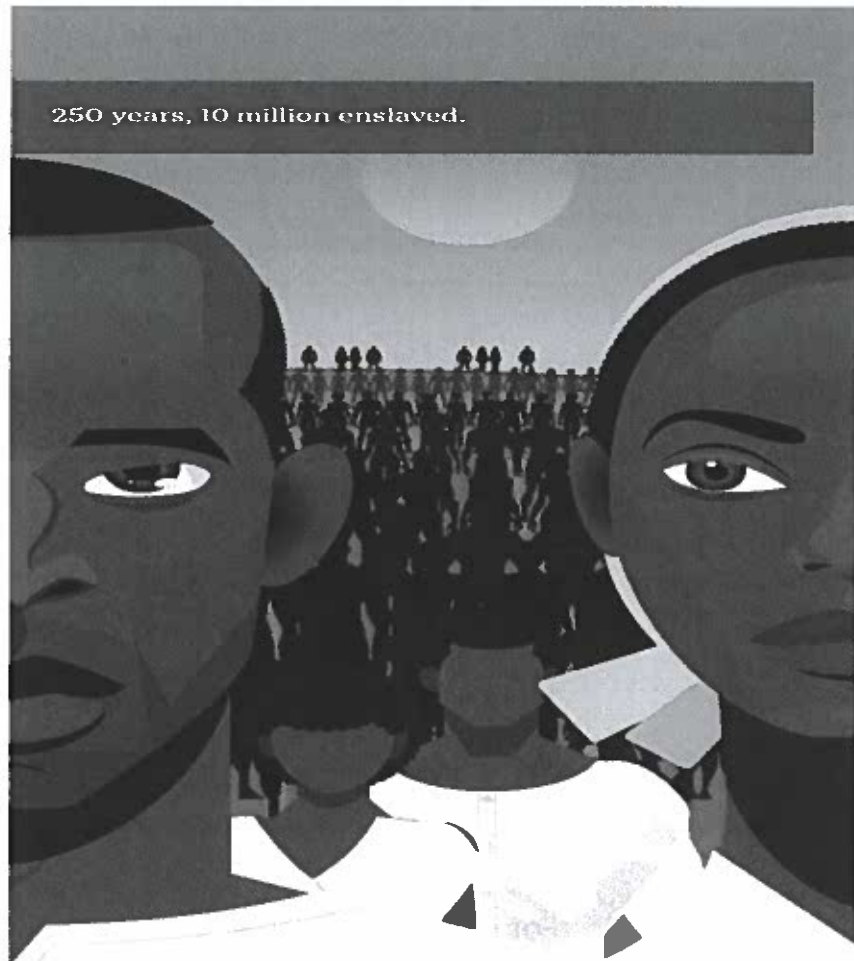


1619 Project Discussion Article Packet



Topic: Policing and the Black Community

September 9, 2021

6:30 – 8:00 pm

Zoom ID: 823 648 5349

Password: 691353

Upcoming 1619 programs

All programs hosted on Zoom from 6:30 pm – 8:00 pm.

Topics subject to change.

November 14, 2021

Slavery and Prisons

October 11, 2021

Slavery in America 1619-1659

Chapter 1 of

Four Hundred Souls: A Community History of African America 1619-2019

Please check our 1619 Discussion homepage at:

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<https://www.youtube.com/hashtag/1619projectdiscussion>

And our Facebook Group:

<https://www.facebook.com/groups/3125417084169554>

For more information

Contact: John Piche' at jpiche@heightslibrary.org

"In June 1971, President Nixon declared a "war on drugs." He dramatically increased the size and presence of federal drug control agencies, and pushed through measures such as mandatory sentencing and no-knock warrants.

A top Nixon aide, John Ehrlichman, later admitted: "You want to know what this was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. 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."

Yes, Black America Fears the Police. Here's Why.

 propublica.org/article/yes-black-america-fears-the-police-heres-why

by Nikole Hannah-Jones

March 4, 2015, 9:14 p.m. EST

Last July 4, my family and I went to Long Island to celebrate the holiday with a friend and her family. After eating some barbecue, a group of us decided to take a walk along the ocean. The mood on the beach that day was festive. Music from a nearby party pulsed through the haze of sizzling meat. Lovers strolled hand in hand. Giggling children chased each other along the boardwalk.

Most of the foot traffic was heading in one direction, but then two teenage girls came toward us, moving stiffly against the flow, both of them looking nervously to their right. "He's got a gun," one of them said in a low voice.

I turned my gaze to follow theirs, and was clasping my 4-year-old daughter's hand when a young man extended his arm and fired off multiple shots along the busy street running parallel to the boardwalk. Snatching my daughter up into my arms, I joined the throng of screaming revelers running away from the gunfire and toward the water.

The shots stopped as quickly as they had started. The man disappeared between some buildings. Chest heaving, hands shaking, I tried to calm my crying daughter, while my husband, friends and I all looked at one another in breathless disbelief. I turned to check on Hunter, a high school intern from Oregon who was staying with my family for a few weeks, but she was on the phone.

"Someone was just shooting on the beach," she said, between gulps of air, to the person on the line.

Unable to imagine whom she would be calling at that moment, I asked her, somewhat indignantly, if she couldn't have waited until we got to safety before calling her mom.

"No," she said. "I am talking to the police."

My friends and I locked eyes in stunned silence. Between the four adults, we hold six degrees. Three of us are journalists. And not one of us had thought to call the police. We had not even considered it.

We also are all black. And without realizing it, in that moment, each of us had made a set of calculations, an instantaneous weighing of the pros and cons.

As far as we could tell, no one had been hurt. The shooter was long gone, and we had seen the back of him for only a second or two. On the other hand, calling the police posed considerable risks. It carried the very real possibility of inviting disrespect, even physical harm. We had seen witnesses treated like suspects, and knew how quickly black people calling the police for help could wind up cuffed in the back of a squad car. Some of us knew of black professionals who'd had guns drawn on them for no reason.

This was before Michael Brown. Before police killed John Crawford III for carrying a BB gun in a Wal-Mart or shot down 12-year-old Tamir Rice in a Cleveland park. Before Akai Gurley was killed by an officer while walking in a dark staircase and before Eric Garner was choked to death upon suspicion of selling "loosies." Without yet knowing those names, we all could go down a list of unarmed black people killed by law enforcement.

We feared what could happen if police came rushing into a group of people who, by virtue of our skin color, might be mistaken for suspects.

For those of you reading this who may not be black, or perhaps Latino, this is my chance to tell you that a substantial portion of your fellow citizens in the United States of America have little expectation of being treated fairly by the law or receiving justice. It's possible this will come as a surprise to you. But to a very real extent, you have grown up in a different country than I have.

As Khalil Gibran Muhammad, author of *The Condemnation of Blackness*, puts it, "White people, by and large, do not know what it is like to be occupied by a police force. They don't understand it because it is not the type of policing they experience. Because they are treated like individuals, they believe that if 'I am not breaking the law, I will never be abused.'"

We are not criminals because we are black. Nor are we somehow the only people in America who don't want to live in safe neighborhoods. Yet many of us cannot fundamentally trust the people who are charged with keeping us and our communities safe.

As protest and revolt swept across the Missouri suburb of Ferguson and demonstrators staged die-ins and blocked highways and boulevards from Oakland to New York with chants of "Black lives matter," many white Americans seemed shocked by the gaping divide between law enforcement and the black communities they are supposed to serve. It was no surprise to us. For black Americans, policing is "the most enduring aspect of the struggle for civil rights," says Muhammad, a historian and director of the Schomburg Center for Research in Black Culture in New York. "It has always been the mechanism for racial surveillance and control."

