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AN EVEN BETTER WAY

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AN EVEN BETTER WAY

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INTRODUCTION

The final session of Berkeley Law School’s symposium, "Section 1983 and Police Use of Force: Building a Civil Justice Framework," asked the persistent and profound question: “How Do We Reform the Law in Light of What We Know?”

What *I* know most about is our current system of accountability when police officers violate law and policy. I know that civil rights lawsuits brought under 42 U.S.C. §1983 are often the best—or only—available means of vindicating people’s rights.¹ And I know that the Supreme Court and state and local governments across the country have created multiple barriers to relief in these cases that make it exceedingly difficult for people to prevail in them, or for them to have any tangible effect on officers or the departments that give them their badges and guns.²

* Professor of Law, UCLA School of Law. Deepest thanks to Devon Carbado, Sharon Dolovich, Barry Friedman, Dan Schwartz, and Fred Smith for comments on an earlier version of this Essay.

¹ See JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* xi-xiii (Viking 2023) (explaining why civil rights lawsuits, despite their flaws, are better than criminal prosecutions or internal affairs investigations at delivering some measure of justice to people whose rights have been violated by police). In most jurisdictions, people are not limited to Section 1983 claims; they can, in addition or in the alternative, file claims under state law. For a description of these state laws and why claims under these laws are often inferior to a Section 1983 cause of action for plaintiffs, see Alexander Reinert, Joanna C. Schwartz, & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 757-63 (2021).

² See SCHWARTZ, *supra* note 3, at xiv-xv (setting out this argument).

In various law review articles and most comprehensively in the final chapter of my book, *Shielded: How the Police Became Untouchable*, I have proposed a set of reforms intended to improve this one part of our system: qualified immunity should be eliminated; local governments should be held vicariously liable for misconduct by their officers; lawsuit payments should be taken out of police department budgets, and departments should be made to gather and analyze information about those suits with an eye toward preventing similar cases from occurring in the future; it should be more financially viable for attorneys to take civil rights cases; and it should be easier for plaintiffs to get injunctive relief to prevent future constitutional violations from occurring.³

These reforms would make it easier for people to get some measure of justice when their rights have been violated, and should pressure officers and departments to change their behavior in ways that make future constitutional violations less likely to occur. But, as I wrote in *Shielded*, “I don’t promise that any one of these changes—or even all of them together—will get us the system of accountability we need” even if they will “get us closer.”⁴ And although the reforms I outlined should reduce the frequency of constitutional violations to some degree, they are not up to the task of preventing many of the harms people sue about, as well as the harms for which people never seek remedy.⁵ Reducing the frequency of—ideally, eliminating—these harms must be a primary concern. As Fred Smith observed during his keynote address at this symposium, it may be a good thing to improve our system of police accountability so that he could successfully sue if he were shot by the police. But he’d prefer changes to the system that resulted in him not being shot in the first place.⁶ If a better system of accountability for constitutional violations is “A Better Way,” as I’ve titled the last chapter of *Shielded*, it would be “An Even Better Way” to avoid rights violations altogether.

In *Shielded*, I do not endeavor to engage with the types of front-end measures that could be taken to reduce or prevent police violence and other harms. Nor do I explore how these types of reforms relate to the legal-accountability recommendations I offer. For this reason, in Brandon Hasbrouck’s

³ See *id.* at 225-41. See also Reinert, Schwartz, & Pfander, *supra* note 3, at 768-82.

⁴ SCHWARTZ, *supra* note 3, at 233.

⁵ Accord Paul Butler, *Is Police Brutality Just Part of the Job?*, WASH. POST (Feb. 17, 2023, at 6:30 AM).

⁶ For another discussion of this same point by Smith, see *Emory Law Presents: Conversations About Racism, Part 1* (Sept. 3, 2020, at 59:15), <https://www.youtube.com/watch?v=13NrayYmb-o>.

words, “the book is, perhaps a chapter too short.”⁷ In this Essay, I offer a version of that last chapter, situating front-end solutions in relation to the sorts of back-end accountability-type proposals I offer in *Shielded* and considering how to prioritize among the seemingly unending swirl of possibilities, suggestions and demands about how to move forward.

I. WHAT WE KNOW

Consider first the second part of the question posed by the Berkeley symposium: *What do we know* about the scope and causes of police violence and misconduct?

We know that police kill more than 1,000 people annually; that police use nonfatal force, threaten force, or otherwise mistreat more than one million people each year; and that even those only tangentially impacted by police power and abuse can suffer devastating and long-lasting harms.⁸ We also know that members of our society do not bear these harms equally. Instead, police disproportionately use their powers against the most marginalized: people who are Black, Latino, and Indigenous; immigrants; protestors; homeless; mentally ill; and people who identify as LGBTQ+.⁹

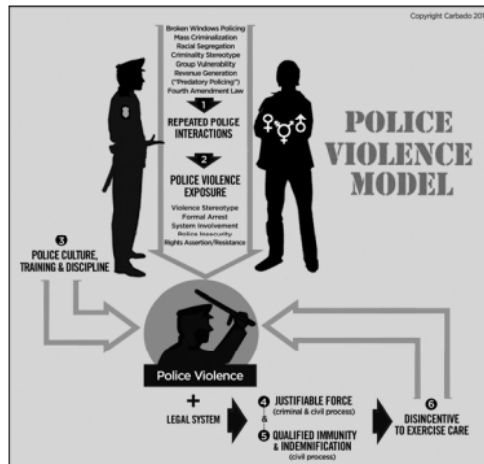
And we know—from decades of academic research, investigative journalism, community advocacy, blue ribbon commissions, and Department of Justice investigations—that police violence is not simply the work of individual, rogue, bad-apple officers but is, instead, the product of systemic and structural forces. In his article, *Blue on Black Violence: A Provisional Model of Some of the Causes*, Devon Carbado distills much of this wide-ranging research and analysis into three categories of factors that make up this “structural phenomenon” and explain the persistence of police violence against African-Americans: 1) *social forces* that lead to the repeated exposure of African-Americans to police surveillance, contact, and the possibility of violence; 2) *police practices*,

⁷ Brandon Hasbrouck, *The Untouchables and the Stakes of Abolition*, BALKINIZATION BLOG (Mar. 7, 2023).

