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# An Even Better Way

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|-----------------------------------------------------------------------------------------------------|------|
| Introduction .....                                                                                  | 1083 |
| I. What We Know .....                                                                               | 1085 |
| II. How to Reform the Law in Light of What We Know .....                                            | 1093 |
| III. How to Reform the Law in Light of What We Know About How<br>Hard it is to Reform the Law ..... | 1098 |
| Conclusion .....                                                                                    | 1106 |

## INTRODUCTION

The final session of the 2023 *California Law Review* 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.<sup>1</sup> And I know that the Supreme Court and state and

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\* Professor of Law, UCLA School of Law. Deepest thanks to participants in the *California Law Review* symposium for thought-provoking discussions that inspired this Essay; to Peter Bibring, Devon Carbado, Adam Davidson, Sharon Dolovich, Barry Friedman, Brandon Hasbrouck, Dan Schwartz, Fred Smith, and participants in a faculty workshop at DePaul University College of Law for insightful comments on earlier drafts; to Zachary Howard, Vasudev Mittal, and Madeleine Mozina for excellent research assistance; and to the editors of the *California Law Review*, especially Laura Carver, Emma Gomez, Caiti Hall, Heather DeMocker, Thomas Saenz, Andrew Schwartz, Ali Suebert, and Ashley Fan, for superb editorial assistance.

1. See JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE xi–xiii (2023) (explaining why, in our current system, civil rights lawsuits, despite their flaws, are better than criminal prosecutions or internal affairs investigations at delivering some measure of justice to people when police violate their rights). In most jurisdictions, people are not limited to § 1983 claims; they can, in addition or in the alternative, file claims under state law. For a description of existing state laws and why claims under these laws are often inferior to a § 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). Note, also, that my endorsement of civil suits as among our best available options should not be read to suggest that they are ideal. Reparations, restorative justice, 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.<sup>2</sup>

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 legal accountability: qualified immunity should be eliminated, local governments should be held vicariously liable for misconduct by their officers, injunctive relief should be more easily attainable for people seeking forward-looking relief, lawsuit payments should be taken out of police department budgets, departments should be made to gather and analyze information about suits with an eye toward preventing similar cases from occurring in the future, and people whose rights have been violated should have readier access to experienced attorneys to represent them.<sup>3</sup>

These reforms would make it easier for people to get some measure of justice when the police violate their rights 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.”<sup>4</sup> And although the reforms I outlined should reduce the frequency of constitutional violations to some degree, they will not prevent many of the harms people sue about, or the harms for which people never seek remedy.<sup>5</sup> Reducing the frequency of—ideally, eliminating—these harms must be a primary concern. As Fred Smith

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transformative justice approaches may offer more meaningful remedies and more fundamental change. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1623–28 (2019) (describing a “wide-ranging reckoning” in Chicago for those tortured by officer Jon Burge, including the creation of a public record documenting the torture, a formal apology, and reparations for survivors); *id.* at 1630–31 (“Transformative justice differs from certain other experiments in restorative justice—which are often focused primarily, if not exclusively, on individualized responsibility—in that transformative justice processes aspire to work toward broader social, political, and economic change.”).

2. See SCHWARTZ, *supra* note 1, at xiv–xv (setting out this argument).

3. See *id.* at 225–41; see also, e.g., Reinert, Schwartz & Pfander, *supra* note 1, at 768–82 (proposing similar reforms through state law analogues of § 1983 and changes to local governments’ budgeting and risk management practices); Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 700–04 (2023) (proposing various means by which it could be made more financially viable for lawyers to accept civil rights cases); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1207–11 (2016) (proposing, among other reforms, that payments in police misconduct cases be taken from police department budgets); Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1235–40 (2023) (proposing that local governments be held vicariously liable for constitutional violations by their officers); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1832–36 (2018) (proposing that the Supreme Court, Congress, or lower courts do away with qualified immunity or limit its power).

4. SCHWARTZ, *supra* note 1, at 233.

5. Accord Paul Butler, *Is Police Brutality Just Part of the Job?*, WASH. POST (Feb. 17, 2023), <https://www.washingtonpost.com/books/2023/02/17/police-reform-books-paul-butler/> [https://perma.cc/X59Y-XCSP].

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.<sup>6</sup> 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 delve into the sorts of nonlitigation measures that could be taken to reduce or prevent police violence and other harms. Nor do I explore how these reforms relate to the legal accountability recommendations I offer. This was by choice: there is only so much that can be tackled in one book, and my goal in *Shielded* was to describe a set of interlocking protections that frustrate our system of civil rights remediation and proposals to improve that aspect of the system. Still, for those who want answers to the pressing question of how to prevent police violence and misconduct, the book may be, in Brandon Hasbrouck's words, "a chapter too short."<sup>7</sup> 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.<sup>8</sup>

## I.

### WHAT WE KNOW

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

We know that police kill more than one thousand 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.<sup>9</sup> We also

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6. For another discussion of this same point by Smith, see *Emory Law Presents: Conversations About Racism, Part 1*, YOUTUBE 59:15–59:36 (Sept. 3, 2020), <https://www.youtube.com/watch?v=13NrayYmb-o> [<https://perma.cc/9RCW-7MKR>].

7. Brandon Hasbrouck, *The Untouchables and the Stakes of Abolition*, BALKINIZATION BLOG (Mar. 7, 2023), <https://balkin.blogspot.com/2023/03/the-untouchables-and-stakes-of-abolition.html> [<https://perma.cc/P8D5-9PQ8>]. For Hasbrouck's elegant and compelling description of an abolitionist vision that his version of that final chapter might set out, see Brandon Hasbrouck, *Unshielded: How the Police Can Become Touchable*, 137 HARV. L. REV. 895 (2024) (book review). Adam Davidson's cogent review of *Shielded* ends with a similar call to engage with abolitionist theory. See Adam A. Davidson, *The Shadow of the Law of the Police*, MICH. L. REV. (forthcoming 2024) (draft on file with author).

8. For further discussion of "front-end" and "back-end" police reforms, see, for example, Maria Ponomarenko & Barry Friedman, *Democratic Accountability and Policing*, in 2 REFORMING CRIMINAL JUSTICE: POLICING 5, 9 (Erik Luna ed., 2017) (arguing that police accountability efforts focus unduly on the back end—"identifying and sanctioning misconduct"—rather than shoring up rules on the front end that define and constrain police powers).

