

# REPARATIONS FOR POLICE VIOLENCE

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## ABSTRACT

*Police violence does lasting damage to communities that is not adequately acknowledged or addressed by the usual responses of local governments and the legal system. Civil lawsuits by private plaintiffs provide only the direct victims of police violence with opportunities to seek redress. Extensive procedural hurdles, limitations on liability, and few remedial options further limit their utility and leave bystanders sidelined. In the policy realm, efforts to create or revise police accountability mechanisms reflect the laudable goal of reducing the likelihood of future violence but fail to look back at the harm already done. Federal civil rights investigations and prosecutions of police officers are infrequent. None of these modalities repairs the damage to communities inflicted by police violence. Reparations, which can and should include creative remedies beyond monetary distributions, offer the possibility of doing so. From apologies and memorials to educational programs, communities should consider calling for responses to police violence outside of the typical lawsuits and investigations. Following extraordinary episodes of police violence in Chicago and Philadelphia, activists sought and won creative reparations schemes. These examples demonstrate that reparations offer a valuable tool for addressing harm to whole communities caused by police violence that may otherwise be ignored.*

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## I. INTRODUCTION

In the United States, reparations are often debated but rarely come to fruition. In the American public imagination, slavery is the subject matter most closely tied to the concept, and reparations are defined as money. Given the focus of scholarship,<sup>1</sup> works in the popular press,<sup>2</sup> and political debate about these topics,<sup>3</sup> these

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1. For samples of legal scholarship on reparations, *see, e.g.*, Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903 (2003) (describing various forms of reparations and arguing that racial reconciliation should be a goal of the reparations movement); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2001) (describing the limits of the legal system to provide reparations for slavery and Jim Crow); Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69 (2018) (arguing that the United States should follow other countries by utilizing a “Truth and Reconciliation” process to address racial injustice); Rhonda V. Magee, *The Master’s Tools, from the Bottom up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993) (arguing that reparations are necessary because integrationist and nationalist approaches do not adequately remedy racial injustice on their own); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003) (describing numerous reparations programs and legal limitations); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993) (defining the “dominant perspective” and “African-American consciousness” and analyzing arguments for and against reparations for slavery from these two points of view); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998) (arguing that activists and legislators should consider reparations as a tool for addressing racial injustice instead of relying solely on affirmative action).

2. For a few examples of popular works that spurred public conversation about reparations for slavery, *see, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 54; RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); Charles Krauthammer, *Reparations for Black Americans*, TIME, Dec. 31, 1990.

3. Since 1989, a member of Congress has introduced a bill almost every year that would institute a commission to explore the possibility of reparations for the descendants of enslaved Africans. *See* Sheryl Gay Stolberg, *A Historic Hearing on Slavery, and the Struggle That Remains*, N.Y. TIMES, June 19, 2019, at A1. In 2019, a House Judiciary Subcommittee held a hearing on the topic. *See id.*; *Here’s What Ta-Nehisi Coates Told Congress About Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/ta-nehisi-coates-reparations.html> [<https://perma.cc/FL64-6G42>] (providing a transcript of author Ta-Nehisi Coates’ testimony from the 2019 hearing).

associations are unsurprising. But reparations can and should be thought of more expansively.

There are many definitions of “reparations.”<sup>4</sup> Monetary payments are the paradigmatic example, such as the U.S. government’s provision of monetary compensation to the Japanese Americans it interned during World War II.<sup>5</sup> Similarly, North Carolina offered monetary reparations to victims of its eugenic sterilization program, pursuant to which more than seven thousand people were sterilized by the state between 1929 and 1975.<sup>6</sup>

But reparations sometimes take other forms, such as apologies, legislative reform, educational efforts, and truth and reconciliation commissions.<sup>7</sup> With an expansive definition of reparations in mind, one can more easily find examples of reparations in the United States that addressed ills beyond slavery. In 1993, the United States government offered an apology to descendants of native Hawaiian groups for the annexation of the Hawaiian Islands in 1893.<sup>8</sup> President Clinton offered an apology to the victims of experiments conducted by the U.S. Public Health Service in Tuskegee, Alabama that left Black men with syphilis untreated for decades, and he acknowledged the far-reaching impact the study had on the

4. Indeed, the appropriate definition of reparations is highly contested in academic circles. See, e.g., Roy L. Brooks, *Getting Reparations for Slavery Right—Response to Posner & Vermeule*, 80 NOTRE DAME L. REV. 251, 256, 272 (2004) (arguing for an “atonement model” of reparations, pursuant to which a “reparation . . . is properly defined as the *revelation and realization of an apology*” in contrast to a “tort model” that focuses on compensation rather than apology); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 814 (2006) (showing the numerous meanings of reparations by listing the range of forms they can take); Posner & Vermeule, *supra* note 1, at 691–93 (providing a narrow definition of reparations focused on monetary reparations to compensate victims who were barred from seeking traditional legal redress).

5. See, e.g., Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 477 (1998) (discussing the presentation of reparations checks to survivors of internment camps).

6. Richard Craver, *N.C. Eugenics Victims Projected to Get Final State Compensation Payment Soon*, WINSTON-SALEM JOURNAL (Jan. 17, 2018), [https://journalnow.com/news/local/n-c-eugenics-victims-projected-to-get-final-state-compensation-payment-soon/article\\_87e3c891-7828-5f2d-856f-498b6405781a.html](https://journalnow.com/news/local/n-c-eugenics-victims-projected-to-get-final-state-compensation-payment-soon/article_87e3c891-7828-5f2d-856f-498b6405781a.html) [<https://perma.cc/EG9D-EHXM>]; Joanna Schoen, *Reassessing Eugenic Sterilization: The Case of North Carolina*, in A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA 141 (Paul Lombardo ed. 2010).

7. See Roy L. Brooks, *Introduction*, in WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3, 9 (Roy L. Brooks, ed., 1999) (providing examples of nonmonetary reparations and settlements); *Reconsidering Reparations*, *supra* note 4, at 814 (same). Nine U.S. states have issued apologies for slavery. See, e.g., Michelle Hackman, *Delaware Just Became the 9th State to Apologize for Slavery*, VOX (Feb. 11, 2016), <https://www.vox.com/2016/2/11/10965548/delaware-slavery> [<https://perma.cc/W3JE-FAHX>]. Both the U.S. Senate and House of Representatives have apologized for slavery and Jim Crow, but no joint resolution has ever passed. See, e.g., Mark Medish, *Congress Must Officially Apologize for Slavery Before America Can Think About Reparations*, NBC NEWS (Aug. 30, 2019), <https://www.nbcnews.com/think/opinion/congress-must-officially-apologize-slavery-america-can-think-about-reparations-ncna1047561> [<https://perma.cc/QXE3-NBSC>]; S. Con. Res. 26, 111th Cong. (2009); H.R. Res. 194, 110th Cong. (2007).

8. Joint Resolution, Pub. L. No. 103–150, § 1, 107 Stat. 1510, 1510–14 (1993).

African American community.<sup>9</sup> In 2001, an Oklahoma commission recommended numerous forms of reparations including and beyond monetary compensation for the 1921 race massacre in Tulsa, Oklahoma, during which at least three hundred Black people were killed by a white mob in Greenwood, a prosperous neighborhood known as “Black Wall Street.”<sup>10</sup> Since then, the Tulsa Race Massacre Centennial Commission has sponsored efforts to create a Black Wall Street Mural, renovate and expand the Greenwood Cultural Center, and create a curriculum for the Tulsa public schools about the massacre.<sup>11</sup> In addition to examples of non-monetary reparations, these are also all examples of reparations that are directed not solely to the direct victims, but to the larger impacted communities.