⁸ For data about the number of people killed by police each year, see *Fatal Force*, Washington Post (last updated June 27, 2023), <https://www.washingtonpost.com/graphics/investigations/police-shootings>. For data about the number of people who are subject to nonfatal force, threats of force, or other mistreatment, see Susannah N. Tapp & Elizabeth J. Davis, *Contacts Between Police and the Public, 2020* (Nov. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpp20.pdf>. For an overview of the types of public health harms caused by police, see Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J. L. & MED. 279, 283-84 (2017).

⁹ See SCHWARTZ, *supra* note 3, at xix.

including culture, training, and discipline, that implicitly encourage or allow violence to occur; and 3) *the legal system*, which makes it difficult for police to be held accountable after the fact.¹⁰ Carbado offers a useful schematic diagram that situates these three categories in relation to each other and to police violence:¹¹



In *Shielded*, I focus on one part of Carbado’s police violence model—the legal system—and the ways in which civil rights litigation limits accountability for officers after they have used violence and creates disincentives for officers and departments to exercise care.¹² But I agree wholeheartedly with Carbado that failings of legal accountability are but one of the contributors to police violence, and that the social forces and police practices Carbado describe also play an important role.

Many of the stories I tell in *Shielded* illustrate how social forces, police practices, and the legal system combine to harm African-Americans and members of other marginalized groups. Consider, as just one example, the story of Tony Timpa.¹³

One hot August night in 2016, Timpa, a white, wealthy executive, called 911 from the parking lot of an adult film store in Dallas, Texas. Timpa told the

¹⁰ Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483-84 (2016).

¹¹ See *id.* at 1484.

¹² I actually focus only on a subset of the legal system, as I mention only in passing the availability of criminal prosecution of officers, and do not consider the ways in which criminal defendants may assert their constitutional rights in defenses to their cases.

¹³ The details of Timpa’s death set out in the following paragraph are described in SCHWARTZ, *supra* note 3, at 45-46.

dispatcher that he suffered from anxiety and schizophrenia, he was off his medication, he was unarmed, and he needed help. When a Dallas police sergeant and four officers arrived at the scene, Timpa had already been put in handcuffs by a security guard, and Timpa was rolling on his back and stomach in a grassy patch beside the road. The officers replaced the guard's handcuffs with their own, ziptied Timpa's feet, and then two officers pressed more than three hundred pounds of their body weight on Timpa's back and neck. Timpa was held in that position for more than fourteen minutes. During those fourteen minutes, the officers' body cameras recorded them laughing as they looked through Timpa's wallet, and joking after Timpa stopped moving that he was like a young boy who didn't want to go to school. Once paramedics lifted Timpa onto a gurney, one of the officers looked into his half-opened eyes and said, "I don't think he died, did he? I hope I didn't kill him." More laughter. Less than an hour after Timpa called the police, asking for help, he was dead.

In *Shielded*, I describe how the legal system protected the Dallas officers who killed Timpa from any consequences of their actions and has made justice in the courts exceedingly difficult for Timpa's family to obtain.¹⁴ Texas law allowed the Dallas police department to withhold body camera video and other evidence about how Timpa died. As a result, when Vicki Timpa, Tony's mother, filed her §1983 lawsuit she could not name the officers involved or describe with any specificity what happened to her son. Then, the City of Dallas moved to dismiss the complaint because it did not include sufficient facts to assert a "plausible claim" under the Supreme Court's pleading standard. Vicki's lawyer convinced the City of Dallas to release the body camera video and other documents before the motion to dismiss was decided—had Vicki had a less tenacious attorney, or had the videos been erased or never recorded, her case might well have been dismissed. In July 2020, just six weeks after George Floyd was murdered in nearly the same way, Vicki Timpa's lawsuit against the officers who killed her son was dismissed on qualified immunity grounds; the district court held that there was no prior court decision that clearly established that what the officers did was wrong.¹⁵ That qualified immunity grant was

¹⁴ The details of Vicki Timpa's lawsuit set out in this paragraph are described in SCHWARTZ, *supra* note 3, at 33-35 (regarding Vicki's efforts to learn what happened to her son); *id.* at 43-45 (describing Dallas's efforts to get the case dismissed and Vicki's lawyer's efforts to get body camera and other evidence turned over by Dallas); *id.* at 89-91 (regarding the district court's dismissal of Vicki's claims on qualified immunity grounds and the court of appeal's decision overturning that grant).

¹⁵ Timpa voluntarily dismissed her claim against the City of Dallas after she amended her complaint to identify the officers involved. *See* Plaintiff's Notice of Dismissal of Defendant City of Dallas, *Timpa v. The City of Dallas*, No. 3:16-cv-03089-N (N.D. Tex. Mar. 13, 2017). Although Timpa could have pursued a claim against the City of Dallas, Timpa's attorney told me that he

reversed on appeal two years later, and the case is set to go to trial in July 2023. But, at each step of the way, the legal system has made justice in Vicki Timpa's case far more difficult to obtain than it should be.

