-on-black' crime narrative as an explanation for police excessive use of force disregards the structural and historical issues that formed these neighborhoods, as well as the social and economic factors that currently sustain them." Ibid. at notes 33.

. . . Legitimacy is the extent to which the community believes that police actions are ‘appropriate, proper, and just.’ If the police have a high level of perceived legitimacy in a community, members of the community tend to be more willing to cooperate with the police and to accept the outcome of their interactions with the police. As a result, legitimacy is important not only for its own sake, but also because success in achieving key goals (such as reducing crime rates) can depend largely on whether the community supports the police.⁹³⁴

“[R]ather than focusing only on the narrow question of whether a particular action by an officer can survive legal scrutiny, forward-thinking police leaders are reviewing their policies and practices to ensure that they not only promote community policing and crime reduction, but also advance the broad constitutional goal of protecting everyone’s civil liberties and providing equal protection under the law.”⁹³⁵ This approach will also help to ensure that those that risk their lives to keep us all safe are also able to return home safely to their families each day. Restoring the legitimacy of police in the eyes of communities is also important to the ability of law enforcement to recruit the best and the brightest to join their ranks to serve their communities.

As we found in our investigation, there is a growing consensus that modern police should not envision themselves as “warriors” who transiently insert themselves into neighborhoods to do what needs to be done “at all costs” then depart, but as “guardians” who stay and serve the people.⁹³⁶ Warrior police are encouraged to “think of the people they are supposed to serve as enemies,”⁹³⁷ and the troublesome attitude engendered by this hyper-militarized mindset further undermines community trust and relationships. It is crucial that police are not simply interceding to solve problems “*for* the community,” but are working together “*with* the community” to reach collective goals.⁹³⁸

While the vast majority of police officers strive for professionalism and constitutional policing, the lack of sufficient training in modern policing strategies and de-escalation techniques is a major factor in sowing community distrust of the police and perpetuating the unjustified police use of force. Black police officers and their associations have historically advocated for change in police departments to end racial bias in their profession.⁹³⁹ Some police unions have demanded that police officers get the training they need to avoid unintentionally escalating situations to where the safety

⁹³⁴ Police Executive Research Forum, *Constitutional Policing as a Cornerstone of Community Policing*, *supra* note 111 at 3.

⁹³⁵ *Ibid.*

⁹³⁶ Commission Report at notes 59 (discussing warrior mindset).

⁹³⁷ American Civil Liberties Union, *War Comes Home: The Excessive Militarization of American Policing*, 2014, <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>.

⁹³⁸ Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 29 (quoting Leesburg, VA Chief Joseph Price) (emphasis in original).

⁹³⁹ See Taylor Hosking, “The Long History of Black Officer Reforming Policing From Within,” *The Atlantic*, Dec. 5, 2017, <https://www.theatlantic.com/politics/archive/2017/12/the-long-history-of-black-officers-reforming-policing-from-within/547457/>.

of officers and others become more at risk.⁹⁴⁰ For example, the Baltimore police union urged city and federal officials negotiating a consent decree “to include better training, more hiring, [and] technology upgrades[.]”⁹⁴¹

But change is not easy nor is it always welcomed. As recognized in PERF’s report *Re-Engineering Training On Police Use of Force*, it is difficult to change the culture when police training for decades has emphasized now outdated viewpoints, particularly given the fact that officers are putting their lives on the line every day.⁹⁴²

A recent Pew Research Center survey highlights the divergent views—including among police officers along racial lines—of whether the shooting of African Americans in police encounters is representative of a larger problem of police accountability which hinders acceptance of reform efforts.

Some of the sharpest differences between the police and the public emerge over views on deaths of blacks during encounters with police in recent years and the protests that many of those incidents ignited. For example, 67% of the police but only 39% of the public describe these deadly encounters as isolated incidents rather than signs of a broader problem between blacks and police. When this overall finding is analyzed by race, an equally striking result snaps into focus: About seven-in-ten white officers (72%) but fewer than half of all black officers see these encounters as isolated incidents. By contrast, majorities of black officers (57%) as well as the public overall (60%) say the incidents are signs of a broader problem between police and the black community.⁹⁴³

At our New York hearing, witnesses shared that the “blue wall of silence” that pressures officers to keep quiet about unethical behavior by encouraging retaliation against officers who step out of line is real.⁹⁴⁴ We heard that police officers need “whistleblower protection” and “witness protection for the officers that come forward”⁹⁴⁵ It is no wonder communities of color have

⁹⁴⁰ See Kevin Rector, “Baltimore Police Union Responds to DOJ Report With Its Own Reform Recommendations,” *Baltimore Sun*, Oct. 13, 2016, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-fop-doj-response-20161013-story.html>; Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 62 (Las Vegas Deputy Chief Kirk Primas discussing union buy-in).

⁹⁴¹ Rector, “Baltimore Police Union Responds to DOJ Report With Its Own Reform Recommendations,” *supra* note 940.

⁹⁴² See Police Executive Research Forum, *Re-Engineering Training on Police Use of Force*, *supra* note 309 at 3-10 (calling for the need for an overhaul of police training).

⁹⁴³ Rich Morin, Kim Parker, Renee Stepler, and Andrew Mercer, “Behind the Badge: 6. Police Views, Public Views” Pew Research Center, Jan. 11, 2017, <http://www.pewsocialtrends.org/2017/01/11/police-views-public-views/#police-say-no-more-changes-needed-to-achieve-racial-equality-public-divided>.

⁹⁴⁴ Commission Report at notes 60-61.

⁹⁴⁵ Fogg, *Briefing Transcript* at 43; see also Rector, “Baltimore Police Union Responds to DOJ Report With Its Own Reform Recommendations,” *supra* note 940 (Baltimore police union request “whistleblower protections” to be included in DOJ consent decree).

difficulties trusting the police when some police officers themselves in some departments cannot always trust the integrity of the system.

Unfortunately, as our report lays out, some police unions are resisting the implementation of crucial reforms despite clear indications that the situation as-is cannot stand.⁹⁴⁶ The pressure for police to stay silent in the face improper behavior is fortified by some provisions contained in union negotiated contracts and laws that have been pushed by unions⁹⁴⁷ that allow police to effectively “operate by a completely different set of rules.”⁹⁴⁸ Some of these protections, such as dismissing complaints filed after a set amount of days after the incident, preventing interrogations of officers immediately following the alleged misconduct, and limiting disciplinary repercussions, hinder accountability and transparency and shield even repeat offenders from appropriate punishment.⁹⁴⁹

The difficulties of firing officers who have been found to clearly cross the line highlight the consequences of these provisions.⁹⁵⁰ Not only do the provisions cover-up numerous misconduct complaints by dismissing those filed past a certain number of days or erasing disciplinary records after a few years, they may make it too easy to reverse punishment decisions made by police chiefs.⁹⁵¹ From 2006 to 2017, of the 1,881 officers from 37 of the nation’s largest police departments who were fired for betraying the public trust during that time, the arbitration and appeals system has resulted in 451 of them being reinstated to their jobs.⁹⁵²

By putting “cops deemed unqualified by their own bosses” because of use of excessive force back in their jobs,⁹⁵³ these policies not only undermine community faith in police, but also demoralize the police seeking to do the right thing and chiefs who are trying to hold the department accountable to the public.⁹⁵⁴ Of course, officers need to collectively bargain to protect their labor

⁹⁴⁶ Commission Report at notes 61-66. There is agreement across the ideological spectrum on this issue. *See* James Surowiecki, “Why are Police Unions Blocking Reform?” *New Yorker*, Sept. 19, 2016, <https://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform> (police unions continue to attempt to “block policing reforms of all kinds”); Lucy Morrow Caldwell, “It’s Time to Take on Police Unions,” *National Review*, Dec. 16, 2014, <https://www.nationalreview.com/2014/12/its-time-take-police-unions-lucy-morrow-caldwell/> (“unions fight over a range of issues beyond compensation that impact the day-to-day practices of government workers, and in turn, citizens’ experiences interacting with them”).

⁹⁴⁷ Walter Olson, “Police Misconduct and ‘Law Enforcement Officers’ Bill of Rights’ Laws,” *Cato Institute*, April 24, 2015, <https://www.cato.org/blog/police-misconduct-law-enforcement-officers-bill-rights> (“Maryland was the first state to pass a [Law Enforcement Officer Bill of Rights], in 1972, and by now many states have followed, invariably after lobbying from police unions and associations.”).

⁹⁴⁸ McKesson, et al., “Police Union Contracts and Police Bill of Rights Analysis,” *supra* note 336.

⁹⁴⁹ *Ibid.* at 1–2. *See also* Stephen Rushin, *Police Union Contracts*, 66 DUKE L. J. 1191, 1222–39 (2017) [hereinafter *Police Union Contracts*].

⁹⁵⁰ *See* Commission Report at notes 63-66.

⁹⁵¹ *Police Union Contracts*, at 1238–39.

⁹⁵² Kelly, et al., “Fired/Rehired,” *supra* note 337.

⁹⁵³ Conor Friedersdorf, “How Police Unions and Arbitrators Keep Abusive Cops on the Street,” *The Atlantic*, Dec. 2, 2014, <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>.

⁹⁵⁴ Kelly, et al., “Fired/Rehired,” *supra* note 337.

rights and ensure a fair process when under investigation or dismissed from the service. That can be done without pushing for excessive protections that obstruct accountability, and sometimes justice for the civilians unlawfully harmed by the police, and in the long run undermine the legitimacy police need in the communities they serve to successfully to prevent and solve crimes. Police unions who believe that the problem of excessive use of force against marginalized groups is limited to a few “bad apples” and do not want to be unfairly “painted with the same broad strokes” as those who commit misconduct need to spearhead efforts to weed out those outliers and make it easier to identify recurring perpetrators and dismiss them from service.⁹⁵⁵ It is in their best interests to support reforms necessary to protect police integrity and reestablish community trust.⁹⁵⁶

By creating special protections and privileges for officers suspected of wrongdoing, these policies suggest that the law “isn’t a body of rules binding on all of us, but something [police] impose on others,”⁹⁵⁷ heightening the image of police as outside soldiers, so unattached to the neighborhoods they patrol that they are not even governed by the same laws or consequences. In order to rehabilitate police-community relations and re-instill faith in officers as community guardians, it is crucial that unions support programs geared towards eliminating racial prejudices, as well as educating officers on de-escalating hostile situations before using force as an absolute last-resort measure.⁹⁵⁸ Unions should support and encourage the officers who hold each other accountable and honor those who invest in building community trust.

Police and their unions have a legitimate concern when reforms are developed without their input. In my work over the years on racial profiling, I have observed that there is often a gap between police chiefs and the police on the beat. Community stakeholders need to understand that for real change to happen, everyone needs to be at the table having candid and hard conversations. It is not enough to get the police chief on board.

At our hearing in New York, Ellen Scrivener, Deputy Director of the Police Foundation, observed:

I've had a lot of experience of sitting down at the table with all the stakeholders from the community and the line officers, the officers who were working in that community, not just the police chiefs or the supervisors or the captains. I think you heard Sean Smoot talk early today about the union needs to be at the table. If you're going to have buy-in, that's pretty critical, and I will tell you right now, initially those meetings can be very uncomfortable. Nobody trusts each other. Nobody really likes each other, but over time they start to build up some respect for one another's position because they begin to realize that they're all after the same thing. They want safe neighborhoods and neighborhoods where people can see their kids playing out in the street or they can walk to the grocery store without worrying about being shot or harassed by police, and so as they start to learn that from each

⁹⁵⁵ Andrew Cohen, “How Bad Apples Spoil the Whole Bunch,” *Marshall Project*, Sept. 27, 2017, <https://www.themarshallproject.org/2017/09/27/how-bad-apples-spoil-the-whole-bunch>.

⁹⁵⁶ *Ibid.*

⁹⁵⁷ Julian Sanchez, “When Corruption is a Job Perk,” *Cato Institute*, Jan. 22, 2018, <https://www.cato.org/blog/when-corruption-job-perk-0>.

⁹⁵⁸ *See* Commission Report, Findings: Training.

other, you see a lot more engagement. When I talked earlier about collaborative engagement, that's not just a nice term. That really means we're going to work together. This is not cooperation. This is not coordination. This is you and me working together to create something that's going to make it better for all of us, and it takes some time to get there, but that was really a foundation of community policing, and once that starts to happen, then you will see change begin to occur and we were seeing it all over the country really but then things changed, unfortunately. Really it hadn't gotten the roots that it needed, and hopefully we can try to re-root it.⁹⁵⁹

Some conservatives take a dim view of the federal government and, in particular, the role of the Department of Justice, in interceding in what they view as local prerogatives. In fact, as we heard at our hearing,⁹⁶⁰ and as many chiefs of police who seek to modernize their approach to policing, have said, the Department of Justice has an important role to play. The Department of Justice, Office of Community Oriented Policing Services (COPS Office) supports community policing through information, resources, technical assistance, and grant programs.⁹⁶¹ Numerous police chiefs have also stated at a PERF roundtable discussion that the threat of Department of Justice litigation actually can open doors to conversations that otherwise would not take place.

- Then-Commissioner of the Philadelphia Police Department, Charles Ramsey (also former D.C. Chief of Police):

The process of having a consent decree can actually be a benefit to your department. You can leverage the Justice Department to get some things that you desperately need. When I was chief at the Metropolitan Police Department in Washington, we would not have been able to make the changes we made without the consent decree. We would have encountered pushback from the union, and we would not have obtained the funding needed to develop an early intervention system and underlying technology infrastructure to support it.

The end result was very positive. Shootings dropped by 80 percent and have remained low. And it gave us credibility with the public.⁹⁶²

- Elizabeth Township Police Chief Bob McNeilly:

A couple of months after I became chief in Pittsburgh, the Department of Justice showed up and took a lot of boxes of paperwork back to Washington, D.C. When they announced their desire to enter into a consent decree, it seemed intimidating at first. But I could see that they opened a door for me that my labor union had

⁹⁵⁹ *Briefing Transcript* at 285-88.

⁹⁶⁰ *Briefing Transcript* at 288-90 (Ellen Scrivner discussing evolving role of the Department of Justice).

⁹⁶¹ See Commission Report at notes 140-41 (discussing positive impact of COPS office on the Las Vegas Metropolitan Police Department).

⁹⁶² Police Executive Research Forum, *Civil Rights Investigations of Local Police: Lessons Learned*, *supra* note 553 at 34.

closed. And the door they opened included funding and political support for all my initiatives for the department.⁹⁶³

John Farmer, Executive VP and General Counsel, Rutgers University:

Our Consent Decree Gave the Reform Process Momentum Without the force of a court order behind us, I doubt we would have obtained the funding that we needed from the state, over a sustained period of time, to develop the systems that the New Jersey State Police put in place to ensure internal transparency. I think the process was a help to us. We did not put anything in place that we were not going to do eventually in any case. But putting the force of a court order behind it created a momentum that would not have otherwise existed.⁹⁶⁴

PERF and the members of the law enforcement community and other stakeholders who worked on PERF's 30 Guiding Principles on the Use of Force⁹⁶⁵ should be commended for digging into a topic fraught with emotion and controversy and for seeking to build a safer more effective vision of community policing for the 21st century.

MENTAL HEALTH

As our report highlighted, too often, fatal police interactions involved “individuals with psychological, emotional, or physical disabilities,”⁹⁶⁶ largely because police were unaware on how to identify disability and how to address the situation. For example, police often misunderstand the body language and facial expressions of deaf people and resort to using force on them.⁹⁶⁷ To combat this problem, training on how to interact with persons with mental health needs or other disabilities is absolutely critical.⁹⁶⁸ The police and community should be willing to invest in the cost of the training and ensuring there are enough police hired to make it possible for everyone in the force to take the time for regular training.

The police and the community have a shared interest in not only ensuring that encounters between officers and persons with mental health problems remain safe, but also getting at the root of the problem—the need to invest in mental health facilities and services. Community advocates know that funding mental health services will keep people with mental health needs from cycling through jails and emergency rooms.⁹⁶⁹ Investing in mental health services will also restore “police work to

⁹⁶³ Ibid. at 35.

⁹⁶⁴ Ibid.

⁹⁶⁵ Police Executive Research Forum, *Guiding Principles on Use of Force*, *supra* note 28.

⁹⁶⁶ Commission Report at notes 51.

⁹⁶⁷ See Lewis Statement at 3-4.

⁹⁶⁸ See Commission Report, Findings: Training, Finding 2; Recommendations, Recommendation 6.b. iii-iv (promoting and funding partnering with mental health organizations and training on crisis intervention).