Notably, none of these examples addresses the ills of the criminal legal system. But reparations should be extended to that context. The extraordinary harms of the criminal legal system are now widely discussed and understood in both

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9. Bill Clinton, President, United States of America, Remarks in East Room in Apology for Study Done in Tuskegee (May 16, 1997), <https://www.learningforjustice.org/classroom-resources/texts/bill-clinton-apologizes-for-tuskegee-experiment> [<https://perma.cc/E2PD-8CFJ>]. The victims separately received financial compensation following the settlement of a lawsuit filed against, among others, the United States. See FRED D. GRAY, THE TUSKEGEE SYPHILIS STUDY 98 (2003).

10. TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921 (2001), <https://www.okhistory.org/research/forms/freport.pdf> [<https://perma.cc/V9HJ-8BV3>]; DREISEN HEATH, THE CASE FOR REPARATIONS IN TULSA, OKLAHOMA, HUMAN RIGHTS WATCH 10 (2020), <https://www.hrw.org/news/2020/05/29/case-reparations-tulsa-oklahoma> [<https://perma.cc/5D6L-3YYV>].

11. Heath, *supra* note 10, at 39–40. It is noteworthy, however, that neither the Tulsa nor Oklahoma governments have followed the Commission’s recommendation for monetary reparations. *Id.* (noting that state legislation adopting some findings of the Commission did not provide financial compensation to survivors or descendants and that the then-Governor rejected culpability and believed reparations were prohibited by state law). A lawsuit recently filed against the City of Tulsa and other entities concerning the massacre seeks reparations in numerous forms, including “[a] declaration that . . . [the] policies, actions, and omissions during and after the 1921 Massacre created a public nuisance.” Compl. at 40, *Randle v. City of Tulsa*, CV-2020-01179 (Okla. Dist. Ct. Sept. 1, 2020). The lawsuit also calls for the creation of a Tulsa Massacre Victims Compensation Fund equivalent to, at a minimum “the unjust enrichment Defendants received by appropriating the historic reputation and legacy of the Massacre and the ongoing nuisance to its benefit.” *Id.* at 41–42.

academic circles<sup>12</sup> and popular culture.<sup>13</sup> From the imprisonment of innocent people to the effects of mass incarceration more generally, the criminal legal system is often destructive. Police violence in particular can cause lasting psychological harm. Indeed, police contact alone can result in trauma and anxiety symptoms.<sup>14</sup> Importantly, police violence can be destructive to both its immediate victims *and* the communities from which they come. The racial justice protests that took place in the summer of 2020 vividly illustrate this reality. After a Minneapolis police officer killed George Floyd by kneeling on his neck for nine minutes and twenty-nine seconds,<sup>15</sup> protestors took to the streets, and Minneapolis burned for days because of the pain the killing inflicted on the entire community.<sup>16</sup> Indeed, the

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12. See generally, e.g., Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2 (2018) (describing the widespread use of economic sanctions in response to criminal charges and their serious consequences, such as restrictions on licensing and incarceration); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (explaining that even without criminal conviction, arrests are used as regulatory tools in areas outside of the criminal legal system, including housing, employment, and education, and can cause significant harms); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010) (describing the collateral consequences that follow criminal conviction and their impact on reentry to society following incarceration); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018) (describing abuses of incarcerated people and prison administrators' "practical immunity" from liability for such abuses).

13. In recent years, millions have viewed films like *13th*, *Free Meek*, and *The Kalief Browder Story*. See Emma Nolan, '*13th*' Netflix Documentary Viewers Surge by 4,665 Percent in Three Weeks, NEWSWEEK (June 17, 2020, 12:15 PM), <https://www.newsweek.com/13th-netflix-youtube-documentary-watch-ava-duvernay-race-movies-1511535> [<https://perma.cc/ATF4-MFPX>] (describing viewership of *13th*, Ava DuVernay's documentary about the prison legal system).

14. Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014).

15. Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported.*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [<https://perma.cc/Z3EX-CEJB>].

16. See Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905> [<https://perma.cc/GJ89-2CCA>]; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/P7H4-3R2F>]; Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/DY3Z-9ZSP>]; Josiah Bates, *These Protests Are the Community Grieving.' Activists Say Minneapolis Leaders Need to Make Drastic Changes After George Floyd's Murder*, TIME (May 29, 2020, 3:01 PM), <https://time.com/5844252/minneapolis-activists-police-protests-george-floyd/> [<https://perma.cc/3ZDT-RS52>] (quoting community organizer Marjaan Sirdar reporting, "[t]his hit harder, this hit different. The leaders of this city have ignored us.").

brutal killing reverberated around the world and caused people who had never taken the idea of racism in policing seriously to reconsider.<sup>17</sup>

The goal of this Article is to urge activists, community organizers, lawyers, and other actors to broaden the conversation about redress for police violence to include reparations directed to impacted communities. Reparations schemes have the potential to explicitly recognize and attempt to remedy the widespread harm that police violence often creates. Traditional responses to police violence do not do this because they either do not address the harm to the entire impacted community, or they are too modest to be fully effective. For example, despite many hurdles, lawsuits may compensate direct victims and cost the governments that employ police officers millions.<sup>18</sup> Police departments or local governments sometimes adopt policy reforms, such as the creation of civilian police oversight agencies, with the aim of staving off future abuse.<sup>19</sup> Individual police officers sometimes—but rarely—face criminal prosecution and incarceration.<sup>20</sup> The U.S.

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17. Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?* 58 HOUS. L. REV. 817, 822 (2021) (“[A]s protests around the nation during summer 2020 revealed, the very act of witnessing the killing of George Floyd helped to shift many Whites’ thinking about policing—specifically, racialized police brutality—across the United States and around the world.”) (citing Richard Russo, *Will White People Forget About George Floyd?*, ATLANTIC (July 28, 2020), <https://www.theatlantic.com/culture/archive/2020/07/richard-russo-george-floyd-white-americans-flitcraft-parable/614638/> [https://perma.cc/9NQF-H4PQ]).

18. Christina Carrega, *Millions in Lawsuit Settlements Are Another Hidden Cost of Police Misconduct, Legal Experts Say*, ABC NEWS (June 14, 2020, 10:12 AM), <https://abcnews.go.com/US/millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540> [https://perma.cc/UL8F-GLPW] (“During fiscal year 2019, [New York City] paid out \$175.9 million in civil judgments and claims for police-related lawsuits.”); Paul Schwartzman, *These Are the Police Misconduct Lawsuits the Public Hears Little About*, WASH. POST (Dec. 25, 2020, 3:00 PM), [https://www.washingtonpost.com/local/legal-issues/dc-police-lawsuits/2020/12/24/e986472c-2375-11eb-8672-c281c7a2c96e\\_story.html](https://www.washingtonpost.com/local/legal-issues/dc-police-lawsuits/2020/12/24/e986472c-2375-11eb-8672-c281c7a2c96e_story.html) [https://perma.cc/H3FD-U323] (reporting that Washington D.C. paid out more than \$40 million to settle cases alleging police misconduct between 2016 and 2020).

19. Nicole Dungca & Jenn Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back*, WASH. POST (Apr. 27, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability/> [https://perma.cc/VF2Y-S3E8] (“More than 160 municipalities and counties have implemented some form of civilian oversight through review boards, inspectors general and independent monitors. Another 130 localities are trying to do so, according to officials from the National Association for Civilian Oversight of Law Enforcement, or NACOLE, though this represents a fraction of roughly 18,000 law enforcement agencies nationwide.”).