9. For data about the number of people killed by police each year, see *Fatal Force*, WASH. POST (last updated Mar. 9, 2024), <https://www.washingtonpost.com/graphics/investigations/police->

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, Latinx and Indigenous; immigrants; protestors; homeless; mentally ill; and people who identify as LGBTQ+.<sup>10</sup>

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shootings-database [<https://perma.cc/NTW3-UE59>]. 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 5 (Nov. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpp20.pdf> [<https://perma.cc/JMR7-98F5>]. 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).

10. See SCHWARTZ, *supra* note 1, at xix; see also, e.g., ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 4, 8, 16–17 (2018) (finding that Black residents were more likely to be stopped by police than white or Latinx residents, that Black and Latinx residents were more likely than white residents to have multiple contacts with police, and that police were twice as likely to threaten or use force against Black and Latinx residents than white residents); DORIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI & JOHN SNOOK, TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015) (reporting evidence that the mentally ill make up a disproportionate number of people killed by police); Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html> [<https://perma.cc/4U9X-Q7C2>] (“Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group.”); CHRISTY MALLORY, AMIRA HASENBUSH & BRAD SEARS, THE WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 4–11 (2015) (describing studies showing discrimination and harassment of LGBTQ+ communities by law enforcement); Leila Miller, *Use-of-Force Incidents Against Homeless People Are Up*, *LAPD Reports*, L.A. TIMES (Jan. 21, 2020) (reporting that “[m]ore than one out of three times that a Los Angeles police officer used force in recent months involved a person experiencing homelessness”); *Policing Immigrant Communities*, 128 HARV. L. REV. 1771 (2015) (providing an overview of immigration enforcement by state and local officers and the lack of accountability when officers inflict harm); Tobi Thomas, Adam Gabbatt & Caelainn Barr, *Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests*, GUARDIAN (Oct. 29, 2020) (describing a database with more than one thousand uses of force and other misconduct against protestors and the media).

And we know—from decades of academic research,<sup>11</sup> investigative journalism,<sup>12</sup> community advocacy,<sup>13</sup> blue ribbon commissions,<sup>14</sup> and Department of Justice investigations<sup>15</sup>—that police violence is not simply the

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11. For a small sampling of recent academic research that has contributed to our understanding of the structural nature of police violence, see, for example, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (arguing that the criminal justice system functions as a means of racialized control); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2003) (arguing that police violence should be viewed not as acts of individual officers but as products of police departments' organizational culture); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (arguing that policing strategies portrayed as problematic in Department of Justice reports and the popular press are not only legal but integral; "how the system is supposed to work"); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009) (arguing that policing methods encourage residential segregation); Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (describing how Fourth Amendment doctrine legalizes racial profiling, surveillance, contact, and the violence that can emerge from those engagements); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2014) (arguing that racially disparate police violence is the product of unconscious racial biases and self-threat); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7, 21–29 (2019) (describing central tenets of abolitionist philosophy, including that "today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained," and that "the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime"); Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225 (2015) (describing how law enforcement training and tactics encourage a "warrior" style of policing that undermines police/community relations).

12. For a small sampling of recent investigative journalism that has shone a light on these systemic factors, see generally, for example, John Archibald, *Inside the Remarkable Rise and Fall of Alabama's Most Predatory Police Force*, AL.COM (May 10, 2023), <https://www.al.com/news/2022/04/inside-the-remarkable-rise-and-fall-of-alabamas-most-predatory-police-force.html> [<https://perma.cc/8ZAJ-FD24>]; RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2014); JUSTIN FENTON, *WE OWN THIS CITY: A TRUE STORY OF CRIME, COPS, AND CORRUPTION* (2021); ROBERT SAMUELS & TOLUSE OLORUNNIP, *HIS NAME IS GEORGE FLOYD: ONE MAN'S LIFE AND THE STRUGGLE FOR RACIAL JUSTICE* (2022); Abbie VanSickle, Maurice Chammah, Michelle Pitcher, Damini Sharma, Andrew Calderon & David Eads, *Mauled: When Police Dogs Are Weapons*, MARSHALL PROJECT (2020), <https://www.themarshallproject.org/2020/10/15/mauled-when-police-dogs-are-weapons> [<https://perma.cc/XX9X-QLE9>].

13. For recent reports written by community groups, see generally, for example, MPD150, *ENOUGH IS ENOUGH: A 150 YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT* (Expanded ed. Summer 2020); FERGUSON COMM'N, *FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY* (2015), [https://forwardthroughferguson.org/wp-content/uploads/2015/09/101415\\_FergusonCommissionReport.pdf](https://forwardthroughferguson.org/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf) [<https://perma.cc/35FA-MPS3>].

14. For a sampling of blue ribbon commission reports examining the causes of police misconduct and violence, see generally, for example, NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968) (examining the causes of the 1967 uprisings in Detroit, Newark, and other cities); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) (examining the Los Angeles Police Department's policies and practices in the wake of the beating of Rodney King); PRESIDENT'S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING, *FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING* (2015) (examining how policing practices can build public trust and legitimacy in departments across the country).

15. For a description of the U.S. Department of Justice Civil Rights Division's work and for links to its lengthy investigations of police departments, see *Conduct of Law Enforcement Agencies*,

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 set out six dynamics that make up this “structural phenomenon” and explained the persistence of police violence against African Americans:

