



NEW YORK STATE
BAR ASSOCIATION

A pair of dark grey scales of justice is shown against a light grey background. The left pan is lower and contains a large, crumpled piece of black paper. The right pan is higher and contains a large, crumpled piece of brown paper. The central pillar of the scales is prominent.

Report and Recommendations of the **Task Force on Racial Injustice and Police Reform**

June 2021

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9. Puerto Rican Bar Association
10. Rochester Black Bar Association
11. South Asian Bar Association of New York
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Executive Summary

Police officers, state troopers or members of sheriff's offices (hereinafter collectively referred to as "police officers" or "police") serve an integral role in protecting our communities from harm, preventing the commission of crimes and investigating and bringing to justice those that commit crimes.

Communities want and need the police. Communities also want police that do not unnecessarily harm, or even kill, the people the police are charged with protecting.

In many communities of color, the police are a double-edged sword. They are the legal remedy to address acts of violence, control dangerous situations and investigate crimes committed. Yet, these communities are often wary of police because the line between controlling and escalating situations during efforts to contain incidents seems to be too often crossed with tragic consequences. A Pew Center Research survey conducted a month prior to the murder of George Floyd "found that 78% of Americans overall—but a far smaller share of Black Americans (56%)—said they had at least a fair amount of confidence in police officers to act in the best interests of the public."¹

During an unprecedented pandemic, the nation in lockdown watched on May 25, 2020 as George Floyd was murdered by a Minneapolis Police Department training officer who knelt on his neck for approximately nine minutes while his trainee and other officers looked on.² A call for police to respond to the commission of an alleged non-violent crime of fraud unexpectedly and tragically ended in Floyd's death. A video taken by a bystander displayed a gross lack of humanity toward yet another Black man. Chauvin's action was so alarming that it captured the attention and outrage of people across the nation, and the globe. His action were also considered a crime: Chauvin was recently tried and convicted for the murder of George Floyd.

Floyd's unnecessary death was yet another instance of the police crossing the line between controlling and tragically escalating a situation. Floyd's death led to never-before-seen levels of protests by people of all races, backgrounds and economic levels. His tragic death was the catalyst for a nationwide call to action.

To communities of color, the conduct of Derek Chauvin came as no surprise: excessive use of force in policing has been a long-simmering issue. The tragic consequences of police misconduct disproportionately impact and result in serious harm and deaths of Black and Brown men. George Floyd's death was yet another instance in a long line of tragic deaths of Black and Brown men and women for alleged crimes that police unnecessarily escalated, deploying lethal force and unjustifiably killed during their arrests. On April 28, 1973, a plainclothes officer shot and killed 10-year-old Clifford Glover in Jamaica, Queens, believing he fit the description of a

¹ *A month before George Floyd's death, black and white Americans differed sharply in confidence in the police*, Pew Center Research (June 5, 2020), <https://www.pewresearch.org/fact-tank/2020/06/05/a-month-before-george-floyds-death-black-and-white-americans-differed-sharply-in-confidence-in-the-police/>.

² Evan Hill, Ainara Tiefertähler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. Times (March 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

robbery suspect.³ On September 15, 1983, Michael Stewart was arrested for spraying graffiti in a Brooklyn train stop, beaten unconscious, and brought to Bellevue Hospital “bruised and hogtied . . . where he died without regaining consciousness.”⁴ On August 9, 1997, Officer Justin Volpe sodomized Abner Louima while he was in custody; Louima was arrested after an altercation outside of a Brooklyn club. On February 4, 1999, four Bronx NYPD Detectives killed Amadou Diallo as he was entering his home, believing that he was removing a gun from his coat when in fact it was a wallet. On March 13, 2020, Breonna Taylor was shot to death by police in Louisville, Kentucky, awakened from her bed⁵ by police executing a no-knock warrant.⁶ On March 23, 2020, officers in Rochester responded to a man’s call asking for mental health services for his brother.⁷ They placed a hood over Daniel Prude’s face and suffocated him to death. In November 2020, the Bronx County District Attorney’s Office released body-worn camera footage of police killing Kawaski Trawick in his apartment on April 14, 2019.⁸ His last words were, “Why are you in my home?” The repeated incidents of police brutality demonstrate that there is a far-reaching problem that must be addressed. Prior to Chauvin’s conviction, only one officer in these cases—Officer Volpe—was convicted of crimes for their actions.

Being a police officer is not an easy career. Though rewarding, it is challenging and stressful; it requires officers to make split-second decisions to use force to stop what they perceive to be a threat to themselves and others.

Communities need police. Good police want to protect the communities they serve. Yet, communities of color, particularly Black communities, bear the brunt of bad policing and the tragic consequences of excessive use of force. NYSBA Immediate Past President Scott Karson created the Task Force on Racial Injustice and Police Reform to amplify voices pushing for the disruption of the status quo.

³ Jim Dwyer, *A Police Shot to a Boy’s Back in Queens, Echoing Since 1973*, N.Y. Times (Apr. 16, 2015), <https://www.nytimes.com/2015/04/17/nyregion/fired-at-queens-boy-fatal-1973-police-shot-still-reverberates.html?searchResultPosition=6> (“The officer said he fired when Clifford, in flight, pointed a gun at him, which the mortally injured boy had then managed to toss or hand to his stepfather.”).

⁴ Isabel Wilkerson, *Jury Acquits All 6 Transit Officers In 1983 Death of Michael Stewart*, N.Y. Times (Nov. 25, 1983), <https://timesmachine.nytimes.com/timesmachine/1985/11/25/181103.html?pageNumber=1>.

⁵ Rukmini Callimachi, *Breonna Taylor’s Life Was Changing. Then the Police Came to Her Door*, N.Y. Times (Aug. 30, 2020), <https://www.nytimes.com/2020/08/30/us/breonna-taylor-police-killing.html>.

⁶ A New York Times analysis determined that “[a]s policing has militarized to fight a faltering war on drugs, few tactics have proved as dangerous as the use of forcible-entry raids to serve narcotics search warrants, which regularly introduce staggering levels of violence into missions that might be accomplished through patient stakeouts or simple knocks at the door.” These raids are also racist in application: In an ACLU study of 20 cities, “42 percent of those subjected to SWAT search warrant raids were black and 12 percent Hispanic. Of the 81 civilian deaths tallied by The Times, half were members of minority groups.” See Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. Times (Mar. 18, 2017), <https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html>.

⁷ Michael Gold, *What We Know About Daniel Prude’s Life and Death*, N.Y. Times (Dec. 4, 2020), <https://www.nytimes.com/article/what-happened-daniel-prude.html>.

⁸ Rosa Goldensohn, *Why Are You in My Home? Kawaski Trawick Never Got an Answer Before Police Fatally Shot Him*, The City (Nov. 17, 2020), <https://www.thecity.nyc/justice/2020/11/17/21572438/nypd-bodycam-bronx-shooting-kawaski-trawick-killed>.

The Task Force engaged a diverse group of stakeholders: police officers throughout the ranks, including chiefs, as well as elected officials, community organizers, and citizens most directly impacted by police misconduct, to study the issues leading to police misconduct and brutality and to provide recommendations to policymakers, law enforcement, and the judiciary to end these deleterious policing practices that disproportionately impact persons of color. Specifically, the Task Force examined five areas: (1) the qualifications and training of police; (2) monitoring of police activities including the use of body cameras and other data-gathering techniques; (3) the role of civilian review boards and community oversight bodies charged with the identification and investigation of police misconduct; (4) the role of attorneys and the courts in the prosecution of police misconduct cases; and (5) the role and impact of legislation in the reform of policing. The work of the Task Force and its five committees included: four public forums, meetings with various stakeholders and reviewing various publications relevant to the issue of racial injustice and police reform.

The Task Force's 23 recommendations are focused on achieving a 21st century approach to policing. The recommendations bring to bear learnings, best practices and technological advances that will enable the police to better serve a 21st century community that has significantly evolved since police departments were established in the 18th century. The Task Force's work and recommendations are discussed in five sections: (1) A Brief History of Policing and Police Misconduct, (2) An Overview of 21st Century Policing, (3) Recommendations that Improve Policing at Key Stages, (4) Recommendations that Provide Additional Accountability in the Criminal Justice System; and (5) Conclusions.

Below is an overview of the 23 recommendations:

I. Improving Policing at Key Stages

A. Hiring

1. Changing the educational hiring requirements to requiring a college degree
2. Adding obtaining a license to the hiring process
3. Adding obtaining professional liability insurance to the hiring process
4. Focus hiring efforts on recruiting women and people of color

B. Training

1. Increasing the duration and focus of Academy training for Police Officers
2. Implement the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program \(ABLE\)](#)
3. Update training to help police handle persons with disabilities

C. Activities while “on the beat”

1. Enacting a duty to intervene law
2. Leveraging civilian oversight agencies to provide insight into policing practices that are improper

D. Monitoring

1. Requiring all members of New York State policing agencies to wear body cameras and for similar cameras to be installed in patrol vehicles, along with requisite training

E. Disciplining

1. Expand access to police disciplinary records through new state laws
2. Strengthen community oversight's role in disciplining officers

II. Additional Accountability within the Criminal Justice System

A. Additional Accountability Through Civilian Oversight

1. Give All Communities Control Over Police Discipline By Changing State Law
2. Require Large Cities to Create Strong, Independent Civilian Oversight Agencies
 - a. Require Agencies to Have Comprehensive Investigatory, Adjudicatory, and Disciplinary Powers
 - b. Require Agencies to Allow Anonymous Complaints
 - c. Require Agencies to Have an Independent and Victim-Centric Complaint Process
 - d. Require Implementing Governments to Ban Officers from Retaliating Against or Harassing Complainants
 - e. Require Agencies to Have Rule-Making Powers Over Police Departments
 - f. Require Sufficient Due Process Protections for Subject Officers
 - g. Require Agencies to Have Independence From Undue Influence
 - h. Require Minimum Training Standards for Board Members
 - i. Study the Creation of Regional or Inter-Municipal Civilian Police Oversight Agencies
 - j. Exempt Local Governments from Referendum Requirements
3. Provide State Funding to Support & Incentivize Strong Civilian Review Boards

B. Additional Accountability in the District Attorney's Office and County Public Defenders

1. Provide Implicit Bias Training to all of its employees, who hold positions in the Offices of the Attorney General, Inspector General, County District Attorney and County Public Defender in a consistent and uniform manner.
2. Foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner

C. Additional Accountability in the Courts

1. Foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner
 - i. Identifies the underlying reasons for the low rate of diversity with respect to judicial and non-judicial supervisory positions, as well as for non-judicial positions with higher Pay Grades
 - ii. OCA must take affirmative steps to train Black employees to hold such positions with a transparent grooming process
 - iii. Post openings and encourage candidates of color to apply for such positions
 - iv. Have a transparent hiring and selection process; and

- v. Provide institutional support once these employees obtain such positions
- vi. establish a duty on UCS to promote equal opportunities for minority
- 2. Periodic Audits to Determine Patterns of Implicit Bias
- 3. Implicit Bias Instructions Should Consistently and Uniformly Be Provided to Potential Jurors, During Jury Selection

D. Additional Accountability Criminal Justice System through Modifications

- 1. Implementing controls and guidelines for the gang databases
- 2. Reforming qualified immunity – creating a civil remedy for violations of a person’s rights under the Federal and State Constitutions
- 3. Amendments to the criminal procedure law
 - a. Prohibit prosecutors from unilaterally nullifying the Exclusionary Rule
 - b. Prohibit prosecutors from using appeal waivers in plea negotiations
 - c. Public defenders assigned for appellate defense
 - d. Preclude inadmissible statements induced by law enforcement by providing materially false information to defendants
 - e. Allow civil actions to proceed even if the underlying offense was resolved through an adjournment in contemplation of dismissal plea
- 4. Minimizing the influence of police unions on the disciplinary actions

Part 1: A Brief History of Policing and Police Misconduct in the United States

A. A Brief History of Policing

“The development of policing in the United States closely followed the development of policing in England. In the early colonies policing took two forms. It was both informal and communal, which is referred to as the ‘Watch,’ or private-for-profit policing, which is called ‘The Big Stick.’”⁹ These two forms of policing remained in place for the first 200 years of American history: “the small urban areas and little villages that dotted the countryside relied on trained militia and lowly paid, or volunteer, watchmen and constables for protection.”¹⁰ Generally “[a]s was the case in England, those who could afford to do so often hired others to serve their shifts, and those who served were not particularly effective.”¹¹

“The Dutch had appointed paid watchmen for New York from 1648, and the British took this over with the city in 1664.”¹² Bruce Chadwick, in his book *Law & Disorder: The Chaotic Birth of the NYPD*, stated that New York City’s, Boston’s or Philadelphia’s constable force were not “particularly effective.”¹³ Quoting a *New York Gazette* 1757 article, he states, “they were a ‘parcel of idle, drinking, vigilant snorers, who never quelled any nocturnal tumult in their lives . . . but would, perhaps, be as willing to join in a burglary as any thief in Christendom.”¹⁴

Troy, New York also had a constable force, though it was better respected than those in New York City. As described in Frederic T. Cordoze’s, *History of the Police Department, of Troy, N.Y. From 1786 to 1902*, the constable force were a part of “The Night Watch:”

The Night Watch, patterned after the vigilance system adopted in other cities, seems to have been the first instance of Police organization in Troy.

The following record of the duties of the Night Watch is to be found among the archives of 1786:

“The Night Watch, which patrolled the quiet streets of the village, were accustomed to cry, ‘all’s well !’ at the expiration of each hour. When a building was discovered to be on fire, the loud cry of ‘fire! fire!’ aroused the inhabitants, and hastened the steps of the firemen. When the fire was extinguished, those returning from it cried, ‘All out ! All out!’”

⁹ Gary Potter, *The History of Policing in the United States: Part 1*, Eastern Kentucky University (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1>.

¹⁰ Bruce Chadwick, *Law & Disorder: The Chaotic Birth of the NYPD* (2017) at 17.

¹¹ Steven M. Cox, David Massey, Connie M. Koski, Brian D. Fitch, *Introduction to Policing* (Sage Publications, Jan. 2019), at 19.

¹² Clive Emsley, *A Short History of Police and Policing*, Oxford Scholarship Online (Jan. 2021), <https://oxford-universitypressscholarship-com.i.ezproxy.nypl.org/view/10.1093/oso/9780198844600.001.0001/oso-9780198844600-chapter-7>.

¹³ *Id.* at 13.

¹⁴ *Id.* at 20.

During the year 1791, a town meeting was held and the first officers of the town were elected. Among those officers were Constables and the following were elected: David Henry, William Hikok, Laurence Dorsit, Samuel Colamore.

The Police Force of Troy consisted of six Constables, at the time of the incorporation of the City in 1816, who were elected annually. For many years afterwards the men whose duty it was to preserve order by day were known by that name. The position was a dignified one and considerable authority was attached to it.¹⁵

In these early days, Black people were specifically policed. In the South, policing included slave patrols:

After American independence, the slaveholders paid substitutes to act in their place as patrollers, rather as some men in England had been paid to act as constables in the place of the individual chosen for the forthcoming year or so. In urban areas, paramilitary watches and city guards began to be recruited to look out for escaping slaves, or for blacks planning some form of insurrection. Indeed, it has been argued that the cities and towns of the Deep South were where formalized and ultimately military-style policing emerged in the United States. Charleston, Savannah, St Louis, and New Orleans are good examples of kinds [sic] of places with police emerging as a result of fears over large numbers of slaves assembling and over free blacks in general. The free blacks were often suspected of being runaways. These cities generally had smaller populations than those of the northeast, and some were seaports, where the fear of drunken, fighting sailors ran alongside the fear of blacks.¹⁶

In the North, the watch also kept an eye on Black people:

The watch, even in Northern cities, was issued specific instructions concerning the policing of the Black population. Boston, for example, instituted a curfew for Black people and Native Americans, beginning in 1703; in 1736 the watch was specifically ordered to “take up all Negro and Molatto [sic] servants, that shall be unseasonably Absent from the Masters [sic] Families, without giving sufficient reason therefore.” But while the watch was told to keep an eye on Black people along with numerous other potential sources for trouble, slave patrols . . . were more exclusively on the Black population.¹⁷

Increasing urbanization in the major cities across the US exposed the deficits of the night-watch system. As explained in Steven M. Cox, David Massey, Connie M. Koski, and Brian D. Fitch’s book *Introduction to Policing*:

As the nation’s cities grew larger and more diverse, voluntary citizen participation in law enforcement and order maintenance became increasingly less effective, and some

¹⁵ Frederic T. Cordoze, *History of the Police Department of Troy, N.Y.* (1902) at 14.

¹⁶ *Supra* note 12 at 1, 41–142.

¹⁷ Kristian Williams, *Our Enemies in Blue: Police and Power in America*, Oakland (AK Press, 2015) at 189–190.

other system was needed to replace it. In 1749, residents of Philadelphia convinced legislators to pass a law creating the position of warden. The warden was authorized to hire as many watchmen as needed, the powers of the watchmen expanded, and the city paid selected individuals from taxes. Other cities soon adopted similar plans. The wardens and their watchmen served warrants, acted as detectives, and patrolled the streets. But these wardens were not widely respected and were considered inefficient, corrupt, and susceptible to political interference.¹⁸

As the population of New York City grew, the ineffectiveness of the constable force became more troublesome as well. As described in Edwin G. Burrows & Mike Wallace's book *Gotham: A History of New York City to 1898*:

The police force was not inconsequential, to be sure. Jacob Hays, appointed high constable in 1802, was a seasoned enforcer of the law. During the 1830's disturbance he had plunged gamely into the thick of a crowd, armed only with his staff of office, and seized rioters with viselike grip. Hays, moreover, was backed by an expanded cadre of peace officers. By day these consisted of two dozen elected constables (two per ward) and scores of mayoral appointed marshals. By night hundreds of watchmen roamed the streets; though primarily on the lookout for fires, they were empowered to arrest any criminals they caught in the act. By 1834, New York's constabulary was among the largest and most efficient in the United States.

But not efficient enough. Old Hays, as he was known, was in sixties. The daytime men were unsalaried and often corrupt political appointees, more interested in earning fees than preventing crimes. The "leatherheads" (as watchmen were jeeringly known, after their leather helmets) were poorly paid moonlighters, scantily trained and ill respected.¹⁹

To address these issues, municipalities began to take control of policing.

In the United States in the early to middle 1800s, day watch systems were established in U.S. cities. Also by this time, the main structural elements of U.S. municipal policing had emerged. Watch and ward systems had been replaced—in the cities at least—by centralized, government-supported police agencies whose tasks included crime prevention, provision of a wide variety of services to the public, enforcement of "morality," and the apprehension of criminals. A large force of uniformed police walked regular beats, had the power to arrest without a warrant, and began to carry revolvers in the late 1850s. The concept of preventive policing included maintenance of order functions such as searching for missing children, mediating quarrels, and helping at fire scenes. Both municipal police and county sheriffs performed these tasks.²⁰

¹⁸ *Supra* note 11 at 20.

¹⁹ Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898* at 635–636.

²⁰ *Supra* note 11 at 20.

New York City has the 2nd oldest police force in the United States, organized in 1845.²¹ The creation of a formal police force was spurred by the unsolved death of Mary Rogers in 1841.²² In 1844, the New York Municipal Police Act abolished the constable system and replaced it with a police department modeled on London's Metropolitan Police.²³ The basic structure of the police department we know today was created by this law:

Each ward became a patrol district, with its own stationhouse [*sic*]. And each ward nominated its own candidates for police officers; if accepted by the mayor, they were required to live and serve in that ward. New York's police, beholden to politicians, would be inextricably enmeshed in local politics.

The new policemen were salaried . . . and each was expected to make policing his only and full-time job. Preventing crime became as important as apprehending criminals.

[They were required to wear] a star-shaped copper badge (hence "copper" or "cop") . . . a blue frock coat with covered buttons, a dark vest, blue pantaloons, and a standing coat-collar with the letters M.P and a number in woolen embroidery.²⁴

The police were charged with keeping the public order. In the North, control was focused on the newly arrived immigrants as well as Blacks.

And part of the context for early modern policing by the late 1840s was that the immigrant population of Europeans, particularly the Irish, were generating in their own way a similar kind of social anxiety, xenophobic, nativist, racist reaction . . . The populations that made up early police officers were, unlike the slave patrols, made up of lower-class men, often men who were first-generation Americans. There was an early emphasis on people whose status was just a tiny notch better than the folks who they were focused on policing. And so the Anglo-Saxons are policing the Irish or the Germans are policing the Irish. The Irish are policing the Poles. Black people are there. They're getting policed by everyone, but their numbers are fewer. And so this dynamic that's playing out is that police officers are a critical feature of establishing a racial hierarchy, even among white people.²⁵

At the same time, the late 19th century was the era of political machines, so police captains and sergeants for each precinct were often picked by local political party ward leaders, who often owned taverns or ran street gangs that intimidated voters. They then were able to use police to harass opponents of that particular political party, or provide payoffs for officers to turn a blind

²¹ The first publicly funded, organized police force with officers on duty full-time was created in Boston in 1838.

²² *Id.* at 637.

²³ *Id.* at 638.

²⁴ *Id.* at 638.

²⁵ Throughline, *American Police: Transcript*, Nat'l Pub. Radio (June 4, 2020), <https://www.npr.org/transcripts/869046127>.

eye to allow illegal drinking, gambling and prostitution.²⁶ In New York City, the police accommodated the spread of prostitution, for a price:

By 1876 the system of payoffs was so notorious that when police captain Alexander S. “Clubber” Williams was transferred to the 29th Precinct, he almost drooled with delight: “I’ve been having chuck steak ever since I’ve been on the force,” said Clubber, “and now I’m going to have a bit of tenderloin.”²⁷

During this time, the predecessor to the New York Patrolmen’s Benevolent Association (PBA) was created in 1892. In 1894, the PBA was not a union, its purpose was to support the widows of police officers; however, the support they provided to police officers were very similar to unions: “[T]he PBA became the main advocate for patrolmen, forging an alliance with Tammany Hall, negotiating salaries, and advocating for better pensions and benefits.”²⁸

In the early 20th century, corruption continued to plague police departments. The passage of the 18th Amendment ushering in the era of Prohibition only worsened corruption: “In many cities police became little more than watchmen for organized crime enterprises, or, on a more sinister vein, enforcement squads to harass the competition of the syndicate paying the corruption bill.”²⁹ A national commission was created by President Herbert Hoover to investigate the rise in crime and propose recommendations to address it.³⁰ Reform focused on professionalizing the police and creating the police departments that we see today. These reforms included standards for recruiting and training officers (“selection standards, training for new recruits, placing police under civil service, and awarding promotion as a result of testing procedures”), organizing departments with clear management and chain-of-command structures similar to the military and the use of technology to collect evidence and solve crimes.³¹ The police were also charged with enforcing the law and reducing the crime rate.³²

During this period, large numbers of Black people were leaving the South to the North for better economic opportunities and an escape from blatant racism. Though the North provided economic opportunity, these Black migrants also found racism:

[B]lack people are less than 5% of the populations of these big cities until the second and third decade of the 20th century, until the Great Migration period, which begins during World War I in the 1910s. And so, you begin to see populations doubling from

²⁶ Olivia B. Waxman, *How the U.S. Got Its Police Force*, Time (May 18, 2017), <https://time.com/4779112/police-history-origins/>.

²⁷ *Supra* note 19 at 959.

²⁸ Matthew Vaz, *How police unions got their power: The rise of the PBA and lack of accountability in the NYPD*, N.Y. Daily News (June 13, 2020), <https://www.nydailynews.com/opinion/ny-oped-how-police-unions-got-their-power-20200613-jgqaeq7l4bhvvgixsxx3psx434-story.html>.

²⁹ Gary Potter, *The History of Policing in the United States: Part 4*, Eastern Kentucky University (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-4>.

³⁰ *Supra* note 11 at 25.

³¹ *Id.* at https://plsonline.eku.edu/insidelook/history-policing-united-states-part-5#_ga=2.248104334.844811338.1619146536-1394501205.1619146536.

³² *Supra* note 11 at 25.

2% to 4% to 8%. Police officers receive African American migrants in the same way that their white neighbors and community peers did, which is with contempt and hostility.³³

By the 1960s, the benefits and the pitfalls of professionalizing the police were becoming clearer. Police were becoming better trained with improved education and training opportunities available.³⁴ Yet policing practices developed as part of this professionalism and deployed by a vastly white and male police force were repressive:

Professionalism antagonized tensions between the police and the communities they served and created rancor and dissension within the departments themselves. The crime control tactics recommended by the professionalism movement, such as aggressive stop and frisk procedures, created widespread community resentment, particularly among young, minority males who were most frequently targeted. Police professionalism and the military model of policing became synonymous with police repression. Furthermore, as Walker points out “a half century of professionalization had created police departments that were vast bureaucracies, inward looking, isolated from the public, and defensive in the face of any criticism”. In addition, professionalization had done nothing to rectify racist and sexist hiring practices that had been in effect since police departments had been created in the 1830s.³⁵

The 1960s was also a time of great social upheaval. “The crime rate per 100,000 persons doubled, the civil rights movement began, and antiwar sentiment and urban riots brought police to the center of the maelstrom.”³⁶ Police were seen using excessive force against Civil Rights and Vietnam War protesters. President Lyndon B. Johnson “declared a ‘war on crime’” and Congress subsequently passed and Johnson signed major legislation³⁷ to combat crime that significantly increased money and other resources provided to police departments across the country, including providing military-grade weapons used in Vietnam to local law enforcement. Funding from social programs was diverted to fund this increase.³⁸

As a result of this reinforcement of police departments, Black communities became more of a focus of law enforcement activities.

[T]he “frontline soldiers” in Johnson’s war on crime. . . spent a disproportionate amount of time patrolling Black neighborhoods and arresting Black people. Policymakers concluded from those differential arrest rates that Black people were prone to criminality, with the result that police spent even more of their time patrolling Black neighborhoods, which led to a still higher arrest rate. “If we wish to rid this country of

³³ *Supra* note 25 (NPR) at <https://www.npr.org/transcripts/869046127>.

³⁴ *Supra* note 11 at 26.

³⁵ Potter, *supra* note 31, <https://plsonline.eku.edu/insideloook/history-policing-united-states-part-5>.

³⁶ *Supra* note 11 at 25.

³⁷ The Law Enforcement Assistance Act in 1965 and Omnibus Crime Control and Safe Streets Act in 1968.

³⁸ Jill Lepore, *The Invention of the Police*, *The New Yorker* (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police>.

crime, if we wish to stop hacking at its branches only, we must cut its roots and drain its swampy breeding ground, the slum,” Johnson told an audience of police policymakers in 1966. The next year, riots broke out in Newark and Detroit. “We ain’t rioting agains’ all you whites,” one Newark man told a reporter not long before being shot dead by police. “We’re riotin’ agains’ police brutality.”³⁹

Increased funding and resources were not the key to winning the “war on crime.” By the 1980s, with the increase in drug use, crime rates continued to rise unabated. The nation sought more effective ways of controlling crime. At the national level, winning the war included more stringent sentencing requirements for offenses, first through mandatory sentencing with the Comprehensive Crime Control Act of 1984, and mandated life sentences if one was convicted of the same crime three times (the “three strikes” provision). This tactic was also followed at the state level. These laws exacerbated the trend of increased incarceration both at the federal and state level.⁴⁰

Some police departments sought a different approach to policing that recognized a community’s role in helping to prevent crime. “Community policing was intended to counter enhanced technology, specialization, and paramilitary organization and restore relationships that the police had lost with the citizenry they were sworn to serve and protect.”⁴¹ Part of this approach included a new focus on minor offenses to prevent more serious offenses from occurring, commonly known as the “Broken Window” approach. This approach has met with mixed results:

Law enforcement professionals embraced the broken-windows metaphor and readily folded it into the doctrine of community policing. Moving in this direction emphasized discretion at the street level and encouraged officers to use their authority to address individuals and situations that were “out of place” or “out of order” so that nothing more problematic or criminal would happen. Under the guise of community policing being practiced to both reduce crime and improve relationships with communities, proactive policing strategies and tactics have been legitimized in the eyes of many . . . When it comes to street-level policing, regardless of being in- or out-of-place, Blacks still disproportionately experience surveillance, stops, searches, detentions, arrests, and force that cannot be easily explained away by legal factors.⁴²

Many counties in New York State have focused on community policing, including Broome, Orange, the five counties of New York City, Cortland, Monroe (Rochester) and Erie (Buffalo). Though a step in the right direction, reports of police misconduct continue to be revealed.

Prior efforts to reform policing practices have not prevented police misconduct. The New York City Police Department (NYPD) is a cautionary tale. The NYPD is one of the best-trained, best-

³⁹ *Id.*

⁴⁰ James Cullen, *The History of Mass Incarceration*, Brennan Center (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

⁴¹ *See supra* note 11 at 29.