20. Philip M. Stinson, Sr. & Chloe A. Wentzlof, Research Brief, *On-Duty Shootings: Police Officers Charged with Murder or Manslaughter, 2005–2019*, POLICE INTEGRITY RESEARCH GROUP (2019), <https://www.bgsu.edu/content/dam/BGSU/health-and-human-services/document/Criminal-Justice-Program/policeintegritylostresearch/-9-On-Duty-Shootings-Police-Officers-Charged-with-Murder-or-Manslaughter.pdf> [https://perma.cc/7E8H-DPXV] (finding there have been 104 nonfederal law enforcement officers who have been arrested for murder or manslaughter resulting from an on-duty shooting from 2005 to 2019, and of those, thirty-five were convicted of a crime as a result); *Fatal Force*, WASH. POST (July 20, 2021), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [https://perma.cc/N9TG-BMHG] (“[P]olice nationwide have shot and killed almost the same number of people annually – nearly 1,000 – since The Post began [logging data in 2015].”).

Department of Justice investigates a small number of police departments, resulting in consent decrees or other resolutions that create policy changes and reforms.<sup>21</sup> But all of these tools are often met with resistance from police departments and do little to address the community-wide harm created by police violence.<sup>22</sup>

Calls for change in response to police abuse are beginning to take new forms. The demand to defund the police—a push for reallocating resources away from police departments and toward other priorities—is now popular in some corners and is a frequent topic of political conversation.<sup>23</sup> Indeed, well before George Floyd’s killing, the Movement for Black Lives responded to police violence by calling for widespread policy changes beyond police departments.<sup>24</sup> But defunding the police is part of a long-term abolitionist vision for the future;<sup>25</sup> police departments are not leaving communities anytime soon. When inevitable episodes of police violence erupt, reparations should be included in the conversation as they offer a useful framework for recognizing and implementing meaningful responses to abusive practices that create community-wide harm.

## II.

### THE USUAL RESPONSES TO POLICE ABUSE AND MISCONDUCT AND THEIR LIMITATIONS

Too often, responses to police abuse are relegated to the judicial system and civil lawsuits. While litigation sometimes provides important redress for individual victims, access to the judicial process is severely restricted, overcoming procedural hurdles is challenging, and only narrow types of redress are usually available. Outside of lawsuits brought by private plaintiffs, the U.S. Department of Justice pursues investigations of patterns and practices of constitutional violations, generally resulting in court-approved consent decrees. However, the number of such investigations is vanishingly small compared to the number of police departments in the United States. Prosecutions against police officers are also notoriously difficult to pursue, and civilian oversight of police misconduct is often weak.

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21. Between 1994 and 2017, the Justice Department opened just seventy investigations into patterns and practices of unconstitutional conduct by police departments and entered into about forty reform agreements. U.S. DEP’T JUST., CIVIL RIGHTS DIVISION, *THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT*, 3 (Jan. 2017), <https://www.justice.gov/crt/file/922421/download/> [<https://perma.cc/9GNP-YR2K>] [hereinafter *THE CIVIL RIGHTS DIVISION’S PATTERN AND PRACTICE POLICE REFORM WORK*].

22. Dungca & Abelson, *supra* note 19.

23. Anna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REVIEW OF BOOKS, June 15, 2020; Katie Rogers, *Trump Continues Criticism of Movement to Defund the Police*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/trump-police-reform.html> [<https://perma.cc/7LN2-8LQL>].

24. Anna A. Akbar, *Toward a Radical Reimagining of Law*, 93 N.Y.U. L. REV. 405, 421–34 (2018) (describing emergence of the Movement for Black Lives and its “Vision for Black Lives,” released in 2016, which called for a variety of policy changes, such as community control of schools and the public financing of elections).

25. *Id.* at 461 (“Mariame Kaba . . . explained: We need ‘steps between where we are and . . . an abolitionist future.’”).

In short, all of the traditional tools used to address police abuse have significant flaws. Unlike reparations, none look backward to offer meaningful redress to people who were indirectly, but perhaps severely, impacted by police violence. Each category is discussed briefly below.

### A. Civil Lawsuits

Civil lawsuits on behalf of the victims of police abuse have serious limitations. The most common vehicle used to bring claims addressing police abuse is 42 U.S.C. § 1983, which was enacted as part of the Ku Klux Klan Act in 1871.<sup>26</sup> Private plaintiffs use § 1983 to assert violations of their constitutional rights, such as the Fourth Amendment right to be free from unreasonable searches and seizures, as well as excessive force.<sup>27</sup> Plaintiffs also sometimes bring tort claims that sound in state law, such as negligence, battery, and unlawful imprisonment.<sup>28</sup> Pursuing either option requires a plaintiff to navigate a complex thicket of procedural hurdles. In addition, significant limits on the remedies available mean that monetary compensation is only available for the victims most directly affected by the abuse.

In both the § 1983 and state law contexts, the right to bring a cause of action against police officers or their employers is severely constrained to those who have been most directly harmed and are cognizable only for the victims most affected by the alleged abuse. In federal court, a party must have standing to pursue a claim, which requires proof of an “actual injury,”<sup>29</sup> that is “concrete and particularized,”<sup>30</sup> and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>31</sup> Although organizations that address police abuse may technically be able to meet that standard if the abuse implicates their members or interests, successful examples are few and far between.<sup>32</sup> Thus, people who witness police violence or live in

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26. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983); Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, CONST. DAILY (Apr. 20, 2021), <https://constitutioncenter.org/blog/looking-back-at-the-ku-klux-klan-act> [<https://perma.cc/J6CT-N6VP>].

27. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 388 (1989) (establishing standard for Fourth Amendment claims alleging excessive force).

28. MICHAEL AVERY, DAVID RUDOVSKY, KAREN M. BLUM & JENNIFER LAURIN, *POLICE MISCONDUCT: LAW & LITIGATION* § 6.22 (2020); *see also, e.g.*, *Beltran-Serrano v. City of Tacoma*, 442 P.3d 608, 609 (Wash. 2019) (noting that assault and battery and negligence claims could be available in tort claims against police officers); *District of Columbia v. Chinn*, 839 A.2d 701, 705 (D.C. 2003) (noting that assault, battery, and negligence claims could be available in tort claims against police officers).

29. *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)) (discussing standards for standing in federal court).

30. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

31. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

32. *See, e.g.*, *Md. State Conference of NAACP Branches v. Md. Dep’t of State Police*, 72 F. Supp. 2d 560, 565 (D. Md. 1999) (finding Article III standing in a class action involving racial profiling by Maryland State Police). For an example of ongoing litigation with an organizational plaintiff, *see also* *Black Love Resists in the Rust v. City of Buffalo*, 334 F.R.D. 23 (W.D.N.Y. 2019).

communities where there are long memories of abuse will be unlikely to successfully assert tort claims.

Other technical legal doctrines also thwart access to the courts. In particular, statutes of limitations for civil claims erect barriers. As § 1983 does not contain its own statute of limitations, the relevant statute of limitations is borrowed from state analogues and therefore varies across the country.<sup>33</sup> For example, the statute of limitations is two years in Texas,<sup>34</sup> three years in New York,<sup>35</sup> and four years in Florida.<sup>36</sup> Especially in states where the statute of limitations is relatively short, it can be difficult for potential litigants to access counsel and file a claim. Moreover, victims of police violence may face criminal prosecution arising from the underlying incident or conduct that gave rise to the civil claim, which can delay the opportunity to file a civil suit.<sup>37</sup> Attorneys typically pursue civil rights claims on a contingency fee basis and are sometimes reluctant to pursue civil claims against police officers while a criminal case is pending. When a criminal defendant decides to pursue a trial, cases can linger for years. Such a delay can put viable civil claims in serious jeopardy, as the penalty for failure to comply with the statute of limitations is harsh: the claim is extinguished.<sup>38</sup>

The doctrine of qualified immunity also creates substantial barriers to civil rights claims. A legal defense to § 1983 claims created by the Supreme Court, qualified immunity eliminates damages liability for government officials sued in their individual capacity when the constitutional right at issue was not “clearly established” at the time of the alleged violation.<sup>39</sup> Because courts are given discretion to address whether the right at issue was clearly established before determining whether the right was violated,<sup>40</sup> cases are often dismissed without a ruling on whether the victim’s rights were, in fact, violated.<sup>41</sup> And, while qualified immunity applies outside of cases involving alleged police misconduct, its toll in such cases is uniquely devastating. As Fourth Amendment claims against police officers alleging excessive force require highly fact-intensive inquiries, it is often not difficult for a police officer to establish that there was not case law that created

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33. *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (“Section 1983 provides a federal cause of action, but in several respects . . . federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts.”).