⁹⁶⁹ See, e.g., Mark Cook, “For Mental Illness, Community Resources are More Effective Than Jail,” ACLU of Washington, Dec. 18, 2015, <https://www.aclu-wa.org/blog/mental-illness-community-resources-are-more-effective->

a better balance of community building and protection” and aid in recruitment.⁹⁷⁰ Concern for police officers potentially or actually being charged for unlawfully shooting a person with a mental illness has prompted police unions to argue for more funding mental health programs.⁹⁷¹ And as Louis Dekmar, the president of the International Association of Chiefs of Police, stated, “The real story is the failure of the mental health system. There’s just not a large political constituencies for the mentally ill, unless law enforcement or family members advocate.”⁹⁷² Tackling this problem provides a great opportunity for police leadership and their unions to work together with concerned communities.

The dearth of in-patient treatment options for persons with mental illnesses⁹⁷³ has led to police too often assuming the role of first responders to an individual suffering a mental health crisis.⁹⁷⁴ Police are, in effect, asked to do more with less funding and inadequate training when answering calls involving people with mental health challenges. And without the training needed to prepare law enforcement for this responsibility, police have reacted with force in situations where it was unwarranted, mistaking “behaviors associated with disability” with threats to their safety and authority.⁹⁷⁵

The combination of a large population of people suffering from inadequately treated mental health problems and some police departments inadequately prepared to respond to such emergencies has resulted in the disproportionate use of force against persons with disabilities, with around 25% of all police killings targeted against people with mental health problems.⁹⁷⁶ While some departments have recognized the need to properly educate their officers on mental illnesses and how to act in interactions with persons undergoing a mental health crisis, the necessary training has by no means been universally implemented.⁹⁷⁷ A majority of departments that do have education programs only require 8 hours for mental health training, compared to 58 hours mandated for firearms training.⁹⁷⁸ The Department of Justice can help by working with law enforcement to convene mental health experts, disability advocates, police unions, and police chiefs to identify effective trainings and

jail (arguing for community-based resources to prevent people with mental illnesses from going to jail or emergency rooms).

⁹⁷⁰ See, e.g., Editorial Board, “Investments in Mental Health and Addiction Treatment Can Help Police Shortage,” *Bangor Daily News*, March 27, 2018, <https://bangordailynews.com/2018/03/27/opinion/editorials/investments-in-mental-health-and-addiction-treatment-can-help-police-shortage/>.

⁹⁷¹ Valerie A. Canady, “Officers Call for Federal Intervention to Address MH System,” *Mental Health Weekly*, July 24, 2017, <https://onlinelibrary.wiley.com/doi/full/10.1002/mhw.31129>.

⁹⁷² Caroline Carballeria, “Police Unions Join Forces to Rally for Mental Health Reform,” *NBC10*, Aug. 24, 2017, <https://www.nbcphiladelphia.com/news/national-international/Police-Unions-Mental-Illness-Policy-Reform-440784533.html>.

⁹⁷³ Samantha Raphelson, “How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis,” *NPR*, Nov. 30, 2017, <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis>.

⁹⁷⁴ Commission Report at notes 51-52.

⁹⁷⁵ *Ibid.* at notes 53.

⁹⁷⁶ *Ibid.* See also Julie Tate, et al., “Fatal Force,” *supra* note 265.

⁹⁷⁷ Commission Report at notes 136 (In 2016, only 15 percent of police jurisdictions have crisis intervention training programs in place).

⁹⁷⁸ Commission Report at notes 134.

trainers and help develop best practices.⁹⁷⁹ Congress can help by appropriating funding to enable more law enforcement to be trained at a more rapid pace as well as by working to address the crisis in mental health funding and support systems.⁹⁸⁰

It took the deaths of many people and the advent of cell phone cameras to expose the too frequent unjustified and unaccountable uses of force. Recent protests are not the first to call for reform. More than fifty years ago, people were outraged by images of police officers beating black protesters at Selma,⁹⁸¹ just as they were outraged in 1991 by footage of officers beating Rodney King in Los Angeles,⁹⁸² and just as they were outraged in 2014 by reports of the police shooting of Michael Brown in Ferguson.⁹⁸³ This problem of excessive police use of force is not a new one, but that does not mean the issue is unsolvable.

Some police departments have begun to make the changes necessary to rebuild community trust by implementing key reforms and training. Congress as well as state and local governments can and should provide the resources to departments to make reforms and provide training. And the Department of Justice can help foster and disseminate best practices, provide technical assistance and help facilitate the necessary discussions among stakeholders and hold accountable police departments whose practices violate modern policing principles. No more lives should be lost before meaningful change happens, and before communities of color and law enforcement become partners in building safe and vibrant communities.

⁹⁷⁹ U.S. Government Accountability Office, *Federal Law Enforcement: DHS and DOJ are Working to Enhance Responses to Incidents Involving Individuals with Mental Illness*, 2018, <https://www.gao.gov/products/GAO-18-229> (describing ongoing federal law enforcement efforts to respond to incidents involving individuals with a mental illness).

⁹⁸⁰ See Carballera, "Police Unions Join Forces to Rally for Mental Health Reform," *supra* note 972 (police calling for Congress to fund the 21st Century Cures Act, which funds police training on identifying and responding to incidents involving persons with mental health disorders, among other provisions).

⁹⁸¹ Christopher Klein, "Remembering Selma's 'Bloody Sunday,'" *History*, March 6, 2015, <https://www.history.com/news/selmas-bloody-sunday-50-years-ago>.

⁹⁸² Nicole Flatow, "What Has Changed About Police Brutality in America, from Rodney King to Michael Brown," *ThinkProgress*, Sept. 11, 2014, <https://thinkprogress.org/what-has-changed-about-police-brutality-in-america-from-rodney-king-to-michael-brown-e6b29a2feff8/>.

⁹⁸³ BBC News, "Ferguson Unrest: From Shooting to Nationwide Protests," *BBC*, Aug. 10, 2015, <https://www.bbc.com/news/world-us-canada-30193354>.

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Statement of Commissioner Gail Heriot

In the Jim Crow South, one of the most severe problems faced by African-American communities was that many law enforcement officers just didn't give a damn. Swedish sociologist and Nobel Laureate Gunnar Myrdal exposed their neglect in his influential 1944 book, *An American Dilemma: The Negro Problem and Modern Democracy*:⁹⁸⁴

It is part of the Southern tradition to assume that Negroes are disorderly and lack elementary morals, and to show great indulgence toward Negro violence and disorderliness "when they are among themselves." . . . As long as only Negroes are concerned and no whites are disturbed, great leniency will be shown in most cases. This is particularly true in minor cases which are often treated in a humorous or disdainful manner. The sentences for even major crimes are ordinarily reduced when the victim is another Negro. Attorneys are heard to plead [to] juries: "Their code of ethics is a different one from ours."

The leniency in punishment of Negro crime against Negroes has repeatedly been pointed out . . . by white Southerners as evidence of the friendliness of Southern courts toward Negroes.⁹⁸⁵ . . . Yet the Southern Negro community is not at all happy about this double standard of justice in favor of Negro offenders. Law-abiding Negroes point out that there are criminal and treacherous Negroes who secure immunity from punishment because they are fawning and submissive toward whites. Such persons are a danger to the Negro community. Leniency toward Negro

⁹⁸⁴ Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 551 (1944).

⁹⁸⁵ Myrdal wrote that he could personally attest to a few cases of a white upper class person obtaining a lenient sentence for an African American accused of a crime against another African American. Myrdal at ch. 26, note 15. He also quotes as an example of Southern attitudes Progressive reformer Edgar G. Murphy, who wrote in 1904: "'Petty crimes are often forgiven him, and in countless instances the small offences for which white men are quickly apprehended are, in the negro, habitually ignored. The world hears broadly and repeatedly of the cases of injustice, it hears little of those more frequent instances in which the weaknesses of a child-race are accorded only an amused indifference or a patient tolerance by their stronger neighbors.'" Edgar G. Murphy, *Problems of the Present South* 176 (1904), quoted at Myrdal, ch. 26, note 16.

Myrdal quotes a letter he received from a white lawyer in the Upper South: "... I have noted that cases between Negro and Negro are handled somewhat differently than cases between white and white. I mean a spirit of levity, an expectation of something 'comical' appears to exist. The seriousness in the white vs. Negro case is decidedly lacking. As you know, it is a rare case indeed in which a Negro who has murdered a Negro receives the extreme penalty, either death or life imprisonment here, regardless of the facts. Only the other day in a local case a Negro who murdered another with robbery as motive, a charge that would have been as between white and white, or Negro and white victim, good for the electric chair, was disposed of by a jury with a 15-year sentence. The punishment as between Negro and Negro, as distinguished from white vs. white, or Negro vs. white victim, is decidedly different and clearly shows the racial approach to the question. In short the court-room feeling is that the Negro is entirely inferior, with punishment for crimes by him against his own kind punished with less punishment than when the white man is involved." Letter of June 19, 1940 in Myrdal at ch. 26, note 14.

defendants in cases involving crimes against other Negroes is thus actually a form of discrimination.

It's difficult to see how people could have thought this kind of neglect was "friendly" toward African Americans. No government function is more important than protecting citizens from crime. For law enforcement authorities to leave one part of the population without the full protection of the law was not the least bit "friendly." It was a travesty.⁹⁸⁶

With the passage of the Voting Rights Act of 1965, ignoring the victimization of African Americans was no longer something local governments could do without fear of retaliation at the ballot box. Things therefore got better. But not enough better. During the 1960s and 1970s new approaches to crime and law enforcement were being discussed and experimented with across the country. Alas, much of it was wrongheaded. A good example is Karl Menninger's 1966 *The Crime of Punishment*, which argued that *all* punishment is cruel and useless and that criminal behavior should instead be treated as mental illness. As Menninger saw it, those who asked us to spare a thought for the victims were being "melodramatic" and "childish" and appealing only to the "unthinking."⁹⁸⁷

To read Menninger today is itself punishment. Here's a sampling:

*I suspect that all the crimes committed by all the jailed criminals do not equal in total social damage that of the crimes committed against them.*⁹⁸⁸

And there is one crime we all keep committing, over and over. . . . We commit the crime of damning some of our fellow citizens with the label "criminal." And having done this, we force them through an experience that is soul-searing and dehumanizing.⁹⁸⁹

⁹⁸⁶ Yet one doesn't hear much about it today. Instead, the law enforcement issue we tend to learn about from history is the practice of lynchings. Lynch mobs were indeed a horrific problem that deserves to be discussed, but lynch mobs were by no means the only crime-related problem for African American communities in the Jim Crow South. It isn't even clear they were the most important problem. Without close examination of the historical record, it is impossible to say which caused the greater harm to African American communities: lynch mobs or law enforcement officers who don't care about the safety of entire communities. Fortunately, there is no need to decide: They were both horrors.

These days school children tend to come away with the impression that lynching was overwhelmingly a Southern practice and that it was used against African Americans exclusively or nearly so. But lynching was a frequently used practice in the West as well, where African Americans were by no means the only victims. See Ken Gonzales-Day, *Lynching in the West: 1850-1935*; Lisa Arellano, *Vigilante and Lynch Mobs: Narratives of Community and Nation* (2012); Stephen J. Leonard, *Lynching in Colorado 1859-1919* (2002).

⁹⁸⁷ Karl Menninger, *The Crime of Punishment* 9 (1966).

⁹⁸⁸ *Ibid.* at 28 (italics in original).

⁹⁸⁹ *Ibid.* at 9.

The inescapable conclusion is that society secretly *wants* crime, *needs* crime, and gains definite satisfactions from the present mishandling of it! We condemn crime; we punish offenders for it; but we need it. The crime and punishment ritual is a part of our lives. We need crimes to wonder at, to enjoy vicariously, to discuss and speculate about, and to publicly deplore. We need criminals to identify ourselves with, to secretly envy, and to stoutly punish. Criminals represent our alter egos—our “bad” selves—rejected and projected. They do for us the forbidden, illegal things we wish to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment—“the iniquities of us all.”⁹⁹⁰

As Menninger's and similar views become common among policymakers, incarceration rates dipped, while crimes rates soared, especially in African-American neighborhoods in large cities.⁹⁹¹ Meanwhile, he was given many honors, including the Presidential Medal of Freedom by President Jimmy Carter.⁹⁹²

Were African Americans of that era as keen as Menninger and his disciples on reducing the level of incarceration for criminal wrongdoing? In *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment*, Professor Michael Javen Fortner demonstrates that most were not. In the Preface to the book, Fortner makes it clear that his interest in the subject stems in part from his own experience growing up in Brownsville, Brooklyn. In response to suggestions that the dominant response to crime of African Americans of that era was “a sense of sympathy for and empathy with the perpetrators,” Fortner states bluntly: “[T]hat's not what I heard. . . . I remember black folks constantly worrying about keeping their children, homes, and property safe.”⁹⁹³

Fortner's book, however, is not a memoir. Rather, it meticulously documents that while African Americans were not at all monolithic on crime-related issues, large numbers of African Americans opposed liberal policies that emphasized lenience and therapy rather than prison time. As early as 1970, in a survey of 2000 urban black households, respondents were asked whether “[keeping] offenders off the Street and in jail” would help in curbing the crime problem. Over 80% indicated

⁹⁹⁰ Ibid. at 153 (italics in original).

⁹⁹¹ At the same time the number of psychiatric inpatients declined precipitously from a high of over 550,000 in 1950 to around 30,000 by the 1990s. Megan Testa and Sara G. West, *Civil Commitment in the United States*, 7 *Psychiatry* (Edgmont) 30, 33 (Oct. 2010). As a result, many of those who in an earlier day would have been institutionalized in psychiatric hospitals wound up in prisons instead or on the street. Estimates of exactly how many vary widely. Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 *Psychiatr. Serv.* 862 (2014). But today's incarceration rates are surely influenced by the near absence of psychiatric inpatients in the American systems. This makes incarceration rate comparisons with other countries where psychiatric inpatients are more common hopelessly flawed.

Menninger very much favored the de-institutionalization of psychiatric inpatients. Interestingly, that de-institutionalization and the corresponding incarceration of many mentally ill individuals created common ground between the average American and Menninger: There are certainly some prisoners today who would be more effectively dealt with as psychiatric patients.

⁹⁹² *Karl Menninger, 96, Dies; Leader in U.S. Psychiatry*, N.Y. Times (July 19, 1990).

⁹⁹³ Michael Javen Fortner *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment* x-xi (2015).

that it would be “very helpful” or “somewhat helpful.” A near majority also agreed that “tougher police policies” would be a good thing.⁹⁹⁴

Polling data in this context has obvious limitations. More important, Fortner shows that during the 1970s, African-American grassroots leaders in New York pushed for more intervention from the police, not less. Among the many statements and events he discusses to support his point is a well-attended public hearing on crime held at Harlem’s Salem Methodist Church. The hearing was opened with these words by the chairman of the Harlem Youth Opportunities Unlimited and Associated Community Teams (HARYOU-ACT):

I charge the Mayor and the Police Commissioner with gross neglect of our community in failing and refusing to provide adequate police protection to Harlem as they do to white areas. This neglect is criminal. Perhaps 200,000 angry black residents will have to march on City Hall and Police Headquarters to protest this criminal neglect, and to say to the Mayor and the Police Commissioner just how angry we are, to provide equal protection for our law-abiding citizens who are daily being mugged, raped, assaulted, molested and killed by a small but effective band of criminal who have made us prisoners in our own homes.⁹⁹⁵

Sometimes leaders went beyond pushing for more police protection. On a different occasion, Waldaba Stewart, an African-American state senator from Brooklyn, argued for vigilantism: “If [the crime problem] is bigger than police then we must organize vigilante operations and arm ourselves in defense of our home, our families, and our children. . . . I have reached the place where I am on the verge of being the leader of the proposed vigilante group. . . . I don’t want to—but something has to be done.”⁹⁹⁶

Others argued against vigilantism, but nevertheless in favor of strong police measures. Fortner writes, for example: “Vincent Baker, author of the 1969 NAACP crime report that embraced the death penalty and stop-and-frisk, among other punitive strategies, regretted that there ‘is an embryonic vigilante movement in this community. It’s cropping up all over. Tenant groups are arming themselves.’ While he recognized a feeling of ‘anarchy and complete helplessness against marauding hoodlums,’ Baker considered such efforts anathema to his ‘law and order’ campaign. . . .”⁹⁹⁷

Fortner shows that African Americans provided crucial grassroots political support for Governor Nelson Rockefeller’s get-tough drug laws, which had been vehemently opposed by white “reformers”:

Empowered by their newly won civil rights, members of the black silent majority vigorously battled King Heroin and reconfigured the politics of drug policymaking

⁹⁹⁴ *Id.* at 155.

⁹⁹⁵ *Id.* at 188-89.

⁹⁹⁶ *Id.* at 187.