⁴² Robert A. Brown, *Policing In American History*, 16 *Du Bois Rev.: Social Science Research on Race*, 189–195 (2019).

funded, and seemingly most progressive departments in the country. It is the size of the seventh-largest standing army in the world with a total budget of around \$11 billion.⁴³ NYPD headcount and funding will not have suffered for COVID-related budget cuts elsewhere,⁴⁴ with 900 new cops added to the force in January 2021. The costly implicit bias training received by NYPD officers is the most cutting-edge available, but it has failed to deliver any measurable results.⁴⁵ The NYPD Patrol Guide is thousands of pages long and has been written, rewritten, and amended to reflect every imaginable demand for police reform.⁴⁶ The City’s Administrative Code and official NYPD guidelines prohibit biased policing,⁴⁷ which still persists at staggering

⁴³ *Report: A look inside the New York City Police Department Budget*, Vera Institute of Justice, available at <https://www.vera.org/downloads/publications/a-look-inside-the-new-york-city-police-department-budget.pdf> (last accessed Feb. 1, 2021).

⁴⁴ *NYC Budget Justice*, Communities United for Police Reform, <https://www.changethenypd.org/nycbudgetjustice> (last accessed Jan. 20, 2021).

⁴⁵ A years-long study of the NYPD’s extensive training program showed no difference in enforcement behavior, serving only to improve officers’ articulable understanding of bias. See Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, N.P.R. (Sept. 10, 2020), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior>.

⁴⁶ The NYPD Patrol Guide is a publicly available document containing rules adopted by the Department and reflecting changes demanded and implemented after instances of violence and brutality. However, these rules are often flagrantly violated. For example, the Patrol Guide governs acceptable instances for use of force (Sections 221-01 and 221-02), requires NYPD personnel to intervene during instances of excessive force by other officers (221-02), and has strict reporting requirements (221-03). It also articulates limited circumstances for the use of pepper spray (221-07) and CEMs (aka TASERS) (221-08). The Guide governs appropriate contact with the public outside of arrests (203-09 and 203-10) and requires officers to provide their names and badge numbers in accordance with the Right to Know Act (203-09). The Guide governs police interactions with members of the press (212-49) and requires that NYPD personnel “cooperate with media representatives by not interfering or allowing others to interfere with media personnel acting in their news gathering capacity.” Patrol Guide Procedure No. 212-123 requires body-worn camera activation in almost every instance of a uniformed police officer’s interactions with the public. This regulation, created as a purported police reform during the 2014 Black Lives Matter Protests, specifically includes interactions during demonstrations and instances of civil disobedience. During a protest (213-05), the guide instructs NYPD personnel not to “‘punish,’ rather, be ‘professional’ at all times,” to “[b]e tolerant of verbal abuse uttered by civilians in crowd” and to “ensure that only minimum force is used to achieve objectives.” There are special rules for interacting with legal observers (213-11). Legal observers who are clearly identified are to be given “free access through police lines at the scene of any demonstration” and “all members of the service shall extend every courtesy and cooperation to observers,” and “observers shall be permitted to remain in any area or observe any police activity” unless their presence poses a safety threat. See NYPD Patrol Guide, available at <https://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page>.

⁴⁷ In 2014, the NYPD amended its Patrol Guide to expressly prohibit speech or conduct targeting a person’s actual or perceived protected status and implemented a process for investigating complaints of biased behavior by members of the Department. The NYPD had not previously tracked these complaints or had a specific process for investigating them, and this move was widely considered as a necessary reform. Over the next five years, about 2,500 of these complaints had been made by the public. Then, in 2019, a watchdog report by the Department of Investigation called out the NYPD for failing to substantiate any of these claims and for deficiencies in the investigatory process. In a striking demonstration of the inefficacy of such police “reforms,” as of January 2021 only one allegation of bias has been substantiated—against a school safety officer. See DOI Report on Deficiencies in NYPD’s Handling of Biased Policing Complaints https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf; see also Yasmeen Khan, *The NYPD Substantiated its First Case of Biased Policing—But Not Against an Actual Officer*, WNYC (Dec. 11, 2020), <https://gothamist.com/news/the-nypd-substantiated-its-first-complaint-of-biased-policing-but-not-against-an-actual-officer>.

levels.⁴⁸ New York City sees the unabated abuse and even murder of New Yorkers and the ongoing protection of abusive police, including by the Mayor and the Commissioner who have full authority to fire them⁴⁹ without the constraints that exist elsewhere in the State.⁵⁰

The history of policing shows that crises spur the evolution of policing. We are at another crisis point in policing in the US and New York: deleterious policing practices resulting in misconduct that disproportionately impacts Black people and a culture that allows these practices to continue unchecked. It is again time to examine what policing should be for the 21st century.

B. Police Misconduct – The Problem

The unjustified killing of suspects by police is a form of misconduct that has received significant attention both nationally and within New York. More routine forms of misconduct also rob people of both freedom and dignity, ignite demonstrations, and underpin community demands more broadly. In the Task Force’s study of police misconduct, several key forms of harm emerged. False testimony, police reports and allegations,⁵¹ biased policing,⁵² physical and sexual abuse,⁵³ and harassment are all perpetrated by bad cops against people in New York State, often without any meaningful accountability response from their employer. Neighborhoods that are economically disadvantaged and predominantly people of color are subjected to constant police presence and surveillance and are home to community members

⁴⁸ We know based on years of data that police enforcement, as well as stop-and-frisk encounters, disproportionately target Black and Latinx people. Data from the Legal Aid Society from 2019 showed that nearly all people who were stopped and frisked by the NYPD—a practice that persists despite extensive litigation—were people of color, accounting for 90% of encounters. While other states were legalizing cannabis, Black people in New York were 15 times more likely to be charged with marijuana-related offenses in Manhattan than whites, despite accounting for about 17% of residents. In Brooklyn, a 2019 report showed that 86% of all people charged with crimes in the borough over a six-month period were people of color. See Noah Goldberg, *86% of Brooklynites in court are people of color: report*, The Brooklyn Eagle (Apr. 15, 2019), <https://brooklyneagle.com/articles/2019/09/17/86-percent-of-brooklynites-in-court-are-people-of-color-report/>.

⁴⁹ See Mollie Simon, Lena V. Groeger, Eric Umansky and Adrianna Gallardo, *What it Looks Like When the Police Commissioner has Unchecked Power*, ProPublica (Dec. 11, 2020), <https://projects.propublica.org/nypd-unchecked-power/>.

⁵⁰ See Brian Sharpe, *RPD reform proposal will seek to scrap union contract and start over, reduce size of force*, Rochester Democrat & Chronicle (Feb. 4, 2021), <https://www.democratandchronicle.com/story/news/2021/02/04/city-put-onus-state-draft-proposal-reforming-rpd/4386604001/>.

⁵¹ See Joseph Goldstein, *Testifying by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testifying-police-perjury-new-york.html>; John Kelly and Mark Nichols, *Tarnished Brass*, USA Today (Apr. 24, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/>.

⁵² See Steve Hughes, *Firm Corrects Albany Racial Bias Arrest Numbers*, Albany Times Union (Nov. 18, 2020), <https://www.timesunion.com/news/article/Firm-corrects-Albany-racial-bias-arrest-figures-15737785.php> (An independent audit showed that 65.7% of all arrests in Albany were made against Black people, who make up about 28% of Albany’s population).

⁵³ See Joshua Kaplan and Joaquin Sapien, *NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, Black and Brown New Yorkers Pay the Price*, ProPublica (Dec. 7, 2020), <https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price>.

who are most likely to be abused at the hands of police.⁵⁴ These communities are also frequently left out of serious discussions regarding police policies and practices.

Police misconduct persists because of institutional and cultural norms. As we discuss further in this report, the 20th century policing model focuses on a warrior mentality in which police deploy force to protect themselves and the community; when force is excessive and used inappropriately, the culture of policing, in contrast to the policies that may be in place, discourage holding that officer accountable for the inappropriate use. In addition, police are asked to deal with social issues that they are insufficiently trained to handle, also resulting in the use of force.⁵⁵ The question about how to address these issues has long been debated. Today, we are now living in a seminal moment of reckoning and the momentum must be seized by those in power to deliver transformative change.

This Task Force has examined methods to rein in police misconduct that have previously been tried and failed, and issues recommendations with the understanding that this moment demands more than platitudes or empty promises of reform. The changes that the people of this State need require taking some powers and authority away from police departments and vesting them within communities instead. The goal of protecting the lives and wellbeing of New Yorkers, and ensuring accountability in instances of police misconduct should outweigh other political considerations.

C. Why is Reform Needed Now?

The time is right for reform. The nation is receptive to reform. Governor Cuomo has created an incentive for police departments statewide to reform their practices. Lastly, and most significantly, if we do not do something now, the policing practices in place that result in the death of suspects, with a disproportionate impact on Black and Brown communities, will continue.

The brutal beating of Rodney King in 1995—which was one of the first police brutality cases captured on video and aired publicly for all to see—started the national dialogue about racial profiling and the disparate way police interacts with people of color (and, in particular, Blacks), in contrast to their interactions with whites.

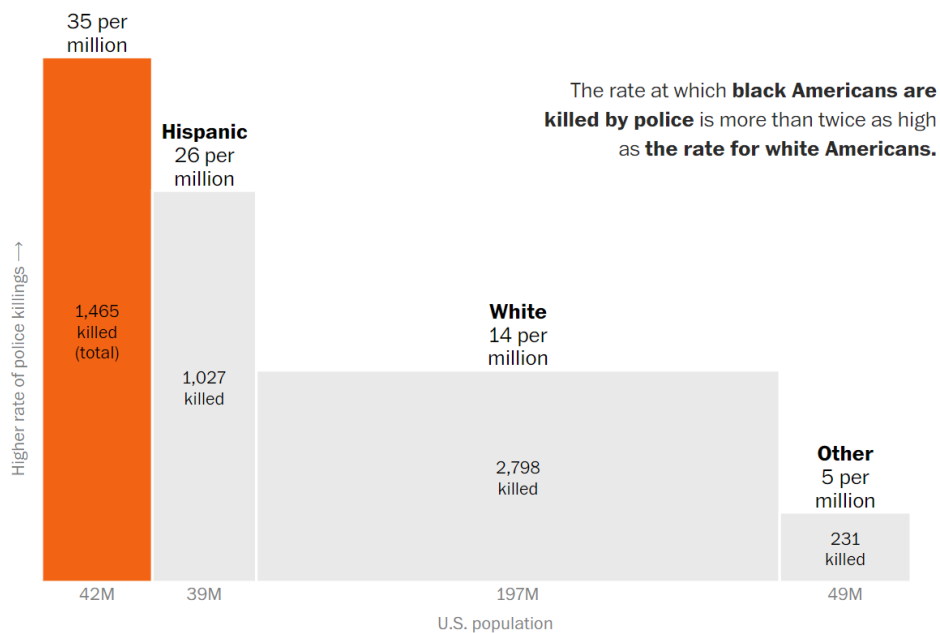
Sadly, the trend of fatal police interactions in the United States continues unabated. The Black Lives Matter Movement, formed in 2013 in response to the killing of Michael Brown by police in Ferguson, Missouri, has been a vocal part of the movement against police brutality in the U.S. by organizing “die-ins,” marches, and demonstrations in response to the killings of Black men and women by police. While Black Lives Matter has become a controversial movement within

⁵⁴ Justin M. Feldman, Sofia Gruskin, Brent A. Coull, and Nancy Krieger *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015–2016*, *Am. J. of Pub. Health* 109, 458–464 (2019), <https://doi.org/10.2105/AJPH.2018.304851>.

⁵⁵ See Alex S. Vitale, *The End of Policing*, (Verso, 2018) at 39.

the U.S., it has brought more attention to the number and frequency of police brutality against Blacks.⁵⁶

Research has proven conclusively that African Americans are killed at a much higher rate than white Americans by law enforcement. With respect to police shootings in particular, although half of the people shot and killed by police are white, Black Americans are shot at a disproportionate rate. They account for less than 13 percent of the U.S. population, but are killed by police at more than twice the rate of white Americans. Hispanic Americans are also killed by police at a disproportionate rate. Most victims are young males. An overwhelming majority of people shot and killed by police are male—over 95 percent. More than half the victims are between 20 and 40 years old.⁵⁷



According to 2019 census data, New York State has a population of approximately 19,453,561 people.⁵⁸ By ethnicity, 69.6% are white, 17.6% are Black, 19.3% are Hispanic and 9% are Asian. According to 2019 data from the NYS Division of Criminal Justice Services, police made 356,333 arrests across New York State of adults 18 years and older.⁵⁹ By ethnicity, the arrests are as follows: 118,952—white (33%), 136,319—Black (38%), 83,942—Hispanic (24%),

⁵⁶ Number of people shot to death by the police in the United States from 2017 to 2021, by race, Statista (May 3, 2021), <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/> (last accessed May 18, 2021).

⁵⁷ Julie Tate, Jennifer Jenkins, and Steven Rich, *Fatal Force: Police Shootings Database*, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last accessed May 17, 2021).

⁵⁸ United States Census, New York QuickFacts, <https://www.census.gov/quickfacts/NY>.

⁵⁹ <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Allcounties.pdf>.

11,885 (3.3%)—Asian and 5,235 (1.5%)—other/unknown. Though over a 10-year period crime has gone down in New York State, the demographics of those arrested has remained steady.

New York has not been forthcoming about releasing the race of individuals involved in police shootings.⁶⁰ However, the website [Mapping Police Violence](#) shows that New York follows the trend of the rest of the country in that Black Americans are disproportionately represented in people killed by the NYPD (please see graphic below).⁶¹

Between 2013 and 2021, the New York Police Department (NY) killed **83 people**.

Do you know their names?

ALL	RACE	SEX	ARMED STATUS	CAUSE OF DEATH	YEAR
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Black

Unknown Race

White

Hispanic



⁶⁰ *NYCLU v. New York City Police Department*, No. 115928 (Sup. Ct., N.Y. Co. 2009) This case challenged the NYPD’s refusal to disclose information about the role of race in police shootings. In October 2007, the NYCLU filed a Freedom of Information Law request with the NYPD for records identifying the race of everyone shot by police officers since January 1997. After months of stalling, the NYPD ultimately denied the request in May 2008. The NYCLU filed an Article 78 petition in the State Supreme Court on Aug. 4, 2008. NYPD shooting reports released in 1996 and 1997 show that 89.5 percent of shooting victims during those two years were Black or Latino. The Department stopped reporting information about race in police shootings in 1998, after four white NYPD police officers killed Amadou Diallo, an unarmed Black man, in a hail of 41 bullets. At the same time, the Department started reporting the breed of dogs that officers shot.

The issue of race in police shootings reemerged in November 2006 after Department officers fired 50 bullets at Sean Bell, an unarmed Black man, killing him just hours before he was to get married. The NYCLU filed its FOIL request as part of an effort to determine if race is playing an inappropriate role in police shootings. In response to the lawsuit, the NYPD agreed to disclose the race of people who were shot by police officers between 1997 and 2006, but it refused to release racial data about people who had been shot at by police officers but not struck by the bullets. In an opinion dated Dec. 15, 2009, Supreme Court Judge Joan A. Madden ruled that the NYPD had not met its burden under the state’s Freedom of Information Law to withhold the data and ordered the Department to turnover racial data of people shot at, but not struck, by police gunfire.

The City appealed that decision. In June 2010, the First Department of the Appellate Division affirmed Judge Madden’s ruling requiring the NYPD to turn over information about the race of people shot at by police officers over the last 10 years. State Supreme Court, New York County, Index No. 08/110557.

⁶¹ [Mapping Police Violence](#) (chart is from the website using a filter to get statistics of New York).

D. Reform Efforts in the Wake of George Floyd’s Killing

Since Floyd’s death, community groups and states have proposed or enacted reforms. This section provides an overview of those efforts.

1. Call for Criminal Justice Reform and Defund the Police Movement

After the spate of killings of unarmed African Americans by law enforcement in 2020, there were clarion calls to “defund the police.”

While some have sought to paint the “defund the police” movement as a call to abolish law enforcement altogether, thereby allowing society to descend into anarchy and chaos, that is not what the movement calls for. Rather, it calls for reallocating or redirecting funding away from police departments to other government agencies that provide social services.⁶² A *Washington Post* study of 60 years of state and local funding of police showed that increasing funding for police departments did not correlate to a decrease in crime; however, increasing funding in education equity and teaching people skills to decrease unemployment did.⁶³

Data shows that 9 out of 10 “911” calls are for nonviolent situations.⁶⁴ Similarly, a Center for Constitutional Rights analysis of data of the NYPD’s “stop and frisk” program, for instance, showed that 90% of the stops did not result in officers finding any criminal activity or contraband.⁶⁵ Further, from 2005–2008, 80% of the stops made by NYPD were of African American and Latinx people, which only comprised 25% and 28% of the population, respectively. Whites were only 10% of those stopped and frisked, while comprising 44% of the population. *Id.*

“Defund the police” advocates also point to the outsized power yielded by police unions as a reason to deconstruct current law enforcement structures and to create a new policing mechanism where unions do not call the shots.⁶⁶ “Local governments most likely can drastically cut police budgets and reinvest in social services without needed to negotiate with police unions, which often have been criticized for resisting reform and accountability[.]”⁶⁷ Indeed, it has been said that rather than weed out bad officers, police unions protect officers who behave poorly

⁶² Rashawn Ray, *What does ‘defund the police’ mean and does it have merit?*, Brookings Institution (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

⁶³ Philip Bump, *Over the past 60 years, more spending on police hasn’t necessarily meant less crime*, Wash. Post (June 7, 2020), <https://www.washingtonpost.com/politics/2020/06/07/over-past-60-years-more-spending-police-hasnt-necessarily-meant-less-crime/>.

⁶⁴ Jeff Asher, *Numbers Racket*, Slate (Mar. 15, 2016), <https://slate.com/news-and-politics/2016/03/calls-for-service-data-are-the-best-way-to-analyze-crime-why-dont-cities-make-them-available.html>.

⁶⁵ *Racial Disparity in NYPD Stops-and-Frisks: Preliminary Report on UF-250 Data From 2005 through June 2008*, Ctr. for Const. Rights, available at https://ccrjustice.org/sites/default/files/assets/Report-CCR-NYPD-Stop-and-Frisk_3.pdf.

⁶⁶ Robert Iafolla, *Defunding Is One Place Police Unions See Vaunted Powers Limited*, Bloomberg Law (June 12, 2020), <https://news.bloomberglaw.com/daily-labor-report/defunding-is-one-place-police-unions-see-vaunted-powers-limited>.

⁶⁷ *Id.*

and impede reform that would improve police and police-community relations.⁶⁸ However, legislators are loath to place checks on the power of police unions because of their political power.⁶⁹

Unfortunately when police show up to respond to a call, they too often contribute to an escalation of a situation, rather than de-escalating. The “defund the police” advocates are also seeking criminal justice reform and greater accountability by law enforcement when officers kill or injure civilians: i.e. bans on chokeholds and certain other restraints, greater civilian oversight of police, and mandatory de-escalation training. In addition, advocates are concerned that a police officer’s “skillset and training are often out of sync with the social interactions that they have” such as individuals with mental health issues.⁷⁰ To that end, they advocate rerouting some police funding to create a department or hire personnel knowledgeable in ascertaining when an alleged perpetrator may be suffering a mental/psychological/psychiatric episode or is otherwise in distress and means no actual harm to law enforcement.

2. Reform Actions Taken by States

In the Midwest, legislation has been introduced in many state capitols since the May 25, 2020 death of George Floyd, including Minnesota. In July 2020, during its second special session of 2020, the Minnesota Legislature passed HF1.⁷¹ This comprehensive measure:

1. bans the use of chokeholds, except when a peace officer or other’s life is endangered;
2. prohibits “warrior” style training of officers;
3. establishes an independent unit within the Bureau of Criminal Apprehension to investigate officers when they kill someone or are accused of sexual misconduct;
4. adds two citizen members to the Peace Officer Standards and Training (POST) Board;
5. changes the arbitration system for officers accused of misconduct.
6. adopts use-of-force standards that make sanctity of life a core organization value and that include requirements for de-escalation; and

⁶⁸ Daniel DiSalvo, *The Trouble with Police Unions*, Nat’l Affairs (Fall 2020),

<https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions>.

⁶⁹ *Id.* (“According to an investigation by the *Guardian*, police unions in Los Angeles, New York, and Chicago alone spent a combined \$87 million over the last decade on state and local politics.”)

⁷⁰ Rashawn Ray, *What does ‘defund the police’ mean and does it have merit?*, Brookings Institution (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

⁷¹ Minnesota Police Reform Bill HF-1, available at <https://iris.com/wp-content/uploads/2020/07/minnesota-police-reformbill.pdf>.

7. improves training and develops new models of response to de-escalate incidents involving individuals in a mental health crisis.

A month earlier, in June 2020, Iowa became the first state in the region to get a comprehensive police-reform measure from introduction to enactment. The bill places tougher restrictions on the use of chokeholds in arrests and prevents officers fired for misconduct from being hired in the state. Iowa Governor Kim Reynolds indicated that the bill adds “‘additional accountability’ for law enforcement and that such accountability benefits both the community and the police.”⁷²

Three days after the death of George Floyd, Michigan Sen. Jeff Irwin introduced SB 945, which would require all incoming police officers to complete training on implicit bias, de-escalation techniques, and the use of procedural justice in interactions with the public. Additionally, the bill would require officers to complete 12 hours of continuing education annually. SB 945 passed the Michigan Senate in just one week. A near-identical measure, HB 5837, was passed by the Michigan House in June.









Months before George Floyd’s death, an 18-member working group in Minnesota (including two members of the Legislature) released 28 recommendations aimed at reducing deadly-force encounters with law enforcement. Among the ideas:

- Adopt use-of-force standards that make sanctity of life a core organization value and that include requirements for de-escalation, and
- Improve training and develop new models of response to de-escalate incidents involving individuals in a mental health crisis.

Other legislatures also passed legislation aimed at addressing police misconduct:⁷³

⁷² Veronica Stracqualursi, *Iowa governor signs police reform bill that was passed in one day*, CNN Politics (June 12, 2020), <https://www.cnn.com/2020/06/12/politics/iowa-police-reform-bill-trnd/index.html>.

⁷³ Mitch Arvidson, *After death of George Floyd, push for state-level change intensifies: Proposals seek new police training, protocols and ways to prosecute misconduct cases*, The Council of State Gov’ts (July 24, 2020), <http://knowledgecenter.csg.org/kc/content/after-death-george-floyd-push-state-level-change-intensifies-proposals-seek-new-police>.

	<p>Minnesota: Legislators take action on comprehensive measure</p> <p>In July, during its second special session of 2020, the Legislature passed HF 1. It bans the use of chokeholds by officers in nearly all instances; prohibits "warrior" style training of officers; establishes an independent unit within the Bureau of Criminal Apprehension to investigate officers when they kill someone or are accused of sexual misconduct; adds two citizen members to the Peace Officer Standards and Training (POST) Board; and changes the arbitration system for officers accused of misconduct.</p>	 <p>Illinois: Trio of bills in committee</p> <p>Soon after the death of George Floyd, the sponsors of three bills in Illinois renewed their push for passage of their reform measures: take away the pensions for any police officer convicted of a felony (HB 4999); require a special prosecutor to be assigned to all death cases involving a law enforcement officer (HB 3926); and require local governments to provide mental and behavioral health professionals, instead of the police, to individuals who call 911 in mental or emotional distress (SB 3449).</p>
	<p>Ohio: Review bills' impact on racial groups</p> <p>Two Ohio resolutions introduced in June (SCR 14 and HCR 31) would declare racism a public health crisis and request the formation of a working group to promote racial equity. HB 690, meanwhile, would require that human impact statements be completed by Ohio's Legislative Service Commission on all criminal justice bills. The purpose: Determine if these measures would have a disparate impact on a racial or ethnic group. Finally, HB 703 would impose mandatory psychological testing of police officers and create a disciplinary database.</p>	 <p>Iowa: Law changes police prosecutions</p> <p>HF 2647, signed into law in June, gives the state attorney general the power to prosecute cases involving the death of a civilian by a police officer, "regardless of whether the county attorney requests the assistance." In addition, the use of chokeholds by law enforcement is not allowed, except in cases when an officer "reasonably believes" that an individual will use deadly force and cannot be apprehended in any other way. (This is the same standard under Iowa law for use of deadly force by police.)</p>
	<p>Saskatchewan: Improve police oversight</p> <p>The Government of Saskatchewan introduced legislation in June to improve police oversight. One key provision: When someone suffers a serious injury or death while in police custody, or as a result of the actions of an officer, turn over the investigation to the province's Public Complaints Commission — a five-member, non-police body.</p>	 <p>Kansas: Resolution 'condemning brutality'</p> <p>On June 3, HCR 5002 was introduced to condemn "all acts of police brutality, racial profiling and the use of excessive and militarized force throughout the country." The resolution died in committee when the Legislature adjourned the next day.</p>
	<p>Wisconsin: Governor unveils nine bills</p> <p>Gov. Tony Evers and Lt. Gov. Mandela Barnes released drafts of nine bills that, among other provisions, would ban chokeholds, establish statewide use-of-force standards, require de-escalation training by police, and prohibit no-knock warrants. Evers declined to convene a special session, so consideration of these bills must wait until 2021.</p>	 <p>Michigan: Focus on de-escalation, training</p> <p>Under separate bills passed by the Michigan House and Senate (HB 5837 and SB 945), the state would require all incoming officers to complete training on implicit bias, de-escalation techniques and procedural justice. Procedural justice is described in these bills as prioritizing "legitimacy over deterrence in obtaining citizen compliance" and emphasizing "a fair process and respectful two-way communication." As part of their training, too, incoming officers would receive information on mental health resources available to them. Lastly, these bills mandate that officers complete 12 hours of continuing education every year.</p>

In September, California's Governor signed four police reform bills into law. AB 846 required police officers to be evaluated by a psychologist for potential bias against certain protected classes which included race or ethnicity. AB 1185 authorized counties to create a board to oversee the actions of the Sheriff's office. AB 1196 prohibits police officers from using a chokehold to restrain a person. AB 1506 requires state prosecutors to investigate incidents of an officer-involved shooting resulting in the death of an unarmed civilian.

Several California municipalities also acted to address police reform. Several, created some form of community review board over their respective police departments. Some voted to reduce or redirect police funding including Los Angeles which cut the police department budget by \$150 million. San Diego also removed its mandatory police staffing level under the city's charter. Los Angeles and San Francisco also created policies to replace police officers with non-armed professionals for non-violent, non-emergency crisis.

3. Reform Actions Taken by New York

In 2020, the New York State Legislature took up 12 bills focused on police reform, 10 of which passed both houses and were subsequently signed by Governor Cuomo. Additionally, the Governor issued an Executive Order that was aligned with the police reform package and a separate order that recognized Juneteenth as a state holiday. The New York state laws and

executive orders and Task Force recommendations—where relevant—for improving accountability are outlined below:⁷⁴

a. Executive Order No. 203

- Requires all municipalities within New York State with a police agency to establish a plan for reinventing and modernizing police strategies and programs. The process for developing the plan must incorporate the input of community stakeholders. In particular, the executive order requires municipalities to review current police force policies and procedures; develop a plan for improvement that addresses the needs of the communities they service; promote community engagement to foster trust, fairness, and legitimacy; and to address any racial bias and disproportionate policing of communities of color. The plan must be ratified or adopted by local law or resolution no later than April 1, 2021,⁷⁵ or the municipality risks losing state funding.

b. Disclosure of Police Disciplinary Records: A.10611/S.8496 | Signed into Law

- A.10611 repeals Section 50-a of the Civil Rights Law, which made personnel records of police officers, firefighters, correction officers, and peace officers confidential and not subject to inspection or review without the consent of the officer or mandated by court order. A.10611 amends Section 86 of the Public Officers Law, which codifies the New York Freedom of Information Law, to define and include law enforcement disciplinary records, disciplinary proceedings, agencies, and technical infractions. This legislation also adds certain exceptions to disclosure, such as requiring law enforcement agencies responding to requests for personnel records to redact certain sensitive information related to medical history, certain addresses and telephone numbers, social security numbers, and use of mental health services.

Prior to the enactment of this law, Section 50-a of the New York State Civil Rights Law permitted law enforcement officers to refuse disclosure of personnel records used to evaluate performance toward continued employment or promotion. This narrow exemption has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer.

The implementation of the law had been stayed pending litigation commenced by the police unions in opposition to it. However, as of February 2021, the Second Circuit held that the NYPD could not continue to refuse to disclose disciplinary records.

⁷⁴ Obiamaka P. Madubuko, New York State Police and Criminal Justice Reforms Enacted Following George Floyd's Death, Nat'l L. Rev. (June 24, 2020), <https://www.natlawreview.com/article/new-york-state-police-and-criminal-justice-reforms-enacted-following-george-floyd-s>.

