

PREVENTION AND REMEDIATION OF POLICE EXCESSIVE FORCE AND SIMILAR COMPLAINTS

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I.

This Article, like many, started with a narrow focus. Because I believe that the substantive criminal law is an ineffective, frequently inapposite and blunt instrument, it strikes me that any proposal to reduce or eliminate excessive police force,¹ and related complaints by some alteration(s) of substantive or procedural aspects of the criminal law, will not work.² I believe part of this is in part a function of the fact that we have fifty-two systems of criminal law and procedure in the United States, and even more sub-systems based on local conditions.³ In addition, we have multitudinous police, fire, and sheriff jurisdictions and structures.

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1. In general, this Article will focus on allegations of improper use of force in a racial context but in recent months a number of suits have been filed against police use of force in the context of otherwise lawful demonstrations against excessive use of force and there is no reason that the changes and procedures suggested below should not be applicable in such context. *See, e.g.*, Rachel Droze, *Lawsuit: BLM Activist Alleges Police, City of Des Moines Violated Her Civil Rights and Used Excessive Force When Arresting Her*, WE ARE IOWA WOI-DT ONLINE (Jan. 5, 2021, 2:27 AM), <https://www.weareiowa.com/article/news/community/black-lives-matter-liberation-movement-blm-activist-suing-city-des-moines-dmpd-police-department-officers-protests-george-floyd/524-a9b25124-51ad-482d-8768-916b4172256e> [<https://perma.cc/MUY7-ZCRS>].

2. This is not to say that no one is convicted criminally for using excessive force. The tragic killing of the teenaged William Chapman in Portsmouth, Virginia led to the conviction for voluntary manslaughter of Officer Stephen Rankin in 2016. *See Verdict Reached for Former Officer Accused in Black Teen's Killing*, CBS NEWS (Aug. 4, 2016), <https://www.cbsnews.com/news/stephen-rankin-william-chapman-verdict-reached/> [<https://perma.cc/FG9N-SKC2>]. At the same time in several of these cases, like the case of Michael Brown, the St. Louis grand jury refused to indict Officer Darren Wilson who resigned apparently without any disciplinary proceeding. The refusal to indict was reviewed by a new St. Louis County prosecutor, Wesley Bell, who declined to move forward also based on his reading of the grand jury minutes which were released for public scrutiny. *See infra* note 10.

3. Many states' criminal laws do not spell out rules for police use of force or do so in an incomplete manner. One of the most comprehensive attempts is to be found in Article 35 (Defense of Justification) of the New York State Penal Law. *See* N.Y. PENAL LAW § 35.30 (McKinney 2019). New York attempts, it seems, to articulate common sense standards (there are one or two exceptions to this to be found in Article 35). But even this attempt is incomplete and has been in effect during a series of

Because I believe that reforming the substantive and procedural law of crimes will not work to solve the problem of excessive use of force,⁴ and is also unwieldy, my main proposal was going to be devising and applying better police disciplinary procedures.⁵ Currently, I think it is fair to say that many jurisdictions do not have even a basic disciplinary system in place that works, especially with respect to allegations of excessive force.⁶ But it is

high profile claims of police use of excessive force almost all of which ended without a decision to prosecute and without discipline being imposed. I do not mean to imply that all allegations of excessive use of force are correct, but the anecdotal evidence suggests what most people believe about most cases, e.g., that it is extremely difficult to convict or discipline a police officer for use of excessive force because of the great deference given to police action by prosecutors, jurors, grand jurors, and police dominated disciplinary review mechanisms. The tremendous legal confusion surrounding the death of Ahmaud Arbery in Georgia is illustrative. *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html> [https://perma.cc/6AF6-HQ9E].

4. As discussed *infra*, there have been a variety of proposals to remove the handling of police prosecutions from the hands of local prosecutors and, for instance, place it in the hands of a special prosecutor or the state's attorney general. See, e.g., Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016); Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & POL'Y 137 (2015). In saying that I do not believe the substantive criminal law and procedure will likely be effective at controlling excessive uses of force by the police, I am not saying that that law should be changed in any way to make assault, homicide, and related offenses not be available to a prosecutor in dealing with a case of possible police excessive use of force.

5. One of the most thoughtful discussions of issues with respect to disciplinary procedures containing many helpful suggestions is a publication of the Harvard John F. Kennedy School of Government's Program in Criminal Justice Policy and Management. DARREL W. STEPHENS, NAT'L INST. OF JUSTICE, POLICE DISCIPLINE: A CASE FOR CHANGE (2011), <https://www.ncjrs.gov/pdffiles1/nij/234052.pdf> [https://perma.cc/LXF4-F63U]. See *infra* note 28.