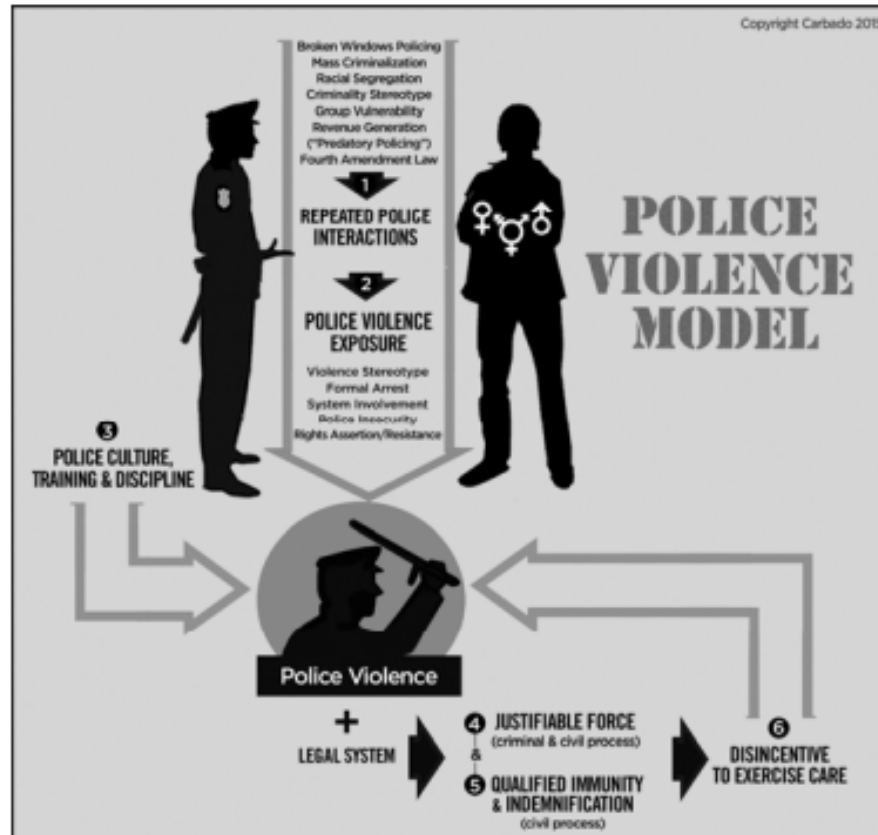
1. A variety of social forces (including, but not limited to, broken windows policing, racial stereotypes, racial segregation and gentrification, and Fourth Amendment law) converge to make African-Americans vulnerable to ongoing police surveillance and contact.
2. The frequency of this surveillance and contact exposes African-Americans to the possibility of blue-on-black violence.
3. Police culture and training encourages that violence (mostly implicitly).
4. When violence occurs, a range of legal actors in civil and criminal processes translate that violence into justifiable force.
5. The doctrine of qualified immunity makes it difficult for plaintiffs to win cases against police officers, and when plaintiffs win such cases, police officers rarely suffer financial consequences because their local government indemnifies them.
6. The conversion of violence into justifiable force, the qualified immunity barrier to suing police officers, and the frequency with which cities and municipalities indemnify police officers reduce the risk of legal sanction police officers assume when they employ excessive force. This reduction in the risk of legal liability diminishes the incentive for police officers to exercise care with respect to when and how they deploy violent force.<sup>16</sup>

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U.S. DEPT. OF JUST. C.R. DIV., <https://www.justice.gov/crt/conduct-law-enforcement-agencies> [https://perma.cc/7BKV-523E]. For a few recent examples of reports following these investigations see generally, U.S. DEPT. OF JUST. C.R. DIV. AND U.S. ATTY’S OFF. DIST. OF MINN. CIV. DIV., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT (June 16, 2023); U.S. DEPT. OF JUST. C.R. DIV. AND U.S. ATTY’S OFF. W. DIST. OF KY. CIV. DIV., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT (Mar. 8, 2023); U.S. DEPT. OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015).

16. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1482–84 (2016).

Carbado offers a useful schematic diagram that situates these six dynamics in relation to each other and to police violence:<sup>17</sup>



As Carbado's diagram suggests, these six dynamics can be understood to fall into three broader categories: 1) *social forces* that lead to the repeated exposure of African Americans to police surveillance, contact, and the possibility of violence; 2) *police culture, training, and discipline* that allow or implicitly encourage violence to occur; and 3) *the legal system*, which makes it difficult for police to be held accountable after the fact.<sup>18</sup>

In *Shielded*, I focus on the third part of Carbado's police violence model—the legal system—and how civil rights litigation limits accountability for officers after they have used violence and creates disincentives for officers and departments to exercise care.<sup>19</sup> But I agree wholeheartedly with Carbado that failings of legal accountability are but one of the contributors to police violence

17. See *id.* at 1484.

18. See *id.*

19. 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 how criminal defendants may assert their constitutional rights in defenses to their cases.

and that social forces and the state of police culture, training, and discipline also play an important role.

Many of the stories I tell in *Shielded* illustrate how social forces, police culture/training/discipline, 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.<sup>20</sup>

One hot August night in 2016, Tony Timpa called 911 from the parking lot of an adult film store in Dallas, Texas. Timpa told the 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, zip-tied Timpa's feet, and then two officers pressed more than three hundred pounds of their body weight on Timpa's back and neck. The officers held Timpa 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 made justice in the courts exceedingly difficult for Timpa's family to obtain.<sup>21</sup> Texas law allowed the Dallas police department to withhold body camera video and other evidence about how Tony 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.<sup>22</sup> Vicki's lawyer successfully negotiated for the release of body camera video and other documents in the city's possession before the motion to dismiss was decided,

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20. The details of Timpa's death set out in the following paragraph are described in SCHWARTZ, *supra* note 1, at 45–46.

21. The details of Vicki Timpa's lawsuit set out in this paragraph are described in SCHWARTZ, *supra* note 1, 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).

22. See Motion to Dismiss Pursuant to Rule 12(b)(6) filed by the City of Dallas with Brief/Memorandum in Support, *Timpa v. City of Dallas*, No. 3:16-CV-3089-N (N.D. Tex. Jan. 17, 2017).

allowing Vicki to file an amended complaint with sufficient detail.<sup>23</sup> But 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.<sup>24</sup> That qualified immunity grant was reversed on appeal two years later; the Fifth Circuit explained that "the law had long been clearly established that an officer's continued use of force on a restrained and subdued subject is objectively unreasonable" and concluded that, viewing the facts in the light most favorable to Tony Timpa's family, the officers violated Tony's clearly established rights.<sup>25</sup>

In September 2023, more than seven years after Dallas police officers killed Tony Timpa, the civil rights case brought by Vicki and other family members went to trial. After a week of testimony and argument, the jury found that three officers who were on the scene violated Tony Timpa's constitutional rights but awarded qualified immunity to the two officers who knelt on Tony's neck and back.<sup>26</sup> The jury denied qualified immunity to one officer, who joked about waking Tony up as he lay dying, and awarded \$1 million to Tony's son.<sup>27</sup> The jury awarded nothing in damages to Vicki, Tony's father, or Tony's estate. After the verdict, two of the jurors who unsuccessfully pushed for a larger award reported that their fellow jurors did not want to award the family anything out of concern that the officers would be personally responsible for any judgment.<sup>28</sup> In reality, the officers were never threatened with personal financial responsibility for any judgment awarded against them because Dallas indemnifies its officers, but evidence of indemnification was not admissible at trial.<sup>29</sup>

The award to Tony Timpa's son represented some measure of justice. As Vicki commented after the jury's verdict, "[w]hen [Tony's son] googles his

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23. See Second Amended Complaint with Jury Demand, *Timpa* (N.D. Tex. Apr. 20, 2017). Vicki Timpa voluntarily dismissed her claim against the City of Dallas five weeks before she filed an amended complaint that identified the officers involved. See Plaintiff's Notice of Dismissal of Defendant City of Dallas, *Timpa* (N.D. Tex. Mar. 13, 2017). Although Vicki could have pursued a claim against the City of Dallas, Vicki's attorney told me that he 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).