In the South, police once did the dirty work of enforcing the racial caste system. The Ku Klux Klan and law enforcement were often indistinguishable. Black-and-white photographs of the era memorialize the way Southern police sicced German shepherds on civil rights protesters and peeled the skin off black children with the force of water hoses. Lawmen were also involved or implicated in untold numbers of beatings, killings and disappearances of black Southerners who forgot their place.

In the North, police worked to protect white spaces by containing and controlling the rising black population that had been propelled into the industrial belt during the Great Migration. It was not unusual for Northern police to join white mobs as they attacked black homeowners attempting to move into white neighborhoods, or black workers trying to take jobs reserved for white laborers. And yet they strictly enforced vagrancy laws, catch-alls that gave them wide discretion to stop, question and arrest black citizens at will.

Much has changed since then. Much has not.

Last Fourth of July, in a few short minutes as we adults watched the teenager among us talking to the police, we saw Hunter become a little more like us, her faith a little shaken, her place in the world a little less stable. Hunter, who is biracial and lives with her white mother in a heavily white area, had not been exposed to the policing many black Americans face. She was about to be.

On the phone, she could offer only the most generic of suspect descriptions, which apparently made the officer on the other end of the line suspicious. By way of explanation, Hunter told the officer she was just 16. The police called her back: once, twice, then three times, asking her for more information. The interactions began to feel menacing. "I'm not from here," Hunter said. "I've told you everything I know."

The fourth time the police called, she looked frightened. Her interrogator asked her, "Are you really trying to be helpful, or were you involved in this?" She turned to us, her voice a quiver. "Are they going to come get me?"

"See," one of us said, trying to lighten the mood. "That's why we don't call them."

We all laughed, but it was hollow.

My friend Carla Murphy and I have talked about that day several times since then. We've turned it over in our minds and wondered whether, with the benefit of hindsight, we should have called 911.

Carla wasn't born in the United States. She came here when she was 9, and back in her native Barbados, she didn't give police much thought. That changed when she moved into heavily black Jamaica, Queens.

Carla said she constantly saw police, often white, stopping and harassing passersby, almost always black. "You see the cops all the time, but they do not speak to you. You see them talking to each other, but the only time you ever see them interact with someone is if they are jacking them up," she said. "They are making a choice, and it says they don't care about you, it tells you they are not here for your people or people who look like you."

Carla herself was arrested at a young age—because she was present when her cousin pushed through a subway turnstile without paying. The teenagers were cuffed, thrown in a paddy wagon, booked and held overnight. At 15, Carla, then a student at The Dalton School, a prestigious private academy in Manhattan, had an arrest record.

That experience, along with many others, informed Carla's decision on July 4.

"I am a responsible adult, but I really can't see having a different reaction. Isn't that weird?" she told me. "By calling the police, you are inviting this big system—that, frankly, doesn't like you—into your life. Sometimes you call and it is not the help that comes."

"So, no, I wouldn't call the police," she said. "Which is sad, because I want to be a good citizen."

I moved to the historic Bedford-Stuyvesant neighborhood of Brooklyn in 2011. Before then, I had been living in Portland, Oregon, and when I chose my new home in the gritty big city, it was partly because it was only a block away from a police precinct. That proximity made me feel safer—I figured crime would be less common with so many police nearby. Inadvertently, however, I also picked a prime target area of the city's stop-and-frisk program—a system of policing that caught so many innocent black and brown men in its dragnet that a federal judge found it unconstitutional in 2013.

My block is fairly typical of Bed-Stuy. My neighbors, until recently, were all black and included everyone from laborers to college professors. Both immaculately kept brownstones and boarded-up townhouses line my street. We have block meetings and a community garden. Police are a constant presence, speeding down the street to the precinct or walking the beat. Sometimes, I escort my daughter to the store underneath police watchtowers with tinted windows that pop up around the neighborhood with no warning, then disappear just as suddenly—their entire existence ambiguous yet alarming. I have witnessed from my window, countless times, police stopping someone, usually a young man, who is walking down the street. These men are often searched and questioned as they go to the bodega or head home from work or school.

A few months ago, a police officer approached my neighbor as he was leaving the bodega and began questioning him. My neighbor is quiet and respectful, but he also is poor and transient. He tends to look disheveled, but the worst thing I've seen him do is drink beer on the stoop.

When he asked why he was being stopped, the police grabbed him and threw him to the ground. As someone recorded the incident on a cellphone, police shot my neighbor with a Taser gun and then arrested him.

He was never told why police stopped him. The only thing they charged him with was resisting arrest. But this arrest cost him his job and a fine he will struggle to pay. If he doesn't pay, a judge will issue a bench warrant, and instead of preventing crime, the police will have created a criminal.

Across the street and a few doors down from me, my neighbor Guthrie Ramsey has his own story. Guthrie was born in Chicago and grew up in a family that did not emphasize the obstacles their children would face. "I was socialized to believe that the police were our friends," he said.

Yet one night, some years ago, while driving his teenage son to a soccer game, Guthrie was pulled over by police. Within minutes, he and his son were sprawled on the ground, with guns drawn on them. The police believed Guthrie fit the description of a suspect. Guthrie, a short, easy-going guy with a contagious laugh, managed to point the police to his University of Pennsylvania faculty ID. That's right: He's an Ivy League professor. And a noted musician.

"It was so frightening. It was humiliating. You get so humiliated that it's hard to even get to the anger," he told me. "You just don't get to experience interactions with the police as a garden-variety circumstance."

These types of stories in black communities are so ubiquitous as to be unremarkable. If my husband is running very late and I cannot get hold of him, my mind does not immediately go to foul play. I wonder if he's been detained.

This fear is not unjustified. Young black men today are 21 times more likely to be shot and killed by police than young white men. Still, it's not that black Americans expect to die every time they encounter the police. Police killings are just the worst manifestations of countless slights and indignities that build until there's an explosion.

Since 1935, nearly every so-called race riot in the United States—and there have been more than 100—has been sparked by a police incident, Muhammad says. This can be an act of brutality, or a senseless killing. But the underlying causes run much deeper. Police, because they interact in black communities every day, are often seen as the face of larger systems of inequality in the justice system, employment, education and housing.

In the months since Ferguson, many pundits have asserted that black Americans deserve this type of policing, that it is a consequence of their being more likely to be both the perpetrators and victims of violent crime. "White police officers wouldn't be there if you weren't killing each other," former New York Mayor Rudy Giuliani argued on *Meet the Press* as the nation awaited the grand jury decision in the Michael Brown shooting. It should be noted that Giuliani oversaw the NYPD during two of the most notorious cases of police brutality in recent memory, the sodomy of Abner Louima and the death of Amadou Diallo, who was unarmed, in a hail of 41 bullets. Both were black men.

What Giuliani was saying, in essence, is that law-abiding citizens deserve to be treated with suspicion because they share racial traits with the tiny number among them who commit crimes.

Black communities want a good relationship with law enforcement because they want their families and property to be safe. After all, it is true that black communities often face higher rates of crime; in 2013, more than 50 percent of murder victims across the country were black, though only 13 percent of the total population is. But it's also true that crime reduction efforts by black people in black communities have contributed to the recent, historic drop in crime across the country.

So why are black Americans still so often denied the same kind of smart policing that typically occurs in white communities, where police seem fully capable of discerning between law-abiding citizens and those committing crimes, and between crimes like turnstile-jumping and those that need serious intervention?

