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# How Much is Police Brutality Costing America?

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Eleanor Lumsden\*

INTRODUCTION.....	142
I. A BRIEF HISTORY OF POLICING .....	145
II. FEDERAL LAW .....	155
A. <i>The United States Constitution</i> .....	155
B. <i>Federal Statutory Law</i> .....	158
III. THE COMMON LAW OF TORTS.....	162
IV. THE COSTS OF POLICE BRUTALITY.....	165
A. <i>Direct, Current Costs</i> .....	165
1. <i>Costs to Victims</i> .....	165
2. <i>Broken Homes and Families</i> .....	172
B. <i>Indirect, Current Costs</i> .....	174
1. <i>Costs to States and Local Governments</i> .....	174
2. <i>Costs to Communities</i> .....	177
C. <i>Indirect, Future Costs</i> .....	181
1. <i>Distrust of Law Enforcement</i> .....	181
2. <i>Lack of Trust in the Social Compact</i> .....	183
3. <i>The Cost to Law and Order</i> .....	184
4. <i>The Cost to our Reputation</i> .....	188
5. <i>Black Flight</i> .....	190
V. LEGAL & POLICY RECOMMENDATIONS .....	193
VI. CONCLUSION.....	201

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*Abstract*

*The criminal law of the United States fails to stop the unlawful killing of minorities by law enforcement. In fact, it was never meant to do so. Civil tort law is also unequal to the task. The consequences of not correcting these legal failures have been underreported, and are far-reaching for the United States and its neighbors. This article explores the direct and indirect costs of these failings, identifies positive measures already underway, and outlines further suggestions for reform.*

## INTRODUCTION

Now, what I have said about Harlem is true of Chicago, Detroit, Washington, Boston, Philadelphia, Los Angeles and San Francisco—is true of every Northern city with a large Negro population. [T]he police are simply the hired enemies of this population. They are present to keep the Negro in his place and to protect white business interests, and they have no other function. [The police] are, moreover—even in a country which makes the very grave error of equating ignorance with simplicity—quite stunningly ignorant; and, since they know that they are hated, they are always afraid. One cannot possibly arrive at a more surefire formula for cruelty.

This is why those pious calls to “respect the law,” always to be heard from prominent citizens each time the ghetto explodes, are so obscene. The law is meant to be my servant and not my master, still less my torturer and my murderer.<sup>1</sup>

The system of policing in the United States is broken. Police brutality—which in this article is defined as any situation where public officials use the power invested in them by law to unlawfully kill others<sup>2</sup>—has left an abiding stain that will be well remembered in the annals of U.S. history. One could argue that little has changed since James Baldwin wrote his

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<sup>1</sup> James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), <https://www.thenation.com/article/report-occupied-territory/>.

<sup>2</sup> Although this Article will focus on police brutality that results in death, police encounters that result in non-lethal injuries are very important as well—they are underreported and more numerous than the numbers of police encounters that result in death. See Rob Arthur et al., *Shot by Cops and Forgotten: Police Shoot Far More People Than Anyone Realized, A Vice News Investigation Reveals*, VICE NEWS (Dec. 11, 2017), [https://news.vice.com/en\\_us/article/xwvv3a/shot-by-cops/](https://news.vice.com/en_us/article/xwvv3a/shot-by-cops/) (In the “first attempt to count both fatal and nonfatal shootings by American police in departments across the country,” the investigation found that in the largest local police departments, there were 1,378 fatal encounters versus 2,720 nonfatal encounters between 2010-16.). See also Tom Kertscher, *Fatal Police Shootings Occur in Tiny Percentage of Arrests in U.S., Milwaukee’s Police Chief Says*, POLITIFACT WIS. (Aug. 29, 2014, 5:00 AM).

“report” in 1966.<sup>3</sup> Yet the central thesis of this article is that the failure of U.S. federal and state laws to eradicate unlawful police action has even more pressing implications than those present 50 years ago. The primary issue is whether U.S. law, as currently enacted, can prevent these unnecessary deaths in the United States. If the answer to this question is no, a secondary question is what are the costs of failing to stop unlawful police killing in general, and the disproportionate rates at which unarmed black men are killed?<sup>4</sup> A third question is, what can be done to improve the current situation for all Americans, including for the police themselves?

These pressing issues require answers, and an immediate national response. They are just as significant as employment, immigration, or health care. In fact, and as described further below, police brutality is inextricably linked to the economy.<sup>5</sup> It is the position of this article that the current status quo is untenable and cannot stand in a nation that is committed to human rights and the rule of law. Our collective willingness to tolerate and not eradicate police misconduct in all its forms has increased social costs today. Poor and minority members of society do not bear these costs alone, although they are among the most directly affected.<sup>6</sup> Police

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<sup>3</sup> See, e.g., Richard Wolf, *Equality Still Elusive 50 Years After Civil Rights Act*, USA TODAY (Apr. 1, 2014, 12:22 PM), <http://www.usatoday.com/story/news/nation/2014/01/19/civil-rights-act-progress/4641967/> (noting it has been easier to end overt discrimination than to achieve economic, educational or social equality).

<sup>4</sup> A recent (but not yet public) academic study by Professors Justin Nix and Bradley Campbell at the University of Louisville, Kentucky and Professor Geoffrey Albert of the University of South Carolina, *Fatal Shootings by US Police Officers in 2015: A Bird's Eye View*, “found that unarmed black men were shot and killed last year [in 2015] at disproportionately high rates and that officers involved may be biased in how they perceive threats.” Wesley Lowery, *Study finds police fatally shoot unarmed black men at disproportionate rates*, WASH. POST (Apr. 7, 2016), [https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3\\_story.html?utm\\_term=.3459b10e273a](https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html?utm_term=.3459b10e273a). See Justin Nix et al., *Fatal Shootings by U.S. Police Officers in 2015: A Bird's Eye View*, POLICE CHIEF, <http://www.policechiefmagazine.org/fatal-shootings-by-u-s-police-officers-in-2015-a-birds-eye-view/> (last visited Oct. 7, 2018).

<sup>5</sup> James Prumos, *Police Brutality: Economic Impact*, THE STILLMAN EXCHANGE (Nov. 18, 2015), <https://thestillmanexchange.com/2015/11/18/police-brutality-economic-impact/> (underscoring that the costs of police brutality are paid by taxpayers); see also Terrance Heath, *Police Violence Against Blacks Has an Economic Context*, CAMPAIGN FOR AMERICA'S FUTURE (June 10, 2015), <https://ourfuture.org/20150610/police-violence-against-blacks-has-an-economic-context> (highlighting the fact that police encounters “occur in a socioeconomic context that goes back centuries.”).

<sup>6</sup> See Kenneth C. Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 717 (Apr. 1974).

misconduct affects all segments of society,<sup>7</sup> and these costs are outlined more fully in Part IV of this Article. The failure of both the criminal justice and tort systems to bring about change is a problem that the broader society ignores at its peril.

Many Americans commonly use the word “America” to refer to the geographic boundaries of the United States. Often, those residing in Latin America or elsewhere outside of the U.S. feel that this is imperialistic and wrong. America refers to a continent composed of many autonomous countries, of which the United States is just one.<sup>8</sup> As used in the title of this article, “America” does not reflect this more limited use. Citizens of all of the Americas are impacted by this particular failure of justice in the United States.<sup>9</sup>

U.S. minorities and the so-called “underclass” suffer most from our collective inability and unwillingness to do better, but so do the citizens of other nations, including our closest southern neighbor. Recently, the U.S. Supreme Court considered the constitutional implications of a case where a U.S. border patrol agent fired a shot from El Paso, Texas that struck an unarmed 15-year-old boy in Juarez, Mexico: Sergio Adrián Hernández Güereca was standing a mere sixty feet away when he was killed.<sup>10</sup> According to legal documents filed by the boy’s parents, there have been more than forty killings by border patrol agents, including ten cross-border shootings and six deaths.<sup>11</sup> In this case, the border control agent stated that he was under attack from youths who were throwing rocks. Cell phone

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<sup>7</sup> Black parents must delicately balance how to instruct their child to obey, but somehow not fear, police. Those same parents may be left grieving or bereft when despite their best efforts, their child nonetheless runs afoul of the criminal justice system and is incarcerated or killed. Schools must keep their students and teachers safe and must grapple with the decision of whether to allow armed security or police on campus. Such schools also must consider the role they may play in contributing to the school to prison pipeline. Communities must simultaneously grapple with attempts to reduce gun violence with attempts to monitor local law enforcement. Women must contend with the loss of partners to either prison or death, or the possibility of raising their children without partners.

<sup>8</sup> Chris Kirk, *I’m From America, Stop Complaining South America*, SLATE (Aug. 19, 2013), [http://www.slate.com/articles/news\\_and\\_politics/a\\_fine\\_whine/2013/08/america\\_the\\_continent\\_vs\\_america\\_the\\_country.html](http://www.slate.com/articles/news_and_politics/a_fine_whine/2013/08/america_the_continent_vs_america_the_country.html).

<sup>9</sup> MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 65 (1963) (“Injustice anywhere is a threat to justice everywhere.”).

<sup>10</sup> See *Hernandez v. Mesa*, 137 S.Ct. 2003 (2017); see also Robert Barnes, *Supreme Court Considers Case of a Shot Fired in U.S. That Killed a Teenager in Mexico*, WASH. POST (Feb. 19, 2017), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-considers-case-of-a-shot-fired-in-us-that-killed-a-teenager-in-mexico/2017/02/19/c2935c36-f548-11e6-8d72-263470bf0401\\_story.html?utm\\_term=.22c1ae87daab](https://www.washingtonpost.com/politics/courts_law/supreme-court-considers-case-of-a-shot-fired-in-us-that-killed-a-teenager-in-mexico/2017/02/19/c2935c36-f548-11e6-8d72-263470bf0401_story.html?utm_term=.22c1ae87daab).

<sup>11</sup> See *Hernandez*, 137 S.Ct. 2003.

video contradicts that account and instead appears to show the youths playing a game where they ran back and forth along a culvert that separates the two countries.<sup>12</sup> Unlawful killings occurring within the strict confines of our geographic borders have implications further afield.

Righting these wrongs does not necessitate the assignation of blame. Change comes, whether beckoned or not. Erasing the debt collectively owed to the marginalized and the defenseless means not only an acknowledgment of the problem, which by now has been covered extensively by other writers, but also an awareness that the willful subjugation and subordination of any group of people has never been indefinite or without repercussions.

This Article seeks to challenge the idea that unlawful police killings boil down to a mere disagreement over whether “Blue Lives Matter” or “Black Lives Matter.” I argue that there are significant and currently underestimated societal and economic costs that accrue when unaccountable public officials use the power granted to them by law to commit murder. Increased transparency and accountability over law enforcement will make it safer for all persons already living in the United States, for our immediate neighbors, and for those who intend to migrate to, or visit the country.

Part I begins by discussing the racial context in which policing developed in the United States, and lays the foundation for a narrative that explains the continuing racial tensions between law enforcement and African Americans in particular. Parts II and III explain and critique existing federal and state laws that allow racial killing to continue. Part IV explores and outlines the direct and indirect costs of police brutality. Part V discusses positive reforms and concludes with some thoughts and recommendations on how policing, police policy, and laws in the United States can be further improved to bring about meaningful change.

## I. A BRIEF HISTORY OF POLICING

*It's long past time we watched the watchmen.*<sup>13</sup>

An abbreviated history of policing in the United States may help to place the current narrative in context. In 1704, the first slave patrols were formed.<sup>14</sup> Slave patrols were responsible for returning runaway slaves to

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<sup>12</sup> *See id.*

<sup>13</sup> *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/>.

<sup>14</sup> The first slaves were brought to the U.S. in 1619. Slave patrols started in 1704 and

their masters, enforcing laws which prevented blacks from traveling without passes or permits, and preventing revolt.<sup>15</sup> Over time, these slave patrols eventually morphed into a form that is now recognized as modern-day law enforcement: “[t]he slave patrol, which began as an offshoot of the militia, and came to resemble the modern police, thus provides a transitional model in the development of policing.”<sup>16</sup> It can be argued that from the beginning, law enforcement existed to control, not protect, blacks. Further, as African-Americans were literal property, policing that returned runaway slaves to their masters directly served the purpose of maintaining white property interests.

Slavery was formally abolished in the United States by the Thirteenth Amendment to the U.S. Constitution in 1865.<sup>17</sup> However, official control over black bodies continued even after the end of slavery. Contained within the 13<sup>th</sup> Amendment was an exception that allowed for the continued enslavement of those under government control.<sup>18</sup> Under the “convict-labor exception,”<sup>19</sup> a system of “convict leasing” emerged which allowed forced

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continued through 1861. Yet the birth of American policing really begins in 1631 with the establishment of the first night watch in Boston. Colonial cities included provisions in their articles of incorporation for night watches and constables whose duties included “keeping the peace, ensuring public safety, and law enforcement. BRYAN VILA & CYNTHIA MORRIS, *THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY* 3 (1999).

<sup>15</sup> KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 64 (Soft Skull Press, 2004) (“the slave patrols existed solely as a means of preserving the status quo through the enforcement of the slave codes “); see also Jeffrey R. Hummel, *Slave Patrols: Law and Violence in Virginia and the Carolinas*, Book Review, Hoover Institution, Stanford University (July 2002), [http://eh.net/book\\_reviews/slave-patrols-law-and-violence-in-virginia-and-the-carolinas/](http://eh.net/book_reviews/slave-patrols-law-and-violence-in-virginia-and-the-carolinas/) (“Slave patrols, rather than being desultory or inadequate, turn out to be one of the chief ways that the southern states enforced their peculiar institution. The patrols apprehended runaways, monitored the rigid pass requirements for blacks traversing the countryside, broke up large gatherings and assemblies of blacks, visited and searched slave quarters randomly, inflicted impromptu punishments, and as occasion arose, suppressed insurrections”).

<sup>16</sup> *Id.* at 75; see also Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, *POLICING PERSPECTIVES, AN ANTHOLOGY* (EDS. LARRY K. GAINES AND GARY W. CORDNER) 79 (1999) (citing Samuel Walker, “slave patrols were precursors to the police . . . [and] . . . the slave patrols operated solely for the enforcement of colonial and state laws”).

<sup>17</sup> See 13<sup>TH</sup> (Netflix 2016).

<sup>18</sup> THE LIBRARY OF CONGRESS, *Primary Documents in American History*, <https://www.loc.gov/tr/program/bib/ourdocs/13thamendment.html> (“Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”) (emphasis added).

<sup>19</sup> Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 872 (2012).

labor to continue through the prison population.<sup>20</sup> Although African-Americans did see important gains during “Reconstruction,” the period between 1865-1877 that immediately followed the Civil War, the accumulation of rights by African-Americans led to a “white rage” that “work[ed] its way through the courts, the legislatures, and a range of government bureaucracies.”<sup>21</sup> In 1865, laws known as the “Black Codes” were enacted:

Their aims were to control the activities of the free black population in the states of the South, and to preserve a captive labor force for the plantations. Their provisions hark back to the previous slave codes. The Black Codes remained in force only until military rule was established by Congress in the states of the former Confederacy and the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.<sup>22</sup>

In addition to the inequality written into U.S. laws, African-Americans simultaneously faced threats from both public officials and non-governmental agents. Non-state actors such as the Ku Klux Klan (the “KKK”) also bolstered the legalized system of control: the KKK, a hate group founded and based on white supremacy in 1865,<sup>23</sup> participated in “night rides” to terrorize the freed black population.<sup>24</sup> Thousands of African-Americans were lynched, often with either the tacit or explicit approval of state authorities:

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<sup>20</sup> This fact of life was memorialized in the lyrics of Sam Cooke’s famous song, released in 1960: “[t]hat’s the sound of the men, working on the chain gang.” SAM COOKE, CHAIN GANG (RCA Victor 1960); *see also* THE BLACK EXPERIENCE, 1865-1978: A DOCUMENTARY READER 38-39 (Anthony J. Cooper, ed., 1995) (“The penitentiary system of the South, with its infamous chain-gang and convict features, is not equaled in inhumanity, cruelty, and deliberate fraud in any other institution outside of Russian Siberia.”).

<sup>21</sup> CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 3 (2016). Ms. Anderson also discusses (for example, during the Great Migration) how law enforcement officials assisted “mayors, governors, legislators, business leaders,” and “city councils, state legislators” in the violent repression of African Americans. *Id.* at 42, 48.

<sup>22</sup> THE BLACK EXPERIENCE, *supra* note 20, at 6. Per W.E.B. DuBois, the Black Codes “were an astonishing affront to emancipation” and made “plain and indisputable” the “attempt on the part of the Southern States to make Negroes slaves in everything but name.” W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 167 (2013).

<sup>23</sup> According to the Southern Poverty Law Center, “[t]he Ku Klux Klan, with its long history of violence, is the most infamous—and oldest—of American hate groups. Although black Americans have typically been the Klan’s primary target, it also has attacked Jews, immigrants, gays and lesbians, and, until recently, Catholics.” *Ku Klux Klan*, SOUTHERN POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (last visited Oct. 2, 2017).

<sup>24</sup> WILLIAMS, *supra* note 15, at 88 (citing MARY F. BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 73-74 (2d ed., 1994)).

Lynchings were violent and public events that traumatized black people throughout the country and were largely tolerated by state and federal officials. This was not “frontier justice” carried out by a few marginalized vigilantes or extremists. Instead, many African Americans who were never accused of any crime were tortured and murdered in front of picnicking spectators (including elected officials and prominent citizens) for bumping into a white person, or wearing their military uniforms after World War I, or not using the appropriate title when addressing a white person. People who participated in lynchings were celebrated and acted with impunity.<sup>25</sup>

The horrors of this often-under-reported period of American history were memorialized in the lyrics of *Strange Fruit*, a protest anthem that was famously and hauntingly performed by Billie Holiday: “Southern trees bear strange fruit; Blood on the leaves and blood at the root; Black bodies swinging in the southern breeze; Strange fruit hanging from the poplar trees. . . .”<sup>26</sup>

The dark days following the official end of slavery were not without legal triumphs. The Civil Rights Act (which will be discussed further in Part II) was passed in 1866, and the Fourteenth Amendment to the U.S. Constitution was ratified in 1868.<sup>27</sup> The 14<sup>th</sup> Amendment granted citizenship to all those who were born or naturalized in the United States, including former slaves.<sup>28</sup> Even with the passage of the Civil Rights Act, and despite the holdings of U.S. Supreme Court decisions like *Brown v. Board of Education*,<sup>29</sup> white resistance to integration in public schools and

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<sup>25</sup> See, e.g., Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, EJI, <https://eji.org/reports/lynching-in-america> (last visited Oct. 7, 2017) (“[EJI] researchers documented 4075 racial terror lynchings of African Americans in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia between 1877 and 1950. . . .”); See also Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, EJI (3rd ed.), <https://lynchinginamerica.eji.org/report/> (last visited Oct. 5, 2017) (“Lynchings . . . were largely tolerated by state and federal officials.”).

<sup>26</sup> *Strange Fruit*, THE BICYCLE CO., <http://www.billieholiday.com/portfolio/strange-fruit/>. The original poem was written by Abel Meeropol, a white, Jewish high school teacher. The poem continues:

Pastoral scene of the gallant South; The bulgin’ eyes and the twisted mouth; Scent of magnolias sweet and fresh; Then the sudden smell of burnin’ flesh. Here is a fruit for the crows to pluck; For the rain to gather, for the wind to suck; For the sun to rot, for the tree to drop; Here is a strange and bitter crop.

*Id.*

<sup>27</sup> *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Oct. 2, 2017).