Although my discussion of Timpa's story in *Shielded* focuses on these legal accountability failures, his story additionally illustrates failures in the Dallas Police Department's practices. The Dallas police policy manual instructs officers to move people from a prone position "as soon as [they] are brought under control," and all the officers at the scene had received at least two trainings regarding this rule.¹⁶ Yet the officers who knelt on Tony and clearly violated department policy received only a written reprimand and were sent back to work.¹⁷ At the end of their disciplinary hearing, the officer in charge said to the men who had killed Tony, "As long as you don't come back before me with the same type of allegations, I believe you guys will have a fruitful career still ahead of you."¹⁸ The officers are still on the force and one has been promoted to senior corporal, making him responsible for training rookie officers.¹⁹

Timpa's death should also be understood as a product of deeper social forces. Many of the types of social forces Carbado describes did not come into play; this is not a story of broken windows policing, segregation, or a stereotype of African-Americans as criminally suspect—although other stories in *Shielded* most certainly are.²⁰ But it *is* a story that illustrates the dangers of a world in which people regularly do not receive the mental health services that they need; police are called upon to respond to people in mental health crisis; and the

does not tend to pursue these types of municipal liability claims because of exacting standards set by the Supreme Court to prove them. See Notes of Interview with Geoff Henley (Jan. 26, 2021).

¹⁶ See SCHWARTZ, *supra* note 3, at 45.

¹⁷ See *id.* at 47.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See, e.g., SCHWARTZ, *supra* note 3, at 117-19 (describing Robbie Tolan's shooting by a police officer in his family's front yard in a nearly all-white suburb of Houston; the interaction began because the officer accused Tolan, a Black man, of driving a stolen car but Tolan and his parents had confirmed the car belonged to the family); *id.* at 157-60 (describing officers' stop, arrest, and strip search of James Campbell while he was on his way to the Indianapolis Jazz Festival; the officers stopped Campbell because he supposedly looked like a robbery suspect, although the only similarity between the two men was that they were Black, and then accused Campbell of possessing a baggie of marijuana they found several feet away, and strip searched Campbell in public based on that accusation); *id.* at 209-10 (describing the baseless drug arrest, assault, and strip search of Shawn Schenck, a Black man, seconds after he entered a bodega in the Bronx to buy a pack of cigarettes).

Fourth Amendment gives those officers vast discretion to use force against people while in that state of crisis.²¹

Improving legal accountability might mean that Vicki Timpa could more easily have learned what happened to her son, or that she would not have had to fight the plausibility pleading standard and qualified immunity for seven years before she could get to trial. But I am certain that if Vicki Timpa had a choice between strengthening the deterrent effect of the lawsuit she brought or avoiding Tony's death, she would choose the latter. Vicki's preferred path would have necessitated changes to the police department's practices and/or to the social forces that contributed to Tony's death.

II. HOW TO REFORM THE LAW IN LIGHT OF WHAT WE KNOW

Now consider the entirety of the question posed by the Berkeley symposium: How do we reform the law given what we know about the scope and causes of police violence? If the back-end legal accountability reforms I propose in *Shielded* are not, alone, up to the task, what types of front-end proposals should also be pursued?

Much of the front-end police reform efforts over the past several decades have focused on improving police practices—through, for example, better screening of officers; more robust policies and training; more effective supervision; and discipline or termination of officers who have violated law and policy. These reforms to police practices have dominated Department of Justice consent decrees, class action lawsuits, and local government reform efforts.²²

²¹ For further discussion of these social forces see, for example, Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 495 (2022) ("Fourth Amendment doctrine both fails to adequately protect disabled people and reinforces a 'normative bodymind' by rendering vulnerable to police surveillance, suspicion, and force those persons whose physical and psychological conditions, abilities, appearances, behaviors, and responses do not conform to the dominant norm."); Amy C. Watson & Taled El-Sabawi, *Expansion of the Police Role in Responding to Mental Health Crises Over the Past Fifty Years: Driving Factors, Race Inequities and the Need to Rebalance the Roles*, 86 L. & CONTEMP. PROBS. 1, 2 (2023) (describing "the events that led to the reliance on police for mental health crises response in general and...how such involvement has disproportionately affected Black persons and other persons of color experiencing mental health crisis.").

²² See, e.g., Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, Brennan Center for Justice (May 21, 2021) (describing state initiatives regarding use-of-force policies, the duty to intervene, and policies related to law enforcement reporting and certification), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>; Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1378-88 (2015) (describing typical provisions in Department of Justice negotiated settlements, including changes to use of force policies, early

The general view is that improvements in these areas have led to some tangible improvements in policing over the past several decades.²³ But it is also clear that widespread abuses by police continue despite these investments in police operations, training, oversight, and discipline.

For this reason, many believe that the most potent targets for front-end reforms are the social forces that lead to repeated police interactions and violence. These types of recommendations focus on limiting police contacts—through, for example, restrictions on the Fourth Amendment; decriminalization of drug and other nonviolent offenses; limitations on police authority to conduct stop-and-frisks, traffic stops, and mental health calls; the development of a trained, unarmed corps that can respond to calls for service that do not require police; and improvements in education, housing, and health care that could, in an ideal world, obviate the need for police altogether.²⁴ Calls to defund or abolish the police should be understood as the most far-reaching proposals in this vein.²⁵

Given the choice—and setting aside the viability or advisability of any specific proposal—I favor reforms that target the social forces that lead to police exposure and violence to those that target police practices. Limiting unnecessary police contacts is far preferable to training officers to engage properly in those unnecessary contacts. And there are limits to how much improving police practices can do; the officers who killed Timpa were trained about the dangers of putting bodyweight on someone in a prone position but did so anyway. Although improving police practices in Dallas might mean that the officers who

intervention and risk management systems, complaint procedures and investigations, training, bias-free policing, and community and problem-oriented policing). *See also Consent Decree, Bailey v. City of Philadelphia*, C.A. No. 10-5952 (E.D. Pa. June 21, 2011) (agreeing to changes in training, supervision, and data collection as part of a consent decree in a class action challenging stop-and-frisk practices in Philadelphia).

²³ *See id.* at 1396-1408 (describing benefits of the Department of Justice’s structural reform injunctions).