24. See Memorandum Opinion and Order, *Timpa* (N.D. Tex. July 6, 2020).

25. *Timpa v. Dillard*, 20 F.4th 1020, 1034 (5th Cir. 2021).

26. Billy Binion, *Tony Timpa Wrongful Death Ends With 2 Out of 3 Cops Getting Qualified Immunity*, REASON (Sept. 27, 2023). For discussion and analysis of the role qualified immunity plays at trial in the Fifth Circuit and elsewhere, see Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2063, 2087–89 (2018) (finding that juries in the Fifth Circuit are instructed on qualified immunity more than half the time, far more than in other circuits, and that plaintiffs are far less likely to prevail at trials in which qualified immunity instructions were given).

27. See Binion, *supra* note 26.

28. See Kelli Smith, *2 Jurors Say They Failed Tony Timpa in Verdict for Dallas Cops: 'I Should Have Done More'*, DALLAS MORNING NEWS (Oct. 1, 2023), <https://www.dallasnews.com/news/public-safety/2023/10/01/2-jurors-say-they-failed-tony-timpa-in-verdict-for-dallas-cops-i-should-have-done-more/> [<https://perma.cc/RR4E-NNHL>].

29. See *id.*

name, he will see that—that his daddy’s life mattered. That one person got in trouble.”<sup>30</sup> But at each step, the legal system made even this meager justice far more difficult to obtain than it should have been.

Although my discussion of Tony Timpa’s story in *Shielded* focuses on these legal accountability failures, his story also illustrates failures in the Dallas Police Department’s culture, training, and discipline of officers. 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.<sup>31</sup> Yet the officers who knelt on Tony and clearly violated department policy received only a written reprimand and were sent back to work.<sup>32</sup> 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.”<sup>33</sup> The officers are still on the force and one has been promoted to senior corporal, making him responsible for training rookie officers.<sup>34</sup>

Tony 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: Tony was a white, wealthy executive, and so this is not a story of broken windows policing, segregation, or racial profiling of African Americans as criminally suspect—although other stories in *Shielded* most certainly are.<sup>35</sup> 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 Fourth Amendment gives those officers vast discretion to use force against people while in that state of crisis.<sup>36</sup>

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30. See Cary Aspinwall, *A Death in Dallas, and a Family’s Long Fight for Justice*, MARSHALL PROJECT (Oct. 7, 2023), <https://www.themarshallproject.org/2023/10/07/texas-dallas-tony-timpa-police-accountability> [<https://perma.cc/9MD5-V7E8>]; Kelli Smith & Aria Jones, *Attorney for Tony Timpa’s Mother Says Fight Isn’t Over After Trial of 4 Dallas Officers*, DALLAS MORNING NEWS (Sept. 29, 2023), <https://www.dallasnews.com/news/public-safety/2023/09/29/attorney-for-tony-timpas-mother-says-fight-isnt-over-after-trial-of-4-dallas-officers/> [<https://perma.cc/X84B-WKKN>].

31. See SCHWARTZ, *supra* note 1, at 45.

32. See *id.* at 47.

33. See *id.*

34. See *id.*

35. See, e.g., *id.* at 117–19 (describing Robbie Tolan’s shooting by a police officer in Tolan’s 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, 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).

36. 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

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 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 culture, training, and discipline and/or 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 *California Law Review* symposium: How do we reform the law given what we know about the scope and causes of police violence? If the legal accountability reforms I propose in *Shielded* are not, alone, up to the task, what other interventions should also be pursued?

Many police reform efforts over the past several decades have focused on improving police culture, training, and discipline 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 types of reforms have dominated Department of Justice consent decrees, class action lawsuits, and local government reform efforts,<sup>37</sup> and research has shown that they can meaningfully reduce police violence and other misconduct.<sup>38</sup> But it is also clear that widespread abuses by police continue

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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 crises").

37. See, e.g., Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/2ZLG-H6KQ>] (describing state initiatives regarding use-of-force policies, the duty to intervene, and policies related to law enforcement reporting and certification); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1378–87 (2015) (describing typical provisions in Department of Justice negotiated settlements, including changes to use-of-force policies, early intervention and risk management systems, complaint procedures and investigations, training, bias-free policing, and community and problem-oriented policing); Settlement Agreement, Class Certification, and Consent Decree, *Bailey v. City of Philadelphia*, No. 2:10-cv-5952-SD (E.D. Pa. June 21, 2011) (setting out the terms of a consent decree mandating changes in training, supervision, and discipline regarding stops and frisks in Philadelphia).

38. For discussion of research demonstrating that more restrictive use of force policies, de-escalation policies, use-of-force continuums, policies requiring comprehensive report writing, and trainings that favor a peacemaking rather than warrior approach have reduced police violence and death,

despite these types of investments in police operations, training, oversight, and discipline. As Mariame Kaba and Andrea J. Ritchie observed, departments that adopted police reforms promoted by Obama’s Task Force on 21st Century Policing and the #8Can’tWait campaign have nevertheless “continu[ed] to kill, maim, and harm Black people with impunity,” including George Floyd, Rayshard Brooks, Breonna Taylor, Tamir Rice, and Daniel Harris.<sup>39</sup>

For this reason, many believe that the most potent reforms target the social forces that lead to unnecessary 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.<sup>40</sup> Calls to defund or abolish the police should be understood as the most far-reaching proposals in this vein.<sup>41</sup>

Given the choice—and setting aside the viability or advisability of any specific proposal—I favor reforms that target social forces to those that target police culture, training, and discipline. Eliminating unnecessary police contacts is far preferable to training officers about how to engage properly in those unnecessary contacts. And there are limits to how much improvements to training can accomplish. The Dallas Police Department had policies limiting the

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see Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol’s Fight Against Police Reform*, 97 IND. L.J. 1, 15–24 (2021). See also Butler, *supra* note 11, at 1459–61 (describing research demonstrating the successes of three Department of Justice police department investigations and consent decrees).

39. Mariame Kaba & Andrea J. Ritchie, *Why We Don’t Say ‘Reform the Police,’* NATION (Sept. 2, 2022), <https://www.thenation.com/article/society/no-more-police-excerpt/> [<https://perma.cc/D9HC-PWAR>].

40. For a sampling of critiques and recommendations focused on these types of social factors, see generally Carbado, *supra* note 11 (describing how the Fourth Amendment allows racial profiling and stops, and facilitates violence); Rachel A. Harmon, *Why Arrest?*, 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); Nicholas Turner, *We Need to Think Beyond Police in Mental Health Crises*, VERA INST. (Apr. 6, 2022), <https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises> [<https://perma.cc/7J6U-TCAG>] (describing programs to have mental health professionals respond to people in mental health crisis).