6. The widely publicized case of the death of Eric Garner in New York City on July 17, 2014, caused by Officer Daniel Pantaleo is an exception. Following the refusal of a New York grand jury to indict Officer Pantaleo NYPD instituted a disciplinary proceeding against him. This proceeding led to his termination as a police officer and the stripping away of his pension. See *Timeline of Key Events in Eric Garner Chokehold Death*, ASSOCIATED PRESS (July 16, 2019), <https://apnews.com/article/ec7ac5a664d74cdab852d639c0da08f4> [https://perma.cc/6MYM-GZHC]. The Louisville police department sought to terminate two officers, one of whom applied for the no-knock search warrant and the other who fired the shot that killed Breonna Taylor. The Department had previously fired the officer who sprayed ten rounds into Breonna Taylor's apartment. Tessa Duvall, Darcy Costello & Bailey Loosemore, *Louisville Police Seek to Fire 2 More Officers Connected to Fatal Shooting of Breonna Taylor*, USA TODAY (Dec. 31, 2020, 11:26 AM), <https://www.usatoday.com/story/news/nation/2020/12/29/breonna-taylor-death-louisville-police-seek-fire-another-detective/4081400001> [https://perma.cc/R4NU-6AXQ]. The officers in question were subjected to a termination hearing on January 4, 2021. See Dylan Lovan, *Detectives in Breonna Taylor Case Face Termination Hearing*, PBS NEWS (Jan. 4, 2021, 1:29 PM), <https://www.pbs.org/newshour/nation/police-officers-in-breonna-taylor-case-face-termination-hearing> [https://perma.cc/AA3B-DZVH]. The officers were subsequently terminated. See David K. Li, *2 Louisville Police Officers Fired Over Roles in Fatal Shooting of Breonna Taylor*, NBC NEWS (Jan. 6, 2021, 5:14 PM), <https://www.nbcnews.com/news/us-news/2-louisville-police-officers-fired-over-roles-fatal-shooting-breonna-n1252751> [https://perma.cc/3YEW-TGF4]. The Breonna Taylor case shows that

also true that those with disciplinary systems (typically large police forces), have found them to be ineffective due to police mismanagement and timidity or union⁷ domination. Practical difficulties also exist in devising adjudicatory mechanisms that provide knowledgeable decision making about community sensitivities,⁸ crime and police practices without becoming captive to one perspective or another.⁹ A further problem with placing heavy reliance on police disciplinary procedures to handle excessive force complaints is that many of these procedures provide that a proceeding under it must abate if the officer resigns.¹⁰

officers can be fired quickly and without a disciplinary proceeding in some cases.

7. Myself and many others are critical of police union domination of disciplinary procedures and also of a seemingly blind defense of police misconduct or worse. I understand that frequently a union representative is the only one a police officer can turn to in a moment of crisis with respect to a claim of excessive force. This function of the union is a good thing but is to be distinguished from turning over directly or indirectly the levers of power in a disciplinary process to an individual or entity with an inherent conflict of interest.

8. In the long and widespread debate during the 1960s and 1970s about the wisdom and parameters of establishing Civilian (wholly or partially) Review Boards to review police functioning, one of the most vexed issues was how to find civilians (if they exist) with the expertise to review police functioning and the corollary fear that these boards would be captured by anti-police factions. *See generally* Kelly McConney Moore, *For Civilian Review Boards to Work, They Must Avoid Past Mistakes*, ACLU CONN. (Sept. 10, 2020, 6:00 PM), <https://www.acluct.org/en/news/civilian-review-boards-work-they-must-avoid-past-mistakes> [<https://perma.cc/7RTS-QTCA>]. As recently as this year, a major city, Portland, Oregon, in the midst of major civil unrest, had under consideration the creation of a Community Police Oversight Board which could not include any past or present police or their family members but should include particularly people who have experienced racism, mental illness, addiction or alcoholism. The proposed Board was to be given very broad investigative powers over the Portland Police Bureau. The City of Baltimore has one of the most unbalanced CRB structure. *See Civilian Review Board*, OFFICE OF EQUITY & C.R. OF BALT., MD., <https://civilrights.baltimorecity.gov/civilian-review-board> [<https://perma.cc/MB97-3857>].

9. *See generally* RON SAFER, KISH KHEMANI & JAMES O'KEEFE, PREVENTING AND DISCIPLINING POLICE MISCONDUCT: AN INDEPENDENT REVIEW AND RECOMMENDATIONS CONCERNING CHICAGO'S POLICE DISCIPLINARY SYSTEM (2014), https://www.chicago.gov/content/dam/city/progs/safety/Preventing_Disciplining_Police_Misconduct_Dec_2014.pdf [<https://perma.cc/J6QJ-684K>].

10. Officer Darren Wilson resigned from the St. Louis police force while the criminal investigation of the shooting of Michael Brown was pursued (twice at the state level and then federally also). *See* Joel Currier, *St. Louis County Prosecutor Reopened Michael Brown Shooting Case But Won't Charge Darren Wilson*, ST. LOUIS POST-DISPATCH (July 31, 2020), https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutor-reopened-michael-brown-shooting-case-but-wont-charge-darren-wilson/article_8e537a12-4dd0-51d8-a325-11ba7ddd20e.html [<https://perma.cc/8YSU-TFNX>]; *see also* U.S. DEP'T OF JUST. REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf

The case of George Floyd¹¹ in Minneapolis is on point. Floyd's death by asphyxiation on May 25, 2020, was caused by Officer Derek Chauvin (a nineteen-year veteran of the Minneapolis police force) kneeling on his neck, for almost nine minutes, in the absence of a visible threat to Officer Chauvin or his three fellow police officers who sought to detain Floyd. Minneapolis has had a sophisticated policy disciplinary procedure in place for more than eight years.¹² It is more intricate and thoughtful than most, and yet the officer who held George Floyd down causing his death had been the subject of numerous complaints and interactions,¹³ including one¹⁴ that resembles in seriousness of facts in the George Floyd case. Yet Officer Chauvin was still on duty and tasked with the apprehension of people like George Floyd. On April 20, 2021, Derek Chauvin was found guilty of unintentional second-degree murder, third-degree murder, and second-degree

[<https://perma.cc/NBW7-ZG4V>]. Some states, Michigan for example, provide that once an investigation has begun, an officer's resignation does not obviate the possibility that a record will be available for future employers to review. See Law Enforcement Officer Separation of Service Record Act, MICH. COMP. LAWS §§ 28.561–.565 (2020), [http://www.legislature.mi.gov/\(S\(140neuypsta3nn1zb5ze403r\)\)/mileg.aspx?page=getObject&objectName=mcl-Act-128-of-2017](http://www.legislature.mi.gov/(S(140neuypsta3nn1zb5ze403r))/mileg.aspx?page=getObject&objectName=mcl-Act-128-of-2017) [<https://perma.cc/5YFZ-94H7>].