"You can be protected and served," Muhammad says. "It happens every day in communities across America. It happens all the time in white communities where crime is happening."

During the height of the "Black Lives Matter" protests, a mentally ill man shot and killed two police officers a few blocks from my home. I lay up that night thinking about those two men and their families. No one wants to see people killed. Not by police, not by anyone. The next morning, my husband and I took food and flowers to the grim brick precinct right around the corner from us that the officers were working out of when they were killed.

The officer at the front desk did not greet us when we came in. And he looked genuinely surprised by our offering, his face softening as he told us we didn't have to do this, but thank you. That people who should be allies somehow felt like adversaries troubled me.

The next day, I drove by the precinct on my way to the store. It had been cordoned off with metal barricades. Two helmeted officers stood sentry out front, gripping big black assault rifles, and watching. The message felt clear.

They weren't standing out there to protect the neighborhood. They were there to protect themselves from us.

For more of Nikole Hannah-Jones' work on race and inequality in the nation's schools and neighborhoods, see *School Segregation, the Continuing Tragedy of Ferguson*.

Officers say fatal encounters between police and blacks have made policing harder

% of officers saying high-profile incidents between police and blacks have made ...



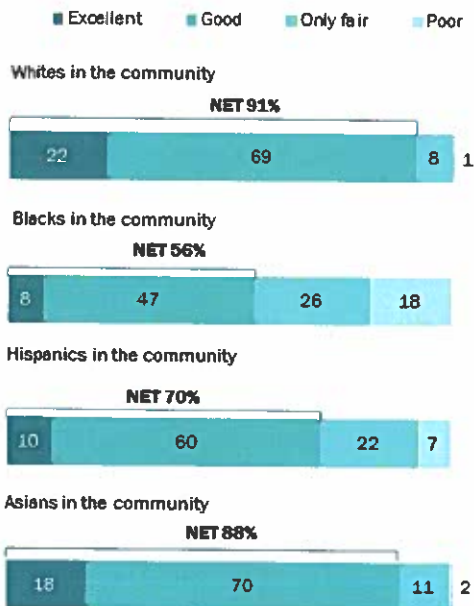
Note: Less than 0.5% said these incidents have made their job easier.

% of officers saying each has happened in their department as a result of high-profile incidents involving blacks and the police

- Officers have become more concerned about their safety **93%**
- Officers have been more reluctant to use force when it is appropriate **76%**
- Interactions between police and blacks have become more tense **75%**
- Officers have become less willing to stop and question people who seem suspicious **72%**

About half or more officers say police have positive relations with the racial, ethnic groups in their communities

% of officers saying they would rate relations between the police in their department and the following groups in the community they serve ...



Note: NET calculated before rounding. Percentages based on those officers who rated relations with each group. A total of 15% of all officers report they could not rate relations with Asians because there are too few in the community where they worked, 2% say there are too few blacks and 3% say there are too few Hispanics or whites.

Source: Survey of law enforcement officers conducted May 19-Aug. 14, 2016.

"Behind the Badge"

PEW RESEARCH CENTER

4

10 An overwhelming majority of police officers (86%) said in 2016 that high-profile fatal encounters between black people and police officers had made their jobs harder. Sizable majorities also said such incidents had made their colleagues more worried about safety (93%), heightened tensions between police and blacks (75%), and left many officers reluctant to use force when appropriate (76%) or to question people who seemed suspicious (72%).

The Epidemic of White Supremacist Police

 theappeal.org/the-epidemic-of-white-supremacist-police-4992cb7ad97a/

The Washington Post, the Root, and others have recently written about a District of Columbia police officer who was seen in D.C. Superior Court wearing a t-shirt with a white supremacist symbol and the grim reaper holding a rifle and police badge. Under the ugly image of death is the caption “let me see that waistband jo”—understood to be a reference to “jump outs,” a highly controversial police practice, or “mocking a slang expression used by some black youths” in the neighborhoods where the officer works. This particular officer’s shirt states the precinct in which he works: the 7th District, an area of the city where the residents are primarily African American.

It seems unlikely this officer made this shirt just for himself. Many more officers may own it but have the sense not to wear it to court. Other officers may have seen it but failed to report it. An internal investigation into the matter is now underway.

This is not only terrifying to people of color in the District of Columbia but it should send chills down the backs of the top police brass around the country. The officer’s outward expression of racial animus is hardly an isolated incident, and is reflective of an increasingly troubling pattern within the D.C. police department and across the country. It is also a problem that could have been avoided.

For years national law enforcement agencies have been sounding the alarm about white supremacists in their midst. In 2006, the F.B.I. warned of white supremacists attempting to enter into police departments and recruit police officers. In 2009, it was the Department of Homeland Security that was letting the public and local law enforcement know of the threat to national security posed by white supremacists after the election of the first black president. It is no secret that white supremacist groups are actively recruiting college students and former members of the military—qualifications necessary to become a police officer in D.C.

In the time that has passed since the first of these now-repeated warnings, there has been an alarming number of police officers reported to be members of hate groups or expressing racist vitriol in texts, emails, and on social media. In 2014, three police officers of a 13-member all-white police department were discovered to be members of a local chapter of the Ku Klux Klan in Fruitland Park, Florida. These men were discovered because they were trying to recruit other officers to join them. In 2015, a lieutenant in the Anniston County Police Department in Alabama was fired for being a member of the League of the South, a southern hate group. (Another lieutenant was also a member but retired once his affiliation became publicized.) The membership was no secret to the department when the fired lieutenant was first hired, and in fact was “the subject of friendly jokes.” It was only once a story about his membership was highlighted by the Southern Poverty Law Center’s Hatewatch that he was eventually fired. A Lake Arthur, Louisiana police officer was fired after a photo of him surfaced on Facebook giving a Nazi salute next to a man in a white hood in 2015. Just last week, a different Louisiana police officer posted a depiction of a mother drowning her daughter in a bathtub with the caption: “when your daughter’s first crush is a little negro boy.”

Police with vile racist beliefs are not limited to the Deep South, as the recent incident in D.C. has shown. In 2016, an officer with the Philadelphia Police Department was found to have a white supremacist tattoo on his forearm. Four San Francisco police officers sent racist text messages to one another. A police officer in Metro Detroit called black citizens protesting at a rally “monkeys.” A police officer in the Price Police Department in Utah used the “n” word in a Facebook post. NYPD Detective Gregory Gordon made a Facebook comment in which he called New York Mayor Bill DeBlasio’s black wife a “former crack addict.” The same officer also said that black people should stop complaining and “get over” slavery.

Bigoted police officers are not confined to the streets; some high-ranking officers have been responsible for spreading their appalling views throughout their departments. In 2015, the Clatskanie Chief of Police in Oregon resigned after being accused of calling black people “monkeys” in response to a lawsuit alleging racial discrimination. A Pennsylvania police chief used the “n” word in an email that suggested blacks in a particular neighborhood were illiterate. A police chief in New Jersey sent an email calling for racial profiling of blacks in white neighborhood. The Howard County Sheriff in Maryland often referred to black people as “n—— -rs” and called a Jewish county executive a “Jew-boy.” A 2017 report

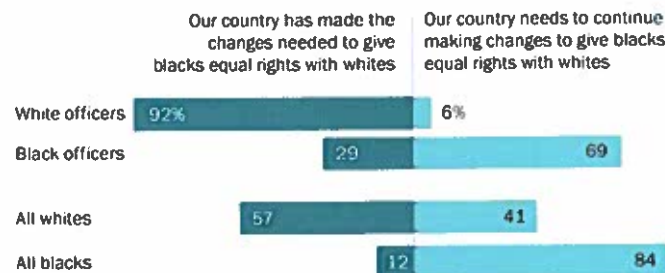
about the Chicago Police Department by the U.S. Department of Justice found that dozens of officers, including supervisors, made racist remarks and disparaging comments about African Americans, Muslims, and other minority groups.