34. *See, e.g., King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 761 (5th Cir. 2015).

35. *See, e.g., Owens v. Okure*, 488 U.S. 235, 251 (1989).

36. *See, e.g., Henyard v. Does*, 543 F.3d 644, 646 (11th Cir. 2008).

37. *See, e.g., James C. McKinley Jr., New York City to Pay N.B.A.’s Thabo Sefolosha \$4 Million to End False-Arrest Suit*, N.Y. TIMES (Apr. 5, 2017), <https://nyti.ms/2oDwN2P> [<https://perma.cc/AS7C-E728>] (describing settlement of civil lawsuit brought by NBA player Thabo Sefolosha, whose leg was broken by a police officer in New York City, after acquittal on criminal charges for resisting arrest, obstruction of governmental administration, and disorderly conduct).

38. *See Owens*, 488 U.S. at 237.

39. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

40. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

41. Karen Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1894–96 (2018).

clearly established law in a sufficiently similar scenario.<sup>42</sup> For example, in *Baxter v. Bracey*, the plaintiff's excessive force claim was dismissed under the qualified immunity doctrine because the legal standard at issue was not clearly established.<sup>43</sup> In this case, the police officer released a dog to attack a burglary suspect who had raised his hands in surrender; the case was dismissed because the plaintiff did not identify "case law suggesting that raising his hands, on its own, [was] enough to put [the officer] on notice that a canine apprehension was unlawful in these circumstances."<sup>44</sup> As the Supreme Court famously opined, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."<sup>45</sup>

While legal scholars have critiqued qualified immunity for years,<sup>46</sup> the doctrine has also received significant attention since the killing of George Floyd in May 2020. Mainstream news outlets now regularly report on its impact.<sup>47</sup> Congress has taken notice as well. The pending George Floyd Justice in Policing Act of 2021 would eliminate qualified immunity for state and local law enforcement officers.<sup>48</sup> But until legislative change is enacted, qualified immunity remains a serious obstacle to redress in civil rights litigation.

Finally, exhaustion requirements, which can be difficult to navigate, typically accompany state tort claims that may be filed against police officers, municipalities, and state agencies.<sup>49</sup> For example, those who seek to bring claims against municipalities in New York for the actions of their employees must file a notice of claim with the municipality within 90 days of the occurrence giving rise to the claim.<sup>50</sup> Securing counsel who can advise a potential plaintiff of this requirement and ensure compliance with it so quickly after a likely traumatic event can be very challenging. A state law claim against a municipality on the basis of vicarious liability can be especially useful because § 1983 liability against municipalities is

42. *Id.* at 1899 ("[I]nsisting on precedent with the degree of particularity required by the Supreme Court in recent cases means that many claims against individual officers will be disposed of . . . and plaintiffs with serious and substantial injuries will be left without redress.").

43. 751 Fed. Appx. 869 (6th Cir. 2018).

44. *Id.* at 872.

45. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

46. See, e.g., Will Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Blum, *supra* note 41; Karen Blum, Erwin Chemerinsky & Martin Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013); Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

47. See, e.g., Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/#article-supreme-defense> [<https://perma.cc/G4PE-UGGM>]; Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [<https://perma.cc/6DTY-UXL7>].

48. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021).

49. In contrast, with few exceptions, exhaustion of state remedies is not required under § 1983. See *Heck v. Humphrey*, 512 U.S. 477, 480 (1994); *Ellis v. Dyson*, 421 U.S. 426, 432–33 (1975); *Damico v. California*, 389 U.S. 416, 416–17 (1967).

50. N.Y. GEN. MUN. LAW § 50-e (McKinney 2020).

extremely limited to only those wrongs committed pursuant to official policy or custom.<sup>51</sup> The loss of such a claim, in combination with the barrier to relief created by qualified immunity for claims against officers, can therefore eliminate the possibility of relief from a civil lawsuit.

For plaintiffs who manage to overcome these many hurdles, the relief available in civil lawsuits is also limited. The typical relief sought is a monetary award for the plaintiff, most commonly compensatory damages sought with the aim of making the plaintiff whole following the harm they have suffered.<sup>52</sup> Punitive damages against individual officers are also available in § 1983 actions.<sup>53</sup>

Court-ordered injunctive relief that requires reform of the policies and practices that led to police violence is possible in civil litigation, but it is frequently unavailable. Again, the standing doctrine plays a critical role: it not only presents an obstacle to mounting a claim, it also severely limits the type of relief available. In *City of Los Angeles v. Lyons*, the Supreme Court held that a Black man who had been restrained in a chokehold until he passed out and defecated on himself did not have standing to pursue injunctive relief against the Los Angeles Police Department (LAPD) that would have required reform of the LAPD's policies and training on chokeholds.<sup>54</sup> Astoundingly, the Court reasoned that the plaintiff did not face “a real and immediate threat” of being placed in a chokehold *again* and therefore could not establish an actual “controversy” in a claim for injunctive relief.<sup>55</sup> Since *Lyons*, federal courts have routinely used standing doctrine to curtail cases for injunctive relief against police departments, with isolated exceptions.<sup>56</sup> There are few cases in which private plaintiffs succeeded in achieving systemic changes to policies or practices regarding the use of force since *Lyons*. Two prominent examples in Cincinnati and Oakland involved settlements in which the

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51. See *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (holding that plaintiffs could sue local governments provided the constitutional wrongs were inflicted pursuant to official policy or custom); Karen Blum, *Section 1983 Litigation: The Maze, the Mud & the Madness*, 23 WM. & MARY BILL RIGHTS J. 913, 916–20 (2015) (describing limitations on municipal liability under § 1983).

52. See AVERY, *supra* note 28 at §§ 13.1; 13.2.

53. *Smith v. Wade*, 461 U.S. 30, 35–36 (1983) (“[A]lthough the precise issue of the availability of punitive damages under § 1983 has never come squarely before us, we have had occasion more than once to make clear our view that they are available.”).

54. 461 U.S. 95, 105–11, 115 (1983).

55. *Id.* at 110.