11. There is a fair amount of misinformation about Officer Derek Chauvin and what has happened to him following George Floyd's death. He was fired on May 26, 2020. He was charged on May 29, 2020 with three counts of homicide, one of which was later dismissed. *State v. Chauvin*, No. 27-CR-20-12646, 2020 WL 6270693, at *1 (Minn. Dist. Ct. Oct. 21, 2020). Wilson was found guilty of unintentional second-degree murder, third-degree murder, and second-degree manslaughter; see *infra* Note 16.

12. See MINNEAPOLIS, MINN., ORDS. Ch. 172 n.3 (2021 Supp. 62 Update 7) (adopted Sept. 21, 2012), https://library.municode.com/mn/minneapolis/codes/code_of_ordinances/376408?nodeId=C_OOR_TIT9FIPOPR_CH172POCOOV (amending chapter title from "Civilian Police Review Authority" to "Police Conduct Oversight") [<https://perma.cc/SB5N-2N8H>]. The Hennepin County District Court ruled on January 12, 2021 that former Officer Chauvin would be tried separately from the other officers for homicide related offenses. Chao Xiong, *Derek Chauvin Will Be Tried Separately in Death of George Floyd*, STARTRIBUNE (Jan. 13, 2020, 9:00 AM), <https://www.startribune.com/derek-chauvin-will-be-tried-separately-in-death-of-george-floyd/600009598/> [<https://perma.cc/3U5G-HYGD>].

13. See Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> [<https://perma.cc/YQ5V-8CAQ>].

14. See *Officer Charged in George Floyd's Death Used Fatal Force Before and Had History of Complaints*, WASH. POST (May 29, 2020, 5:47 PM), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/> [<https://perma.cc/XD54-W86P>].

manslaughter.¹⁵ He has since requested a new trial and will likely appeal the decision.¹⁶

A further problem with the idea of devising and implementing a better police disciplinary system is the multiplicity and variability of United States police and sheriff departments. There are around 18,000 such departments;¹⁷ many are very small, too small to accommodate staff and administer sophisticated police disciplinary mechanism. This is not to say that larger departments should not try to devise and operate better disciplinary systems, but even they are subject to capture, union domination, and lack of knowledge and expertise. And of course, all of this leaves the many small or medium sized systems without much of a disciplinary procedure.

So, with the criminal law and police disciplinary systems offering only partial and frequently weak controls, what alternative approaches are there? Many have argued that the core problem is systemic racism in the social order and on police forces. Those who espouse this position then offer little except canned schemes for sensitivity and implicit bias training that seem unlikely to have a direct impact or even be implemented.¹⁸ Those strategies also frequently have little impact and, even worse, become the subject of derision due to their lack of sophistication or practical focus.¹⁹

15. Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR, (Apr. 20, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial> [<https://perma.cc/GM4B-L8MJ>].

16. *Derek Chauvin: ex-officer convicted in George Floyd's murder asks for new trial*, THE GUARDIAN, (May 4, 2021), <https://www.theguardian.com/us-news/2021/may/04/derek-chauvin-george-floyd-new-trial> [<https://perma.cc/KTT3-ZW2G>].

17. DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA (2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/4CPQ-DFCH>].

18. *See generally* Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR, (Sept. 10, 2020), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> [<https://perma.cc/LG85-3D2H>]; Belinda Luscombe, *She Wrote a Book About Bias. Here's How She Thinks Police Departments Should Approach Reform*, TIME IDEAS, (June 8, 2020), <https://time.com/5849172/police-racial-bias/> [<https://perma.cc/SX64-T5CL>].

19. *See generally* Tiffany L. Green & Nao Hagiwara, *The Problem with Implicit Bias Training*, SCI. AM., (Aug. 28, 2020), <https://www.scientificamerican.com/article/the-problem-with-implicit-bias-training/> [<https://perma.cc/WU93-4LU9>]; Abby Tang & Michelle Yan Huang, *The problem with implicit bias trainings*, BUS. INSIDER, (Feb. 17, 2021), <https://www.businessinsider.com/implicit-bias-trainings-imperfect-should-we-stop-them-2020-7> [<https://perma.cc/2G6A-PF8V>]; Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, N.Y. MAG.: THE CUT, (Jan. 2017), <https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html> [<https://perma.cc/F2U8-DPXM>].

II.

I believe that the only viable solution is to mandate some form of a statewide or regional²⁰ police force structure with better training, higher educational requirements for officer entry, less of a militarized appearance and modus operandi, and more of a superstructure for review and discipline of issues with respect to claims for excessive force and related problems such as unjustified racial disparities in stops, arrests, charging and sentencing. The cost effect of such a change might well be the opposite of defunding the police.

As an important parenthetical, one cannot underestimate the difficulties in identifying and measuring unfair patterns in all of these areas of police activity.²¹ Mere racial disparities, while evidence, may not be conclusive

20. One of the major issues that needs addressing is who supervises the police in the United States. Some cities have police boards or commissions and some report to a mayor. I favor having the police report directly to a politically accountable official. In connection with the proposal made here although there is a lot to be said for regional police systems such systems usually span a number of political boundaries and there is, therefore, no single politically accountable official for such a regional police system to report to. One could imagine in a large state like California have several regions, all reporting to the governor. In smaller states a unified police authority would report to the governor. What would be undesirable is to have the police report to someone who is not accountable. The proposal being made does not mean that local supervision of everyday aspects of police operations would be eliminated but it would, especially in medium to small jurisdictions give supervisors more of a structure above them to both support and review such local supervision.