<sup>28</sup> *Id.*

<sup>29</sup> 347 U.S. 483 (1954). In *Brown*, the U.S. Supreme Court declared state laws

in public life was widespread. Bull Connor, the Chief of Police in Birmingham, stated: “[w]e don’t give a damn about the law. Down here we make our own law.”<sup>30</sup>

A racial caste system buoyed by so-called “Jim Crow” laws operated to keep blacks separate and unequal in most key areas of life, including but not limited to housing, education, and public accommodations.<sup>31</sup> Demonstrating that the “line of progress is never straight,”<sup>32</sup> a series of U.S. Supreme Court decisions dealt a series of blows to the fight for racial equality, including for example, approving police stops for less than probable cause,<sup>33</sup> approving racial profiling,<sup>34</sup> upholding harsh mandatory minimum sentencing for drug offenses,<sup>35</sup> and requiring proof of overt, visible discrimination while ignoring evidence of racial bias in sentencing.<sup>36</sup>

During the Civil Rights Movement of the nineteen-fifties and sixties, Southern Blacks and their allies marched, conducted “sit-ins” at segregated lunch counters, and engaged in peaceful acts of civil disobedience to protest these injustices.<sup>37</sup> In fact, the rise of police unions in the nineteen-seventies can be traced to the fight against inequality and institutionalized racism.<sup>38</sup> Police unions today wield significant power and shield not only innocent, but culpable officers from scrutiny and discipline.<sup>39</sup> In fact, some argue that today, police unions serve to uphold the status quo and are standing in the way of necessary reforms:

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establishing separate public schools for black and white students to be unconstitutional. *See id.*

<sup>30</sup> FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 306 (1990).

<sup>31</sup> *Id.*

<sup>32</sup> MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (Beacon Press, 2010).

<sup>33</sup> *See Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>34</sup> *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 131 (2010).

<sup>35</sup> *See Hutto v. Davis*, 454 U.S. 370 (1982); *see also* ALEXANDER, *supra* note 34, at 90.

<sup>36</sup> *See McClesky v. Kemp*, 481 U.S. 279 (1987); *see also* ALEXANDER, *supra* note 34 at 109-11.

<sup>37</sup> *See* Davarian L. Baldwin, *The Civil Rights Movement*, AFRICANA AGE (2011), <http://exhibitions.nypl.org/africanaage/essay-civil-rights.html>; *see also* *A History of Racial Injustice*, EQUAL JUSTICE INITIATIVE (2014), <http://racialinjustice.eji.org/timeline>.

<sup>38</sup> *See* VILA & MORRIS, *supra* note 14 at xxxv.

<sup>39</sup> *See* Reade Levinson, *Protecting the Blue: Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017), <http://www.reuters.com/investigates/special-report/usa-police-unions> (noting that union contracts erase disciplinary records or allow police to forfeit sick leave for suspensions, and residents face hurdles in pursuing complaints).

Indeed, most [police unions] were formed as a reaction against public demands in the nineteen-sixties and seventies for more civilian oversight of the police. Recently, even as the use of excessive force against minorities has caused outcry and urgent calls for reform, police unions have resisted attempts to change the status quo, attacking their critics as enablers of crime.<sup>40</sup>

Although beyond the scope of this Article, there is significant room for additional research on this subject. Without a deeper look at the role that police unions play in maintaining the status quo, increasing accountability and transparency in law enforcement will be difficult.

In June 1971, President Nixon declared a “War on Drugs.”<sup>41</sup> Under the auspices of this so-called war, he dramatically increased the size and power of federal drug enforcement agencies.<sup>42</sup> According to Michelle Alexander in her ground-breaking book, *The New Jim Crow, Mass Incarceration in the Age of Colorblindness*, the Nixonian drug war precipitated a replacement system of state control that has led to the mass incarceration of people of color today at wildly disproportional rates.<sup>43</sup>

The point of this abbreviated historical survey is to demonstrate that issues of race, police brutality and mass incarceration form an unholy trinity. First, the origins of policing and police culture spring from white supremacy and the social construct of race.<sup>44</sup> Second, echoes of this history of policing can be seen today in increased surveillance and control of

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<sup>40</sup> See, e.g., Surowiecki, *supra* note 13.

<sup>41</sup> See Frontline, *Thirty Years of America's Drug War: A Chronology*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/>. See also *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), <https://www.npr.org/templates/story/story.php?storyId=9252490>; Richard Nixon, *203 - Special Message to the Congress on Drug Abuse, Prevention and Control*, THE AM. PRES. PROJECT (June 17, 1971), <http://www.presidency.ucsb.edu/ws/?pid=3048/>.

<sup>42</sup> John Ehrlichman, a Nixon advisor, was recorded as stating:

We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did.

Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), <http://www.cnn.com/2016/03/23/politics/john-ehlichman-richard-nixon-drug-war-blacks-hippie/index.html>.

<sup>43</sup> ALEXANDER, *supra* note 34 at 105-08.

<sup>44</sup> Robette A. Dias, *Racism Creates Barriers to Effective Community Policing*, 40 S. ILL. U. L.J. 501, 503 (“ . . . because policing developed in the milieu of white supremacy, racism still distorts the reality of the people who are perceived as vulnerable and needing to be protected and those who are perceived as dangerous and needing to be controlled.”).

communities of color, including the institutionalized nature of racial profiling,<sup>45</sup> “which has the effect of limiting the mobility of people of color and restricting their access to resources.”<sup>46</sup> Third, increased surveillance and control of communities of color often results in militarized police responses that may end in wrongful incarceration, injury, and/or death. For now, this triangle of terror disproportionately burdens black and brown people, but the lack of accountability in policing is a societal problem that must be eventually solved for the benefit of all.

In the United States, as in many other countries, the arc of state violence towards those viewed as “other” is long, but there is always cause for hope.<sup>47</sup> Just over seventy years ago, the U.S. government stripped Japanese-Americans of their constitutional rights and sent them to concentration camps.<sup>48</sup> The attack by Japan on Pearl Harbor was the pretext,<sup>49</sup> but being a hard-working and increasingly prosperous racial minority during a time of extreme racial hatred in the United States was a significant contributing factor.<sup>50</sup> While these innocent persons were hauled away, the majority

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<sup>45</sup> See, e.g., Kirk Miller, *The Institutionalization of Racial Profiling Policy: An Examination of Antiprofiling Policy Adoption Among Large Law Enforcement Agencies*, 59 CRIME & DELINQ. 32, 36 (2013) (“The use of race in drug courier profiles used by several agencies along the I-95 corridor linking Miami to large urban markets in Washington, D.C., Baltimore, Philadelphia, New York, and Boston reflects the institutionalization of organizational assumptions about race and criminal suspicion, which sanctioned the legitimacy of considering race in law enforcement decisions.”).

<sup>46</sup> WILLIAMS, *supra* note 15 at 90.

<sup>47</sup> According to Rev. Dr. Martin Luther King, Jr., in a quote originally attributed to 19<sup>th</sup> century abolitionist and Unitarian minister Theodore Parker, there is always cause for hope because “the arc of the moral universe is long, but it bends toward justice.” *Theodore Parker and the ‘Moral Universe,’* NPR (Sept. 2, 2010, 3:00 PM), <http://www.npr.org/templates/story/story.php?storyId=129609461>.

<sup>48</sup> Shannon M. Harris, *10 Shameful Facts About Japanese-American Internment*, LISTVERSE (Oct. 25, 2014), <http://listverse.com/2014/10/25/10-shameful-truths-about-japanese-american-internment> (“It’s possible to be imprisoned in your own country without committing any wrongdoing. It happened in America within the last century. President Franklin D. Roosevelt signed Executive Order 9066 in 1942. His go-ahead allowed more than 100,000 Japanese Americans to be uprooted and relocated to isolated, high-security internment camps.”) Also, while they are more commonly known as internment camps, President Roosevelt himself called them “concentration camps.” *Id.*

<sup>49</sup> Toni Konkoly, *Korematsu v. United States*, *Supreme Court History: Law, Power and Personality*, Famous Dissents, PBS, [http://www.pbs.org/wnet/supremecourt/personality/landmark\\_korematsu.html](http://www.pbs.org/wnet/supremecourt/personality/landmark_korematsu.html) (last visited Oct. 2, 2017).

<sup>50</sup> Hannah Miles, *WWII Propaganda: The Influence of Racism*, ARTIFACTS JOURNAL (2012), (“[o]ne of the most repressive actions ever taken by the U.S. government was the incarceration of Japanese Americans during World War II, and it was the idea of eugenics and virulent racism that was partly responsible for the occurrence of one of America’s worst civil liberty disasters.”) (quoting Alison Dundes Renteln, *A Psychohistorical Analysis of the*

reaped the benefits of their forced removal. Whites took the personal and real property of Japanese-American citizens and the Issei, or first generation immigrants, without repercussion.<sup>51</sup> Those forcibly removed were made to live like animals,<sup>52</sup> and they suffered for several years before President Franklin Delano Roosevelt rescinded his executive order in 1944 and the last camp closed a year later.<sup>53</sup> In 1988, the U.S. government finally offered a formal apology for the indignities suffered by the Japanese through the Civil Liberties Act.<sup>54</sup> Although apologies may never be enough, words do have power.

More than 20 “truth commissions” have been established world-wide since 1973.<sup>55</sup> The most famous of these—South Africa’s Commission of Truth and Reconciliation—was established by the government in 1995 and set the stage for an official acknowledgement of past human rights abuses committed in the name of apartheid.<sup>56</sup> Recently, Justin Trudeau, the Prime Minister of Canada, issued a (second) formal apology on behalf of the government to indigenous peoples who were forcibly removed from their homes and placed in state-run boarding schools: “It’s time for Canada to acknowledge its history for what it is: flawed, imperfect, and unfinished.”<sup>57</sup> The fact that the apology was preceded by a lawsuit does not diminish its

*Japanese American Internment*, HUMAN RIGHTS QUARTERLY 618 (1995).

<sup>51</sup> See Harris, *supra* note 48; see also ISABEL ALLENDE, *THE JAPANESE LOVER* 83-84 (2015) (stating that in 1988, the government awarded each surviving intern \$20,000.).

<sup>52</sup> See Harris, *supra* note 48 (“Internees stayed in animal stables and stalls where livestock had been kept recently. Many of these units didn’t even have roofs overhead. Health care, food, and general cleanliness were disgustingly low-quality. People who had done nothing wrong were kept behind barbed wire fences, in desolate camps patrolled by military police. Armed guards kept constant watch and shot anyone suspected of attempting escape.”).

<sup>53</sup> *Japanese-American Relocation*, HIST. (2009), <http://www.history.com/topics/world-war-ii/japanese-american-relocation>.

<sup>54</sup> Harris, *supra* note 48.

<sup>55</sup> Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOC. JUST.: ANTHROPOLOGY, PEACE, AND HUM. RTS. 47 (2001).

<sup>56</sup> *Id* (“In an interesting analysis of the South African case, Wilson (2000) underlines the value inherent in recognizing individual suffering and collectivizing it, as the South African TRC did through its televised hearings. *A new political identity was constructed, that of ‘national victim.’ In this way, individual suffering was brought into a public space to be shared by all, “made sacred in order to construct a new national collective conscience.”*) (emphasis added).

<sup>57</sup> The first official apology was made in 2008 by Trudeau’s predecessor, Stephen Harper, but excluded survivors from Newfoundland and Labrador. See Ian Austen, *Trudeau Apologizes for Abuse and ‘Profound Cultural Loss’ at Indigenous Schools*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/world/canada/trudeau-indigenous-schools-newfoundland-labrador.html>.

power. Symbolic gestures have meaning. While not erasing the abuses of the past, such gestures may allow a nation to move forward.

Unless government officials publicly acknowledge wrongdoing and commit to change, a society may remain mired in its past hurts and wrongs. In what must be viewed as a tremendous step in the right direction, in 2016, the president of the largest police management organization in the U.S. issued a formal apology to minorities “for the actions of the past and the role that our profession has played in society’s historical mistreatment of communities of color.”<sup>58</sup> Again, apologies are not a panacea. Mere words cannot wash away the blood of the countless lives already lost,<sup>59</sup> and ultimately, they may not be accepted by everyone.<sup>60</sup> However, as it seems clear that the people of the United States need both change *and* reconciliation, such apologies should form the basis of any policing reforms.

Today, Occupy Wall Street (“OWS”) and the Black Lives Matter (“BLM”) Movement have emerged as protest movements that reflect attempts to change the status quo. OWS sheds light on worsening socioeconomic conditions in the U.S., and BLM challenges racial violence propagated by the state.<sup>61</sup> These movements are not without controversy,

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<sup>58</sup> Tom Jackman, *U.S. police chiefs group apologizes for ‘historical mistreatment’ of minorities*, WASH. POST (Oct. 17, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities/?utm\\_term=.6a0d6f603c82/](https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities/?utm_term=.6a0d6f603c82/).

<sup>59</sup> Charles M. Blow (Op-Ed), *The Flag is Drenched with Our Blood*, N.Y. TIMES (Sept. 28, 2017) <https://www.nytimes.com/2017/09/28/opinion/the-flag-is-drenched-with-our-blood.html> (quoting Fannie Lou Hamer: ‘The flag is drenched in our blood.’ “It is through that haze of hurt that black people see the flag, because the blood memory of the black man is long in this country.”).

<sup>60</sup> *Id.* (How dare America say so cavalierly, ‘Forgive us our sins and grant us our laurels,’ when forgiveness has never been sufficiently requested—nor the sins sufficiently acknowledged—and the laurels are tainted and stained by the stubbornness of historical fact. How dare we even pretend that the offenses have been isolated and anomalous and not orchestrated and executed by the nation?”).

<sup>61</sup> Alicia Garza, Patrisse Cullors, and Opal Tometi created the Black Lives Matter movement after the high-profile murder of Trayvon Martin. BLM, in their own words, “affirms the lives of Black queer and trans folks, disabled folks, black undocumented folks, folks with records, women, and all Black lives along the gender spectrum.” The movement aims to broaden the conversation around state violence to include all the ways in which Black people are intentionally left powerless at the hands of the state and are deprived of basic human rights and dignity. See *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/>; see also Micah White, *The End of Protest: A New Playbook for Revolution*, END OF PROTEST (Jan. 29, 2016), <http://endofprotest.com/news/occupy-black-lives> (“Black Lives Matter and Occupy Wall Street are the manifestation of a collective awakening. Social movements are moments when people suddenly wake up and decide that something that has been happening all the time—

but like apologies, they serve an important role in society. Social movements may provide a much-needed measure of hope during troubling times.<sup>62</sup> Hope is necessary because the racial and ethnic make-up of the United States is slowly but inexorably changing.<sup>63</sup>

Although the U.S. has been a nation of immigrants from the start, we have often treated new immigrants with derision and dishonor.<sup>64</sup> Muslims are the latest targets for public anger.<sup>65</sup> In our times, a certain politician has called for a ban on all Muslims from entering the United States.<sup>66</sup> Negative perceptions of Islam, a religion encompassing some 1.6 billion people, roughly 23 percent of the global population, and the world's fastest growing major religion,<sup>67</sup> stubbornly persist. A dark take on the history recounted above is that the exercise of the police function depends on the continued

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like police officers unlawfully shooting black people without repercussion—suddenly becomes something that is no longer tolerated.”).

<sup>62</sup> Rebecca Solnit, *Hope is an Embrace of the Unknown: Rebecca Solnit on Living in Dark Times*, GUARDIAN (July 15, 2016, 5:00 EDT), <https://www.theguardian.com/books/2016/jul/15/rebecca-solnit-hope-in-the-dark-new-essay-embrace-unknown/> (“[P]atrice Cullors, one of the founders of Black Lives Matter, early on described the movement’s mission as to ‘Provide hope and inspiration for collective action to build collective power to achieve collective transformation, rooted in grief and rage but pointed towards vision and dreams.’ It is a statement that acknowledges that grief and hope can coexist.”).

<sup>63</sup> Laura B. Shrestha & Elayne J. Heisler, *The Changing Demographic Profile of the United States*, CONG. RES. SERV. (2011), <https://www.fas.org/sgp/crs/misc/RL32701.pdf> (“The United States [i]s [b]ecoming [m]ore [r]acially and [e]thnically [d]iverse, reflecting the major influence that immigration has had on both the size and the age structure of the U.S. population. . . . [T]he inexorable demographic momentum will have important implications for the economic and social forces that will shape future societal well-being.”).

<sup>64</sup> Jessie Daniels, *Irish-Americans, Racism and the Pursuit of Whiteness*, RACISM REV. (Mar. 17, 2010), <http://www.racismreview.com/blog/2010/03/17/irish-americans-racism-and-the-pursuit-of-whiteness/> (highlighting that when the Irish fled the repression of the British and arrived on our eastern shores during the first half of the 19<sup>th</sup> Century, they were the ones on the receiving end of vitriol and hate.); see also Ed Falco, *When Italian Immigrants Were ‘the Other’*, CNN (July 10, 2012), <http://www.cnn.com/2012/07/10/opinion/falco-italian-immigrants/> (“America has a proud tradition as an immigrant nation, but it also has a long history of marginalizing those it marks as ‘other’. America’s other heritage includes suspicion, hostility, abuse and even death, leveled against ethnic groups as they arrived one after another in waves over the past 2½ centuries.”).

<sup>65</sup> See Falco, *supra* note 64 (“In earlier centuries, Catholics in America were in a position similar to today’s Muslims.”).

<sup>66</sup> Jeremy Diamond, *Donald Trump: Ban all Muslim travel to the U.S.*, CNN (Dec. 8, 2015), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/>.

<sup>67</sup> Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR. (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>.

subordination of black, brown, and “other” bodies. However, if left unchecked, both our past, and our more recent history of willful ignorance regarding the plight of the poor and marginalized will eventually come home to roost.<sup>68</sup>

The law cannot solve all social ills. However, one must question whether a history of systematic racial discrimination, “lax legal standards,”<sup>69</sup> and a culture which appears to champion the possession of military-grade firearms by police and civilians alike,<sup>70</sup> all combine to create a toxic cloud of injustice for communities of color in the United States. To answer this question, we should begin by examining the federal and state laws that have brought us here.

## II. FEDERAL LAW

### A. *The United States Constitution*

Although the subject of gun rights and gun control is beyond the subject of this Article, given the significance of guns in crime and policing,<sup>71</sup> it seems like a mistake to not start with the Second Amendment. Congress

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<sup>68</sup> Martin Niemöller, “*First They Came for the Socialists . . .*,” U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?%20ModuleId=10007392> (last updated Jan. 6, 2011) (“First they came for the Socialists, and I did not speak out— Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out— Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me.”); see generally TAVIS SMILEY & CORNELL WEST, *THE RICH AND THE REST OF US* (2012).

<sup>69</sup> German Lopez, *Police Shootings and Brutality in the US: 9 Things You Should Know*, VOX (Aug. 26, 2016), <http://www.vox.com/cards/police-brutality-shootings-us/us-police-shootings-statistics> (“Perhaps it’s the lax legal standards that allow cops to justify deadly force against suspects who pose no danger, and sometimes are only perceived to pose a threat to officers because cops hold racial biases that are endemic in the criminal justice system.”).

<sup>70</sup> See, e.g., Benjamin Studebaker, *Demilitarization of Police Requires Demilitarization of Civilians*, (Aug. 15, 2014), <https://benjaminstudebaker.com/2014/08/15/demilitarization-of-the-police-requires-demilitarization-of-civilians/> (“So long as civilians insist on their right to bear extremely lethal weapons, [U.S.] police forces will continue to demand weapons still more lethal and equipment still more protective, and the militarization of our police forces will continue. In effect, American civilians and American police officers are engaged in an arms race that too often ends in tragedy for both sides.”).