⁷⁵ The plans have been filed. The Legislation Committee requires additional time to review these plans.

It is expected that the NYPD will continue its legal fight, up to and including the United States Supreme Court.⁷⁶

c. Eric Garner Anti-Chokehold Act: A.6144B/S.08539 | Signed into Law

- The “Eric Garner Anti-Chokehold Act” adds a new Section 121.13 to the New York Penal Law, making the crime of aggravated strangulation a Class C Felony. The bill was introduced in response to the 2014 death of Staten Island, New York resident Eric Garner by way of a police officer chokehold. While chokeholds were and currently are prohibited in the New York City Police Patrol Guide, this law makes it a crime to engage in one as a police officer throughout the State of New York.

d. Banning False, Protective Class-Based 911 Calls: A.01531B/S.0849 | Signed into Law

- This legislation amends subdivision 2 of Section 79-n of the Civil Rights Law to provide for civil penalties where any person who intentionally summons a police officer or peace officer without reason to suspect a criminal violation, in whole or in part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.

e. Special Prosecutor Office for Police-Involved Deaths: A.1601c/S.02574-C | Signed into Law

- This bill adds a section to the Executive Law to establish a new Office of Special Investigation within the Office of the Attorney General. This Office is tasked with investigating and, if warranted, prosecuting, any alleged criminal offense(s) committed by a police or peace officer while on- or off-duty where that offense results in the death of another individual.
- Furthermore, the Office of Special Investigation is required to issue a public report for each incident where the office initiates an investigation but declines to prosecute, or where a grand jury declines to return an indictment as well as a report six months after the law takes effect, and annually thereafter, providing information on the matters investigated and recommendations for reforms.

f. Weapons Discharge Reporting: A.10608/S.2575-B | Signed into Law

- This legislation requires state and local law enforcement officers, as well as peace officers, to report, within six hours, when they discharge their weapon

⁷⁶ Josh Russell, *NYPD Loses Appeal to Keep Disciplinary Records Under Lock & Key*, Courthouse News Service (Feb. 16, 2021), <https://www.courthousenews.com/nypd-lose-appeal-to-keep-disciplinary-records-under-lock-key/>.

where a person could have been struck, whether they were on or off duty. It became effective on September 13, 2020.

While the law is couched as mandatory (“shall”), it indicates that the officer may refuse to provide additional information by invoking their Fifth Amendment right against self-incrimination.

g. Medical Attention for Persons Under Arrest: A.8226/ S.6601A | Signed into Law

- This act adds an amendment to the Civil Rights Law, establishing a cause of action for failure by law enforcement to provide proper medical treatment for people in their custody. Additionally, the bill creates a duty for police officers to respond in good faith in addressing the medical and mental health needs of people under arrest.

h. Right to Record Police Activity: A.1360a/S.3253B | Signed into Law

- This legislation clarifies the rights of a person not under arrest or in the custody of law enforcement to record police activity and to maintain custody and control of that recording, along with any property or instruments used to record such police activities.

i. Expanded Use of Law Enforcement Body Cameras: A.8674/S.8493a | Signed into Law

- The “New York State Police Body-Worn Cameras Program Act” directs the Division of State Police and the Metropolitan Transit Authority (MTA) Police to provide all agency police officers with body-worn cameras that are to be used any time an officer conducts a patrol and prescribes mandated situations when the camera is to be turned on and recording.

The entire text of the law—which became effective on April 1, 2021, reads as follows:

§ 234. New York state police body-worn cameras program

- 1. There is hereby created within the division of state police a New York state police body-worn cameras program. The purpose of the program is to increase accountability and evidence for law enforcement and the residents of the state by providing body-worn cameras to all state police officers while on patrol.*
- 2. The division of state police shall provide body-worn cameras, to be worn by officers at all times, while on patrol. Such cameras shall record:*
 - (a) immediately before an officer exits a patrol vehicle to interact with a person or situation, even if there is a dash camera inside such vehicle which might also be recording the interaction;*

- (b) all uses of force, including any physical aggression and use of a non-lethal or lethal weapon;*
 - (c) all arrests and summonses;*
 - (d) all interactions with people suspected of criminal activity;*
 - (e) all searches of persons and property;*
 - (f) any call to a crime in progress;*
 - (g) investigative actions where there are interactions with members of the public;*
 - (h) any interaction with an emotionally disturbed person; and*
 - (i) any instances where officers feel any imminent danger or the need to document their time on duty.*
3. *The attorney general may investigate any instance where body cameras fail to record an event pursuant to this section.*
 4. *At the discretion of the officer, body-worn cameras may not record:*
 - (a) sensitive encounters, including but not limited to speaking with a confidential informant, or conducting a strip search; or*
 - (b) when a member of the public asks such officer to turn off the camera; provided, however, such officer may continue recording if he or she thinks a record of that interaction should be generated.*
 5. *The division of state police shall preserve recordings of such body-worn cameras and perform all upkeep on equipment used in such body-worn cameras. Such duties shall include:*
 - (a) creating a secure record of all instances where there is recorded video or audio footage;*
 - (b) ensuring officers have sufficient storage capacity on their cameras to allow for the recording of interactions required by this section; and*
 - (c) ensuring officers have access to body-worn cameras for the recording of instances required by this section.*

N.Y. Exec. Law § 234 (McKinney)

Initially, the Task Force notes that this law applies only to State Police and Metropolitan Transit Authority police. As this law is an Executive Law, it can and should be expanded to all law enforcement within the State. This recommendation is discussed more fully later in the report in Part 3: Improving Policing at Key Stages, Section 4: Monitoring.

Additionally, the provision leaves it up to “the discretion of the officer” to decide when they will *not* record certain interactions. All public-facing police interactions should be recorded and should not be left to the discretion of the officer. We make this recommendation because of the critical importance of video in revealing police misconduct: if not for the video recordings of certain recent instances of police brutality and/or fatal interactions with the police, the public would not have become aware of the police misconduct. These instances include George Floyd’s murder and Breonna Taylor’s death (where the officers wrote in the report that there were no injuries, despite

the fact that she had been killed by their bullets⁷⁷). If police officers are to be held accountable for their actions, they cannot have the discretion to determine when this potential evidence is available.

In addition, this law indicates that the attorney general “may” investigate instances where the body camera fails to record. That is not strong enough. We recommend that the attorney general “shall” investigate any instance where the body camera fails to record, in order to ascertain that it was not deliberately disabled.

Further, the law has no consequences should law enforcement intentionally disable or turn off cameras.⁷⁸ Again, this leads to a continued lack of accountability on the part of law enforcement. While we understand that police departments, in conjunction with the law enforcement unions, decide how to discipline officers who may engage in conduct unbecoming an officer, inclusion of penalties within the statute would lead to greater transparency and accountability. Contrast this to the Eric Garner Aggravated Strangulation law which is housed in the Penal Law and which incurs penalties consistent with class C felonies. We leave it up to the Legislature to determine what those penalties should be, but we recommend that intentional tampering or disabling of body cameras should be made a criminal offense.

Other ancillary issues that should be raised here are cost and the potential loss of privacy by the officers wearing the body cameras. We have heard the arguments of police organizations who say that cameras that are always activated will lead to police officers feeling like they have no privacy and are constantly being surveilled, in addition to dampening confidence by informants who may wish to provide important information to law enforcement about criminal activity.⁷⁹ In response, we would note that footage from police cameras is not made publicly available. Indeed, even when a recording exists, police have fought its disclosure.⁸⁰ Thus, there is no real threat to police officers’ privacy through the use of body cameras.

The argument that storage of body camera footage would be cost-prohibitive is also unavailing.⁸¹ Cloud storage is becoming increasingly less expensive and police

⁷⁷ Audrey McNamara, *Louisville police release Breonna Taylor incident report – it lists her injuries as “none”*, CBS News (June 11, 2020), <https://www.cbsnews.com/news/louisville-police-breonna-taylor-death-incident-report/>.

⁷⁸ Megan Cassidy, *San Francisco police turned off body cameras before illegal raid on journalist, memo says*, S.F. Chronicle (June 18, 2020), <https://www.sfchronicle.com/crime/article/San-Francisco-police-turned-off-body-cameras-15349795.php>.

⁷⁹ Brendan del Pozo, *Body Cameras And Privacy—Where Do You Draw The Line?*, Nat’l Police Found., <https://www.policefoundation.org/body-cameras-and-privacy-where-do-you-draw-the-line/> (last accessed May 17, 2021).

⁸⁰ Laurent Sacharoff and Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 Wash. Univ. L. Rev. 267 (2017), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6274&context=law_lawreview.

⁸¹ *Police Body Camera Policies: Retention and Release*, Brennan Ctr. for Justice (Aug. 3, 2016, updated July 9, 2019), <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-retention-and-release> (last accessed May 17, 2021).

departments would still need to retain all other “business records”—the body camera footage would be one such record.

j. Law Enforcement Misconduct Investigative Office: A.10002B/ S.3595 | Signed into Law

- This bill directs the State Inspector General, MTA Inspector General, and the Port Authority Inspector General to investigate allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, or abuse by officer agencies. Unlike the Special Prosecutor, which is only triggered following a law enforcement–related death, this law allows for an independent review of alleged misconduct by any local law enforcement agency.

k. Reporting Requirements of Chief Administrator of Courts: A.10609/ S.1830 | Signed into Law

- This bill expands reporting requirements of misdemeanors and violations charged by the Chief Administrator of the Courts and law enforcement agencies. The bill mandates the collection of data about the race, ethnicity, age, and sex of individuals charged, as well as the status of their cases, all of which must now be made publicly available online. It also requires the reporting and publication of deaths in police custody and those caused by any use of police force.

4. Federal Laws

The George Floyd Justice in Policing Act—which was first passed by the House of Representatives in 2020 but did not make it to the floor in the Senate—has been reintroduced for the 2021 legislative session. The George Floyd Justice in Policing Act aimed to bolster police accountability and prevent problem officers from moving from one department to another by creating a national registry to track those with checkered records. It also would end certain police practices that have been under scrutiny. The bill bans chokeholds and federal no-knock warrants, among other reform measures.⁸²

The reintroduced bill retains many of the original measures with some new ones: prohibit profiling based on race and religion and mandate training on profiling; ban chokeholds, carotid holds and no-knock warrants; require the use of federal funds to ensure use of body cameras; establish a National Police Misconduct Registry; amend the prosecution standard for police from “willfulness” to “recklessness” and reform qualified immunity; and require stronger data reporting on police use of force.

⁸² Jeanine Santucci and Deborah Barfield Berry, *For second time, House to take up police reform legislation named for George Floyd*, USA Today (Feb. 24, 2021), <https://www.usatoday.com/story/news/politics/2021/02/24/george-floyd-justice-in-policing-act-legislation-reintroduced-house/6804467002/>.

The Task Force believes this proposed law is a good first step towards federalizing law enforcement, thereby making police procedure more uniform. Further, it would drive more accountability, as police officers who are accused of misconduct in one jurisdiction would not be able to omit or fail to disclose prior complaints when seeking employment in other jurisdictions.

Part 2: Task Force Focus – 21st Century Policing

“This is an opportunity to reinvent law enforcement for the 21st century,” concluded Gov. Andrew Cuomo in his preface to the guidebook entitled, “New York State Police Reform and Reinvention Collaborative.”⁸³ The guidebook is the resource for New York State Police Departments to use in developing their policing plans to comply with Executive Order 203.

The murder of George Floyd was another flashpoint forcing Americans to critically examine policing practices and the role of police in our communities. The motto of most police departments is to serve and protect. How well are police practices enabling police officers to serve and protect their communities? Are they serving and protecting all members of their communities? Why does it seem that police officers use more force, especially lethal force, against Black and Brown citizens? Despite efforts to reform police practices after each highly publicized death due to excessive force, why do these deaths continue? Why is trust in police officers declining? Do we need to rethink what policing should be?

Yes, we do need to rethink what policing should be. Police are an integral component of protecting our communities, but the needs of our community have changed. The Task Force considered: what are the needs of communities with regard to the police in the 21st Century? In 2014, President Barack Obama created the Task Force on 21st Century Policing after the death of Michael Brown in Ferguson, MO to “identify[] best practices and offer[] recommendations on how policing practices can promote effective crime reduction while building public trust.”⁸⁴ The guidebook to comply with Executive Order 203 opens with the first paragraph in the introduction from the Task Force on 21st Century Policing report under the section “Part 1: Key Questions and Insights for Consideration:”

The purpose of the New York State Police Reform and Reinvention Collaborative is “to foster trust, fairness and legitimacy” within communities throughout our State and “to address any racial bias and disproportionate policing of communities of color.” The United States Department of Justice has emphasized the need for “trust between citizens and their peace officers so that all components of a community are treating one another fairly and justly and are invested in maintaining public safety in an atmosphere of mutual respect.”⁸⁵

The Task Force’s recommendations are based on four of six themes outlined in the report, excerpted in pertinent part below:

⁸³ Available at https://www.governor.ny.gov/sites/default/files/atoms/files/Police_Reform_Workbook81720.pdf.

⁸⁴ President’s Task Force on 21st Century Policing, 2015, *Final Report of the President’s Task Force on 21st Century Policing*, Washington, DC: Office of Community Oriented Policing Services, at 1.

⁸⁵ New York State Police Reform and Reinvention Collaborative at 5.

1. **Change the culture of policing:** Guardians versus warriors.
2. **Embrace community policing:** Community policing is a philosophy as well as a way of doing business.
3. **Ensure fair and impartial policing:** Procedural justice.
4. **Technology:** New and emerging technology improves efficiency and transparency.⁸⁶

Based on the information received, the Task Force envisioned achieving 21st Century policing in New York State to include the following four components:

1. aligning police professionals to other professions in terms of education, licensing and continuous substantive legal training;
2. inclusive and empowered community engagement in working with police departments to hold officers accountability for misconduct;
3. modifying criminal law procedures that hinder holding police officers accountable for misconduct as well increasing diversity and diversity training for the key actors in the criminal justice process—police, DA’s office, Public Defenders and Courts; and
4. leveraging technology to obtain data to improve monitoring and oversight and strengthen accountability.

The Task Force recommendations will be discussed in two general categories: (1) improving policing at key stages in Part 3 and (2) enhancing accountability in the criminal justice system in Part 4.

Part 3: Improving Policing at Key Stages

A key component of 21st century policing is rethinking the type of person who should be a police officer and how that officer’s career is managed from being a rookie to a senior leader in the department. Through our research, the Task Force identified 5 key stages of policing for enhancement to achieve a 21st policing model: (1) hiring, (2) training, (3) activities while “on the beat,” (4) monitoring, and (5) disciplining.

1. Hiring

Attracting the right kind of person to be a police officer is the focus of the hiring stage. At this point, you not only establish requirements but expectations of what is needed to be a successful police officer.

The hiring requirements to be a New York police officer generally include the following:⁸⁷

⁸⁶ Office of Community Oriented Policing Services. 2015. *The President’s Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action*. Washington, DC: Office of Community Oriented Policing Services at 2–3.

⁸⁷ “Join the State Police,” <https://joinstatepolice.ny.gov/process>; “Join the New York Police Department – Hiring Process,” <https://www1.nyc.gov/site/nypd/careers/police-officers/po-hiring.page>.

1. **Residency:** New York State Resident; NYPD—within 30 days of hiring reside in Queens, Kings, Richmond, Bronx, New York (Manhattan), Nassau, Suffolk, Rockland, Westchester, Putnam or Orange counties;
2. **Age:** 20–35; NYPD—Candidates may take the Police Officer’s Entrance Exam at age 17.5 years;
3. **Education:** High School Diploma/GED with 60 college credits of coursework (approximately 2 years for college education) with a minimum GPA of 2.0 (active military duty can take place of college credits);
4. **Valid New York State Driver’s License;** and
5. **Disqualifications:** “derogatory information from the background check”; “NYPD states “candidates will be disqualified if they have been convicted of a felony, domestic violence misdemeanor, or have been dishonorably discharged from the military [and] may also be disqualified if they demonstrate a history of disrespect for the law, a tendency toward violence, termination from a job for poor behavior, or not adjusting to discipline.”⁸⁸

The hiring process to become a New York police officer generally includes:⁸⁹

1. **Written Exam:** measures cognitive ability, observational skills, and mental acuity;
2. **Background Check:** areas examined include education, finances, employment history, and criminal history;
3. **Physical Test:** sit-ups, push-ups, running; NYPD also requires surmounting a barrier; climbing stairs; demonstrating the ability to physically restrain someone; dragging 175-pound mannequin 35 feet to simulate a rescue; and pulling the trigger of an unloaded firearm multiple times;
4. **Psychological Test:** includes self-evaluation, multiple choice questions and meeting with a psychologist; testing to assess the characteristics: “courage, honesty, impulse control, general intelligence, emotional intelligence, integrity, dependability, attitude toward sexuality, judgment and personal bias;”⁹⁰ and
5. **Drug/Alcohol Test.**

The Task Force recommends enhancing the hiring requirements⁹¹ and the hiring process in three ways: (a) changing the educational hiring requirements to require an associate’s college degree;

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *What You Should Know About the Psychological Screening of Police Officers*, Civil Service Success (Dec. 6, 2020), <https://www.civilservicesuccess.com/what-you-should-know-about-the-psychological-screening-of-police-officers/>.

⁹¹ Changing the residency hiring requirement for New York Police Department (NYPD) officers has been recommended as another way to minimize police misconduct. Though proposed by several of the New York City mayoral candidates and in the “Preliminary Report on the New York City Police Department’s Response to Demonstrations Following the Death of George Floyd” by the Office of the Attorney General, the Task Force did not find sufficient research or evidence that a change in this requirement would reduce police misconduct and, therefore, does not take a position on this proposal. Historically, police officers did live in the same city where they worked; however, concerns about corruption, discussed earlier in the report, led to many departments allowing officers to live outside of the city. In 2014, a FiveThirtyEight article stated 62% of police officers lived in New York City, noting that was comparatively high compared to comparable cities, stating that the majority of

(b) adding obtaining and maintaining a license; and (c) adding obtaining professional liability insurance. The Task Force further recommends that police departments focus hiring efforts on recruiting women and people of color.

a. Requiring at least an associate's college degree

In the early 1900s, police departments across the nation were viewed as corrupted by political and criminal influences. The enforcement of the 18th Amendment prohibiting intoxicating liquors was hobbled by corrupt police officers.⁹² President Herbert Hoover created the National Commission on Law Observance and Enforcement or commonly known as the Wickersham Commission to determine ways to address this issue. In Volume 14 accompanying its 1931 report, one of the recommendations was to include an educational requirement for police officers. Thirty years later, the tumultuous events of the 1960s, and the police response to those events, led President Lyndon B. Johnson to create the Commission on Law Enforcement and the Administration of Justice. A recommendation from this report was for police officers to be college-educated.⁹³

officers of color lived in the City and the majority of white officers lived outside of the City. Nate Silver, *Most Police Don't Live In The Cities They Serve*, FiveThirtyEight (Aug. 20, 2014), <https://fivethirtyeight.com/features/most-police-dont-live-in-the-cities-they-serve/>. An August 13, 2021 Washington Examiner article states the percentage is closer to 49%, with the largest percentage (17.1%) of officers living in Nassau County. Steve Bittenbender, *More than half of NYPD officers live outside city: Report*, Wash. Examiner (Aug. 13, 2020), <https://www.washingtonexaminer.com/politics/more-than-half-of-nypd-officers-live-outside-city-report>. A 2021 blog article found that the percentage is approximately 58% after reviewing pertinent data from NYPD. Labs Bell Blog, *Your neighborhood NYPD officer isn't likely to be your neighbor*, <https://blog.labsbell.com/blog/NYPDHomeZip> (last accessed May 17, 2021). Kesi Foster, an activist with Communities United for Police Reform and Make the Road New York, stated in a *City & State New York* April 19, 2021 article that, "I don't think there's anything that points to diversity getting at the root problems of policing in this country, . . . noting that Chicago has a police residency requirement, but it still continues to deal with police brutality . . . [i]nstead, he said lawmakers should focus more energy on police accountability and reducing the scope of police departments." Chicago has had a residency requirement for 100 years and continues to be plagued by police misconduct: on March 29, 2021, 13 year-old Adam Toledo was shot by a Chicago Police Officer shortly after complying with the officer's command to drop the gun. The same *City & State New York* article quotes David Pritchard, an adjunct criminal justice professor at the Wilder School of Government and Public Affairs at Virginia Commonwealth University, stating "My study, I would argue, shows on a neighborhood level that it reduces crime and on the neighborhood level that it reduces social disorganization, [noting] it would be difficult to conclude whether that would hold true in a large city like New York City, where officers may live in different boroughs than where they work." Only one NYC mayoral candidate, Dianne Morales, opposes the residency requirement. According to the same City and State New York article, Morales described it as a "distraction: There is no evidence that residency has a positive effect on police performance or community relations." The NYPD Patrol Guide prohibits police officers from living in the same precinct where they work.

⁹² *Report on the Enforcement of the Prohibition Laws of the United States*, U.S. Dep't of Justice Nat'l Comm. on Law Observance and Enforcement (July 7, 1931), <https://www.ojp.gov/pdffiles1/Digitization/44540NCJRS.pdf>, at 78 (stating "As to corruption, it is sufficient to refer to the reported decisions of the courts during the past decade in all parts of the country, which reveal a succession of prosecutions for conspiracies, sometimes involving the police . . .").

⁹³ *The Challenge of Crime in a Free Society*, U.S. Dep't of Justice Comm. on Law Enforcement and the Admin. of Justice (Feb. 1967), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf>, at 109. ("The ultimate aim of all police departments should be that all personnel with general enforcement powers have baccalaureate degrees.")

Nationally, most police departments do not require more than a high school diploma. While 81.5% only require a high school diploma, 6.6% require some college credits, 10.5% require a two-year degree and 1.3% require a four-year degree.⁹⁴ A 2017 study entitled, “Policing around the Nation: Education, Philosophy, and Practice,” found that police leadership had differing opinions on the value of higher education on policing:

There is little consensus about which perceived advantages of hiring college-educated officers are actual benefits of hiring college-educated officers. The two perceived benefits that a majority of respondents agreed are actual benefits are that college-educated officers are better report writers (61.6%) and better able to use modern technology (46.1%). Respondent perceptions of college-educated officers was highly and significantly correlated with [department head] education level.⁹⁵

In addition, the survey found:⁹⁶

Small and medium sized agencies serving populations less than 100,000 have a higher proportion of officers with two-year degrees and larger agencies serving populations over 100,000 have a higher proportion of officers with four-year degrees.

Slightly more than half (51.8%) of sworn officers in the United States have at least a two-year degree, 30.2% have at least a four-year degree, and 5.4% have a graduate degree. This varies considerably by state, region, agency size, [department head] education level, union presence, and department type.

From a 21st century policing perspective with an emphasis on greater community engagement, recruiting future police officers with more in-depth training and broader socialization with a wider array of people will be advantageous. The 2017 study provided an overview of various studies that found benefits to having a college-educated police officer:

Research evidence on the value of a bachelor’s degree for police officers is not indisputable; some studies find positive benefits, but others find no correlation. On the whole, more research indicates positive effects than no correlation or negative consequences. Even though they typically receive higher salaries, research suggests that college-educated officers (those with a bachelor’s degree or higher) save departments money. This is because, according to research, college-educated officers take fewer sick days, have fewer on-the-job injuries and accidents, and have fewer individual liability cases filed against them (Carter & Sapp, 1989; Cascio, 1977; Cohen & Chaiken, 1972). They also may be better employees; research finds that college-educated officers are better report writers, more innovative, more reliable, more committed to the agency, more likely to take on leadership roles within the department, and more likely to be promoted than officers without a college degree (Carlan & Lewis, 2009; Cohen &

⁹⁴ Christie Gardiner, Ph.D., *Policing around the Nation: Education, Philosophy, and Practice*, Police Foundation (Sept. 2017), https://www.policefoundation.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation_10-2017_Final.pdf, at 2.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 4.

Chaiken, 1972; Krimmel, 1996; Trojanowicz & Nicholson, 1976; Whetstone, 2000; Worden, 1990). If degree-holding officers are truly better report writers, that could translate into better investigations, higher court case filings, fewer evidentiary constitutional challenges, fewer false confessions or wrongful convictions, and/or more successful prosecutions.

Research has also found that college-educated officers have fewer complaints and disciplinary actions against them, use force less often, and when they do use force they use lower levels of force than officers without a college degree (Chapman, 2012; Cohen & Chaiken, 1972; Fyfe, 1988; Kappeler et al., 1992; Lersch & Kunzman, 2001; Manis, Archbold, & Hassell, 2008; Roberg & Bonn, 2004; Rydberg & Terrill, 2010; Wilson, 1999). These particular benefits may be especially valuable for agencies which serve poor, majority-minority communities where police-community relations are more likely to be strained than wealthy, homogenous communities. Some research also suggests that college-educated officers may be less resistant to change and more likely to embrace new methods of policing (Roberg and Bonn, 2004); characteristics which might be particularly valuable in agencies committed to newer and more innovative policing strategies, such as community policing, problem solving, intelligence-led policing, democratic policing and procedural justice principles.⁹⁷(emphasis added)

Focusing on the finding concerning use of force, another study conducted in 2007 of police encounters in Indianapolis, Indiana and St. Petersburg, Florida, found that “encounters involving officers with a four-year degree result in significantly less physical force” being used.⁹⁸

Police officers are also increasingly asked to handle cases involving individuals with mental health issues. Police officers with college education were found to be more likely to handle these types of encounters by referring the individual to a mental health professional rather than trying to informally resolve the situation.⁹⁹

Compared to their counterparts in Europe, education requirements for police in the United States are far less onerous. Gary Potter, a professor at Eastern Kentucky University’s School of Justice Studies, further states that, “Police officers there have to go to three years of police college. It’s real college. And then two additional years where they don’t have arrest powers or guns. They have to work in the community and adapt to the community. That makes a huge difference.” According to the Council on Foreign Relations, “In Finland and Norway, recruits study policing in national colleges, spending part of the time in an internship with local police, and earn degrees in criminal justice or related fields.”

For these reasons, **the Task Force recommends that new recruits to police departments hold college degrees.**

⁹⁷ *Id.* at 11.

⁹⁸ Eugene Paoline and William Terrill, *Police Education, Experience and the Use of Force*, 34 *Criminal Justice and Behavior* 179, 179–196 (Feb. 2007).

⁹⁹ Teresa LaGrange, *The Role of Education in Police Handling Cases of Mental Disorder*, 28 *Crim. Justice Rev.* 1 (Spring 2003). The study was conducted by the Cleveland, Ohio police department from 1998–1999.

b. Police Officer Licensing

To ensure that high-quality and professional law enforcement services are provided to the community, police agencies should seek to ensure that officers are educated, certified and licensed. Studies have shown that well-educated and well-trained police officers are less likely than their colleagues to engage in misconduct or to be disciplined and more likely to enjoy successful police careers.¹⁰⁰ A professional licensing and certification scheme should include education, training, regulation, discipline, and decertification,¹⁰¹ as well as continuing law enforcement education, especially in the areas of use of force standards, implicit bias, intersectionality, and mental illness.

According to the National Conference of State Legislatures, a process involving the certification and decertification of police officers, under the auspices of a state entity, constitutes for all practical purposes a professional licensing structure.¹⁰² In most states, the agency to certify police officers is the peace officer standards and training (POST) board, which establishes guidelines and requirements for peace officer training and continuing education.¹⁰³ The POST board in New York State is the Municipal Police Training Council (MPTC) created under Executive Law § 839. The MPTC sets the minimally acceptable training standards for police officers in New York State and established the Basic Course for Police Officers. The curriculum consists of approximately 700 hours of training, covering such topics as ethics & professionalism, cultural diversity, bias-related incidents, professional communication, persons with disabilities, crisis intervention, use of physical force & deadly force, active shooter response and decision making.¹⁰⁴ In addition, recruits are required to participate in what is referred to as “Reality Based Training Scenarios to better prepare them for the situations they will encounter on the job.”¹⁰⁵

In addition to developing the basic police training program, the MPTC makes “recommendations regarding police training schools, instructor qualifications and categories/classification of in-service training.”¹⁰⁶ However, the Office of Public Safety of the New York State Division of Criminal Justice Services (DCJS), which administers the MPTC training program, does not require any further training after the basic training.

¹⁰⁰ James J. Fyfe and Robert Kane, *Bad Cops: A Study of Career-Ending Misconduct Among New York City Police Officers*, U.S. Dep’t of Justice, Nat’l Institute of Justice (February 2005), at 128.

¹⁰¹ Tatiana Follett, Suzanne Hultin, Amber Widgery and Lesley Kennedy, *Law Enforcement Certification and Discipline*, Nat’l Conf. of State Legislatures (Aug. 17, 2020), <https://www.ncsl.org/research/labor-and-employment/policing-oversight-and-new-legislation.aspx>.