21. There have been a number of efforts to measure and document racial disparities in policing. The leading study of high quality by Roland Fryer, an Economics Professor at Harvard, in 2018 found that there is a fifty-percent differential in the likelihood that African-American and Hispanics will experience some form of force during interactions with the police. Roland G. Fryer, *An Empirical Analysis of Racial Differences in Police Use of Force* 3–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22399, 2018), https://www.nber.org/system/files/working_papers/w22399/w22399.pdf [<https://perma.cc/L9ST-D353>]. At the same time, the Fryer study found that there were no racial differences in the rate at which African Americans and Hispanics were involved in shootings in connection with such an interaction. *Id.* There are a number of problems in measurement. First, African-Americans tend to live in highly urbanized areas which tend to have more crime and also more effective policing of crime (more arrests, convictions, and longer sentences). See Parker, Horowitz, Brown, Fry, Cohn & Igielnik, *What Unites and Divides Urban, Suburban and Rural Communities*, PEW RSCH. CTR., (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/> [<https://perma.cc/HN86-C33V>]. Second, even though poverty rates have been trending downwards, “the share of Blacks in poverty was 1.8 times greater than their share among the general population” in 2020; a higher crime rate in more impoverished groups is not surprising. John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. Census Bureau, (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/MJ5P-7KYX>]. Third, and finally, high rates of criminal activity occur in social situations in which living arrangements and family structure are less stable both of which are more

given variations in types of crimes across racial and geographic lines. A major goal is of course to inhibit or rule out invidious, e.g., racially motivated,²² differentials in the deployment of unjustified force, stops, arrests, and sentencing. These additional aspects of unfair police behavior further show why a disciplinary procedure standing alone is inadequate no matter how well devised.

In determining ways to identify and measure invidious differentials in police practices in other areas of the law, sometimes, if a significant differential is discerned, the burden of proof²³ is flipped back onto the entity or individual accused of the practices. But this flipping is potentially unreliable or unfair, particularly as it relates to an officer's employment. First, one must agree on what the comparison data is. Second, in some cases, neighborhoods, regions, or races are characterized by a higher or lower incidence of a particular crime. Whites may disproportionately commit embezzlement, rural people may disproportionately commit certain types of thefts, and urbanized populations may in fact engage in more armed robberies or may disproportionately commit random violence.²⁴

What I propose is a very tall order, the statewide or regional²⁵ reorganization of all police structures. This would face all kinds of legal, practical and constitutional barriers. Existing police forces would be swept aside and that will produce enormous resistance. One thing that might soften this resistance would be to organize police forces within the context of our states (or compacted groups of states).²⁶ Focusing on the state level would allow some states to move forward without 100% participation by all the states, and without constitutionally suspect²⁷ federal one-size-fits-all

likely in urban areas. *Family Life and Delinquency and Crime: A Policymakers' Guide to the Literature*, U.S. DEPT. OF JUST., (Jan. 15, 1993), <https://www.ojp.gov/pdffiles1/Digitization/140517NCJRS.pdf>.

22. Police bias is also possible and to be controlled if aimed at teenagers or males.

23. Title VII of the Civil Rights Act of 1964, codified in part at 42 U.S.C. § 2000e(k).

24. For a breakdown of various offenses by race, see *Law Enforcement & Juvenile Crime*, U.S. DEPT. OF JUST. OFF. OF JUST. PROGRAMS, (2019), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2 [<https://perma.cc/8ZVC-QNKP>]. For a breakdown of urban and rural crime divide, see *2019 Crime in the United States*, U.S. DEPT. OF JUST.: FED. BUREAU OF INVESTIGATION, (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-18> [<https://perma.cc/49FY-PRPE>]; see also Weisheit, Falcone & Wells, *Rural Crime and Rural Policing*, U.S. DEPT. OF JUST. OFF. OF JUST. PROGRAMS (1994), <https://www.ojp.gov/pdffiles/rcrp.pdf>.

25. See generally *supra* note 21.

26. There are of course vast and complex state-to-state differences among the stated statutory and constitutional aspects of law enforcement organization.

27. See *United States v. Morrison*, 529 U.S. 598 (2000).

legislation. At the same time the current multiplicitousness of police structures and entities lead to a radical discontinuity in police practices, effectiveness, and quality. This might be tolerable if important considerations of social cohesion and racial fairness were not uppermost in people's minds as more fully discussed below.

It is worth noting that a more broadly organized system of police entities would have other advantages for communities and individual officers. Police would not be tightly tied to a single location or system in a state. Their training would be relevant within whatever larger structure the police organization obtains, and it would allow easier transfers for any reason. It would create more of a system of professional promotion for police. Communities would benefit from occasional change (and less stagnation) but of course easier transfers would require training as to the social (and if across state lines the legal) terrain of a new jurisdiction. Caspar, Wyoming is different from Salt Lake City, Utah.

III.

Changing police structures is a big step towards better handling of excessive force allegations (whether racially discriminatory or not) and other claims of invidious discrimination in policing. It should be noted that broadening the structural base will still mean that there will need to be a disciplinary procedure in place, one that probably will resemble some of the better crafted procedures that exist today.²⁸ At the same time, it is my belief that the details of such a disciplinary process are less significant than the structure of police organization and the personnel who administer the process.

An ideal state-wide or regional police disciplinary procedure should, at a minimum, have the following features: (1) a description of behaviors that might lead to discipline,²⁹ (2) an adjudicatory tribunal composed of three

28. Although it has some significant flaws, the Minneapolis procedure is an example of one that is generally thoughtfully drafted. *See* MINNEAPOLIS, MINN., ORDS. Ch. 172 (2021 Supp. 62 Update 7), https://library.municode.com/mn/minneapolis/codes/code_of_ordinances/376408?nodeId=COOR_TIT9FIPOPR_CH172POCOOV [<https://perma.cc/SB5N-2N8H>].