<sup>71</sup> The prevalence of guns in the U.S. is unmatched by any other country in the world: “The United States has 88.8 guns per 100 people, or about 270,000,000 guns, which is the highest total and per capita number in the world. 22% of Americans own one or more guns (35% of men and 12% of women).” *Should More Gun Control Laws Be Enacted?*, PROCON, <https://gun-control.procon.org/> (last visited Oct. 7, 2017).

passed the Second Amendment to the U.S. Constitution in 1789, and it states: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."<sup>72</sup>

In the intervening years, much controversy has existed about what the words really mean, but in 2008 and 2010, the U.S. Supreme Court "settled several important controversies concerning the Second Amendment right to keep and bear arms," and also "left many vital questions unanswered."<sup>73</sup> In *District of Columbia v. Heller*, the Court held that the Second Amendment protects the right of private individuals to possess and use firearms unrelated to militia activities,<sup>74</sup> whereas in *McDonald v. City of Chicago*, the Court held that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment.<sup>75</sup>

When public officials violate constitutional rights, victims have several "weapons" under the law,<sup>76</sup> including the ability to make claims under the Constitution.<sup>77</sup> As this Article generally examines the misuse of guns by local officials, the Fourteenth Amendment is the relevant statute, yet:

Holding law enforcers accountable to the commands of the law is an age-old challenge not yet fully met. To be sure, our legal system embodies substantive standards to curb the conduct of law-enforcement officials. But standards are not self-executing, even when endowed with the significance and permanence of explicit constitutional status.<sup>78</sup>

Still, under the Fourteenth Amendment, states cannot deny "equal protection of the laws" to any person; nor may they "deprive any person of life, liberty or property without due process of law."<sup>79</sup> In other words,

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<sup>72</sup> Nelson Lund & Adam Winkler, *The Second Amendment*, THE CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-ii/> (last visited Oct. 7, 2017).

<sup>73</sup> See Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 819 (2015).

<sup>74</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>75</sup> See *McDonald v. City of Chi.*, 561 U.S. 742 (2010).

<sup>76</sup> Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the §1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 448 (Jan. 1978) ("Victims have three weapons, including 1) the 'exclusionary rule,' 2) a criminal prosecution of officials who willfully deny constitutional rights, and 3) a civil damage remedy brought via a) the U.S. Constitution (and via the 4<sup>th</sup> Amendment for federal officials), b) federal or state statutory law, or c) common law torts.").

<sup>77</sup> See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>78</sup> Newman, *supra* note 76, at 447.

<sup>79</sup> DAN B. DOBBS, THE LAW OF TORTS 84 (2000) ("Similar clauses in the 5<sup>th</sup> Amendment apply to the federal government.").

during the attempt to apprehend criminal suspects, law enforcement officers are not authorized to shoot first, and ask questions later.<sup>80</sup>

Further, a Fourteenth Amendment due process claim can be successfully brought if, for example: 1) a superior officer fails to investigate or discipline a subordinate officer who has been subject to claims of police brutality in the past but nonetheless continues to use excessive force;<sup>81</sup> or 2) a city fails to adequately train officers to avoid excessive force or to discipline those officers who inflict excessive force on others.<sup>82</sup>

An action may also be brought against federal officials for violating the Fourth Amendment to the U.S. Constitution.<sup>83</sup> Under the Fourth Amendment, (which also limits the power of states via the Fourteenth Amendment), law enforcement may not conduct “unreasonable” searches and seizures, or issue warrants without probable cause.<sup>84</sup> One type of unreasonable seizure happens when an officer applies excessive or unreasonable force when trying to take control of a suspect.<sup>85</sup> The question of whether the force that was used was excessive is a question of fact that is usually reserved for the jury, and the jury usually prefers the word of the officer.<sup>86</sup> The case may never get to the jury however because prosecutors frequently choose not to charge officers in the first place: prosecutors work closely with law enforcement and are disinclined to damage this relationship.<sup>87</sup> If a prosecutor does decide to charge an officer with wrongdoing, the prosecutor must not only show evidence that a constitutional right was denied, but must also prove, beyond a reasonable doubt, that the officer acted with the specific intent to deny such a right.<sup>88</sup> Even prosecutors who do decide to charge officers may be unable to meet this burden.

All of this means that the U.S. Constitution is unlikely to serve as much of a deterrent to police brutality. As we shall see, either federal statutory

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<sup>80</sup> *Tennessee v. Garner*, 47 U.S. 1 (1985) (“A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”).

<sup>81</sup> *See, e.g., Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).

<sup>82</sup> *See, e.g., Cox v. District of Columbia*, 821 F. Supp. 1 (D.D.C. 1993).

<sup>83</sup> *See Bivens*, 403 U.S. 388.

<sup>84</sup> *See DOBBS*, *supra* note 79, at 87.

<sup>85</sup> *Id.* at 88.

<sup>86</sup> *Id.*; *see also Davis*, *supra* note 6, at 717 (“A jury frequently has to choose between the word of the plaintiff and the word of the officer, and it normally prefers the word of the clean-looking officer to that of a plaintiff against whom criminal charges are pending.”).

<sup>87</sup> *See Newman*, *supra* note 76, at 450.

<sup>88</sup> *See Screws v. United States*, 325 U.S. 91, 104 (1945) (plurality opinion). *But see Monroe v. Pape*, 365 U.S. 167, 187 (1961) (underscoring that specific intent is not required for civil liability).

law or state common law should step into this gap, however neither appears able to meet the challenge.

### B. Federal Statutory Law

A civil lawsuit for money damages may be the more realistic avenue for relief for the plaintiff who is charging a state official with misconduct.<sup>89</sup> Section 1983 was originally enacted as the Ku Klux Klan of 1871,<sup>90</sup> and its purpose was to stop acts of racial terror and killing committed by both white supremacists and by public officials.<sup>91</sup> It also targeted public officials who refused to enforce protective laws enacted during the Reconstruction.<sup>92</sup> During this period there were “unwritten codes” and institutionalized customs like the “police code of silence” that buoyed racially discriminatory policing that still persists today.<sup>93</sup>

The statute gave individuals a private right of action to bring a tort claim for civil damages for the violation of constitutional rights by an agent of the state.<sup>94</sup> Individuals may sue state or local officials, like police officers, or

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<sup>89</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (“When government officials abuse their offices, action(s) for damages may offer the only reliable avenue for vindication of constitutional guarantees.”) (internal quotations omitted) (*quoting* *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

<sup>90</sup> Ch. 22, 17 Stat. 13, codified as amended at 18 U.S.C.A. § 241, 42 U.S.C.A. §§ 1983, 1985(3), and 1988.

<sup>91</sup> “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” Civil Rights Act of 1971, ch. 22, 17 Stat. codified as amended at 18 U.S.C.A. § 241, 42 U.S.C.A. §§ 1983, 1985(3), and 1988 (commonly referred to as the Ku Klux Klan Act).

<sup>92</sup> See *Developments in the Law, §1983 and Federalism*, 90 HARV. L. REV. 1133, 1154 (1977) (“[T]he Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan’s outrages.”); see also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984) (“One of the primary reasons §1983 was enacted was to remedy and deter racial killing and other acts violative of the Fourteenth Amendment. . . . The legislative history behind §1983 expresses an unequivocal concern for protecting life. . . .”); *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”).

<sup>93</sup> See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 63-71 (2000).

<sup>94</sup> 42 U.S.C. §§ 1981-88. The Reconstruction Civil Rights Acts, enacted during the 1860s and 1870s, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in

local governments.”<sup>95</sup> For example, a claim can be brought under §1983 if an officer shoots an “unarmed and nonviolent” suspect.<sup>96</sup>

The amount of force that an officer may use depends on the circumstances of each case, and courts will often examine the threat posed by the suspect and the seriousness of the crimes charged.<sup>97</sup> Often, police are given wide latitude regarding the reasonableness of their behavior in deciding to use force. Two U.S. Supreme Court decisions, *Tennessee v. Garner*<sup>98</sup> and *Graham v. Conner*,<sup>99</sup> articulate when the use of deadly force is reasonable. In general, police officers may only use deadly force to either protect their life, the life of another, or to prevent a suspect from escaping if the officer has probable cause to believe the suspect poses a danger to others.<sup>100</sup> On the one hand, this latitude protects officers who must make quick decisions. On the other hand, it may give officers too much discretion in deciding when to use force.

To state a cause of action under §1983, a plaintiff must prove that her damages were proximately caused by the defendant officer (and not by an independent decision of the prosecutor, a determination of probable cause by a court, or an indictment by a grand jury).<sup>101</sup> A plaintiff who succeeds in a §1983 claim for official conduct that results in death is entitled to compensatory damages, and sometimes punitive damages as well.<sup>102</sup>

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more limited situations, by private parties acting alone). *See Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U. S. 1, 19 (1981) (§1983 provides an “alternative source of express congressional authorization of private suits). *See also* *Maine v. Thiboutot*, 448 U. S. 1, 4 (1980) (the Court construed 42 U. S. C. § 1983 as authorizing suits to redress violations by state officials of rights created by federal statutes). *See also* Robert P. Capistrano, *5.1.A Express Causes of Action, Section 1983, Elements of the Claim*, FED. PRAC. MANUAL FOR LEGAL AID ATTORNEYS (Updated 2013), [http://www.federalpracticemanual.org/chapter5/section1a#footnote3\\_13zukw3/](http://www.federalpracticemanual.org/chapter5/section1a#footnote3_13zukw3/).

<sup>95</sup> *See* DOBBS, *supra* note 79, at 82.

<sup>96</sup> *See id.* at 88.

<sup>97</sup> *See id.* (citing *Graham v. Conner* 490 U.S. 386 (1989)).

<sup>98</sup> *See Tennessee v. Garner*, 471 U.S. 1 (1985) (“[D]eadly 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. . . .”).

<sup>99</sup> *Graham*, 490 U.S. 386. “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396.

<sup>100</sup> *See Garner*, 471 U.S. 1 (1985).

<sup>101</sup> *See* Martin A. Schwartz, *Fundamentals of a Section 1983 Litigation*, TOURO L. REV. 525, 527 (2016).

<sup>102</sup> *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374-80 (1994).

In many tort cases, punitive damages are awarded to deter future tortious conduct.<sup>103</sup> To be awarded punitive damages however, a plaintiff first must prove that the officer acted with “reckless or callous indifference to [the plaintiff’s] federally protected rights.”<sup>104</sup> Successful plaintiffs are rare, and are usually awarded modest awards.<sup>105</sup> The law presupposes that rather than punitive damages, damages that compensate for actual harm will suffice to deter constitutional violations. In many cases, they do not.<sup>106</sup>

Punitive damages may be awarded against state actors acting in their individual, not official, capacities, but not against municipalities as a matter of policy.<sup>107</sup> While there may be good policy reasons to not punish cities vicariously for the acts of their wayward officers, the fact that punitive damages are unavailable against cities means that cities are not forced to “internalize the full costs of violations,”<sup>108</sup> and that §1983 cannot effectively serve as deterrent to unlawful conduct.

Some scholars argue that §1983 does serve a deterrence function and that tort remedies *can* alleviate police illegality: “[n]evertheless, constitutional damage remedies, although denominated in dollars, clearly translate into the political currency that moves political actors.”<sup>109</sup> Section 1983 may

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<sup>103</sup> See, e.g., 5.5 Punitive Damages, Model Jury Instructions, United States Courts for the Ninth Circuit (“The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.”), <http://www3.ce9.uscourts.gov/jury-instructions/node/111/>.

<sup>104</sup> *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>105</sup> See Newman, *supra* note 76, at 465. Cf. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 921 (2014) (“Juries have awarded punitive damages against New York City police department officers six times between 2006 and 2011, with punitive damage awards totaling over \$28 million.”).

<sup>106</sup> Even when a court finds against a police officer, the victim of police brutality is rarely able to collect on the judgment because the police officer may not have sufficient funds to pay. Further, cities may have to indemnify officers who are found to have acted in good faith. See, e.g., CAL. GOV’T CODE § 825 (1995) (“[A] public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if . . . [t]he judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity [and at] the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.”).

<sup>107</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (“Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.”).

<sup>108</sup> Eaton, *supra* note 111 (The argument made by Professor Levinson is that settling these types of claims “diverts resources that could be used for other more important public purposes, such as redistributing wealth through social spending.”); see also Schwartz, *supra* note 101, at 888 (“There is no vicarious liability against municipalities when their officers violate the law.”).

<sup>109</sup> Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of*

have limits that preclude fully effective avenues for relief in police brutality claims, but federal law does have several advantages over state-based common law tort claims (as outlined in Part III). These advantages include, but are not limited to: (1) plaintiffs can choose whether to sue in federal or state court; (2) successful plaintiffs are able recover reasonable attorney's fees; and (3) defendant officers cannot claim state law immunities (though they can claim the benefit of federal immunity).<sup>110</sup>

The defense of qualified immunity “insulates government officials from liability for most unconstitutional acts” and makes a finding of “liability and trials for liability the exception.”<sup>111</sup> Public officials performing discretionary functions are qualifiedly immune from civil liability for money damages if their conduct “does not violate clearly established constitutional rights of which a reasonable person would have known.”<sup>112</sup> Also, the prosecutor often decides not to prosecute.<sup>113</sup> Consequently, many potential plaintiffs are rebuffed procedurally before they can even raise their substantive claims.<sup>114</sup>

In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, another federal statute aimed at stopping unconstitutional police “pattern[s] or practice[s].”<sup>115</sup> Unlike §1983, there is no private right

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*Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001); *see also* Newman, *supra* note 76 at 451 (a private tort suit is the “most promising weapon”); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 516 (1955) (“[T]ort remedies offer what is perhaps the best hope of achieving increased control over police illegality. By placing the initiative for enforcement in the hands of injured persons who are offered a selfish motive for prosecuting the actions, it is possible to by-pass the insoluble problem of how to make a police force police itself.”).

<sup>110</sup> DOBBS, *supra* note 79, at 83 (emphasis added).

<sup>111</sup> In a study of all federal court cases over two years, qualified immunity motions were granted in approximately eighty percent of cases. *See* Thomas Eaton, *Symposium Foreword, Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts*, 35 GA. L. REV. 837, 841 (2001) (citing Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 128 (1999)).

<sup>112</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also* *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (holding that a police officer could be also immune from civil liability if acting in good faith and with probable cause even if the statute he believed to be valid was later held unconstitutional).

<sup>113</sup> *See, e.g.*, James McKinley, Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html>.

<sup>114</sup> *See* Eaton, *supra* note 111.

<sup>115</sup> 34 U.S.C. § 12601 (1994). Eaton, *supra* note 111, at 879. The statute makes it “unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with

of action under the statute and only the Attorney General is authorized to sue for violations.<sup>116</sup> However, the statute gives the Department of Justice (the "DOJ") the power to investigate law enforcement agencies and to issue injunctions or provide equitable relief for misconduct. Where either constitutional or federal statutory law fails to prevent or deter unlawful policing practices, states should step into the breach.

### III. THE COMMON LAW OF TORTS

*Tort law is better understood when its limits are appreciated.*

*Law cannot effectively solve all problems.*<sup>117</sup>

Liability under state tort law is generally imposed in order to: (1) correct wrongs that have already occurred; (2) prevent future wrongful conduct; (3) redistribute losses among various defendants; (4) provide a peaceful means of determining the rights of parties who might otherwise take the law into their own hands; and (5) encourage socially responsible behavior.<sup>118</sup> These functions are, in some ways, broader than the goals of the criminal law,<sup>119</sup> and are often analyzed by utilizing a cost-benefit approach to private conduct. The issue is whether a cost-benefit analysis can be properly applied to public or official conduct as well. It makes sense to believe that the government does not respond to financial incentives in the same way as private actors or enterprises.<sup>120</sup> While there is a serious need for further empirical research in this area, the purpose of this Article is to jumpstart a discussion on an underreported set of economic and societal costs that stem from unlawful conduct by state actors.

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responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges or immunities secured or protected by the Constitution or laws of the United States." The Act gives the Attorney General the power to investigate and stop police patterns and practices that deprive individuals of constitutional rights, but this too presents problems: "The federal executive can ill afford—politically and economically—to uncover, challenge, and seek to remedy unconstitutional policies and practices wherever they may be maintained in police departments around the country." *Id.*

<sup>116</sup> *See id.*

<sup>117</sup> DOBBS, *supra* note 79, at 29; *see also*, KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 1 (3d ed. 2007).

<sup>118</sup> ABRAHAM, *supra* note 117, at 14-20.

<sup>119</sup> In contrast, the goals of the criminal justice system seem to be limited to punishment, behavior correction, and deterrence. As a law professor, this author had hoped that tort law, with its focus on compensation and deterrence, could provide a better answer than criminal law in this area. As it turns out, tort law is also unable to properly address the problem of unlawful police shootings.

<sup>120</sup> Daryl Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 346, 350-52 (2000).

Derived as it is from the common law, judges (not legislatures) mostly set the bounds of tort law.<sup>121</sup> The word “tort” comes from the Latin word “tortus,” which means twisted, and from the French word, “tort,” which means injury or wrong.<sup>122</sup> The concept refers to “conduct that amounts to a legal wrong that causes harm, for which courts will impose civil liability.”<sup>123</sup> A person who commits a crime may or may not be convicted and sent to jail, but such a person may still have to pay the persons harmed by any intentional, reckless, or negligent conduct.<sup>124</sup>

The common law of torts may also impose direct liability on employers who fail to train or supervise employees, or vicarious liability for negligent hiring or supervision.<sup>125</sup> This doctrine could be used to widen the net of responsibility for unlawful conduct by public officials.

One of the early goals of tort law was to encourage people to put away their dueling pistols.<sup>126</sup> Today, tort law is a broad, dynamic and ever-changing area that touches on many types of physical and non-physical harms, including harms that affect mental peace or reputation, privacy, and economic interests. Critics of this oft-maligned area should consider what the U.S. would look like if we did not have tort law. Would it be possible to accomplish the goals of compensation and deterrence in some other way? The answer is, probably not satisfactorily. Although plagued with persistent issues of proof, judicial and administrative efficiency, tort law often steps in to pick up where criminal law leaves off.

Police officers who act unlawfully are rarely prosecuted or convicted for killing civilians.<sup>127</sup> The National Police Misconduct Reporting Project found that out of 3,238 criminal cases filed against officers between April 2009 through December 2010, only 33% of the officers were convicted and only 36% who were convicted ended up serving prison sentences.<sup>128</sup>

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<sup>121</sup> DOBBS, *supra* note 79, at 1.

<sup>122</sup> ABRAHAM, *supra* note 117, at 1.

<sup>123</sup> DOBBS, *supra* note 79, at 1.

<sup>124</sup> FRANKLIN, RABIN & GREEN, *TORT LAW AND ALTERNATIVES, CASES AND MATERIALS 1* (10th ed. 2017) (“The primary concern of tort law has been whether one whose actions cause harm to another should be required to pay compensation for the harm done.”).

<sup>125</sup> *Delfino v. Agilent Tech., Inc.*, 52 Cal. Rptr. 3d 376, 397 (Cal. Ct. App. 2006). *See also* CACI No. 426, <https://www.justia.com/trials-litigation/docs/caci/caci-2017-edition.pdf>.

<sup>126</sup> DOBBS, *supra* note 79, at 12 (“In medieval England, the law of torts, like the law of crimes, had modest aims, principally to discourage violence and revenge. Today’s tort law has much grander aims . . . the dominant concern is not just justice to the individual; it is to provide a system of rules that, overall, works toward the good of society.”).