¹⁰² *Law Enforcement Officer Decertification*, Nat’l Conf. of State Legislatures (Jan. 12, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/decertification.aspx>.

¹⁰³ *Supra* note 101.

¹⁰⁴ *Basic Course for Police Officers*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo01.htm>.

¹⁰⁵ Yasmeen Serhan, *What the World Could Teach America About Policing*, The Atlantic (June 10, 2020), <https://www.theatlantic.com/international/archive/2020/06/america-police-violence-germany-georgia-britain/612820/>.

¹⁰⁶ *Law Enforcement Agency Accreditation Program Overview*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo/index.htm>.

After successfully completing the New York basic training course, a police officer receives a certificate of completion. An officer maintains the certification so long as the officer remains on the force for more than two consecutive years and has no break in service lasting more than four years.¹⁰⁷

Society requires certain occupations and professions to be licensed as a means of protecting the public by ensuring that only competent and ethical individuals practice in the occupation or profession.¹⁰⁸ Cosmetologists, nail specialists, electricians, therapists, doctors, lawyers and other professionals must be licensed in order to work in New York State. Anne Levinson, a former Seattle police oversight official and municipal court judge, observed that, “We regulate hairdressers, barbers and a range of other professionals much more seriously than we regulate law enforcement, despite the fact that law enforcement can take your life or liberty.”¹⁰⁹ In an interview with *The Atlantic*, Saint Louis University law professor emeritus Roger Goldman, who has spent more than forty years studying the process of decertification of police officers, opined that, “When you think about licensing as a way to protect the public, then of all the professions that ought to be licensed, we should require law enforcement to meet those same professional standards—if not tougher standards.”¹¹⁰

A necessary component of a professional licensure/certification process is the ability to decertify, following, of course, a prescribed state-level due process hearing to ensure fairness. Decertification (or delicensing) prevents the individual from continuing to practice in the profession after a determination has been made that the individual engaged in conduct in violation of standards and norms of the particular profession. For police officers, decertification would entail taking away the officer’s badge and gun, thereby preventing the officer from continuing to be employed in law enforcement. There are numerous accounts from around the country of police officers in states without a decertification process being fired by one police agency for sometimes gross misbehavior and being hired by another police agency.¹¹¹

¹⁰⁷ *Police Refresher Course*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo/bcpo02.htm>.

¹⁰⁸ *Does your current or new occupation require a license?*, CareerOneStop, <https://www.careeronestop.org/ExploreCareers/Plan/licensed-occupations.aspx#:~:text=Examples%20of%20occupations%20licensed%20in,state%20standards%20for%20that%20career> (last accessed May 17, 2021).

¹⁰⁹ Mike Reicher, *Fired, But Still a Cop: How Washington State’s Decertification Process Leaves Troubled Officers With Their Guns*, *The Seattle Times* (Aug. 23, 2020; updated Oct. 6, 2020), <https://www.seattletimes.com/seattle-news/times-watchdog/fired-but-still-a-cop-how-the-state-decertification-process-leaves-troubled-officers-with-their-guns/>.

¹¹⁰ Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, *The Atlantic* (Apr. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/>.

¹¹¹ Saint Louis University School of Law, *The Long Fight for Police Certification Standards*, <https://www.slu.edu/law/news/2020/goldman-decertification.php>; Sarah Childress, *How States Are Moving to Police Bad Cops*, *Frontline PBS* (Apr. 8, 2016), <https://www.pbs.org/wgbh/frontline/article/how-states-are-moving-to-police-bad-cops/>; Laura Bowen, *Toughening Police Decertification: an Uphill Battle for States*, *The Crime Report* (Sept. 15, 2020), <https://thecrimereport.org/2020/09/15/toughening-police-decertification-an-uphill-battle-in-the-u-s/>.

New York is one of five states¹¹² that have no authority to decertify police officers, thereby allowing rogue officers to seek employment with other unsuspecting law enforcement agencies. While New York maintains a registry¹¹³ with information about police officers who have been fired for cause, the registry is ineffective because the fired officers are allowed to keep their certifications. As a solution, Professor Goldman recommends that “every state should enact a comprehensive law (license/certification/decertification) that takes away the ability for unfit officers to continue in law enforcement.”¹¹⁴

Critics of the notion of licensing police officers object to the idea on the ground that a large bureaucracy would be needed to implement and run the process. Instead, the critics suggest that many of the problems in law enforcement can be corrected by better training and by intensive supervision. Bad cops, according to the critics, should be fired quickly and other police departments should do more vetting before hiring fired officers.¹¹⁵ However, the critics appear to ignore the difficulty that police departments encounter in dismissing officers, chiefly because of collective bargaining agreements that keep many bad actors on the force.¹¹⁶ Moreover, the vetting by the new law enforcement agency is only as good as the information available to it. On many occasions, the information is ignored. Case in point is Officer Tim Loehmann, who was strongly encouraged to resign from the Cleveland Police Department following his involvement in the killing of 12-year-old Tamir Rice in 2014. Before hiring Officer Loehmann, the Cleveland Police Department failed to review the publicly available records from his former agency showing that the officer was clearly ill-suited for being a police officer. In accepting Officer Loehmann’s resignation in advance of a determination by the Cleveland Police Department to fire him, the deputy chief of the department wrote that, “I do not believe time, nor training, will be able to change or correct the deficiencies.”¹¹⁷ In 2018, Officer Loehmann sought employment with the Village of Bellaire (Ohio) police department. The Bellaire police chief determined that since Officer Loehmann was not fired, but resigned, it would be appropriate to hire him as a police officer. After public outrage surfaced, Officer Loehmann withdrew his application.¹¹⁸ If a licensing/decertification system was in place that could have

¹¹² The four states in addition to New York are: California, Hawaii, New Jersey and Rhode Island.

¹¹³ <http://www.criminaljustice.ny.gov/ops/>.

¹¹⁴ Roger Goldman, *Importance of State Law in Police Reform*, 60 Saint Louis Univ. L.J. 363, 382 (May 17, 2016).

¹¹⁵ The Chicago Tribune Editorial Board, *Licensing Cops is not the Answer to Police Misconduct*, Chicago Tribune (June 15, 2020), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-license-police-lightfoot-raoul-20200615-jayyprcid5ho7axm6cagf6wyt4-story.html>.

¹¹⁶ Seth W. Stoughton, Jeffrey J. Noble and Geoffrey P. Alpert, *How to Actually Fix America’s Police*, The Atlantic, (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/>; Alex Ebert, *To Keep Bad Cops Off Streets, States Consider Police Licensing*, Bloomberg Law, (July 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/to-keep-bad-cops-off-streets-states-consider-police-licensing>.

¹¹⁷ Adam Ferrise, *Cleveland Officer Who Shot Tamir Rice Had ‘Dismal’ Handgun Performance for Independence Police*, Cleveland.com (Dec. 3, 2014; updated Jan. 12, 2019), https://www.cleveland.com/metro/2014/12/cleveland_police_officer_who_s.html.

¹¹⁸ Nick Fouriezos, *Police Who Have Killed Black Americans: Where Are They Now?*, OZY (June 2, 2020), <https://www.ozy.com/news-and-politics/police-who-have-killed-black-men-where-are-they-now/334974/>.

removed Mr. Loehmann's license as a police officer, he would have been prevented from seeking and obtaining employment with a different law enforcement agency.

Until recently, the State of Massachusetts did not have a licensure/certification system for police officers. On December 31, 2020, the Massachusetts governor signed a massive police reform bill, establishing, foremost, a civilian-lead POST commission. The Massachusetts POST Commission oversees the certification and decertification of police officers, and investigates allegations of police misconduct. While the legislation falls short of eliminating completely the qualified immunity enjoyed by police officers, the law, nonetheless, sets minimum standards of training for police officers, imposes a duty to intervene and to de-escalate, establishes rules of engagement during mass protests/demonstrations, bans chokeholds, prohibits no-knock warrants unless officers can certify to the judge that their lives would otherwise be in danger, bans racial profiling, and creates a body-worn camera task force to promulgate rules on the use of such cameras. In addition, a police officer certified under the new law receives a three-year renewable license. Any police officer found to have committed one or more of the defined violations will have his or her license revoked and will be placed in the public database of decertified officers.

The Massachusetts law can be found at this link: [Bill S.2963 \(malegislature.gov\)](#). **The Task Force recommends that the New York State legislature adopt many of the provisions of the Massachusetts police reform measures to establish a licensure/certification system.** Except for the qualified immunity provision, the Massachusetts law seeks to achieve by order of magnitude a level of police reform suitable for the 21st century.¹¹⁹

c. Professional Liability Insurance

The rash of settlements by, and judgments against, municipalities and in favor of victims of police misconduct has put a strain on the budgets of many local governments.¹²⁰ The popular media is replete with stories about large cash settlements and judgments for police misconduct.¹²¹ Case in point is the recent \$27 million dollar settlement made by the City of

¹¹⁹ The qualified immunity protection under the Massachusetts law is eliminated only with regard to decertified police officers.

¹²⁰ Amelia Thomson-DeVeaux, Laura Bronner and Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, FiveThirtyEight (Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/>; Scott Calvert and Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, Wall St. J. (Oct. 22, 2020), <https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002>; Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impact Cities and Taxpayers*, Nat'l Pub. Radio (Sept. 19, 2020), <https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers>; Brentin Mock, *How Cities Offload the Cost of Police Brutality*, Bloomberg CityLab (June 4, 2020), <https://www.bloomberg.com/news/articles/2020-06-04/the-financial-toll-of-police-brutality-to-cities>.

¹²¹ See note 120; see also, Rakim Brooks, Esq., *The Role Insurance Companies play in the Brutality Against Black Bodies*, The Grio (June 30, 2020), <https://thegrio.com/2020/06/30/police-brutality-insurance-companies/>; Rachel B Doyle, *How Insurance Companies Can Force Bad Cops Off the Job*, The Atlantic (June 10, 2017), <https://www.theatlantic.com/politics/archive/2017/06/insurance-companies-police/529833/>.

Minneapolis to the family of George Floyd.¹²² This spending has caused a rethinking of who, in addition to municipalities, should be responsible for these payouts.

Some believe that an individual police officer should at least be significantly responsible for a police misconduct settlement or judgment.¹²³ Since it is very unlikely that an individual police officer would have the financial wherewithal to pay a multimillion dollar settlement or judgment, it has been proposed that each officer be required as a condition of employment to carry personal liability insurance (PLI).¹²⁴ Requiring police officers to carry PLI would ease the burden on financially-strapped municipalities. Additionally, with the officers having a financial stake in the outcome of misconduct matters, they might be more inclined to modify their behavior when interacting with the public.

In the October 22, 2020 issue of the *Wall Street Journal*, it was reported that, between 2015 and 2020, New York City paid \$1.1 billion to settle police misconduct cases.¹²⁵ During the same time period, Nassau County paid \$55 million and Suffolk County paid \$16.8 million. Municipalities all across the country make large payouts annually.¹²⁶ Funds set aside to satisfy settlements and judgments are not available for use in obtaining other essential public services, like education, affordable housing, infrastructure repairs, safety net programs and similar services.¹²⁷

To begin holding police officers partly responsible will require legislation, which must include provisions modifying or eliminating the court-created police qualified immunity doctrine. One such legislative scheme is Colorado's Senate Bill 217,¹²⁸ signed by the governor on June 19, 2020. The Colorado law provides that police officers can be sued in their individual capacities and specifically states that qualified immunity is not a defense to liability under the section of the statute permitting civil actions against officers for deprivation of rights. If an officer in Colorado admits to, or is found liable for, the misconduct, the officer will pay 5% or \$25,000 of the damages, whichever is less.

¹²² Nicholas Bogel-Burroughs and John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. Times (Mar. 12, 2021, updated Mar. 22, 2021), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html>.

¹²³ Johanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Reform*, 63 UCLA L. Rev. 1144, 1208–1210 (2016), <https://www.uclalawreview.org/how-governments-pay-lawsuits-budgets-and-police-reform/>.

¹²⁴ Deborah Ramirez, *Policing the Police: Could Mandatory Professional Liability Insurance for Police Officers Provide a New Accountability?*, 45 Am. J. of Crim. L. 407, 407–59 (2019),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449415#; Stephen Wulff, *How Individual Professional Liability Insurance Could Reform US Policing*, The Society Pages (June 11, 2020), <https://thesocietypages.org/specials/how-individual-professional-liability-insurance-could-reform-us-policing/>.

¹²⁵ Scott Calvert and Dan Frosch, *Police Rethink Policies as Cities Pay Millions to Settle Misconduct Claims*, Wall St. J. (Oct. 22, 2020), <https://www.wsj.com/articles/police-rethink-policies-as-cities-pay-millions-to-settle-misconduct-claims-11603368002>.

¹²⁶ *Summary of Police Misconduct Settlement Amounts*, Thurgood Marshall Institute: National Police Funding Database, <https://policefundingdatabase.tminstitutelfd.org/misconductsettlements>.

¹²⁷ See note 125.

¹²⁸ https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_217_enr.pdf.

While the Colorado law is laudable, the better legislative approach would be to eliminate completely the doctrine of qualified immunity and to require police officers to carry PLI coverage. Under this scheme, the municipality would pay the basic annual insurance premium for each officer. The insurance carrier and/or reinsurer would assist the police department in developing best practices and a risk management framework. A police officer would be subject to a premium increase if it is determined that the officer failed to abide by departmental rules or otherwise engaged in misconduct while on duty. Any increase in the officer's annual premium would be borne exclusively by the officer. Bad cops, who tend to have numerous misconduct incidents, would pay higher premiums and could be in many instances priced out of policing. Imposing a financial cost on a person is one method of discouraging bad behavior. Such costs in the normal course of human events will tend to reorient the actor and cause the actor not to pursue a particular course of conduct that might cause harm.

There are several bills pending in the New York State legislature that, if passed, would require police officers to possess PLI (Senate Bill S.1064 [2021] by Biaggi;¹²⁹ Assembly Bill A.2464 [2021] by Hyndman¹³⁰) or would require the municipality to purchase PLI on behalf the officers (Assembly Bill A.2106 [2021] by Fernandez¹³¹). S.1064 and A.2464 are virtually identical for all practical purposes. Senator Biaggi's bill, first introduced in the Senate on July 6, 2020 (S.8676 [2020]) and reintroduced on January 6, 2021, provides that police officers must provide proof of PLI and must maintain PLI throughout their employment as an officer. The bill further provides that the municipality must pay the base rate for each policy, with the implication that an officer will pay any increase in the premium due to missteps on the officer's part.

One of the significant benefits of requiring police officers to carry PLI is that it provides a market-based solution to getting rid of bad cops by pricing them out of the market. An organization in Minneapolis called InsureThePolice.org reported that a local officer had five significant settlements against him in an 18-month period and asserted that the officer would be personally responsible for the estimated \$60,000 to \$70,000 increase in premium under this type of legislative scheme.¹³² This type of financial impact might propel, or at least compel, troubled police officers to leave the profession.

The threat of possibly having to pay a hefty premium to remain on the police force should provide sufficient motivation for most, if not all, officers to moderate their behavior. PLI will encourage police officers to limit unnecessary interactions with the public. On those occasions where interacting with the public is unavoidable, police officers will be more likely to exercise appropriate caution in carrying out their duties.

¹²⁹ <https://www.nysenate.gov/legislation/bills/2021/s1064>.

¹³⁰ <https://www.nysenate.gov/legislation/bills/2021/A2462>.

¹³¹ <https://www.nysenate.gov/legislation/bills/2021/A2106>.

¹³² Martin Kaste, *To Change Police Practices, A Push For Liability Insurance in Minneapolis*, Nat'l Pub. Radio (June 27, 2016), <https://www.npr.org/2016/06/27/483420607/to-stop-police-lawsuits-reformers-want-officers-to-get-insurance#:~:text=Organization-To%20Change%20Police%20Practices%2C%20A%20Push%20For%20Liability%20Insurance%20In.pay%20for%20their%20own%20insurance>.

Another benefit of PLI is that risk managers well-trained in policing practices will likely be deployed to assist police departments in developing law enforcement best practices.¹³³ For example, a good use-of-force policy put in place by risk managers could help reduce the use of excessive force.¹³⁴ Failure to adhere to the best practices could result in higher premiums or even a loss of coverage. In fact, Professor Joanna Schwartz of UCLA Law School found anecdotal evidence supporting the view that police departments make personnel and policy changes demanded by their insurers whenever possible.¹³⁵ The professor also notes that private insurers “. . . have a uniquely powerful position from which they can demand improvements in policing . . . [by] financially sanction[ing] individual officers who have violated department policies or the law.”¹³⁶ Sanctions, of course, would be the imposition of higher insurance premiums or the loss of coverage altogether.

Finally, requiring police officers to carry PLI would ease the burden on struggling municipalities. Taxpayers should not be required to carry the full weight of a settlement or a judgment. Funds not spent on settlements or judgments can be deployed toward other worthy needs of the municipalities.

Perhaps the major objection to PLI for police officers (or to insurance in general) involves the concept of moral hazard. In the context of insurance, moral hazard is the notion that an insured entity will take on more risk since potential losses will be covered by the insurer. For example, a person may leave his or her vehicle running while going into the coffee shop because if the vehicle is stolen, the loss (less any deductible) will be covered by insurance. It has been suggested that police officers covered by PLI will not have an incentive to modify their behavior and to reduce instances of misconduct because of the concept of moral hazard. However, Professor John Rappaport of the University of Chicago Law School posits that:

When the insurer assumes the risk of liability, it also develops a financial incentive to reduce that risk through loss prevention. By reducing risk, the insurer lowers its payouts under the liability policy and thus increases profits. An effective loss-prevention program can also help the insurer compete for business by offering lower premiums. In other words, an insurer writing police liability insurance may profit by reducing police misconduct.¹³⁷

The risk of paying higher insurance premiums or losing coverage altogether because of inability to pay the increase in premiums is counterbalanced by the notion of moral hazard. The requirement that police officers carry PLI in order to maintain their employment would provide sufficient incentive to modify their behavior.

¹³³ John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1541, 1573–1586 (2017).

¹³⁴ John Rappaport, *An Insurance-Based Typology of Police Misconduct*, Univ. of Chicago Pub. L. & Legal Theory Working Paper No. 585 (2016).

¹³⁵ Schwartz, *supra* note 123, at 1204.

¹³⁶ *Id.* at 1207, 1209.

¹³⁷ Rappaport, *supra* note 133, at 1543.

Some have called into question the fairness of requiring all police officers in a department to carry PLI,¹³⁸ Not all police officers in a given precinct are walking a beat, or are otherwise interacting directly with the public. Many police officers work exclusively as desk officers, assignment officers, property clerks, school crossing guards, and other non-patrol officers. However, the fairness issue vis-à-vis non-patrol officers is of no moment if the legislative scheme of Senator Biaggi and Assemblyperson Hyndman is enacted. As noted above, the bills of Biaggi and Hyndman, respectively, provide that the basic premium for each officer is to be paid by the municipality. Unless the non-patrol officers engage in misconduct that causes their premiums to rise, there would be no cost to them at all.

The Task Force recommends that legislation modeled after the Biaggi/Hyndman bills be drafted to provide that police officers must carry PLI in order to maintain their employment. Taxpayers should not bear the sole responsibility of paying settlements or judgments arising out of police misconduct incidents. Moreover, and more importantly, the legislation should result in greater police accountability.

d. Reflecting the communities served

A 21st century police force must reflect the community it serves. **The Task Force recommends targeted recruitment efforts, keeping track of the efforts and engaging the community in refreshing the hiring criteria.**

Police departments across the state do not reflect the community they serve: they have insufficient numbers of women and people of color in their ranks.¹³⁹ Police departments in every jurisdiction should be under a mandate to actively recruit personnel of color, along with other diverse backgrounds, and to account for their efforts annually, similar to the framework set forth under Article 15-A of the Executive Law to promote participation by minority and women owned businesses in State contracts. State funding should be allocated to support this initiative. The New York Police Department in spring 2021 commenced a focused effort on recruiting women and people of color.

In the 2015 Report from President Obama’s Task Force on 21st Century Policing, the Task Force observed, “Building trust and legitimacy on both sides of the police-citizen divide is not only the first pillar of this task force’s report but also the foundational principle underlying this inquiry into the nature of the relations between law enforcement and the communities they

¹³⁸ Patrick Wraight, *Do Police Officers Need to Buy Professional Liability?*, Ins. J. (July 6, 2020), <https://www.insurancejournal.com/magazines/mag-features/2020/07/06/574234.html>.

¹³⁹ According to statistics from the New York State Division of Criminal Justice Services, the total number of police officers statewide is 62,998 as of April 19, 2021. The specific breakdown by ethnicity and gender is 42,213 (67%) white, 6,598 (11%) Black, 11,780 (11%) Hispanic and 2,407 (3%) Other – Non-Hispanic; 53,531 (85%) male and 9462 (15%) female. See *Sworn Law Enforcement Personnel in 2020 by Race, Ethnicity and Sex* at 17, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/Sworn%20Officers%20Demogs%202020.pdf>.

serve.”¹⁴⁰ A way to build this trust and reflect the community served is to include the community in the hiring process. Specifically:

Examine hiring practices to better involve the community in recruiting and screening of recruits. Example: The Sarasota (Florida) Police Department involves the community in recruiting, selecting, and hiring officers as a way to encourage a more diverse workforce. The city works with residents to identify culturally responsive and qualified multilingual candidates for consideration. The community gives input into the hiring priorities considered in selection.¹⁴¹

2. Training

Training is a shield as well as a sword. Training also ensures that officers can be held accountable if they deviate from policies and procedures. Continuous training ensures that officers remain current on department policies and procedures, the latest developments in the law that impact their work as well as learn best practices. The Task Force has three recommendations concerning training: (1) increasing the duration and focus of Academy training for Police Officers, (2) implement the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program](#) (ABLE) and (3) update training to help police handle persons with disabilities.

a. Increasing the Duration and Focus of Academy Training for Police Officers

Once a candidate is hired by a police department, the officer now must take Basic Course Training.¹⁴² The Municipal Police Training Council set a minimum training standard of over 700 hours.¹⁴³ Training topics include, but are not limited to, “Ethics & Professionalism, Cultural Diversity, Bias Related Incidents, Professional Communication, Persons with Disabilities, Crisis Intervention, Use of Physical Force & Deadly Force, Active Shooter Response and Decision Making . . . and numerous Reality Based Training Scenarios to better prepare them for the situations they will encounter on the job.”¹⁴⁴

A minimum of 700 training hours is approximately three months of training. To be a New York City Police Officer, you attend the Police Academy for six months, a time period equivalent to approximately 1040 training hours.

Is three months or even six months of training sufficient to prepare a person authorized to use lethal force to be ready to handle the various complex situations a police officer can handle? To

¹⁴⁰ Office of Community Oriented Policing Services. 2015. The President’s Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action. Washington, DC: Office of Community Oriented Policing Services, at 9.

¹⁴¹ *Id.* at 10.

¹⁴² *Basic Course Training*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/ops/training/bcpo/bcpo01.htm>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

put the training hours requirement in perspective, below are a few professions that have training hour requirements of about six months.

Profession	License Required	Training Hours
Massage Therapist	Yes	1,000 hours including training on a person ¹⁴⁵
Cosmetology	Yes	1,000 hours ¹⁴⁶
Certified Shorthand Reporter	Yes	1,300 hours ¹⁴⁷

A 2020 survey conducted by The Institute for Criminal Justice Training Reform of 100 countries found that the United States had the lowest training hours for police officers: the UK requires 2,250 hours, Australia 3,500 hours, Germany 4,050 hours and Dubai in the United Arab Emirates 5,400 hours.¹⁴⁸ Countries with lower training hours than the US included Iraq, Afghanistan, and Papua New Guinea.¹⁴⁹

A majority of police officers in larger departments say they did not receive sufficient training to do their job. According to a 2017 Pew Research Survey entitled “Behind the Badge:”

Police in larger agencies are considerably less likely to say their department has done very well in each of these aspects. For example, 29% of police in agencies with at least 1,000 officers say their department has done very well in training them adequately for their job, compared with 49% of police in agencies with fewer than 1,000 officers. Likewise, just 19% of police in agencies with 1,000 or more officers say their department has done very well in equipping them adequately to perform their job, compared with 41% of those in smaller agencies.¹⁵⁰

Legal training for New York police officers generally is a small portion of their training. Officers receive 53 hours on legal related topics or approximately 8.27% of the total training time.¹⁵¹ This training can be divided into three categories: (1) constitutional law topics (30 hours), (2)

¹⁴⁵ *Massage Therapist—License Requirements*, N.Y. State Ed. Dep’t – Office of the Professions, <http://www.op.nysed.gov/prof/mt/mtlic.htm#educ>.

¹⁴⁶ *How to Become a Cosmetologist in New York*, Cosmetology License.com, <https://www.cosmetology-license.com/new-york/>.

¹⁴⁷ *Certified Shorthand Reporter—License Requirements*, N.Y. State Ed. Dep’t – Office of the Professions, <http://www.op.nysed.gov/prof/csr/csrlic.htm>.

¹⁴⁸ *Not Enough Training*, The Institute for Criminal Justice Training Reform, <https://www.trainingreform.org/not-enough-training> (last accessed May 18, 2021).

¹⁴⁹ *Id.*

¹⁵⁰ *Behind the Badge: Amid protests and calls for reform, how police view their jobs, key issues and recent fatal encounters between blacks and police*, Pew Research Center (Jan. 11, 2017), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf, at 12.

¹⁵¹ Yuri R. Linetsky, *What the Police Don’t Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. Rev. 1, 27 (2018), <https://digitalrepository.unm.edu/nmlr/vol48/iss1/2>.

statutory law or criminal offenses (5 hours), and (3) traffic law or traffic offenses (18 hours).¹⁵² In 30 hours of instruction, police officers learn approximately 19 constitutional law related topics including:

1. Constitutional Law / Bill of Rights / Constitutional Principles;
2. Fundamentals of the Criminal Justice System;
3. Laws of Arrest;
4. Miranda Warnings;
5. Laws of Search and Seizure;
6. Search Warrant Procedures;
7. Criminal Procedure;
8. Civil Rights;
9. Civil Liability;
10. Legal Considerations of Use of Force;
11. Courtroom Procedure, Demeanor, and Testimony;
12. Rules of Evidence;
13. Civil Procedure/Civil Process;
14. Law of Interrogations and Confessions;
15. Legal Components of Reports;
16. Pretrial Identification Procedures;
17. Prisoner Rights and Privileges;
18. Juvenile Law; and
19. Rights of Victim.

Police officers must have sufficient training to understand when it is legally appropriate to use lethal force as well as when it is appropriate to impinge on a person's liberty. "Though society cannot expect police officers to be lawyers, officers must have more than a basic understanding of the elements of criminal statutes," observes Yuri R. Linetsky in *The New Mexico Law Review* article entitled *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*. "Modern police officers must understand the theoretical underpinnings of our criminal justice system and the constitutional principles they must protect and apply to real-world situations. Police academies must produce graduates—new police officers—who can correctly apply legal concepts in their daily work."¹⁵³

The Task Force recommends that the Municipal Police Training Council increase the statewide training minimum hours from 700 to 1,000 hours serving communities with populations below 500,000, 2,000 hours with populations between 500,000 and 1,000,000, and 3,000 hours with populations above 1,000,000. The Task Force further recommends that the curriculum devote at least 30% of the training hours to legal education.

¹⁵² *Id.* at 27–28.

¹⁵³ *Supra* note 151 at 3.

The Task Force further recommends that “in-service” training also includes additional training hours to legal education.

- b. Implement the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program \(ABLE\)](#)

A major concern heard by the Task Force was why do officers not intervene when fellow officers commit misconduct. New York State does not impose a duty to intervene for police officers. Executive Law Section 840 encourages the adoption of these policies, stating in pertinent part the Municipal Police Training Council “may recommend to the governor rules and regulations with respect to:

(d)(1) Establish and regularly update a model law enforcement use of force policy suitable for adoption by any agency that employs police or peace officers.

(2) The model law enforcement use of force policy shall include, but is not limited to:

- (i) information on current law as it relates to the use of force by police and peace officers;
- (ii) guidelines regarding when use of force is permitted;
- (iii) requirements for documenting use of force;
- (iv) procedures for investigating use of force incidents;
- (v) guidelines regarding excessive use of force including duty to intervene, reporting, and timely medical treatment for injured persons;
- (vi) standards for failure to adhere to use of force guidelines;
- (vii) training mandates on use of force, conflict prevention, conflict resolution and negotiation, de-escalation techniques and strategies, including, but not limited to, interacting with persons presenting in an agitated condition; and
- (viii) prohibited uses of force.”¹⁵⁴

The Use of Force Policy promulgated by the Municipal Police Training Council in September 2020 specifically describes a Duty to Intervene, stating:

- A. Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the

¹⁵⁴ New York State Executive Order Section 840.

circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.