⁹⁹⁷ *Id.* at 188.

in New York State. Working- and middle-class African Americans exploited old organizational forms and founded a multitude of new committees and groups. They met, protested, and lobbied to combat the problems of drug addiction, drug trafficking, and crime in their neighborhoods. . . . With banners and bands, picket signs and bullhorns, leaders of block association, church groups, women's groups, fraternal organizations, and Democratic clubs took to the streets to demand more police, shame addicts, call out pushers, and upbraid white and black leaders for their perceived unresponsiveness. . . .⁹⁹⁸

Changing the drug laws in New York did not immediately put a dent in crime rates nationwide (and I will leave it to others to judge whether it was a significant factor in controlling crime in New York). But there is no doubt that it was a significant part of the crime-fighting agenda of African-American leaders in New York at the time. In an opinion piece in the *New York Law Journal*, Charles Rangel, the Member of the U.S. House of Representatives from Harlem, called for President Nixon to wage war on the drug trade here and abroad.⁹⁹⁹ Rangel, with the full support of the Black Caucus, was a leading voice in Congress for get-tough drug legislation at the national level into the 1980s. Nevertheless rates of violent crime did not peak until the early 1990s.¹⁰⁰⁰

The good news is that violent crime has decreased dramatically since that time. This has benefited everyone, but it has especially benefitted African Americans. When law-abiding people don't need to be constantly worrying about crime, they can spend their time achieving their own goals instead. Instead of staying home after dark, they can take a course in accounting at the local community college. They can earn money for a down payment on a house by working a part-time job at a local shopping mall. Instead of spending money to put bars on their windows, they can buy a used car that will get them to an out-of-the-way work site where the pay is better. They can have a picnic in the park. They can get to know their neighbors.

Whole neighborhoods blossom when crime goes down. People start to feel more comfortable coming out at night, and once they come out their presence reduces crime even further. Businesses are formed—restaurants, stores, and hair salons. It becomes a virtuous circle where things get better and better. I've seen it myself in and around the neighborhoods in which I've lived and worked—from the South Side of Chicago to Northeast Washington to City Heights in San Diego.

Small differences between living and working in a safe place and a not-so-safe one must be multiplied by the millions of individuals who benefit. The result has been an overwhelming change for the better. Every day individuals of all races and ethnicities are added to the middle class—maybe not as quickly as we'd like—but they get added. They succeed. Every day the black middle class in particular gets larger.

The reasons for this steep decline in crime since are complex. Some of it is that the average American is a little older than in 1990. Violent crime is largely a young person's game. (Is it wrong

⁹⁹⁸ *Id.* at 212-13.

⁹⁹⁹ Charles B. Rangel, *Addiction Epidemic in Harlem*, *New York Law Journal* (July 6, 1971).

¹⁰⁰⁰ See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 *J. Econ. Perspectives* 163, 166 (2004).

for a member of the U.S. Commission on Civil Rights to point out that young people commit more violent crimes than older people? Of course not.) Some of it is that crime-solving technologies and other law enforcement techniques have improved. But a large reason is people of all races and communities got fed up and saw to it that our public policies changed. As a nation, we made the decision to use incarceration more often than we had in the 1960s and 1970s, not just for drug offenses, but for all offenses, particularly violent ones. We hired more police officers.¹⁰⁰¹ Menninger's notion that the dominant response to crime should be therapeutic lost favor.

We haven't exactly reached the Promised Land. There is still plenty of crime in the country, and lives continue to be ruined on account of it. The number of violent crimes today is roughly twice what it was in 1960 per 100,000 persons. And, of course, the financial cost and social cost of incarceration should not be ignored in evaluating our present position.

Significantly, especially for this Commission, it remains the case that African Americans are, on average, more likely to be victimized by crime than others. For example, while African Americans are only about 13%¹⁰⁰² of the population, they are about 43% of the murder victims¹⁰⁰³ and 22.4% of the victims of violent crimes generally.¹⁰⁰⁴

Why then aren't African Americans still demanding greater police protection? A significant part of the answer is that they are. As Heather Mac Donald stated in her written testimony to the Commission:

Go to a police community meeting in Harlem, the South Bronx, or Central Brooklyn, and you will invariably hear some variant on the following requests: "We want the dealers off the corner." "You arrest them and they're back the next day." "There are kids hanging out on my stoop, why can't you arrest them for loitering?" "I smell weed in my hallway, can't you do something?" I met an elderly cancer amputee in the Mount Hope section of the Bronx who was terrified to go into her lobby to get her mail because of the youth hanging out there trespassing and selling drugs. The only time she felt safe was when the police were there. "Please, Jesus," she said, "send more police!"¹⁰⁰⁵

There is certainly no reason to believe that Mac Donald's observation applies only to New York. My strong suspicion is that requests for more police protection—from people of all races—are made at community meetings with police in Chicago, Oklahoma City, and Santa Ana and indeed in every city. They just don't seem to make the news.

¹⁰⁰¹ See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. Econ. Perspectives 163, 184 (2004).

¹⁰⁰² United States Census Quick Facts, available at <https://www.census.gov/quickfacts/fact/table/US/PST045217> (giving % of population that is black or African American only.)

¹⁰⁰³ FBI: Uniform Crime Reporting, "2015 Crime in the United States," *supra* note 106. Figures for recent past years are extremely similar.

¹⁰⁰⁴ Crime Victimization, 2014, Bureau of Justice Statistics, available at <https://www.bjs.gov/content/pub/pdf/cv14.pdf> (August 2015, rev. September 29, 2015)(App. tbl. 6).

¹⁰⁰⁵ Written Testimony of Heather Mac Donald, 3-4.

Maybe that is in part a consequence of the decline of journalism, particularly at the local level. Not many of the dwindling number of reporters left on the local beat can spend their time at community meetings with police. There just aren't enough of them left on the payroll. Instead, too often, reporters have to let the news come to them. News ends up being constructed out of press releases. If you don't have a publicist working for you, your story may not get told.

Meanwhile more and more of our news comes from organizations and foundations that function at the national rather than the grassroots level. It therefore gets filtered, sometimes consciously but more often unconsciously, to suit the goals of those organizations and foundations and the individuals who run them.¹⁰⁰⁶ Big stories sometimes get missed entirely.¹⁰⁰⁷

The same is true of political activism more generally. Activism guided by national organizations and foundations is different from grassroots activism. Their leaders tend to be college graduates whose experiences are very different from the typical American's or from the kind of individuals they are trying—usually in good faith—to represent. Inside-the-beltway civil rights organizations, for example, tend to be staffed by lawyers and other professionals who have never lived in a high-crime neighborhood. Issues like voting law and affirmative action at the college and university level tend to be of great importance to them. And it is understandable why this would be so. They themselves have benefited from a college education, and they see that experience as crucial to their own success. The fact that their organizations are located in or near the nation's capital suggests that their work tends to include lobbying Congress. For lobbyists, getting to right people elected to office is generally a prime concern.

Such organizations have the resources to draw a newspaper's or radio station's attention to a need for increased police protection if they so desire. But it is not the kind of story to which they are likely to give priority. It also invites the question, "Why are African Americans victimized at such high rates?" That inevitably leads to the answer that, for a variety of demographic, historic and economic reasons, African Americans are not just disproportionately the victims of violent crime, they are also disproportionately likely to commit violent crimes. That's a story these organizations may be reluctant to tell.¹⁰⁰⁸

¹⁰⁰⁶ Hal Pashler & Gail Heriot, *Perceptions of Newsworthiness are Contaminated by a Political Usefulness Bias*, 5 Royal Soc. Open Sci.172239 (2018).

¹⁰⁰⁷ Raise your hand if you are a college graduate who resides inside the beltway *and* you accurately predicted well before Election Day that Donald Trump would be elected President of the United States in 2016. A significant number of those who read this report will fall into that basic demographic. Only a tiny number of them saw the 2016 election returns coming. This is what I mean when I say that big stories sometimes get missed entirely.

¹⁰⁰⁸ What are those reasons for that reluctance? One of them is likely the understandable fear that when this fact is brought up, it will cause listeners to be less sympathetic with all African Americans. Of course it shouldn't. Americans pride themselves on their ability to judge people as individuals. But one can sympathize with the reluctance of civil rights organizations to dwell on the negative.

Another reason may be related to socio-economic class. In general, the individuals who set priorities for civil rights organizations are fairly well off. They often don't live in the neighborhoods that are hardest hit by crime and may not identify as closely with the victims of crime as someone who does.

Yet it's a true story, and it is important to discuss criminal justice issues with our eyes open. According to FBI statistics, 52% of all homicides between 1990 and 2008 were committed by African Americans.¹⁰⁰⁹ In 2013, the figure for robbery is 66.9% and for kidnapping/abduction, 37%.¹⁰¹⁰

Part of it is that African Americans are, on average, younger than whites. Another part is that African Americans are more likely to be low-income or unemployed. But those factors don't account for all of difference in crime rates. Part of it, no doubt, has to do with African Americans' unique history in this country. We live in a complex world, but it is ordinarily better to face those complexities head on rather than ignore them.

It is worth noting that African Americans were not the first ethnic group to come along with higher than average rates of social pathologies (nor are they the only such group now). One hundred and fifty years ago, it was Irish Americans.¹⁰¹¹ That changed. There is no reason that African

On the other hand, I suspect few things are as infuriating for an African-American professional as being pulled over by a police officer for no apparent reason. This could make it easier for them to identify with what is no doubt a very real experience: Law abiding African Americans, especially young men, essentially have a "tax" levied upon them because of their skin color.

¹⁰⁰⁹ See Alexia Cooper and Erica Smith, Homicide Trends in the United States, 1980-2008, Bureau of Justice Statistics (November 2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

¹⁰¹⁰ See Offenders Race by Offense Category, 2013, <https://ucr.fbi.gov/nibrs/2013/table-pdfs/offenders-race-by-offense-category-2013>.

¹⁰¹¹ These days to be Irish American is to be a member of the "majority." But it was not always thus. Irish immigrants and the first few generations of Irish Americans had a difficult time.

Direct comparisons between the histories of African Americans and of Irish Americans are not possible. But by all accounts, nineteenth-century Ireland—from which Irish immigrants to this country fled by the boatloads—was a remarkably dismal place even before the Great Potato Famine. As Gustave de Beaumont, traveling companion to Alexis de Tocqueville, wrote in the 1830s: "I have seen the Indian in his forests and the Negro in his chains, and thought, as I contemplated their pitiable condition, that I saw the very extreme of human wretchedness; but I did not know then the condition of unfortunate Ireland." See Andrew M. Greeley, *That Most Distressful Nation: The Taming of the American Irish* 34-35 (1972).

With the famine, things took an almost unimaginable turn for the worse in Ireland. In a remarkably short period of time, the potato, Ireland's staple crop, essentially disappeared. One and half million, half-starved souls were cast upon American shores in the years between 1845 and 1855. And these were the lucky ones. Out of Ireland's population of eight million, one million died.

When these immigrants got off the boat, most were illiterate, unskilled and ill-equipped for urban life. Not everyone sympathized with their plight. Friedrich Engels, who fancied himself a champion of the workingman, regarded the Irish immigrant to Great Britain as having a "crudity" that "places him little above the savage." For work requiring skill or patience, Engels complained, "the dissolute, unsteady, drunken Irishman is on too low a plane." Here in America, many agreed with Engels. "No Irish" signs went up.

I would like to be able to say that each and every Irish American struggled heroically against all these obstacles, refusing to let his or her dignity or sense of responsibility flag for even a moment. Of course, that would be true of some of them. But not everyone is a hero. That why most of us should thank our Creator that circumstances have never put us to the test; real human beings can be disappointing. Irish neighborhoods had more than their share of crime, prostitution, and other urban pathologies. Family abandonment was more common among the Irish than

Americans or any other group should remain marginalized forever. The process of integration into the mainstream has been well underway with African Americans for decades now. You wouldn't know it from the wild statements that get made in the media, but slowly and sometimes fitfully, it has been working.

All of this leads me to the point I want to make about the present debate over the criminal justice system. And by "debate over the criminal justice system," I mean the debate over incarceration rates, police shootings, police practices in general, the death of Michael Brown, the Ferguson, Missouri riots, the Black Lives Matter movement, the death of Freddie Gray, the Baltimore riots, and much more. *There is far too much one-sidedness in this debate.*

One of the best examples of this is the failure to acknowledge African American victimhood and the need to ensure that the African-American community receives adequate police protection.¹⁰¹²

among other immigrant groups at the time. And in 1914, more than a half century after the first great wave of Irish immigration, about half of Irish families living on the West Side of New York were still (for that and other reasons) without fathers.

Yet despite all these difficulties, things worked out. A group that suffers from higher than average social pathologies today will not necessarily be the one that is still suffering later on.

See, e.g., Thomas Sowell, *Ethnic America: A History* (1981); Patrick J. Blessing, *Irish in The Harvard Encyclopedia of American Ethnic Groups* 524-45 (Stephan Thernstrom, Ann Orlov and Oscar Handlin, eds.) (1980); Andrew M. Greeley, *That Most Distressful Nation: The Taming of the American Irish* (1972).

¹⁰¹² Part of the one-sidedness stems from misinformation. Commissioner Kirsanow's Statement in this report discusses the misinformation in connection with the death of Michael Brown—misinformation that led to riots. Unfortunately, it is not the only example of the epic effects of misinformation in this debate.

Another example was the death of Trayvon Martin. This led to a panic over "Stand Your Ground" laws that has still not completely subsided. See Elliott C. McLaughlin and Amir Vera, *Florida's "Stand Your Ground" Law Is "a License to Kill Black People," Attorney Says*, CNN (July 25, 2018) available at <https://www.cnn.com/2018/07/24/us/florida-stand-your-ground-fatal-shooting/index.html>.

The debate has become surreal.¹⁰¹³ No sensible policy decisions can be expected to arise out of such a corrupt discourse.¹⁰¹⁴

I don't doubt that there have been police abuses. In order to do their jobs, police officers must have power. Wherever there is power, there will be abuses of power. That is why it is important to avoid concentrating more power than is necessary in anybody's or any institution's hands (a topic that all Americans should think about regularly.) Fortunately, the overwhelming majority of police officers want to do their jobs right. (They would probably also like a little credit for the heroism that they must routinely engage in, and I cannot blame them for that.)

I also don't doubt that there are ways to improve police practices so as to better protect the rights of those suspected of crimes and of bystanders. There is always room for improvement. I am

¹⁰¹³ Part of the one-sidedness stems from taboos. On November 27, 1993, the Rev. Jesse Jackson told an audience at a meeting of Operation PUSH in Chicago: "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery. Then turn around and see somebody white and feel relieved." "We've got the power right now to stop killing each other," Jackson said then. See Mary A. Johnson, *Crime: New Frontier—Jesse Jackson Calls It Top Civil-Rights Issue*, Chicago Sun-Times (November 29, 1993)(quoting Jackson's remarks at a meeting of Operation PUSH in Chicago on November 27, 1993). See also Mike Royko, *Jesse Jackson's Message Is Too Advanced for Most*, Baltimore Sun (December 3, 1993).

I recently ran across an exchange on an internet message board among several individuals. One asked whether Jackson had ever apologized for the statement. Another opined that Jackson meant it as a confession that even he could harbor racist thoughts and an illustration that such thoughts are wrong. See <https://boards.straightdope.com/sdmb/showthread.php?t=559631>.

I can't help but wonder if he or any other African-American leader would be able to make that statement again today without a deluge of criticism.

¹⁰¹⁴ In the last few years, it has become fashionable among intellectuals to argue that our prison system is deeply racist. Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*—a New York Times Bestseller—is a good example. In the book's introduction, Alexander wrote that she had recently come to suspect that the criminal justice system "was not just another institution infected with racial bias but rather a different beast entirely." "I came to see," she wrote with a dramatic flair best reserved for fiction, "that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."

Hyperbolic rhetoric has always been fashionable among intellectuals. I suppose it helps sell books. A few things need to be said about Alexander's claim: No one would deny that racism rears its ugly head in our criminal justice system from time to time. But any suggestion that it is "strikingly similar to Jim Crow" is wrongheaded.

Those who suggest that racial disparities in arrests or incarceration are attributable in significant part to race discrimination should remember this: (1) If racial disparities in arrests were attributable to race discrimination, one would expect the worst disparities to occur in connection with minor crimes, where the chance of getting away with a false accusation is greatest. But the worst disparities are with murder, where the motivation for making a false accusation and the likelihood of getting away with one are at their lowest; (2) If racial disparities in incarceration were attributable to race discrimination, one would expect those disparities to be most pronounced in the state popularly viewed as most racist (i.e. the states of the old Confederacy); but precisely the opposite is true. Using the statistics provided by the Prison Policy Initiative, I calculated that Minnesota and Vermont are among the top five states in terms of racial disparities in rates of incarceration. Alabama and Mississippi are among the bottom five. See Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race-Ethnicity*, Prison Policy Initiative (May 28, 2014), available at <https://www.prisonpolicy.org/reports/rates.html>.

particularly optimistic about the use of cameras by police. Cameras are not perfect solutions to any problem. But they are very important partial solutions. They protect both police officers and the public. They have an important role to play in creating trust between police officers and the public.