41. For examples of these proposals, see generally Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1786–87 (2020) (developing an “abolitionist horizon that reimagines and redirects reform toward the political, economic, and social transformations necessary to confront the enduring realities of police violence” and “focuses our aspirations [on] a society that does not depend on prisons, police, or other forms of penal control”); Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/YM6V-RGBH>] (“The surest way of reducing police violence is to reduce the power of the police, by cutting budgets and the number of officers” and “redirect[ing] the billions that now go to police departments toward providing health care, housing, education, and good jobs.”); DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* (2021).

use of prone restraints, and the officers who killed Tony Timpa were trained at least twice about the dangers of putting body weight on someone in a prone position but did so anyway.<sup>42</sup> Although improving police culture, training, and discipline in Dallas might have meant that the officers who killed Timpa would have been better trained before encountering him or would have been disciplined or fired after killing him, addressing underlying social forces that precipitated the encounter could have had a far greater impact. If, for example, Dallas had sent mental health professionals instead of police officers to respond to Timpa's 911 distress call, those professionals may well have been able to meet Timpa's needs without using force at all.<sup>43</sup>

Despite my preference for reforms targeting social factors, I also believe improvements to police culture, training, and discipline have value. I would welcome the world abolitionists envision, in which social services and mutual aid obviate the need for police altogether.<sup>44</sup> But so long as we live in a society where government officials are charged with maintaining order—and I believe that is the type of society in which we will live for the foreseeable future—reforms to police policies, trainings, supervision, and oversight that can meaningfully reduce police violence and other harms should be pursued. The same logic applies to improvements to legal accountability. As I explain in *Shielded*:

[N]o 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.<sup>45</sup>

As we work to address the social forces that expose people to unnecessary police contact and violence, we should also work to ensure police are hired, trained, and supervised to act within the bounds of the authority they currently have and to ensure that when police violate a person's rights, as those rights are currently understood, there is meaningful recourse in the courts.

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42. See *supra* notes 31–32.

43. For a description of the mental health response program instituted in Dallas two years after Timpa's death, see *infra* Part III.

44. For descriptions of that world see, for example, Kaba, *supra* note 41 ("People like me who want to abolish prisons and police, however, have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation."); Derecka Purnell, *How I Became an Abolitionist*, ATLANTIC (July 6, 2020) ("Rather than thinking of abolition as just getting rid of police, I think about it as an invitation to create and support lots of different answers to the problem of harm in society, and, most exciting, as an opportunity to reduce and eliminate harm in the first place.").

45. SCHWARTZ, *supra* note 1, at 238.

Abolitionists would agree that incremental efforts are an important means of harm reduction on the long road to achieve their goals.<sup>46</sup> As Mariame Kaba has written, “I don’t know anybody who is an abolitionist who doesn’t support *some* reforms.”<sup>47</sup> 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?<sup>48</sup>

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.”<sup>49</sup> But under most definitions and most circumstances, reforms to police policies, training, supervision, and discipline would presumably fall outside the category of non-reformist reforms because they allocate resources to the police<sup>50</sup> and aim to improve the functioning of a criminal legal system that, abolitionists argue, is fundamentally oppressive, racist, and corrupt.<sup>51</sup> Abolitionists have also argued that a focus on these types of reformist reforms may take wind out of the sails of more transformational change.<sup>52</sup>

46. 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.”); Roberts, *supra* note 11, at 108 (“[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.”).

47. MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 66 (2021).

48. *Id.*

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

50. Accord KABA, *supra* note 47, at 54 (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 46, at 1208–09 (observing that abolitionists “adamantly oppose reforms that invest resources into surveillance, policing, and punishment systems”).

51. See, e.g., Akbar, *supra* note 49, at 2497–98 (“The primary concern is that to focus on reformism is to orient action toward entrenching, rather than overthrowing or substituting, a fundamentally corrupt system, institution, or set of relations.”); Kaba & Ritchie, *supra* note 39 (arguing that police reform “requires us to affirm the current system and surrender our imagination to the carceral state”); Roberts, *supra* note 11, at 43 (“[R]eforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation.”); MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* 17 (2020) (“Reform is not the building of something new. It is the re-forming of the system in its own image, using the same raw materials: white supremacy, a history of oppression, and a toolkit whose main contents are confinement, isolation, surveillance, and punishment.”).

52. See, e.g., Akbar, *supra* note 49, 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 41, at 1802 (arguing that legal scholars’ focus on

Although I take these concerns seriously, I do not think they merit rejecting reforms to police policies, training, supervision, and discipline out of hand. Instead, they merit careful evaluation of proposed reforms' costs and benefits, measured against the paired goals of reducing police contacts with the public whenever possible and preventing police violence and misconduct in the exercise of power they currently have. As Carol Steiker writes, "[T]he ultimate question should be one of weighing the magnitude of improvement against the likelihood of entrenchment of injustice."<sup>53</sup>

For example, I oppose any policy allowing police to deploy armed robots, as would abolitionists; such a policy would unjustifiably expand police officers' power in the name of public safety while almost certainly resulting in more police-inflicted injury and death.<sup>54</sup> But I support de-escalation training, which has been found to markedly reduce police uses of force.<sup>55</sup> Abolitionists would likely deem de-escalation training a "reformist reform" that aims to improve a fundamentally unjust system and threatens to foreclose more transformative

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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*, ATLANTIC (Sept. 15, 2020), <https://www.theatlantic.com/magazine/archive/2020/09/police-reform-is-not-enough/614176/> [https://perma.cc/88J9-Q23D] ("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 between "maximalists" and "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).

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

54. See, e.g., Michael Levenson, *San Francisco Considers Allowing Use of Deadly Robots by Police*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/11/30/us/police-robots-san-francisco.html> [https://perma.cc/V9HA-58ST]; 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> [https://perma.cc/7ZK8-5WMG].