<sup>127</sup> Cynthia Lee, “*But I Thought He Had a Gun*”, *Race and Police Use of Deadly Force* 36, 2 HASTINGS RACE & POVERTY L. J. 1, 3 (2004) (“Less than one percent of all complaints referred to the Department of Justice alleging civil rights violations by law enforcement officers lead to the filing of an indictment in federal court.”).

<sup>128</sup> Lopez, *supra* note 69.

Further, the U.S. criminal justice system is plagued with tremendous racial disparities in how the police use force. Generally, police shoot and kill more minorities,<sup>129</sup> but officers also shoot and kill more people of any race than their peers in other developed countries, including the United Kingdom and Germany, “where police officers might go an entire year without killing more than a dozen people or even anyone at all.”<sup>130</sup> Admittedly, the U.S. does have higher rates of gun ownership and gun violence,<sup>131</sup> which may prompt police to feel compelled to use force in more cases. Research indicates that more guns are likely to lead to more overall gun violence.<sup>132</sup> Still, the fact that U.S. law enforcement uses deadly force far more often than their peers across the world should be concerning to all Americans.

Just looking at the goals of tort law might make one suppose that fashioning more robust civil remedies would be the best way to bring about change in this area. As it turns out, the various limitations on the availability of damages means that state tort law also cannot (and does not) fully address the magnitude of this problem.<sup>133</sup> Perhaps much like the criminal law, it was never meant to do so. Ending systemic oppression and holding law enforcement accountable for unlawful racial killings appears to be a much bigger job than can be handled by existing laws. Nevertheless, having a legal system that cannot remedy a major societal problem, whether through constitutional, federal or state statutory, or state common law, has, and will have significant economic and social costs.

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<sup>129</sup> Lee, *supra* note 127, at 3 (“It is undisputed that Blacks are disproportionately represented among the victims of police shootings. . . . On average, Blacks are more than six times as likely as Whites to be shot by police. . . . Latinos (or Hispanics) are about twice as likely as Whites, but only half as likely as Blacks, to be shot and killed by police.”).

<sup>130</sup> Lopez, *supra* note 69 (citing THE ECONOMIST).

<sup>131</sup> Kara Fox, *How US Gun Culture Compares with the World in 5 Charts*, CNN (Oct 4, 2017) <http://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html/>.

<sup>132</sup> *Id.* (“[O]ne study found that every 10 percent increase in firearm ownership correlated with 10 additional officers killed at the state level over a 15-year period.”).

<sup>133</sup> Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988) (arguing that there is little legislative support for using tort liability to limit constitutional harms inflicted by the police); *See also* DOBBS, *supra* note 79, at 18 (citing DEBORAH R. HENSLER, ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991) (concluding that “only 10% of all persons who get some kind of compensation for injuries receive payments under the tort system, that is, from the tortfeasor or his insurer.”)).

## IV. THE COSTS OF POLICE BRUTALITY

*I can't breathe.*<sup>134</sup>

*We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.*<sup>135</sup>

Justice Sotomayor recognized that unlawful police action has costs that threaten the entire legal system. When people think of costs, they may consider the physical harm experienced by the "victims," people hurt or killed, or costs borne by particular communities. They may also consider the costs to the criminal justice system. The costs are in fact much broader. These costs have been greatly underestimated, and have serious consequences for all Americans.

## A. Direct, Current Costs

## I. Costs to Victims

*Although there are no reliable government statistics on civilians killed by police, data compiled independently last year . . . have led to estimates of roughly 1,000 deadly shootings each year.*<sup>136</sup>

First, let's begin where we should, and that is with the direct, immediate costs of unjustified police violence that result in death. How many victims are we talking about? Finding official figures for the total number of unarmed people killed by police officers is a difficult task because victims do not always sue,<sup>137</sup> and the police do not always track these numbers.<sup>138</sup> According to James B. Comey, Jr., former Director of the FBI:

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<sup>134</sup> Eric Garner's last words, repeated 8 times before he died, have become the rallying cry of the Black Lives Matter movement. Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014, 7:31 PM), <http://www.cnn.com/2014/12/04/us/garner-last-words/>.

<sup>135</sup> *Utah v. Strieff*, 136 S.Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting) (citing, in part, L. GUINIER & G. TORRES, *THE MINER'S CANARY* 274-83 (2002)).

<sup>136</sup> Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), [http://www.huffingtonpost.com/entry/police-shooting-convictions\\_us\\_5695968ce4b086bc1cd5d0da](http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da).

<sup>137</sup> Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 863-64 (2012) (citing to a 2002 Bureau of Justice report stating that people mistreated by

We can't have an informed discussion because we don't have data. People have data on who went to a movie last weekend, or how many books are sold, or how many cases of the flu walked in to an emergency room, and I cannot tell you how many people were shot by the police in the United States in the last month, last year, or anything about the demographics. And that's a very bad place to be.<sup>139</sup>

Comey further stated that it was embarrassing that the news media had more information on police killings than the F.B.I.<sup>140</sup> In 2014, Congress passed the Death in Reporting Custody Act, which required local law enforcement agencies to report police-involved shootings that resulted in death.<sup>141</sup> The DOJ is relying on local law enforcement officials to voluntarily report on "non-lethal encounters."<sup>142</sup>

Evidence suggests that police killings of unarmed citizens in the United States are both widespread and underreported.<sup>143</sup> In March 2016, the Bureau of Justice Statistics ("BJS") released a report that claimed that the current number, 930, is actually low and that the reality is actually closer to 1,240 killed per year.<sup>144</sup> Besides the data that is being compiled through various sources, including police departments, BJS, BLM, and the Centers for Disease Control and Prevention, it seems clear at least that the U.S. needs more reliable tracking in order to accurately assess the full scale of the problem.<sup>145</sup>

Under the Obama Administration, the Justice Department agreed to track killings by police officers: "the Justice Department said that it would ask law enforcement agencies and medical examiner's offices to fill out forms

police only sue about one percent of the time).

<sup>138</sup> Carl Bialek, *A New Estimate of Killings By Police Is Way Higher—And Still Too Low*, FIVETHIRTYEIGHT (Mar. 6, 2015, 4:07 PM), <http://fivethirtyeight.com/features/a-new-estimate-of-killings-by-police-is-way-higher-and-still-too-low/>.

<sup>139</sup> Eric Lichtblau, *Justice Department to Track Use of Force by Police Across U.S.*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/justice-department-track-police-shooting-use-force.html>; see also FBI Oversight, *FBI Director James Comey testified at a House Judiciary Committee oversight hearing of his agency*, C-SPAN (Oct. 22, 2015), <https://www.c-span.org/video/?328793-1/fbi-director-james-comey-oversight-hearing-testimony>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Bialek, *supra* note 138; see also Dara Lind, *The FBI is Trying to Get Better Data on Police Killings. Here's What We Know Now.*, VOX (Apr. 10, 2015, 10:31 AM), <https://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black> ("[O]ne study in March 2015 estimated that more than half of people killed by police aren't counted in the FBI's statistics.").

<sup>144</sup> Bialek, *supra* note 138.

<sup>145</sup> *Id.*

when there is a news report or another indication that a person died while in police custody.”<sup>146</sup> These offices would be asked to complete forms on the total number of police killings every three months. The FBI would also ask local law enforcement to provide more detailed, incident-based reports, but these reports are voluntary, not required.<sup>147</sup> These are steps in the right direction and should help both law enforcement agencies and activists have the same numbers while trying to find solutions. However, the fact that a national database for tracking police shootings of civilians doesn’t exist (where law enforcement is required to report investigations)<sup>148</sup> will likely mean that the numbers will continue to be underreported.

In the meantime, statistical and anecdotal evidence compiled by various sources is being used to tell a story of tremendous racial disparities in police shootings. According to FBI data published in July 2016, African-Americans, who only make up 12.6 percent of the U.S. population, accounted for 24 percent of the 560 people killed in 2016.<sup>149</sup> According to ProPublica, “[b]lack teens were 21 times as likely as white teens to be shot and killed by police between 2010 and 2012.”<sup>150</sup> All racial minorities comprise about 37.4 percent of the total U.S. population, but they make up 62.7 percent of unarmed people killed by police.<sup>151</sup> As another report stated, police officers appeared to shoot and kill unarmed civilians in a “steady drumbeat of bloodshed accentuated by higher profile-incidents that dominated headlines for days.”<sup>152</sup>

One of those “higher profile-incidents” included the fatal shooting in 2015 of 50-year-old, engaged, father of four, Walter Scott, who was shot in the back while fleeing a traffic stop.<sup>153</sup> Cell phone footage supplied by a

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<sup>146</sup> Charlie Savage, *Justice Department to Streamline Tracking of Police Killings*, N.Y. TIMES (Apr. 10, 2015, 10:31 AM), [http://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html?\\_r=0](http://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html?_r=0).

<sup>147</sup> Lind, *supra* note 143.

<sup>148</sup> *Id.*

<sup>149</sup> *Why Black Lives Matter*, RT (July 7, 2016, 9:06 PM), <https://www.rt.com/usa/350024-why-black-lives-matter/>; see also Lind, *supra* note 143; James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 189 (1988) (“[E]very study that has examined this issue [has] found that blacks are represented disproportionately among those at the wrong end of police guns.”); Lee, *supra* note 127, at 3.

<sup>150</sup> Lopez, *supra* note 69.

<sup>151</sup> *Id.*

<sup>152</sup> Julia Craven & Nick Wing, *Cops are Still Killing People, But the Nation Stopped Paying Attention*, HUFFINGTON POST (Apr. 18, 2016, 2:00 PM), [www.huffingtonpost.com/entry/police-shootings-2016\\_us\\_571](http://www.huffingtonpost.com/entry/police-shootings-2016_us_571).

<sup>153</sup> Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), [http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?\\_r=0](http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0).

bystander contradicted early official accounts that Scott was armed and presented a danger to the officer. The officer involved falsely claimed that Scott had taken his Taser and was threatening him with it. Similarly, a damning cell phone video also emerged in the 2014 police killing of 43-year-old, married father of six, Eric Garner. The footage showed Garner, who was initially confronted by police officers for selling illegal cigarettes, being tackled and placed in an illegal chokehold by police.<sup>154</sup> Garner can also be clearly heard gasping, repeatedly (11 times to be exact), "I can't breathe."<sup>155</sup> By the time the officer released his hold, it was too late.<sup>156</sup>

In their attempts to stem the violence, many African-Americans and others protesting in solidarity have adopted Garner's final words as a rallying cry. Within the past two decades, other victims of police violence are readily recognizable, including but not limited to, Abner Louima,<sup>157</sup> Amadou Diallo,<sup>158</sup> Sean Bell,<sup>159</sup> Oscar Grant,<sup>160</sup> Alton Sterling, and

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<sup>154</sup> *New York Police Sergeant Charged in Death of Eric Garner*, L.A. TIMES (Jan. 8, 2016, 3:02 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-chokehold-eric-garner-20160108-story.html>. See also Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

<sup>155</sup> *Why Black Lives Matter*, *supra* note 149. See also Baker, *supra* note 154.

<sup>156</sup> *Id.*

<sup>157</sup> Married, 30-year-old father of one, Abner Louima was an unarmed, Haitian immigrant who was falsely arrested after being mistakenly identified as someone who assaulted an officer at a night club. Louima was severely beaten and forcibly sodomized with a broom handle while in police custody in New York in 1997. Officer Justin Volpe pled guilty, received a 30-year sentence and was forced to pay restitution for his role in the attack; others received lesser punishments for lying or for helping to cover up the assault. See Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. TIMES: CITY ROOM (Aug. 9, 2007, 1:11 PM), <https://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/>.

<sup>158</sup> Unarmed Amadou Diallo was killed (shot 41 times) in a New York City stairwell. See Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man is Killed*, N.Y. TIMES (Feb. 5, 1999), <http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html?pagewanted=all>. Three of the four officers who shot him had been previously involved in shootings, and the officers who shot him were cleared of criminal charges. In the ensuing 17 years, one of the shooting officers has since been promoted to sergeant. See *Officer Involved in Amadou Diallo Shooting to be Promoted to Sergeant*, CBS N.Y. (Dec. 16, 2015, 7:14 PM), <http://newyork.cbslocal.com/2015/12/16/amadou-diallo-officer-promotion/>.

<sup>159</sup> Police officers killed engaged, unarmed, 23-year-old father of two, Sean Bell, hours before he was due to get married. See Julian Borger, *New York on Edge as Police Kill Unarmed Man in Hail of 50 Bullets on His Wedding Day*, GUARDIAN (Nov. 27, 2006, 4:32 PM), <https://www.theguardian.com/world/2006/nov/27/usa.julianborger>; see also A.G. Sulzberger & Tim Stelloh, *Bell Case Underlines Limits of Wrongful-Death Payouts*, N.Y. TIMES (July 28, 2010),

Philando Castile.<sup>161</sup> These deaths make it clear that police killings in the Post-Civil Rights era continue unabated and unchecked. In response to the Castile shooting, Kelly McCreary, a board member of the Equal Justice Initiative, tweeted a statement tinged by horror, anger and fear—and a sentiment shared by many African-Americans:<sup>162</sup> “[i]t’s like waking up in a horror film. Stop killing us.”<sup>163</sup>

These stories and others, now consumed and spread like wildfire by the ubiquity of social media, have dominated news headlines. However, many more have not received much attention at all. According to *The Washington Post*: “[n]early a thousand times per year, an American police officer has shot and killed a civilian.”<sup>164</sup> The article goes on to cycle through a host of numbers that are visually jarring:

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<http://www.nytimes.com/2010/07/29/nyregion/29bell.html?ref=collection%2Ftimestopic%2F>  
F.

<sup>160</sup> Unarmed Oscar Grant III, father of one, was shot in the back on a BART (Bay Area Rapid Transit) platform in Oakland, California by a transit officer. The shooting was captured in a cell phone video and became the subject of a widely-hailed independent film, *Fruitvale Station*. The officer claimed he made a mistake and grabbed his service revolver instead of his Taser; he was acquitted of murder but convicted of involuntary manslaughter in 2010. He was released in 2011. See Michael McLaughlin, *Ex-Transit Officer Who Killed Oscar Grant, Unarmed Black Man, Wins Lawsuit*, HUFFINGTON POST (July 1, 2014), [http://www.huffingtonpost.com/2014/07/01/oscar-grant-lawsuit-bart-officer\\_n\\_5548719.html](http://www.huffingtonpost.com/2014/07/01/oscar-grant-lawsuit-bart-officer_n_5548719.html).

<sup>161</sup> Unarmed Philando Castile was shot in his car in St. Paul, Minnesota after being pulled over for a broken taillight and being asked to produce his license and vehicle registration. His girlfriend and her four-year-old daughter were in the car at the time of the shooting, and he later died in the hospital due to his injuries. Cell phone video of the incident, taken by his girlfriend from the passenger seat, was later broadcast on social media. Castile died two days after Alton Sterling, a thirty-seven-year-old father of five, was shot and killed by a police officer in Baton Rouge, Louisiana for selling CDs outside a convenience store. The officer claims that Sterling reached for a gun before being shot. Cell phone video at the scene appears to show Sterling’s hands restrained and a bystander claims he was not reaching for a weapon when he was shot. See Leah Donnella, *Two Days, Two Deaths: The Police Shootings of Alton Sterling and Philando Castile*, NPR (July 7, 2016), <http://www.npr.org/sections/codeswitch/2016/07/07/485078670/two-days-two-deaths-the-police-shootings-of-alton-sterling-and-philando-castile>; see also Tom Cleary & Alton Sterling, *Top 10 Facts You Need to Know*, HEAVY (July 5, 2016), <http://heavy.com/news/2016/07/alton-sterling-baton-rouge-louisiana-police-shooting-victim-suspect-video-photos-facebook-family-protests-officers-names/>.

<sup>162</sup> See Russell Contreras, *Police Shootings of Black Men Stir Fears, Anger Among Blacks*, SALON (July 8, 2016), [http://www.salon.com/2016/07/07/police\\_shootings\\_of\\_black\\_men\\_stir\\_fears\\_anger\\_among\\_blacks/](http://www.salon.com/2016/07/07/police_shootings_of_black_men_stir_fears_anger_among_blacks/).

<sup>163</sup> Donnella, *supra* note 161.

<sup>164</sup> Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015),

- 965 people were fatally shot by police in 2015;
- 564 were armed with a gun;
- 281 were armed with another weapon; and
- 90 were unarmed.<sup>165</sup>

In reviewing these statistics, it appears that in the majority of cases where people were killed, the victim was carrying a weapon of some kind. This would likely lead many to believe that police shootings are usually justified. These numbers might cause some to wonder whether these “victims” are really victims.

Significant controversy may surround these questions, but the fact remains that whether “victims” are engaged in unlawful activity or not, the guarantees of the Constitution still apply. The U.S. Constitution provides criminal suspects with the right to be first tried by a jury of their peers,<sup>166</sup> before being either convicted or released. When police officers shoot first and ask questions later, they substitute their own judgment, which is often flawed by racial bias, and subvert the judicial process. Instead of being guardians of the community, they become warriors—much like an occupying military force.<sup>167</sup>

The police will often say that they were “just doing their jobs.” Indeed, they do have a dangerous job, and many lose their lives in their efforts to protect the public. According to the National Law Enforcement Officers Memorial Fund, there are more than 900,000 law enforcement officers serving in the U.S., and an average of 144 officers are killed in the line of duty each year.<sup>168</sup> In 2015, the same year that 965 people were fatally shot by police, 123 officers lost their lives.<sup>169</sup> Some would argue that individual officers should be not only commended for such service, but also should be granted great deference considering the dangers that they willingly confront each day. Others might claim that officers are not the problem, but

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<http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>.

<sup>165</sup> Kindy et al., *supra* note 164.

<sup>166</sup> See, e.g., Stephanos Bibas & Jeffrey L. Fisher, *The Sixth Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-vi/> (last visited Oct. 7, 2017).

<sup>167</sup> See, e.g., Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. 225, 225 (Apr. 10, 2015) (“Modern policing has so thoroughly assimilated the warrior mythos that, at some law enforcement agencies, it has become a point of professional pride to refer to the ‘police warrior.’”).

<sup>168</sup> *Law Enforcement Facts: Key Data About the Profession*, NAT'L LAW ENFORCEMENT OFFICERS FUND, <http://www.nleomf.org/facts/enforcement/> (last visited Oct. 6, 2017).

<sup>169</sup> *Id.*

supervisors who “look the other way” are to blame. Indeed, victims of police brutality may have a better chance of holding supervisors liable than rank and file officers.<sup>170</sup>

Either way, annual crime statistics show that on average, crime in the U.S. is decreasing, not increasing.<sup>171</sup> Also, the passage of time has been good to police officers. The 1920s and 1930s were apparently the deadliest (243 died on average per year in the 1920s, and in 1930, the deadliest year in history, 304 officers were killed), whereas the numbers dropped dramatically in the 1990s (average of 162 per year).

What are we to do with the fact that during a time when police officers are in fact safer than they ever have been in the history of the United States, more often than not they defend the shooting of victims with the common refrain that they “feared for their life?”<sup>172</sup> It seems that the question we must ask ourselves as a society is whether we should continue to allow courts to accept statements like this at face value despite mounting evidence to the contrary.<sup>173</sup> At the same time, the influence of fear as a driver of the use of force by police should not be minimized, and the issue of possible deficiencies in police training in this regard deserves additional attention.<sup>174</sup>

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<sup>170</sup> See Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273, 276 (2012).