²⁴ For a sampling of critiques and recommendations focused on these front-end targets, see generally Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2016) (describing how the Fourth Amendment allows racial profiling and stops, and facilitates violence); Rachel A. Harmon, 115 MICH. L. REV. 307 (2016) (arguing for a reduction or elimination of arrests); David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022) (describing cities’ efforts to limit traffic stops); Turner, *supra* note 24 (describing programs to have mental health professionals respond to people in mental health crisis), <https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises>.

²⁵ *See generally, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020); Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020); DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* (2022).

killed Tony Timpa would have been disciplined or fired, addressing the underlying social forces could have had a far greater impact. If, for example, Dallas had sent mental health professionals instead of police officers to respond to Tony Timpa's 911 distress call, those professionals may well have been able to meet Timpa's needs without using force at all.²⁶

Although, given the choice, I would prefer reforms targeting social factors, I also believe reforms to police practices have value. So long as we live in a society where there are government officials charged with maintaining order—and I believe that is the type of society in which we will live for the foreseeable future—improvements to police practices that can meaningfully reduce police violence and other harms must also be pursued. The same logic applies to improvements to back-end legal accountability. As I explained in *Shielded*:

No matter what changes are put in place, there will still be times when government officials overstep the authority they have been given and people are hurt in the process. No matter what policing looks like in the future, we will still need to compensate people who have been hurt, and to prevent something similar from happening again. Civil rights lawsuits will continue serving an important role. We might as well get them working better than they do now.²⁷

As we work to address the social forces that expose people to unnecessary police contact and violence, we must also work to ensure that the system functions as best it can in its current iteration—which means that police must be hired, trained, and supervised to act within the limits of their current authority and that when police violate a person's rights, as those rights are currently understood, there is meaningful recourse in the courts.

Abolitionists would agree that reforms are a necessary form of harm reduction on the long road to achieve their goals.²⁸ As Mariame Kaba has written, “I don't know anybody who is an abolitionist who doesn't support *some*

²⁶ For a description of the mental health response program instituted in Dallas two years after Timpa's death, see *infra* notes 62-67.

²⁷ See SCHWARTZ, *supra* note 3, at 238.

²⁸ See, e.g., Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1214 (2022) (“While they pursue a radical new world, abolitionists also respond to ongoing and immediate forms of state and private violence—what is referred to as harm reduction); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 108 (2019) (“[P]rison abolitionists acknowledge that building a prisonless society is a long-term project involving incremental achievements.”); Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019) (“I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it”).

reforms.”²⁹ But abolitionists tend to limit their support to what they term “non-reformist reforms”; a phrase that has been defined different ways, but that Kaba situates with the following questions:

Which reforms don’t make it harder to dismantle the systems we are trying to abolish? Don’t make it harder to create new things? What “non-reformist” reforms will help us move toward the horizon of abolition?³⁰

Amna Akbar has observed that “the lines between reformist and non-reformist efforts are blurry. The same demand may look non-reformist from one point of view and reformist from another; non-reformist when proposed and reformist down the line.”³¹ But, under most definitions and most circumstances, reforms to police practices would presumably fall outside the category of non-reformist reforms because they allocate resources to the police and aim to improve how police do their jobs.³² Some abolitionists have argued that a focus on improving police practices may take wind out of the sails of more transformational change, and entrench a criminal justice system that is fundamentally flawed.³³ Although I share these concerns, they do not merit rejecting reforms to police practices out of hand in my view. Instead, they merit careful evaluation of proposed reforms’ costs and benefits. As Carol Steiker writes, “the ultimate question should

²⁹ MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 96 (Haymarket Books: 2021)

³⁰ *Id.*

³¹ Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L.J.* 2497, 2536 (2023).

³² *Accord* KABA, *supra* note 29, at 70 (offering a “simple guide for evaluating any suggested reforms of US policing in this historic moment” including the question: “Are the proposed reforms allocating more money to the police? If yes, then you should oppose them.”). *See also* Morgan, *supra* note 29, at 1208-09 (observing that abolitionists “adamantly oppose reforms that invest resources into surveillance, policing, and punishment systems.”).

³³ *See, e.g.*, Akbar, *supra* note 31, at 2519 (“Reformism telegraphs to the public that the system, institution, or set of relations it seeks to tweak are here to stay; that the problem is not structural or symptomatic but stray.”); Akbar, *supra* note 25, at 1802 (arguing that legal scholars’ focus on reforming the police “mires us in debates about what investments will improve policing while obscuring the fundamental role of violence in policing and the immense power at the core of their impunity”); Mychal Denzel Smith, *Incremental Change Is a Moral Failure*, *THE ATLANTIC* (Sept. 2020) (“The set of demands issued by the police-reform advocacy project Campaign Zero, branded “#8cantwait,” threatened to suck up the energy that was forming around defunding the police and divert it toward minor reforms that would have little impact on levels of police violence.”). For a description of these same arguments framed as between what Margo Schlanger calls “maximalists” against “incrementalists” in debates about solitary confinement reform, see Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 *NW. U. L. REV.* 273, 275-78 (2020).

be one of weighing the magnitude of improvement against the likelihood of entrenchment of injustice."³⁴

For example, I oppose any policy allowing police to deploy armed robots; such a policy would unjustifiably expand police power in the name of public safety, while almost certainly resulting in more police-inflicted injury and death.³⁵ But I support de-escalation training, which has been found to markedly reduce police uses of force.³⁶ I recognize that de-escalation training is an incomplete fix; it may sometimes reduce uses of force in situations where police aren't needed at all. I would prefer to limit police power to respond in situations where they were not needed. And if the footprint of policing were reduced in this manner, some of the money spent on de-escalation training could be used to improve other under-funded public resources like education and housing. But if there isn't political will at the moment to limit police power (more on that in a moment) and if police would continue to have power to use force even if those limits were adopted, then de-escalation training seems a worthwhile investment.