As hate group membership rises across the country, police departments need to do more to ensure that people who hold these beliefs are not on the force. Personality testing has been used during hiring by law enforcement for years, but departments must employ bias testing, as well, and ramp up their in-service anti-bias training. Monitoring of work emails and texts by employers is legal and common practice—and police departments need to be doing it. Social media checks are routinely done in the private sector; the same needs to be done in law enforcement. And the focus cannot simply be on new hires; these measures are also needed for those officers already on the force.

Public opinion of police in American is low: one-third of white Americans do not express a favorable opinion of police, while the number is even lower when limited to African Americans. Further, according to Cato Institute survey, “Black (31%) and Hispanic (42%) Americans are far less likely than white Americans (64%) to be highly confident their local police departments treat all racial groups equally.” This tension threatens not only the reputation and functionality of the criminal justice system, but also the physical safety of certain communities and the very fabric of our country. Without swift action by state and federal law enforcement to address this clear and present danger, things will only get worse.

Police, public divided by race over whether attaining equality requires more changes

% saying that ...



Note: No answer category not shown.

Source: Survey of law enforcement officers conducted May 19-Aug. 14, 2016; survey of U.S. adults conducted Aug. 16-Sept. 12, 2016.

"Behind the Badge"

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9A majority of officers said in 2016 that relations between the police in their department and black people in the community they serve were “excellent” (8%) or “good” (47%). However, far higher shares saw excellent or good community relations with whites (91%), Asians (88%) and Hispanics (70%). About a quarter of police officers (26%) said relations between police and black people in their community were “only fair,” while nearly one-in-five (18%) said they were “poor” – with black officers far more likely than others to say so. (These percentages are based on only those officers who offered a rating.)



ELIJAH NOUNE/AGENCY

Body-worn cameras can increase the accountability of the police, but studies on their use have produced mixed results.

BRUTALITY AND RACIAL BIAS: WHAT THE DATA SAY

Some interventions could help to reduce racism and rein in the use of unnecessary force in police work, but the evidence base is still evolving. **By Lynne Peeples**

For 9 minutes and 29 seconds, Derek Chauvin pressed his knee into the neck of George Floyd, an unarmed Black man. This deadly use of force by the now-former Minneapolis police officer has reinvigorated a very public debate about police brutality and racism.

As protests have spread around the globe, the pressure is on police departments and politicians, particularly in the United States, to do something – from reforming law-enforcement tactics to defunding or even abolishing police departments.

And although researchers are encouraged by the momentum for change, some are also concerned that, without ample evidence to support new policies, leaders might miss the mark. Many have been arguing for years about the need for better data on the use of force,

and for rigorous studies that test interventions such as training on how to de-escalate interactions or mandating the use of body-worn cameras. Those data and studies have begun to materialize, spurred by protests in 2014 after the deadly shooting of Michael Brown in Ferguson, Missouri, and the death by chokehold of Eric Garner in New York City.

From these growing data sets come some disturbing findings. About 1,000 civilians are killed each year by law-enforcement officers in the United States. By one estimate, Black men are 2.5 times more likely than white men to be killed by police during their lifetime¹. And in another study, Black people who were fatally shot by police seemed to be twice as likely as white people to be unarmed².

“We have enough evidence that tells us that action needs to be taken,” says Justin Nix, a criminologist at the University of Nebraska

Omaha. “One thousand deaths a year does not have to be normal.” New evidence continues to support a link between racial bias and the use of force. Data from California show that, in 2018, police stopped and used force against Black people disproportionately (see go.nature.com/2bgfrah). A December 2019 paper reported that bias in police administrative records results in many studies underestimating levels of racial bias in policing, or even masking discrimination entirely³.

The data are still limited, which makes crafting policy difficult. A national data set established by the FBI in 2019, for example, contains data from only about 40% of US law-enforcement officers. Data submission by officers and agencies is voluntary, which many researchers see as part of the problem.

“Most agencies do not collect that data in a systematic way,” says Tracey Meares, founding



director of the Justice Collaboratory at Yale Law School in New Haven, Connecticut. "I hope when people think about the science of this that they understand what we know, what we don't know and why we don't know it," she says. "Policing, in large part for historical reasons, has proceeded in kind of a science-free zone."

Bad apples

Scientists must often work around the limitations in the data. Mark Hoekstra, an economist at Texas A&M University in College Station, has attempted to decipher the role of race in police officers' use of force, by comparing responses to emergency calls.

Based on information from more than two million 911 calls in two US cities, he concluded that white officers dispatched to Black neighbourhoods fired their guns five times as often as Black officers dispatched for similar calls to the same neighbourhoods¹ (see 'Answering the call').

Scientists have tried to identify some predictive factors, such as racial bias, a bad temper, insecure masculinity and other individual characteristics, many of which can be identified through simulations already used in officer training⁵. Nix suggests that such screening could help with vetting officers before they are recruited. But raising the bar for hiring might be impractical, he cautions, because many police departments are already struggling to attract and retain highly qualified candidates.

Similar forecasting models could recognize patterns of bad behaviour among officers. Data from the New York City Police Department suggests that officers who had repeated negative marks in their files were more than three times as likely to fire their gun as were other officers⁶.

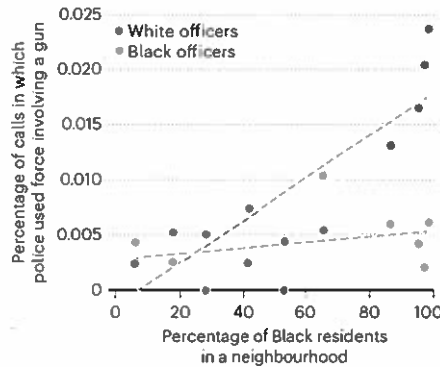
Such wrongdoing might even be contagious. Another study, published in February, looked at complaints filed against police officers in Chicago, Illinois. It found that although only a small percentage of officers shoot at civilians, those who have done so often serve as "brokers" in the social networks within policing⁷. Other officers connected to them were also found to be at greater risk of shooting.

But carrying out disciplinary action, let alone firing a police officer, is notoriously difficult in the United States. Union contracts give officers protections that have been tied to increases in misconduct⁸. In many states, a bill of rights for law-enforcement officers shields personnel from investigations into misconduct. "One thing we need to take a hard look at are those state laws and union contracts that provide either flawed or overly protective procedures that insulate officers from appropriate accountability," says Seth Stoughton, a former police officer who is a law professor at the University of South Carolina in Columbia.

Lawrence Sherman, director of the

ANSWERING THE CALL

Researchers looked at responses to 1.2 million 911 emergency calls in a US city and plotted the use of force involving a gun across neighbourhoods, according to their racial composition. White officers were more likely to use a gun than were Black officers and more likely to do so in predominantly Black neighbourhoods.



Cambridge Centre for Evidence-Based Policing in Cambridge, UK, suggests that states have the constitutional power to license, or revoke, the power of any individual to serve as a police officer. "If a state agency was keeping track of everyone's disciplinary history, they might have taken Derek Chauvin out of the policing business ten years ago," says Sherman. Chauvin had received 18 complaints against him even before he put his knee on Floyd's neck. "We monitor performance of doctors," Sherman adds. "Why don't we monitor the performance of police officers?"