29. The U.S. Military has historically imposed sanctions under the Uniform Code of Military Justice for "conduct unbecoming an officer and a gentleman." 10 U.S.C. § 933. This standard has proven to be less workable in a more diverse and heterogeneous society, and the absence of a standard in older police disciplinary procedures or any description of the possible infractions is similarly vague and objectionable.

individuals, including at least one expert on policing not drawn from the local area and with no ties to the officer being investigated,³⁰ (3) decisions of the tribunal would require the concurrence of only two members, (4) the burden of proof required for a determination of a violation would be by clear and convincing evidence,³¹ (5) the third tribunal member should be from the local area of the source of any complaint but should not represent any particular advocacy organization including the police force or any collective bargaining representative,³² (6) local courts possessing nationwide service of process powers by federal legislation should have the power to compel the production of evidence and the attendance of witnesses, (7) the proceeding should be governed by rules similar to the rules governing arbitrations including arbitral rules of evidence,³³ and (8) the proceeding may commence and/or continue after the resignation of the target of the investigation, not to administer discipline but to create a record for future employers and others.

As a concomitant to the foregoing suggestions, all records of charges and disciplinary proceedings should be permanent public records. One of the major complaints against many existing disciplinary procedures is that either records are not kept or else they are not publicly available.³⁴ At the

30. Advocates for greater vigilance against excessive force will no doubt object to the composition of the board. My view is that the two extremes we see in current proposals, heavily police oriented versus heavily interest group/community oriented, are likely to lead to erroneous determinations or at least more controversy with respect to the cases involved. Expertise in policing is absolutely necessary for the fair judgment of officers whose careers may be ended and disinterest judgment is absolutely necessary to maintain police credibility.

31. It is probable that advocates for greater harshness in the treatment of excessive force violations will object to this. My reason for including this is that an officer's livelihood and occupation are at stake. A determination that an officer used excessive force is likely a career ending event even if the sanction imposed is lower than dismissal.

32. This is the opposite of the approach in the more recent version of Baltimore's civilian review board. See OFFICE OF EQUITY & C.R. OF BALT., MD., *supra* note 8.

33. See AM. ARB. ASS'N, EMP. ARB. RULES AND MEDIATION PROC. (2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [<https://perma.cc/CDA6-K8NR>].

34. See Jason Clayworth & Andrea May Sahouri, *Wall of Protection: How Hundreds of Iowa Police Complaints Stay Secret*, DES MOINES REGISTER (Jan. 10, 2021), <https://www.desmoinesregister.com/in-depth/news/investigations/2021/01/10/des-moines-iowa-police-officer-misconduct-records-secret/3976034001/>; available at <https://www.desmoinesregister.com>. Following the refusal of the St. Louis County grand jury to indict Officer Darren Wilson and the huge public uproar, the St. Louis County Prosecutor Robert McCulloch released most of the grand jury testimony (which is usually held secretly in Missouri). See *Documents from the Ferguson Grand Jury*, CNN (Nov. 25, 2014), <https://www.cnn.com/interactive/2014/11/us/ferguson-grand-jury-docs/index.html> [<https://perma.cc/5R3M-2SCY>].

same time, I do not believe that police disciplinary proceedings should be open to the public because they are not criminal proceedings rather they are in the nature of employment decisions. Because these are in the nature of employment decisions each side should bear its own legal fees except, as in trusts and estates proceedings, I would give the arbitrators the power to award attorneys' fees to an officer if they find that the disciplinary proceeding was brought without a reasonable foundation in the facts of the matter.

Finally, and most importantly, an ideal police disciplinary procedure should identify the range of possible sanctions and give some indication of when the highest and lowest sanctions should be imposed. The highest sanction is obviously dismissal and elimination of pension and other post-retirement accrued benefits, which should be reserved for purposeful and intentional deaths or serious bodily harm. But dismissal without removal of benefits should be the putative sanction for any other use of excessive force causing death or serious bodily injury.³⁵ Sanctions should begin at the lowest level include permanently filed letters of reprimand, restitution (by payment or by an offset to any future pay) for stolen property or improperly billed hours,³⁶ suspension without pay, mandatory training, reassignment away from patrol duties, reductions of pay or grade, denial of promotion, and other disciplinary remedies. Having said this, it is clear that it is impossible to expound a 100% fully reticulated list of offenses with pre-set, tailored sanctions because the facts and circumstances may suggest either lenity or severity in punishment just as in criminal sentencing, civil rights violations or civil assessment of damages. It should also be clear under such rules that a determination and imposition of a sanction in such a proceeding does not eliminate the possibility of a criminal conviction tort or other civil liability.³⁷

35. "Excessive" force obviously requires some level of intention even in this latter case like recklessness or a high degree of negligence but would not include purely accidental (e.g., non or low-level negligent) deaths or serious injuries.

36. Massachusetts has pursued a significant number of state police officers for falsely inflating working hours.

Former Massachusetts State Police Troopers Charged with Conspiracy to Embezzle Overtime Funds and Wire Fraud, U.S. ATTORNEY'S OFFICE DIST. OF MASS. (Dec. 11, 2020), <https://www.justice.gov/usao-ma/pr/former-massachusetts-state-police-troopers-charged-conspiracy-embezzle-overtime-funds-and> [https://perma.cc/AFU9-8QBX].