It is impossible to weigh with any precision or confidence the benefits of de-escalation training against the risk that such training will entrench injustice or make transformative reforms more difficult to obtain. Different people will assess these costs and benefits in different ways. But, as I see it, the benefits of de-escalation training outweigh the costs; I don't believe it will foreclose more transformative reforms in the future and do believe it will make policing safer today.

³⁴ Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1394 (2019).

³⁵ See, e.g., Michael Levenson, *San Francisco Considers Allowing Use of Deadly Robots by Police*, N.Y. TIMES (Dec. 7, 2022); Jay Stanley, *It's Simply Too Dangerous to Arm Robots*, ACLU (Dec. 16, 2022), <https://www.aclu.org/news/privacy-technology/its-simply-too-dangerous-to-arm-robots>.

³⁶ See, e.g., Robin Engel, Nicholas Corsaro, Gabrielle T. Isaza & Hannah D. McManus, *Assessing the Impact of De-Escalation Training on Police Behavior: Reducing Police Use of Force in the Louisville, KY Metro Police Department*, 21 CRIM. & PUB. POL'Y 199 (2022) (finding "demonstrated statistically significant reductions in use of force incidents (-28.1%), citizen injuries (-26.3%), and officer injuries (-36%) in the post-training period"); Tom Jackman & Dan Morse, *Police De-Escalation Training Gaining Renewed Clout as Law Enforcement Seeks to Reduce Killings*, WASH. POST (Oct. 27, 2020) ("In the Bay Area, the San Francisco Police Department created a training program that resulted in a 24 percent decrease in use of force in 2019 compared with 2018...And a recent study shows that one form of de-escalation training run by the Police Executive Research Forum (PERF) dramatically cut use-of-force incidents and injuries to citizens and officers for one big-city department."); Jessica Winters, *New ASU Research Says Officer De-Escalation Training Works. Here's Why.*, 12 NEWS (Nov. 3, 2021) ("Officers who received the one-day training last year were 58% less likely to injure someone in a use of force encounter than those who didn't do the training.").

III. HOW TO REFORM THE LAW IN LIGHT OF WHAT WE KNOW ABOUT HOW HARD IT IS TO REFORM THE LAW

In light of what we know about the scope and causes of police violence and misconduct, we should work to address the underlying social forces that lead to police interactions and violence, and should also improve police practices and legal accountability that govern policing in its current form. But there is another reality to account for before moving forward with one or more of the countless concrete proposals to address each of these categories of concern: the challenges of actually reforming the law.

A first challenge is getting reforms enacted. Police reform is, as David Sklansky has described, “a partisan flashpoint.”³⁷ Debates about qualified immunity over the past several years have made clear just how partisan police reform can be, and the difficulties of advancing reforms that are portrayed to be against “law and order” and police officers’ interests. Although a majority of people believe that police should suffer consequences when they violate the law, and that ending qualified immunity is an important step in this direction,³⁸ the law enforcement lobby has been remarkably successful in quelling efforts to do away with the defense.³⁹ The George Floyd Justice in Policing Act failed in Congress after more than a year of negotiations; qualified immunity was, apparently, a key sticking point.⁴⁰ Since May 2020, more than half the states have introduced bills that would effectively eliminate qualified immunity by allowing people to sue under state law for violations of their constitutional rights without qualified immunity as a defense. But police union representatives, local government attorneys, and law enforcement officials have testified in opposition to these bills, arguing—without any evidence to support their claims—that officers would be bankrupted for good-faith mistakes without qualified immunity’s protections. I have testified in several hearings in support

³⁷ David Alan Sklansky, *Police Reform in Divided Times*, 2 AM. J. L. & EQUITY 1, 5 (2022).

³⁸ See Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INSTITUTE (July 16, 2020); Pew Research Center, *Majority of Public Favors Giving Civilians the power to Sue Police Officers for Misconduct* (July 9, 2020) (“Two-thirds of Americans (66%) say that civilians need to have the power to sue police officers to hold them accountable for misconduct and excessive use of force, even if that makes the officers’ jobs more difficult.”), <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/>

³⁹ See Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021).

⁴⁰ See Sarah D. Wire, *The Supreme Court Created Qualified Immunity. Why Is It So Tough for Congress to Get Rid of It?*, L.A. TIMES (May 25, 2021).

of these bills, referencing a decade's worth of research undermining these claims. And yet, the unfounded fears repeatedly prove convincing: bills passed in Colorado, New Mexico, and New York City, but other bills have died in legislative committee or have been voted down.⁴¹

A second challenge is actually implementing reforms once they are enacted. When, for example, the Department of Justice enters into a consent decree with a local government, requiring that the local police department overhaul its policies, trainings, supervision, and investigations, that consent decree is just the first step in what can be a years'-long process.⁴² Policies and trainings must be rewritten; officers and officials must be retrained; hardware and software must be updated to better track officers' conduct; officers' and officials' conduct must be monitored; and further interventions must be made to address shortcomings and prevent backsliding.⁴³

Given these dual challenges, ideal reforms will bridge the partisan divide—both so that the reforms can be enacted, and so that there will be energy and commitment to do the hard work of implementing them.⁴⁴ It might seem that there can be no meeting of the minds on this polarizing topic, or that any agreement would be about the most modest of reforms. Yet, while some basic reforms to police practices and legal accountability have been vigorously opposed, fundamental adjustments to the social forces that lead to police contact and violence have garnered agreement across the aisle.⁴⁵

Consider, for example, proposals to limit or eliminate police involvement in calls for service that do not require police power. In the last chapter of *Shielded*, I endorsed this type of measure in the form of “initiatives to have

⁴¹ For further discussion of those bills, see Reinert, Schwartz & Pfander, *supra* note 1.