55. 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, 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 Cloud as Law Enforcement Seeks to Reduce Killings*, WASH. POST (Oct. 27, 2020), [https://www.washingtonpost.com/local/deescalation-training-police/2020/10/27/3a345830-14a8-11eb-ad6f-36c93e6e94fb\\_story.html](https://www.washingtonpost.com/local/deescalation-training-police/2020/10/27/3a345830-14a8-11eb-ad6f-36c93e6e94fb_story.html) [https://perma.cc/6DTK-6H39]) ("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."); U.S. COMM'N ON C.R., POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 117 (2018) (reporting that, four years after the Dallas Police Department instituted de-escalation training, excessive force complaints had dropped by sixty-four percent); Jessica Winters, *New ASU Research Says Officer De-Escalation Training Works. Here's Why*, 12 NEWS (Nov. 3, 2021) <https://www.12news.com/article/news/local/valley/does-officer-de-escalation-training-work-asu-research-says-it-does-nov-2021/75-d5b1ff80-a7f0-4e1b-8de2-3833d376c964> [https://perma.cc/EJ4A-57BC] ("Officers who received the one-day [de-escalation] training last year were 58% less likely to injure someone in a use of force encounter than those who didn't do the training.").

change.<sup>56</sup> I recognize that de-escalation training may sometimes reduce uses of force in situations where police are not needed at all. I would prefer to limit police power to respond in situations where they are not needed. And if the footprint of policing were reduced in this manner, the money spent on de-escalation training could be used to improve other underfunded public resources like education and housing. But if there is not currently the political will to limit police power in these ways (more on that in a moment) and if police would continue to have the power to use force even if those limits were adopted, then de-escalation training seems a worthwhile investment. In my view, this type of reform—capable of reducing police violence and harm but incapable of more fundamentally transforming policing—is, in Paul Butler’s words, “both essential and a stopgap.”<sup>57</sup>

### 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 unnecessary police interactions and violence. We should also improve police culture, training, and discipline and strengthen the currently available legal means for holding police accountable. But there are practical hurdles to implementing one or more of the countless concrete proposals to address these categories of concern: the challenges of actually reforming the law.

The first challenge is getting reforms enacted. Police reform is, as David Sklansky has described, “a partisan flashpoint.”<sup>58</sup> 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 by opponents as 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,<sup>59</sup> the law enforcement lobby has been remarkably successful in

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56. For this critique of de-escalation training and other reforms to police policies and training, see, for example, Olivia Murray, *Why 8 Won't Work: The Failings of the 8 Can't Wait Campaign and the Obstacle Police Reform Efforts Pose to Police Abolition*, HARV. C.R.-C.L. L. REV. (June 17, 2020), <https://journals.law.harvard.edu/crcl/why-8-wont-work/#:~:text=The%20most%20fallible%20aspect%20of,of%20policing%20other%2C%20average%20people> [https://perma.cc/M7JV-Z38Q]; Edward Ongweso, Jr., ‘Defund the Police’ Actually Means Defunding the Police, VICE NEWS (June 9, 2020), <https://www.vice.com/en/article/ep4xy7/what-does-defund-and-abolish-the-police-mean> [https://perma.cc/FM54-W293].

57. Butler, *supra* note 11, at 1466.

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

59. See Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), <https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police#endnotes> [https://perma.cc/8KZC-YEKV]; Pew Research Center, *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct* (July 9, 2020),

quelling efforts to do away with the defense.<sup>60</sup> 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.<sup>61</sup> 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 lawsuits would bankrupt officers for good-faith mistakes without qualified immunity’s protections. I have testified in several hearings in support of these bills, referencing a decade’s worth of research undermining these claims. And yet, the unfounded fears repeatedly prove convincing: bills have passed in Colorado, New Mexico, and New York City, but other bills have died in legislative committees or have been voted down.<sup>62</sup>

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 their police department overhaul its policies, trainings, supervision, and investigations, that consent decree is just the first step in what can be a yearslong process.<sup>63</sup> 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.<sup>64</sup>

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

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<https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/> [<https://perma.cc/J6NF-QAJM>] (“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.”).

60. 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), [https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a\\_story.html](https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html) [<https://perma.cc/K5B3-K3UC>]. For exploration of the power of the law enforcement lobby, see also, generally, Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965 (2023) (describing how the law enforcement lobby—including police and correctional unions and prosecutor associations—have shaped criminal justice policy to favor law enforcement interests).

61. See Sarah D. Wire, *What Is Qualified Immunity, the Court Creation that Keeps Cops from Being Sued over Civil Rights Abuses?*, L.A. TIMES (May 25, 2021), <https://www.latimes.com/politics/story/2021-05-25/what-is-qualified-immunity-how-is-george-floyd-connected> [<https://perma.cc/778T-GT4D>].

62. For further discussion of those bills, see Reinert, Schwartz & Pfander, *supra* note 1, at 806.

63. 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).

64. See *id.* For the dangers of backsliding, see Rushin, *supra* note 37, at 1410–12.

commitment to do the hard work of implementing them.<sup>65</sup> 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 encountered vigorous opposition, some proposals to fundamentally adjust the social forces that lead to police contact and violence have garnered agreement across the aisle.<sup>66</sup>

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 unarmed people respond to those having mental health crises,” and cities’ resolutions to “end[] police stops for some minor traffic violations.”<sup>67</sup> 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 nongovernmental agency would be best suited to address the needs that police are ill-suited to address, and develop the infrastructure to shift those responsibilities to that other entity.<sup>68</sup>

Groups that do not appear to agree about anything when it comes to policing—abolitionists, 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. As Allegra McLeod has explained, 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” are “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.”<sup>69</sup>

In the view of law enforcement officials and union leaders, disaggregating the police function also benefits police officers. In March 2023, the Los Angeles

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65. For similar arguments in favor of bipartisan reforms, see Brandon L. Garrett, *Unified Criminal Justice Reform*, 85 L. & CONTEMP. PROBS. 123, 130–39 (2022); Sklansky, *supra* note 58, at 23–24; Steiker, *supra* note 53, 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).

66. For discussion of common ground on reforms to the social forces that lead to police contacts and violence, see Steiker, *supra* note 53, at 1370–71 (describing bipartisan agreement about decriminalization of marijuana); Kirkpatrick, Eder & Barker, *supra* note 40 (“Chiefs, prosecutors and lawmakers are rethinking the value, and the harm, of minor traffic stops.”).

67. SCHWARTZ, *supra* note 1, at 238.

68. See Barry Friedman, *Disaggregating the Policing Function*, 169 U. PENN. L. REV. 925, 928–34 (2021).

69. See McLeod, *supra* note 1, at 1628.

Police Protective League proposed that unarmed personnel from other city departments or nonprofits—not police—respond to twenty-eight different calls for service, including nonviolent homeless, quality-of-life, and mental health calls; calls to schools; under-the-influence calls where no crime is in progress; and nonfatal traffic accidents.<sup>70</sup> 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 responding to emergencies, saving lives (and property), and of course, engaging in community policing.<sup>71</sup>

Elsewhere, unions and police officials have endorsed alternative responder programs for reasons that echo those offered by the Los Angeles police union representative—such programs would reduce officer workload and delegate responsibility to others better suited to respond to nonviolent, nonemergency calls for service.<sup>72</sup>

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.<sup>73</sup>

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70. For a description of each of the twenty-eight calls for service the Los Angeles Police Protective League proposed be handled by unarmed responders, see Sheila McClear, *LAPD Officers' Union Lists 28 Calls for Service That Someone Else Can Handle*, L.A. MAG. (Mar. 1, 2023), <https://www.lamag.com/citythinkblog/the-lapd-propose-their-officers-stop-responding-to-28-calls-for-service> [https://perma.cc/Y25H-9G94].