56. Compare *Davis v. Harshbarger*, No. 93 C 1021, 1993 WL 189961 (N.D. Ill. June 1, 1993) (dismissing plaintiff's claims for injunctive relief against a clerk and a sheriff of the Swansea Police Department due to the speculative nature of the future injury claimed by plaintiff), with *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding that plaintiffs had standing to pursue injunctive relief addressing the New York City Police Department's stop and frisk practices), and *Battle v. City of New York*, No. 11 Civ. 3599, 2012 WL 112242 (S.D.N.Y. Jan. 12, 2012) (finding that plaintiffs had standing to pursue injunctive relief addressing Fourth Amendment violations related to the New York City Police Department's Taxi Robbery Inspection Program).

defendants did not appear to pursue dismissal of the plaintiffs' claims for injunctive relief.<sup>57</sup>

It is worth noting that creative remedies, such as those involving apologies, memorials, and educational programs are sometimes available in response to litigation.<sup>58</sup> To take a prominent recent example, after Philadelphia police officers arrested two Black men for trespassing in a Starbucks when they were waiting for a business meeting to commence, the settlement between the parties required the City of Philadelphia to spend \$200,000 on an entrepreneurship program for high school students.<sup>59</sup> But such creative remedies, including those involving apologies, are not usually ordered by courts. Instead, they are the result of settlements or other voluntary agreements between the parties.<sup>60</sup> Municipalities, which operate most police departments and are frequently named as defendants in cases involving police misconduct, are often particularly resistant to creative settlements that involve admissions of wrongdoing.<sup>61</sup>

### B. Prosecutions

Criminal prosecutions of police officers who have perpetrated violence are notoriously difficult. One major hurdle to criminal prosecutions is that prosecutors typically work closely with police officers and face pressure to avoid prosecuting them. One legal scholar has argued that such prosecutors have actual conflicts of interest in such cases.<sup>62</sup> Some states address these concerns by requiring investigation and, if appropriate, prosecution by state attorneys general instead of local

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57. See, e.g., Collaborative Agreement, *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002), <https://www.cincinnati-oh.gov/police/linkservid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/> [<https://perma.cc/J8T9-HZM8>] (requiring implementation of community problem-oriented policing strategy and periodic assessments of whether the parties are achieving this goal); Negotiated Settlement Agreement, *Allen v. City of Oakland*, No. 00-cv-04599 THE (N.D. Cal. Nov. 28, 2012), <http://www2.oaklandnet.com/oakcal1/groups/police/documents/webcontent/dowd022066.pdf> [<https://perma.cc/F9MN-WRCY>] (implementing numerous reforms in the Oakland Police Department such as a community policing plan, revised use of force policy and new complaint procedures). In both cases, there are no reported judicial decisions regarding motions to dismiss claims for injunctive relief, and a review of the docket sheets did not identify any such motion being made.

58. See SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 239-43 (2020) (providing several examples of nontraditional settlement agreements); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1286 n.142 (2006) (providing examples of police apologies for wrongdoing).

59. Jacey Fortin, *2 Black Men Settle with Philadelphia and Starbucks over Arrest*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/starbucks-arrest-philadelphia-settlement.html> [<https://perma.cc/75U2-GHX6>].

60. White, *supra* note 58, at 1273. Such agreements, while not ordered by courts, can be enforced by them.

61. *Id.* at 1264.

62. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1464-86 (2016).

district attorneys.<sup>63</sup> But given the novelty of this approach, it is not yet clear whether it could result in a greater number of prosecutions than might otherwise occur. And, given the discord between many prosecutorial agencies and the communities most often impacted by police violence, prosecutions may not be seen as responsive to community needs.

Federal criminal prosecutions of police officers for violations of civil rights are also rare. Federal prosecutors, including both United States Attorneys' offices and the Criminal Section of the U.S. Department of Justice's Civil Rights Division, have authority to prosecute police officers for criminal violations of civil rights.<sup>64</sup> But these federal prosecutions require a showing of "willful" disregard of a victim's civil rights.<sup>65</sup> This standard is both extraordinarily high and confusing. It has rightfully been critiqued for decades.<sup>66</sup>

### *C. Investigations by the U.S. Department of Justice Civil Rights Division*

The Civil Rights Division's authority to investigate patterns and practices that implicate civil rights, and ultimately sue police departments, is more straightforward. Following the uprisings and outrage unleashed in response to the acquittal of four LAPD officers who had savagely beaten Rodney King, Congress created this new authority in 1994.<sup>67</sup> Between 1994 and 2016, the Civil Rights Division opened seventy investigations, resulting in about forty consent decrees (reform agreements) with state and local police departments.<sup>68</sup> Some investigations have also resulted in a memorandum of agreement.<sup>69</sup> As of 2014, only one case has

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63. See, e.g., Act of Jan. 30, 2019, ch. 1, 2019 N.J. Laws 13; N.Y. Exec. Order No. 147 (July 8, 2015).

64. OFFICE OF THE INSPECTOR GENERAL, AUDIT OF THE DEPARTMENT OF JUSTICE'S EFFORTS TO ADDRESS PATTERNS OR PRACTICES OF POLICE MISCONDUCT AND PROVIDE TECHNICAL ASSISTANCE ON ACCOUNTABILITY REFORM TO POLICE DEPARTMENTS, i–ii (Feb. 2018), <https://oig.justice.gov/reports/2018/a1814.pdf> [<https://perma.cc/9GNP-YR2K>] [hereinafter Office Inspector General Audit].

65. 18 U.S.C. § 242 (2021); *Screws v. United States*, 325 U.S. 91, 100 (1945).

66. See, e.g., David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 24 (1999) ("Accepting *Screws* as precedent, I conclude, symbolically undervalues police brutality as a civil rights crime and demeans, in particular, black lives and black bodies."); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2120 (1993) ("[T]he solutions proposed in [*Screws*] are flawed."); but see, Paul J. Watford, *Hallows Lecture: Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 481–83 (2014) (arguing that although *Screws* made federal prosecutions of civil rights violations difficult, it had some positive impacts, such as providing affirmation that the federal government had a role in regulating local and state police behavior).

67. THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK *supra* note 21, at 3; Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113, 113 (2016).

68. THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 21, at 3.

69. *Id.* at 21.

proceeded to litigation rather than some consensual resolution.<sup>70</sup> The investigations are usually long, lasting several years.<sup>71</sup> Consent decrees with the Civil Rights Division typically require the adoption of new policies, training programs, and supervision practices.<sup>72</sup> Given the severe limitations on the ability of private plaintiffs to pursue systemic reform through litigation due to the stringent standing requirement announced in *Lyons*, the Civil Rights Division's ability to investigate systemic civil rights violations—particularly around the use of force—may facilitate scrutiny of a police department that would otherwise not exist.

The Civil Rights Division's investigations of police departments have, in some cases, created lasting change in the departments.<sup>73</sup> Their biggest structural challenge, however, is the limited volume of cases they can pursue. As of 2017, there are roughly eighteen thousand police departments in the United States, but, as noted above, the Civil Rights Division has formally investigated only about seventy and entered into reform agreements with only about forty.<sup>74</sup> This powerful tool to compel police departments to change necessarily applies to only a small number of departments.

#### *D. Civilian Oversight and Other Local Efforts to Oversee*

Civilian oversight is another popular response to police violence and abuse. The basic premise of civilian oversight is that non-police officers should have a role in monitoring, and in some cases investigating, allegations of police misconduct. The theory underlying civilian oversight is that internal affairs departments and other units within police agencies cannot and have not offered meaningful accountability in response to complaints.<sup>75</sup> According to the National Association for Civilian Oversight of Law Enforcement, there are approximately 150 civilian review boards that operate in the United States.<sup>76</sup> While there are many ways to classify civilian review boards, they generally fit into three basic models:

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70. Rushin, *supra* note 67, at 115 (describing DOJ litigation against Alamance County, NC Sheriff's Department).

71. Between 2011 and 2016, the average investigation spanned about three years from opening to closure. See OFFICE INSPECTOR GENERAL AUDIT, *supra* note 64 at 7.

72. THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 21, at 2.

73. Rushin, *supra* note 67 at 113, 119 (praising the investigation of the LAPD for substantially transforming the department).

74. THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 21, at 1, 3.

75. Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO STATE J. CRIM. L. 653, 659 (2004) (citing PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 91 (1995)).