⁴² For one description of these challenges, see Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 *UCLA L. Rev.* 1023, 1060-66 (2010).

⁴³ For the dangers of backsliding, see Rushing, *supra* note 22, at 1410-12.

⁴⁴ For similar arguments in favor of bipartisan reforms, see Brandon L. Garrett, *Unified Criminal Justice Reform*, 85 *LAW & CONTEMP. PROBS.* 123, 130-39 (2022); Sklansky, *supra* note 37, at 23-24; Steiker, *supra* note 34, at 1366-73. For an entirely different, and intriguing approach—“one that involves imposing various changes on the system unilaterally, without the support of policymakers and even in the face of concerted opposition by police, prosecutors, and judges”—see Clark M. Neily III, *Thinking Outside the Cage: A Review of Rachel Barkow's Prisoners of Politics*, 56 *N.E. L. REV.* 7, 10 (2021)

⁴⁵ For discussion of common ground on reforms to the social forces that lead to police contacts and violence, see Steiker, *supra* note 34, at 1370-71 (describing bipartisan agreement about decriminalization of marijuana); David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, *N.Y. TIMES* (Apr. 15, 2022) (“Chiefs, prosecutors and lawmakers are rethinking the value, and the harm, of minor traffic stops”).

unarmed people respond to those having mental health crises,” and cities’ resolutions to “end[] police stops for some minor traffic violations.”⁴⁶ Barry Friedman has called this “disaggregating the policing function”: He has proposed that we figure out what it is that police are charged with doing; figure out which government or non-governmental agency would be best suited to address those problems that police are ill-suited to address; and develop the infrastructure to shift those responsibilities to that other agency or group.⁴⁷

Groups that do not appear to agree about anything when it comes to policing—those who support abolition, law enforcement unions and officers, and local government administrators—share interests that converge around proposals to disaggregate the police function. In the view of those seeking abolition, this type of approach is a modest, though important step, forward.⁴⁸ But unlike qualified immunity, defunding the police, and other types of reform proposals that have provoked intense criticism, disaggregating the police function has been understood to advance police officers’ interests.

In March 2023, the Los Angeles Police Protective League proposed that unarmed personnel from other city departments or nonprofits—not police—respond to twenty-eight different calls for service, including non-violent homeless, quality-of-life, and mental health calls; calls to schools; under-the-influence calls where no crime is in progress; and non-fatal traffic accidents.⁴⁹ As one union representative explained at a news conference introducing the proposal:

Police officers are not psychologists. We are not psychiatrists. We are not mental health experts. We are not social workers, doctors, nurses or waste management experts. I do believe that many people think we should be all those things but we are not. We should be focused on

⁴⁶ SCHWARTZ, *supra* note 3, at 238.

⁴⁷ See generally Barry Friedman, *Disaggregating the Policing Function*, 169 U. PENN. L. REV. 925 (2021).

⁴⁸ See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1628 (2019) (describing projects that “provide alternative first responders, mediation support, or other forms of mutual aid to those who would otherwise likely be subject to victimization, arrest, possible police violence, or incarceration” as “small-scale attempts to prefigure different relationships between people, to develop meaningful and thick mutual support networks, to constitute real alternatives to police and jail intervention, and to build power that may be used to realize farther-reaching change.”).

⁴⁹ For a description of each of the 28 calls for service the Los Angeles Police Protective League wants handled by unarmed responders, see Sheila McClear, *LAPD Officers’ Union Lists 28 Calls for Service That Someone Else Can Handle*, LA Mag (Mar. 1, 2023), <https://www.lamag.com/citythinkblog/the-lapd-propose-their-officers-stop-responding-to-28-calls-for-service/>.

responding to emergencies, saving lives (and property), and of course, engaging in community policing.⁵⁰

Not only is disaggregating the police function a model that police unions can accept; it appears, at least in the view of the Los Angeles Police Protective League, that its members would affirmatively benefit from the passage of their proposal.

These types of programs are also in local governments' interests. Consider, for example, a program started more than thirty years ago in Eugene, Oregon—Crisis Assistance Helping Out on the Streets (CAHOOTS)—that sends a medic and crisis worker, instead of police, to respond to behavioral health crisis calls.⁵¹ In 2019, CAHOOTS responded to approximately 20% of all calls for service.⁵² CAHOOTS saves the City of Eugene money—it estimates that it saves \$14 million each year in ambulance trips and emergency room visits, and approximately \$8.5 million in public safety costs.⁵³ Given that more than one in five people fatally shot by police have mental illnesses, CAHOOTS may be saving community members' lives as well.⁵⁴ Particularly given reported challenges recruiting and retaining police officers, diverting officers' current responsibilities to other trained responders seems a win-win proposition.⁵⁵

Even when local governments embrace these types of initiatives, they can be difficult to implement.⁵⁶ But, despite perhaps inevitable bureaucratic

⁵⁰ Stephanie Daszio, *Los Angeles Union Proposes Limits to 911 Responses*, ABC NEWS (Mar. 1, 2023, 2:31 PM), <https://abcnews.go.com/US/wireStory/los-angeles-police-union-proposes-limits-911-responses-97566246>.

⁵¹ See, e.g., Scottie Andrew, *This Town of 170,000 Replaced Some Cops with Medics and Mental Health Workers. It's Worked For Over 30 Years*, CNN (July 5, 2020); Jackson Beck, Melissa Reuland & Leah Pope, *Case Study: CAHOOTS*, VERA INST. (Nov. 2020), <https://www.vera.org/behavioral-health-crisis-alternatives/cahoots>.

⁵² See Andrew, *supra* note 51.

⁵³ See *id.*

⁵⁴ See Minyvonne Burke, *Policing Mental Health: Recent Deaths Highlight Concerns over Officer Response*, NBC News (May 16, 2021, 1:30 AM), <https://www.nbcnews.com/news/us-news/policing-mental-health-recent-deaths-highlight-concerns-over-officer-response-n1266935>.