37. One complex sub-issue is whether the disciplinary sanction can strip away any immunity or employer liability contribution to the injured party. As an initial matter, it seems improper to strip

So, why will anything change if my suggestions on disciplinary procedures are adopted? The answer is that such an enlarged police structure will: (1) provide more resources and a deeper staff to handle such allegations within the disciplinary procedure, (2) make it easier to find non-involved but expert adjudicators, and (3) remove the decisions (depending on how the procedure is structured) from the hands of people close to the officer being investigated and from the community in which the alleged excessive force occurred.

But these changes should be accompanied by other changes. One feature of a more unified police structure should be to reduce the appearance of militarization of the police,³⁸ by way of new types of uniforms,³⁹ and reduced deployment of deadly weapons on regular patrols. It will remain true that citizens need to be able to generally identify officers out on patrol to add deterrence and build trust. Related to this, today in urban and suburban areas police overwhelmingly are seated in cruisers while on call whether driving around or parked.⁴⁰ Where possible, police should be on foot, on bicycles, or on motorized vehicles like scooters to be visible and to be able to build trust and reliance in communities. In rural areas, patrol cars are indispensable, but police should endeavor to be visible in venues where gather, like in schools or public parks.

Along with a change in the appearance of policing, we should undertake a widespread effort to educate children and adults about policing and the law. This should be focused on male students particularly those between the ages of twelve and eighteen. Various “police-in-the-schools” programs have

away such liability protection retroactively and also as a matter of deterrence such immunity or liability protection should remain in place while an officer is employed to encourage police employers to work to prevent (in advance) excessive use of force by training, etc.

38. California has recently banned the wearing by police officers of military camouflage. *California Lawmakers Approve 5 out of 7 Police Reform Bills*, KUSI NEWS SAN DIEGO (Sept. 1, 2020), <https://www.kusi.com/california-lawmakers-approve-5-out-of-7-police-reform-bills/> [https://perma.cc/K2DA-LDN8].

39. It is interesting that police chiefs seem to always appear on television in a full-dress uniform sometimes with a holstered revolver. I am sure that these officers believe they are sending a message of being in charge, frequently in a crisis setting. But part of crisis management is the need to deescalate the sense of the crisis being out of control. It is curious that the detectives frequently behind the police chief are in suits or jackets or shirts with a badge.

40. On a cold, winter morning, January 3, 2021, while running at 5:30 am this author observed in two separate police jurisdictions two sets of squad cars parked (appositionally) so that the officers in the adjoining cars could chat.

been attempted and generally lacked staying power.⁴¹ This is in part because many large cities station police officers or school police officers in the schools for violence prevention purposes. What I am suggesting would not be a “police in the schools program,” but legal criminal education taught by regular instructors, and aimed at explaining the purposes and goals of the criminal law as opposed to police activities.

Another set of initiatives would be in the area of more stable deployment of officers, particularly in urban and suburban areas, in smaller, consistent squad groups so officers know and understand each other and build camaraderie and esprit.⁴² These groups would report to a stable continuing intermediate level supervisor, a sergeant typically. The squad approach to policing has been a common suggestion, but has met fierce resistance from officers and unions because it reduces flexibility in assignments for many officers. But the problems we face require change and this resistance should be overcome.

Finally, apparent racial disparities in the rate of stops and arrests, sentence length, and rates of incarceration should be further investigated and efforts should be devised to ameliorate them. The first thing that could be done is to make an officer’s proven pattern of racially motivated or otherwise discriminatory stops and arrests a disciplinary offense. Ameliorating the heavily disparate sentencing of African-Americans and to a lesser extent Hispanics—even if not overtly discriminatory—requires major changes in our overly complex and harsh sentencing rules. We have too many side constraints in sentencing, e.g., mandatory minimums, multiple enhancements, overlapping and redundant federal/state crimes, manufactured additive crimes (“armed criminal action” in Missouri⁴³) which balloon the sentences typically for racial minorities and younger males even if not a racial minority.⁴⁴ Finally, the federal Sentencing

41. For various criticisms of existing police activities in the schools, see *Solutions, END ZERO TOLERANCE*, <https://www.endzerotolerance.org/police-in-schools-policy-reforms> [<https://perma.cc/8T9A-B7HS>]. The American Bar Association has a Division of Public Education which seeks to involve public schools and their teachers in educating about the role of law. See *Division for Public Education*, AM. BAR ASS’N, https://www.americanbar.org/groups/public_education/ [<https://perma.cc/9R5V-WEQW>].

42. See Safer et al., *supra* note 9, at 27–36.

43. MO. REV. STAT § 571.015 (2020), <https://revisor.mo.gov/main/OneSection.aspx?section=571.015> [<https://perma.cc/6528-VEGL>].

44. Why are minorities and younger males most affected by these features? Many of them are added by a Congress seeking (outside of the Second Amendment) to express special displeasure with

Guideline ranges are too high.⁴⁵ Interestingly, our smaller, more rural states have generally not relied as heavily on such additive, punitive sentencing techniques. Thus, while there are likely institutional forces that will resist the structural changes proposed there are alternative possibilities that might be more acceptable.

IV.