<sup>171</sup> Charles C. W. Cooke, *Careful with the Panic: Violent Crime and Gun Crime are Both Dropping*, NAT'L REVIEW (Nov. 30, 2015), <http://www.nationalreview.com/corner/427758/careful-panic-violent-crime-and-gun-crime-are-both-dropping-charles-c-w-cooke>.

<sup>172</sup> See Uzma Kolsy, *Are Today's Cops Too Quick to Shoot?*, ATLANTIC (Nov. 5, 2013), <https://www.theatlantic.com/national/archive/2013/11/are-todays-cops-too-quick-to-shoot/281159/>.

<sup>173</sup> See Carlo Allegri, *Cops Trained to Justify Use of Deadly Force – Former US Marshal*, RUSSIA TODAY (Apr. 9, 2015), <https://www.rt.com/usa/248081-cops-trained-justify-shooting-suspects/>. Cf. Joseph P. Williams, *When It Comes to Police Brutality, Fear is Also a Factor*, U.S. NEWS (Dec. 5, 2014), <https://www.usnews.com/news/blogs/washington-whispers/2014/12/05/when-it-comes-to-police-brutality-fear-is-also-a-factor> (arguing that blatant racism is not the problem, but rather “society’s not-so-latent fear of black men”) (paraphrasing interview with civil rights attorney Constance Rice); Keven P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killings*, 9 HARV. BLACKLETTER J. 1, 8-12 (1992) (concluding that racism, even if disguised, is often a factor in police shootings of African-Americans).

<sup>174</sup> Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014) (“In most police shootings, officers don’t shoot out of anger or frustration or hatred. They shoot because they are afraid. And they are afraid because they are constantly barraged with the message that that they should be afraid, that their survival depends on it. Not only do officers hear it in formal training, they also hear it informally from supervisors and older officers. They talk about it with their peers. They see it on police forums and law enforcement publications.”),

2. *Broken Homes and Families*

Meanwhile, the families of the victims are also suffering in myriad and demonstrable ways.<sup>175</sup> It is easy to forget the human cost to the families who are left behind to pick up the pieces after their loved ones are gone.

Survivors of police brutality and families of victims who are killed are accumulating scars that may last well past the swiftly shifting sands of the relentless 24-hour news cycle.<sup>176</sup> In fact, “families of police brutality victims experience a level of suffering that is typically ignored and misunderstood.”<sup>177</sup> Some evidence suggests that minorities suffer post-traumatic stress at higher rates than other Americans:

PTSD is a severe and chronic condition that may occur in response to any traumatic event. The National Survey of American Life (NSAL) found that African Americans show a prevalence rate of 9.1% for PTSD versus 6.8% in non-Hispanic Whites, indicating a notable mental health disparity. Increased [sic] rates of PTSD have been found in other groups as well, including Hispanic Americans, Native Americans, Pacific Islander Americans, and Southeast Asian refugees. Furthermore, PTSD may be more disabling for minorities; for example, African Americans with PTSD experience significantly more impairment at work and carrying out everyday activities.<sup>178</sup>

More research should be conducted to ascertain the emotional toll of police brutality on communities of color, but at the very least, we know that the direct and immediate costs can include the loss of a breadwinner, the loss of consortium, emotional distress, and the loss of parental support. Some of these costs are readily ascertainable and compensable by the tort

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<https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>.

<sup>175</sup> Williams, *infra* note 280 (“Mental health difficulties attributed to racist incidents are often questioned or downplayed, a response that only perpetuates the victim’s anxieties. Thus, clients who seek out mental healthcare to address race-based trauma may be further traumatized by *microaggressions*—subtle racist slights—from their own therapists.”) (internal citations omitted).

<sup>176</sup> Esther J. Cepeda, *Life in a Violent 24-Hour News Cycle*, STANDARD-EXAMINER (July 15, 2016), <http://www.standard.net/National-Commentary/2016/07/15/violence-socialmedia-news-mentalhealth-column-Cepeda> (stating that mental health experts say that “feasting yourself on images of traumatic events may lead to serious mental and physical aftereffects resulting from anxiety, panic and the feeling of helplessness.”).

<sup>177</sup> Adam Hudson, *Families of Police Violence Victims Face Trauma Without Support*, TRUTHOUT (June 7, 2015), <http://www.truth-out.org/news/item/31197-families-of-murdered-black-men-deal-with-trauma-channel-anger>.

<sup>178</sup> Williams, *infra* note 280.

system through settlements, but those costs likely do not reflect the true costs of police brutality.<sup>179</sup>

At the 2016 BET Awards, Jesse Williams, an actor and prominent BLM activist, received BET's "Humanitarian Award."<sup>180</sup> In his acceptance speech, he dedicated the award to:

[T]he real organizers all over the country – the activists, the civil rights attorneys, the struggling parents, the families, the teachers, the students that are realizing that a system built to divide and impoverish and destroy us cannot stand if we do.<sup>181</sup>

His words seemed to reference a collective pain: "[j]ust because we're magic,<sup>182</sup> doesn't mean we're not real."<sup>183</sup> Many in the predominantly African-American audience rose, just a minute and a half into his nearly five minute speech, and then remained on their feet, clapping, for the duration. The speech became an instant viral sensation. Similarly, Erica Garner, the daughter of Eric Garner, stated, "[t]his is what families go through. We might seem like we're strong but . . . it hurts."<sup>184</sup>

Imagine that hurt on a massive scale: try multiplying the one thousand average deaths per year by the hundreds of relatives who are linked to those victims. The U.S. is creating a monster of a problem that will not stay hidden forever. Do we as a society have the resources or the political will to address this looming issue?

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<sup>179</sup> Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 760 (2004) (highlighting that details of lawsuits against the police, including settlement payments, are largely hidden from public view).

<sup>180</sup> Mr. Williams served as the executive producer on a documentary called, *Stay Woke: The Black Lives Matter Movement*. See Megan Lasher, *Read the Full Transcript of Jesse Williams' Powerful Speech on Race at the BET Awards*, TIME (June 27, 2016), <http://time.com/4383516/jesse-williams-bet-speech-transcript/>.

<sup>181</sup> Jesse Williams, *Acceptance Speech for the BET Humanitarian Award* (June 26, 2016) (transcript available at <http://time.com/4383516/jesse-williams-bet-speech-transcript/>). For a video of the speech, see Brotha Doug, *Jesse Williams' Speech (BET Awards 2016)* YOUTUBE (Jun. 26, 2016), <https://youtube.com/watch?v=orXogk3euMA>.

<sup>182</sup> The term "Black Girl Magic" was created by CaShawn Thompson "to celebrate the beauty, power and resilience of black women." Julee Wilson, *The Meaning of #BlackGirlMagic*, HUFFINGTON POST (Jan. 12, 2016, 9:37 AM), [http://www.huffingtonpost.com/entry/what-is-black-girl-magic-video\\_us\\_5694dad4e4b086bc1cd517f4](http://www.huffingtonpost.com/entry/what-is-black-girl-magic-video_us_5694dad4e4b086bc1cd517f4); see also Desiree Melton, *The Myth of the Magical Black Woman*, BALTIMORE SUN (July 5, 2016, 12:30 PM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-black-magic-20160705-story.html>.

<sup>183</sup> Lasher, *supra* note 180 (quoting Jesse Williams, Address at the 2016 BET Awards (June 26, 2016)).

<sup>184</sup> *Id.*

B. *Indirect, Current Costs*

1. *Costs to States and Local Governments*

*It's the economy, stupid.*<sup>185</sup>

There are many indirect, yet immediate costs to the legal system to investigate and litigate police brutality claims. Those costs include the costs to cities to prosecute the so-called “bad apples.” However, just focusing on a few bad apples ignores the systemic nature of the problem and an institutional culture that allows this conduct to continue.<sup>186</sup>

Before liability can be imposed, plaintiffs wishing to sue cities for unconstitutional conduct by public officials need to prove that a municipal policy or custom caused constitutional injury.<sup>187</sup> Also, cities cannot be held vicariously liable for unconstitutional conduct committed by law enforcement.<sup>188</sup> Perhaps the time has come for a reconsideration of vicarious liability in this context?<sup>189</sup> Others argue that allowing the award of punitive damages will force the responsible officials and supervisors to sit up and take notice.<sup>190</sup>

Plaintiffs who choose to sue may be able to argue their way to a settlement, but settlements are an imperfect solution. They represent negotiated deals in which there are external pressures on both sides, and decisions are often being made by financially vulnerable parties. The city of Cleveland paid \$6 million to settle the wrongful death lawsuit brought by the parents of Tamir Rice.<sup>191</sup> The number of the average civil settlement in

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<sup>185</sup> James Carville, presidential strategist for the eventually successful 1992 presidential campaign of Bill Clinton, first coined the phrase, “The economy stupid.” See Caleb Galoozis, *It's the Economy, Stupid*, HARV. POL. REV. (Oct. 17, 2012), <http://harvardpolitics.com/united-states/its-the-economy-stupid/>.

<sup>186</sup> DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 24-25, 47 (1994).

<sup>187</sup> See *Monnell v. Dept. of Social Services*, 436 U.S. 658, 713 (1978).

<sup>188</sup> *Id.* at 692; see also *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) (“We have consistently refused to hold municipalities liable under a theory of respondeat superior”).

<sup>189</sup> See Schwartz, *infra* note 194, at 896; see, e.g., *City of Okla. City v. Tuttle*, 471 U.S. 808, 835-42 (1985) (Stevens, J., dissenting) (highlighting that legislators would have assumed that the common law tort doctrine of respondeat superior applied, barring any specific provisions to the contrary); see also CATHERINE FISK & ERWIN CHERMERINSKY, CIVIL RIGHTS WITHOUT REMEDIES: VICARIOUS LIABILITY UNDER TITLE VII, SECTION 1983, AND TITLE IX, 7 WM. & MARY BILL RTS. J. 755, 796 (1999) (arguing in favor of using respondeat superior for cities).

<sup>190</sup> Myriam Gilles, *In Defense of Making Government Pay*, 35 GA. L. REV. 845, 854, 871-75 (2001); see also *Ciraolo v. City of New York*, 216 F.3d 236, 247 (2d Cir. 2000) (Calabresi, J., concurring).

<sup>191</sup> Trymaine Lee, *Analysis: The Cost of a Black Boy's Life*, MSNBC, (April. 25, 2016),

a wrongful death case in the United States is between \$1 million and \$6 million.<sup>192</sup> These numbers are misleading, however, because settlements are exceedingly rare. Most families who do sue are unable to state a claim under §1983 and actually receive nothing for the loss of a loved one.<sup>193</sup>

In cases where cities *are* forced to pay out to tort victims, police officers themselves are “virtually always” indemnified for the costs of their brutality:

Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9,225 civil rights damages actions resolved in plaintiff’s favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases.<sup>194</sup>

Therefore, taxpayers bear second direct, and immediate cost themselves.

American taxpayers may not fully realize that while law enforcement officers are not paying anything out of their own pockets for any wrongdoing, state and local governments *are* paying enormous sums.<sup>195</sup>

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<http://www.msnbc.com/msnbc/analysis-the-cost-black-boys-life-6-million>.

<sup>192</sup> Here’s the breakdown of a sampling of judgments received by families who lost loved ones: Freddie Gray (\$6.4 million), Eric Garner (5.9 million), Walter Scott (\$6.5 million), Philip Coleman (\$4.95 million). See Cristina Silva, *What is a Black Life Worth?*, INT’L BUS. TIMES (Apr. 25, 2016), <http://www.ibtimes.com/what-black-life-worth-tamir-rice-settlement-reflects-growing-trend-paying-families-6m-2359142>; see also Kia Michette, *The Worth of Freddie Gray’s Black Life: \$6.4 Million*, URB. IMAGE MAG. (Sept. 8, 2015), <https://urbanimagemagazine.com/the-worth-of-freddie-grays-black-life-6-4-million/>.

<sup>193</sup> *Id.* See also Ben Rosenfeld, Evaluating Your Potential Police Misconduct Civil Rights Case, 3 CIVIL LIBERTIES DEF. CTR., <https://cldc.org/wp-content/uploads/2014/04/Evaluating-Police-Misconduct-Cases.pdf> (last updated Aug. 2014) (“[C]ivil rights cases are notoriously difficult to maintain and win.”).

<sup>194</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (“During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in law-suits alleging civil rights violations by law enforcement. Law enforcement . . . never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments—even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct”); see also Susan Milligan, *Police Settlement Cases Rare*, U.S. NEWS (Sept. 9, 2015), <https://www.usnews.com/news/articles/2015/09/09/police-settlement-cases-rare-and-rarely-deter-misconduct>.

<sup>195</sup> Nick Wing, *We Pay A Shocking Amount for Police Misconduct, And Cops Want Us Just To Accept It. We Shouldn’t*, HUFFINGTON POST (May 29, 2015), [http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements\\_n\\_7423386.html](http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html). See also Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015), <https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> (“The 10 cities with the largest police departments paid out \$248.7 million last year in settlements and court judgments in police-misconduct cases, up 48% from \$168.3

Here is a random sampling of U.S. cities that have paid out more than \$50 million on police brutality claims:

- Chicago: \$521 million between 2004 and 2014
- New York City: \$348 million between 2006 and 2011;
- Los Angeles: Approximately \$101 million between 2002 and 2011; and
- Oakland: \$74 million between 1990 and 2014.<sup>196</sup>

Oakland public schools are facing severe cuts and a \$15.1 million deficit.<sup>197</sup> Los Angeles, as well as many other cities, have utterly failed to conquer homelessness. One wonders if cities would be better able to address such problems if these costs did not burden them. As one scholar notes, corrective justice is achieved only at the sacrifice of distributive justice.<sup>198</sup>

In addition, the true cost of investigating, disciplining, training, or firing problem officers is likely under-reported. On the one hand, litigation may serve an informational purpose: the discovery process during trial often unearths important information regarding police policy, training, and practices.<sup>199</sup> The public exposure that a trial often brings may shed light on a problem and spur needed reform in ways that public protest cannot. On the other hand, putting forth evidence of the amount taxpayers are paying because of unconstitutional conduct by state actors may not be enough:

So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will **never** deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.<sup>200</sup>

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million in 2010 . . . [t]hose cities collectively paid out \$1.02 billion over those five years in such cases, which include alleged beatings, shootings and wrongful imprisonment.”).

<sup>196</sup> Wing, *supra* note 195.

<sup>197</sup> Jill Tucker, *Oakland schools face harsh cuts as another budget crisis hits*, SF CHRONICLE (Nov. 9, 2017), <http://www.sfchronicle.com/bayarea/article/Oakland-schools-face-harsh-cuts-as-another-budget-12346142.php/>.

<sup>198</sup> See Levinson, *supra* note 100, at 412-14; see also Eaton, *supra* note 111 (“[L]itigating and paying judgments to constitutional tort plaintiffs diverts resources that could be used for other more important public purposes, such as redistributing wealth through social spending.” (footnote omitted)).

<sup>199</sup> See G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 750-51 (1999).

<sup>200</sup> Levinson, *supra* note 100, at 370 (emphasis in the original).

Majoritarian public attitudes towards police brutality may only shift when the full measure of societal costs is analyzed through empirical study. At this point in time, such studies have not yet taken place but given the above, the costs of police brutality are likely much larger than can be demonstrated by numbers alone.

## 2. Costs to Communities

*Compensation is also socially desirable, for otherwise the uncompensated injured persons will represent further costs and problems for society.*<sup>201</sup>

There are also indirect costs to communities that accrue from losing spouses, parents, teachers, mentors or friends. Absent black fathers leave children without adequate support. Such children may then be left to fend for themselves in a school system that often serves as a pipeline to prison instead of a path to higher education.<sup>202</sup>

Communities also pay the costs for additional police for marches, disruption of traffic and commerce, and any destruction to property that may result from riots. Poor, minority communities want law and order just as much as any other demographic, yet they are the ones who are most immediately affected by police brutality and individual or collective responses to it.

Another cost to communities that needs further exploration and discussion is the number of low income people with mental health problems that are killed by police. According to one study, a minimum of one in four, and up to *one half* of those killed by police are mentally ill.<sup>203</sup> The issue of untreated mental illness is a serious public health issue, and this issue especially affects homeless communities.<sup>204</sup>

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<sup>201</sup> DOBBS, *supra* note 79, at 17.

<sup>202</sup> Megan French-Marcelin & Sarah Hinger, *Bullies in Blue: The Origins and Consequences of School Policing*, ACLU 1, 5 (April 2017) (“Over the past 50 years, schools—particularly in poor Black and Latino communities—have become sites of increased criminalization of young people . . . . Programs that gave teachers and administrators, as well as law enforcement, the authority to identify students as “pre-delinquent” are at the origins of what is now called the “school-to prison pipeline.”).

<sup>203</sup> See Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, TREATMENT ADVOC. CTR. 1 (Dec. 2015), <http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.

<sup>204</sup> While only 6% of the general U.S. population suffers from severe mental illness, the number is between 20-25% for the homeless. See National Coalition for the Homeless, *Mental Health and Homelessness* (July 2009), [http://www.nationalhomeless.org/factsheets/Mental\\_Illness.pdf/](http://www.nationalhomeless.org/factsheets/Mental_Illness.pdf/).

San Francisco is taking an innovative approach to the problem and has a model that “has been widely lauded as the best community-oriented model in the country, known for reducing the use of deadly force nationwide.”<sup>205</sup> The city’s police force has expanded the number of mental health training units and the capacity of a crisis intervention team (“CIT”). The CIT is made up of “community members, mental health advocates, health service providers, consumers, The Public Defender’s Office, The SF District Attorney’s Office, and police officers working together to provide innovative training for law enforcement officers.”<sup>206</sup> The involvement of these various constituencies is a positive step in the right direction.

Even with this progress, since 2010, San Francisco police officers still shot and killed 14 people who appeared to have mental health issues.<sup>207</sup> One wonders if it is possible to quantify the trauma to families who have lost loved ones because we as a society have not successfully prioritized this issue. Further research needs to be conducted to determine the indirect costs to communities of failing to address this issue in a timely and effective manner.<sup>208</sup>

Police brutality “serves as a lightning rod for widespread public fear and anger” and may lead to “deep societal chasms.”<sup>209</sup> These societal chasms may be created when juries repeatedly fail to indict or convict police officers for brutality,<sup>210</sup> even when such unlawful conduct is recorded and seemingly unambiguous. Fear and anger may also stem from the fact that minority communities know that many police take civilian defense so seriously that they reject even the slightest resistance,<sup>211</sup> and will frequently

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<sup>205</sup> Vivian Ho, *Police Make Slow Progress in Confronting Mentally Ill*, SF CHRONICLE (Dec. 19, 2015), <http://www.sfchronicle.com/bayarea/article/Police-and-the-mentally-ill-seeking-better-ways-6710369.php>.

<sup>206</sup> The goal of the CIT is “to instruct officers on how to effectively manage behavioral crisis situations in the field using de-escalation techniques, time, distance and cover, while maintaining the safety of all individuals.” See Lieutenant Mario Molina, Sergeant Donald Anderson, & Sergeant Laura Colin, *Crisis Intervention Statistics & Crisis Team Concept*, SF POLICE DEPT. (Nov. 3, 2016), [https://sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/PoliceCommission122116-SFPDCITPresentation\\_0.pdf](https://sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/PoliceCommission122116-SFPDCITPresentation_0.pdf)

<sup>207</sup> See Ho, *supra* note 205.