71. Stephanie Dazio, *Los Angeles Police Union Proposes Limits to 911 Responses*, ASSOCIATED PRESS (Mar. 1, 2023), <https://apnews.com/article/los-angeles-police-lapd-police-reform-911-calls-444e653e9b1e33dffdc52f8dda232a32> [https://perma.cc/6DXG-JZKX].

72. See, e.g., Megan Cassidy, *S.F. Police Union Clears Way for Civilians, Not Cops, to Respond to Non-Violent Calls for Help*, S.F. CHRON. (Dec. 1, 2020), <https://www.sfchronicle.com/crime/article/S-F-police-union-clears-way-for-civilians-to-15768591.php> [https://perma.cc/T55R-F7XG] (describing a letter of intent signed by the president of San Francisco's police union listing seventeen calls for service where union officials believe civilians should be the responders, and quoting the letter as saying: "Currently, police officers are the initial responders and primary resource on certain calls for service that may be better situated to mental health or non-law enforcement professionals."); Molly Castle Work, *Advocates Call for 911 Changes. Police Have Mixed Feelings*, S.F. CHRON. (June 23, 2023), <https://www.sfchronicle.com/health/article/911-mental-police-california-18153018.php> [https://perma.cc/8J4P-KTPC] (quoting the communications director for the Association of Orange County Deputy Sheriffs as saying: "Our members are not mental health professionals . . . We agree that law enforcement should not be the lead addressing mental health calls but should be there to assist in these programs."); *id.* ("Tom Saggau, a San Jose Police Officers' Association spokesperson, referenced a pilot program in San Jose of which police were initially skeptical, until they saw how sharing the burden of emergency call response eased their workload. The program has grown sixfold in eight years.").

73. See 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), <https://www.cnn.com/2020/07/05/us/cahoots-replace-police-mental-health-trnd/index.html> [https://perma.cc/7LWN-WNXC]; Jackson Beck, Melissa Reuland & Leah Pope, *Case Study:*

In 2019, CAHOOTS responded to approximately 20 percent of all calls for service.<sup>74</sup> 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.<sup>75</sup> Given that more than one in five people fatally shot by police have mental illnesses, CAHOOTS may be saving community members' lives as well.<sup>76</sup> Particularly given reported challenges recruiting and retaining police officers, diverting officers' current responsibilities to other trained responders seems a win-win proposition.<sup>77</sup>

Even when local governments embrace these types of initiatives, they can be difficult to implement.<sup>78</sup> But, despite perhaps inevitable bureaucratic growing pains, a wide range of groups—including grassroots organizations, mental health providers, law enforcement and government officials, and nonprofits—are developing these types of mental health responder programs in communities across the country, and there is mounting evidence that they are saving local governments money and improving outcomes for community members.<sup>79</sup>

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CAHOOTS, VERA INST. (Nov. 2020), <https://www.vera.org/behavioral-health-crisis-alternatives/cahoots> [<https://perma.cc/4BYP-WZBD>].

74. See Andrew, *supra* note 73.

75. See *id.*

76. See Minyvonne Burke, *Policing Mental Health: Recent Deaths Highlight Concerns over Officer Response*, NBC NEWS (May 16, 2021), <https://www.nbcnews.com/news/us-news/policing-mental-health-recent-deaths-highlight-concerns-over-officer-response-n1266935> [<https://perma.cc/3U2B-PZ2Y>].

77. 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> [<https://perma.cc/Y4C8-2LVL>].

78. See Candace Hanson & Taylor Crouch-Dodson, *A Wicked Challenge: Unarmed, Trauma-Informed and Culturally Affirming Response to Behavioral Crisis 911 Calls in Minneapolis*, #CRISISTALK (June 20, 2023), <https://talk.crisisnow.com/opinion-a-wicked-challenge-unarmed-trauma-informed-and-culturally-affirming-response-to-behavioral-crisis-911-calls-in-minneapolis> [<https://perma.cc/X84A-XS2J>] (describing challenges in the implementation of Minneapolis's mental health crisis response team); Lila Seidman, *L.A. Promised Mental Health Crisis Response Without Cops. Why Isn't It Happening?*, L.A. TIMES (Apr. 13, 2023), <https://www.latimes.com/california/story/2023-04-13/988-hotline-mental-health-crisis-system-police> [<https://perma.cc/TT7K-4DBN>] (describing the challenges of rolling out a mental health response team in Los Angeles County).

79. The International Crisis Response Association and the Alternative Mobile Services Associations are two nationwide associations of local alternative service providers. To view their work and those of the community organizations that make up their membership, see <https://icraconnect.org/about-our-network/> [<https://perma.cc/2MCF-2JZT>] (the International Crisis Response Association website) and <https://www.us-amsa.org/> [<https://perma.cc/C58Q-4NF6>] (the Alternative Mobile Services Association website). For reports by organizations working to support and develop these types of programs, see generally POLICE EXEC. RSCH. F., *RETHINKING THE POLICE RESPONSE TO MENTAL HEALTH-RELATED CALLS: PROMISING MODELS* (Oct. 2023), <https://www.policeforum.org/assets/MBHResponse.pdf> [<https://perma.cc/4DY9-RFDN>] (describing different types of crisis-response programs, key issues to consider when deciding which type of program to build, and necessary steps when putting a crisis-response program in place); THE POLICING PROJECT & THE JUST. COLLABORATORY, *REIMAGINING PUBLIC SAFETY: FIRST CONVENING REPORT* (2021), <https://www.policingproject.org/rps-first-convening-report> [<https://perma.cc/8BX8-PRZM>] (describing New York University's Policing Project's convening of public safety officials, community advocates, and other experts around the country to consider and develop these same types of programs as part of

There are, of course, limits to the ambitiousness 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.<sup>80</sup> 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 could 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.”<sup>81</sup> 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 that it is not going to fade away without a major shift in public consciousness.<sup>82</sup>