76. JOSEPH DE ANGELIS, RICHARD ROSENTHAL & BRIAN BUCHNER, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: A REVIEW OF THE STRENGTHS AND WEAKNESSES OF VARIOUS MODELS 5 (2016), [https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NA\\_COLE\\_short\\_doc\\_FINAL.pdf?1481727977](https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NA_COLE_short_doc_FINAL.pdf?1481727977) [https://perma.cc/9T6Q-6TZX] (documenting “[o]ver 144 oversight agencies” as of 2016).

investigation-focused, review-focused, and audit/monitor-focused.<sup>77</sup> Most, but not all, focus on investigating or reviewing individual complaints of alleged past misconduct.<sup>78</sup>

The investigation-focused model, by definition, aims to investigate complaints about past conduct and is typically limited to individual complaints. New York City's Civilian Complaint Review Board (CCRB) is a good example. The CCRB has primary responsibility for investigating allegations concerning force, abuse of authority, discourtesy, and offensive language.<sup>79</sup> Accordingly, a complainant with an allegation that fits into one of these categories may never interact with the New York City Police Department's own Internal Affairs Bureau or other investigative arms. That said, despite the CCRB's robust investigative authority, it has no authority to impose discipline; the police commissioner is the ultimate arbiter of disciplinary measures for New York City Police Department ("NYPD") officers.<sup>80</sup> Thus, although the CCRB stands out for its independence from the NYPD in pursuing investigations, it has no power to implement discipline or impose policy changes.<sup>81</sup>

In the review model, civilian review boards again typically focus on individual complaints of alleged wrongdoing, but they differ from the investigation model in that they review investigations already completed by police departments' internal affairs units.<sup>82</sup> For example, the San Diego Community Review Board on Police Practices reviews the facts and evidence adduced in the San Diego Police Department's Internal Affairs investigations concerning certain categories of misconduct, including the use of force and all in-custody deaths.<sup>83</sup> It may make policy recommendations, but it does not have the power to enact policies or to implement discipline.<sup>84</sup>

Finally, civilian review boards in the auditor/monitor-focused model play a more complementary role to internal affairs units.<sup>85</sup> For example, the Denver Office of the Independent Monitor provides civilian oversight of the City and County

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77. *Id.* at 7.

78. *See id.* at 14.

79. Livingston, *supra* note 75 at 654–55; *see About*, CIVILIAN COMPLAINT REVIEW BOARD, <https://www1.nyc.gov/site/ccrb/about/about.page> [https://perma.cc/95E4-S9F9] (last visited June 9, 2021).

80. Livingston, *supra* note 75 at 655 n.12.

81. *See Frequently Asked Questions*, CIVILIAN COMPLAINT REVIEW BOARD, <https://www1.nyc.gov/site/ccrb/about/frequently-asked-questions-faq.page> [https://perma.cc/C9ZS-M73N] (last visited June 9, 2021).

82. DE ANGELIS, ROSENTHAL & BUCHNER, *supra* note 76 at 9–11.

83. *See CRB Frequently Asked Questions*, COMMISSION ON POLICE PRACTICES, <https://www.sandiego.gov/communityreviewboard/about/faq> [https://perma.cc/ED7S-FY3V] (last visited Jan. 14, 2021); CITY OF SAN DIEGO, COMMUNITY REVIEW BOARD ON POLICE PRACTICES BYLAWS 2 (2020), <https://www.sandiego.gov/sites/default/files/legacy/citizensreviewboard/pdf/crb-bylaws.pdf> [https://perma.cc/EBT5-YN83].

84. *Id.* at Art. II, § 2.

85. *See* DE ANGELIS, ROSENTHAL & BUCHNER, *supra* note 76 at 12 (describing the functions of the auditor/monitor model).

of Denver Police and Sheriff Departments.<sup>86</sup> It monitors the work of both Internal Affairs Departments as it unfolds, and it makes recommendations on police policies and practices, among other responsibilities.<sup>87</sup> Similarly, Oakland and New York City each has an Office of Inspector General. Both have authority to review a variety of policies and practices and do not typically investigate individual complaints.<sup>88</sup>

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In sum, typical responses to police violence and abuse are focused on policy reforms that aim to change the behavior of police officers in the future or provide redress to direct victims. Most of them are rarely implemented, and even the more common approaches, like lawsuits, face significant limitations and hurdles, both in getting off the ground and in the remedies they ultimately provide. While these responses create some measure of justice at times, they often leave unaddressed the harm caused by police violence that extends beyond its most immediate victims. None offers relief to those who were indirectly impacted by the abuse. Reparations can play a valuable role in addressing—and attempting to repair—such community-wide harm.

### III.

#### REPARATIONS FOR POLICE VIOLENCE

The measures commonly suggested in response to police violence are undertaken with the aim of either providing redress to people most directly victimized by police abuse and violence, or instituting policy reforms that aim to prevent recurrence. These are unquestionably laudable goals undergirded by the values of traditional legal remedial processes. They largely do not, however, provide redress for the harm caused by police violence that reverberates through entire communities. Even for direct victims, they may not offer meaningful relief.

As described above, the concept of reparations is multifaceted and has many interpretations. Reparations take many forms, ranging from apologies to monetary compensation to victims or their descendants. Reparations can be particularly valuable in response to police violence because they provide an opportunity to repair

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86. See *Office of the Independent Monitor*, DENVER: THE MILE HIGH CITY, <https://www.denvergov.org/content/denvergov/en/office-of-the-independent-monitor.html> [<https://perma.cc/87LY-7AT7>], (last visited Jan. 14, 2021).

87. See NICHOLAS E. MITCHELL, 2019 ANNUAL REPORT 1 (2019), [https://www.denvergov.org/content/dam/denvergov/Portals/374/documents/2019AnnualReport\\_OIM.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/374/documents/2019AnnualReport_OIM.pdf) [<https://perma.cc/5HXK-QSQJ>].

88. See *Oakland Police Department Office of the Inspector General (OIG)*, CITY OF OAKLAND (Aug. 20, 2020, 4:17 PM), <https://www.oaklandca.gov/resources/oakland-police-department-office-of-the-inspector-general-oig> [<https://perma.cc/6AAH-X2VE>]; OAKLAND, CAL., MUN. CODE §2.45.120 (2021), [https://library.municode.com/ca/oakland/codes/code\\_of\\_ordinances?nodeId=TIT2ADPE\\_CH2.45OAPOCO\\_2.45.120FUDUOFINGE](https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.45OAPOCO_2.45.120FUDUOFINGE); [<https://perma.cc/D7VR-X66W>]; *Inspector General for the NYPD*, CITY OF NEW YORK, [www1.nyc.gov/site/doi/offices/oignypd.page](http://www1.nyc.gov/site/doi/offices/oignypd.page) [<https://perma.cc/XZ9H-QKXJ>]; *Frequently Asked Questions*, CITY OF NEW YORK, <https://www1.nyc.gov/site/doi/oignypd/faq.page#faq5> [<https://perma.cc/6VB7-F5N3>].

harm inflicted on the community as a whole. One legal scholar has described the benefit of reparations in response to police violence as the ability to restore dignity to persons who have been dehumanized.<sup>89</sup> But the value of reparations in response to police violence has the potential to move beyond the individual who has been dehumanized to the community at large, which has suffered as well.

Black communities, in particular, have a well-documented lack of trust in police departments.<sup>90</sup> Some scholars have theorized that this trust deficit erodes police legitimacy within Black communities, leading to a refusal to follow police commands or cooperate with investigations.<sup>91</sup> Monica Bell has argued that the ramifications of distrust are even greater, including the legal estrangement of Black communities.<sup>92</sup> Much like the impact of the well-known Tuskegee study conducted by the U.S. Public Health Service,<sup>93</sup> notorious episodes of police violence reverberate widely and for generations. Just as the conventional wisdom is that bystanders to the Tuskegee study are believed to have lost trust in the health system,<sup>94</sup> so, too, do bystanders to police violence lose faith in the police.

Efforts to repair trust between marginalized communities and the police are unquestionably complex and cannot be reduced to a single intervention. Reparations may, however, be a valuable tool in doing so where police violence has fueled distrust.