Here's another one: I don't doubt that there may be ways in which the weight of our high incarceration rate can be lightened. I am not, however, optimistic that this can be done easily. I fear that those who believe that our incarceration rates can be significantly decreased without a corresponding increase in crime are being naïve.

My real doubt is in the country's present ability to enter into a thoughtful consideration of those issues. I am not hearing realistic discussions of the trade-offs involved. Until those discussions take place, I very much doubt that progress can be made. On the other hand, the likelihood that things can be made worse is very high.

It's not easy to insist *both* that police officers vigorously protect the public from crime *and* that they refrain from using force when they believe it is to be necessary for their own self-defense. Training is helpful, but all the training in the world will not resolve the underlying tension between those two aspirations. Instead, the more likely result is that police officers will avoid engaging with individuals they regard as dangerous.

The decrease in crime over the last few decades has been an important achievement. Let's not let it slip through our fingers.

ADDENDUM:

In response to the Statements of my fellow Commissioners, let me add the following:

I am not convinced that increased federal control over local police forces holds much promise except in the most egregious of cases. Seldom does adding layers and layers of bureaucracy on a problem improve it. Alas, the Commission does not have sufficient evidence to determine whether all or indeed any of the cases of federal intervention conducted by the Department of Justice mainly during the Obama Administration were justified.

Chair Lhamon and Commissioner Narasaki are apparently of a different opinion. They praise the Department of Justice's numerous interventions under Attorneys General Eric Holder and Loretta Lynch, while they chide the current Attorney General, Jeff Sessions, for following a policy of greater local control.

The efforts under Holder and Lynch usually involved an urban police department that received attention in the media for a particular police shooting or for a higher than average number of police shootings in a particular year. The Department of Justice would investigate the police department, sometimes bringing a lawsuit and sometimes not. It would then negotiate an agreement with the targeted police department, which would become a consent decree in those cases for which a lawsuit had been filed or a collaborative reform agreement in those cases for which there was no

lawsuit. Even the advocates of such agreements agree that “there is no question [they] are arduous and complicated.”¹⁰¹⁵

A typical such consent decree is the 110-page Cleveland decree. It requires Cleveland to have a DOJ-approved Independent Monitor to enforce the decree as well as a 13-member Community Police Commission, which must issue reports at least annually). Members of the Commission will be selected by a specially-constituted selection panel and will work with the (apparently already-existing) Community Relations Board and the District Community Relations Committees (renamed the District Policing Committees). The police department is also required to create a Force Investigative Team, a Mental Health Response Advisory Committee, a Force Review Board, and a Consent Decree Implementation Unit. Extensive training and recordkeeping duties were undertaken throughout the system. Put differently, layers and layers of bureaucracy were added.

Chair Lhamon and Commissioner Narasaki argue for this in different ways. Both ways, however, leave me unconvinced.

Chair Lhamon points to a graph that appeared in *Vice News*. The graph purports to show that, at police departments that have been subjected to DOJ consent decrees/collaborative reform agreements, the number of police shootings decreases. It further purports to show that at other police departments, the number has gone up and down with no clear net effect.

There are many problems with this chart. For example:

1. The *Vice News* article that the chart accompanies points out that the Department of Justice was invited to investigate Philadelphia precisely because it had high numbers of police shootings in a particular year. It is likely that, one way or another, many or most of the investigations were triggered by high numbers of shootings. If so, the chart is hopelessly flawed.

This is essentially a question of mathematical probabilities. Imagine a casino at which 100 gamblers operate 100 slot machines that randomly generate numbers 1 through 10. A number 10 is a big winner, while number 1 is a big loser. But whether one gets a 1 or a 10 or something in between is purely a matter of chance; it says nothing about one's skill as a gambler. Consequently, if one were to take all the gamblers who got a 1 in the last round and subject them to intensive training in “gambling science,” it would not improve their chances of winning one iota. Nevertheless, they would appear to have improved dramatically, since the group, which had been selected on the basis of their poor performance in the last round, can be expected to achieve an average score of 5.5. It is simply a matter of regression to the mean. Meanwhile, the other 90 gamblers (whose average score was likely around 6 in the last round) can be expected to decrease slightly in score to the same 5.5).

¹⁰¹⁵ Sadie Gurman, Federal Overhauls of Police Departments Bring Mixed Results, *Chicago Tribune* (April 5, 2017)(quoting Chuck Wexler, executive director of the Police Executive Research Forum), available at <http://www.chicagotribune.com/news/nationworld/ct-federal-police-departments-overhaul-20170405-story.html>.

This may fully account for the results in the chart cited by Chair Lhamon.

2. Even if the decline in shootings is real rather than just the result of chance, it may be a bad sign rather than a good one. It may be a reflection of police disengagement (the “Ferguson effect”), which leaves high-crime neighborhoods less protected.
3. Strangely, four of the thirteen consent decrees/collaboration reform agreements included in the chart did not occur until the very end of the time period considered on the graph. These consent decrees/collaborative reform agreements cannot have been responsible for any decrease in police shootings during the period considered in the graph.
4. The article admits that the data for Philadelphia, the largest city subjected to a consent decree or collaborative reform agreement, largely drives the results. For all the reader can tell, it is the only city considered in the graph that managed to lower the number of police shootings. Because *Vice News* does not reveal the figures underlying its analysis, I cannot say for sure.

Commissioner Narasaki argues that police officials often appreciate federal interventions and includes several quotations to that effect in her Statement. There are at least three things Commissioner Narasaki is missing here. First, when a powerful federal agency is investigating someone, it's not uncommon for that someone to avoid complaining to the press. It may make them more vulnerable.¹⁰¹⁶ Second, local governance is complex. Some individuals within the local police bureaucracy may indeed appreciate federal interventions, because it gives them an advantage in the competition for local resources. If the police chief can go to the mayor and city council and say, “You must give us more resources, because our consent decree demands more resources,” that is a good thing from the standpoint of the police chief. But it is not a good thing from the standpoint of local control. The mayor and the city council were elected to make the tough choices about how to allocate the local taxpayers' resources, not the police chief and not the Department of Justice.¹⁰¹⁷ Third, the Department of Justice sometimes dispenses its own funds,

¹⁰¹⁶ Alas, this type of error is not uncommon. At a Commission briefing on federal government policy regarding bullying and harassment in K-12 schools, Russlyn Ali, the then-Assistant Secretary for Civil Rights at the Department of Education, testified about an OCR investigation that “Owatonna's superintendent, I'm pleased to say, said in the press when asked about this that the Office for Civil Rights, and we together with the Department of Justice, have made her school district better.” United States Commission on Civil Rights, Transcript of May 13, 2011 Briefing at 11. As I said to her then, “You've got to remember that, at a school district, the worst thing in the world that can happen to them is to have a giant investigation, which is often what happens. I was a little troubled by your quoting the school district, school board member praising the Department. Remember, they're under your authority.” Id. at 18-19.

¹⁰¹⁷ As a law professor, I sometimes see a similar dynamic at work in the accreditation process. A disinterested observer might expect that law schools and the law school accrediting agency to have an adversarial relationship. But in general they do not. Law schools often are pleased when the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar requires them to make improvements. Those requirements can be taken to the central university and used to wrest greater resources for the law school. I strongly suspect the same dynamic is at work with medical schools, engineering schools and other components of universities as well as at police

which can make it very popular with local police chiefs. But that is how local control erodes, bit by bit. Federal control over the purse strings is not something to be celebrated.

Moreover, for what it's worth, I can quote several police officers and political leaders who do *not* favor these extensive interventions.

In Seattle, for example, according to *The Seattle Times*, Mayor Mike McGinn warned the Department of Justice's intervention could cost as much as \$41 million per year. He said the plan would put vital services at risk and that the Independent Monitor would function as a "shadow mayor," who could interfere with the city's ability to respond quickly to events.¹⁰¹⁸

New Orleans is similar. According to *Chicago Tribune*, the 2012 consent decree is expected to cost at least \$55 million and requires rank-and-file police offices to complete time-consuming paperwork rather than patrol the community.

Mike Glaser, president of the Police Association of New Orleans, has said that a relaxing of redundant oversight and reviews would help matters. More important, he has pointed out that excessive oversight can make officers more reluctant to act. They may think twice before approaching a suspicious person or making a traffic stop. Why make trouble for oneself?

"'I'm not going to say that happens to everybody categorically,' Glaser said. 'But if you don't think that impacts the officer's behavior, you're naïve.'"¹⁰¹⁹

And then there is the special case of Chicago, where the Obama Administration had not yet completed the process of negotiating a consent decree when the 2016 Presidential election intervened. The Illinois Attorney General Lisa Madigan intervened by filing a separate lawsuit and negotiating a separate consent decree. Kevin Graham, president of the Fraternal Order of Police there, said in a statement that the proposed consent decree "'is politically motivated and threatens both public safety and the well-being of our members.'" He excoriated the Illinois Attorney General for being unwilling to listen to police while being excessively willing to pay attention to "fiercely anti-police groups like Black Lives Matter and the American Civil Liberties Union."¹⁰²⁰

Is it worth it to spend millions of dollars to bring an out-of-control police department of a major city under control (assuming it can be done in accordance with the rule of law)? Of course it is.

departments being investigated by the Department of Justice. This is not evidence that the Department of Justice is not interfering with local control.

¹⁰¹⁸ Steve Miletich, Jennifer Sullivan and Lynn Thompson, McGinn: DOJ Plan to Cost \$41M; but Feds Say That's 'Simply Wrong,' *Seattle Times* (May 14, 2012), available at <https://www.seattletimes.com/seattle-news/mcginn-doj-plan-to-cost-41m-but-feds-say-thats-simply-wrong/>.

¹⁰¹⁹ Sadie Gurman, Federal Overhauls of Police Departments Bring Mixed Results, *Chicago Tribune* (April 5, 2017) available at <http://www.chicagotribune.com/news/nationworld/ct-federal-police-departments-overhaul-20170405-story.html>.

¹⁰²⁰ Ray Sanchez & Brad Parks, Draft of Reforms for Chicago Police Unveiled by Mayor, State Attorney General, *CNN* (July 27, 2018).

But that assumes a fact that has not been proven to us. We on the Commission cannot speak to the question of the performance of any of particular police department.¹⁰²¹ That is not an inquiry we undertook. As a result, we cannot we opine on whether adding layers of bureaucracy will be a good thing or a bad thing in a particular case. Mercifully, we have not yet reached the point where bureaucracy is considered a good unto itself.

¹⁰²¹ In her statement, Chair Lhamon points out that she has experience with the Los Angeles police department back in 2002. However, I must point out that one of her statements seems to have inadvertently misstated something. She wrote, "As the U.S. Court of Appeals for the Ninth Circuit charitably phrased it, my clients had 'suffered from, and [were] likely to continue to suffer from, the unconstitutional police misconduct that forms the basis of the United States' suit against the City defendants.'" See *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). The Court, however, was referring to Chair Lhamon's clients' *allegations*. It was not finding that those allegations were true. That opinion was simply about whether the District Court erred in failing to allow certain litigants (including Chair Lhamon's clients) to intervene. The Court ultimately found that that the Los Angeles Police Protection League should have been granted leave to intervene as of right. It further found that the District Court erred in the standards for determining whether the group that it referred to as the "Community Interveners" (Chair Lhamon's clients) should be permissively allowed to intervene. It therefore remanded for a re-determination of that issue. In the interim, however, the District Court had entered the consent decree without the participation of either the Los Angeles Police Protection League or the Community Interveners. On this matter, the Court held that "it was proper for the district court to continue to act in the case notwithstanding the intervention appeal because no stay was entered" and stated that its holding "does not require the district court to turn back the clock or rescind the consent decree." *Id.* at 404-05.

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Dissenting Statement of Commissioner Peter Kirsanow

The events that prompted this report were based on a lie. The Commission decided on this topic in the wake of protests in Ferguson, Missouri after the death of Michael Brown. “Hands up, don’t shoot,” became a mantra, the alleged last words of a supposed innocent black man callously murdered by a white police officer, an example of the disproportionate and unjustified targeting and use of force against blacks by cops.

But it was a lie.

Don’t take my word for it—take the Obama Justice Department’s word for it. The Criminal Section of the Department of Justice’s Civil Rights Division conducted an in-depth review of the shooting and concluded that Officer Darren Wilson’s actions were not objectively unreasonable and that he had not violated Brown’s constitutional right to be free of excessive force.

Wilson encountered Brown as he was responding to a report that a man matching Brown’s description had stolen several packages of cigarillos from a convenience store by intimidating the clerk with his large size. The Criminal Section wrote in its report:

As Wilson drove toward Brown and Witness 101, he told the two men to walk on the sidewalk. According to Wilson’s statement to prosecutors and investigators, he suspected that Brown and Witness 101 were involved in the incident at Ferguson Market based on the descriptions he heard on the radio and the cigarillos in Brown’s hands. Wilson then called for backup, stating, “Put me on Canfield with two and send me another car.” Wilson backed up his SUV and parked at an angle, blocking most of both lanes of traffic, and stopping Brown and Witness 101 from walking any further. Wilson attempted to open the driver’s door of the SUV to exit his vehicle, but as he swung it open, the door came into contact with Brown’s body and either rebounded closed or Brown pushed it closed.

Wilson and other witnesses stated that Brown then reached into the SUV through the open driver’s window and punched and grabbed Wilson. This is corroborated by bruising on Wilson’s jaw and scratches on his neck, the presence of Brown’s DNA on Wilson’s collar, shirt, and pants, and Wilson’s DNA on Brown’s palm. While there are other individuals who stated that Wilson reached out of the SUV and grabbed Brown by the neck, prosecutors could not credit their accounts because they were inconsistent with physical and forensic evidence, as detailed throughout this report.

Wilson told prosecutors and investigators that he responded to Brown reaching into the SUV and punching him by withdrawing his gun because he could not access less lethal weapons while seated inside the SUV. Brown then grabbed the weapon and struggled with Wilson to gain control of it. Wilson fired, striking Brown in the hand. Autopsy results and bullet trajectory, skin from Brown’s palm on the outside of the SUV door as well as Brown’s DNA on the inside of the driver’s door

corroborate Wilson's account that during the struggle, Brown used his right hand to grab and attempt to control Wilson's gun. According to three autopsies, Brown sustained a close range gunshot wound to the fleshy portion of his right hand at the base of his right thumb. Soot from the muzzle of the gun found embedded in the tissue of this wound coupled with indicia of thermal change from the heat of the muzzle indicate that Brown's hand was within inches of the muzzle of Wilson's gun when it was fired. The location of the recovered bullet in the side panel of the driver's door, just above Wilson's lap, also corroborates Wilson's account of the struggle over the gun and when the gun was fired, as do witness accounts that Wilson fired at least one shot from inside the SUV.

Although no eyewitnesses directly corroborate Wilson's account of Brown's attempt to gain control of the gun, there is no credible evidence to disprove Wilson's account of what occurred inside the SUV. Some witnesses claim that Brown's arms were never inside the SUV. However, as discussed later in this report, those witness accounts could not be relied upon in a prosecution because credible witness accounts and physical and forensic evidence, *i.e.* Brown's DNA inside the SUV and on Wilson's shirt collar and the bullet trajectory and close-range gunshot wound to Brown's hand, establish that Brown's arms and/or torso were inside the SUV.

After the initial shooting inside the SUV, the evidence establishes that Brown ran eastbound on Canfield Drive and Wilson chased after him. The autopsy results confirm that Wilson did not shoot Brown in the back as he was running away because there were no entrance wounds to Brown's back. The autopsy results alone do not indicate the direction Brown was facing when he received two wounds to his right arm, given the mobility of the arm. However, as detailed later in this report, there are no witness accounts that could be relied upon in a prosecution to prove that Wilson shot at Brown as he was running away. Witnesses who say so cannot be relied upon in a prosecution because they have given accounts that are inconsistent with the physical and forensic evidence or are significantly inconsistent with their own prior statements made throughout the investigation.

Brown ran at least 180 feet away from the SUV, as verified by the location of bloodstains on the roadway, which DNA analysis confirms was Brown's blood. Brown then turned around and came back toward Wilson, falling to his death approximately 21.6 feet west of the blood in the roadway. Those witness accounts stating that Brown never moved back toward Wilson could not be relied upon in a prosecution because their accounts cannot be reconciled with the DNA bloodstain evidence and other credible witness accounts.

As detailed throughout this report, several witnesses stated that Brown appeared to pose a physical threat to Wilson as he moved toward Wilson. According to these witnesses, who are corroborated by blood evidence in the roadway, as Brown continued to move toward Wilson, Wilson fired at Brown in what appeared to be self-defense and stopped firing once Brown fell to the ground. Wilson stated that

he feared Brown would again assault him because of Brown's conduct at the SUV and because as Brown moved toward him, Wilson saw Brown reach his right hand under his t-shirt into what appeared to be his waistband. There is no evidence upon which prosecutors can rely to disprove Wilson's stated subjective belief that he feared for his safety.