B. An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.¹⁵⁵

“The policy,” as stated in the purpose section of the Policy, “is designed to provide guidance to individual agencies as they develop their own use of force policies in accordance with Executive Law § 840(4)(d)(3).”¹⁵⁶

Police officers are very supportive of Duty to Intervene policies. A report issued by the Task Force on Policing created by the Commission on Criminal Justice in January 2021 citing a January 2017 Pew Research survey found that of 8,000 police officers surveyed, “84% believed officers should be required to intervene when they think another officer is using unnecessary force.”¹⁵⁷

What hampers the ability of officers to intervene is culture. The report very succinctly describes this problem:

Studies find that police officer compliance with mandatory reporting policies, a close relative of DtI [Duty to Intervene] policies, may be low because reporting the wrongdoing of peers involves violating the commonly understood code of silence (Rothwell and Baldwin 2007, Pershing 2003). Moreover, calling out misconduct on the part of superiors is challenging and frowned upon given the paramilitary structure and rigid hierarchy of police agencies (Kaptein, 2011). A survey of rank and file officers in several police agencies, however, found that officers are more likely to report on a colleague when they are familiar with rules prescribing the reporting of misconduct, they believe the misconduct to be of a serious nature, and/or they expect harsh discipline associated with noncompliance (Kutnjak, Haberfeld, and Peacock, 2016). *Another study found that perceptions of internal procedural fairness and departmental equity are necessary preconditions for officers to feel comfortable reporting wrongdoing on the part of their peers* (Wolfe and Piquero, 2011). [emphasis added]¹⁵⁸

The perceptions of police concerning departmental procedural fairness is mixed. The 2017 Pew Research Survey found:

¹⁵⁵ *Municipal Police Training Council policy*, N.Y. State Div. of Criminal Justice Servs. – Municipal Police Training Council (Sept. 2020), at 3, available at

<https://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/MPTC-Model-Policy-Use-of-Force-2020.pdf>.

¹⁵⁶ *Id.* at 1. Some cities in New York have adopted laws/policies requiring a duty to intervene, including Buffalo passing “Cariol’s Law” on October 28, 2020. Rochester adopted it as police policy on March 15, 2021, Tompkins County adopted it as policy on June 3, 2020, and Albany adopted it as policy in June 2020.

¹⁵⁷ Duty to Intervene – Policy Assessment, Comm’n on Crim. Justice – Task Force on Policing (Jan. 2021), at 2, https://assets.foleon.com/eu-west-2/uploads-7e3kk3/41697/pdf_-_duty_to_intervene.6e39a04b07b6.pdf.

¹⁵⁸ *Id.*

Officers give their departments mixed ratings for their disciplinary processes. About half (45%) agree that the disciplinary process in their agency is fair, while 53% disagree (including one-in-five who strongly disagree). When they are asked more specifically about the extent to which underperforming officers are held accountable, police give more negative assessments of their departments. Only 27% agree that officers who consistently do a poor job are held accountable, while 72% disagree with this.

The Task Force, consequently, concludes that for policies to be effective, officers must be trained on how to implement the policy, leadership must enforce the policy and, perhaps most importantly, the culture creates an atmosphere for compliance.

A well accepted best practice in training officers to intervene when other officers cross the line, and referenced by the Task Force on Policing, is the Active Bystandership Training from the [Active Bystandership for Law Enforcement Program \(ABLE\)](#). ABLE is a national hub for training, technical assistance, and research, all with the aim of promoting a police culture in which officers routinely practice peer-to-peer intervention as necessary to:

- ✓ Prevent misconduct,
- ✓ Avoid police mistakes, and
- ✓ Promoted officer health and wellness.

Building on training developed in consultation with the New Orleans Police Department to help police officers stop unnecessary harmful behavior by fellow officers in 2014, Project ABLE delivers practical, scenario-based training for police agencies in the strategies and tactics of peer intervention. The program is administered through a train-the-trainer methodology, equipping law enforcement professionals to take ownership and responsibility to train each other on peer intervention.

ABLE has found that the benefits of meaningful active bystandership training are significant and include reduced unnecessary harm to civilians; reduced unnecessary harm to officers; reduced risk of officers losing their jobs; reduced risk of lawsuits against departments, cities, and individual officers; improved police and community relations; improved officer health and wellness; improved officer job satisfaction; and improved citizen satisfaction with their law enforcement agency. These issues of unnecessary harm in policing, officer wellness and police relations with the civilian community are urgent. The benefits will undoubtedly result in considerable cost savings, which may better be used elsewhere.

The ABLE program has emerged as a best practice and as part of our listening tour we have identified the program as a potentially scalable best practice that we want to recommend for wider adoption in New York State. Indeed, this proposal coincides with the statements that Albany County Sheriff Craig Apple and NYPD Commissioner Ernest Hart made at a Task Force public forum in the fall of 2020 about how their teams have found the ABLE training transformational. The Task Force heard from law enforcement professionals around the country

about how this program has played a significant part in reducing harm to civilians and officers by creating a culture of peer intervention that redefines loyalty among officers.

To date, more than 70 law enforcement agencies across the US have completed the Train the Trainer certification program. The New Jersey Attorney General has mandated ABLE training statewide for each of New Jersey's roughly 550 law enforcement agencies. In New York, the NYPD as well as Westchester and Yonkers law enforcement agencies have formally committed to ABLE. The NYPD plans to certify 125 instructors who in turn will provide the training to the department's 35,000+ officers. While the training is typically provided at no cost to law enforcement agencies, law enforcement agencies and regional or state academies must commit to and are accountable for [minimum program standards](#) and creating a culture of active bystandership and peer intervention through policy, training, support and accountability.

The Task Force recommends that New York State require officially and expressly recommend that New York Law Enforcement Agencies commit to ABLE.

c. Update Training to Help Police Handle Persons with Disabilities

The Task Force's recommendations related to interaction between police and people with disabilities are twofold. First, the police must no longer be the default responders to calls for help when a person with serious mental illness (SMI) is in possible crisis. Time and again, it has been proven that when compared to other methods, police responses increase the chance of a violent or deadly outcome toward people with SMI. These outcomes can be avoided completely if this role is taken away from police officers and placed in the hands of trained professionals who hold experience working with people with SMI. **Second, police training must include peer-involved interaction and experiences with the disability community.** Even if the default model of having police respond to calls involving SMI is replaced, not all people with disabilities have SMI, and officers undoubtedly will need to interact with people of all abilities during their careers. Ensuring that such training includes a peer-driven perspective would help officers understand disability and the various ways in which it may manifest.

i. Replacing the Default Model

According to a *Washington Post* database which has tracked every fatal police shooting in the U.S. for the last six years, 5,709 people have been fatally shot by an on-duty police officer since January 1, 2015. Of those several thousand, 23% of people killed by the police—1,407 people, including 16 people in 2021 as of the end of February—have been identified as having a mental illness. Police kill people with autism, people who are deaf or cannot follow verbal commands, people who are neurodivergent, and other people with special needs at much higher rates than the general population; studies show that between 30% and 50% of all people killed by the police have a disability.¹⁵⁹ This stark disparity is also reflected in the numbers of people who are arrested by police and incarcerated. According to another study by the Bureau of Justice

¹⁵⁹ Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, Time (June 25, 2020), <https://time.com/5857438/police-violence-black-disabled/>.

Statistics, roughly 40% of people in jail and 32% of people in prison reported having at least one disability.¹⁶⁰

The Task Force repeatedly found that many instances of police misconduct and unjustified force could be avoided if police were not the ones responding to calls for help when they were neither equipped nor inclined to address the needs of the person before them. On January 29, 2021 in Rochester, the police responded to a call and found a nine-year-old girl in distress and reportedly contemplating self-harm.¹⁶¹ They rear-handcuffed her tiny arms, put her in the back of a squad car, and pepper sprayed her in the face. “Unbelievable,” one officer muttered as he shut the door on her screams.

Instances where the police respond to mental health crises often end in this type of abuse or even death, such as in the cases of Daniel Prude killed in Rochester and Kawaski Trawick killed in New York City. A 2015 report from the Treatment Advocacy Center found that one in four people killed by police had untreated SMI, and that one in every 10 calls to police were related to a person with untreated SMI.¹⁶² People experiencing mental health crises who survive their encounters with responding police are often criminalized and subjected to other forms of misconduct. According to the United States Department of Justice’s Bureau of Justice Statistics, roughly one out of every four people in jail met the threshold for severe psychological distress within the prior 30 days, as compared to just 5% of the general population.¹⁶³ According to the American Psychological Association, at least half of all incarcerated people struggle with mental health issues.¹⁶⁴ Similarly, people who are unhoused and/or struggling with substance use disorder are more likely to encounter the police and be incarcerated¹⁶⁵—without having their needs met.

The case has been made repeatedly that police should not be first responders to mental health crisis calls. Even so, enforcement is much more commonly dispatched in response to a 911 call than are social workers or mental health professionals. It’s been reported that 154,000 mental

¹⁶⁰ Jennifer Bronson, Ph.D., Laura M. Maruschak, BJS, and Marcus Berzofsky, Dr.P.H., *Special Report: Disabilities Among Prison and Jail Inmates*, U.S. Dep’t of Justice, Bureau of Justice Statistics, available at <https://bjs.gov/content/pub/pdf/dpji1112.pdf>.

¹⁶¹ Khaleda Rahman, *Rochester Police Union Chief Defends Pepper Spraying Girl—‘She Could Have Been Hurt Worse’*, Newsweek (Feb. 1, 2021) <https://www.newsweek.com/rochester-police-union-chief-defends-pepper-spraying-nine-year-old-girl-1565700#:~:text=U.S.-,Rochester%20Police%20Union%20Chief%20Defends%20Pepper%20Spraying%20Girl%E2%80%94%20She,Could%20Have%20Been%20Hurt%20Worse%20&text=The%20head%20of%20a%20police,nine%20year%20old%20g> [irl](https://www.newsweek.com/rochester-police-union-chief-defends-pepper-spraying-nine-year-old-girl-1565700#:~:text=U.S.-,Rochester%20Police%20Union%20Chief%20Defends%20Pepper%20Spraying%20Girl%E2%80%94%20She,Could%20Have%20Been%20Hurt%20Worse%20&text=The%20head%20of%20a%20police,nine%20year%20old%20g).

¹⁶² Doris Fuller & H. Richard Lamb, Michael Biasotti and John Snook, *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, Off. of Research & Pub. Affairs, available at <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf>.

¹⁶³ Jennifer Bronson, Ph.D., *Report: Indicators of Mental Health Problems Reported By Prisoners and Jail Inmates*, U.S. Dep’t of Justice, Bureau of Justice Statistics, available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5946>.

¹⁶⁴ Lorna Collier, *Incarceration nation*, 45 Monitor on Psychology 56 (Oct. 2014), <http://www.apa.org/monitor/2014/10/incarceration>.

¹⁶⁵ *Criminal Justice Drug Facts*, Nat’l Institute on Drug Abuse (June 1, 2020), retrieved from <https://www.drugabuse.gov/publications/drugfacts/criminal-justice> (last accessed February 1, 2021).

health-related calls came through to 911 dispatchers in 2020 in New York City's five boroughs alone.

Studies focused on alternatives to traditional police response are currently lacking in both scope and breadth. However, the attention on police relations with the disabled and Black, Indigenous and People of Color (BIPOC) communities in the last several years have forced us to take an honest accounting of what has not worked, and what may work. For instance, Disability Rights New York (DRNY) and the John Jay College of Criminal Justice collaborated to form the RAASIC Project (Research and Advocacy Addressing Systems in Crisis). In their March 2021 paper, *Identifying Critical Issues in Response to Mental Health Crisis Calls*, the Project discusses the various disadvantages of having police respond to calls involving people with SMI; the alternative models being implemented; and guidance for communities seeking to establish the best model for them.

The Project emphasizes the fact that there is no one solution to the default policing model. But what is clear is that the status quo model is not working and needs replacing. Local communities must assess and choose for themselves which model(s) of mental health response work for them.

Although crisis intervention programs exist in some jurisdictions, there is no guarantee that such programs are effective in all instances in which a person with SMI is having a disability-related emergency. Moreover, the example mentioned above involving a nine-year-old girl in crisis shows that even when an alternative response is available, authorities may fail to engage it. The City of Rochester failed to involve its new "Person in Crisis" (PIC) program when the 911 call came in for help in response to the girl's threats of suicide.

Similarly, even if the PIC program existed in March 2020, Daniel Prude still would not have benefited from it because when 911 was called, injuries and a possible crime were reported. Per their policy as of February 2021, a report of injury, crime, or weapons nulls any request for the PIC Team, even if a disability is also reported. Last, there is never a guarantee that the call for assistance includes any indication at all of disability, even if there is one discovered at a later time (as in the cases of Elijah McClain and Mario Gonzalez).

These incidents help support the Project's conclusion that assessments need to be done on a local level to determine the best alternatives to the police response model.

ii. Peer-Based Training

All law enforcement personnel must develop an understanding of, and a working relationship with, people who have disabilities. This can be achieved via proper training, and should be provided to officers alongside any other required intersectionality and cultural competency training. To this end, the Task Force recommends that law enforcement agencies engage actively with people with disabilities, and seek out and tailor live training with the assistance of people with disabilities, so that officers are prepared for such interactions while on duty.

The disabled community makes up the largest minority population in the world, and in the United States. The population is incredibly varied, and different disabilities can manifest themselves in multiple different ways. Law enforcement personnel must strive to learn best practices for interacting with people with disabilities, and to mindfully engage in such practices in their fieldwork. And this mindfulness goes far beyond understanding SMI alone.

People often have multiple disabilities: a person with SMI can present with sensory impairments, or be on the autism spectrum, or have other diagnoses specifically affecting their processing of information. These diagnoses—when taken into account alongside intersecting identities and experiences such as age, race, ethnicity, language barrier, citizenship status, gender, sexual orientation, history of trauma, and more—all affect the way in which a person reacts during an encounter with police. A person who at first seems to be willfully “non-compliant” to an officer’s questions or commands may actually be manifesting the effects of a disability. It is possible that the person has a developmental disability and does not know how to comply, or that the person is exhibiting symptoms of severe hypoglycemia and is physically unable to comply. When other potential variables such as deafness, severe trauma, or citizenship status are accounted for, the police interaction becomes more complicated, and requires a mindful and compassionate approach.

In addition, intersectionality-focused training with a peer-driven component would help officers gain an understanding of their own potential biases while on and off the job. For instance, white officers have statistically been found to make arrests more often than non-white officers.¹⁶⁶ In addition, Black people, and Black people with SMI, have much higher rates of arrest than their white peers. (*Id.*) An officer’s ability to understand the varied nature of disability and the interplay between disability and other identities could mean the difference between life and death for the individual needing assistance and others involved.

In short, police must be prepared to handle interactions with the disabled community. Having officers engage meaningfully with people who have disabilities in their training is an effective way for officers to learn how to manage their expectations when responding to a call for help that may involve a person with a disability emergency.

3. “On the Beat”

Police misconduct results from improper policing practices while officers are “on the beat.” The Task Force recommends two ways to address improper policing practices: (1) enacting a duty to intervene law and (2) leveraging civilian oversight agencies to provide insight into policing practices that are improper.

a. The Duty to Intervene

When watching videos of police misconduct, a recurring question is “why didn’t the other officers intervene?” Although there may be many reasons why an officer would not intervene, a legal obligation does not exist for them to intervene. As discussed earlier in this report, police are generally supportive of a duty to intervene when another officer is using unnecessary force. They do not because challenging superiors or fellow officers is not supported by the culture. To create a culture of intervention, **the Task Force recommends that (1) New York State follow Buffalo’s lead and enact a law creating a duty to intervene and (2) all police departments adopt appropriate policies to implement the law.**

¹⁶⁶ Therese L. Todd and Preeti Chauhan, *Seattle Police Department and mental health crises: Arrest, emergency detention, and referral to services*, 72 J. of Crim. Justice 101718 (2021).

- b. Leveraging Civilian Oversight Agencies to Provide Insight into Policing Practices that are Improper

The Task Force recommends that New York should look to civilian oversight agencies for recommendations on how to improve police practices statewide. Civilian oversight agencies are keenly aware of what the gaps in police hiring, training, and practices are, which is why this Task Force recommends they have policy-making power over their respective law enforcement agencies. The state could also take advantage of this expertise by mandating staff or board members of civilian oversight agencies be appointed to statewide advisory bodies, such as the Municipal Police Training Council. The state could either require a certain number of appointees to those advisory bodies be staff or a board member of a civilian oversight agency, or permit a to-be-formed statewide voluntary association of civilian oversight agencies to nominate a certain number of members to those bodies. This would extend the principle of community control to the entire statewide institution of policing and help bridge the disconnect between local progress and statewide stagnation in reimagining policing.

Civilian oversight agencies should be required to send uniform data about complaints and investigations to the Division of Criminal Justice Services or the state Attorney General. State collection of data from various municipalities will aid in creating a centralized and uniform repository of information. This will allow the state to identify best practices for civilian oversight which should be replicated elsewhere, as well as local or statewide areas of concern to be addressed. Uniform reporting would also allow the state to randomly audit the operations of oversight agencies, which will improve agencies' performance. Giving the state immediate access to every agency's complaint and investigative records would also likely help to streamline any future decertification process, and give valuable data to state policymakers to further improve policing and civilian oversight statewide. Requiring the collection and reporting of this data will also encourage civilian oversight agencies to allocate resources towards proper data collection and management, which is essential for transparency.

At a minimum, the following data points should be required:

- a public tracking number for complaints;
- total number and types of complaints, delineated by category;
- information about the incident;
- age, race and gender of complainant; rank, gender and race of officers;
- witness information;
- number and types of use of force per complaint; and
- information about firearm use; and previous complaints against the officer.

If applicable, this information could also be broken down by police department divisions or sections.

The Task Force further recommends that New York should also require civilian oversight agencies to have accessible websites where agencies publish the state-mandated information from the previous section, as well as publish certain policies of their law enforcement agency, such as their use of force policy. Currently, many communities around the state and nation feel that their civilian oversight agencies lack transparency, notwithstanding the dedication of staff

and board members. Requiring public release of complaint and investigation data allows community members to review the work of their civilian oversight agencies and fosters an environment of openness to the community. It would also help reverse the decades-long resistance by police departments to public disclosure of important departmental and policy information.

4. Monitoring

Police departments have had to adapt over the decades to technological changes to investigate crimes and apprehend criminals. Technological advances can also help police to better protect themselves and the community from instances of misconduct. **The Task Force recommends requiring all members of New York State policing agencies to wear body cameras and for similar cameras to be installed in patrol vehicles, along with requisite training.**

Through the use of video recording on cellular phones, the public has become increasingly aware of heinous acts of police brutality against unarmed African American men, such as in the murders of George Floyd in 2020 and Walter Scott in 2015. Mr. Scott attempted to evade arrest for an alleged traffic and child support violation in South Carolina by running in an open field, when an officer shot him in the back five times.¹⁶⁷ After Mr. Scott was fatally wounded, the officer attempted to cover up his conduct by planting his Taser device near Scott's body.¹⁶⁸ Further, the officer falsely reported that Mr. Scott attempted to grab his Taser.¹⁶⁹ Fortunately, a bystander was present during these events and used his cellphone to record what he witnessed.¹⁷⁰ Ultimately, this officer pled guilty to violating Mr. Scott's federal civil rights in order to avoid having to face a second murder trial in state court, after a mistrial occurred due to a hung jury.¹⁷¹ The federal prosecutor who handled the proceeding for the civil rights violation recommended a sentence of twenty years in prison.¹⁷² The surviving family of Mr. Scott settled a civil lawsuit with the City of North Charleston, South Carolina in the amount of six and a half million dollars.¹⁷³

With respect to Mr. Floyd's killing, he was initially arrested for allegedly presenting a counterfeit \$20.00 bill at a convenience store in Minneapolis, Minnesota.¹⁷⁴ Multiple bystanders recorded police officer Derek Chauvin applying his knee against the neck of Mr. Floyd for

¹⁶⁷ John Eligon, Tim Arango, Shaila Dewan and Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. Times (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Greg Botelho and Sonia Moghe, *North Charleston Reaches \$6.5 Million Settlement with Family of Walter Scott*, CNN Politics (Oct. 9, 2015), <https://www.cnn.com/2015/10/08/us/walter-scott-north-charleston-settlement/index.html>.

¹⁷⁴ See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (May 31, 2020, updated Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

approximately nine minutes, after he was handcuffed and lying on the ground.¹⁷⁵ Mr. Floyd repeatedly stated, over twenty times, “I can’t breathe.”¹⁷⁶ This officer was recently convicted of second and third degree murder, along with second-degree manslaughter.¹⁷⁷ Mr. Floyd’s family recently reached a settlement in a civil lawsuit with the City of Minneapolis in the amount of 27 million dollars.¹⁷⁸

These senseless deaths underscore that, during the course of an investigation or subsequent legal proceeding in response to this egregious misconduct, the circumstances of the factual events leading up to these fatal police-civilian encounters could not be captured and verified without this video-recording technology. But what if a bystander who sees a police officer acting in such a barbaric and unlawful manner does not have access to a cellphone with a camera? This routinely invites a credibility determination and potential dispute over what occurred. In the event that there are no eyewitnesses to such misconduct, an officer is empowered to falsely account for what happened.

The residents of New York State, particularly those of color, should not be at the mercy of chance during encounters with the police. They should have confidence that their interactions with police officers are being recorded and that these officers will not act in excess of their authority. Moreover, police officers who faithfully perform their duties as expected under law should have the added assurance that they can be insulated from unfounded claims of misconduct because their encounters are recorded. For the protection of both the police who dutifully serve and the public that live and travel in New York State, **the Task Force recommends that body-worn cameras should be a standard requirement for all uniformed and plain clothed officers as well as in the operation of their patrol vehicles.**

On June 16, 2020, Governor Cuomo signed legislation which required “New York State Police officers to wear body cameras while on patrol (S.8493/A.8674); and creat[ed] the Law Enforcement Misconduct Investigative Office (S.3595-C/A.10002).”¹⁷⁹ Without question, this legislation is certainly a step in the right direction, but it simply does not go far enough. According to the Census of State and Local Law Enforcement Agencies, 2008, there were a total of 514 police agencies in New York State, including the New York State Police.¹⁸⁰

¹⁷⁵ *Id.*

¹⁷⁶ See Maanvi Singh, *George Floyd Told Officers ‘I can’t breathe’ More than 20 Times, Transcripts Show*, The Guardian (July 9, 2020), <https://www.theguardian.com/us-news/2020/jul/08/george-floyd-police-killing-transcript-i-cant-breathe>.

¹⁷⁷ See Rochelle Olson, *What are the charges against ex-Minneapolis police officer Derek Chauvin in the killing of George Floyd?*, Minneapolis Star-Tribune (Mar. 18, 2021), <https://www.startribune.com/derek-chauvin-charges-trial-george-floyd-murder-manslaughter-police-minneapolis-minnesota/600030691/>.

¹⁷⁸ See Nicholas Bogel-Burroughs and John Eligon, *George Floyd’s Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. Times (Mar. 12, 2021), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html>.

¹⁷⁹ See *Governor Cuomo Signs Legislation Requiring New York State Police Officers to Wear Body Cameras and Creating the Law Enforcement Misconduct Investigative Office*, N.Y. St. Off. of the Governor (Jun 16, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-requiring-new-york-state-police-officers-wear-body-cameras-and>.

¹⁸⁰ See *Census of State and Local Law Enforcement Agencies*, U.S. Dep’t of Justice, Bureau of Justice Statistics (2008), <https://www.bjs.gov/content/pub/pdf/cslla08.pdf>.

Consequently, at that time, the Bureau of Justice Statistics within the U.S. Department of Justice, who conducted the census, reported that there were approximately 66,472 full-time police officers.¹⁸¹ With such a large police force, the Task Force further recommends that the legislature expand this mandate for body-worn cameras, under law, to include all local law enforcement agencies within the State. Moreover, every agency should be required to have cameras installed in their patrol vehicles.

According to the NYPD, it is “the largest and one of the oldest municipal police departments in the United States, with approximately 36,000 officers and 19,000 civilian employees.”¹⁸² After the NYPD was sued in federal court, its longstanding race-based “stop and frisk” practices were held to be unconstitutional in 2013.¹⁸³ A federal monitor (hereinafter “the Monitor”) was appointed by the trial court to oversee the necessary reforms to the NYPD’s illegal and discriminatory policies and practices, rooted in the “stop and frisk” program.¹⁸⁴ The NYPD was subsequently ordered “to institute a pilot project in which body-worn cameras will be worn for a one-year period by officers on patrol in one precinct per borough—specifically the precinct with the highest number of stops during 2012” as a remedial measure imposed by the Court.¹⁸⁵ In imposing this particular remedy on the NYPD, the Court carefully noted that “body-worn cameras are uniquely suited to addressing the constitutional harms at issue in this case” and further stated the following:

Video recordings will serve a variety of useful functions. First, they will provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts. The recordings may either confirm or refute the belief of some minorities that they have been stopped simply as a result of their race, or based on the clothes they wore, such as baggy pants or a hoodie. Second, the knowledge that an exchange is being recorded will encourage lawful and respectful interactions on the part of both parties. Third, the recordings will diminish the sense on the part of those who file complaints that it is their word against the police, and that the authorities are more likely to believe the police. Thus, the recordings should also alleviate some of the mistrust that has developed between the police and the Black and Hispanic communities, based on the belief that stops and frisks are overwhelmingly and unjustifiably directed at members of these communities. Video recordings will be equally helpful to members of the NYPD who are wrongly accused of inappropriate behavior.¹⁸⁶

The Court further directed that the Monitor “will establish procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers. The Monitor will also

¹⁸¹ *Id.*

¹⁸² See *About NYPD*, N.Y. City Police Dep’t, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing-page#>.

¹⁸³ See *Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory*, Ctr. for Const. Rights (Aug. 21, 2014), <https://cjrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices>; See also <http://www.cjrjustice.org/ourcases/current-cases/floyd-et-al>.

¹⁸⁴ See <http://nypdmonitor.org/wp-content/uploads/2015/09/Floyd-Liability-Opinion-8-12-13.pdf>.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

establish procedures for the preservation of stop recordings for use in verifying complaints in a manner that protects the privacy of those stopped. Finally, the Monitor will establish procedures for measuring the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks. At the end of the year, the Monitor will work with the parties to determine whether the benefits of the cameras outweigh their financial, administrative, and other costs, and whether the program should be terminated or expanded. The City will be responsible for the costs of the pilot project.”¹⁸⁷ The Court thereafter ordered that the program be modified to allow for a “randomized” approach to the use of body-worn cameras throughout the precincts of the City of New York.¹⁸⁸

The Monitor has written a series of published reports to the Court in order to outline the course of action, undertaken by the NYPD, to comply with these remedial orders and implement the body-worn camera pilot program.¹⁸⁹ The most recent, dated November 30, 2020, is entitled, “The Monitor’s Twelfth Report: The Deployment of Body Worn Cameras (BWCs) on the New York City Police Department (NYPD) Officers.”¹⁹⁰ In this report, the Monitor indicated that it was prepared to “[describe] the evaluation of the NYPD’s BWC pilot program, as required by the Court’s Remedial Order and modified order.”¹⁹¹

After accounting, in great detail, for the scientific methods which were relied upon in conducting the study of the NYPD’s use of body-worn cameras during the one year period the Monitor conveyed the following findings:

In New York City and elsewhere, BWCs have been nominated as a potential technological solution (at least in part) to the problem of unlawful policing. This study finds that the placement of BWCs on officers can increase their compliance with department directives to document stops of citizens. These data can then be used to determine whether officers are adhering to the rule of law in their enforcement efforts. In addition to reducing the CCRB complaints against NYPD officers, BWCs could be useful in reducing persistent problems with unlawful citizen stops.

The results of this experimental evaluation suggest that the adoption of BWCs is not a panacea to problems of police-community relations. Although a 20% reduction in citizen complaints is a very positive development, there are relatively few citizen complaints, and a one-year reduction in an uncommon event does not seem powerful enough to change durable citizen perceptions of the NYPD and assessments of officer behaviors during specific encounters. The NYPD and other police departments may be best served if, in addition to adopting BWC, they double down on other programs that have solid scientific evidence of enhancing community attitudes towards the police. ... Police departments should be formally training their officers to embrace procedural justice

¹⁸⁷ *Id.*

¹⁸⁸ See <http://nypdmonitor.org/wp-content/uploads/2015/09/Torres-Order-Modifying-Remedial-Order.7.30.14.pdf>.

¹⁸⁹ See <http://nypdmonitor.org/wp-content/uploads/2016/02/2015-12-08FloydvCityofNY-TorresOrderModifyingRemedialOrderwrtBWCPilotProgram.pdf>

¹⁹⁰ See <http://nypdmonitor.org/wp-content/uploads/2020/12/12th-Report.pdf>.