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89. See John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOWARD L.J. 621, 645 (2016).

90. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2070 (2017) (collecting sources on distrust between Black communities and law enforcement); THE OPPORTUNITY AGENDA, A NEW SENSIBILITY: AN ANALYSIS OF PUBLIC OPINION RESEARCH ON ATTITUDES TOWARDS CRIME AND CRIMINAL JUSTICE POLICY 30–34 (2016), <https://www.opportunityagenda.org/sites/default/files/2018-04/A-New-Sensibility-Report.pdf> [<https://perma.cc/ZMZ3-G7EM>] (reporting on results of numerous public opinion surveys and polls addressing trust in police); *Yahoo! News Race and Politics - June 11, 2020*, YOU GOV (2020), [https://docs.cdn.yougov.com/86ijisd7cy/20200611\\_yahoo\\_race\\_police\\_covid\\_crosstabs.pdf](https://docs.cdn.yougov.com/86ijisd7cy/20200611_yahoo_race_police_covid_crosstabs.pdf) [<https://perma.cc/LVR3-GV35>].

91. See, e.g., Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1875–77 (2013); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 246, 250–52, 260 (2008); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 526, 540, 545 (2003); Bell, *supra* note 90, at 2058 (“Many scholars and policymakers have settled on a ‘legitimacy deficit’ as the core diagnosis of the frayed relationship between police forces and the communities they serve. The problem, this argument goes, is that people of color and residents of high-poverty communities do not trust the police or believe that they treat them fairly, and that therefore these individuals are less likely to obey officers’ commands or assist with investigations.”).

92. See *id.* at 2084–88.

93. See Susan M. Reverby, *Compensation and Reparations for Victims and Bystanders of the U.S. Public Health Service Research Studies in Tuskegee and Guatemala: Who Do We Owe What?*, 34 BIOETHICS 893, 897 & nn. 36–37 (2020) (noting that clinicians and researchers often receive training on the harm of the Tuskegee study, but research into how the study harmed peoples’ trust toward the medical establishment has yielded mixed results).

94. *Id.*

Chicago and Philadelphia, where reparations schemes have been adopted in response to police violence, provide useful illustrations of the potential value of reparations in addressing community-wide harm. Activists and community members in Chicago successfully urged the creation of a reparations scheme in response to the torture perpetrated by members of the Chicago Police Department (CPD) against Black men between 1972 and 1991.<sup>95</sup> During this timeframe, a unit of CPD police detectives led by Jon Burge, a notorious commander, tortured Black men by, among other tactics, suffocating them with plastic bags, beating them, and applying electric shocks to their genitals.<sup>96</sup> As a result, the officers elicited confessions that left many of the men incarcerated for decades.<sup>97</sup> Unsurprisingly, the torture traumatized the victims, their families, and others in their community.<sup>98</sup> Pursuant to the Reparations for Burge Torture Victims Ordinance and its accompanying resolution, which the Chicago City Council passed in 2015, the city apologized for the torture and promised to build a memorial to the torture victims, provide monetary reparations to the victims, waive tuition to city colleges for the victims and their immediate families, and adopt a mandatory curriculum concerning the history of the torture practices in the Chicago public schools.<sup>99</sup>

Reparations are also taking shape in response to a remarkable event that occurred 35 years ago when the Philadelphia Police Department (PPD) dropped a bomb on a home in a residential neighborhood. Members of a Black radical organization, MOVE, resided in the home.<sup>100</sup> MOVE had a history of ugly entanglements with the PPD, including one struggle in which a police officer was

95. Andrew S. Baer, *Dignity Restoration and the Chicago Police Torture Reparations Ordinance*, 92 CHI.-KENT L. REV. 769, 769–71 (2018); Nickolas Kaplan, “Reparations NOW!”: *Municipal Reparations, International Tribunals, and the Chicago Torture Justice Memorials Campaign*, 20 PUB. INT. L. REP. 116, 118–20 (2015); see Noah Berlatsky, *When Chicago Tortured*, ATLANTIC (Dec. 17, 2014), <https://www.theatlantic.com/national/archive/2014/12/chicago-police-torture-jon-burge/383839/> [<https://perma.cc/62XU-MWUB>].

96. See Berlatsky, *supra* note 95; Baer, *supra* note 95, at 769–70; Kaplan, *supra* note 95, at 118.

97. See Kaplan, *supra* note 95, at 118.

98. See *id.*; Joey Mogul, *Lawyer for Chicago Torture Victims: A Model for Responding to Police Brutality*, TIME (May 12, 2015), <https://time.com/3852431/lawyer-for-chicago-torture-victims-a-lesson-for-responding-to-police-brutality/> [<https://perma.cc/WE8W-TNA5>].

99. Chi., Ill., Reparations for Burge Torture Victims Ordinance (May 6, 2015) [hereinafter Chicago Torture Ordinance], [https://www.chicago.gov/content/dam/city/depts/dol/supp\\_info/Burge-Reparations-Information-Center/ORDINANCE.pdf](https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/ORDINANCE.pdf) [<https://perma.cc/QV55-M2AX>]; Resolution on Reparations to Victims of Torture by Police Commander Jon Burge, Comm. On Fin., 2015 Chi. City Council (Ill. 2015) [hereinafter Chicago Torture Resolution], [https://www.chicago.gov/content/dam/city/depts/dol/supp\\_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf](https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf) [<https://perma.cc/2DJE-ABM2>]. Although the memorial has not yet come to fruition, the Chicago Torture Justice Memorials, an advocacy organization, continues to press for its creation. See *Statement on 2020 Police Violence*, CHICAGO TORTURE JUSTICE MEMORIALS, <https://chicagotorture.org/statement-on-2020-police-violence/> [<https://perma.cc/7PLW-ZEN5>] (last visited Jan. 7, 2021).

100. See *In re City of Philadelphia Litig.*, 49 F.3d 945, 949 (3d Cir. 1995). For a description of MOVE’s ideology and connection to Black identity, see J.M. Floyd-Thomas, *The Burning of Rebellious Thoughts: MOVE as Revolutionary Black Humanism*, 32 THE BLACK SCHOLAR 11 (2002).

killed.<sup>101</sup> When the PPD attempted to remove MOVE members from their home in 1985, bullets flew and the PPD dropped a bomb on the home from a helicopter that ultimately killed 11 people, including five children.<sup>102</sup> Fire spread beyond the MOVE compound, destroying 61 homes.<sup>103</sup> Despite two state grand jury investigations into potential criminal liability, only the single adult MOVE member who survived the bombing and another Black contractor who had misappropriated money in rebuilding the neighborhood were indicted; none of the police officers involved in the bombing were prosecuted.<sup>104</sup> Although it did rebuild the destroyed homes (shoddily at first),<sup>105</sup> the City contested civil liability for roughly 10 years.<sup>106</sup>

It took 35 years for the city to address the harm inflicted upon the larger Philadelphia community. In May 2020, W. Wilson Goode, who was the mayor of Philadelphia in 1985, called for the city to apologize for the MOVE bombing.<sup>107</sup> In November 2020, the Philadelphia City Council passed a resolution formally apologizing for the bombing and establishing the anniversary of the bombing as “an annual day of observation, reflection, and recommitment.”<sup>108</sup> The resolution itself, as well as statements by the mayor of Philadelphia and the city council member who sponsored the resolution, refer to ongoing harm created by the bombing, not just for MOVE members, but for the larger Black community in Philadelphia.<sup>109</sup>

In both Chicago and Philadelphia, the reparations resolutions explicitly recognize the trauma that police violence inflicted on people who were not direct

101. *In re City of Philadelphia Litig.*, 49 F.3d at 949.

102. *Id.* at 948, 950–52.

103. *Id.* at 952.