Ballistics analysis indicates that Wilson fired a total of 12 shots, two from the SUV and ten from the roadway. Witness accounts and an audio recording indicate that when Wilson and Brown were on the roadway, Wilson fired three gunshot volleys, pausing in between each one. According to the autopsy results, Wilson shot and hit Brown as few as six or as many as eight times, including the gunshot to Brown's hand. Brown fell to the ground dead as a result of a gunshot to the apex of his head. With the exception of the first shot to Brown's hand, all of the shots that struck Brown were fired from a distance of more than two feet. As documented by crime scene photographs, Brown fell to the ground with his left, uninjured hand balled up by his waistband, and his right, injured hand palm up by his side. Witness accounts and cellular phone video prove that Wilson did not touch Brown's body after he fired the final shot and Brown fell to the ground.

Although there are several individuals who have stated that Brown held his hands up in an unambiguous sign of surrender prior to Wilson shooting him dead, their accounts do not support a prosecution of Wilson. As detailed throughout this report, some of those accounts are inaccurate because they are inconsistent with the physical and forensic evidence; some of those accounts are materially inconsistent with that witness's own prior statements with no explanation, credible for[sic] otherwise, as to why those accounts changed over time. Certain other witnesses who originally stated Brown had his hands up in surrender recanted their original accounts, admitting that they did not witness the shooting or parts of it, despite what they initially reported either to federal or local law enforcement or to the media. Prosecutors did not rely on those accounts when making a prosecutorial decision.

While credible witnesses gave varying accounts of exactly what Brown was doing with his hands as he moved toward Wilson—*i.e.*, balling them, holding them out, or pulling up his pants up [sic]—and varying accounts of how he was moving—*i.e.*, “charging,” moving in “slow motion,” or “running”—they all establish that Brown was moving toward Wilson when Wilson shot him. Although some witnesses state that Brown held his hands up at shoulder level with his palms facing outward for a brief moment, these same witnesses describe Brown then dropping his hands and then “charging” at Wilson.¹⁰²²

¹⁰²² U.S. Dep't of Justice, *Department of Justice Report Regarding the Criminal Investigation Into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson*, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

I include this part of the DOJ report in my statement for several reasons. The fact that the prevailing narrative surrounding the death of Michael Brown and that launched protests against the police was a lie undermines this Commission report's narrative. DOJ issued its report exonerating Wilson a month and a half before the Commission held its hearing on police use of force.¹⁰²³ One would think this would deflate the Commission a bit and prompt it to reassess whether it should approach the topic based on an assumption that the police regularly engage in excessive force against minorities.¹⁰²⁴ One would be wrong. Instead, the report uncritically repeats the statement of Montague Simmons from the Organization for Black Struggle, who stated at the hearing:

The U.S. Commission on Civil Rights has now cast its eyes upon our community because the execution of Mike Brown, the corrupt and inept ways of the investigation as follows: The investigation that ended in a fiasco of a grand jury that would have amounted to business as usual, except for the anger, tenacity and determination of the people who have been in the streets over 250 days.¹⁰²⁵

The Commission includes Michael Brown's death in a list of police shooting deaths where "de-escalation" should have been employed. Yet according to the DOJ report, Brown attacked Wilson while Wilson was sitting in his vehicle.¹⁰²⁶ It was Brown who escalated the situation from a stop to investigate a theft of cigarillos to a life-and-death struggle. Brown's death is a tragedy for him and for his family, but this report should not contribute to the false narrative that his death was racially-motivated. Brown attacked a police officer who stopped him. There is no evidence he was killed because of his race.

The Commission report offers Simmons's statement as a legitimate criticism of grand jury proceedings, the implication being that the grand jury system is flawed because the grand jury declined to indict Wilson. But over a month before Simmons testified, DOJ had concluded that there was no basis on which to charge Wilson. Simply because someone asserts that grand jury proceedings feel unfair to them does not mean the proceedings are unfair. It is clear that nothing would have satisfied Simmons short of the prosecution and conviction of Wilson, but both the grand jury and DOJ concluded that Wilson had not broken the law. The legal system is supposed to avoid scapegoating innocent people in order to placate angry mobs.

¹⁰²³ DOJ issued its report on March 4, 2015, and the Commission held its hearing on April 20, 2015.

¹⁰²⁴ Over the past several years, the Commission, alas, has shown a preference for holding hearings and conducting investigations of events in the headlines. Perhaps the fact that DOJ issued a report undercutting the premise of this hearing before the hearing was even held should lead the Commission to question whether it is wise to continue chasing headlines, rather than focusing on smaller discrete issues that we are better suited to address.

¹⁰²⁵ U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018 [hereinafter Commission Report] at notes 47.

¹⁰²⁶ Commission Report at notes 702.

The DOJ report illustrates that making sweeping generalizations about police brutality is useless. These incidents are fact-specific. The facts often do not support charges of police brutality, though, so the report falls back on “systemic” analysis and surveys.¹⁰²⁷

Flaws in Report

The report states:

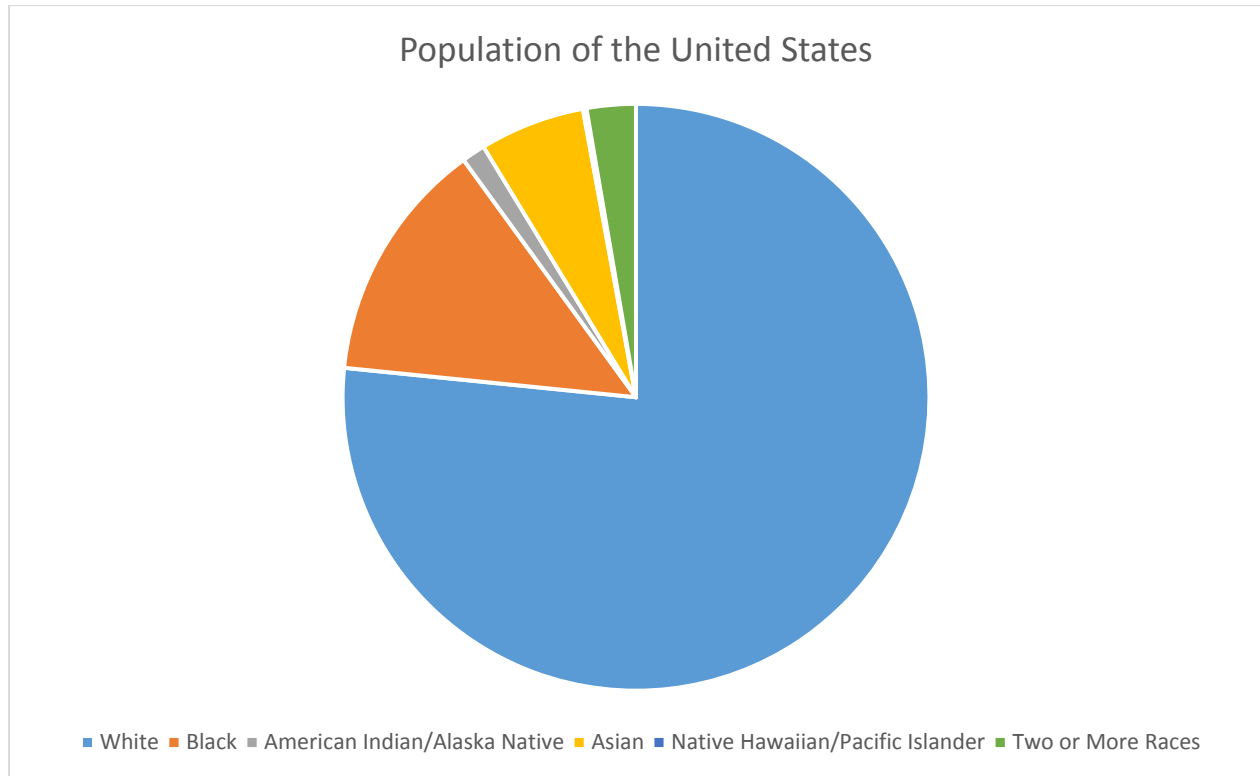
In her testimony to the Commission, Delores Jones-Brown from the Department of Law, Police Science, and Criminal Justice at the John Jay College of Criminal Justice also challenged the notion that black neighborhoods are inherently more violent than other neighborhoods, and thus the driver for excessive force statistics. Jones-Brown states that in some years during the past decade, the number of firearm-related homicides was the same for both black and white civilians, thus challenging the argument that violence in black neighborhoods can account for the disparate rates of fatal police shootings.¹⁰²⁸

Jones-Brown testified that “the *number* of firearm-related homicides was the same for both black and white civilians”. Because the white population and black population are not the same size, the *number* of homicides is of limited utility in analyzing the prevalence of violence in communities. What matters is the *rate* of violence. The Census Bureau estimates that in 2017, 76.6 percent of the U.S. population was “white alone,” which includes Hispanics. 13.4 percent of the U.S. population was “Black or African-American alone”.¹⁰²⁹ (This FBI table does not disaggregate offenders by both race and ethnicity, so it is impossible to determine how many non-Hispanic whites were arrested for murder.).

¹⁰²⁷ When the Criminal Division of the Civil Rights Division issued its report exonerating Wilson of having committed a crime or a constitutional violation, the Civil Rights Division as a whole issued a report accusing the Ferguson Police Department for committing constitutional violations in its collection of municipal fines and fees. The Commission dutifully followed suit and held two hearings on municipal fines and fees, culminating in issuing a report. See U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color*, 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

¹⁰²⁸ Commission Report at notes 163.

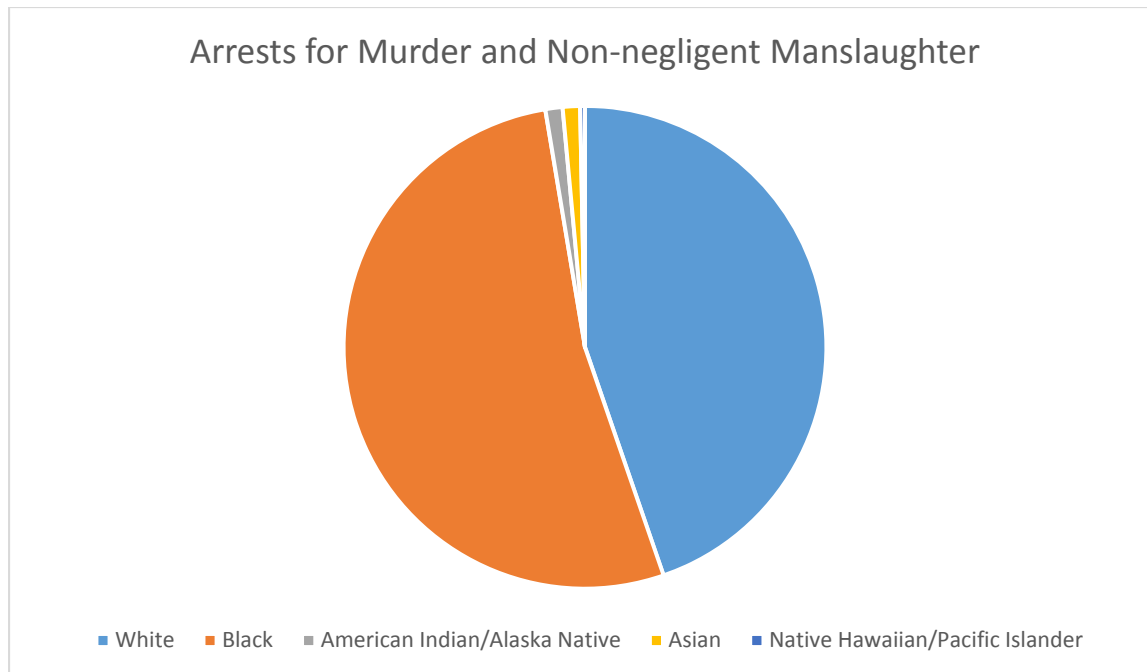
¹⁰²⁹ U.S. Census Bureau, “QuickFacts, United States,” <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last accessed Nov. 4, 2018).



In 2016, 4,192 white people (Hispanic and non-Hispanic) were arrested for murder and non-negligent manslaughter.¹⁰³⁰ But 4,935 black people were arrested for murder and non-negligent manslaughter. Even in absolute terms, the number of black Americans arrested for murder and nonnegligent manslaughter exceeds the number of white Americans arrested for murder and nonnegligent manslaughter, even though the white population is five-and-a-half times the size of the black population. The white alone (Hispanic and non-Hispanic) population of the United States was approximately 249,485,500 in 2017, and the black alone population was approximately 43,646,369.¹⁰³¹ This means that approximately 1.7 whites are arrested for murder per 100,000 whites, and approximately 11.3 blacks are arrested for murder per 100,000 blacks. Or to put it another way, *blacks are six times more likely to be arrested for murder than are whites*. And this is not because the criminal justice system is racist. Cases of murder are very straightforward. There is a dead body. No police officer wants a bunch of unsolved murders on his record. And often it is not too difficult to figure out who murdered someone, because the perpetrator frequently is a family member, friend, or known associate.

¹⁰³⁰ FBI: Uniform Crime Reporting, “2016 Arrests by Race and Ethnicity,” Table 21, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21>.

¹⁰³¹ U.S. Census Bureau, “QuickFacts, United States,” *supra* note 1029.



The report states:

[E]xperts also argue that bias may be increased by media outlets reinforcing the narrative of particular criminality by presenting African American and Latino people differently than white people—both quantitatively and qualitatively. News programs and newspapers over-represent people of color as crime suspects and white people as crime victims. Reporters may use language such as ‘black-on-black crime,’ but rarely phrase violent crime as “white-on-white crime”; this gives the impression that violent crime is more prevalent and uniquely an issue with the black community.¹⁰³²

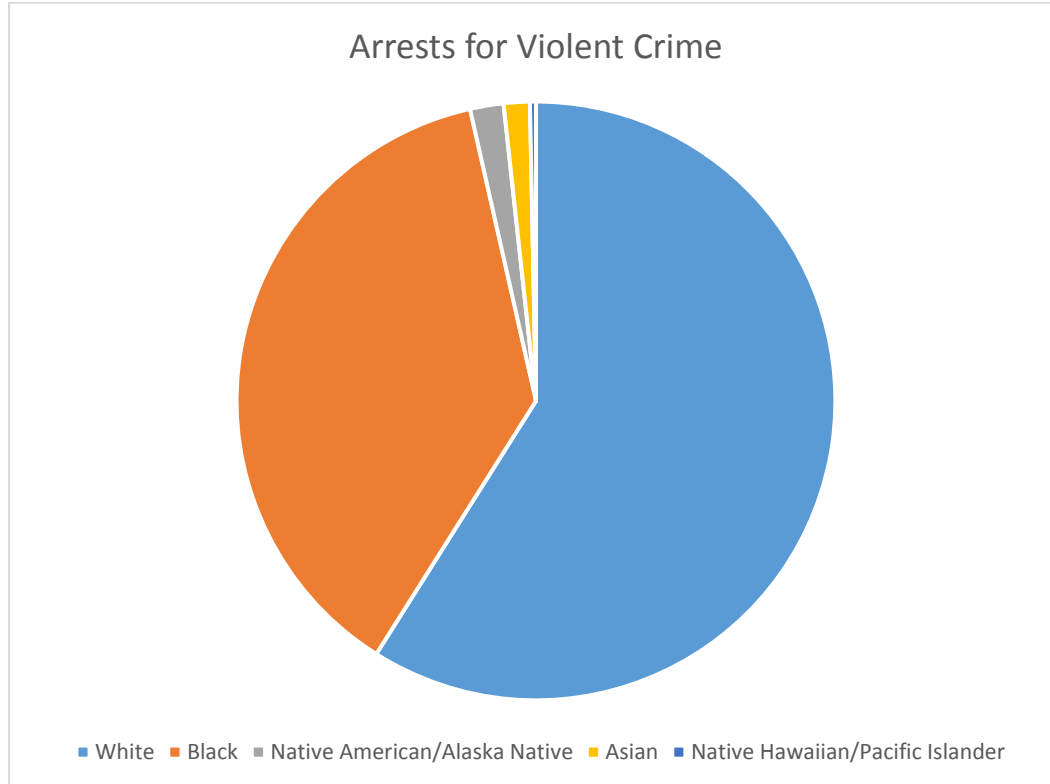
Unfortunately, “people of color” are overrepresented as crime suspects, and violent crime is more prevalent within the black community than within white or (especially) Asian communities. It may be that “White Americans overestimate the proportion of crime committed by people of color ... white respondents in a 2010 survey overestimated the actual share of burglaries, illegal drug sales, and juvenile crime committed by African-Americans by 20-30%”¹⁰³³, but that does not change the fact that African-Americans *are* overrepresented in criminal activity. The white respondents may have been wrong about the exact numbers, but they were correct in assuming that African-Americans are disproportionately involved in crime.