Even officers who are fired for misconduct are frequently rehired. The police officer in Cleveland, Ohio, who fatally shot 12-year-old

"Policing, in large part for historical reasons, has proceeded in kind of a science-free zone."

Tamir Rice in 2014 had previously resigned from another police department after it had deemed him unfit to serve. The Cleveland police did not review the officer's personnel file before hiring him, *The New York Times* reported in 2015. An investigation of public records from Florida showed that about 3% of that state's police force had previously been fired or had resigned in lieu of being dismissed. The study, published in May, found that these officers tended to move to smaller agencies which served a slightly larger proportion of Black residents, but with no significant difference in crime rates⁹. They also appeared to be more likely to commit misconduct in the future compared to officers who had never been fired.

Federal legislation introduced last month targets barriers to good and fair policing. One bill would effectively end the doctrine of qualified immunity, by which courts have largely

prevented officers from being successfully sued for abuse of power or misconduct since the mid-1960s (ref. 10). A similar bill proposes a number of measures intended to increase police accountability, training and data collection, including a national police misconduct registry to keep record of when an officer is fired or quits. Although Democrats in Washington DC broadly support the bills, Republicans unveiled a competing, weaker proposal that does not address the issue of qualified immunity. Robin Engel, director of the Center for Police Research and Policy in Cincinnati, Ohio, suggests that the real capacity for change is at the state and local levels. "There's a collective citizen call to action now to hold political leaders responsible for ensuring that the police are collecting data, releasing data and operating with best practices," says Engel.

Evidence-based policing

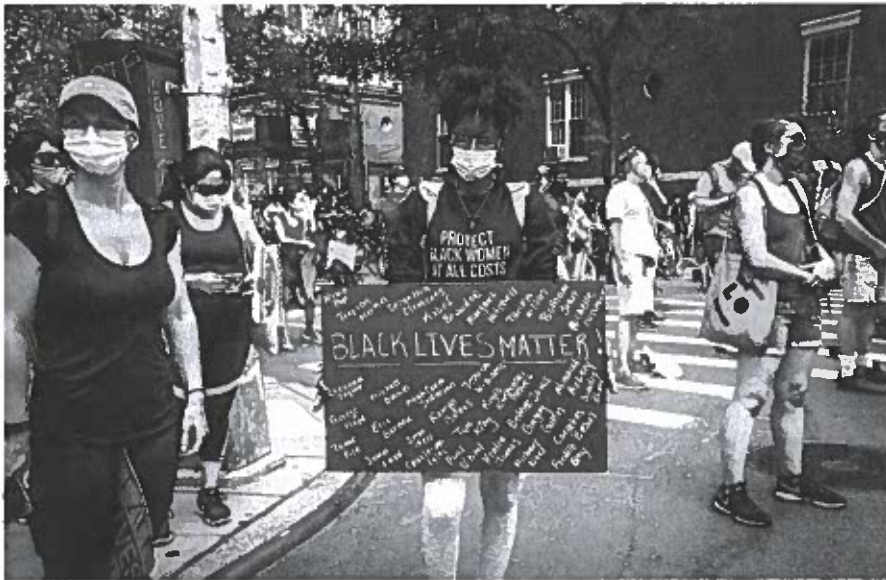
It remains unclear which law-enforcement practices are actually best, largely because of a lack of data and science. "We're operating in the dark about what are the most effective strategies, tactics and policies to move forward with," Engel says. Political leaders and activists pushing for change in the United States have widely endorsed body-worn cameras, de-escalation training, implicit-bias training, early intervention systems, the banning of chokeholds, and civilian oversight since the tragedies of 2014. A survey of 47 of the largest US law-enforcement agencies between 2015 and 2017 found that 39% changed their use-of-force policies in 2015–16 and revised their training to incorporate tactics such as de-escalation. Among the agencies surveyed, officer-involved shootings dropped by 21% during the study period¹¹.

"But as we have seen in the last several weeks – from Minneapolis and from the police response to the protests – there's a great deal that still has to change in policing," says Laurie Robinson, a criminologist at George Mason University in Fairfax, Virginia.

Researchers are advocating collection of better data, such as tracking situations in which force was avoided by de-escalation strategies or, when force was used, recording whether it was at a lower level than it might previously have been.

The Oklahoma City Police Department is among agencies working to fill that void. It now collects details on the applicability of each specific de-escalation tactic and technique any time force is used. "Since the implementation of our de-escalation policy, our use-of-force numbers have decreased," states Megan Morgan, a police sergeant and spokesperson for the department.

The collection of data might itself hold police officers more accountable. In one study, a requirement that officers file a report when they point their guns at people but do not fire



Protests after the death of George Floyd have renewed pressure to reform US policing.

was associated with significantly reduced rates of gun death¹².

The use of body-worn cameras could be among the easiest interventions to enhance accountability. The technology gained traction after a randomized experiment published in 2014 compared shifts in which all officers wore cameras all the time with shifts in which they never did¹³. The likelihood of force being used by officers with cameras was roughly half that of officers without cameras. Furthermore, camera-wearing officers received about one-tenth the number of complaints as did officers without cameras.

Results of more-recent studies have been mixed. When the Las Vegas Metropolitan Police Department in Nevada implemented body cameras, it experienced drops in both the rate of complaints and the use of force¹⁴. But when the Metropolitan Police Department of the District of Columbia did the same, it found no benefits (see go.nature.com/3heuxac). The differences might have to do with policies that allow officers to choose when to turn on their cameras, as well as a lack of controls for situations in which one officer shows up wearing a camera while another does not, notes Sherman. The latter could dilute true differences in the rates of complaints or uses of force.

“It would be a travesty if we got rid of body cams,” says Sherman. “They very often help to clarify what happened.”

Evidence suggests that encouraging officers to listen to citizens’ views before making decisions and to generally demonstrate an interest in working with members of a community can be another effective intervention. A one-day training programme based on these principles of procedural justice was shown to reduce both citizen complaints and use of force by officers in the Chicago Police Department¹⁵.

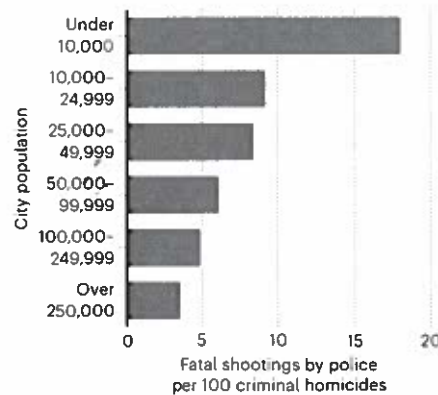
“If police are to be of service to communities,

they need to build trust with communities that are likely to distrust them,” says Thomas O’Brien, a researcher at the Social Action Lab at the University of Illinois in Urbana–Champaign. His work suggests that such trust building requires the police to both acknowledge its role in creating the distrust, as well as apologize for it¹⁶. Any half-hearted attempts at reconciliation could backfire, he says. Special training can be difficult, however, particularly in smaller jurisdictions, which have been shown to have a higher rate of police shooting civilians¹⁷ (see ‘Small-town problems’).

In the wake of Floyd’s death, many calls for change have gone beyond police reform to defunding police departments – reducing their public funding and reallocating resources to other programmes – or dismantling them altogether. Some researchers caution against fully abolishing police departments. That could have “disastrous consequences”, says Engel. “It’s better to work within and demand

SMALL-TOWN PROBLEMS

Large cities account for about 30% of fatal police shootings, but the rate of police shootings per 100 homicides is much higher in smaller communities. Little research has been done to understand this relationship.



significant and meaningful change, and then hold them accountable for that change.”