¹⁹¹ *Id.*

principles during all interactions with the public and not just rely on technology to do so.

As stated, this study does not support the perspective that BWCs lead to short-term changes in the public perceptions of the police. However, it remains possible that the BWC technology could produce longer term benefits. When controversial events happen, the public expects to see video of the police-citizen encounter so they can judge whether officers acted lawfully and behaved appropriate[ly]. NYC residents are overwhelmingly in favor of the placement of BWCs on NYPD officers, and express hope that the technology may improve police-community relations. At the very least, the presence of BWCs on officers suggests to community members that mechanisms exist to ensure transparency and hold officers accountable when they misbehave. And, as a component of a broader set of evidence-based strategies to improve community perceptions, the placement of BWCs on officers could help to enhance the legitimacy of the police to the public that they serve. *Given the demonstrated benefits and absence of harmful outcomes, this study supports not only the use of body-worn cameras by the NYPD, but their use by the other departments as well.* (internal citations omitted) (emphasis added).¹⁹²

It should be further noted that prior to the conclusion of the pilot study program, the NYPD determined that it was more beneficial to use body-worn cameras before obtaining the actual results of the same.¹⁹³ In outlining its policy for the use of body-worn cameras, the NYPD's website states the following:

All Police Officers, Detectives, Sergeants and Lieutenants regularly assigned to perform patrol duties throughout the city are equipped with body-worn cameras. The NYPD body-worn camera program is the largest in the United States with over 24,000 members of the Department equipped with body-worn cameras. The rollout of these cameras was conducted in three phases.¹⁹⁴

Given the fact that the NYPD is already using body-worn cameras and the New York State Police began wearing these devices in 2020, a large segment of New York State's police force is already utilizing this technology and has established specific policies as well as procedures for the use of the same. Therefore, **the Task Force recommends that the current statute, requiring the New York State Police to use cameras, while on patrol, be amended to mandate that the smaller police agencies throughout the remainder of the State implement a similar body-worn camera program.**

5. Discipline

The area that has caused the greatest concern in addressing police misconduct is how officers are held accountable when misconduct is established. The Task Force offers three

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>.

recommendations concerning disciplining officers when misconduct is established: (1) expand access to police disciplinary records through new state laws, and (2) strengthen community oversight’s role in disciplining officers [this recommendation is discussed more fully in Part 4].

The Task Force recommends expanding access to police disciplinary records through New State Laws. It is a common police union–negotiated benefit to have police disciplinary records destroyed after a period of time has passed since the adverse determination imposing discipline on an officer.¹⁹⁵ This deprives an oversight agency of the ability to review the entire police disciplinary history of an officer as it reviews allegations of misconduct. State law should be passed requiring that all police disciplinary records are to be permanently maintained by the police agency.

Additionally, it is a common practice for police officers facing significant sanction for misconduct to resign to avoid the imposition of discipline. These officers gain employment in other agencies who may not be aware of the full scope of any prior misconduct. If these officers engage in future misconduct, the oversight agency has no ability to review the disciplinary history of the subject officer. A possible remedy would be the establishment of a central registry of all police disciplinary records, maintained by the New York State Division of Criminal Justice Services.

Another possible remedy would be a requirement that municipalities make police disciplinary records available online, rather than forcing members of the public to use the Freedom of Information Law to request them. Some departments have charged thousands of dollars for access to disciplinary records; the Manlius Police Department, for example, reportedly asked for \$47,504 when a media organization asked for its complete disciplinary files.¹⁹⁶ Other departments have claimed to be unable to separate disciplinary files from protected personnel files, or argued that requests are too broad. Actions like these have the potential to practically nullify the repeal of Civil Rights Law Section 50-a, and to undermine the community trust produced by full access to police disciplinary records.

Part 4: Recommendations that Provide Additional Accountability in the Criminal Justice System

“Through our criminal justice system,” said the former U.S. Attorney General Loretta Lynch on July 22, 2020 at the New York City Bar Association, “we show what is important to us and who is important to us.” The purpose of the criminal justice system is to dispense justice. Police officers are an integral part of this system—they are the first contact a person has with the system. When a person’s first contact as well as first impression of the system is one of bias, that impression casts a pall across the entire system and diminishes the credibility and integrity

¹⁹⁵ See, e.g., the recent contract between the City of Rochester and the union representing uniformed police officers. A contract provision required disciplinary records related to “command discipline” be destroyed after one year, and further that such discipline “will not be used against the member thereafter.” (Article 20, Section 2, G.) The contract may be found here: <http://rochester.indymedia.org/node/148063>.

¹⁹⁶ Beryl Lipton and Jon Campbell, *New York 50-a repeal: Months later, police find ways to shield disciplinary records*, WBFO (Jan. 11, 2021), <https://news.wbfo.org/post/new-york-50-repeal-months-later-police-find-ways-shield-disciplinary-records>.

of the system to achieve its purpose. Those bearing the brunt of the bias see a system where achieving justice for them is not important as it is for others.

“Majorities of both black and white Americans say black people are treated less fairly than whites in dealing with the police and by the criminal justice system as a whole,” observed a June 2020 Pew Center Research Report. “In a 2019 Center survey, 84% of black adults said that, in dealing with police, blacks are generally treated less fairly than whites; 63% of whites said the same. Similarly, 87% of blacks and 61% of whites said the U.S. criminal justice system treats black people less fairly.”¹⁹⁷

This same system is then responsible for prosecuting police misconduct cases. The perception and too many times the reality is that the law affords credulity to officers and treats the accounts of civilians they have abused with generalized mistrust. Much like the police department itself, the legal system can protect officers who commit acts of misconduct and abuse. The Task Force recommends implementing measures of additional accountability in the criminal justice system through civilian oversight, controls to minimize bias in the District Attorney’s Offices and the Courts, and revisions to the criminal justice process that will strengthen the integrity of the system.

A. Accountability Through Civilian Oversight

To understand the need for civilian review, and the role that civilian oversight entities play in promoting public safety and community trust in police, it is necessary to understand how civilian oversight agencies fit into the larger picture of police accountability and oversight. Over time, multiple mechanisms for police oversight have evolved, including discipline within police departments, processes for state certification of police officers, statutes that allow victims of police misconduct to file civil litigation, criminal investigations and prosecutions of police, oversight by legislative bodies, audits, and special oversight units like the New York Police Department’s Office of the Inspector General. Each mechanism has strengths and weaknesses. Civilian oversight entities are designed to fill in some of the gaps left by these other mechanisms. But legal, political, and practical constraints often prevent them from doing so.

1. Current Mechanism for police oversight

a. Internal Discipline

To begin with, police officers are employees, and as such they are subject to the same sanctions that any employer can impose on employees, including discipline, termination, and counseling. Police departments invariably have internal disciplinary processes by which supervising officers, and ultimately the police chief, can impose these employment-based sanctions. Like any employee, police officers are also subject to supervision, which sometimes involves strategies for preventing misconduct; for example, in some police departments, supervisors perform random audits of body camera footage to look for instances of misconduct (as well as any other behavior that may be worth addressing).

¹⁹⁷ *10 Things We Know about Race and Policing in the US*, Pew Research Center (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/>.

When a police department seeks to impose discipline on an officer, and the officer wishes to contest the discipline, most collective-bargaining agreements in New York State give the officer the choice of which procedure to invoke: they can either follow the procedures of the Civil Service Law, which involve a hearing before a state hearing officer, or they can choose arbitration. The vast majority of officers choose arbitration because it is generally more favorable to the officer.¹⁹⁸

Internal discipline has many limits. Because police supervisors and chiefs are themselves police officers, they may have a pro-police bias. Their worldview is shaped by the same factors that shape the worldview of the officers being disciplined; thus, internal discipline tends not to be effective in addressing cases where widespread police attitudes or practices are in conflict with the values of the community.

In several notable cases, police disciplinary procedures found no wrongdoing in cases where a community consensus later emerged against the conduct in question. For example, the Rochester Police Department’s internal investigation found no wrongdoing in the case of Daniel Prude.¹⁹⁹ Other mechanisms for accountability are often similarly limited in that they too do not reflect the values of the community being policed.

b. Civil Litigation

Another mechanism for police accountability is civil litigation: people who are victimized by police misconduct can file a lawsuit. Civil lawsuits can seek damages (monetary payments) or injunctions (orders that direct police departments to change their practices). Frequently, lawsuits end in settlements, which are agreements negotiated between the police and/or municipality and the person who files the lawsuit. The U.S. Department of Justice can also sue police departments for civil rights violations, and sometimes obtains a “consent decree”—a court order negotiated between the parties to resolve a lawsuit, under which the police agree to specific reforms and the court remains involved in overseeing the implementation of those reforms.

One other important aspect of civil litigation is the discovery process. Plaintiffs are entitled to information relevant to their case, which can in some cases significantly advance the public’s interest in transparency by forcing the disclosure of information that otherwise might have stayed secret.

Civil litigation, although a powerful tool, has significant limits. It only leads to a remedy when there is sufficient evidence that an officer’s misconduct violates specific statutes. But not all misconduct leaves evidence behind. And litigation may be unable to address problems that are apparent only in the aggregate, like over-policing—of communities of color or racial profiling. The litigation process requires significant resources and time. Moreover, legal doctrines like

¹⁹⁸ New York Times Editorial Board, *To Hold Police Accountable, Ax the Arbitrators*, N.Y. Times (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html>.

¹⁹⁹ Sarah Maslin Nir, *Rochester Officers Will Not Be Charged in Killing of Daniel Prude*, N.Y. Times, <https://www.nytimes.com/2021/02/23/nyregion/daniel-prude-rochester-police.html>.

qualified immunity²⁰⁰ (i.e., frivolous lawsuits are tossed if the officer was acting in good faith) and indemnification²⁰¹ (i.e., if the lawsuit settles or the officer is convicted of wrongdoing, the taxpayers pay out, not the individual officer) protects officers even when evidence of specific legal violations is available.

Decisions to pursue civil litigation are made by individuals who are victims of police misconduct. Some are deterred by the expense, the practical challenges, the unlikelihood of success, or by fear of retaliation. Moreover, civil litigation does not meaningfully engage the community in oversight of policing. It is designed to remedy individual acts of misconduct on a case-by-case basis, and although in unusual cases there may be consent decrees that cause systemic reform (and in some cases fail to effectuate reform²⁰²), litigation is best thought of as an individual remedy for legal violations, not a vehicle for engaging the community in designing a public safety approach that best expresses and serves the community's values.

c. Criminal Prosecutions

Another important tool for police accountability is criminal prosecutions. Some police misconduct is criminal, including assault, unjustified killing, accepting bribes, and so on. From 2005–2014, about 10,000 Americans were killed by police; about 153 officers were charged (about 1.5%), and of those cases, 55% led to convictions, most by guilty pleas.²⁰³ But there are several limits on the use of the criminal justice system as a tool of police accountability. One is simply that it applies only to a narrow range of the most egregious police misconduct, and thus can remedy at best only a small subset of the police actions that undermine community trust.

Another constraint on criminal prosecutions is that they are controlled by prosecutors, who often have close relationships with police, which may bias them against pursuing prosecutions. Federal prosecutors, for example, declined to prosecute in 96% of cases involving alleged crimes by police officers, as opposed to 23% of cases that did not involve police.²⁰⁴ Thus, some

²⁰⁰ Jay Schweikert, *Qualified immunity: A Legal, Practical, and Moral Failure*, Cato Institute (Jan. 29, 2021), <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure>.

²⁰¹ Joanna C. Schwartz, *Police indemnification*, 89 N.Y. Univ. L. Rev. 885 (2014).

²⁰² Kevin Schofield, *It's time to face reality: the consent decree didn't work*, Seattle City Council Insight (June 9, 2020), <https://sccinsight.com/2020/06/08/its-time-to-face-reality-the-consent-decree-didnt-work/>; *Fired Oakland Police Chief, City Councilman Call For End To Federal Oversight Of Department*, CBS San Francisco (Mar. 2, 2020), <https://sanfrancisco.cbslocal.com/2020/03/02/fired-oakland-police-chief-city-councilman-anne-kirkpatrick-noel-gallo-federal-oversight/>.

²⁰³ Tom Jackman and Devlin Barrett, *Charging officers with crimes is still difficult for prosecutors*, Wash. Post (May 30, 2020), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/>; see generally The Henry A. Wallace Police Crime Database, (last accessed on June 1, 2021) <https://policecrime.bgsu.edu/>; and Amelia Thomson-DeVaux, Nathaniel Rakich, & Likhitha Butchireddygar, *Why It's So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 4, 2020), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

²⁰⁴ See *U.S. police escape federal charges in 96 percent of rights cases: newspaper*, Reuters (Mar. 13, 2016), <https://www.reuters.com/article/us-usa-police/u-s-police-escape-federal-charges-in-96-percent-of-rights-cases-newspaper-idUSKCN0WF0KM>.

laws exist to require prosecution by other officials, like the State Attorney General; a 2020 law provides that the Attorney General will prosecute crimes by police, but only those that result in death.²⁰⁵

Even when charges are brought, grand juries may decline to indict, as in the case of Eric Garner. Community members may perceive a decision not to indict as a vindication of the officer's conduct or a failure of the current system. Proceedings often remain secret, which can further undermine community faith in the process.

Finally, as with other mechanisms for police accountability, the criminal prosecution process does not give the community a significant voice in the oversight of police.

d. Decertification

Many professions require some sort of licensure or certification from a state-level entity that is empowered to investigate alleged misconduct or malpractice and take away practitioners' entitlement to practice their profession.²⁰⁶ If a lawyer or doctor engages in malpractice, their clients or patients can file complaints with state oversight entities that have authority over the practitioner's license. No such entity exists for the profession of policing.

New York State does require certification of police officers, but it is limited. To become a police officer, one must complete a training program; the Division of Criminal Justice Services then certifies the officer.²⁰⁷ DCJS maintains a registry of police officers.²⁰⁸ Employers must report officers who leave, resign, are removed, or are removed for cause.²⁰⁹ Employers must also submit a certification that the officer has completed training.²¹⁰ Removal or removal for cause invalidates the training.²¹¹ Officers can be excluded from the registry if they are no longer eligible.²¹²

Although decertification is powerful, in that it prevents officers from seeking employment at a different department, New York's decertification process is significantly limited. No one can file a complaint seeking decertification of a police officer who engages in misconduct, and the state conducts no investigations. DCJS merely maintains a registry.

Even the delicensing process is subject to significant limits, because officers can avoid decertification if they can avoid counting their termination as "for cause." Officers may be able to avoid a termination for cause by resigning before investigations are completed. In such cases, they remain able to work for other police departments.

²⁰⁵ See A.1601c/S.02574-C (2020) (adding Exec. Law § 70-b).

²⁰⁶ Roger L. Goldman *Importance of state law in police reform*, 60 Saint Louis Univ. L. J. 363 (2016).

²⁰⁷ Gen. Mun. Law § 209-q.

²⁰⁸ 9 N.Y.C.R.R. § 6056.1; Exec. Law § 845; Gen. Mun. Law § 209-Q; CPL § 2.30.

²⁰⁹ 9 N.Y.C.R.R. § 6056.4(c).

²¹⁰ 9 N.Y.C.R.R. § 6056.4(d).

²¹¹ 9 N.Y.C.R.R. § 6056.4(d).

²¹² 9 N.Y.C.R.R. § 6056.6.

In Albany, officer Cristofer Kitto shot a man who was trying to rob him while the officer was patronizing a sex worker.²¹³ He resigned from the Albany Police Department and says disciplinary charges were dropped. He is now suing the Albany Police Department for notifying DCJS of his status; he says he was not removed for cause. If successful, he will be eligible for employment elsewhere.

Like other mechanisms, the decertification process does not allow for significant community input. It depends entirely on actions by police departments, which are subject to the limits discussed above.

e. Other Accountability Mechanisms

Finally, other investigative mechanisms exist to ensure police accountability. The New York City Police Department has an Office of the Inspector General, and other jurisdictions have used auditors to investigate racial disparities and other issues. These entities, while they may prompt public conversation, do not generally provide for the community to play a role in overseeing police.

2. Barriers to Civilian Review Success

A number of barriers—structural, legal, and political—serve to prevent civilian oversight agencies in New York from operating as effectively as they could. One such barrier is a lack of true independence as an agency. This means not just a formal separation from the leadership structure of the police department it oversees, but also independence from broader political influence. For decades, New York City’s Civilian Complaint Review Board (CCRB) was housed within the New York Police Department (NYPD) and staffed by NYPD employees.²¹⁴ It was not until 1993 when the agency was formally severed from the NYPD and reconstituted as an independent, entirely civilian agency.²¹⁵ Even with this new structure, however, the mayor retained ultimate control over all appointments to the Board, and New York City mayors have used this control to reject proposed designees from the City Council and to unilaterally designate the CCRB’s chairperson.²¹⁶

The mayor’s control extends to the political sphere as well, limiting the ability of the oversight agency to engage in advocacy with policymakers. In October 2019, the mayor reportedly ordered the CCRB not to appear at a New York Senate committee hearing, at which the agency

²¹³ Brendan J. Lyons, *Ex-Albany officer who fatally shot robber sues to get his credentials back*, Alb. Times Union (Nov. 14, 2020), <https://www.timesunion.com/news/article/Ex-Albany-officer-who-fatally-shot-robber-sues-to-15727616.php?IPID=Times-Union-HP-CP-Spotlight>.

²¹⁴ New York City Civilian Complaint Review Board, *History*, <https://www1.nyc.gov/site/ccrb/about/history.page>.

²¹⁵ *Id.*

²¹⁶ 2019 New York City Charter Revision Commission, Final Report, 50, https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5d83dffbf8b08c5b3087ecc4/1568923645088/Final+Report_8.2.pdf.

chair was scheduled to testify in support of repeal of Civil Rights Law Section 50-a.²¹⁷ The chair subsequently appeared at a separate hearing later that month, but only in his personal capacity.²¹⁸ While a 2019 referendum expanded the CCRB and split appointment authority among other city officials, the mayor and the police commissioner—who is, of course, also chosen by the mayor—still retain control over the majority of the Board’s appointments.²¹⁹ And despite new Charter-mandated funding levels, the mayor retains the ability to set a lower budget for the oversight agency.²²⁰

In terms of their day-to-day operations, civilian oversight agencies also face immense barriers to simply accessing the information they need to conduct reviews or investigations. Police departments regularly do not provide civilian investigators with timely access to evidence, and agencies without subpoena power face limited recourse to compel a reluctant police department to turn over needed records.²²¹ Police unions have intervened to refuse to make individual officers available for meetings with investigators.²²²

Unsurprisingly, this delays the ability of oversight agencies to complete their investigations. In 2020, New York City’s CCRB took 11 months on average to complete an investigation that resulted in a substantiated complaint, with the agency blaming a lack of cooperation from the NYPD as among the reasons slowing down their investigators’ work.²²³ It should be noted that under New York law, investigators generally must commence disciplinary proceedings within 18 months of the alleged misconduct, so delays in investigations can ultimately push these cases beyond the statute of limitations.²²⁴

The inability to review evidence and interview officers have been cited as major factors contributing to the CCRB’s high rates of unsubstantiation, in which investigators are unable to reach any conclusion one way or the other on the underlying merits of a complaint.²²⁵ In the

²¹⁷ Craig McCarthy, et al, *De Blasio Muzzled NYPD, CCRB from Testifying on Planned Repeal of Records Law*, N.Y. Post (Oct. 17, 2019), <https://nypost.com/2019/10/17/de-blasio-muzzled-nypd-ccrb-from-testifying-on-planned-repeal-of-records-law/>.

²¹⁸ Bernadette Hogan and Craig McCarthy, *NYPD, CCRB Testify on Repeal of Law Shielding Cop Records*, N.Y. Post (Oct. 24, 2019), <https://nypost.com/2019/10/24/nypd-ccrb-testify-on-repeal-of-law-shielding-cop-records/>.

²¹⁹ See N.Y.C. Charter § 440.

²²⁰ Nolan Hicks, *De Blasio’s Budget Delays Expansion of NYPD Civilian Complaint Board*, N.Y. Post (June 5, 2020), <https://nypost.com/2020/06/05/de-blasios-budget-delays-expansion-of-nypd-civilian-complaint-board/>.

²²¹ Eric Umansky & Mollie Simon, *The NYPD is Withholding Evidence from Investigations into Police Abuse*, ProPublica (Aug. 17, 2020), <https://www.propublica.org/article/the-nypd-is-withholding-evidence-from-investigations-into-police-abuse>.

²²² Eileen Grench & Reuven Blau, *Police Say They’ll Refuse to Submit to Video Interviews for Misconduct Investigations*, The City (June 11, 2020), <https://www.thecity.nyc/justice/2020/6/11/21288820/police-say-theyll-refuse-to-submit-to-video-interviews-for-ccrb-investigations>.

²²³ David Brand & Rachel Vick, *CCRB Takes Longer to Close Cases as Cops and COVID Hinder Probes, Report Shows*, Queens Daily Eagle (Sept. 22, 2020), <https://queenseagle.com/all/ccrb-cases-take-11-months-to-close-as-cops-and-covid-hinder-probes-mayors-report-shows>.

²²⁴ See Civ. Serv. Law § 75(4).

²²⁵ David Cruz, *Why the Majority of NYPD Misconduct Complaints End Up “Unsubstantiated,” Gothamist* (Aug. 18, 2020), <https://gothamist.com/news/why-the-majority-of-nypd-misconduct-complaints-end-up-unsubstantiated>.

agency's 2019 report, it noted that 60% of complaints were closed without a finding on the merits in cases where investigators did not have access to video footage, while only 26% of complaints where body camera footage was provided yielded such outcomes.²²⁶

Ultimately, the greatest barrier to effective civilian oversight is the fact that these agencies simply are not empowered with any real authority to act on their findings and recommendations, and agencies that have attempted to expand their oversight authority have faced significant opposition. These barriers include questions about the proper scope of the agency's jurisdiction as well as their ability to act on their findings and recommendations. Jurisdictionally, some agencies are only designed to review and assess the sufficiency of police department-led investigations, where there is no real authority for independent action. Others, like the CCRB, have jurisdiction to independently investigate certain categories of misconduct, but face pushback when they seek to assert that authority in new ways. When the CCRB sought to begin investigating officer sexual misconduct under its jurisdiction to review police "abuse of authority," the agency was met with police union litigation successfully challenging its ability to do so without going through a more formal rule-making process.²²⁷ And despite arguments that acts of bias-based profiling should similarly fall under the agency's abuse of authority jurisdiction, the CCRB has never challenged the NYPD's full control over those investigations.²²⁸

Although the CCRB has the authority to prosecute charges and specifications against NYPD officers, it must do so within the NYPD's trial room, owing to a state law—Unconsolidated Law Section 891—that requires police disciplinary proceedings to take place within the agency that has ultimate disciplinary authority.²²⁹ Unlike other agencies, who can and do designate officials at the Office of Administrative Trials and Hearings to preside over misconduct hearings, the NYPD is legally required to control the process. This control makes the CCRB dependent on the NYPD's cooperation in scheduling trials and providing public access in high profile cases; in 2019, it was reported that the CCRB had been ready to begin its prosecution of the officer who killed Eric Garner, but that the NYPD had delayed its scheduling.²³⁰

Perhaps the most important factor, however, is whether the work of civilian oversight agencies actually translates into accountability for officers found to have engaged in misconduct. Here, the main barrier is the fact that disciplinary decision-making generally rests outside the oversight agency itself. In New York City, the NYPD commissioner has exclusive control over

²²⁶ New York City Civilian Complaint Review Board, 2019 Annual Report, 9, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2019CCRB_AnnualReport.pdf.

²²⁷ Sydney Pereira & Josefa Velasquez, *NYPD's Oversight Agency Launches Do-Over on Police Sexual Misconduct Investigations*, Gothamist (Nov. 10, 2020), <https://gothamist.com/news/nypds-oversight-agency-launches-do-over-police-sexual-misconduct-investigations>.

²²⁸ See Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training*, https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf (recommending the CCRB adopt a policy to investigate biased policing allegations under its abuse of authority jurisdiction).

²²⁹ See *Lynch v. Giuliani*, 301 A.D.2d 351, 755 N.Y.S.2d 6 (2003).

²³⁰ Mira Wassef, *Eric Garner's Mother Wants All Officers Charged in Her Son's Death*, Staten Island Advance (July 26, 2018), https://www.silive.com/news/2018/07/eric_garners_mother_wants_all.html.

disciplinary outcomes and unlimited discretion to accept, reject, or modify disciplinary recommendations.²³¹ Low rates of concurrence between the commissioner and the oversight agency have long been an issue, with one recent analysis finding that the commissioner downgraded or outright rejected CCRB recommendations in about 71% of serious misconduct charges over the past twenty years.²³² In Rochester, where concerns about a lack of accountability for police misconduct led voters to approve transferring disciplinary authority to a new Police Accountability Board, reports similarly show patterns of a police chief rejecting disciplinary recommendations from the city's oversight agency.²³³ This transfer of authority, however, was quickly challenged in court by police unions.

State and local laws provide a confusing patchwork of provisions related to police disciplinary authority, collective bargaining, and the degree to which localities can implement new systems. Public employee discipline is generally governed by the Taylor Law and subject to collective bargaining, but that law notably did not displace pre-existing statutory provisions that vested police disciplinary decision-making power in local officials.²³⁴ If a locality had such a law in place, it ostensibly retains much greater control over police discipline, but questions remain as to whether the locality can substantially alter those disciplinary systems without upsetting this balance. New York City has had local control over police discipline since the 1870s, yet the City Council has called on the State Legislature to act in order to allow for the transfer of disciplinary authority outside of the NYPD.²³⁵ Rochester's attempt to make such a change at the local level will likely involve further litigation and perhaps a ruling from the Court of Appeals on the degree to which local governments can legislate on matters of disciplinary authority, but in the meantime, state law offers little practical guidance to communities and policymakers hoping to create or expand truly empowered oversight agencies.

New York must have the civilian oversight agencies necessary to make our state's public safety systems transparent and accountable. To do this, **the Task Force recommends moving away from the "civilian review" model of oversight to a model better characterized as civilian control of police oversight and contemplates both the ability to investigate and impose discipline but also policymaking.** Rochester,²³⁶ Oakland,²³⁷ and what was attempted in

²³¹ See N.Y.C. Charter § 434; N.Y.C. Admin. Code § 14-115.

²³² Ashley Southall, et al, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, N.Y. Times (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html>.

²³³ See Rochester Police Department Professional Standards Section, 2018 Annual Report on Police Complaints, <https://www.cityofrochester.gov/PSSAnnualReports/> (noting that the Rochester Police Chief did not concur with 18 findings of misconduct by the Civilian Review Board and imposing no penalties in two-thirds of these cases).

²³⁴ See *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Emp. Rels. Bd.*, 6 N.Y.3d 563, 573 (2006).

²³⁵ Christopher Robbins & Yasmeen Khan, *City Council Aims to "Reduce the NYPD's Footprint" with Sweeping New Police Reforms*, Gothamist (Jan. 30, 2021), <https://gothamist.com/news/city-council-aims-reduce-nypds-footprint-sweeping-new-police-reforms>.

²³⁶ Charter of the City of Rochester art. XVIII Police Accountability Board, see <https://www.cityofrochester.gov/PAB/> to download the legislation from the right-aligned sidebar.

²³⁷ City of Oakland, Police Commission. Retrieved from <https://www.oaklandca.gov/boards-commissions/police-commission#documents>.

Newark, New Jersey²³⁸ are all examples of communities pushing for *direct* control over the people and institutions that police their neighborhoods (i.e., community control–type models of oversight). This type of model is independent of law enforcement and local politics; it has broad and direct powers to investigate, adjudicate, and discipline both officers and institutions for wrongdoing; it has the power to make policy changes and set community standards, while operating as a model of inspired government transparency.²³⁹ Most importantly, it has an administrative arm and community representation that drive the agency. **The Task Force further recommends that New York State pass legislation and adopt policy, as outlined below, to ensure that these civilian oversight agencies are widespread and fully empowered.**

3. *Give All Communities Control Over Police Discipline By Changing State Law*

As discussed above, existing New York State laws frustrate the ability of communities to implement effective civilian police oversight. A message the Task Force heard repeatedly is that communities who have experienced over-policing, police violence, and racist inequalities do not trust a disciplinary process that gives police final say over discipline. Civilian control of police discipline is a minimum requirement for communities to trust police. Thus, **the Task Force recommends that New York state laws should be amended to allow local municipalities to determine police disciplinary procedures as well as to directly discipline officers in response to civilian complaints that fall within the jurisdiction of the civilian oversight agency.**

New York’s Public Employees’ Fair Employment Act (colloquially known as the “Taylor Law”) was passed in 1967 and provided unions the power to negotiate disciplinary procedures (Civil Service Law Article 14). When given such power, police unions have uniformly created disciplinary frameworks that take control out of the public’s hands.²⁴⁰ As a result, it has become impossible for many New York municipalities to assert direct civilian control over police discipline.²⁴¹

New York civil service laws should be amended to prohibit police unions from negotiating disciplinary powers as part of union negotiations. Furthermore, civil service laws should be modified to allow disciplinary procedures to be devised, and hearings to be conducted, by an independent civilian police oversight agency.²⁴² The oversight agency’s policies and procedures

²³⁸ City of Newark, New Jersey Civilian Complaint Review Board. Retrieved from <https://www.newarknj.gov/departments/ccrb>.