It seems useful to pause at this point and say it would seem like I am proposing a massive organization change to deal with what is admittedly a big problem without any guarantee of success. But the proposal here would set in place a structure that, in the future, would be better able to devise new approaches to the problem that leads to this proposal. If the creation and implementation of more broadly-based police structures is to be undertaken, what will the federal role be and, similarly, how do we encourage states to move in this direction in light of major resistance? There have been proposals recently to encourage such reforms by using the federal spending power.⁴⁶ The Community Relations Service of the U.S. Department of Justice has issued a “Conciliation Handbook” to help communities experiencing conflict over claims of excessive force.⁴⁷ But this well-intentioned effort has obviously had limited efficacy during the numerous conflicts over this issue in recent years.

robbery/burglary/larceny offenses committed while in possession of a weapon. *See generally Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, CONG. RSCH. SERV. (Mar. 25, 2019), <https://crsreports.congress.gov/product/pdf/R/R45629> [<https://perma.cc/R5LD-NL68>]; *Muscarello v. United States*, 523 U.S. 125, 132 (1998); *Smith v. United States*, 508 U.S. 223, 240 (1993); 114 *Conr. Rec.* 22231 (1968). Many others are focused on repeat offenders particularly those who offend repetitiously within a fairly short period of time. Urban crime is disproportionately committed by minority members and theft type offenses are disproportionately committed by young males. *See generally 2019 Crime in the United States Table 42*, U.S. DEPT. OF JUST.: FED. BUREAU OF INVESTIGATION, (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-42> [<https://perma.cc/BN4Q-7RAH>]; *2016 Crime in the United States Table 20*, U.S. DEPT. OF JUST.: FED. BUREAU OF INVESTIGATION, (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-20> [<https://perma.cc/CD4S-K53A>].

45. U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENT’G COMM’N 2010), <https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-5> [<https://perma.cc/YL6T-KBKJ>].

46. *See* Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351 (2011); *see also* James P. Turner, *Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991 (1999).

47. COMMUNITY RELATIONS SERVICE, U.S. DEP’T OF JUST., POLICE USE OF EXCESSIVE FORCE: A CONCILIATION HANDBOOK FOR THE POLICE AND THE CMTY. (2002), <https://www.justice.gov/archive/crs/pubs/pdexcess.htm> [<https://perma.cc/BN2U-U5BY>].

Further, it seems implausible to think that the states will accede to the removal of policing from their traditional control. A less drastic method for ensuring effective reviews of claims of excessive police force has been implemented in Iowa and Wisconsin.⁴⁸ Iowa leaves the decision to prosecute with the county district attorney but the State's Attorney General, the longest serving state attorney general in U.S. history, a Democrat, has been informally reviewing such cases since about 2004. Of the thirty cases his office has reviewed he has not recommended prosecution even once (following the district attorney's non-prosecution decision). The office did concur in two prosecutions of such cases but neither individual was convicted. The Iowa legislature has recently given the Attorney General formal statutory authority to engage in these reviews.⁴⁹ In a recent case involving allegations by protesters against the Des Moines police, the protesters have filed civil lawsuits alleging multiple federal and state violations of law by the police in connection with demonstrations related to the George Floyd case.⁵⁰ It is not clear that any disciplinary action was undertaken against the officers responsible for the claimed violations, but that seems unlikely. In another tragic case, Wisconsin announced in January, 2021 that under procedures similar to Iowa's, prosecutors had decided not to pursue charges against police in connection with the death of Jacob Blake.⁵¹

What can one conclude from Iowa's and Wisconsin's thin record? It is not implausible to believe that Iowa and Wisconsin (maybe because much of those states is thinly populated) that rural and semi-rural areas may produce fewer cases of excessive force. But it may also be that other, less

48. *Only Two Officers Charged for Force Since '04*, DES MOINES REG. col 4, p. 1C, Dec. 26, 2020; *Officer Involved Critical Incident*, WISCONSIN DEP'T OF JUST., <https://www.doj.state.wi.us/dci/officer-involved-critical-incident> [<https://perma.cc/U73X-4W26>]; Jason Stein, *Wisconsin DOJ Issues First Full Guidelines for Investigating Fatal Police Shootings*, MILWAUKEE J. SENTINEL (May 17, 2017), <https://www.jsonline.com/story/news/crime/2017/05/21/wisconsin-doj-issues-first-full-guidelines-investigating-fatal-police-shootings/331053001/> [<https://perma.cc/GLH9-RH96>].

49. See DES MOINES REG., *supra* Note 49.

50. *Lawsuits Accuse Police of Using Excessive Force*, DES MOINES REG. Dec. 27, 2020, col. 1, at 1C.

51. See Kenosha News Staff, *Photos: Peaceful Protest Follows No Charges Being Filed in Kenosha Police Shooting of Jacob Blake*, KENOSHA NEWS (Jan. 5, 2021), https://www.kenoshanews.com/news/local/photos-peaceful-protest-follows-no-charges-being-filed-in-kenosha-police-shooting-of-jacob-blake/collection_6bad83b6-65ca-5728-aba7-b0eb7c1ef462.html#6 [<https://perma.cc/VLX6-TB3C>].

exculpatory, explanations could be the case. Rural police tend to arrest people outside of the presence of disinterested witnesses and generally do not have body cams.⁵² It seems implausible that since 2004 there are ZERO cases of excessive force by police in Iowa.

During the summer of 2020, New York enacted a series of police reforms and one state senate bill (A1601c/S02574-C) that creates an Office of Special Prosecutor for Police-Involved Deaths.⁵³ It is odd that this Office is limited to cases of death. Another piece of legislation in the same package (A10002B/S3595) requires the New York Inspector General and the Port Authority Inspector General to investigate “allegations of corruption, fraud, use of excessive force, criminal conflicts of interest, or abuse by officer agencies.”⁵⁴ The United States’ experience with special prosecutors at the state and federal level does not leave me sanguine that this provision, as shown in Iowa, will change the outcomes with respect to excessive force claims under the substantive criminal law; but, it is hard to imagine that this innovation will hurt. By contrast, the Inspector General and Port Authority provisions strike me as likely to generate evidence which might well lead to more prosecutions.