<sup>208</sup> See Fuller, *supra* note 203 at 1. For example, “[a]n estimated 1 in 3 individuals transported to hospital emergency rooms in psychiatric crisis are taken there by police.” It would be interesting to know the cost of time and resources expended as police officers are taken away from their work on the streets in these situations.

<sup>209</sup> Freeman, *infra* note 223, at 683, 706 (“Police brutality contributes to a deepening racial divide, “including African-American alienation from the criminal justice system.”).

<sup>210</sup> See Catherine H. Milton et al, *Police Use of Deadly Force* 85 (1977).

<sup>211</sup> See PAUL CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 68-83, 88-98 (1969) (affirming that verbal defiance and antagonizing attitudes trigger police brutality).

retaliate against those who complain.<sup>212</sup> This fear may lead victims of police brutality to refrain from making complaints in the first place.<sup>213</sup> Communities of color are not only fearful of individual officers, but they also do not trust the criminal justice system overall.

Another component of this fear likely stems from the well-documented over-militarization of local law enforcement agencies.<sup>214</sup> The right to protest and express grievances against the government is constitutionally protected. Yet lawful protestors who are confronted with armored vehicles and military-grade weapons (as they were in Ferguson, Missouri) may be deterred from exercising their constitutional rights. In the words of a former Seattle police chief:

Many local law enforcement agencies are now outfitted and behave like small armies. This is not good, and the federal government shares much of the blame. With the advent of the drug war and especially since 9/11, the Department of Defense has been more than generous in gifts of surplus military items to the locals: armored personnel carriers, MRAP's (mine-resistant, ambush protected vehicles), and a wide assortment of military weaponry.<sup>215</sup>

Besides the proliferation of military-grade weaponry in the hands of local law enforcement, the ranks of these departments are often filled by veterans who are returning home from war, as “one in five police officers are literally warriors, returned from Afghanistan, Iraq, or other assignments.”<sup>216</sup> While the majority reintegrate without issue and are valued by police

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<sup>212</sup> See April Walker, *Racial Profiling-Separate and Unequal Keeping the Minorities in Line-The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 605 (2011) (noting that a consequence of reporting police brutality is retaliation by police officers and powerful police unions) (internal citations omitted).

<sup>213</sup> See ANTHONY M. PATE & LORIE A. FRIDELL, POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES 35-36, 38-40 (1993) (“[P]olice departments make reporting difficult by failing to establish and publicize citizen complaint procedures.”).

<sup>214</sup> See THE HARV. L. REV. ASS'N, *Considering Police Body Cameras* 128 HARV. L. REV. 1794, 1811-12 (2015) (“Police departments in recent decades have become increasingly militarized, complete with intelligence departments, devices that mimic cell phone towers, and facial recognition software.”).

<sup>215</sup> Norm Stamper, *Militarizing Ferguson Cops with Riot Gear is a Huge Mistake*, TIME MAGAZINE (Aug. 18, 2014), <http://time.com/3136586/militarizing-ferguson-cops-with-riot-gear-is-a-huge-mistake/>.

<sup>216</sup> Simone Weichselbaum & Beth Schwartzapfel, *When Veterans Become Cops, Some Bring War Home*, USA TODAY (Mar. 30, 2017, 1:42 PM), <https://www.usatoday.com/story/news/2017/03/30/when-veterans-become-cops-some-bring-war-home/99349228/>.

leaders, some evidence suggests that veterans are more likely to “get physical” in policing situations.<sup>217</sup>

There is a significant dearth of research on differences in the use of force between veterans and non-veterans on police forces, but other troubling conclusions *have* emerged, namely that:

- Veterans who work as police are more vulnerable to self-destructive behavior—alcohol abuse, drug use . . . and attempted suicide;
- Hiring preferences for former service members that tend to benefit whites disproportionately make it harder to build police forces that reflect and understand diverse communities; and
- Most law enforcement agencies, because of factors including a culture of machismo and a number of legal restraints, do little or no mental health screening for officers who have returned from military deployment, and they provide little in the way of treatment.<sup>218</sup>

The push by some law enforcement agencies to recruit guardians rather than warriors will be hampered unless these issues are studied and addressed.<sup>219</sup> In the end, whether the justification is the drug war, “law and order,” or the fight against terrorism, all communities will eventually suffer if checks are not maintained on the misuse of police power.

Instead of militarizing police forces, a fundamental shift in attitudes and policing culture is needed. The President’s Task Force Report on 21<sup>st</sup> Century Policing is a tremendous step in the right direction as it acknowledges that “law enforcement cannot build community trust if it’s seen as an occupying force.”<sup>220</sup> This report concludes with “59 concrete recommendations for research, action and further study,” and proposes several recommendations for “immediate action” by the administration, including but not limited to recommendations that:

1. The President should direct all federal law enforcement agencies to read the report and adopt the recommendations; and

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Victor Hwang, *Call for New Policing in San Francisco: Guardians, Not Warriors*, SF CHRONICLE (Feb. 8, 2016), <http://www.sfchronicle.com/opinion/openforum/article/Call-for-new-policing-in-San-Francisco-6815656.php> (“We need to end the deployment of officers as warriors in the ‘War on Drugs,’ the ‘War on Terrorism,’ or as federal immigration officers. Police officers must be officers of the peace, defenders of our constitution, and guardians of our communities.”).

<sup>220</sup> Office of Cmty. Oriented Policing Servs. U.S. Dep’t of Justice, Final Report of the President’s Taskforce on 21st Century Policing 1 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

2. The DOJ should explore public-private partnerships to discuss and collaborate on implementing the recommendations.<sup>221</sup>

Again, this involvement at the federal level is essential for helping to bring about meaningful change.

### C. *Indirect, Future Costs*

#### 1. *Distrust of Law Enforcement*

There is another indirect cost when minorities feel that law enforcement is not held accountable for wrongdoing. That cost is reflected in mistrust of police officers: “[o]fficers who fatally shoot a suspect or even an unarmed civilian are overwhelmingly cleared of wrongdoing following a standard internal investigation of the incident.”<sup>222</sup> To many, this seems like state sanctioned murder.<sup>223</sup> In the case of Eric Garner, an officer can walk “scot-free”<sup>224</sup> even when he violates the department’s own internal rules.<sup>225</sup> That officer was not only *not* indicted or charged, he was given a raise.<sup>226</sup> The officers in the infamous beating of black motorist, Rodney King, were acquitted by a jury.<sup>227</sup> Finally, minority communities know that the so-called “Blue Wall of Silence” (discussed as the “code of silence” above), and the fear of retaliation by colleagues, keeps officers from “ratting out” fellow officers or coming forward with incriminating evidence that might support a victim’s account of brutality.<sup>228</sup>

Further, officers know that even if they use excessive force against suspects like Garner, the broader public will often side with the officer who

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<sup>221</sup> *Id.* at 69.

<sup>222</sup> Kolsy, *supra* note 172.

<sup>223</sup> “In many instances, police officers manage to avoid prison altogether for criminal acts that, if committed by civilians, would lead to many years imprisonment.” Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L. J. 677, 679 (1996).

<sup>224</sup> *Scot-free*, MERRIAM-WEBSTER DICTIONARY (10th ed. 1996) (“Completely free from obligation, harm, or penalty”).

<sup>225</sup> The chokehold used by the officer responsible for Mr. Garner’s death had been officially banned by department policy. *See* Baker, *supra* note 154.

<sup>226</sup> Sally Goldenberg, *Records Show Increased Earnings for Officer Involved in Garner Death*, POLITICO (Sept. 12, 2016), <http://www.politico.com/states/new-york/albany/story/2016/09/officer-in-eric-garner-death-boosts-overtime-pay-105359>.

<sup>227</sup> Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), <http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html>.

<sup>228</sup> *See* Gabriel J. Chin & Scott Wells, The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. PITT. L. REV. 233, 252 (1998).

is trying to enforce the law: “[t]hat suspects pose little threat of becoming attractive plaintiffs in damage actions is precisely the reason why some police officers are unlikely to observe constitutional standards in apprehending them.”<sup>229</sup> Seeing officers go unpunished for actions which violate official police policy may or may not inflame majority groups, but this lack of accountability exacerbates tensions between minority groups and the police.

As mentioned above, inadequate awards in tort suits likely have the same effect, and “defeat the compensatory and deterrent objectives of a §1983 damage suit.”<sup>230</sup> One scholar suggests a small role for the judiciary here, including: setting “judicially required police rules” regarding “what the police must do to avoid unnecessary offense to the dignity and rights of minority groups” to lessen these tensions and to restore trust in law enforcement.<sup>231</sup> Indeed, utilizing the language of human rights may be useful.<sup>232</sup>

Distrust is also created between communities of color and law enforcement when tort claims are filed and the claimants face retaliation as a result. When officers are accused of a tort, such as assault, battery, or false imprisonment, the police may falsely charge the accused with a crime. It is often easier for the prosecutor to negotiate a plea bargain with the accused,<sup>233</sup> who will often accept the plea in return for agreeing to dismiss the tort claim.<sup>234</sup>

The denial of justice for victims of police misconduct strengthens the belief among communities of color that the police are corrupt and are willing and able to do anything to avoid liability for wrongdoing. Without trust, these community members might react by not calling the police in times of need, or will refrain from calling to report crimes that they may observe. Others may respond by choosing not to assist with investigations

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<sup>229</sup> Newman, *supra* note 76, at 455.

<sup>230</sup> *Id.*

<sup>231</sup> Davis, *supra* note 6, at 723-24.

<sup>232</sup> See United Nations High Commissioner for Human Rights Centre for Human Rights, *International Human Rights Standards for Law Enforcement* 3 (“Law enforcement officials are obliged to know, and to apply, international standards for human rights. Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”), <http://www.ohchr.org/Documents/Publications/training5Add1en.pdf/>.

<sup>233</sup> If the police misconduct or brutality occurred during efforts to apprehend a suspect for an offense that was in fact committed, the jury’s knowledge of the plaintiff’s criminal conduct prior to arrest will likely undermine a jury’s impartial assessment of the plaintiff’s claims, even if constitutional rights apply regardless of whether the plaintiff is guilty or innocent. See Newman, *supra* note 76, at 466.

<sup>234</sup> Davis, *supra* note 6, at 724.

when law enforcement asks the community for help, including refusing to serve as witnesses in criminal cases, refusing to accept as truthful the testimony of officers when serving as jurors, and to reject recruitment efforts.<sup>235</sup> Any of these outcomes increases costs and exacerbates relations between the police and communities of color.

## 2. *Lack of Trust in the Social Compact*

When prosecutors refuse to charge, and grand juries fail to indict officers, the criminal law suffers: “[i]t has frequently been observed that the mark of a civilization is the procedure by which it enforces its criminal law.<sup>236</sup> The failure of both the criminal law and tort law may lead communities of color to not only distrust police officers, but also to lose faith in the social compact.

According to political philosophers like Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, a social compact is an implicit agreement between members of society to abide by certain societal rules, and to give up some measure of individual freedom in exchange for protection by the state.<sup>237</sup> Without a social compact, a society falters. Governmental misuse of the police power “threaten[s] the vitality of a system of ordered liberty,”<sup>238</sup> and may lead to distrust in the legal or political system.

Unfair police practices like racial profiling,<sup>239</sup> and a police code of silence may also lead to an “us against them” mentality.<sup>240</sup> Communities that lack trust in the social compact may become disengaged from the larger economy, and this disengagement threatens everyone: “[a]ny misuse of public authority threatens the equilibrium of a system resting so

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<sup>235</sup> Lee, *supra* note 127, at 5.

<sup>236</sup> Newman, *supra* note 76, at 466.

<sup>237</sup> See, e.g., JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT: OR, THE PRINCIPLES OF POLITICAL RIGHTS (1893); see also William O. Douglas, THE ANATOMY OF LIBERTY: THE RIGHTS OF MAN WITHOUT FORCE 1 (1963) (“Today one measure of liberty is the extent to which the individual can insist that his government live under a Rule of Law.”).

<sup>238</sup> Newman, *supra* note 76, at 447 (“Any misuse of public authority threatens the equilibrium of a system resting so fundamentally on the consent of the governed, but the threat is most acute when the misconduct injures a citizen directly—especially if it denies him a constitutionally protected right.”).

<sup>239</sup> According to the Federal Bureau of Justice Statistics, Blacks and Hispanics are more likely to be ticketed for speeding or searched at traffic stops than their white counterparts. See Erica L. Smith & Matthew R. DuRose, BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002, NCJ 211471 DEPT. OF JUST. (June 1, 2006).

<sup>240</sup> See JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 92, 106 (1993) (stating that local law enforcement display an “organizational culture” or “siege mentality” of “internal solidarity, or *brotherhood*” against outsiders).

fundamentally on the consent of the governed.”<sup>241</sup> When communities feel disengaged, they may feel that there is no point to voting, for example.<sup>242</sup> Moreover, if there are citizens who are acting outside of the system, there is a cost of lost economic productivity.

Finally, “actual and perceived unfairness and racial bias in law enforcement undermines overall police effectiveness.”<sup>243</sup> Riots like the ones that engulfed Los Angeles following the acquittal of four white officers who were videotaped beating Rodney King are a further cost to communities.<sup>244</sup> Such civil unrest threatens law and order and affects everyone.

### 3. *The Cost to Law and Order*

Some individuals may demonstrate their lack of trust in the social compact by refusing to “play by the rules” of a criminal justice system that they perceive as unfair or unjust: “citizens might fairly ask themselves why they should follow the law when those who are supposed to enforce it do not.”<sup>245</sup> It is not just police brutality that plays into this narrative. Evidence of racial profiling, unequal drug enforcement in communities of color,<sup>246</sup> and excessive sentencing for drug offenses all support a system that appears designed to benefit one group at the expense of several others.

Another cost is the resulting failure of law and order caused when more and more citizens feel the law is ineffective, unfair, and incapable of righting historic and continuing wrongs. Increasing levels of civil unrest may lead to economic damage to all communities. Black flight, or a potential exodus of black, brown, or other marginalized groups seeking a better life elsewhere, is discussed below. Of course, not everyone has the

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<sup>241</sup> Newman, *supra* note 76, at 447.

<sup>242</sup> Eaton, *supra* note 111, at 843 (“Borrowing from the writings of contemporary French philosopher Paul Ricoeur, Dauenhauer and Wells argue that when governments or their officials deprive individuals of their constitutional rights, they diminish the victim’s capacity to be a ‘full-fledged participant in his or her political society.’”) (quoting Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 907 (2001)).

<sup>243</sup> Lee, *supra* note 127, at 5.

<sup>244</sup> The 1992 riots that followed the beating of Rodney King caused over \$1 billion in property damage, and left over fifty people dead. *LA Riots, Fast Facts*, CNN (Apr. 23, 2017) <http://edition.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/>.

<sup>245</sup> Freeman, *supra* note 223, at 709 (“Police brutality can, and already has for many communities, set into motion an unraveling of respect for law.”).

<sup>246</sup> As Michelle Alexander argues, unequal drug enforcement occurs despite the fact that minorities use drugs at the same rates as whites. See MICHELLE ALEXANDER, *THE NEW JIM CROW, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 99-100 (2012).

means or inclination to leave. The only option left for the ones that remain is likely to be to fight.

Inspiring advocates like Bryan Stevenson of the Equal Justice Initiative have resolved to dig in and use the law to challenge injustice no matter the personal cost.<sup>247</sup> The struggle against oppression has spawned new awareness among minorities, and especially among black and brown youth. Many of these young people are becoming activists in their own right. They are showcasing their talents and claiming their own power through poetry and the spoken word.<sup>248</sup>

Others may be less able or willing to channel their frustration and rage:

Now, what we've been doing is looking at the data and we know that police somehow manage to de-escalate, disarm and not kill white people every day. So, what's going to happen is we are going to have equal rights and justice in our own country or we will restructure their function and ours . . . we're done watching and waiting while this invention called whiteness uses and abuses us, burying black people out of sight and out of mind while extracting our culture, our dollars, our entertainment like oil . . . before discarding our bodies like rinds of strange fruit.<sup>249</sup>

In many communities, the anger is palpable, and the concern is that it will spill out into the streets. The seemingly never-ending stream of graphic, and uncensored cell phone footage released over social media may continue to stoke the flames of anger and fear.

The question is, whether society can commit to change so that progressive community responses will channel the spirit of forgiveness and reconciliation. During the Civil Rights Movement, an early rift developed between leaders who championed non-violence and those who felt more aligned to a creed of “by any means necessary,” or so-called “militant self-defense.”<sup>250</sup> How should community leaders get out ahead of the possibility

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<sup>247</sup> Bryan Stevenson is a lawyer, a professor of law at New York University School of Law and the director of the Equal Justice Initiative (“EJI”) in Montgomery, Alabama (<https://eji.org/>). EJI is a non-profit that champions those who are wrongly sentenced to death and challenges racial discrimination and inequality in the criminal justice system. Mr. Stevenson is a charismatic and humble leader who is seen as a hero to many. Despite being the subject of racism by state actors, he has steadfastly committed himself to champion the rights of the powerless. His book, *Just Mercy*, is a New York Times bestseller and a triumph of the soul. (From EJI’s website: The book “is as gripping as it is disturbing,” wrote Nobel Peace Prize Laureate Desmond Tutu, “as if America’s soul has been put on trial.”)

<sup>248</sup> LaVendrick Smith, *In Tumultuous World, Spoken Words Help Youth Find Their Voice*, WASH. POST (July 15, 2016), [https://www.washingtonpost.com/local/in-tumultuous-world-poetry-and-spoken-words-help-youth-find-their-voice/2016/07/15/39afacaa-492f-11e6-acbc-4d4870a079da\\_story.html](https://www.washingtonpost.com/local/in-tumultuous-world-poetry-and-spoken-words-help-youth-find-their-voice/2016/07/15/39afacaa-492f-11e6-acbc-4d4870a079da_story.html).

<sup>249</sup> Lasher, *supra* note 183.

<sup>250</sup> See, e.g., Hassam Munir, *Meeting in the Middle: The Forgotten Relationship of*

that some (and who knows how large the group will be) will be moved, not towards lawful protest, but towards the incitement of hatred and violence? What is the appropriate response to those who may feel that armed self-defense is the only option?

Many in communities of color have already concluded that if the “law” will not protect them, they will need to do it themselves:

The growing sentiment around armed self-defense may be unable to be ignored. A survey by the Pew Research Center earlier this year showed that 54 percent of black people view gun ownership positively, describing it as a means of protection—an increase of 29 percentage points from just two years prior. . . . Particularly after the Charleston massacre and other acts of violence against black people, the focus among some African American clergy and civil rights officials has shifted.<sup>251</sup>

Considering that the gun ownership in the U.S. is as American as apple pie, perhaps this growing trend simply reflects an increasing commonality between African-Americans and the larger culture?

As with any group, care should be taken in trying to generalize African-American culture. However, as an institution, the Black church has historically held significant influence within the black community.<sup>252</sup> As the Rev. Dr. Martin Luther King, Jr. once argued, it is likely that the black church has a role to play in shaping nonviolent responses to police brutality.<sup>253</sup>

The problem is, not everyone is in church. In general, church attendance in America has been on the wane, and increasingly, religion holds less

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*Malcolm X and MLK Jr.*, iHISTORY (2015), <http://www.ihistory.co/meeting-in-the-middle-the-forgotten-relationship-of-malcolm-x-and-mlk-jr/> (“[T]he real differences between Malcolm and Martin were about the specific approach that would be most effective in achieving their shared dream. In 1963, Martin wrote in a letter from prison that African-Americans should “emulate neither the ‘do-nothingism’ of the complacent nor the hatred and despair of the black nationalist . . .”). Today, the rift is much the same. *See also*, Sam P.K. Collins, *We Will Shoot Back: Meet the Black Activists Who Aren't Ready to Forgive*, THINK PROGRESS (June 27, 2015), <https://thinkprogress.org/we-will-shoot-back-meet-the-black-activists-who-aren-t-ready-to-forgive-d53101387c31#.2lcV0c1w1>.