²³⁹ Mir Usman Ali, & Maureen Pirog, *Social accountability and institutional change: The case of citizen oversight of police*, 79 Pub. Admin. Rev. 411, 411–26 (2019), available at <https://doi.org/10.1111/puar.13055>.

²⁴⁰ Catherine L. Fisk, L. Song Richardson, *Police Unions*, 85 Geo. Wash. L. Rev. 712, 740 (2017).

²⁴¹ There is an exception for municipalities that passed local laws asserting local control over police discipline prior to the passage of these statutes.

²⁴² Multiple bills have been introduced to remove police discipline from the collective-bargaining process, including [S.4334](#) (2021–2022 Session), [A.1278](#) (2021–2022), and S.8678 (2019–2020 Legislative Session). Senate Bill S.268 (2021–2022 Legislative Session) would repeal § 891 of the Unconsolidated Laws. Senate Bill S.5252 (2021–2022 Legislative Session) provides final discipline authority over civilian complaints to the civilian complaint review board.

for investigating complaints, providing notice to the police officer of pending discipline, and conducting hearings should provide the officer substantive due process protections. Importantly, police officers should be able to avail themselves of the appeals procedures outlined in Civil Service Law § 76.

4. Require Large Cities to Create Strong, Independent Civilian Oversight Agencies

As civilian oversight of police is an important component of policing, all police agencies in New York State should be subject to oversight by an independent civilian police oversight agency.²⁴³ Larger municipalities with large police agencies are in the best position to create effective civilian oversight agencies. However, smaller communities with police agencies may lack available resources or the political will to implement effective civilian oversight of the police.

Larger municipalities with concomitantly large police agencies should be mandated to create independent civilian oversight agencies.²⁴⁴ These municipalities, and the large police agencies contained therein, have sufficiently large financial resources to adequately fund effective civilian oversight agencies. Furthermore, these agencies often serve diverse communities whose members should be provided the opportunity to contribute to officer oversight, as well as provide feedback to the police agency on the community impact of police policies and procedures.

To ensure that these state-mandated agencies actually change policing, the Task Force recommends that they should have the following set of powers to ensure their strength and independence:

a. Require Agencies to Have Comprehensive Investigatory, Adjudicatory, and Disciplinary Powers

Oversight agencies in these large jurisdictions should have the following minimum, mandatory powers:

(1) The law enforcement agency and the local municipality shall provide to the oversight agency within fifteen (15) days except for all body worn camera video footage, which shall be immediately accessible to the oversight agency, as requested: other video or audio evidence, records of encounters created by uniformed officers, arrest reports, aided cards, digital memo-book entries, radio communications and calls for service, documents and evidence, including

²⁴³ There are existing civilian oversight agencies in New York City, Rochester, Albany, and smaller localities—but they all lack required financial resources, or the powers required to be effective.

²⁴⁴ Defining these as municipalities with police agencies whose geographical jurisdiction encompasses greater than 200,000 residents, or agencies with greater than 250 sworn officers, would include the New York State Police (5,152 sworn officers); sheriff offices in Suffolk County (271), Westchester County (293), Erie County (158), Monroe County (333), Onondaga County (241), Orange County (114), Rockland County (159), Albany County (146), Dutchess County (132), Oneida County (197), Saratoga County (153), and Niagara County (109); the New York City Police Department (36,563), Buffalo Police Department (729), Rochester Police Department (738), Yonkers Police Department (598), Syracuse Police Department (403), and Albany Police Department (296); as well as the Nassau County Police Department (2,357), the Suffolk County Police Department (2,518), and the Westchester County Department of Public Safety (293).

but not limited to personnel files, early warning system databases, all other databases, internal affairs section investigative case files, disciplinary case files, hearing minutes and/or recordings, disciplinary recommendations from the internal affairs section, criminal and civil case files, and all police agency policies, procedures, practices, patrol guides, manuals or its equivalent, and any other documents that pertain to policies, tactics, complaints, or charges against police employees (sworn and unsworn) and their subsequent investigation and adjudication, or other sources of information deemed appropriate by the oversight agency.

(2) Subpoenas may be issued at any time per the discretion of the oversight agency. Such subpoenas may compel the attendance of witnesses, police agency employees (sworn and unsworn) and/or other persons (e.g., medical personnel and health care facilities), and require the production of records and other materials, including all records of the police agency, other persons or other agencies. A copy of any subpoena served upon a police employee shall also be delivered to the chief executive of the police agency. Subpoenas are enforceable pursuant to relevant provisions of Article 23 of the New York Civil Practice Law and Rules. The chief executive of the police agency will promulgate new rules according to the municipality's charter or utilize existing rules regarding discipline and administration to ensure compliance with oversight agency procedure and applicable law.

(3) Have rulemaking authority to implement policies and procedures related to discipline based upon a civilian complaint, including a disciplinary matrix to be used by the agency in imposing discipline. The oversight agency may gather input from different constituencies and decision-makers on the disciplinary matrix, however, the oversight agency determines the final version of the matrix. A disciplinary matrix is a written, consistent, progressive, and transparent schedule or rubric used to determine discipline for misconduct. The disciplinary matrix shall determine a range of disciplinary action options for misconduct to be pursued by the oversight agency.

(4) Investigate allegations of misconduct, conduct fact-finding hearings, and issue direct discipline in accordance with the disciplinary matrix,²⁴⁵ including issuing discipline for failure to cooperate, or making a false statement during an interview, or retaliation against oversight agency volunteers and employees, complainants, or any person involved pursuant to an investigation;²⁴⁶ also, agencies should be able to initiate their own investigations into potential misconduct, because when the public is made aware of an incident of potential police misconduct and the agency is helpless to initiate its own investigation the public loses confidence in the agency;

²⁴⁵ See Appendix B, pp. 88–91 for information on disciplinary matrices as found in Lacker-Ware, B., & Forsyth, T. (2017). *The case for an independent police accountability system: transforming the civilian review process in Rochester, New York*. Rochester, NY: self-published; *see also* Jon M. Shane, *Police employee disciplinary matrix: An emerging concept*, 15 *Police Quarterly* 62, 62–91 (2012), available at <https://doi.org/10.1177/1098611111433026>.

²⁴⁶ Nothing herein should be construed to limit the police agency from conducting an investigation related to potential criminal conduct by the subject officer.

(5) Hire independent counsel or other expert witnesses necessary to investigate and resolve police complaints;

(6) The oversight agency should complete investigations within 90 days. Organizations run by a board should be permitted to delegate authority to decide the outcome of cases to staff rather than conducting reviews of each case. As a condition of employment with the police agency all sworn and unsworn personnel shall fully cooperate with the oversight agency.

b. Require Agencies to Allow Anonymous Complaints

Allowing for complainant anonymity is crucial for four reasons. First, many individuals feel unsafe putting their name on a complaint against police, especially members of marginalized and over-policed communities. Second, anonymity could serve as a whistleblower mechanism for police departments, allowing officers to file complaints about behavior they see and know is wrong. Third, anonymity allows officers' friends and family members the ability to complain about potentially dangerous behavior, which may help to address the high prevalence of domestic violence in policing. Lastly, complaint forms which require a signature under penalty of perjury or other similar procedures discourage people from filing complaints, as they may worry about facing punitive consequences when relying on the evidence of their experience.

c. Require Agencies to Have an Independent and Victim-Centric Complaint Process

Effective civilian police oversight is predicated on a civilian-complaint process that is as accessible as possible for victims of police misconduct. The complaint process should remain independent from police departments in order to prevent a potential victim from being required to re-confront an accused aggressor, or police in general. This would prevent unnecessary traumatic experiences, and further encourage complainants to come forward. Some civilian-oversight agencies employ victim advocates to guide complainants through the complaint process, which should be encouraged. In general, all efforts should be made so that complainants feel safe and at ease through what is an extremely difficult and sometimes time-consuming experience.

d. Require Implementing Governments to Ban Officers from Retaliating Against or Harassing Complainants

The state should uniformly ban all officers from targeting complainants and their friends and family. Although these types of activities would likely be covered under the jurisdiction of a civilian oversight agency, banning them would solidify the state's policy of ensuring an accessible and safe complaint process. The ban should extend to all officers, whether or not they were the subject of a particular person's complaint. Doing so could either trigger an investigation by the civilian oversight agency, the state Attorney General's office, or both. A finding of retaliation should lead to immediate termination and decertification.

e. Require Agencies to Have Rule-Making Powers Over Police Departments

In addition to exercising direct control over investigation of civilian complaints and the imposition of discipline, oversight agencies in larger municipalities should have the power to develop rules and procedures governing the interaction of police officers with the communities they serve.

In addition to the above mandatory powers, civilian oversight agencies ideally would have the following additional powers and responsibilities:

- (1) To assist the police agency in developing policies and procedures.
- (2) To solicit community feedback on proposed policy changes, and advise the police agency on implementation.

f. Require Sufficient Due Process Protections for Subject Officers

Sufficient protections to police officers to ensure that discipline imposed would not be done arbitrarily and without due process would be required. Ideally, the procedures developed to initiate disciplinary proceedings, provide notice to the officer, and conduct hearings would mirror the procedures outlined in Civil Service Law § 75. As police officers would still be protected under Civil Service Law § 76 there would be no need for civilian oversight agencies to develop procedures governing appeals from adverse determinations. Any hearing officer presiding over a hearing pursuant to Civil Service Law § 75 cannot be a current or former member of the police department.

g. Require Agencies to Have Independence From Undue Influence

Additionally, to ensure that the police oversight agency remained in civilian control, and responsive to the needs of the community, the governing body of the oversight agency must be composed of non-police officers, as well as inhabitants representing the diversity of the community served by the police agency or agencies. Members of the governing body must also have sufficient independence from the appointing authority to ensure that they may perform their duties without fear of reprisal. Finally, the agency should have budgetary authority that is based on firm metrics (police officer headcount, with a sliding scale of funding per officer based on department size) fully independent from the standard budgetary process.

Smaller municipalities should be encouraged to create civilian police oversight agencies. However, care should be taken that these agencies are provided the resources necessary to provide effective oversight.

h. Require Minimum Training Standards for Board Members

The state should mandate minimum training requirements for civilian oversight agency board members. Doing so would empower board members to make well-informed decisions on behalf of their community, as well as ensure a consistent process for officers. Training on jurisdiction-specific policies could be created by each agency, with the state requiring inclusion of certain

topics, such as a review of the department’s use of force policy. Board members could also be required to attend a more general policing and police oversight training, either provided by the state, or provided by a nationally recognized civilian oversight organization, such as the National Association for the Civilian Oversight of Law Enforcement (NACOLE). Available funding should be considered by the state to encourage and pay for board members to attend trainings.

i. Study the Creation of Regional or Inter-Municipal Civilian Police Oversight Agencies

As noted above, smaller municipalities lack the resources necessary to implement effective civilian oversight. However, financing a separate civilian oversight agency for each police agency in New York is beyond the financial resources of New York State, and requiring small (or even mid-size) municipalities to fund these agencies may result in the abolishment of the police agencies themselves.²⁴⁷

Thus, New York should study the concept of regionalizing civilian police oversight agencies or creating oversight agencies that are shared between multiple municipalities.²⁴⁸ Creating civilian oversight agencies that oversee multiple police agencies at the county or multiple-county level has several potential advantages. Economies-of-scale would allow ideal staff-to-complaint ratios and reduce the cost of providing oversight. Larger regional agencies would have larger budgets that would allow for greater independence from local municipal governing bodies. This would also result in greater insulation from undue influence from either individual police agencies, or political leaders.

However, regional offices have potential drawbacks. Ideally, oversight agencies would be overseen by inhabitants who reflect the diversity of the community in which the police agency operates. This may be difficult to accomplish in a regional oversight agency that has broad geographic jurisdiction. Additionally, a regional office with broad subject matter jurisdiction would necessarily need greater resources than an agency with limited subject matter jurisdiction (e.g., the NYC CCRB).

²⁴⁷ More than half of New York counties have fewer than 200 sworn officers (full and part time) in the entire county. The following counties have fewer than 200 sworn officers in the county: Allegany (115) ; Cattaraugus (192); Cayuga (111); Chemung (156); Chenango (80); Clinton (97); Columbia (181); Cortland (127); Delaware (96); Essex (44); Franklin (41); Fulton (108); Genesee (69); Greene (148); Hamilton (17); Herkimer (150); Jefferson (171); Lewis (40); Livingston (158); Madison (184); Montgomery (128); Ontario (163); Orleans (78); Otsego (68); Putnam (177); St. Lawrence (151); Schoharie (53); Schuyler (45); Seneca (80); Steuben (153); Sullivan (124); Tioga (68); Warren (120); Washington (147); Wayne (132); Wyoming (83); and Yates (46). There are 71 police agencies in New York with fewer than 10 sworn officers (full and part time).

²⁴⁸ Other professions are overseen by regional oversight agencies. For example, attorneys are overseen by the attorney grievance panels in each judicial department. Physicians are overseen by the Office of Professional Medical Conduct (OPMC); The literature around intergovernmental risk pools for police liability is similar to the proposal briefly outlined in this report; small municipalities pool resources and risk to cover liability and craft intergovernmental service agreements with insurance-like provisions that cover all member municipalities; likewise, a similar police oversight agency with representation from member municipalities supported by state funding could also exist. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 *Harvard L. Rev.* 1539, 1539–1614 (2017); see also Peter C. Young & B.J. Reed, *Government Risk-Financing Pools: An Assessment of Current Practices*, 15 *Pub. Budgeting & Fin.* 96, 96–112 (1995), available at <https://doi.org/10.1111/1540-5850.01034>.

Regional oversight agencies raise questions that may need further study. The following are some of the issues that should be considered.

Subject Matter Jurisdiction. The civilian oversight agencies currently operating in New York have a variety of subject matter jurisdictions. For instance, the New York City Civilian Complaint Review Board (NYC CCRB) handles complaints that allege the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language.²⁴⁹ The jurisdiction of the Rochester Police Accountability Board (PAB) is much broader, allowing it to “investigate any and all conduct, acts, or omissions by any RPD officer” regardless of whether it is the subject of a filed complaint.²⁵⁰ The jurisdiction of these agencies were defined by legislative action influenced by community input as well as budgetary factors.

In addition to investigation and disciplinary authority (such as the Rochester PAB) or disciplinary recommendation (such as the NYC CCRB), both the PAB and NYC CCRB have the authority to review and recommend policy.

A regional oversight body overseeing multiple police agencies would need to balance the breadth of the agency’s subject matter jurisdiction against the resources available to accomplish its mission.

Geographic Jurisdiction. Similarly, the geographic boundaries of a regional oversight agency would need to be defined. Although larger geographic areas encompassing many smaller police agencies would result in efficiencies that would reduce the financial resources necessary to provide civilian oversight, there are drawbacks as well. Larger areas would impose possible hardships on witnesses should they be required to travel long distances to participate in hearings, potentially disincentivizing witnesses from participating.²⁵¹ Additionally, staffing the governing body of the agency with civilians that adequately reflect the diversity of the various communities served by the regional agency may be a challenge.

Policymaking Powers. Whether a regional civilian oversight agency should be vested with rule-making authority would need to be determined.

j. *Exempt Local Governments from Referendum Requirements*

The state should specifically grant local legislative bodies the power to transfer disciplinary, investigative, and policymaking authority to a civilian oversight agency without the referendum requirements in Municipal Home Rule Law. Clarifying this point would make it easier for

²⁴⁹ <https://www1.nyc.gov/site/ccrb/complaints/complaints.page>.

²⁵⁰ *Police Accountability Board: Establishment and Jurisdiction*, Charter of the City of Rochester, Article XVII, § 18-3, available at <https://ecode360.com/35278812#35278831>.

²⁵¹ This will likely impact civilian witnesses only as police witnesses (or the subject police officer) will usually be compensated for attending disciplinary proceedings.

communities to equip civilian oversight agencies with the requisite powers to ensure their success.

5. *Provide State Funding to Support & Incentivize Strong Civilian Review Boards*

Most agencies fail, in part, because they lack sufficient financial and staffing resources to do their jobs. Many smaller jurisdictions may not have an effective agency because of elected officials' budgetary concerns. **The Task Force recommends that New York State should promulgate legislation providing (1) for the necessary funding to municipalities that create agencies empowered with the abilities, protections, and tools; and (2) supplementing (and not supplanting) funding for existing, empowered agencies.** Funding should be allocated to existing police oversight agencies, or new agencies, with funding being apportioned each year on a per-officer-in-jurisdiction basis (with the jurisdiction being at either the municipal or regional level). Any direct state funding could be tiered to ensure that jurisdictions that gave agencies more power received more money (for example, "investigate only" agencies would receive \$1,000 per officer while "enforce discipline" agencies would receive \$3,000 per officer). Relatively small amounts of funding could dramatically change civilian review.²⁵²

New York State must commit sufficient resources to enhance existing independent civilian oversight agencies, and incentivize the creation of new oversight agencies in communities that lack effective civilian oversight. However, the costs of implementing civilian oversight of police agencies should also be borne by the municipality (or the police agency) as a necessary cost of providing police services.

Each municipality with a police agency could be assessed a yearly per officer fee in an amount determined by the state.²⁵³ The size of the fee to be imposed should take into account the total cost of providing the needed resources to support civilian police oversight agencies in New York State. Additionally, New York State should commit state funding to supplement the available funds to ensure that there are sufficient resources available for effective civilian oversight.

The fund would provide direct financial support to civilian police oversight agencies that currently exist so that they can meet the minimum standards outlined above, and such funds should supplement, and not supplant, existing funding provided by municipalities currently funding civilian police oversight agencies.²⁵⁴

²⁵² For example, if Rochester received \$5 million annually from the state fund, it would see its oversight staff increase from 3 people to 50. It would cost the state \$20 million to give every local jurisdiction outside of New York City (and the state police) \$1,000 per officer in state oversight funding.

²⁵³ In 2019 there were over 63,360 sworn full-time officers and 3,015 sworn part-time officers in New York State (some police agencies failed to report to the Division of Criminal Justice Services the number of officers in the agency). See *Law Enforcement Personnel in 2019*, N.Y. State Div. of Crim. Justice Servs., <https://www.criminaljustice.ny.gov/crimnet/ojsa/2019-le-personnel.pdf>.

²⁵⁴ As an example, if the fee imposed were \$500 per sworn officer (and \$250 for each part-time officer), this fund would generate almost \$32,000,000 for civilian police oversight agencies in New York State each year.

Funding should also be used to provide financial support for municipalities to create new civilian oversight agencies, provided those agencies meet minimum standards designed to ensure effective civilian oversight.

B. Accountability Measures in District Attorney’s Offices, Attorney General’s Office, Public Defenders

The Task Force recognizes that police misconduct does not occur in a vacuum. Further, acts of police brutality against unarmed civilians of color have been thoroughly documented in New York and beyond, well before the tragic killing of Mr. Floyd in 2020. Judges, jurors, prosecutors, and criminal defense attorneys play integral roles in the administration of justice in New York State’s criminal court system and uphold the rule of law when this happens.

Prosecutors serve as “an administrator of justice, a zealous advocate, and an officer of the court. . . . The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”²⁵⁵

When courts fail to hold members of law enforcement fully appropriately accountable for known instances of misconduct, involving racial profiling, unlawful searches and seizures, and/or excessive force during police-civilian encounters, this not only serves to undermine the sacred trust that people have in our government, but also creates a “partnership [or an alliance] in official lawlessness.”²⁵⁶

1. Provide Implicit Bias Training (IBT) to all of its employees, who hold positions in the Offices of the Attorney General (hereinafter “AG”), Inspector General (hereinafter “IG”), County District Attorney (hereinafter “DA” or “CDA”) and County Public Defender (hereinafter “PD” or “CPD”) in a consistent and uniform manner

These offices comprise thousands of employees. They have a responsibility to promote an awareness of the existence of race-based bias within their workforces and should include mandatory implicit bias training, tailored to root out this insidious proclivity.

The governor has used his power in the past to issue an Executive Order to mandate training of New York State employees as follows:

Executive Order No. 19, issued by Governor Elliot Spitzer on October 22, 2007, required “[e]ach state agency, in formulating its Domestic Violence and the Workplace policy, shall give

²⁵⁵ See *Criminal Justice Standards: Prosecution Function (Fourth Ed.)*, Am. Bar Ass’n Crim. Justice Section (2017), available at https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

²⁵⁶ See *Herring v. U.S.*, 555 U.S. 135, 152 (2009), citing *U.S. v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

due regard to the importance of increasing awareness of domestic violence and informing employees of available resources for assistance; ensuring that personnel policies and procedures are fair to domestic violence victims and responsive to their needs; developing workplace safety response plans; complying with State and federal law including restrictions of possession of firearms by a person convicted of a domestic violence related crime or subject to an order of protection; encouraging and promoting domestic violence education *and training for employees*; and holding accountable employees who misuse state resources or authority or violate their job duties in committing an act of domestic violence.” (emphasis added)

Currently, employees of the State of New York are required to have mandatory training for sexual harassment, domestic violence prevention, among other topics. Hence, IBT should be readily incorporated into this requirement by executive action.

The Legislature should declare a public policy against systemic racism in the UCS of New York State and thereby acknowledge the influence of impermissible bias in criminal proceedings. By working in partnership with the Executive Branch, the Legislature must then allocate necessary funding for annual IBT of the employees of the aforesaid offices in order to combat this institutional ill.

a. **Suggested Content of Implicit Bias Training for Prosecutors and Consultation with Experts**

The Task Force found it instructive to conduct a review of the Vera Institute (hereinafter “Vera”) study of the New York County District Attorney’s Office (hereinafter “DANY”) performed in 2012. This review provides a summary of potential content of implicit bias training for prosecutors.

The following synopsis includes an examination of all three constituent parts of the Vera study of DANY, a brief discussion of the circumstances that precipitated this study, and various reform measures adopted by DANY upon its conclusion. This synopsis is not intended to be a comprehensive examination of the entire study but rather those aspects that pertain to training, more specifically, implicit bias training.

This synopsis also relies on information provided to Task Force member Nigel Farinha by several executives in DANY who were instrumental to the implementation and ultimate success of this study, including Chief Assistant District Attorney Nitin Savur and First Deputy Assistant District Attorney Audrey Moore.

b. **Synopsis**

A digest of the racial disparity that Vera found in DANY records:

1. No discernible racial bias found in the initial screening of cases.
2. Notable racial disparity found at arraignment—with African-American and Latinx persons are more likely to be held on bail.

3. Notable racial disparity in plea offers—with African-American and Latinx persons more likely to receive a less favorable offer.
4. Notable racial disparity in incarceration rates. African-American persons are more likely to receive more significant prison sentences.

Critical takeaways pertaining to the above disparities:

1. Vera found almost no identifiable racial disparity in the initial screening of cases during the intake process (known as ECAB). Initially, this would seem like good news, however DANY soon realized that this was not cause for celebration. It concluded that there was no discernable racial disparity in ECAB because essentially DANY was taking *almost all* cases that the NYPD brought to them. In other words, there was no disparate impact at the case assessment stage because DANY removed themselves, essentially, from any discretion in the intake process. This would ultimately prove problematic down the road for several reasons, most significantly in connection with cases that were ultimately dismissed when a disparate impact emerged in cases which arguably should not have been prosecuted in the first place.
2. At arraignment (the first opportunity for DANY to exercise discretion), we begin to see racial disparities occurring. Controlling for such factors as prior criminal history, prior warrant history, nature of the offense, etc., people of color were more likely to be held on bail than white defendants.
3. Ultimately, people of color were more likely to receive less favorable plea bargains, even though African-Americans were more likely to have their cases ultimately dismissed. DANY explained that what might seem like an obvious contradiction, wasn't. If you recall in paragraph one we spoke about DANY accepting all cases, with no instructions on how to be more discerning. So, as these cases progressed and the merits became more apparent, more of the cases involving African-Americans were dismissed. A deeper dive into those matters reveal they probably shouldn't have been prosecuted in the first place. As for the ultimate plea offers on the more viable cases that weren't dismissed, the disparate impact on certain races was clear.
4. And finally, the insistence on longer prison time, and incarceration generally, for African-Americans was also undeniable, across the life of all cases.

c. **Caveats**

There were some limitations to this study. For example, attempts to compare only similarly situated defendants across racial lines were made, however, Vera's lack of institutional knowledge left some gaps. For Vera, comparing white defendants with a bench warrant history to Black defendants with a bench warrant history during their bail analysis made perfect sense, however a defendant with ten prior bench warrants is far more likely to be held than a defendant with just one prior. Criminal law practitioners would easily appreciate that fact. Vera did not control for that. Also, not much attention was paid to socioeconomic status, skin coloring, use of a translator, country of origin, obvious drug use, homelessness, and other factors that could impact decisions by prosecutors and judges. This omission was not because Vera thought these factors irrelevant, but because DANY didn't maintain these records at that time. Also, at times,

factors other than race were more determinative of the ultimate outcome (for example, if someone had a private versus a court appointed attorney, they were far more likely to be released on bail) but those extrinsic factors did not negate the significant role race played in the ways described in this synopsis.

d. **Recommended Changes With Respect to Training**

1. Implicit bias training is not always just about race. Sometimes effective training measures address procedural justice initiatives and changing seemingly race neutral practices that have indirect and unfair impact on certain communities. As stated previously, DANY’s “blind” screening process rarely involved racial identification. Nevertheless, DANY was able to identify a racially disparate impact as a result of unnecessary prosecutions. For example, it was revealed that too many misdemeanor “fare beat” subway cases were having a negative racial impact, giving young minorities a criminal record. Young people of color were being introduced to the “system,” which in the long term caused loss of employment, public housing, and educational opportunities. DANY ultimately determined that the harm they were causing to these communities did not justify these prosecutions, so they stopped them.
2. Implicit Bias Training needs to be continuous and ongoing. Static changes or “one off lectures” were far less meaningful, especially with experienced lawyers who were used to doing things a certain way.
3. Lectures were far more productive when accompanied or followed by interactive “break-out” discussion groups—either as part of the same lecture or in a follow up session. The nature of implicit bias is that people are unaware of it. And so, through interaction, it becomes easier to tease out root causes and identify blind spots.
4. DANY concluded that training sessions provided by persons with a real understanding of criminal law (former ADAs, judges or defense attorneys) were better received than generalized implicit bias training, applicable to all professions. Criminal justice has nuances and unique concerns. It is far too easy for some to dismiss the entire training if it is not tailored specifically to prosecution.
5. Implicit bias training should not be a substitute for other race sensitivity training. There are still those in law enforcement who earnestly believe racial characteristics can be a strong indicator of particular criminal activity, and racially profile as a consequence. Law enforcement needs to be disabused of the notion that racial assumptions have investigatory value, and to fully understand the harm these practices cause to communities of color. Prosecutors must take the lead in discouraging police officers from relying on such assumptions when presenting cases for prosecution.
6. Finally, any implicit bias training must be accompanied by structural practice changes expressly outlined by leadership. Actual rules and regulations act as guardrails against pursuing certain practices or procedures, which may seem race-neutral on the surface, but produce racially disparate results.

Example: The practice of establishing certain prerequisites for receiving a particular “non-incarceratory” or “ATI” sentence (like completing school, having employment, avoiding certain locations) may seem perfectly reasonable on its face, however it is important to look at individual circumstances before adopting a precondition. Prosecutors must appreciate that certain persons with different socioeconomic backgrounds might have a harder time meeting those requirements.

e. **Conclusion**

The Vera report confirms that any real change to the culture, practice and philosophy of any District Attorney’s office must first begin with implicit bias training. That isn’t to say that diversity recruitment and retention strategies won’t have a profound impact on the office environment, or that implementing meaningful accountability standards within those offices won’t encourage better behavior. They will. But training is the first step. That training must begin with senior leadership. And this training should be ongoing. Finally, this training should be paired with structural changes, practice tweaks, checklists, rules, and courtroom mandates that will reinforce its meaning and purpose.

While this review focused on key aspects of IBT for prosecutors, the Task Force recognizes that criminal defense attorneys are not immune from race-based bias during the course of their representation of clients. IBT should be completed on an annual basis as a requirement for handling indigent defense assignment. As such, institutional providers of indigent criminal defense representation and assigned counsel pursuant to 18-B of the County Law should be included in this mandatory training. ILS should also be responsible for administering such training to Attorneys, investigators and support staff that provide legal representation through employment at the Legal Aid Society or assignment pursuant to 18-B of the County Law in accordance with any executive orders issued by the governor mandating such training.