⁵⁵ See, e.g., Peter Charalambous, *'Vicious Cycle': Inside the Police Recruiting Crunch With Resignations on the Rise*, ABC NEWS (Apr. 6, 2023), <https://abcnews.go.com/US/police-departments-face-vicious-cycle-challenges-retaining-recruiting/story?id=98363458>.

⁵⁶ See Candace Hanson & Taylor Crouch-Dodson, *A Wicked Challenge: Unarmed, Trauma-Informed and Culturally Affirming Response to Behavioral Crisis 911 Calls in Minneapolis*, Crisis Now (June 20, 2023) (describing challenges in the implementation of Minneapolis's mental health crisis response team); <https://talk.crisisnow.com/opinion-a-wicked-challenge>.

growing pains, there is excitement and commitment across the country to develop these types of mental health responder programs, and mounting evidence that they are saving local governments money and improving outcomes for community members.⁵⁷

There are, of course, limits to the ambitions of reforms that can garner support across the ideological divide. Michelle Alexander raised this concern more than a decade ago regarding bipartisan limits on mass incarceration.⁵⁸ At the time, tight federal and state budgets led tough-on-crime lawmakers to agree with civil rights groups that the prison population should decrease so that tax dollars should be spent on other needs. Many advocates, Alexander wrote, celebrated this moment of what Derrick Bell called “interest convergence” and encouraged “catch[ing] the wave and rid[ing] it.”⁵⁹ But, Alexander observed, an interest-convergence approach would never address the scope of the problem:

If our nation were to return to the rates of incarceration we had in the 1970s, we would have to release 4 out of 5 people behind bars. A million people employed by the criminal justice system could lose their jobs. Private prison companies would see their profits vanish. This system is now so deeply rooted in our social, political and economic structures

unarmed-trauma-informed-and-culturally-affirming-response-to-behavioral-crisis-911-calls-in-minneapolis/; Lila Seidman, *L.A. Promised Mental Health Crisis Response Without Cops. Why Isn't It Happening?*, L.A. TIMES (Apr. 13, 2023) (describing the challenges of rolling out a mental health response team in Los Angeles County), <https://www.latimes.com/california/story/2023-04-13/988-hotline-mental-health-crisis-system-police>.

⁵⁷ For descriptions of various city programs, see, for example, Nicholas Turner, *We Need to Think Beyond Police in Mental Health Crisis*, VERA (Apr. 6, 2022), <https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises>. New York University’s Policing Project has convened public safety officials, community advocates, and other experts around the country to consider and develop these same types of programs as part of its “Reimagining Public Safety” initiative. See, e.g., THE POLICING PROJECT & THE JUSTICE COLLABORATORY, REIMAGINING PUBLIC SAFETY: FIRST CONVENING REPORT (Jan. 2021), <https://www.policingproject.org/rps-first-convening-report>

⁵⁸ See Michelle Alexander, *‘Interest Convergence’ Won’t End Mass Incarceration*, FRIENDS OF JUSTICE BLOG (May 16, 2011), <https://friendsofjustice.blog/2011/05/16/michelle-alexander-interest-convergence-wont-end-mass-incarceration/>.

⁵⁹ *Id.* For the seminal description of Derrick Bell’s interest-convergence theory—that Black people’s rights improve only when they converge with the interests of white people—see generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

that it is not going to fade away without a major shift in public consciousness.⁶⁰

Interest-convergence would produce some prison downsizing, Alexander predicted, but “we will not end mass incarceration without a recommitment to the movement-building work that was begun in the 1950s and 1960s and left unfinished.”⁶¹

I agree with Alexander—police reforms that are a product of interest convergence will be incomplete. The Los Angeles Police Protective League will not endorse a plan that doesn’t benefit its members. The union may want its officers out of the business of responding to people in mental health crisis, but would presumably oppose punishing an officer who chose to do so. The union may want to delegate some of its officers responsibilities to unarmed personnel, but would likely oppose any reduction of the police department’s budget to fund other agencies and nonprofits that might step in to perform these tasks. And there are limits to the types of police powers the Los Angeles union will want to delegate; they are, for example, strongly opposed to limiting police power to conduct traffic stops.⁶²

But, if adopted and put into place, the Los Angeles police union’s proposal would have tangible and important benefits. It would reduce the frequency with which law enforcement officers engage with people who are in a state of mental health crisis or otherwise need assistance—and might, therefore, reduce arrests, assaults and killings of those people. This proposal, if adopted, should also prompt investment in an unarmed corps that is trained and prepared to respond under these circumstances. And, if successful, the authority and budget of this corps might expand. This is what happened in Eugene, with CAHOOTS, and is happening elsewhere across the country.

In many instances, the compromises that can be negotiated will be far less ambitious than the proposal offered by the Los Angeles police union. What is possible in any given place and time will depend on who the stakeholders are in that jurisdiction, and the nature and extent of their differences. The terms of

⁶⁰ Alexander, *supra* note 58.

⁶¹ *Id.* For a similar argument about the limits of interest convergence and police reform following the murder of George Floyd, see Alexis Hoag, *Derick Bell’s Interest Convergence and the Permanence of Racism: A Reflection on Resistance*, HARV. L. REV. BLOG (Aug. 24, 2020), <https://harvardlawreview.org/blog/2020/08/derrick-bells-interest-convergence-and-the-permanence-of-racism-a-reflection-on-resistance/>.

⁶² See Kevin Rector, *New Limits on ‘Pretextual Stops’ by LAPD Officers Approved, Riling Police Union*, LA TIMES (Mar. 1, 2022, 7:32 PM), <https://www.latimes.com/california/story/2022-03-01/new-limits-on-pretextual-stops-by-lapd-to-take-effect-this-summer-after-training>.

a proposal that can cross the partisan divide in one part of the country may be unacceptable to community groups or the police union in another. What compromises are worth making depends, in my view, not only on the costs and benefits of the proposal (as I explained earlier), but on what is politically feasible.