One might expect California to move to deal with allegations of excessive police force. In its most recent legislative session, the State did enact some police reform measures.⁵⁵ California is one of five states that has no procedure to decertify a police officer following a determination that they committed serious misconduct by using excessive force.⁵⁶ The state legislature refused to enact a measure that would have allowed this. It also declined to make public disciplinary records of police officers accused of racist or discriminatory acts, have a history of wrongful arrests and searches, etc.⁵⁷ Interestingly, New York moved to repeal such shielding of

52. See generally *Concerns of Rural Law Enforcement: What We Heard From the Field*, U.S. DEPT’T OF JUST: DISPATCH (2019), https://cops.usdoj.gov/html/dispatch/09-2019/rural_le.html.

53. India L. Sneed, *New York State Police and Criminal Justice Reforms Enacted Following George Floyd’s Death*, GREENBERG TRAURIG (June 24, 2020), <https://www.gtlaw.com/en/insights/2020/6/new-york-state-police-and-criminal-justice-reforms-enacted-following-george-floyds-death> [https://perma.cc/DGB9-G9A9].

54. *Id.*

55. See KUSI NEWS SAN DIEGO, *supra* note 39.

56. *Id.*

57. *Id.* The Legislature did pass two modest reforms. First, it amended the California government code to require that all localities amend their use of force policies to prohibit the use of a “carotid restraint or choke hold.” A.B. 1196, 2019-20 Reg. Sess. (Cal. 2020), CAL. GOV’T CODE § 7286.5 (West 2021). It also amended the Government code with respect to officer involved shootings to

disciplinary records of police officers, firefighters, correction officers, and peace officers.⁵⁸ As another example, New Jersey's (appointive) Attorney General has moved aggressively by rulemaking to inhibit, review, and act on excessive force by police officers.⁵⁹ Finally, a few states, curiously Florida and Texas, require that the disciplinary process be entirely open to the public.⁶⁰

V.

I want to return to a significant issue I mentioned earlier: whether the changes I propose (and others made elsewhere) are premised on a belief that there is a vast structural racist cast to our criminal laws and our policing. I am personally not certain about this, but I think that a decent respect⁶¹ for the opinion of our African-American citizens requires all of us to treat this claim seriously and to act on it. Racial and/or ethnic animosity and suspicion is common in societies. Ireland, Scotland, France, China, the Balkans, and Malaysia all provide numerous examples of sustained communal tensions based on race, religion, national origin, and other differences. It would be implausible to think that such tensions and suspicions do not manifest themselves in some ways in the United States' criminal justice system, not just in policing, but in charging and sentencing as well.

I do not believe that there is any one silver bullet to cure or eradicate the effects of racial animosity in our criminal justice system. But it does seem to me that it is appropriate given the enormity of the social divide⁶² on

require a report and to authorize an investigation by a local prosecutor or the Attorney General of California of any shooting by a police officer that causes the death of an unarmed civilian. A.B. 1506 2019-20 Reg. Sess. (Cal. 2020), CAL. GOV'T CODE § 12525.3 (West 2021).

58. See KUSI NEWS SAN DIEGO, *supra* note 39.

59. Russell Berman, *The Nation's Most Ambitious Police Reform Launches Today*, ATLANTIC (Dec. 21, 2020), <https://www.theatlantic.com/politics/archive/2020/12/new-jersey-police-reform/617436/> [<https://perma.cc/D36C-VCS3>].

60. See STEPHENS, *supra* note 5. For a comprehensive list of police changes and reforms across the United States, the most common being the banning of chokeholds, see *Changes to Policing Policy in the States and 100 Largest Cities, 2020*, BALLOTPEDIA, https://ballotpedia.org/Changes_to_policing_policy_in_the_states_and_100_largest_cities_2020 [<https://perma.cc/3XQQ-H47Q>].

61. See DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); transcript available at <https://www.archives.gov/founding-docs/declaration-transcript> [<https://perma.cc/E3R6-79T2>].

62. See Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS PSYCH. SCI. 183 (2018); but see Michael Siegel, *Racial Disparities in Fatal Police Shootings: An Empirical Analysis Informed by Critical Race Theory*, 100 B.U. L. REV. 1069, 1071–72

this and the pervasiveness throughout history of such feelings to act in a way that should both respond in particular cases and also to seek to ameliorate those suspicions. When President Truman wisely desegregated the Armed Forces in 1948, it was argued that this would exacerbate racial tension and distrust that existed in the Army. It is true that Truman's act did not eliminate racial tension, but it is widely believed that it helped to reduce it.⁶³

As I conclude, it is fair to ask why we, as a society, should embark on such significant changes in policing when the statistical case showing widespread purposeful discrimination or other injustice in policing is lacking.⁶⁴ The answer is that our constitutional order has as its very first principle an abhorrence of the wrongful exercise of executive power in policing.⁶⁵ Our notions of due process and habeas corpus are premised on the idea that state coercion can only occur when there is a convincing legal justification. Every instance of the use of excessive force is right at the heart of our fears of tyranny and oppression. Whatever might be said about the data about the use of excessive force and the other forms of wrongful exercise of the criminal justice system it, at least, raises such a serious question that a response is not only possible but is required.

Maybe the best thing that can come of what I propose is some sense of amelioration. But that itself is a good thing. And as a society we owe it to the family of William Chapman and others like him whose lives have been lost or made more difficult by excessive force. But we also owe it to all victims of excessive force without regard to race to act. And finally, we owe our police a redesigned structure of police organization that will improve their professional lives and take them, as a whole, out of the midst of a social conflagration about race.

(2020).

63. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

64. See generally Fryer *supra* note 20.

65. See MASS. CONST. pt. the first, <https://malegislature.gov/laws/constitution> [<https://perma.cc/C6GA-6DUM>].