In 2016, there were 408,873 total arrests for violent crime. Since we do not have more granular data, let us be optimistic and assume that each of these arrests represents an individual who was only arrested once. 241,063 were white, 153,341 were black, 7,378 were Native American/Alaska Native, 5,755 were Asian, and 1,336 were Native Hawaiian/Pacific Islander. This means that 97

¹⁰³² Commission Report at notes 154-56.

¹⁰³³ Commission Report at notes 155.

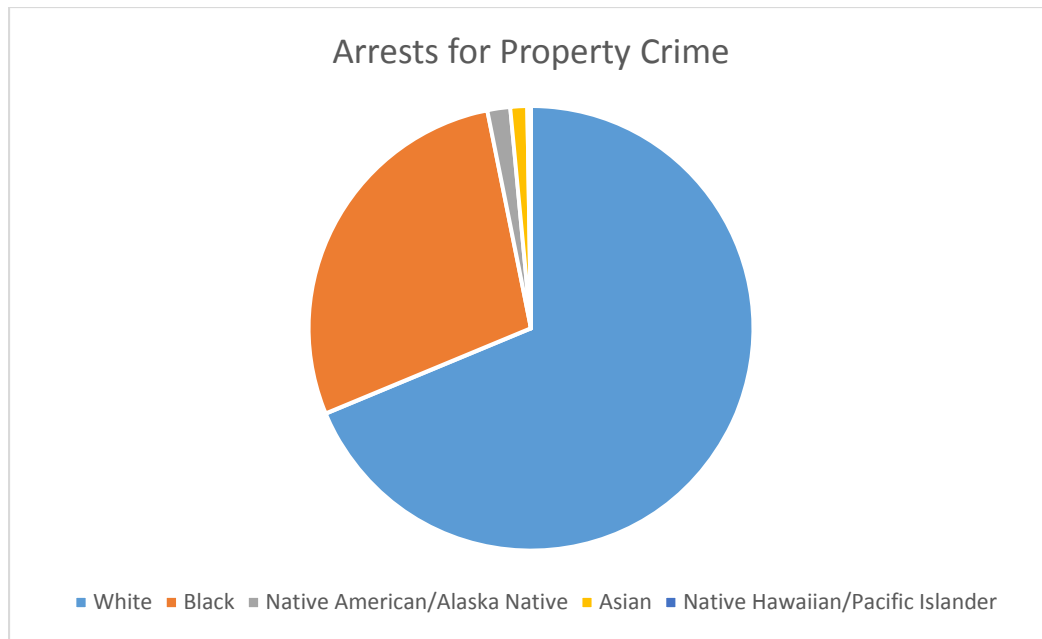
whites per 100,000 whites were arrested for violent crimes, and 351 blacks per 100,000 blacks were arrested for violent crimes.



1,074,136 people were arrested for property crimes. 738,319 were white, 301,958 were black, 17,782 were Native American/Alaska Native, 13,217 were Asian, and 2,860 were Native Hawaiian/Pacific Islander.¹⁰³⁴

295 whites per 100,000 whites were arrested for property crimes, and 691 blacks per 100,000 blacks were arrested for property crimes. So in fact, black neighborhoods generally are more violent and have more crime than white neighborhoods.

¹⁰³⁴ FBI: Uniform Crime Reporting, “2016 Arrests by Race and Ethnicity,” Table 21, *supra* note 1030.



The data make clear that whites are slightly underrepresented among criminals relative to their share of the population (there are, of course, specific crimes where whites are overrepresented), Asians are dramatically underrepresented relative to their share of the population, and blacks and Native Americans are dramatically overrepresented. In murder and non-negligent manslaughter, violent crimes, and property crimes, blacks range from 28 percent to 53 percent of those arrested, despite comprising only 13 percent of the population. Native Americans and Alaska Natives are only 1 percent of the population, but they account for 2 percent of those arrested for violent crimes and property crimes.

In short, the data make clear that blacks are overrepresented among victims of police shootings, but they are *underrepresented* relative to their *overrepresentation* in crime, particularly violent crime. 22.5 percent of those killed by police in 2017 were black.¹⁰³⁵ But 26.8 percent of all individuals arrested in 2017 were black.¹⁰³⁶

The report then shifts gears to acknowledge that yes, black neighborhoods have higher crime rates, but that fails to take into account “systemic issues” that are to blame.¹⁰³⁷ “The “black-on-black” crime narrative as an explanation for police excessive use of force disregards the structural and historical issues that formed these neighborhoods, as well as the social and economic factors that currently sustain them.”¹⁰³⁸ Even if you grant the “structural and historical issues,” the police can’t solve this problem—really no one can, because these issues are now baked in the cake—but the police in particular can’t because their job is to enforce the law, not to engage in housing policy.

¹⁰³⁵ *Washington Post* “2017 Police Shootings Database,” https://www.washingtonpost.com/graphics/national/police-shootings-2017/?hpid=hp_national-police-shootings_20181104_storylines_image_gallery&hpid=hp_national-police-shootings_20181104_storylines_image_gallery (last accessed Nov. 4, 2018).

¹⁰³⁶ FBI: Uniform Crime Reporting, “2016 Arrests by Race and Ethnicity,” Table 21, *supra* note 1030.

¹⁰³⁷ Commission Report at notes 171.

¹⁰³⁸ Commission Report at notes 170.

The report then claims that the assertion that African-Americans are disproportionately likely to be involved in crime “is also problematic because there is not an empirically sound way to ‘take a true measure of criminality within a population’” because the police are allegedly hopelessly biased. Then let’s take a look at the National Crime Victimization Survey, which asks *individuals* to report when they have been victims of crimes and to identify the sex and race of the offender, if known. The NCVS captures crimes that victims did not report to the police. According to the most recent NCVS publication regarding offenders, which covers the period from 2012-2015, survey respondents reported an annual average of 5,883,800 nonfatal violent victimizations per year. The respondents reported that 43.8 percent of the offenders were non-Hispanic whites, 22.7 percent were black, and 14.4 percent were Hispanic. So even according to victims—many of whom are black themselves—African-Americans are over-represented among criminal offenders.¹⁰³⁹ The Commission report’s approach however is, “Who do you believe—me or your lying eyes?”

I appreciate the report’s finding that the police have a difficult and admirable job.¹⁰⁴⁰ The body of the report itself does not take law enforcement officers’ fear of being killed or injured seriously enough.¹⁰⁴¹ The report states that the number of police officers killed has declined over the past 30 years—which is great! However, it is likely that a large part of that decline is due to the increased use of body armor by police. According to the International Association of Chiefs of Police in 2014, since 1987 there were 3,108 confirmed cases of law enforcement officers whose lives had been saved due to body armor.¹⁰⁴² In 2017 alone, there were at least 22 officers whose lives were saved thanks to their body armor.¹⁰⁴³ The report states that there were 42 firearms-related law enforcement fatalities in 2017. Had it not been for body armor, that number would likely be 65, which is comparable to the 63 average annual fatalities in the 1970s.¹⁰⁴⁴

It is also worth noting that law enforcement officers are more likely to be killed by African-Americans than they are to kill African-Americans. In 2017, 26 African-Americans and 34 non-Hispanic and Hispanic whites (all male) were charged with killing law enforcement officers.¹⁰⁴⁵ If we eliminate individuals who killed corrections officers while in prison, we are left with 14 African-Americans and 26 whites (both non-Hispanic and Hispanic) who were charged with killing law enforcement officers, in addition to 3 Native Americans and 1 Asian. According to the

¹⁰³⁹ Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders, 2012-2015*, Bureau of Justice Statistics, 2017, Table 5, <https://www.bjs.gov/content/pub/pdf/rhovo1215.pdf>.

¹⁰⁴⁰ Commission Report: Finding 3.

¹⁰⁴¹ Commission Report at notes 188-204.

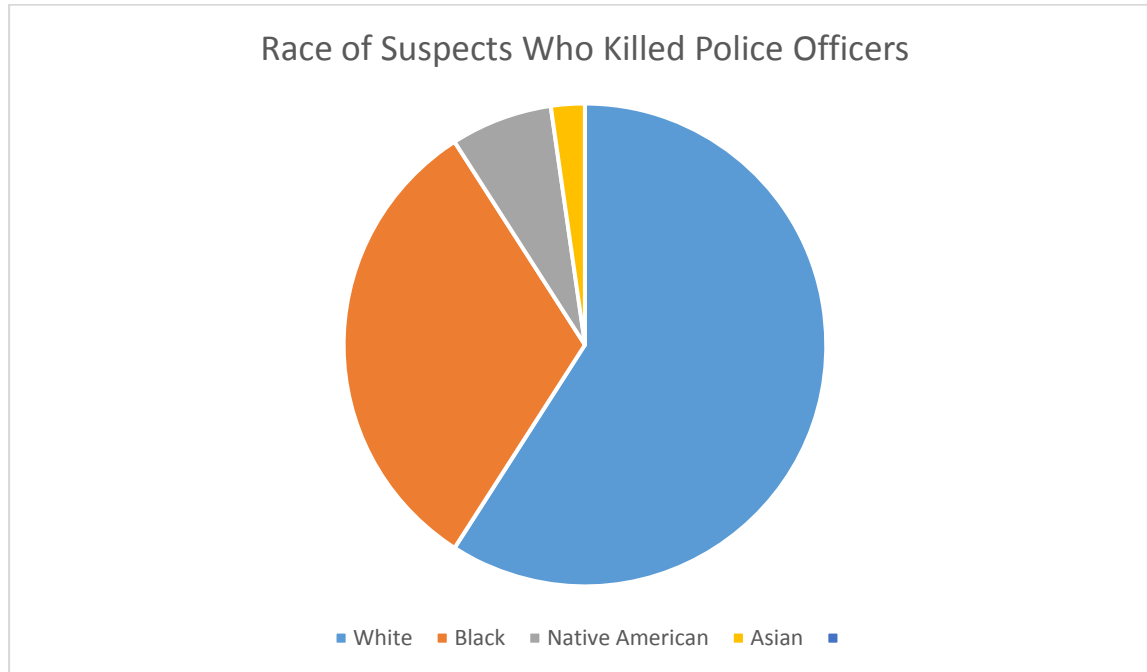
¹⁰⁴² *The Bulletproof Vest Partnership Grant Program: Supporting Law Enforcement Officers When it Matters Most: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2014), testimony of Chief Yousry A. Zakhary, President, International Association of Chiefs of Police, <http://www.theiacp.org/Portals/0/documents/pdfs/051414ZakharyTestimony.pdf>.

¹⁰⁴³ International Association of Chiefs of Police, “The IACP/DuPont Kevlar Survivors Club 2017 Update,” Dec. 4, 2017, <https://theiacpblog.org/2017/12/04/the-iacp-dupont-kevlar-survivors-club-2017-update/>; International Association of Chiefs of Police, “The IACP/DuPont Kevlar Survivors Club 2017 Update,” Dec. 5, 2017, <https://theiacpblog.org/2017/12/05/the-iacp-dupont-kevlar-survivors-club-2017-update-2/>.

¹⁰⁴⁴ Commission Report at notes 193.

¹⁰⁴⁵ Officer Down Memorial Page, “2017 Honor Roll of Heroes,” <https://www.odmp.org/search/year/2017> (last accessed Nov. 4, 2018); see also Appendix A.

FBI, in 2016 there were 652,963 sworn officers.¹⁰⁴⁶ This means that 2.1 per 100,000 sworn officers were killed by African-Americans in 2017.¹⁰⁴⁷ 3.9 per 100,000 sworn officers were killed by whites in 2016. Given the relative size of the populations, this means that 0.12 whites per million whites killed a police officer in 2016, but 0.37 blacks per million blacks killed a police officer in 2016. Are these numbers tiny? Yes. Does it mean that blacks are three times as likely to kill police officers as are whites? Yes.¹⁰⁴⁸



In 2017, 223 African-Americans were killed by police.¹⁰⁴⁹ The African-American population was about 43,646,369. This means that 0.5 African-Americans per 100,000 were killed by police officers. Also in 2017, 636 whites (including both Hispanic and non-Hispanic whites) out of 249,500,890 were killed by police officers. This means that 0.26 whites per 100,000 whites were killed by police in 2017.

This is important because since African-Americans are disproportionately likely to be involved in crime, they are also disproportionately likely to encounter police officers. Even the most law-abiding black men are, through no fault of their own, likely to encounter the police more frequently than white men. As Heather Mac Donald stated in her written testimony to the Commission, “This incidence of crime means that innocent black men have a much higher chance of being stopped by

¹⁰⁴⁶ FBI: Uniform Crime Reporting, “2016 Full Time Law Enforcement Employees,” Table 25, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-25/>.

¹⁰⁴⁷ Officer Down Memorial Page, “2017 Honor Roll of Heroes,” *supra* note 1045; *see also* Appendix A.

¹⁰⁴⁸ It is also worth noting that Native Americans are dramatically overrepresented among those who killed police officers in 2017, given that they are 1.3 percent of the total population.

¹⁰⁴⁹ *Washington Post* “2017 Police Shootings Database,” *supra* note 1035.

the police because they match the description of a suspect than white men. The police do not wish this; it is a reality forced on them by the facts of crime.”¹⁰⁵⁰

The report cites a study in which:

In a recent survey consisting of 802 African-American adults, researchers found that 50 percent of all black Americans (57 percent of black men and 44 percent of black women) said they have personally experienced racial discrimination when interacting with the police. Further, 61 percent responded that police officers are more likely to use unnecessary force against an African American person, compared to 26 percent who answered that police were just as likely to use unnecessary force against a white person. These perceptions of discrimination and unfair treatment by law enforcement have consequences for them personally and on society as whole, since the survey also showed that 31 percent of the respondents said that they avoided calling the police due to fear of discrimination.¹⁰⁵¹

There are several problems with uncritically reporting these survey results. First, just because someone thinks they experienced discrimination does not mean they actually experienced discrimination. Second, the police are more likely to use force (whether lawful or excessive) against individuals who are involved in crime, and since African-Americans are more likely to engage in crime than whites, the police are more likely to use force against them. People who live in majority-black neighborhoods see the police use force against other neighborhood residents because those residents are engaged in crime, but they may not realize that the police do not as often use force against individuals in majority-white neighborhoods because fewer people in those neighborhoods are involved in crime. Reports such as this one that obscure the black-white crime disparity only encourage confusion on this point.

In its eagerness to air the grievances of every racial, ethnic, and sexual minority, the report also uncritically reports the complaints of Native American and transgender advocates.

Simon Moya-Smith, an Oglala Lakota journalist and activist, states that the media rarely covers the number of police-involved killings that occur on tribal lands, and that these incidents are treated as isolated occurrences and largely ignored by the national media. Therefore, it is likely that there is less public awareness about police use of force in these communities, and in turn, considerably less public attention or outcry for reform. Moya-Smith states: “There are no white or black faces rallying around us, marching with us, protesting with us over this injustice. Why? Because we are a forgotten people.” Millet argues that of all police-involved killings of individuals from Native American and Alaskan Native communities over five

¹⁰⁵⁰ Heather Mac Donald, The Manhattan Institute, written statement for the “Police Use of Force: An Examination of Modern Policing Practices” Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 2 [hereinafter Mac Donald Statement].

¹⁰⁵¹ Commission Report at notes 212-214.

years, only two have received significant media coverage outside of the local community.¹⁰⁵²

It is a bit difficult to argue that police-involved killings on tribal lands are motivated by racism, because many police officers on reservations are tribal police who are themselves Native Americans.¹⁰⁵³ Local law enforcement generally does not have authority on the reservation¹⁰⁵⁴,

¹⁰⁵² Commission Report at notes 48.

¹⁰⁵³ It is possible local or federal authorities may be involved, but again, the tragic circumstances of these deaths do not support a “racist police slaughter minorities” narrative. There are two 2017 cases in the *Washington Post* database in which a Native American was killed on tribal land by non-tribal police. The first involved federal law enforcement. BIA agents were responding to a report of shots fired at a gas station. When they encountered George “Ryan” Gipp, he

[W]alked over to them with his hand in his pockets and didn’t follow police orders and was shot.

“The two FBI agents did give us an overview and a video, dash cam of the incident that occurred that night,” said Mike Faith, Standing Rock Sioux Tribal Chairman.

Faith says the case was reviewed by The U.S. Attorney’s Office in the District of Nebraska.

“Determined that Officer Sandland and Officer Webb did not violate George Ryan Gipp Jr. civil rights. And that no charges are warranted and have closed their case,” said Faith.

The FBI said Nebraska reviewed it because North Dakota and South Dakota felt a conflict of interest.

FBI agents say the investigation was thorough in an effort to show transparency since the case involved two officers.

“Like always, our condolences do go out to the family. It is a sad time, but the family wanted to know also, and the tribe. So the case has been closed,” said Faith.