For example, two years after Tony Timpa was killed, Dallas created the Rapid Integrated Group Healthcare Team (RIGHT Care) pilot program—a partnership of paramedics, police officers, and mental health professionals who respond “as a single coordinated team” to people in mental health crisis.⁶³ Some criticize the RIGHT Care program’s design, arguing that police should not be part of the response team; “a clinician and a paramedic are really all you need.”⁶⁴ Defenders of the program’s design argue that having a police officer on scene is important to manage public safety. I agree that these mental health services could be provided without police presence—they already are by CA-HOOTS and teams in other parts of the country.⁶⁵ But the Dallas partnership is the first of its kind in Texas,⁶⁶ and might not have been adopted without this structure. If the RIGHT Care program is studied and data confirm that no police presence is necessary, Dallas could remove police from the response team in the future. But the program is, in its current form, providing an important service—among calls for those in mental health crisis, the program decreased the number of people taken to the emergency room by 20%, and decreased arrests by 60%.⁶⁷ Had it been in put in place two years earlier, it might have saved Tony Timpa’s life.

⁶³ See MEADOWS MENTAL HEALTH POLICY INSTITUTE, MULTI-DISCIPLINARY RESPONSE TEAMS: TRANSFORMING EMERGENCY MENTAL HEALTH RESPONSE IN TEXAS (May 2021), <https://mmhpi.org/wp-content/uploads/2021/06/MDRT-Transforming-Crisis-Response-in-Texas.pdf>

⁶⁴ See *id.* See also Hayley Zhao, *Dallas PD Expands Controversial, Though Successful, Mental Health Response Program*, NEXT CITY (Oct. 6, 2021) https://nextcity.org/urbanist-news/dallas-pd-expands-controversial-successful-mental-health-response-program?gclid=Cj0KCQjwwISIBhD6ARIsAESAmP4rCF3PbJdTEZBdjiLK4Y5-Rgk3BSl-BvHwLXh1RXaYdjkw8HzZG-caAmmxEALw_wcB

⁶⁵ See Turner, *supra* note 57 (describing some of these civilian crisis response programs around the country); Watson & El-Sabawi, *supra* note 21, at 19-22 (describing different models of mental health crisis response, some of which do and others of which do not involve law enforcement).

⁶⁶ See *RIGHT Care Team Responds to Mental Health Crisis Calls*, PARKLAND HEALTH (Feb. 18, 2019), <https://www.parklandhealth.org/news-and-updates/right-care-team-responds-to-mental-health-crisis-c-1488>.

⁶⁷ See *id.*

During this symposium, I and my co-panelists were asked whether they would support a mental health response team that involved police officers: one of us said yes, one said no, and I said it depends. The RIGHT Care project underway in Dallas illustrates why I resist a bright-line rule rejecting certain kinds of reforms because they are too reformist or unambitious.⁶⁸ Instead, I believe in adopting the best proposal that can be adopted under the circumstances—measured in the benefits it will offer against the “likelihood of entrenchment of injustice”⁶⁹—then implementing the proposal, studying its effects, developing future proposals based on its effects, and preparing for future rounds of advocacy and negotiation.

My endorsement of this approach should not be understood as disagreement with Alexander about the importance of a more transformational vision. I believe any progress is hard, and should be applauded, but also believe that, in Mychal Denzel Smith’s words, we should not “convince[] ourselves that *hard* is a synonym for *revolutionary*.”⁷⁰ Instead, I believe that incremental and transformative efforts must play roles in the same enterprise. As reforms are adopted, implemented, and improved—be they mental health response teams like CAHOOTS or the RIGHT Care program, de-escalation training, or state law reforms to qualified immunity—the types of efforts to shift public consciousness Alexander describes should continue to be pursued in earnest, and can influence the kinds of proposals that may become feasible in years to come.⁷¹

CONCLUSION

In *Shielded*, I argue that a “Better Way” is to have meaningful accountability in the courts when a person’s rights are violated. As I argue in this Essay, an “Even Better Way” would be not to have one’s rights violated at all—and avoiding those rights violations can occur through changes to police practices and the types of social forces that make African-Americans and other marginalized groups vulnerable to police contact and violence. In theory, addressing the underlying social forces that cause violence and harm is the most fundamental fix. But it cannot be the only fix. So long as we have police, they must be properly trained and supervised. So long as we have government officials

⁶⁸ See *supra* notes 30-36 and accompanying text.

⁶⁹ Steiker, *supra* note 34, at 1394.

⁷⁰ Smith, *supra* note 33.

⁷¹ Accord McLeod, *supra* note 48, at 1630 (“The ambition of [programs like CAHOOTS] is to expand capacity and membership over time, to demonstrate their success and promise, and to change people’s minds more broadly about the necessity of police interventions across a wide variety of contexts, and to thereby build local power in support of more peaceable means of collective democratic governance.”).

who can violate our rights, we need functioning systems of legal accountability. Although Vicki Timpa would undoubtedly prefer a world in which Tony was never killed, she does not have the luxury of that choice; instead, her only recourse is to demand justice in the courts for her son. And, as I argue in *Shielded*, Vicki and too many others have been denied the justice they deserve.

Although our system needs transformative change at the front and back ends, reforms that can actually be adopted and enacted will be incremental and incomplete. Yet incremental reforms can improve people's lives in important ways, and can lay the groundwork for future reforms—especially as protest, advocacy, and community building continue to shift the bounds of what is considered possible. There will invariably be disagreements about how to prioritize these efforts and what tradeoffs to accept. But the best possible way forward recognizes the value of both of these types of approaches and views them as part of the same fight for a better and more just world.