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.”<sup>83</sup>

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its “Reimagining Public Safety” initiative); Harvard Kennedy School, *Alternative 911 Emergency Response*, <https://govlab.hks.harvard.edu/alternative-911-emergency-response> [https://perma.cc/4GTQ-T7YT] (describing its efforts to develop, train, and test community response programs). The Georgetown Law Center for Innovations in Community Safety and the NYU Law Policing Project hosted a convening about alternative first responder programs that brought together more than 150 stakeholders across the country. For a description of the convening, its participants, and videos of the sessions, see Center for Innovations in Community Safety, *The Future of Alternative First Response: Building Sustainable and Scalable Programs* (June 1–2, 2023), <https://www.law.georgetown.edu/cics/events/the-future-of-alternative-first-response-building-sustainable-and-scalable-programs> [https://perma.cc/N2M9-CYRB]. For additional information about these types of programs, see Ram Subramanian & Leily Arzy, *Rethinking How Law Enforcement is Deployed*, BRENNAN CENTER (Nov. 17, 2022), <https://www.brennancenter.org/our-work/research-reports/rethinking-how-law-enforcement-deployed> [https://perma.cc/NE8V-L7AQ]; Turner, *supra* note 40.

80. See Michelle Alexander, ‘Interest Convergence’ Won’t End Mass Incarceration, FRIENDS JUST. (May 16, 2011; Alan Bean ed.), <https://friendsofjustice.blog/2011/05/16/michelle-alexander-interest-convergence-wont-end-mass-incarceration/> [https://perma.cc/X4Z3-H95V].

81. *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).

82. Alexander, *supra* note 80.

83. *Id.* For a similar argument about the limits of interest convergence and police reform following the murder of George Floyd, see Alexis Hoag, *Derrick 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/> [https://perma.cc/86ZT-AXXS].

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 does not benefit its members. The union may want its officers out of the business of responding to people in mental health crisis, but it 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 it 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 police union will want to delegate; they are, for example, opposed to limiting police power to conduct traffic stops.<sup>84</sup>

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, would also necessitate 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. Instead of taking the wind out of the sails of more transformational change, an incremental approach may, step by step, make such a change more palatable and possible.<sup>85</sup>

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 and the nature and extent of their differences. The terms of 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

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84. See Kevin Rector, *New Limits on 'Pretextual Stops' by LAPD Officers Approved, Riling Police Union*, L.A. TIMES (Mar. 1, 2022), <https://www.latimes.com/california/story/2022-03-01/new-limits-on-pretextual-stops-by-lapd-to-take-effect-this-summer-after-training> [https://perma.cc/UYL7-29C4].

85. Accord McLeod, *supra* note 1, 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.").

respond “as a single integrated unit” to people in mental health crisis.<sup>86</sup> Some criticize the RIGHT Care program’s design, arguing that police should not be part of the response team because “a clinician and a paramedic are really all you need.”<sup>87</sup> Defenders of the program’s design argue that having a police officer on the scene is important to manage public safety. I agree with the program’s critics that these mental health services could be provided without police presence—they already are by CAHOOTS and similar teams in other parts of the country.<sup>88</sup> But the Dallas partnership is the first of its kind in Texas,<sup>89</sup> and it 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 percent, and decreased arrests by 60 percent.<sup>90</sup> Had it been in place two years earlier, it might have saved Tony Timpa’s life.

During this symposium, my co-panelists and I were asked whether we 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.<sup>91</sup> Instead, I believe in pushing for the best proposal that can be adopted under the circumstances—measured in terms of the reductions in police violence and other harms it will offer, while taking into account the “likelihood of entrenchment of injustice”<sup>92</sup>—then implementing the proposal, studying its effects, adjusting the

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86. See MEADOWS MENTAL HEALTH POL’Y INST., MULTI-DISCIPLINARY RESPONSE TEAMS: TRANSFORMING EMERGENCY MENTAL HEALTH RESPONSE IN TEXAS 7 (May 2021), <https://mmhpi.org/wp-content/uploads/2021/06/MDRT-Transforming-Crisis-Response-in-Texas.pdf> [<https://perma.cc/56JK-YJTX>].

87. Michael Murney, *Should Cops Be Involved in Dallas’ Mental Health Crisis Response Teams?*, DALL. OBSERVER (Aug. 24, 2021), <https://www.dallasobserver.com/news/dallas-right-care-program-includes-cops-in-mental-health-response-some-say-it-shouldnt-12254373#:~:text=%E2%80%9CA%20lot%20of%20data%20now,an%20overuse%20of%20police%20personnel.%22> [<https://perma.cc/ABU9-CZES>]; 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-Rgk3BSI-BvHwLXh1RXaYdjkW8HzZG-caAmmxEALw\\_wcB](https://nextcity.org/urbanist-news/dallas-pd-expands-controversial-successful-mental-health-response-program?gclid=Cj0KCQjwwISIBhD6ARIsAESamp4rCF3PbJdTEZBdjiLK4Y5-Rgk3BSI-BvHwLXh1RXaYdjkW8HzZG-caAmmxEALw_wcB) [<https://perma.cc/BR9R-C75E>] (describing criticism of the RIGHT program’s design on the ground that police officers are not necessary to respond to people in mental health crisis).

88. See Turner, *supra* note 40 (describing some of these civilian crisis response programs around the country); Watson & El-Sabawi, *supra* note 36, at 19–22 (describing different models of mental health crisis response, some of which do and others of which do not involve law enforcement).

89. 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> [<https://perma.cc/C5DA-QL2H>].

90. See *id.*

91. See *supra* notes 35–40 and accompanying text.

92. Steiker, *supra* note 53, at 1394.

program based on evidence of its effects, and preparing for future rounds of advocacy and negotiation.

My endorsement of this approach should not be understood as disagreement with Michelle Alexander about the importance of a more transformational vision. I believe any progress is hard, and should be applauded, but I also believe that, in Mychal Denzel Smith's words, we should not "convince[] ourselves that *hard* is a synonym for *revolutionary*."<sup>93</sup> Instead, incremental and transformative efforts must play roles in the same enterprise. As incremental 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 campaigns to transform public consciousness Alexander describes should also be pursued in earnest and can influence the kinds of proposals that may become feasible in years to come.

#### 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 not only through improvements to our legal accountability system, but also through changes to police culture, training, and discipline 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 who can violate our rights, we need functioning systems of legal accountability. Although Vicki Timpa would have undoubtedly preferred a world in which Tony was never killed, she did not have the luxury of that choice; instead, her only recourse was 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.

Because our system needs transformative change, incremental reforms that can currently be adopted and enacted will be incomplete. Yet incremental reforms can improve people's lives in important ways and can lay the groundwork for more transformative change in the future—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.

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93. Smith, *supra* note 52.