Daniela Hurtado, “No charges for officers in Fort Yates October shooting death,” *KFYR*, May 11, 2018, <http://www.kfyrtv.com/content/news/No-charges-for-officers-in-Fort-Yates-October-shooting-death-482432011.html>; see also Jack Dura, “Feds reviewing fatal shooting near Fort Yates,” *Bismarck Tribune*, March 27, 2018, https://bismarcktribune.com/news/local/crime-and-courts/feds-reviewing-fatal-shooting-near-fort-yates/article_21918f2b-d4ad-5460-b7d9-37126a642aa3.html.

In the second case, a police officer from Avenal, California was part of a county task force that “responded to reports of a violent man at the Santa Rosa Rancherita, an Indian reservation adjacent to the Tachi Palace Casino.... Putnam says on Friday night Phoenix threatened security officers on the reservation with a gun and then fled to a house.

“At this house, he repeatedly threatened other people inside the residence while continuing to brandish the handgun,” he said.

Putnam said deputies and other officers with the gang task force surrounded the house but Phoenix fled out of a window. He was then confronted by an officer of the Avenal Police Department.

“Mr. Phoenix turned and pointed his handgun at a law enforcement officer,” he said. “(Officer) Rivera, fired at Mr. Phoenix, obviously fearing for his life after having a gun pointed at him. The result was Mr. Phoenix was hit by gunfire and immediately fell to the ground.”

Four shots were fired Phoenix was pronounced dead at a local hospital. The fun Phoenix was holding was not real but looked like a semiautomatic handgun.

Stivers said it appeared Phoenix was under the influence.

Gene Haagenon, “Authorities release details of deadly officer-involved shooting near Tachi Palace,” *ABC30*, March 6, 2018, <https://abc30.com/news/authorities-release-details-of-deadly-officer-involved-shooting-near-tachi-palace/1787865/>.

¹⁰⁵⁴ Ian MacDougall, “Should Indian Reservations Give Local Cops Authority on Their Land?,” *The Atlantic*, July 19, 2017, <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/>.

and local law enforcement officers near reservations may be Native American themselves.¹⁰⁵⁵ Furthermore, as with African-Americans, Moya-Smith's complaint ignores the sad reality that violent crime is endemic on reservations. "Given that the violent crime rate on reservations is between double and triple the national average, comparable communities would be large urban areas with high violent crime rates."¹⁰⁵⁶

In fact, two Native American police officers, Colt Allery and Houston Largo, were killed in 2017. Largo, a tribal police officer, was killed by a fellow member of the Navajo Nation. Allery, a county deputy who had previously served as a tribal police officer, was killed by a fellow member of the Turtle Mountain Band of Chippewa.¹⁰⁵⁷ Incredibly, the *Washington Post* database includes Deputy Allery's killer, Melvin Delong, in its list of individuals killed by police in 2017—which is technically correct, but leads the casual reader to believe that Delong was a victim of police brutality. Rather, "The video depicts Deputy Allery being shot in the face [after approaching Delong's truck] and Deputy Allery not firing any shots", after which other deputies shot and killed Delong.¹⁰⁵⁸

The facts in cases where Native Americans are shot off tribal lands similarly do not support the Commission report's allegations. Joshua Spottedhorse was shot in Spokane, Washington after robbing a grocery store cashier at gunpoint, being surrounded by police, fleeing on foot, and sticking his hand in his waistband after being repeatedly ordered to show his hands.¹⁰⁵⁹ Thomas Littlecloud began shooting a rifle through a motel room door as police approached to investigate a vehicle death.¹⁰⁶⁰ Littlecloud killed Sacramento Deputy Bob French and injured two California Highway Patrol officers. Littlecloud later died of a gunshot wound he sustained during the gun battle that he initiated.

¹⁰⁵⁵ See Stewart Wakeling, Miriam Jorgensen, Susan Michaelson, and Manley Begay, *Policing on American Indian Reservations: A Report to the National Institute of Justice*, U.S. Dep't of Justice, 2001,

<https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

¹⁰⁵⁶ Ibid. at vii (citations omitted); see also National Institute of Justice, "Tribal Crime and Justice," April 24, 2018, <https://www.nij.gov/topics/tribal-justice/Pages/welcome.aspx>.

¹⁰⁵⁷ Andrew Hazzard, "Community, colleagues say goodbye to slain Rolette County deputy," *West Fargo Pioneer*, Jan. 24, 2017, <http://www.westfargopioneer.com/news/4205089-community-colleagues-say-goodbye-slain-rolette-county-deputy>; U.S. Dep't of Justice, U.S. Attorney's Office, District of New Mexico, "Kirby Cleveland Charged with Murder of Navajo Nation Tribal Police Officer," March 21, 2017, <https://www.justice.gov/usao-nm/pr/kirby-cleveland-charged-murder-navajo-nation-tribal-police-officer>.

¹⁰⁵⁸ April Baumgarten, "Suspect in Rolette County shooting fired first, killed Deputy Colt Allery, investigation reports say," *Grand Forks Herald*, May 2, 2017, <http://www.grandforksherald.com/news/4260251-suspect-rolette-county-shooting-fired-first-killed-deputy-colt-allery-investigation>.

¹⁰⁵⁹ Jonathan Glover, "Training pays off for Safeway employee held at gunpoint Tuesday," *The Spokesman-Review*, Dec. 28, 2017, <http://www.spokesman.com/stories/2017/dec/28/training-pays-off-for-safeway-employee-held-at-gun/>; KREM Staff, "Officer who killed Safeway robbery suspect justified in use of force," *KREM*, March 26, 2018, <https://www.krem.com/article/news/local/spokane-county/officer-who-killed-safeway-robbery-suspect-justified-in-use-of-force/293-532295939>.

¹⁰⁶⁰ Sarah Heise, "Deputy French fired at suspect even after he was shot, sheriff says," *KCRA*, Sept. 6, 2017, <https://www.kcra.com/article/deputy-french-fired-at-suspect-even-after-he-was-shot-sheriff-says/12175319>; Kevin Oliver, "Federal judge was warned not to release man who killed Sacramento Co. deputy," *KCRA*, Sept. 8, 2017, <https://www.kcra.com/article/federal-judge-was-warned-not-to-release-man-who-killed-sacramento-co-deputy/12206136>.

The report found that 59 percent of transgender respondents reported being stopped by police and being “profiled as sex workers when they were conducting routine daily tasks in the neighborhood.”¹⁰⁶¹ It should be noted that one of the Commission’s recent reports stated that nearly 20 percent of transgender respondents had engaged in prostitution or selling drugs.¹⁰⁶² The source the Commission relied on states that 11 percent of surveyed transgender individuals engaged in prostitution, in contrast to the perhaps 1 percent of U.S. women who have engaged in prostitution.¹⁰⁶³ So if the police are indeed profiling transgender individuals as prostitutes, they are behaving rationally.

It is worth noting here that “unarmed” is not a synonym for “harmless,” even though the report treats it as though it is. In 2016, 656 people were beaten to death by individuals who had no other weapon—more than the number killed by rifles and shotguns combined.¹⁰⁶⁴ Even though they are armed with lethal and non-lethal weapons, it is not irrational for police officers to be afraid of “unarmed” individuals who are attacking them or are acting in a threatening manner.¹⁰⁶⁵

For that matter, “mentally ill” is not a synonym for “harmless.” It may reduce the individual’s culpability for his behavior, but it does not mean that his behavior, even if beyond his control, is not objectively dangerous. Of the 236 people shot by police in 2017 whom the *Washington Post* classified as “mentally ill,” only 12 were unarmed.¹⁰⁶⁶ 122 were armed with a gun, 65 with a knife,

¹⁰⁶¹ Commission Report at notes 291.

¹⁰⁶² U.S. Commission on Civil Rights, *LGBT Employment in America*, 2017, at 19, https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf.

¹⁰⁶³ Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at 21, http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

¹⁰⁶⁴ FBI, “Expanded Homicide Data Table 4,” 2016, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-4.xls>.

¹⁰⁶⁵ In 2017, four corrections officers, one in Delaware and three in North Carolina, were beaten to death by inmates. See Brittany Horn, “Here are the 18 inmates charged in officer’s death,” *Delaware Online*, Oct. 17, 2017, <https://www.delawareonline.com/story/news/crime/2017/10/17/delaware-inmates-charged-connection-death-It-steven-floyd/772597001/>; Kevin Green, “Autopsy: NC corrections officer hit with boiling water then beaten with fire extinguisher,” *WNCN CBS North Carolina*, Oct. 26, 2017, <https://www.wavy.com/news/autopsy-nc-corrections-officer-hit-with-boiling-water-before-being-beaten-with-fire-extinguisher/1078266151>; “Durham man who shot trooper in 2013 among 4 charged in attempted prison break,” *WRAL*, Oct. 20, 2017, <https://www.wral.com/durham-man-who-shot-trooper-in-2013-among-4-charged-in-attempted-prison-break/17031550/>.

¹⁰⁶⁶ For example, Jean Pedro Pierre chased a deputy from his apartment and down the hallway, did not back down after the deputy deployed his Taser, knocked the deputy to the ground and dragged him by the leg, and began to charge another deputy, who shot him. Brian Hamacher, “Body Camera, Cellphone and Surveillance Videos Show Fatal BSO Deputy-Involved Shooting in Lauderdale Lakes,” *NBC Miami*, Dec. 8, 2017, <https://www.nbcmiami.com/news/local/Cellphone-Video-Shows-Fatal-BSO-Deputy-Involved-Shooting-in-Lauderdale-Lakes-462793703.html>. William Porubsky (who was white) attacked a deputy who had given him a ride to a homeless shelter after a woman reported Porubsky was pounding on her door and acting erratically. Porubsky tried to knock the deputy’s stun gun out of his hand, and when the deputy discharged the stun gun, it had no effect. Porubsky knocked the deputy to the ground and punched him in the face, at which point the deputy shot Porubsky. The Summit County Prosecutor determined that the shooting was justified. Evan MacDonald, “Stow police officer’s fatal shooting was justified, prosecutor says,” *Cleveland.com*, Feb. 15, 2018, https://www.cleveland.com/akron/index.ssf/2018/02/stow_police_officers_fatal_sho.html. On the other hand, an Oklahoma police officer was charged with murder for shooting Dustin Pigeon, who was suicidal and trying to set

12 with a toy weapon, and 20 with some other weapon (such as a pitchfork¹⁰⁶⁷ or an ax¹⁰⁶⁸). And as panelists Bob Metzger and Felix Vargas noted at our hearing, particularly when a person is both mentally ill and is on drugs, it may be very difficult to subdue him.¹⁰⁶⁹ Unfortunately, it may be impossible to subdue an individual without using deadly force.

Ferguson Effect

Report finding Number Six states:

Department of Justice engagement with police departments through police-requested assistance and at times enforcement and monitoring has proved beneficial to the police and their communities. Recommendations made by the Civil Rights Division, the Office of Community Oriented Policing Services (COPS) and the Community Relations Services office (CRS) have led to police departments implementing policies and practices that uphold constitutional standards. Departments that have undergone DOJ investigation and made agreements for reform, and those who have sought voluntary engagement, continue to see improved policies on use of force, better training of officers, and implementation of more advanced internal accountability and information systems.¹⁰⁷⁰

Contrary to the tone of this finding such investigation and reforms have not been an unqualified success. For example, Chicago and Baltimore are two cities that have been made prominent targets of DOJ investigations and consent decrees. Both witnessed dramatic spikes in crime, particularly murders.¹⁰⁷¹ Maybe the investigations and consent decrees made some members of the community feel better, but they seem to have mostly emboldened the criminal community—and it is doubtful that an increased number of listening sessions are of much comfort to the parents of a child hit by a stray bullet.

himself on fire, after another officer shot Pigeon with beanbag rounds to no effect (Pigeon was of Asian descent). Crimesider Staff, “Oklahoma officer charged with murder in shooting of suicidal man,” *CBS*, Dec. 5, 2017, <https://www.cbsnews.com/news/oklahoma-officer-charged-with-murder-in-shooting-of-suicidal-man/>; *Washington Post* “2017 Police Shootings Database,” *supra* note 1035.

¹⁰⁶⁷ Joseph Serna, “‘Despondent’ man with pitchfork fatally shot by Sacramento County sheriff’s deputy,” *Los Angeles Times*, Nov. 2, 2017, <http://www.latimes.com/local/lanow/la-me-ln-sacramento-ois-pitchfork-20171102-story.html>; Nashelly Chavez, “Man shot by Sacramento County deputy posted a suicidal message the night before his death,” *Sacramento Bee*, Nov. 3, 2017, <https://www.sacbee.com/news/local/crime/article182630416.html>.

¹⁰⁶⁸ “Reserve deputy cleared in fatal shooting of woman with ax,” *Las Cruces Sun-Times*, Jan. 24, 2018, <https://www.lcsun-news.com/story/news/2018/01/24/reserve-deputy-sergio-gotbeter-cleared-fatal-shooting-woman/1063925001/>.

¹⁰⁶⁹ Vargas, *Briefing Transcript* at 127, 91. Mr. Vargas argued that Mr. Zambrano, the individual who was shot by police in Pasco, Washington, could have been controlled through physical force because he was a small man, although a taser was ineffective. I offer no opinion as to the feasibility of Mr. Vargas’s suggestion.

¹⁰⁷⁰ Commission Report, Findings: Finding 6.

¹⁰⁷¹ Kevin Rector, “In 2016, Baltimore’s second-deadliest year on record, bullets claimed targets and bystanders alike,” *Baltimore Sun*, Jan. 2, 2017, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-homicides-2016-20170102-story.html>.

The Chicago consent decree likely will hamstring police officers in their efforts to enforce order and will endanger them. For example, the proposed consent decree states:

CPS officers will treat each application or standard cycle (five seconds) of a Taser as a separate use of force that officers must separately justify as objectively reasonable, necessary, and proportional. CPD will continue to require officers to, when possible, use only one five-second energy cycle and reassess the situation before any additional cycles are given or cartridges are discharged. In determining whether any additional application is necessary, CPD officers will consider whether the individual has the ability and has been given a reasonable opportunity to comply prior to applying another cycle.¹⁰⁷²

The consent decree reads as if police officers are going to be making these decisions in a clinical environment where they can calmly observe whether the Taser is effective before activating it again. Watching dash cam and body cam footage of struggles with suspects quickly reveal that is rarely how these scenarios unfold. Tasers were a great innovation because they allow officers to use non-lethal force. Are they harmless? No. But an exhaustive investigation by Reuters found only 153 deaths attributed to Tasers over the entire country from 1983-July 31, 2017 (Reuters inflates the numbers by reporting 1,005 deaths that occurred after Taser use, but that were not attributed to Taser use—for example, 17 people who died after choking on bags of drugs, because the use of a Taser might have made choking more likely).¹⁰⁷³ Although each death is a tragedy for the individual and his family, this simply is not very many people, and certainly not enough to place additional restrictions upon the use of Tasers—particularly because Tasers are not always effective, so police officers are already taking an increased risk to themselves by using a Taser rather than a firearm.¹⁰⁷⁴

The consent decree also will drown police officers in paperwork, thus giving them less time to engage in patrol work and other non-paperwork duties. For example:

CPD members must report and document any reportable use of force. Beginning January 1, 2019, a reportable use of force will be defined as any use of force by a CPS member included in any of the following three levels:

- a. A level 1 reportable use of force is the use of any force by a CPD member to overcome the active resistance of a subject that does not rise to a level 2

¹⁰⁷² Consent Decree, Draft for Public Review, *Illinois v. Chicago*, Case No. 17-CV-6260, at 51 (N.D. Ill. July 28, 2018), <http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/07/Illinois-v.-Chicago-Consent-Decree-Draft-for-Public-Review-2018-7-27.pdf>.

¹⁰⁷³ Peter Eisler, Jason Szep, Tim Reid, and Grant Smith, "Shock Tactics," *Reuters*, Aug. 22, 2017, <https://www.reuters.com/investigates/special-report/usa-taser-911/>.

¹⁰⁷⁴ Joe Sutton and Joe Sterling, "Police officer in Oklahoma dies after shootout," *CNN*, March 27, 2017, <https://www.cnn.com/2017/03/27/us/oklahoma-officer-killed/index.html> ("Terney chased and used a Taser on the person—but he was able to scramble through a wooded area into a pasture. The officer and suspect later "were involved in gunfire," Kidney said.").

or level 3 reportable use of force. This would include force that is reasonably expected to cause pain or an injury, *but does not result in injury or complaint of injury*. The following techniques are level 1 reportable uses of force when applied in response to active resistance: pressure point compliance techniques; joint manipulation techniques; wristlocks; armbars; and any leg sweep, weaponless defense techniques, or takedown that does not result in injury or complaint of injury. It is not a reportable use of force for a CPD member to escort, touch, or handcuff a person with minimal or no resistance. [emphasis added]¹⁰⁷⁵

Whenever a CPD member engages in a reportable use of force, the member must complete a TRR, or any similar form of documentation CPD may implement, prior to the end of his or her tour of duty. In addition to completing the TRR, officers must also document the reason for the initial stop, arrest, or other enforcement action per CPD policy. . . .