<sup>251</sup> Collins, *supra* note 250.

<sup>252</sup> African-American Registry, *The Black Church, A Brief History*, (Nov. 1, 1758) (“In African-American history, ‘the church’ has long been at the center of Black communities. It has established itself as the greatest source for African American religious enrichment and secular development.”), [http://www.aaregistry.org/historic\\_events/view/black-church-brief-history/](http://www.aaregistry.org/historic_events/view/black-church-brief-history/).

<sup>253</sup> *See* Margarita A. Mooney, *The Black Church in America: Martin Luther King's Legacy*, SOCIAL GOSPEL AND THE PROSPERITY GOSPEL (Jan. 17, 2012), <http://www.patheos.com/blogs/blackwhiteandgray/2012/01/the-black-church-in-america-martin-luther-kings-legacy-the-social-gospel-and-the-prosperity-gospel/>.

sway.<sup>254</sup> For many, that is a good thing. Others are not so sure. Maybe without the ameliorating influence of a “forgive them for they know what they do” mindset, the #WeWillShootBack crowd will step into the breach.<sup>255</sup> In fact, there is evidence that some are losing patience with calls for forgiveness that are unaccompanied by action: “[a]s noble as that philosophy [forgiveness] might be, an often ignored but growing number of African Americans aren’t buying into it.”<sup>256</sup>

While numerous attempts have been made to intimidate Black communities by burning down their churches,<sup>257</sup> such communities have usually focused on rebuilding and have simply turned the other cheek. Still, the bombing of the 16<sup>th</sup> Street Baptist Church in Birmingham, Alabama, and the resulting deaths of four little girls who were inside, has never been forgotten. That single event supercharged a movement.<sup>258</sup> What will be our defining moment? Has it already happened?

When Dylan Roof, an avowed white supremacist, strolled into a black church in Charleston and opened fire on parishioners, many said “no more.” When Bree Newsome climbed a flagpole in South Carolina to take down the Confederate flag flying at the state capitol,<sup>259</sup> her careful ascent was a symbolic act of resistance. Without words, her act suggested that white supremacy will no longer be borne in silence. Since the controversy first erupted, displays of that flag (and specialty license plates) has fallen in several states.<sup>260</sup> We are in uncharted territory, and it is hard to predict what will happen next. At a minimum, perhaps we can all agree that uncertainty,

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<sup>254</sup> *Public Sees Religion’s Influence Waning*, PEW RES. CTR. (Sept. 22, 2014), <http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2/>.

<sup>255</sup> The hashtag, #WeWillShootBack, refers to a movement started by activists who believe that the path of forgiveness has not worked and no longer want to be pacified. See Collins, *supra* note 250.

<sup>256</sup> *Id.*

<sup>257</sup> See Fresh Air, *The ‘Racial Cleansing’ That Drove 1,100 Black Residents Out Of Forsyth County, Ga.*, NPR (Sept. 15, 2016), <https://www.npr.org/2016/09/15/494063372/the-racial-cleansing-that-drove-1-100-black-residents-out-of-forsyth-county-ga/>.

<sup>258</sup> See Danielle Cadet, *Vigilance and Victory: How the Birmingham Church Bombing Revealed America’s Ugly Truths*, HUFFINGTON POST, (Sept. 15, 2013, 8:27 AM), [http://www.huffingtonpost.com/2013/09/15/birmingham-church-bombing-50th-anniversary\\_n\\_3927128.html](http://www.huffingtonpost.com/2013/09/15/birmingham-church-bombing-50th-anniversary_n_3927128.html).

<sup>259</sup> “*This Flag Comes Down Today*”: Bree Newsome Scales SC Capitol Flagpole, Takes Down Confederate Flag, DEMOCRACY NOW, (July 3, 2015), [http://www.democracynow.org/2015/7/3/this\\_flag\\_comes\\_down\\_today\\_bree](http://www.democracynow.org/2015/7/3/this_flag_comes_down_today_bree).

<sup>260</sup> See Eric Brander, *Confederate Flag Debate: A State-by-State Roundup*, CNN <http://www.cnn.com/2015/06/29/politics/confederate-flag-state-roundup/index.html> (last updated June 30, 2015, 2:35 PM).

distrust, fear, and anger are not the best bedfellows when it comes to promoting peace.

On July 7, 2016, 25-year-old military veteran, Micah Johnson, disrupted a peaceful protest with sniper-fire.<sup>261</sup> He killed five officers, and injured several others.<sup>262</sup> The attack was apparently the deadliest enacted on law enforcement since the September 11<sup>th</sup> terror acts in 2001.<sup>263</sup> Will we need to see another Dallas? More bridges shut down in major metropolitan areas? More protests in the streets? Or, are we ready to move this issue to the top of the list of pressing priorities that we need to face together as a nation? By now, hopefully everyone realizes that this is not just a problem for African-American men.<sup>264</sup> The use of excessive, and frequently deadly force by public servants who are beholden to the Constitution is an issue that concerns us all.

#### 4. *The Cost to our Reputation*

A third cost is the loss of reputation suffered domestically by individual cities, or by the country as a whole on the world stage. Certain cities, like Chicago, Illinois or Los Angeles, California, may get better or worse reputations, which may become a drain on tourism to the area.<sup>265</sup> With the release of each new horrific cell phone video of an unarmed black man being shot (or choked) to death for various minor offenses (and the list of offenses seems to keep growing—from selling loose cigarettes, to driving

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<sup>261</sup> Dan Molinski, Dan Frosch, & Alejandro Lazo, *Five Police Officers Dead, Several Hurt at Dallas Protest*, WALL ST. J. (July 8, 2016), <http://www.wsj.com/articles/shots-fired-at-dallas-protest-over-police-shootings-in-baton-rouge-and-minnesota-1467947604>.

<sup>262</sup> *Id.*

<sup>263</sup> Manny Fernandez, Richard Perez-Pena, & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), [https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?\\_r=0](https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0).

<sup>264</sup> “First they came for the Socialists, and I did not speak out—Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out—Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me.” This is a famous quote that has often been changed to fit different needs, but the original has been attributed to Martin Niemöller, a Protestant pastor who came out swinging against Hitler and lived out his days in a concentration camp for his recalcitrance. See Niemöller, *supra* note 68

<sup>265</sup> See Robert Channick, *Can Chicago Tourism Overcome Image of Crime, Police Brutality?*, CHICAGO TRIB. (Jan. 13, 2016), <http://www.chicagotribune.com/business/ct-chicago-tourism-image-0112-biz-20160112-story.html> (explaining tourism is down due to violence); Chris Woodyard, *County's Tourism Industry Hurt by L.A. Violence: \*Impact: Rioting is Prompting Some Foreign Visitors to Cancel Plans to Vacation in the Area*, L.A. TIMES (May 2, 1992), [http://articles.latimes.com/1992-05-02/business/fi-1275\\_1\\_orange-county](http://articles.latimes.com/1992-05-02/business/fi-1275_1_orange-county).

with a broken taillight, to playing with a toy gun in a park, to picking up a fake gun in a store), America's international reputation is taking a thrashing.

Following the death of Eric Garner and the decision to not indict the officer responsible, hundreds of people gathered in London to peacefully protest the killing.<sup>266</sup> Protestors gathered at the Westfield Shopping Centre to stage a "die-in," an event where people gather and lie down en masse. They "chanted and waved placards saying, 'no justice, no peace' and 'we can't breathe.' They then played dead, bringing the shopping centre to a standstill." A group of 76 less peaceful protesters were arrested at the same event.<sup>267</sup>

The citizens of the United Kingdom are not the only ones who have voiced concerns about the state of affairs in the United States. At one point, the Bahamas issued a U.S. travel advisory for its young male citizens traveling here: "[u]se 'extreme caution' around police."<sup>268</sup> Canada, Germany, and others have also warned their citizens of U.S. gun violence.<sup>269</sup> Recently the United Nations ("U.N.") has also condemned police brutality in America:

This [the shooting of Michael Brown] is not an isolated event and illustrates a bigger problem in the United States, such as racial bias among law enforcement officials, the lack of proper implementation of rules and regulations governing the use of force, and the inadequacy of training of law enforcement officials.<sup>270</sup>

The U.N. Committee on the Elimination of Racial Discrimination specifically called out the excessive use of force by police against "racial and ethnic minorities," in addition to persisting racial discrimination that touch upon "all areas" of American life, including "de facto school segregation, health care and housing."<sup>271</sup> The U.N. body acknowledged that

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<sup>266</sup> See Haroon Siddique & Dominic Smith, *76 People Arrested in Eric Garner Protest at Westfield Shopping Centre*, *GUARDIAN* (Dec. 11, 2014), <https://www.theguardian.com/us-news/2014/dec/11/76-arrests-eric-garner-protest-westfield-london>.

<sup>267</sup> *Id.*

<sup>268</sup> Aaron C. Davis, *The Bahamas' New U.S. Travel Advisory: Use 'Extreme Caution' Around Police*, *WASH. POST* (July 9, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/07/09/the-bahamas-travel-advisory-for-the-u-s-use-extreme-caution-around-the-police/?utm\\_term=.e0e9a4750870](https://www.washingtonpost.com/news/morning-mix/wp/2016/07/09/the-bahamas-travel-advisory-for-the-u-s-use-extreme-caution-around-the-police/?utm_term=.e0e9a4750870).

<sup>269</sup> *See id.*

<sup>270</sup> Stephanie Nebehay, *UN Condemns U.S. Police Brutality, Calls for 'Stand Your Ground' Review*, *HUFFINGTON POST* (Aug. 30, 2014), [http://www.huffingtonpost.com/2014/08/30/un-police-brutality-stand-your-ground\\_n\\_5740734.html](http://www.huffingtonpost.com/2014/08/30/un-police-brutality-stand-your-ground_n_5740734.html) (quoting Nouredine Amir, U.N. Committee on the Elimination of Racial Discrimination committee vice chairman, in a news briefing).

<sup>271</sup> *Id.*

these disparities particularly impact African-Americans, and also called for a review of the so-called “Stand Your Ground” Laws of 22 states that bestow “far-reaching immunity.”<sup>272</sup> The U.N. Human Rights Council and delegates from 117 countries also weighed in on this debate.<sup>273</sup>

For those who might be tempted to say, “[w]ho cares? Other countries have much worse problems with providing basic human rights than we do.” However, even if the U.N. has no power to change our laws or impact public policy, it is likely that such keen international scrutiny and censure will have far-reaching consequences that extend well beyond our borders. U.S. citizens traveling abroad may experience a lack of good will, and become subject to derision, condemnation, or worse. Also, members of our military may be exposed to (further) ill will, hatred, and contempt. The tide of international opinion, which at present is generally favorable towards the U.S.,<sup>274</sup> may recede as those who are overseas question our commitment to equality and justice.

The U.S. may sometimes like to think of itself as a law unto itself, but that is not, and never has been, the case. We do not live in a vacuum. With technology, we are living in an interconnected and interdependent age. Actions taken in the U.S. ripple throughout the world.

## 5. *Black Flight*

*America is on the verge of #Blaxit – a mass exodus of black people. Where we will go I don't know, but it's clear that black lives don't matter here, and it's even more apparent that the powers that be are doing everything possible to make America white again (except America was never white to begin with).*<sup>275</sup>

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<sup>272</sup> See *id.*

<sup>273</sup> See Claire Bernish, *117 Countries Slam American Police Brutality at U.N. Human Rights Council*, MINT PRESS (May 13, 2015), <http://www.mintpressnews.com/117-countries-slam-american-police-brutality-at-un-human-rights-council/205588/>; see also Na-tasja Sheriff, *US Cited for Police Violence, Racism in Scathing UN Review on Human Rights*, AL JAZEERA AMERICA (May 11, 2015), <http://america.aljazeera.com/articles/2015/5/11/us-faces-scathing-un-review-on-human-rights-record.html> (“Country after country recommended that the U.S. strengthen legislation and expand training to eliminate racism and excessive use of force by law enforcement.”); *Police Violence, Executions, Gitmo: US Grilled by UN Human Rights Panel*, RUSSIA TODAY (May 11, 2015), <https://www.rt.com/usa/257489-un-america-police-brutality/>.

<sup>274</sup> Richard Wike et al., *U.S. Image Suffers as Publics Around the World Question Trumps Leadership: America Still Wins Praise for Its People, Culture, and Civil Liberties*, PEW RES. CTR. (June 26, 2017), <http://www.pewglobal.org/2017/06/26/u-s-image-suffers-as-publics-around-world-question-trumps-leadership/> (“While the new U.S. president is viewed with doubt and apprehension in many countries, America’s overall image benefits from a substantial reservoir of goodwill.”).

<sup>275</sup> Ulysses Burley III, *#Blaxit: 21 Things We're Taking with Us if We Leave*, SALT

The standard populist response to those who question the status quo is: “[w]ell if you don’t like it, why don’t you just leave?” There are some who have responded to the current crisis by whimsically wondering if they should “go back” to Africa. Others wonder if Canada or Europe might provide better options. Although the desire to leave may be fleeting, the concerns underlying such desires are real. It makes sense that outsiders to the financial, political and social culture might wonder if another country would provide a safer alternative—better educational opportunities, a larger social safety net with more generous health care benefits, or safer communities to raise families. With open season seemingly being declared on unarmed black men, what mother of a black boy today isn’t concerned for the safety of her child, or of her father, brothers, uncles, and nephews? Flight is a rational response.

Up until now, the assumption has been that no one would ever want to leave the United States. When people express dissatisfaction with the state of the world (or with politicians), it’s usually just talk. No one actually moves to Canada, right?

The U.S. has experienced white flight in the past. White flight refers to a historical post-war phenomenon where White Americans, faced with the prospect of having to integrate with Black Americans in cities, chose instead to move to the suburbs.<sup>276</sup> They fled to save themselves from the oppression of having black people as neighbors, or as playmates for their children. White flight is often seen as the reason why many American neighborhoods are still so segregated today.<sup>277</sup>

Similarly, some Black Americans may choose to flee the oppression of seeing the murder of relatives or friends in their communities. Would anyone blame them? What happens if, or when, those who are perhaps more financially mobile decide that they should in fact, leave? Will the U.S.

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COLLECTIVE <http://thesaltcollective.org/6936-2/>. For a week or two in July 2016, social media came alive in response to a tongue-in-cheek post playing on “Brexit,” or the decision by the United Kingdom to leave the European Union. *See id.*

<sup>276</sup> *See* Report of the National Advisory Commission on Civil Disorders, EISENHOWER FOUND. <http://www.eisenhowerfoundation.org/docs/kerner.pdf> (last visited Oct. 5, 2017) (“Black in-migration and white exodus, which have produced the massive and growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs.”). *See also* Alana Semuels, *White Flight Never Ended*, ATLANTIC (July 30, 2015), <http://www.theatlantic.com/business/archive/2015/07/white-flight-alive-and-well/399980/>.

<sup>277</sup> *See* Semuels, *supra* note 276; *see also*, Emily Badger, *White Flight Began a lot Earlier Than We Thought*, WASH. POST (Mar. 17, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/17/white-flight-began-a-lot-earlier-than-we-think/>.

lose a “talented tenth,”<sup>278</sup> or a group of potential leaders who might otherwise have been counted on to help make America a better place to live for everyone?

Of course, the great majority of people have families to support and jobs to tend and leaving is an unlikely option. These workers may grumble aloud and wonder at the state of the world over the water cooler or the dinner table, but given the necessity of caring for children and aging parents, their concerns may just represent idle talk. For this group, their singular goal may be to just put food on the table. They may have little time to follow protest movements, to participate in any protests themselves, or to indulge in fantasies of packing up their families to emigrate to exotic lands. So they are probably stuck, and perhaps feeling angry, afraid, disenfranchised, or powerless.

Trauma can be experienced vicariously.<sup>279</sup> Little empirical research has been conducted on the psychological toll on African-Americans from seeing and experiencing racism or police intimidation and violence.<sup>280</sup> However, some studies suggest that images of African-Americans being brutalized or shot has a major negative impact on black people in particular, especially when those images are uncensored.<sup>281</sup> Failure to censor these images may stem from a history of dehumanizing treatment towards African-Americans in this country.<sup>282</sup> One wonders why uncensored law

<sup>278</sup> Henry Louis Gates, Jr., *Who Really Invented the ‘Talented Tenth’?*, PBS <http://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/who-really-invented-the-talented-tenth/>.

<sup>279</sup> See Caleb Lewis, *Videos of Police Brutality are Everywhere: What Does Watching Them do to us?*, VOX, (July 12, 2016), <http://www.vox.com/2016/7/12/12147290/police-brutality-racial-trauma-castile-sterling>.

<sup>280</sup> See *id.* Monnica Williams, a professor of psychology and director of the Center for Mental Health Disparities at the University of Louisville, notes that “little research recognizes the psychological effects of racism on people of color.” Monnica T. Williams, *Can Racism Cause PTSD? Implications for DSM-5: Racism Itself May be a Traumatic Experience*, PSYCH. TODAY (May 20, 2013), <https://www.psychologytoday.com/blog/culturally-speaking/201305/can-racism-cause-ptsd-implications-dsm-5>. Of course, if there is so little research available on the effects of racism, it is reasonable to assume that even less research exists on the specific issue of the psychological impact of watching public servants kill unarmed citizens. See *id.*

<sup>281</sup> See Tanasia Kenney, *Frequent Exposure to Shootings of Black People Can Cause PTSD-Like Trauma, Research Says*, ATLANTA BLACK STAR (Sept. 22, 2016), <http://atlantablackstar.com/2016/09/22/frequent-exposure-shootings-black-people-can-cause-ptsd-like-trauma-research-says/> (“White people used to have picnics at hangings and at lynchings, bringing their children to watch Black bodies suffer and die. We are not far removed from that, it’s just being played out through technology now. And it hurts.”) (internal quotations omitted).

<sup>282</sup> See *id.*

enforcement videos of black people being shot are often published, whereas in at least one instance, news footage of the on-air shooting of two white anchors was “selectively censored” out of respect and concern for their families?<sup>283</sup>

A credible argument could be made that the entire country, and those in the rest of the Americas and beyond, are heavily impacted. It seems almost impossible to avoid the horrific images that are spread in moments over social media. Whether through Twitter, Facebook (“Twitter and Facebook are teeming with anguish”<sup>284</sup>), Instagram, or a host of other online sources, we are all being buffeted by both personal and long-distance tragedies in a way that was never possible before. Technology has brought both progress and great distress. Do we really suppose that all of this will not have long-term effects on society as a whole?

For now, these costs have gone unmeasured. But someday soon, someone will start the process of quantifying these intangible harms. Many of these costs stem from police brutality, but other costs are increased exponentially by unfair or inadequate government responses to police violence. If victims were compensated fairly for losses through the civil system, and police were punished for bad acts, most of the societal costs mentioned above could be lessened. Minorities might still distrust the police, but might nonetheless trust “the system” to do the right thing in the end. The government could ease the overall societal burden by responding appropriately and fairly and in a timely manner. A mechanism should be developed to either redirect these costs to law enforcement, or more effort must be made to change their behavior through legislation, political pressure or a new federal mandate.