However, Engel does support proposals that would begin “carving off pieces” of law-enforcement agencies’ current responsibilities that might fall outside their expertise – or might not require an armed response – such as issues of homelessness, drug abuse and mental illness. In New York City, the police purview goes as far as to include enforcement of street-vendor licences. Across the United States, an arrest is made every 3 seconds; less than 5% of these are for serious violent crimes, according to the Vera Institute of Justice in Brooklyn, New York (see go.nature.com/3fbwmcn).

Curtailling police encounters could also result in fewer crimes. Research published last year found that Black and Latino boys who are stopped more often by police are more likely to commit crimes months later¹⁸.

Stoughton also emphasizes the role of racial bias in society, as evidenced in the months leading up to Floyd’s murder – by the fatal shooting of a 25-year-old Black man, Ahmaud Arbery, by two white men while he was jogging in Georgia, and by a white woman’s 911 call to falsely report being threatened by a Black birdwatcher in New York City’s Central Park. “I have become convinced that we do not have a race problem in policing,” says Stoughton. “Rather, we have a race problem in society that is reflected in policing.”

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America's tough approach to policing black communities began as a liberal idea

<http://www.washingtonpost.com/news/wonk/wp/2016/05/02/americas-tough-approach-to-policing-black-communities-began-as-a-liberal-idea/>

Jeff Guo

May 2, 2016

Two years ago in Ferguson, Mo., when residents marched to protest Michael Brown's death, the police responded with tear gas and SWAT teams trained in military tactics. Viral photographs showed unarmed protesters facing down phalanxes of armored vehicles. For many African Americans, it seemed like the perfect metaphor for how law enforcement has treated them in recent decades.

The Black Lives Matter movement began as a response to violence against black people, often at the hands of police. But activists quickly acknowledged that the problem was much larger than that. The problem was black poverty, the persistently high black unemployment rate, the overpolicing of black neighborhoods. The problem was Richard Nixon's War on Drugs, Bill Clinton's crime bill and the massive, disproportionate incarceration of black men.

How did we get here — from the optimism of the civil rights movement to riots and rubber bullets in Ferguson? In her new book, "From the War on Poverty to the War on Crime," which comes out May 9, Harvard historian Elizabeth Hinton pinpoints the moment when things started to go sour. The problem didn't originate with Clinton, or Nixon, or Ronald Reagan, she says, though each amplified it in his own way. The roots of today's crisis reach back further.

But Johnson also kicked off the nation's decades-long focus on police enforcement in black communities. And that fact is often forgotten, Hinton says.

"Most of the discussion about the rise of mass incarceration has focused on the war on drugs or the policies of the Reagan administration," Hinton said recently over the phone. "But Reagan stepped into 15 years of a national crime-control policy that really began — ironically and tragically — at the height of the civil rights revolution, during a time of sweeping liberal reforms."

"Policymakers recognized that unemployment was a major issue driving these incidents, even though the proximate cause was police brutality," Hinton says. "Much of the rioting itself was rooted in very similar grievances as the mainstream civil rights movement."

Demographic forces were in part to blame for the situation. After World War II, black migration out of the South accelerated — between 1940 and 1980, roughly 5 million black Southerners moved to cities in the North and West. Places like Detroit, Chicago, Philadelphia and Harlem grew into major black metropolises. Economists Robert Fairlie and William Sundstrom estimate that the South lost about 17 percent of its workforce between 1940 and 1960 alone.

But as they arrived in the North starting in the 1940s, black workers learned that jobs weren't as plentiful as they had hoped. Fairlie and Sundstrom say that between 1880 and 1940, the unemployment rate for black and white men was more or less the same. After 1940, their fates began to diverge. In 1950, the white unemployment rate was around 4 percent, but the black unemployment rate was around 7 percent. That inequality has persisted to this day.

In the early 1960s, politicians began to describe the concentration of black urban poverty as "social dynamite." The term, Hinton says, was coined by former Harvard president James B. Conant, who told policymakers that the cities were essentially powder kegs. "The building up of a mass of unemployed and frustrated Negro youth in congested areas of a city is a social phenomenon that may be compared to the piling up of inflammable material in an empty building on a city block," Conant said in 1961.

Even at this early stage, social policy was intertwined with crime control policy. As Hinton writes, Johnson's War on Poverty "is best understood not as an effort to broadly uplift communities or as a moral crusade to transform society by combating inequality or want, but as a manifestation of fear about urban disorder and about the behavior of young people, particularly young African Americans."

President John F. Kennedy sought to soothe tensions with urban anti-delinquency programs designed to instill moral character into youths. He started the early-childhood education and vocational training efforts that Johnson would later expand into Head Start and the Job Corps under the umbrella of his War on Poverty. The Economic Opportunity Act of 1964, one of Johnson's major legislative accomplishments, also created a domestic version of the Peace Corps, sending young do-gooders into impoverished neighborhoods to make change.

These were well-intentioned efforts, Hinton says, but they fell far short. For urban African Americans, the War on Poverty could better be described as a war on the culture of poverty. Politicians did see the connection between poverty and crime. They recognized how one fed the other, and vice versa. But instead of trying to create jobs or substantially increase welfare payments to families, they fixated on what the influential Moynihan report, echoing the views of many social scientists, called in 1965 the "social pathologies" of black urban life.

"In a word, a national effort towards the problems of Negro Americans must be directed towards the question of family structure," concluded the report. "The object should be to strengthen the Negro family so as to enable it to raise and support its members as do other families." For all its good intentions, the Moynihan report reinforced the idea that there was something particularly wrong with black America — that centuries of slavery and oppression had inculcated dangerous habits.

During his commencement address at Howard University in 1965, Johnson drew upon the ideas in Moynihan's report to make a distinction between white poverty and "Negro poverty."

"Negro poverty is not white poverty," Johnson said. "Many of its causes and many of its cures are the same. But there are differences — deep, corrosive, obstinate differences — radiating painful roots into the community, and into the family, and the nature of the individual."

Johnson's War on Poverty had a fatal fixation with reforming individuals instead of addressing the larger economic problems, Hinton says. In the book, she describes it as a short-sighted approach, "committing to vocational training and remedial education programs in the absence of job creation measures or an overhaul of urban public schools." She writes:

Moynihan's understanding of the urban crisis as rooted in black pathology provided the [Johnson] administration with a rationale for directing domestic programs specifically at the plight of black men while removing itself from accountability for the de facto restrictions, joblessness, and racism that perpetuated poverty and inequality.

It's important to understand how the Johnson administration thought about poverty in the black community because of what happened next. Starting in the summer of 1964, race riots ripped through Northern cities including New York, Philadelphia, Chicago and Rochester, N.Y. Hundreds of people were injured, and thousands were arrested. The riots began with clashes between police and black citizens. In New York City, for instance, 15-year-old James Powell was killed by an off-duty white police officer, which led to six violent days of marching, looting and vandalism in Harlem. "The 'social dynamite' that had worried policymakers and officials at the outset of the decade had finally exploded, despite the Kennedy and Johnson administrations' prevention efforts," Hinton writes.

By 1965, Johnson had formulated a new initiative, what he called a "War on Crime." He sent to Congress a sweeping new bill that would bulk up police forces with federal money and intensify patrols in urban areas. This would be the first significant intrusion of the federal government into local law enforcement, and it was the beginning of a long saga of escalating surveillance and control in urban areas.