In completing the TRR, or whatever similar documentation CPD may implement, CPD members must include a narrative that describes with specificity the use of force incident, the subject's actions, or other circumstances necessitating the level of force used; and the involved member's response, including de-escalation efforts attempted and the specific types and amounts of force used. The narrative requirement does not apply to CPD members who discharged a firearm in the performance of duty or participated in an officer-involved death in the performance of duty. Any CPD member who observes or is present when another CPD member discharges a firearm or uses other deadly force must complete a written witness statement prior to the end of his or her tour of duty. CPD members will note in their TRRs the existence of any body-worn camera or in-car camera audio or video footage, and whether any such footage was viewed in advance of completing the TRR or any other incident reports. CPD members must complete TRRs, or whatever similar documentation CPD may implement, and other reports related to the incident, truthfully and thoroughly

All reportable uses of force by CPD members must be reviewed by CPD supervisors.¹⁰⁷⁶

The Baltimore consent decree is similar.¹⁰⁷⁷

¹⁰⁷⁵ Consent Decree, Draft for Public Review, *Illinois v. Chicago*, Case No. 17-CV-6260, at 55 (N.D. Ill. July 28, 2018).

¹⁰⁷⁶ *Id.* at 56-57, 59.

¹⁰⁷⁷ Consent Decree, *United States v. Police Dep't of Baltimore City*, Case No. 1:17-CV-00099-JKB, at 46-47 (D. Md. Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download>.

BPD will ensure that it continues to categorize Reportable Force into levels for the purposes of reporting and reviewing each use of force. These levels will be based on the following factors: potential of the technique or weapon to cause injury or disability; degree of actual injury or disability; duration of force; potential for abuse or

It is ironic that the report cites Chicago as an example of a successful implementation of a consent decree.¹⁰⁷⁸ Given the violence raging across Chicago (and yes, it is generally “black on black” violence)¹⁰⁷⁹, it is peculiar to cite Chicago as a successful example of anything related to criminal justice. A police commander was shot seven times while attempting to apprehend a four-time felon who was wearing body armor and carrying a weapon, which suggests Chicago needs a stricter approach to law enforcement, not consent decrees.¹⁰⁸⁰ In an interview with the *Chicago Sun-Times*, Chicago police superintendent Eddie Johnson stated that he believed public backlash against his department in the wake of the Laquan MacDonald shooting contributed to the horrific violence that swept Chicago in 2016.

“You couple that with the national anti-police narrative, that set us up for a disastrous 2016, and we saw it,” Johnson said. “Don’t get me wrong, you have to look at those things to ensure it doesn’t happen again. But I think a lot of criminals felt emboldened because of the national narrative. They didn’t feel like we were holding them accountable.”¹⁰⁸¹

This phenomenon is popularly known as the “Ferguson Effect,” which was first identified by panelist Heather Mac Donald the year after the Commission’s hearing.¹⁰⁸² The “Ferguson Effect”

misuse of weapon or force; and physical vulnerability of the subject. Each level of Reportable Force, as defined below, will require increasingly rigorous reporting, investigation, and review.

- a. Level 1: Level 1 Reportable Force includes: (1) force that causes only transient pain or disorientation during its application as a means of gaining compliance, including hand control or escort techniques (e.g. elbow grip, wrist grip, or shoulder grip) and pressure point compliance techniques, but that is not reasonably expected to cause injury; (2) pointing a firearm or Conducted Electrical Weapon (“CEW”) at an individual; (3) “cycling” a CEW as a form of warning (“Displaying the Arc”); and (4) forcible takedowns that do not result in actual injury or complaint of injury. It does not include escorting, touching, or handcuffing a person with minimal or no resistance. Pointing a firearm or CEW at a person is a Level 1 use of Reportable Force, subject to the following exceptions:
 - i. SWAT Team Officers and officers assigned to work on a federal task force will not be required to report the pointing of a firearm at a subject as a use of force during the execution of SWAT Team or federal task force duties; and
 - ii. Pointing of a firearm at a subject will not be a use of Reportable Force if done solely while entering and securing a building in connection with the execution of an arrest or search warrant and a supervisor prepares a report detailing the incident.

¹⁰⁷⁸ Commission Report at notes 554-55.

¹⁰⁷⁹ Chicago Tribune Crime Team, “In Chicago, 374 people have been killed this year. That is 118 fewer than 2017,” *Chicago Tribune*, Sept. 9, 2018, <http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicides-data-tracker-htlmlstory.html>.

¹⁰⁸⁰ Gregory Pratt, “Shomari Leghette, charged with Chicago commander’s murder, compares himself to Trayvon Martin,” *Chicago Tribune*, April 9, 2018, <http://www.chicagotribune.com/news/local/breaking/ct-met-shomari-legghette-paul-bauer-chicago-magazine-20180407-story.html>; Jessica D’Onofrio, “Suspect in killing of Chicago Police Cmdr. Bauer appears in court Friday,” *ABC 7*, March 9, 2018, <https://abc7chicago.com/suspect-in-killing-of-cpd-cmdr-bauer-appears-in-court-friday/3193483/>.

¹⁰⁸¹ Mitchell Armentrout, “Chicago homicides down sharply in 2017, still over 650 slain,” *Chicago Sun-Times*, Dec. 31, 2017, <https://chicago.suntimes.com/news/chicago-murders-homicides-2017-steep-decline/>.

¹⁰⁸² Heather Mac Donald, “The Ferguson Effect,” *Washington Post*, July 20, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/20/the-ferguson-effect/?noredirect=on&utm_term=.88e954adb4d7.

refers to sudden spikes in violent crime, particularly homicides, that occurred across the country following unrest surrounding the death of Michael Brown. The spikes were particularly pronounced in large urban areas. Cleveland, for instance, had a 90.5 percent increase in homicides in 2015, Baltimore had a 58.5 percent increase, Milwaukee had a 72.6 percent increase, and Chicago had a 15.0 percent increase.¹⁰⁸³

Mac Donald argues that the increase in unrest and belief that they lacked governmental support caused police officers to reduce “proactive policing,” which helps maintain order, and instead respond only to calls. As Rahm Emanuel said before capitulating to anti-police forces, “They [police officers] have pulled back from the ability to interdict . . . They don’t want to be a news story themselves, they don’t want their career ended early, and it’s having an impact.”¹⁰⁸⁴ Richard Rosenfeld of the University of Missouri-St. Louis believes that some form of the Ferguson Effect—either that police have backed off from proactive policing or loss of confidence in the police leading to increased private violence—is likely responsible for the surge in homicides among African-Americans since 2014.¹⁰⁸⁵

It doesn’t really matter if “the community” feels better about the police if consent decrees and protests hamstringing the police in their efforts to maintain order. The unfortunate fact of the matter is that even if every single police officer were perfectly trained, had not a shred of explicit or implicit racial bias, and never made a mistake under pressure, many individuals would still be killed by police every year. A situation where a man refuses to follow an officer’s orders, punches her in the face after she pepper-sprays him, and grabs her Taser and attempts to shoot her with it is almost certainly going to end with either the man or the officer dead.¹⁰⁸⁶ Likewise, a man may be unarmed and have a mental illness, but if he chases a deputy out of his apartment and down the hallway, is unaffected by the use of a Taser and baton, knocks the deputy to the ground and continues kicking and dragging him after being ordered to stop by another deputy, and then charges the second deputy, there is a reasonable likelihood that deadly force will be used.¹⁰⁸⁷ There are certainly individuals like Walter Scott who are completely innocent of wrongdoing, but it is far more common that individuals are killed by police after they have escalated a situation to a point where it is a life-or-death struggle.

In the end, perhaps Michael Brown’s untimely death is an accurate archetype of so many individuals who die at the hands of police. An individual is involved in a crime, and the police are called. That individual behaves aggressively and the situation escalates. In the end, either the police officer or the suspect or both are wounded or dead.

¹⁰⁸³ Richard Rosenfeld, *Documenting and Explaining the 2015 Homicide Rise: Research Directions*, National Institute of Justice, 2016, at 9, <https://www.ncjrs.gov/pdffiles1/nij/249895.pdf>.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Ibid.*; Richard Rosenfeld, Shytierra Gaston, Howard Spivak, Seri Irazola, *Assessing and Responding to the Recent Homicide Rise in the United States*, National Institute of Justice, 2017, <https://www.ncjrs.gov/pdffiles1/nij/251067.pdf>.

¹⁰⁸⁶ Jonathan Cooper, “Officer undergoes surgery after struggle leading up to fatal metro officer-involved shooting,” *KOCO News*, Dec. 11, 2017, <https://www.koco.com/article/officer-undergoes-surgery-after-struggle-leading-up-to-fatal-metro-officer-involved-shooting/14411231>.

¹⁰⁸⁷ Carey Codd, “Body Cam Video Captures Tense Moments Leading Up to Deadly Deputy-Involved Shooting,” *CBS Miami*, Dec. 8, 2017, <https://miami.cbslocal.com/2017/12/08/video-shows-moments-leading-up-to-deadly-deputy-involved-shooting/>.

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Rebuttal of Commissioner David Kladney

Commissioner Peter Kirsanow now claims the Commission's inquiry into police use of force is based on a lie. It is not. He says we started investigating because of the protests after the death of Michael Brown at the hands of police. This case was not the basis of the project proposal, which I put forward, the police use of force briefing, or this report. Commissioner Kirsanow knows better. He voted for the project when I proposed it.¹⁰⁸⁸

It is true that protests in St. Louis, Missouri brought attention to police use of force not seen in decades, but the Michael Brown case is not what crystallized it into a briefing before the Commission. For my part, I became convinced the Commission should examine police use of force after the shocking and tragic shooting of 12-year-old Tamir Rice in Cleveland. As I said when I proposed the Commission undertake this project, this episode, in particular, demonstrated failures up and down the chain of police training, tactics, supervision, and accountability. It is an abject failure of the administration of justice for police to kill a person over a minor crime or no crime at all, much less a 12-year-old kid.

But even this one egregious case of police use of force did not form the basis of the Commission's examination either. The briefing and report are an extensive look at police use of force policies around the country. We looked at failures of departments to ensure their chiefs of police and supervisors they appoint are training and enforcing constitutional standards with their officers. It is undoubtedly in the Commission's charge to determine whether such uses of force fall hardest on the populations in the Commission's jurisdiction, as has been alleged, which this report does in detail.

Commissioner Kirsanow knows this. He takes issue with the Commission's investigation because we did not determine, as he does, that crime statistics are the beginning and the end of the story. Commissioner Gail Heriot tells a similar story in her statement, bizarrely claiming that people on the left are not concerned with the deep injustice that race is a predictor of someone's personal safety and whether or not that person will become a victim of violent crime.

I am certainly concerned about crime rates. I think we should do a better job solving murders in every neighborhood, not just in well-connected ones. I don't think it's right to write off entire

¹⁰⁸⁸ Both Commissioner Kirsanow and Commissioner Heriot, who also writes a dissenting statement, voted to pursue this project. Commissioner Kirsanow stated as follows:

COMMISSIONER KIRSANOW: Yes. Thank you, Mr. Chair. I support this as an appropriate and important use of Commission resources. The Tamir Rice situation is something that transpired not too far from my home. And there had been reporting regarding the officer involved in the shooting and whether or not there had been an appropriate background check. And these are tragic circumstances that I'm hopeful it notes exploring whether changes in police procedures will reduce police shootings, ultimate shootings particularly those that resulted in between 95 to a hundred deaths of blacks each year.

U.S. Commission on Civil Rights, Business Meeting, Dec. 7, 2014, transcript at 52, https://www.usccr.gov/calendar/trnscript/CommissionBusinessMeetingTranscript_Dec12-2014.pdf. He also requested the Commission hear from people representing his view that crime rates are the underlying cause of disparities in use of force, which we did.

blocks as places where shootings are inevitable, police use of force is inevitable, and people should be resigned to their fate. The statistics Commissioners Kirsanow and Heriot cite don't tell the whole story. Looking deeper into the crime statistics shows, for example, murders with white victims are much more likely to be solved than murders with black victims. Yet, only 62% of murders of white victims get solved and only 47% of murders of black victims are solved.¹⁰⁸⁹ Because so many more whites are numerically killed each year, the overall closure rate of murder in our country is 60%.¹⁰⁹⁰ More surprising is that only 53% of aggravated assault cases, 34% of rape cases, 30% robbery and 20% of larceny cases are solved and closed every year.¹⁰⁹¹ Oh, and my fellow Commissioners should take note that less than half of all crime is reported in the first place.¹⁰⁹² I am not the only person to have noticed these rates seem low. Plenty of people who denounce police excessive use of force also call for police to do a better job solving crimes in their communities.

The proposals made in this report will increase the crime case clearance rate.

Commissioner Heriot sets up a false choice when she claims we cannot insist police protect the public and refrain from using excessive force. Our choice is not a binary "more" or "less" policing. The experts who testified at our briefing stated over and over that policing practices can be improved, and that doing so would increase community trust, solve more crimes, *and thereby drive down crime rates*. It is also required by our laws that police refrain from using excessive force. It is not some luxury people are requesting.

Police departments' own research and self-reflection has led to improvements, both in use of force practices and in crime clearance rates. The two are not mutually exclusive. As the Las Vegas Metropolitan Police Department experienced, "An analysis conducted during collaborative reform concluded that 90 percent of unarmed subjects in officer-involved shootings were black or Hispanic, and all subjects shot as a result of an officer-initiated stop were black or Hispanic."¹⁰⁹³ This led the Department to initiate a series of reforms that resulted in fewer police uses of force and better community engagement across the board, but with special focus on the communities it

¹⁰⁸⁹ FBI: Uniform Crime Reporting, "2017 Crime in the United States," <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017>. See also German Lopez, "There's a nearly 40 percent chance you'll get away with murder in America," *Vox*, Sept. 24, 2018, <https://www.vox.com/2018/9/24/17896034/murder-crime-clearance-fbi-report> (citing FBI statistics).

¹⁰⁹⁰ Ibid.

¹⁰⁹¹ Ibid.

¹⁰⁹² See John Gramlich, "Most violent and property crimes in the U.S. go unsolved," Pew Research Center, March 1, 2017, <http://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/>.

¹⁰⁹³ Michelle Rindels and Luz Gray, "Vegas police led the way in overhauling force policies, but it hasn't been a panacea," *Nevada Independent*, Aug. 19, 2018, <https://thenevadaindependent.com/article/vegas-police-led-the-way-in-overhauling-force-policies-but-it-hasnt-been-a-panacea>.

noticed were affected the most.¹⁰⁹⁴ The Boston Police Department has implemented new strategies and tactics for investigating crime, drastically improving their rates of solving homicides.¹⁰⁹⁵

We need to give officers better tools, better training, better supervision and better support services so they have all the tools they need to do their job safely and efficiently. They need better pay for the knowledge and skills we are asking them to possess, and we need to provide them more personnel for their safety, for example in providing for two-person patrol cars in high crime neighborhoods. That's how to address excessive uses of force and increase community trust—by listening to people's concerns and changing policies where appropriate. Not by quoting crime statistics and implying it's all their own fault and there's nothing more to do.

Commissioner Kirsanow acknowledges that some innocent people—like Walter Scott—are killed by police, but then he says most have escalated the encounter so that it becomes a life or death struggle. He stops there. I do not. Police have a dangerous and difficult job, yes, but we have not reached the pinnacle of police strategic and tactical approach to citizens. A quarter of people the police killed were experiencing a mental health challenge at the time of their death by police. We can do better for them. Some, as Commissioner Kirsanow says, were not attacking police at all. We can do better for them. Some are attempting violence, but with the right approaches police can, at times, even approach those situations so they are safer and the suspect is safer too. There is ample evidence for this which Commissioners Kirsanow and Heriot conveniently ignore.

Crime statistics are not destiny. Fatalism is not the answer. Better policing is possible. Commissioners Kirsanow and Heriot's approach, surprisingly, is to throw in the towel.

¹⁰⁹⁴ Rachel Crosby, "Police rebuild trust in Las Vegas' Westside, one event at a time," *Las Vegas Review-Journal*, April 30, 2017, <https://www.reviewjournal.com/crime/police-rebuild-trust-in-las-vegas-westside-one-event-at-a-time/>.

¹⁰⁹⁵ Anthony A. Braga and Desiree Dusseault, *Can Police Improve Homicide Clearance Rates?*, Harvard Kennedy School Rappaport Institute for Greater Boston, 2017, https://www.hks.harvard.edu/sites/default/files/centers/rappaport/files/braga_homicideclearance%20v7.pdf; Lopez, "There's a nearly 40 percent chance you'll get away with murder in America," *supra* note 1089.