## V. LEGAL & POLICY RECOMMENDATIONS

*There is a “constant tension in our society between individual accountability and a measure of social responsibility.”*<sup>285</sup>

There were three issues presented at the outset of this article: (1) Can current U.S. law prevent the unjustified killing of racial minorities by law enforcement; (2) What are the costs of failing to stop this injustice; and (3) Is there anything that can be done to improve the outcome for all Americans? First, U.S. law, as currently enacted, is unequal to the task of preventing and deterring racial killing. The criminal law was never

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<sup>283</sup> *See id.*

<sup>284</sup> Jenna Wortham, *Racism’s Psychological Toll*, N.Y. TIMES (June 24, 2015), [http://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html?\\_r=0](http://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html?_r=0).

<sup>285</sup> DOBBS, *supra* note 79, at 21.

designed for this purpose, and the available remedies in civil tort law are only designed to address the narrow class of injuries that can be addressed through state statutory wrongful death or survival actions or federal claims for money damages.

Second, the direct costs of these legal failures include approximately 1,000 deaths each year, in addition to broken homes and families. The indirect costs include significant financial impacts on state and local governments, costs to communities, distrust of law enforcement and lack of trust in the social compact, cost to our international reputation, Black flight, and an overall cost to law and order. Added up, these costs to society are much greater than is currently articulated in the scholarly literature. Third, increased reporting, data tracking, transparency and accountability will make it safer for everyone residing in the U.S, immediate neighbors, and those who wish to visit or move here in the future. Addressing these issues will make a stronger, and “more perfect” union.<sup>286</sup>

Accountability is a two-sided coin. Officers should not oversee policing themselves.<sup>287</sup> Law enforcement officers should be held accountable to those above (state legislators or Congress), and those below. As servants of the public, they must carry out the power of the state with responsibility. The vast majority of officers understands this responsibility and are a credit to their profession. This article is not meant to demonize or denigrate those who put their lives on the line for others every day. Individual citizens must respect law and order and the right of public officials to enforce state and federal laws. Preventing crime is a legitimate and important public interest.

Some cities have successfully implemented reforms to decrease the number of fatal encounters, and to increase transparency and accountability. The city of Camden, New Jersey started over with a new police force focused on community policing; after doing so, its rates of violent crime and murder fell.<sup>288</sup> The city of Cleveland, Ohio established a commission to connect local law enforcement with community groups, implemented changes in the training of officers, and involved civilians and watchdog

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<sup>286</sup> The purpose of the Federal Constitutional Convention of 1787 was the same as stated in the Preamble to the U.S. Constitution: “We the People of the United States, *in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America.” See INDEPENDENCE HALL (Blog), *To Form a More Perfect Union* (emphasis added), available at <http://www.ushistory.org/independencehall/history/indhall4.htm>.

<sup>287</sup> See Newman, *supra* note 76, at 457 (positing that deterrence should not be in the hands of individual officers).

<sup>288</sup> See Lopez, *supra* note 69 (explaining community policing means that law enforcement takes a bottom up approach to policing and works with local institutions, such as churches and community organizations to rebuild trust).

agencies as part of an effort to increase oversight and accountability.<sup>289</sup> In the city of Seattle, Washington, community members developed a new policing policy regarding the use of force by local law enforcement.<sup>290</sup> The new policy in Seattle requires officers to “de-escalate” tense situations unless the circumstances require the use of force.

The Oklahoma City Police were recently praised by organizers for BLM for their deliberately non-confrontational approach to a large BLM protest that was held three days after the shooting in Dallas that saw five officers killed: “[t]he way (police) chose to be present helped people to see them as people and not as the flawed system.”<sup>291</sup> According to a police captain supervising the event: “[The police] showed a lot of restraint and showed a lot of patience. They didn’t react when it was unnecessary. They greeted people, they engaged with the crowd.”<sup>292</sup> Similarly, law enforcement in Tulsa, Oklahoma acted decisively and deliberately after the unjustified police shooting of Terence Crutcher, an unarmed African-American man who was killed while standing beside his stalled vehicle: after reviewing the dashcam footage, they immediately released the video recording of the incident and promptly arrested and charged the officer involved.<sup>293</sup> Actions like these can go a long way to restoring public trust in law enforcement.

The Los Angeles and New York police departments have reformed their practices to ban officers from firing warning shots, from shooting at vehicles, or from firing unless they believe their lives are in danger.<sup>294</sup> As a

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<sup>289</sup> *See id.*

<sup>290</sup> Admittedly, this positive measure came about as the result of a settlement agreement executed between the Department of Justice and the Seattle Police Department. That fact does not negate the fact that residents of Seattle now have a say, jointly with police, in how law enforcement operates (especially since the new use of force policy went further than the mandates of the settlement agreement). In a promising development, the new use of force policy articulates a statement of principle on the Seattle Police Department’s commitment to “Defending the Civil Rights and Dignity of All Individuals, While Protecting Human Life and Property and Maintaining Civil Order.” *See* Samuel Walker, *The Community Voice in Policing: Old Issues, New Evidence*, CRIM. JUST. POL’Y REV., 1, 8-9 (2015).

<sup>291</sup> Ben Felder, *OKC Police Praised by Black Lives Matter Protest Organizers*, OKLAHOMAN (July 12, 2016, 12:00 AM), <http://newsok.com/article/5509145>.

<sup>292</sup> This strategy of de-escalation and engagement is a step in the right direction for civilian encounters with the police. *See id.*

<sup>293</sup> The officer has been ordered to stand trial for manslaughter due to her unreasonable behavior. Peter Holley & Katie Zezima, *White Tulsa Officer Charged in Death of Unarmed Black Man, Freed on Bond*, WASH. POST (Sept. 23, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/09/22/tulsa-officer-who-fatally-shot-terence-crutcher-charged-with-first-degree-manslaughter/?utm\\_term=.f519da80c77b](https://www.washingtonpost.com/news/post-nation/wp/2016/09/22/tulsa-officer-who-fatally-shot-terence-crutcher-charged-with-first-degree-manslaughter/?utm_term=.f519da80c77b).

<sup>294</sup> *America’s Police Kill Too Many People. But Some Forces are Showing How Smarter, Less Aggressive Policing Gets Results*, ECONOMIST (Dec. 11, 2014),

result, “the number of shots fired by police in New York has fallen by more than two-thirds since 1995.”<sup>295</sup> The Los Angeles Police Department now recognizes officers who “de-escalate,” or “go above and beyond normal police work to avoid using deadly force during dangerous encounters” with the “Preservation of Life” medal.<sup>296</sup> Both New York and Los Angeles have also diversified their police forces so that “the police are now blacker than the populations they serve.”<sup>297</sup> New York also adopted a pilot program to have officers wear body cameras.<sup>298</sup> Some say that body cameras have been responsible for the increased number of indictments of officers (while at the same time noting that just six percent of killings are captured by body cameras).<sup>299</sup> Generally, these efforts represent innovative approaches to minimizing the use of force, and should be lauded and supported.

There are still areas of policing and police culture that can be improved or changed. These recommendations spring from this article and from the accumulated research and experience of other experts in this area:

1. The federal government needs to increase its oversight of local law enforcement. Given the track record of failure, we need more government, not less. Citizens should have a means of making complaints directly to the federal government if state law enforcement agencies are unresponsive. The Department of Justice should regularly monitor departments that receive frequent complaints, and then proceed against the most egregious offenders. As discussed above, the federal government will require law enforcement to report all “arrest-related” deaths.<sup>300</sup> Public health scholars recommend that this data should be reported at both the local and national level.<sup>301</sup>

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<https://www.economist.com/news/united-states/21636044-americas-police-kill-too-many-people-some-forces-are-showing-how-smarter-less>.

<sup>295</sup> *Id.*

<sup>296</sup> Kate Mather, *LAPD honors officers for their bravery and, for the first time, their restraint*, L.A. TIMES (Sept. 9, 2016, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-honors-20160908-snap-story.html>.

<sup>297</sup> *America's Police Kill Too Many People. But Some Forces are Showing How Smarter, Less Aggressive Policing Gets Results*, *supra* note 294.

<sup>298</sup> *Id.*

<sup>299</sup> See Kindy, *supra* note 164.

<sup>300</sup> See Jon Swaine, *Police Will be Required to Report Officer-Involved Deaths Under New US System*, GUARDIAN (Aug. 8, 2016), <https://www.theguardian.com/us-news/2016/aug/08/police-officer-related-deaths-department-of-justice> (“Accurate and comprehensive accounting of deaths that occur during the process of arrest is critical for law enforcement agencies to demonstrate responsiveness to the citizens and communities they serve”).

<sup>301</sup> Also, some scholars suggest that police brutality is a public health issue and therefore

These steps would go a long way to increasing transparency in this area. Transparency is the first step to accountability.

There should be a new federal watchdog (that perhaps operates under the authority of the DOJ) that is responsible for creating uniform policing standards and ensuring compliance with such policies.<sup>302</sup> Perhaps something along the lines of an enforcer for financial crimes. It could be called the Policing Review Board or the National Taskforce on Police Accountability.<sup>303</sup> Whatever the name, there should be a separate and distinct body that is not beholden to state law enforcement agencies and that reports to Congress. Even if a new federal watchdog is not established, “problem” cities with a history of serious and sustained public complaints should receive priority for oversight. The point here is to restore public trust and confidence in law enforcement to improve relationships with minority communities.

2. Citizen oversight boards should be established over all police departments to monitor local law enforcement. Like judges, police officers are public servants. Under the public supervision rationale, the public (taxpayers) pay their salaries and therefore should be allowed to play a supervisory function.<sup>304</sup>

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all law enforcement-related deaths should be reportable conditions “which would allow public health departments to report these data in real-time, at the local as well as national level, thereby providing data needed to understand and prevent the problem.” *See, e.g.,* Nancy Krieger, Jarvis T Chen, Pamela D Waterman, Matthew V Kiang & Justin Feldman, *Police Killings and Police Deaths Are Public Health Data and Can Be Counted*, PLOS MED (Dec. 8, 2015), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001915> (noting also that some scholars suggest police brutality is a public health issue and therefore all law enforcement-related deaths should be reportable conditions “which would allow public health departments to report these data in real-time, at the local as well as national level, thereby providing data needed to understand and prevent the problem.”).

<sup>302</sup> *See, e.g.,* James Queally, *Newark Police to be Monitored by Federal Watchdog*, STAR LEDGER (Feb. 9, 2014, 6:06 AM), [http://www.nj.com/essex/index.ssf/2014/02/justice\\_department\\_will\\_place\\_federal\\_monitor\\_over\\_newark\\_police\\_sources\\_say.html](http://www.nj.com/essex/index.ssf/2014/02/justice_department_will_place_federal_monitor_over_newark_police_sources_say.html).

<sup>303</sup> Similar to the name of the non-profit, National Police Accountability Project, a project of the National Lawyer’s Guild. *See* <https://nlg-npap.org/>.

<sup>304</sup> The Department of Justice already does this, in a one-off or piecemeal fashion for “problem” cities (for example, Newark, and New Orleans have received federal monitors after reports of serious abuses by law enforcement). In addition, it seems that the Supreme Court has alluded that there is a need to develop national standards for police conduct. *See*

3. Police departments need to properly train, supervise, and discipline problem officers. Police training should, like Seattle's new policy, encourage officers to make attempts at de-escalation before resorting to the use of force. This may increase trust of police by minority communities. Records should be maintained and there should be something like a "three strikes" policy for problem officers. Problem officers who are repeat offenders should be removed from duty without pay if they violate internal policies and procedures, or if they shoot someone without lawful justification.
4. Police culture needs to be addressed directly. As discussed above, an institutionalized code of silence persists today. This custom puts pressures on officers to either cover up or ignore wrong-doing by their colleagues or face abuse. There needs to be a formalized system of checks that will bring red flags or unlawful conduct to the attention of supervisors and provide protection for whistle-blowers.
5. Body cameras are not a panacea, but they should be compulsory for all police departments. Again, assuming cost is an issue, funds should be prioritized for police departments with a history of problem officers or problematic citizen encounters. Police departments in the United Kingdom adopted body cameras several years ago and they have revolutionized policing.<sup>305</sup> Of course, body cameras can be switched off. Law enforcement should enhance training and adopt de-escalation policies around this issue. Failing any of the above, even if police departments do not have the resources to afford body cameras, members of the public who record police violence should not be punished.
6. Police departments need to become more diverse. Law enforcement agencies need to recruit diverse candidates to combat the "us vs. them" mentality discussed above. Running

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Vermont Agency of Nat. Res. v. U.S. ex rel Stevens, 529 U.S. 765 (2000). See, e.g., *Medico v. Time*, 643 F.2d 134 (3d Cir. 1981).

<sup>305</sup> See THE HARV. L. REV. ASS'N, *supra* note 214 (citing Bracken Stockley, *First Police Force to Make Body Cameras Compulsory for Frontline Officers*, JUST. GAP (Feb. 14, 2014) <http://thejusticegap.com/2014/02/britain-moves-towards-fully-digitalised-criminal-justice-system/>).

a marketing and recruitment campaign that reaches women and minorities amid today's headlines may be difficult. Nonetheless, those confronted with the awesome weight of police power need to see that those upholding the law reflect a diverse cross-section of the community, and that the police are not akin to an occupying force in poor or urban communities. When looking for new officers, the focus should be on recruiting guardians, not warriors. Some scholars also argue that psychological testing should be conducted on candidates as part of the recruitment process to increase trust and minimize violence between officers and minorities.<sup>306</sup> More research is needed on the hiring of combat veterans as police officers and their use of lethal force in policing.<sup>307</sup>

7. The use of community policing should be further explored. As mentioned above, such measures are already being implemented with success in some communities. In cities where officers “walk the beat,” there is less friction between law enforcement and the public. The trust that was once eroded can be rebuilt and earned.
8. Section 1983 needs to be revised. The statute should be revised to allow for respondeat superior or vicarious liability imposed on the unlawful state actor's employer—law enforcement agencies that fail to properly supervise, train or discipline subordinate officers.<sup>308</sup> This will also address the problem of juries who are unwilling to impose monetary damages against individual officers who may be underpaid, hard-working and “just doing their jobs.” Police departments are not feeling the pain of any financial sanctions as a result of paying settlements: “[t]heir budgets are really very strongly insulated

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<sup>306</sup> Others suggest that such profiling is ineffective. See Michelle A. Travis, *Psychological Health Tests for Violence-Prone Officers: Objectives, Shortcomings, and Alternatives*, 46 STAN. L. REV. 1717, 1765 (1994) (providing that psychological profiling cannot identify officers who may be violence prone).

<sup>307</sup> See Weichselbaum & Schwartzapfel, *supra* note 216 (“But even those who advocate hiring combat veterans as police officers have raised alarms. The Justice Department and the International Association of Chiefs of Police put out a 2009 guide for police departments to help with their recruitment of military veterans. The guide warned, ‘Sustained operations under combat circumstances may cause returning officers to mistakenly blur the lines between military combat situations and civilian crime situations, resulting in inappropriate decisions and actions — particularly in the use of less lethal or lethal force.’”).

<sup>308</sup> See Newman, *supra* note 76, at 456.

from the financial effects of their actions.”<sup>309</sup> As one scholar notes, statutory reforms should also allow not only individuals to sue, but to allow the U.S. government itself to intervene as a plaintiff and to initiate a suit on behalf of the wronged individual.<sup>310</sup> Allowing the government to sue would not require prosecutors to jeopardize their relations with local law enforcement agencies, and having the government as the sole plaintiff (or an additional plaintiff) would likely have a better chance of success than a criminal prosecution.<sup>311</sup> Finally, other types of damages, including punitive damages should be available against municipalities for tolerating police brutality.<sup>312</sup> Although juries may be unlikely to impose them, punitive damages should perhaps be imposed against individual officers as well.<sup>313</sup> This has not been the case in the past, but the time certainly seems ripe for a “New Deal” with respect to civil rights.

9. States need to step into the breach. Taxpayers should not have to fund murder. Already, there are areas where state law grants less immunity to public officials than does federal law. State-based indemnification provisions should be revised as necessary to not “dampen the deterrent effect of lawsuits on officers,”<sup>314</sup> and to not insulate officers from unlawful conduct. California has often led the nation in other important areas, including environmental and immigration reform. If the federal government is unable or unwilling to lead, progressive states

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<sup>309</sup> Milligan, *supra* note 194 (“Just 0.02 percent of dollars to plaintiffs in police misconduct suits were paid by the offending officers themselves.”).

<sup>310</sup> Newman, *supra* note 76, at 454.

<sup>311</sup> This outcome is likely because as it stands, juries are more likely to sympathize with law enforcement over a §1983 victim. “At the defendants’ table sit the police officers—well-groomed, in full uniform, and with the American flag figuratively wrapped around them and often literally displayed on their jackets. Except in those rare instances when the party injured is the white, middle-class victim of police mistake, the §1983 plaintiff is likely to be black, or Puerto Rican, poor, disheveled, a felon, and often a drug addict.” If the plaintiff is the U.S. government, such considerations would presumably not come into play. Newman, *supra* note 76, at 454.

<sup>312</sup> *Ciralo v. City of N.Y.*, 216 F.3d 236, 249 (2nd Cir. 2000) (Calabresi, J., concurring) (urging the Supreme Court to overrule *City of Newport v. Fact Concerts, Inc.*, to allow the award of punitive damages against cities in order to deter unlawful killings by public officials) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)).

<sup>313</sup> “Civil rights doctrine relies heavily on the assumption that police officers pay settlements and judgments out of their own pockets.” Schwartz, *supra* note 194, at 887.

<sup>314</sup> Schwartz, *supra* note 194, at 891.

concerned about stemming the violence should take the initiative.

10. More research must be conducted regarding the impact of fear (as distinct from overt or unconscious racism) as a driver of police violence towards African Americans, and especially towards black males. According to civil rights attorney Constance Rice, “cops can get into a state of mind where they’re scared to death. When they’re in that really, really frightened place they panic, and they act out of that panic.”<sup>315</sup> Of course, fear of others who are different should not be used as an excuse to justify police violence. However, ignoring this reality is counterproductive as well.

## VI. CONCLUSION

We cannot countenance a status quo where the police, meant to serve and protect, sometimes turn their guns toward the people instead. We must continue to be able to depend upon the law as an agent of change and a righter of wrongs. For those in the United States who have contributed their blood equity to building a better life for their families, we should make sure that they do not have to fear becoming targets of police violence. We must do this so that the “American Dream” does not turn into a nightmare.

*What happens to a dream deferred?  
Does it dry up  
Like a raisin in the sun?  
Or fester like a sore—  
And then run?  
Does it stink like rotten meat?  
Or crust and sugar over—  
Like a syrupy sweet?  
Maybe it just sags  
like a heavy load.  
Or does it explode?*<sup>316</sup>

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<sup>315</sup> Zenobia Jeffries, *Fear: What Police Reform Doesn’t Address*, YES MAG. (July 11, 2016), <http://www.yesmagazine.org/peace-justice/for-police-and-black-citizens-the-real-problem-is-fear-20160711/> (“In her work in Los Angeles, she interviewed over 900 officers in 18 months and the overarching theme of their answers related to their fear—of Black men.”).

<sup>316</sup> Langston Hughes, *Dream Deferred*, in *The Panther & the Lash*, 14 (1992).

There are reasons to hope that the dream can still become reality for minorities and communities of color. We can choose to act now to bolster our civil rights laws. We can remember the traditional tort law goals of compensation, deterrence, and fairness. We can revise our laws and policies to make sure that they meet and embody these goals. We can hold the police accountable without jeopardizing their lives or the lives of the people that they are meant to serve. If we do not, we will only see the costs continue to mount.

So too, the anger.