In particular, Johnson played up the military flavor of the reforms. "We are today fighting a war within our own boundaries," he said in 1966, likening the black urban unrest to a domestic Vietnam. His initiatives provided money for police to arm themselves with military equipment — "military-grade rifles, tanks, riot gear, walkie-talkies, helicopters, and bulletproof vests," Hinton writes. As the riots intensified through the rest of the '60s — some estimate over 700 incidents occurred between 1964 and 1971 — the administration increasingly began to shift money away from the War on Poverty and toward the War on Crime. "Policy makers really feared a large-scale urban rebellion," Hinton says. "They were really worried about black youth, and had a number of racist notions about their propensities for crime and drug addiction."

These same ideas permeated Johnson's anti-poverty efforts. Some historians view Johnson's War on Crime as a repudiation of his War on Poverty, but one of Hinton's key points is that these initiatives were more similar than they were different. Both programs were propelled by concerns about civil unrest in black communities, and both were influenced by the administration's opinion that poor urban black people suffered from a cultural deficit, even if it wasn't of their own making.

Subsequent administrations expanded and intensified the crime-fighting programs that Johnson had created. They sent undercover officers to go into black neighborhoods and ensnare criminals. They camped out in black communities waiting for crime to happen. They funded the creation of special-tactics forces — SWAT teams — in part out of fear of race riots and the Black Panthers. The War on Drugs, which began under Nixon but reached its height under Reagan, added hundreds of thousands of people to the correctional system. Intensified policing created a growing population of prisoners, which set off a boom in prison construction.

At a moment when policing's impact on African Americans and mass incarceration have again become topic of national conversation, Hinton's book is significant for its reminder that both liberals and conservatives share the blame. Here she is writing on Johnson's War on Crime, and his legacy:

As the product of one of the most ambitious liberal welfare programs in American history, the rise of punitive federal policy over the last fifty years is a thoroughly bipartisan story. Built by a consensus of liberals and conservatives who privileged punitive responses to urban problems as a reaction to the civil rights movement, over time, the carceral state and the network of programs it encompassed came to dominate government responses to American inequality. Indeed, crime control may be the domestic policy issue in the late twentieth century where conservative and liberal interests most thoroughly intertwined.

It's part of standard history that the race riots in the late '60s were pivotal to the rise of tough-on-crime politics. Thanks to the widespread urban unrest, "race had become, yet again, a powerful wedge, breaking up what had been a solid liberal coalition based on economic interests of the poor and the working and lower-middle classes," writes Michelle Alexander in "The New Jim Crow," her history of mass incarceration.

But other historians have been much kinder toward Johnson and his responsibility for the shift toward more punitive policing. Historian Doris Kearns Goodwin describes Johnson's stance on race as "courageous and humane" in her recent biography. "In the political world of the 1950s and early 1960s it would have comfortably occupied a position midway between the radicals and the conservatives," she writes. "But the dimensions of the racial problem in the mid- and late sixties were so large, having grown larger with every year of neglect, that it could not be easily handled by traditional politics."

In a way, that is Hinton's point precisely. Both the left and the right were unwilling, in her view, to make the drastic investments in jobs, housing and human development that black urban communities demanded and needed.

In 1967, Johnson set up a mostly liberal task force to investigate the race riots. The Kerner Commission, as it was called, handed back a white-hot report that blamed the uprisings on the dearth of economic opportunity in poor black neighborhoods. Johnson's War on Poverty, they said, was hardly doing enough. "To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values," the report warned.

The commission argued for "national action on an unprecedented scale": among other things, the immediate creation of 2 million jobs, the establishment of a basic minimum income and the allocation of 6 million units of affordable housing within five years. Essentially, Hinton says, it was a Marshall Plan for black America — a mind-bogglingly huge investment in a distressed community.

Obviously, those economic reforms didn't happen. Instead, the Johnson administration continued to treat urban black poverty and urban black unrest as a problem of discipline, not a problem of denied opportunity.

The consequences of that decision can be observed today, Hinton says — in the policing tactics that led to the deaths of Eric Garner, Michael Brown, Freddie Gray and many others, and in the way that the protests in Ferguson were confronted, almost reflexively, by militarized riot teams and armored cars.

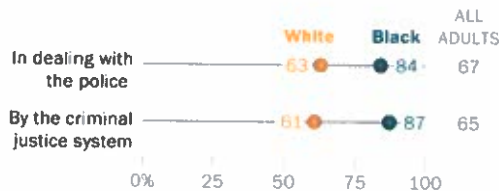
A few days ago, President Obama's economic advisers released a new report on criminal justice and mass incarceration. To help reduce crime, they recommend raising the minimum wage and investing more in early-childhood education. It's expensive to hold so many people in prison, they note.

The implication: It's cheaper, sometimes, to give people opportunities instead of punishing them for not having any. But as always, the question is if the nation is willing to go that far — and whether that's even far enough.

1Majorities of both black and white Americans say black people are treated less fairly than whites in dealing with the police and by the criminal justice system as a whole. In a 2019 Center survey, 84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites; 63% of whites said the same. Similarly, 87% of blacks and 61% of whites said the U.S. criminal justice system treats black people less fairly.

More than eight-in-ten black adults say blacks are treated less fairly than whites by police, criminal justice system

% who say, in general in our country these days, blacks are treated less fairly than whites ...



Note: White and black adults include those who report being only one race and are non-Hispanic.
Source: Survey of U.S. adults conducted Jan. 22-Feb. 5, 2019.

PEW RESEARCH CENTER

Black men are far more likely than black women to say they've been unfairly stopped by the police

% of black adults, by gender, who say each of the following has happened to them because of their race or ethnicity



Note: Blacks include those who only report being one race and are non-Hispanic.
Source: Survey of U.S. adults conducted Jan. 22-Feb. 5, 2019.

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13

A Political Compromise on Qualified Immunity

 lawfareblog.com/political-compromise-qualified-immunity

May 21, 2021

Next week marks the one-year anniversary of the death of George Floyd, whose murder at the hands of a police officer led to national protests over policing in the United States. In his first speech to a joint session to Congress, President Biden called on Democrats and Republicans to work together to enact legislation aimed at police reform by the first anniversary of Floyd's death. Despite broad public support for legislation, and continued negotiations between the parties, it does not appear that a compromise will be reached in time to commemorate the tragic occasion.

Last year, the Democratic-controlled House passed the George Floyd Justice in Policing Act of 2020. The legislation seeks to reform policing by enacting various federal standards, including national training requirements and banning the use of chokeholds and no-knock warrants. The proposed law would also require law enforcement to collect data on all investigatory activities and reinvest in community-based programs to empower communities to reimagine public safety.

Senate Republicans unveiled their own Justice Act in June 2020. The bill has some similarities to the House bill, such as making lynching a federal hate crime, increasing data collection and providing funding for body cameras. However, the parties continue to negotiate over several key issues, including the banning of certain police practices and the ability to transfer surplus military equipment to police departments. But no issue has proved to be a greater roadblock than qualified immunity.

The judicially created doctrine was conceived as a means of striking the proper balance between permitting monetary compensation for police wrongdoing while protecting individual officers who, in good faith, did not realize that their conduct was violating victims' constitutional rights. The doctrine requires courts to assess two questions. First, courts must determine whether the facts as alleged support a claim of a violation of a constitutional right. The doctrine "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Second, courts must decide whether that right was "clearly established" at the time the defendant acted. Previously, the Supreme Court required courts to address whether a constitutional violation was alleged before tackling the second question, but courts are now permitted to decide which of these questions to decide first. Because each encounter with law enforcement is to some degree factually unique, and courts do not need to resolve the issue of whether the conduct was constitutional before concluding that the immunity applies, the doctrine has been chastised as protecting "all but the plainly incompetent or those who knowingly violate the law."