104. CHARLES W. BOWSER, LET THE FIRE BURN: THE FINAL BATTLE WITH MOVE 173–75 (1989). That survivor, Ramona Africa, ultimately served six years in prison. See Gene Demby, *I’m from Philly. 30 Years Later I’m Still Trying to Make Sense of the MOVE Bombing*, NPR (May 13, 2015, 11:55 AM), <https://www.npr.org/sections/codeswitch/2015/05/13/406243272/im-from-philly-30-years-later-im-still-trying-to-make-sense-of-the-move-bombing> [<https://perma.cc/5P6F-NBJV>].

105. Jen Kinney, *‘Music’ of Construction Greets Osage Ave. Neighbors on MOVE Bombing Anniversary*, WHYY (May 13, 2019), <https://whyy.org/articles/music-of-construction-greets-osage-ave-neighbors-on-move-bombing-anniversary/> [<https://perma.cc/L3FY-HV2C>] (describing reconstruction efforts by the city).

106. *In re City of Philadelphia Litig.*, 938 F. Supp. 1278, 1279–81, 1294–95 (E.D. Pa. 1996) (recounting procedural history and entering judgment for three plaintiffs totaling \$1.5M in civil rights case against the City of Philadelphia), *aff’d*, 158 F.3d 711 (3d Cir. 1998).

107. W. Wilson Goode, *When I Was Mayor, Philadelphia Bombed Civilians. It’s Time to Apologise*, GUARDIAN (May 10, 2020) <https://www.theguardian.com/commentisfree/2020/may/10/when-i-was-mayor-philadelphia-bombed-civilians-its-time-for-the-city-to-apologise> [<https://perma.cc/F6AP-3AWL>].

108. Phila. City Council Res. 200609, 2020 Phila. City Council (Pa. 2020).

109. *Id.*; Laura McCrystal, *Council Formally Apologizes for Deadly MOVE Bombing*, PHILA. INQUIRER, Nov. 13, 2020, at B3; Jamie Gauthier (@CouncilmemberJG), TWITTER (Nov. 12, 2020, 12:05 PM), <https://twitter.com/CouncilmemberJG/status/1326934272561860608?s=20> [<https://perma.cc/LU8F-7C2V>].

victims. In Chicago, the torture survivors received monetary compensation, but most of the other elements included in the reparations package were designed to have a broader impact and acknowledge the harm to the community as a whole. For example, while the apology was directed to the victims and their families, the city council's resolution explicitly sought to "restore the trust of all Chicagoans in the decency and fairness of their municipal and county governments, including their law enforcement agencies," and to "reassure Chicago's residents that such wrongs will not be repeated in the future."<sup>110</sup> The curriculum for use in the Chicago public schools creates an ongoing acknowledgement of the harm and seeks to prevent its reoccurrence by instilling anti-racist values in youth.<sup>111</sup> Prioritizing access to mental health treatment for the family members of victims constitutes acknowledgement that the harm created by the torture was not just physical and not limited to those who directly suffered at the hands of police officers.<sup>112</sup>

In Philadelphia, the reparations resolution for the MOVE bombing goes beyond rebuilding the 61 homes that were destroyed by fire. Indeed, it recognizes that the bombing left a scar on an entire neighborhood and disrupted the notion of the home as a sanctuary. A police department that bombs its city's own citizens with blatant disregard for the extensive death, damage, and harm that extraordinary act creates is one that instills terror in all subject to its whims. The resolution's apology acknowledges the toll that the bombing took on Philadelphians outside of the MOVE home, even those who never feared that the fire that resulted from the MOVE bombing could leave them or their loved ones injured, dead, or homeless. The newly established annual day of observation, reflection and recommitment will continue to memorialize the extraordinary act of a police department bombing those it is supposed to serve.

Both the Chicago and Philadelphia examples involve unquestionably extraordinary acts of police violence. Indeed, these acts are so extreme that they may qualify as episodes of collective "cultural trauma."<sup>113</sup> But reparations can also be a valuable tool in response to more commonplace (but still horrific) examples of police violence. Police violence does not have to be as shocking as the torture in Chicago or bomb in Philadelphia to spur a community's demands for accountability. In the age of smartphones and body-worn cameras, it seems particularly likely that uncontested visual records of police violence will trigger outrage and cause emotional harm to bystanders and other witnesses that requires repair.

Reparations present the possibility of ameliorating harm to a community as a whole. While redress for direct victims who have suffered the greatest harm is

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110. Chicago Torture Resolution, *supra* note 99.

111. *See id.*

112. *Id.*

113. Cultural trauma is a group-based harm that "occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways." Jeffrey C. Alexander, *Toward a Theory of Cultural Trauma*, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY 1, 1 (2004).

critically important, police violence also has indirect victims. Reparations provide an opportunity to address the impact on them as well.

Popular discussion of reparations typically revolves around harms perpetrated many years earlier, but decades need not pass before a community decides to make efforts at repair. While the most narrow definition of reparations suggests that they become necessary when legal redress is unavailable because, for example, relevant statutes of limitations have expired,<sup>114</sup> reparations with a community-wide focus do not turn on access to the courts. Instead, reparations to entire communities that have been harmed by police violence can be enacted at any time.

A community that has been harmed is in the best position to determine what form reparations for police violence should take. For example, some may deem a simple apology for harm inflicted on those besides the direct victim a valuable effort toward repair and reconciliation that reduces alienation or estrangement between a community and its government. Chicago offers the examples of an apology, a planned memorial, and curricular changes in local schools as reparations that extend to the entire community. Other communities may look to defund the police as reparations. As one commentator has argued, ending the perpetration of police violence against Black communities requires the removal of resources from police departments through defunding.<sup>115</sup>

Whatever form they take, local elected bodies, such as city councils, that are closely tied to communities that have experienced harm may be well positioned to address the widespread harm that accompanies episodes of police violence. This accords with the traditional regulation of policing at the local level.<sup>116</sup> It was city councils, not courts, that offered reparations in Chicago and Philadelphia decades after significant police violence. Other municipal governments may extend such relief to other communities that need it.

#### IV. CONCLUSION

Efforts at repair in response to abuse and violence are often focused exclusively on the victims. Only direct victims have standing to pursue relief through § 1983 or tort lawsuits. Systemic change is effectively unavailable in the vast

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114. See Posner & Vermeule, *supra* note 1, at 691–93.

115. Dreisen Heath, *Defunding the Police Is a Reparations Issue*, NATION (Oct. 2, 2020), <https://www.thenation.com/article/activism/defund-police-reparations/> [<https://perma.cc/JWC4-D78J>].

116. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1843–45 (2015) (explaining that there are few federal and state statutes that govern the work of local police departments); Alexis Karteron, *Congress Can't Do Much About Fixing Local Police – but It Can Tie Strings to Federal Grants*, THECONVERSATION.COM (June 1, 2021, 8:50 AM), <https://theconversation.com/congress-cant-do-much-about-fixing-local-police-but-it-can-tie-strings-to-federal-grants-159881> [<https://perma.cc/A38Z-TNM3>] (explaining that the federal government's role in regulating local and state police departments is cabined by constitutional constraints and that the U.S. Congress has little authority to impose its policy preferences).

majority of jurisdictions through private litigation due to stringent limits on the pursuit of equitable relief. The Justice Department's Civil Rights Division has the authority to pursue systemic relief, but it can only reach a tiny number of jurisdictions. Prosecutions of police officers in response to violence are rare by both state and federal entities. Civilian oversight, in the few places it exists, is usually weak. Most importantly, none of these tools account for the pain and harm inflicted upon the community at large by notorious episodes of police violence. Reparations for police abuse fill that gap, providing a potential pathway to meaningful redress for those besides the most immediate victims.