Eliminating qualified immunity has been explained as a necessary means to achieving accountability. The challenges with aiming the remedy at the individual officer, however, are both practical and analytical. From a practical standpoint, defendant officers are often either judgment proof or indemnified by their employers. Congress has long understood that such remedies would

often serve as a “hollow remedy” given the officers’ likely inability to pay the substantial judgment. Even if officers were able to pay, most states have statutes that permit employers to indemnify their officers from liability when acting within the scope of their employment.

From an analytical standpoint, remedies aimed at the department or agency level may better incentivize governments to implement best practices, evaluate substandard employees and modify past missteps. As I’ve written in previous posts, if the purpose of these civil actions is to prevent future misconduct, targeting damages at the agency level, rather than the individual, promotes greater structural reform aimed to ensure best practices and training techniques. Systemic problems require institutional reform. A police officer’s contact with an individual is often a manifestation of several prior decisions along a criminal justice continuum. Deterrence, in that sense, is concerned not only with point-of-contact interactions between law enforcement officers and citizens but also with leveraging governmental mechanisms to achieve structural reform.

So where does this leave accountability for the individual officer? To completely abolish qualified immunity would be to remove any analysis of culpability of the individual and instead make officers strictly liable for constitutional infractions. At the same time, officers currently tend to enjoy too great of a shield, regardless of whether their actions were negligent, intentional or even malicious.

Rather than an all-or-nothing approach, Congress should focus on when the officer’s conduct approaches criminal behavior. When an officer acts with the requisite intent or in callous disregard of the plaintiff’s federal protected rights, immunity should no longer shield the individual from personal responsibility. In civil actions, that conduct is addressed through punitive damages. Punitive damages further the aims of the criminal law: to punish reprehensible conduct and to deter its future occurrence.

But how can punitive damages be leveraged to promote greater accountability at the individual officer level while still granting general immunity? One method would be to allow for actions to be brought against states and municipalities for constitutional violations while still permitting claims against individual officers when the plaintiff can plead facts sufficient to warrant punitive damages. This allows for compensatory damages for a broader array of constitutional infractions while narrowing the focus on individual officers to those whose conduct rises to a degree akin to criminal conduct. Such a regime is already aligned with Supreme Court precedent that permits punitive damages against the individual officer but prohibits them against state and municipal entities.

Eliminating indemnification for punitive damages, even when officers act within the scope of their employment under state law, may prove to be a more palatable approach to individualized accountability. Most states traditionally apply respondeat superior liability—that is, when an employer is held vicariously liable for their employees’ acts performed within the course of their employment—only to compensatory damages, not punitive damages. A policy that allows for vicarious liability except for punitive damages strikes the proper balance among maximizing compensation, targeting deterrent impact and preserving individual accountability.

Here's how it would work in practice. Congress would pass legislation making states and local municipalities civilly liable for federal constitutional violations, not merely based on official policy or customs, but as the result of conduct by their employees acting within the scope of their employment under the theory of respondeat superior. While some constitutional questions may surround the imposition of liability on "states" as well as local government entities, scholars generally have concluded that the 11th Amendment would not prohibit such inclusion. And, with the new legislation effectively amending 42 U.S.C. § 1983, courts would no longer be hamstrung by Supreme Court precedent that "has generated a body of interpretive law that is so complex that the law has become difficult to apply." Instead, vicarious liability standards would apply against law enforcement entities for constitutional infractions.

In addition to being able to hold the government entity vicariously liable for the constitutional infraction, a plaintiff would also be able to bring suit against the officer in his or her individual capacity if sufficient facts can be pleaded to allege that the violation occurred as a result of the officer's malicious or evil intent or in callous disregard of the plaintiff's federally protected rights. In the civil rights arena, it is commonplace to file suit against both the government entity and the individual officer under different theories of liability. As I've written in earlier posts, common-law tort law can often address a broader array of conduct than constitutional tort law, and therefore suits are often brought under both theories.

The notion of having to plead an improper motive or intent to open the courtroom doors is not a foreign concept. Many constitutional infractions already include an official's improper motive as a necessary element, such as certain claims of race and gender discrimination in violation of the Equal Protection Clause or termination of employment based on political affiliation in violation of the First Amendment.

Of course, civil rights attorneys may object to that same standard applying to all police conduct, including Fourth Amendment searches and seizures. But as political compromises go, making the threshold for suing individuals premised on when they act purposefully, as opposed to mistakenly, makes a great deal of sense. (To be clear, I use the phrases "purposefully" and "mistakenly" in the colloquial sense. All constitutional violations are "intentional" in so far as an officer cannot violate a person's constitutional rights "negligently." Despite what some courts have suggested, there is no such thing as "negligent use of excessive force." While these standards are often difficult to parse, I use "mistakenly," not merely to suggest the officer acted below a standard of due care, but with a degree of intent that does not rise to the requisite level for punitive damages.)

Reformers may also worry that the swap of an objective standard with the heightened subjective standard will result in only marginal progress. After all, not even qualified immunity protects "those who knowingly violate the law." But the Supreme Court has noted that "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated." Courts have used the objective standard to grant immunity to officers even after juries have awarded punitive damages. Under the subjective standard, while deviations from standard operating procedures and other objective benchmarks may be factors when assessing an officer's motivation, officers would not be shielded from scrutiny by a standard predicated on whether precedent makes the constitutional question "beyond debate."

It will not only be reformers who question the new standard. In the past, some courts, including an en banc decision from the U.S. Court of Appeals for the D.C. Circuit, established an elevated evidentiary standard for improper motives due to the concern that "an official's state of mind is easy to allege and hard to disprove." Officials may view the improper motive standard as an easily navigable standard, particularly at the motion to dismiss stage. And, absent qualified immunity, not only would the officer be unable to dismiss the action early, but the individual would also be unable to seek interlocutory appeal to avoid the burdens and stresses of discovery.

In *Crawford-EI v. Britton*, the Supreme Court declined to heighten the evidentiary standard for constitutional violations based on improper motives. The court identified mechanisms at a court's disposal to assess claims prior to permitting discovery. For example, courts may order a reply to a defendant's or third party's answer under Federal Rule of Civil Procedure 7(a) or grant the defendant's motion for a more definite statement under Rule 12(e). While it is questionable how often those procedural tools are effectively invoked to dispose of cases, another mechanism has arisen since *Crawford-EI* that has proved to have an effective gatekeeping function: the *Iqbal/Twombly/Iqbal* pleading standard. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that pleading standard requires a complaint to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." In *Ashcroft v. Iqbal*, the Supreme Court not only clarified that its articulation of the pleading standard in *Twombly* extends to "all civil actions[.]" The court also echoed its previous skepticism that the current application of discovery rules can adequately prevent abuse by rejecting the so-called "careful case management" approach: "[T]he question presented by a motion to dismiss a complaint for insufficient pleading does not turn on the controls placed upon the discovery process." Under this pleading standard, courts are able to draw on their "judicial experience and common sense" to assess whether plaintiffs have established a reasonable inference of wrongdoing. The standard may be used to quell the concern that the subjective intent standard to bring a constitutional tort claim against an individual officer is too easily circumvented.

This proposed legislation will surely be criticized from both sides of the debate, which is the hallmark of true political compromise. Congress should recognize that there are times when civil actions seek to encourage agency reform and times when they seek to hold officers personally accountable. The law should be reformed to better achieve those twin goals.