Based on our examination of some of the research done, as described herein, the Task Force recommends that experts, such as researchers from the Vera Institute, Cornell Law Study and/or Jennifer Lynn Eberhardt of Stanford University, who served as a member of the Federal Monitor Team of the New York City Police Department Federal Stop and Frisk Litigation, should be consulted to determine the appropriate composition of such IBT for the various positions, such as attorneys, investigators, paralegals, and other administrative staff, within the offices of the AG, IG, CDA and CPD, situated throughout New York State.

2. Foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner

The Task Force finds that the Executive Branch of New York State’s government is similarly situated as the Judicial Branch in terms of its status as a public employer. It shares the exact obligations to promote diversity in hiring, recruitment, promotion and retention of personnel in the offices of the AG, IG and County District Attorneys and Public Defenders throughout the State. Consequently, the New York State Legislature should declare a public policy against systemic racism and acknowledge that the lack of diversity in the composition of the workforce within the Offices of the AG, IG, CDA and CPD is a fundamental contributing factor to this

institutional ill. It must then allocate necessary funding for initiatives for recruitment and retention of personnel from racial and ethnic minority groups as well as other diverse backgrounds, similar to the framework set forth under Article 15-A of the Executive Law. If not already established, an ODI should be formed within each of these Offices (including ILS), with similar authority granted to it, as contemplated under Executive Law § 311 (Division of Minority and Women’s Business Development). The ODI should be allocated appropriate funding to implement protocols for uniform hiring, recruitment and promotions throughout the State, along with being tasked with oversight of the outreach undertaken to achieve any annual goals set to achieve increased diversity of personnel to ensure fairness and transparency in these decisions. Annual reports should be submitted to the governor to account for the efforts that have been made to augment the State’s workforce to reflect the diversity of the population, where these Offices are located throughout the state. The governor should then be tasked with providing updates about the State’s progress here in his or her annual State of the State address. Lastly, Article IV of the Civil Service Law, along with any concomitant regulations, should be amended as appropriate.

C. Accountability Measures in the Courts

The Task Force sought to carefully examine the role that New York State’s Unified Court System (“UCS”) often plays in criminal proceedings, in response to known instances of police misconduct, in order to advocate appropriately for necessary reforms. The influence from key stakeholders in the state’s criminal justice system, such as prosecutors and their counterparts, upon an assignment of defense counsel, was also evaluated.

As described on the website of the United States Supreme Court, “[it is] the final arbiter of the law [and], the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.” The Courts of New York are entrusted to serve and function in a similar manner on behalf of the residents and citizens of the State in preserving the fundamental rights enshrined both in the federal and its state Constitutions. However, the historical record of the United States State Supreme Court is replete with well-reasoned decisional authority that knowingly violated the Constitutional rights of Black or African Americans as a result of race-based chattel slavery, well after it was abolished in 1865.²⁵⁷

When Courts fail to hold members of law enforcement fully appropriately accountable for known instances of misconduct, involving racial profiling, unlawful searches and seizures, and/or excessive force during police-civilian encounters, this not only serves to undermine the sacred trust that people have in our government, but also creates a “partnership [or an alliance] in “official lawlessness.”

²⁵⁷ See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of a statute requiring that “all railway companies carrying passengers in their coaches in [Louisiana], shall provide equal but separate accommodations for the white, and colored races.”); see also *Cumming v. Board of Ed. of Richmond County, State of Georgia*, 175 U.S. 528 (1899) (upholding the Georgia’s Constitution clause permitting “separate schools shall be provided for the white and colored races.”); see also *Swain v. Alabama*, 380 U.S. 202 (1965) (upholding the State of Alabama’s use of peremptory challenges by its Prosecutors to the exclusion of all black prospective jurors from the venire).

The Courts of New York State have vast power and a heightened responsibility to confront and end known race-based discriminatory patterns and practices, whether by local custom, agreement or under law within its workforce and criminal proceedings, which often involves police misconduct. Moreover, given the backdrop of the vast historical record of lawful racial discrimination in New York State from its formation until the Civil Rights Movements of the 1950s and 1960s, a mere 60 years ago, it is long overdue to acknowledge formally the impermissible influence of systemic racism in criminal proceedings in order to finally dismantle it.

Understandably, this begs the following question: **What is “Systemic?”**

The U.S. Equal Employment Opportunity Commission (hereinafter the “EEOC”), which is the governmental agency that is “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information, has expressly identified “systemic discrimination” on its website as follows:²⁵⁸

The EEOC defines systemic cases as “pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location.” “Systemic” has also been defined to mean “bias that is built into systems, originating in the way work is organized” and “refers to structures that shape the work environment or employment prospects differently for different types or workers.” “Systemic” also refers to “. . . patterns of behavior that develop within organizations that disadvantage certain employees and become harmful to productivity.” The purpose behind pursuing systemic enforcement is to dismantle the pattern, practice or policy that results in or facilitates decisions that are discriminatory. While systemic discrimination can affect significant numbers of employees or applicants, it can also impact small numbers as well.²⁵⁹

Hence, it is beyond appropriate to acknowledge the existence of lingering effects of past practices, patterns and/or policies, stemming from racial bias in the makeup of the personnel of the New York State Court at the time of its inception, which have persisted, in spite of landmark judicial decisions and legislation that have sought to prevent state actors from lawfully violating the federal and State Constitutions. Furthermore, it is fitting to recognize that impermissible bias has been built within the structure of the Courts of the State to such a degree that it can only aptly be termed “systemic.” Therefore, as determined by the EEOC, a “systemic enforcement” approach to eradicate the infrastructure, based upon racial bias in New York State’s Courts, is required.

In order to identify viable solutions to this extensive societal problem, in crafting the recommendations contained herein, the Task Force examined and consulted with a variety of sources, such as the Report of the Special Adviser on Equal Justice in New York State Courts

²⁵⁸ <https://www.eeoc.gov/overview>.

²⁵⁹ <https://www.eeoc.gov/systemic-enforcement-eeoc> (internal quotations and citations omitted).

(hereinafter “the Special Adviser’s Report” and the Report to the New York State Court’s Commission on Equal Justice to the Courts, authored by the Judicial Friends Association, Inc. (hereinafter “the Judges Report”). Our review of these reports and other research materials will be discussed more fully below. Thus, the Task Force sought to identify the most effective means of establishing root and branch reforms, as a matter of public policy and law, in New York State’s criminal justice system to ensure that it finally actualizes and embodies the truth that we are all created equal under law at every stage of a criminal proceeding.

The Task Force recommends that the UCS (1) take actions to increase diversity in court personnel per the recommendations from the Report to the New York State Court’s Commission on Equal Justice to the Courts, authored by the Judicial Friends Association, Inc. (“the Judges Report”) and (2) provide implicit bias instructions.

1. Take Actions to Increase Diversity in Court Personnel

The Courts should foster diversity in recruitment, hiring, promotion and retention of personnel therein in a transparent, consistent and uniform manner. On the career section of the UCS’s website, it prominently acknowledges that “[i]t is the policy of the UCS to ensure equal employment opportunity for all employees and applicants for employment, without regard to race, color, national origin, religion, creed, sex (including freedom from sexual harassment), sexual orientation, age, marital status, disability, or, in certain circumstances, prior criminal record.” However, a closer examination of the actual racial makeup of the personnel of UCS paints a different picture, which calls into question the efficacy of this policy. In the report of the Special Adviser, a rather comprehensive breakdown of the demographic information of the judges serving throughout the State of New York was provided as follows:

Today, judges of color are still underrepresented compared to the populations the courts serve. This is true both statewide and in New York City. New York City has a population that is approximately 31.7% white, 24.2% Black, 26.3% Latinx, and 14.1% Asian. However, the judiciary in New York City courts is 58.1% white, 21.5% Black, 12.4% Latinx, and 6.3% Asian. It is well known that counties upstate are, on the whole, less diverse than New York City . . .

However, across all Judicial Districts, the upstate judiciary is even less diverse than the population. In the Fourth, Fifth and Sixth Judicial Districts in the northernmost parts and center of the state, the population is over 80% white. However, the judiciary is well over 90% white. In the easternmost [sic] parts of the state, the Seventh and Eighth Judicial Districts are more diverse because they contain the cities of Rochester, Buffalo, and Syracuse. These districts are around 80% white, but white judges are about 86% and 88%, respectively, of the judiciary. Even in the Third, Ninth, and Tenth Judicial Districts, the more diverse jurisdictions in the southern part of the state, non-white judges are underrepresented. The Third Judicial District is around 10% Black, but less than 5% of its judiciary is Black; the Latinx community accounts for 8.3% of the population, but only 1.6% of the judges, and there are no Asian judges in the Third District. The Ninth Judicial District is over 40% non-white, but less than

20% of its judges are of color. The Ninth District is over 20% Latinx, but has less than 4% Latinx judges, and there are no Asian judges in this District. The Tenth Judicial District on Long Island is nearly 40% non-white, but over 85% of its judges are white. In the Tenth District, the Latinx and Asian communities are the most underrepresented on the bench.

With respect to non-judicial staff within the UCS, similar concerns about the lack of diversity in this class of personnel were specifically highlighted in the Judges Report. A chart of the number of Black employees holding non-judicial positions from 2015 to 2020 was included as an appendix (“M”) in the report and has been included herein as follows:

**UNIFIED COURT SYSTEM WORKFORCE DIVERSITY
NON-JUDICIAL BLACK EMPLOYEES
2015–2020**

TITLE	TOTAL EMPLOYEES	# BLACK	%
2015			
Professional	3919	482	12.7
Technicians	208	8	4.1
Admin Support	6534	1302	20.0
Skilled Crafts	1	0	0
2016			
Professional	3862	458	12.4
Technicians	236	16	7.4
Admin Support	6581	1326	20.3
Skilled Crafts	1	0	0
2017			
Professional	3917	460	12.4
Technicians	247	17	7.4
Admin Support	6510	1324	20.5
Skilled Crafts	1	0	0
2018			
Professional	3896	421	11.9
Technicians	282	17	7.3
Admin Support	6505	1283	20
Skilled Crafts	1	0	0

2019

Professional	3913	416	11.9
Technicians	282	17	7.6
Admin Services	6590	1369	20.4
Skilled Crafts	1	0	0

2020

Professional	3927	409	12.1
Technicians	280	17	7.6
Admin Support	6477	1285	20.3

In order to address the lack of diversity in both judicial and non-judicial positions held within the UCS, the Judges Report contained the following recommendations:

1. It is imperative that the court system identifies the underlying reasons for the low rate of diversity with respect to judicial and non-judicial supervisory positions, as well as for non-judicial positions with higher Pay Grades;
2. OCA must take affirmative steps to train Black employees to hold such positions with a transparent grooming process;
3. Post openings and encourage candidates of color to apply for such positions;
4. Have a transparent hiring and selection process; and
5. Provide institutional support once these employees obtain such positions.

The Task Force supports these recommendations, but finds that additional steps must be taken as a matter of public policy and law in order to root out longstanding patterns of racial discrimination in the hiring and retention process of personnel within the UCS. Thus, once again it is has determined that it is necessary for the New York State Legislature to declare a public policy against systemic racism in New York State Supreme, County and local courts with jurisdiction over criminal matters and thereby acknowledge that the lack of diversity in the composition of the workforce within the UCS, is a fundamental contributing factor to this institutional ill. It must then allocate necessary funding for initiatives for recruitment and retention of personnel from racial and ethnic minority groups as well as other diverse backgrounds, similar to the framework set forth under Article 15-A of the Executive Law.

Article 15-A of the Executive Law, entitled, "Participation by Minority Group Members and Women with Respect to State Contracts," was enacted in 1988 in recognition that the State of New York had an affirmative duty to promote the hiring of minority and women contractors for

the purposes of procuring goods and services on behalf of its agencies.²⁶⁰ The legislative findings and declaration of the statute states the following:

It is hereby found and declared that it has been and remains the policy of the state of New York to promote equal opportunity in employment for all persons, without discrimination on account of race, creed, color, national origin, sex, age, disability or marital status, to promote equality of economic opportunity for minority group members and women, and business enterprises owned by them, and to eradicate through effective programs the barriers that have unreasonably impaired access by minority and women-owned business enterprises to state contracting opportunities.

For the purpose of addressing these findings, therefore, it is necessary and proper that article fifteen-A of the executive law, concerning participation by minority group members and women with respect to state contracts, be enacted.²⁶¹

The statutory framework of Article 15-A provides for the formation of an Office of Minority and Women Business Development by the governor with the appointment of a Director to oversee the same.²⁶² One of the primary responsibilities of the Director is “to encourage and assist contracting agencies in their efforts to increase participation by minority and women-owned business enterprises on state contracts and subcontracts so as to facilitate the award of a fair share of such contracts to them.”²⁶³ Furthermore, the Director is charged with submitting an annual report to the governor and the Legislature regarding “the level of minority and women-owned business enterprises participating in each agency's contracts for goods and services and on activities of the office and effort by each contracting agency to promote employment of minority group members and women, and to promote and increase participation by certified businesses with respect to state contracts and subcontracts so as to facilitate the award of a fair share of state contracts to such businesses.”²⁶⁴

A duty is imposed on all State agencies to promote equal opportunities for minority and women business enterprises in the procurement context by requiring:

all state contracts and all documents soliciting bids or proposals for state contracts shall contain or make reference to the following provisions:

(a) The contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. For purposes of this article

²⁶⁰ See 1988 N.Y. Sess. Law Serv. 261.

²⁶¹ *Id.*

²⁶² *Id.* See also Executive Law § 311 (Division of minority and women's business development).

²⁶³ *Id.*

²⁶⁴ *Id.*

affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.²⁶⁵

Additionally, the Director is tasked with promulgating regulatory standards for State contracting agencies to adhere to “which [set] forth measures and procedures to require all contracting agencies, where practicable, feasible and appropriate, to assess the diversity practices of contractors submitting bids or proposals in connection with the award of a state contract. Such rules and regulations shall take into account: the nature of the labor, services, supplies, equipment or materials being procured by the state agency; the method of procurement required to be used by a state agency to award the contract and minority and women-owned business utilization plans required to be submitted . . . and such other factors as the director deems appropriate or necessary to promote the award of state contracts to contractors having sound diversity practices.”²⁶⁶

Lastly, accountability for compliance with the dictates of the statute are ensured by mandating that “[each contracting agency shall be responsible for monitoring state contracts under its jurisdiction, and recommending matters to the office respecting non-compliance with the provisions of this article so that the office may take such action as is appropriate to ensure compliance with the provisions of this article, the rules and regulations of the director issued hereunder and the contractual provisions required pursuant to this article. All contracting agencies shall comply with the rules and regulations of the office and are directed to cooperate with the office and to furnish to the office such information and assistance as may be required in the performance of its functions under this article.”²⁶⁷

The Task Force finds that this legislation is useful and instructive in tailoring commensurate statutes to promote increased participation by racial and ethnic minorities for employment and promotional opportunities within the UCS. This statute was enacted in recognition that the State has an obligation to diversify the allocation of awards of contracting opportunities to minority and women businesses. This not only contemplated the need to recruit and hire individuals and/or organizations with diverse backgrounds to perform services and/or provide goods, but to create uniform protocols for this purpose. Thus, it provides a viable framework for implementing standards for the hiring and recruitment of personnel throughout the judicial districts of the UCS with diversity in mind. **Article 15-A of the Executive Law also provides insight into crafting a law that ensures greater accountability for such efforts made by the decision makers of the UCS to identify, recruit and promote qualified minority candidates for positions therein. The Task Force recommends that such legislation be enacted as soon as it is practicable.** It further recommends that the Office of Diversity and Inclusion (“ODI”) within the UCS should be granted similar authority as the Division of Minority and Women's Business development, formerly known as Office of Minority and Women Business Development. ODI should be allocated appropriate funding to implement protocols for uniform hiring, recruitment and promotions throughout the judicial districts of the UCS and tasked with

²⁶⁵ See Executive Law § 312 (Equal employment opportunities for minority group members and women).

²⁶⁶ See Executive Law § 313-a (Diversity practices of state contractors).

²⁶⁷ See Executive Law § 315 (Responsibilities of contracting agencies).

oversight of the outreach undertaken to achieve any annual goals set to achieve increased diversity of personnel to ensure fairness and transparency in these decisions. Annual reports should be submitted to the Chief Judge by the administrative judges of each county or Judicial District to account for the efforts that have been made to augment the UCS's workforce to reflect the diversity of the population within each County or District. The Chief Judge should, in turn, provide status updates concerning any progress being made during the annual State of the Judiciary address. Lastly, both Article 7-a of the Judiciary Law and Article IV of the Civil Service Law, along with any concomitant regulations, should be amended, as appropriate.

In relation to our work to recommend necessary improvement in the recruitment and retention protocols in New York State's Court system to ensure greater diversity of personnel of color, the Task Force met with members of the Tribune Society, Inc. of the Court in the State of New York on March 9, 2021. Founded in 1968 by a group of peace officers, the Tribune Society is a fraternal organization of African Americans and other minority judicial and non-judicial court personnel. Its chief objectives are to consistently improve the administration of justice and ensure equal opportunity for all who work in or whom the New York Unified Court System serves. This organization has contributed to both the Judges' Report of the Judicial Friends and Special Advisor's Report concerning its recommendations related to this issue.

Having worked within the UCS for several decades, these members graciously agreed to address the Task Force to share their experiences, along with others, concerning the institutional barriers that they have encountered in advancing their careers within the courts. They described encountering a "good old boy network" as it related to pursuing promotions. Oftentimes positions were discreetly filled prior to any announcements for vacancies being made, based on existing relationships with longstanding employees who are on the verge of retiring. As the Chief Clerk and Administrative Judge of the Supreme Court enjoy a great deal of discretion in personnel matters, employees' duties are typically reassigned with limited transparency and accountability for these decisions.

Additionally, they have observed a process of "grooming" or training of less experienced white employees for positions, which occurs before they are filled. This is as a consequence of some members having direct involvement in providing information technology support to these employees when their offices are reassigned or their access to certain systems is granted before they are selected to be interviewed, among other interested candidates for the position. The interview and hiring process thereby seems rigged once that individual gets the position over other qualified minority candidates. These members indicated that oftentimes there are no announcements for promotional opportunities. Moreover, there is no procedure in place for unsuccessful candidates to be informed of the basis of them not being selected for the position, which reinforces concerns about the lack of transparency and fairness when these decisions are made. Lastly, if there are known deficiencies in a candidate's background, these are typically not addressed in an annual performance evaluation in order to afford the employee an opportunity to further develop their skills. Thus, employees of color feel discouraged to even apply for positions within the UCS under the circumstances. Consequently, the Tribune Society Inc. supports the Task Force recommendations for legislative enactments to ensure greater transparency, fairness, uniformity, consistency and accountability in the recruitment, hiring and retention protocols within the UCS and to increase diversity of its workforce to reflect the population within each county or District therein.

2. Periodic Audits to Determine Patterns of Implicit Bias

As recommended in the Judges Report, a uniform system of data collection of demographic information, in all criminal proceedings, at the time of arrest and at sentencing, for auditing purposes, should be developed to evaluate the decisions of individual judges in order to determine whether they appear to be influenced by implicit or actual bias in making a bail determination and in the imposition of a sentence. The Task Force agrees that “periodic audits in these areas and others could determine whether they exhibit patterns that are indicative of implicit bias. Auditing could increase the available data regarding the extent to which bias affects judicial decision-making. Secondly, it could enhance accountability in judicial decision-making.”

Another key recommendation in the Judges Report to combat implicit or actual bias within New York’s criminal court system was outlined as follows:

A system of auditing should be developed to evaluate the decisions of individual judges in order to determine whether they appear to be influenced by implicit bias in areas such as bail setting, sentencing or even child custody allocation. Periodic audits in these areas and others could determine whether they exhibit patterns that are indicative of implicit bias. Auditing could increase the available data regarding the extent to which bias affects judicial decision-making. Secondly, it could enhance accountability in judicial decision-making.

The Task Force supports this recommendation. Consequently, the Task Force met with Jennie Brooks, Assistant Director of Data Outreach (“Jennie”) and Sema Taheri, Director of Research Operations (“Sema”) with Measures for Justice on March 4, 2021 to better understand what data is currently being collected.

Measures for Justice is a non-profit research organization founded in 2011. Its mission is “to make accurate criminal justice data available to spur reform. [This is accomplished by] showing people what criminal justice looks like nationwide; helping to standardize and improve criminal justice data nationwide; offering tools, services, and research to ensure people can use the data to best effect. [The] Bottom line: The only way our criminal justice system can improve is by monitoring its performance, isolating what works and what doesn’t, and developing interventions based on fact. For all this work, data are critical.”

Sema and Jennie described having worked with OCA during the years of 2011 and 2015 to collect data from the Bronx, New York, Queens, Kings and Richmond Counties of New York. They observed that there were inconsistencies between these counties in how data about criminal defendants is gathered and recorded. At the point of an arrest, law enforcement may be making racial and ethnic determinations for data entry purposes within the Division of Criminal Justice Services, without conferring with the person in custody. The courts are seemingly doing the same, if entering any data at all. They also noted that they had issues figuring out how bail was determined and the basis for pleas from the original charges brought against a defendant based on the information provided. While there are appropriate fields in the OCA’s computer system to collect this information about defendants, there are no standards for what should be obtained. Presently, the available data is not being analyzed.

Sema and Jennie agreed that in order to be able to determine whether there is implicit or actual bias at work in disparate sentences for persons of color versus white people (and in the imposition of bail) much more data must be collected. Moreover, there must be some consensus within OCA about the data to be garnered at the earliest point of contact with criminal defendants. There should be a distinction whether the data obtained about race and ethnicity is self-reported by the defendant or observed by the individual entering this information. Based on their research, when observations are made along these lines, there can be indicators of bias.

OCA should be charged with establishing uniform standards within the UCS to collect racial, ethnic and other demographical data at the time of arrest for auditing purposes, as described herein, as soon as possible. Such audits should occur periodically, with the findings therefrom being disseminated to the public in a written report.

In the past decade, significant social science research on implicit bias has established that every person harbors implicit biases that manifest themselves subconsciously during the decision-making process. Even individuals who report, and have, egalitarian racial attitudes may still harbor implicit biases that result in racially biased decisions.²⁶⁸ This is especially true in the judicial system, as implicit bias impacts judicial decision-making,²⁶⁹ as well as jurors during deliberations.²⁷⁰ “In the context of the American justice system, researchers now point to linkages between implicit racial bias and disparities in detention decisions, jury verdicts, capital punishment, and other sentencing outcomes.”²⁷¹

The New York court system (and other state court systems) has worked to address the impact of *actual bias* on the fairness of the court system. New York’s Franklin H. Williams Judicial Commission was formed in 1988 to study and report upon the “perception of fairness within the court system and to ensure equal justice in New York State.”²⁷² The Franklin Commission, and three other state commissions with similar mandates, created the National Consortium on Racial and Ethnic Fairness in the Courts.²⁷³ The consortium now has 37 members. Recognizing the impact of implicit bias on the fairness of the judicial system, the consortium has prepared resources and training materials to address implicit bias in the court system.²⁷⁴ However, these resources are designed to address *judicial* implicit bias, and not the impact of implicit bias on jurors.

²⁶⁸ Jennifer K. Elek & Paula Hanaford-Agor, *Implicit Bias and the American Juror*, 51 Court Review: The J. of the Am. Judges Ass’n 116, 117 (2015), n. 8.

²⁶⁹ *Achieving an Impartial Jury Toolbox*, Am. Bar Ass’n Crim. Justice Section, at 10, n. 38, available at <https://www.judges.org/wp-content/uploads/2020/03/Achieving-an-Impartial-Jury-Toolbox.pdf>.

²⁷⁰ See generally, Jery Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

²⁷¹ Jennifer K. Elek, Jennifer K. & Paula Hanaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 Court Review: The J of the Am. Judges Ass’n 190, 191(2013), footnote omitted.

²⁷² <http://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml>.

²⁷³ <http://www.national-consortium.org/about>.

²⁷⁴ <http://www.national-consortium.org/implicit-bias>.

Recently both the Judicial Friends Association, Inc.²⁷⁵ and the Special Adviser on Equal Justice²⁷⁶ in the New York State Courts in their respective reports acknowledged the impact of implicit bias on jury deliberations. In each report, the authors proposed several solutions to the issue of implicit bias during jury selection and trials, including a video presentation on juror bias during juror orientation, model jury instructions on implicit bias, and the potential implementation of court rules to allow *voir dire* on bias—actual or implicit.²⁷⁷

3. Implicit Bias Instructions Should Consistently and Uniformly Be Provided to Potential Jurors, During Jury Selection

Currently the Criminal Jury Instructions²⁷⁸ do not contain an instruction that specifically educates and addresses the impact of implicit bias on jurors. The Model Charges on Voir Dire,²⁷⁹ Preliminary Instructions,²⁸⁰ and Final Instructions²⁸¹ contain some language on “fairness,”²⁸² but none of the charges specifically provides instructions for jurors on what implicit bias is, and strategies to address it.²⁸³

It is important to note that the current literature, although supportive of attempts to reduce the impact of implicit bias through jury instructions, cautions that attempts to draft these instructions should be done in collaboration with subject-matter experts:

Crafting clear, effective jury instructions on the topic of implicit bias, however, requires extensive subject-matter expertise for two main reasons. First, subject-matter expertise is necessary to ensure that the language and strategies used in the instruction are accurate reflections of the state of the science. The high level of subject-matter expertise, necessary to leverage lessons learned from existing research and provide jurors with appropriate de-biasing strategies, may not be available among the law trained professionals who typically comprise committees that draft pattern jury instructions. Second, subject-matter expertise is also needed to ensure that the developed instruction intervention does not incorporate communication strategies known to exacerbate expressions of racial bias in certain subpopulations. For example, strategies that impress an extrinsic

²⁷⁵ Report to the New York State Court’s Commission on Equal Justice in the Courts at page 33 *et seq.*

²⁷⁶ Report from the Special Adviser on Equal Justice in the New York State Courts at page 83 *et seq.*

²⁷⁷ Recent studies have shown that potential jurors, through judicial questioning alone, often do not reveal explicit biases. See Achieving an Impartial Jury Toolbox, *supra* note 269, at 8–9, n. 25, 26.

²⁷⁸ Available at <http://www.nycourts.gov/judges/cji/5-SampleCharges/SampleCharges.shtml>.

²⁷⁹ Available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Voir_Dire.pdf.

²⁸⁰ Available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Preliminary_Instructions.pdf.

²⁸¹ Available at http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Final_Instructions.pdf.

²⁸² In June 2019 the model language on “fairness” was modified to read:

Remember, you have promised to be a fair juror. A fair juror is a person who will not permit his or her verdict to be influenced by a bias or prejudice in favor of or against a person who appeared in this trial on account of that person’s race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation, and further, a fair juror will guard against the application of any stereotypes or attitudes a juror may harbor about people or groups that would lead to a biased decision based upon those stereotypes or attitudes.

²⁸³ Nor do the grand jury model impanelment instructions.

motivation to be non-prejudiced (i.e., mandates and other authoritarian language typical of jury instructions) may provoke hostility and resistance from some individuals, failing to reduce and perhaps even exacerbating expressions of prejudice. Instead, communications designed to foster intrinsic egalitarian motivations may more effectively reduce both explicit and implicit expressions of prejudice without eliciting such backfire or backlash effects. These and other research findings are important to consider for those looking to adopt a jury instruction to minimize expressions of implicit biases in juror judgment.²⁸⁴

The American Bar Association’s Achieving an Impartial Jury (AIJ) Project prepared a comprehensive report on the impact of implicit bias on juror decision-making.²⁸⁵ Contained within the “toolbox” is a useful explication on the basics of implicit bias and its impact upon the court system, suggested jury instructions, as well as suggested *voir dire* questions. The proposed instructions are attached.²⁸⁶ Additionally, several state and federal courts have prepared implicit bias instructions of varying quality.²⁸⁷ Those instructions are attached as well.

Based on a review of the relevant literature, **the Task Force recommends that the New York court system address the impact of implicit bias on jury decision making.** The specific recommendations are that:²⁸⁸

1. The court system educate potential jurors (both grand jurors and trial jurors) during jury orientation on what implicit bias is, and its impact on decision-making.
2. The judge empanelling grand jurors provide those jurors with an instruction that specifically addresses implicit bias, as well as provide tools for the grand jurors to prevent it from impacting their decisions.
3. Trial courts provide jury instructions that specifically address implicit bias, as well as provide tools for the jurors to prevent it from impacting their decisions. These instructions should be provided during the preliminary instructions as well as during the final instructions.²⁸⁹
4. The court system implement court rules to specifically allow questioning of potential jurors by the attorneys on actual and/or implicit bias, and expand the time available to the parties to *voir dire* the jury on these subjects.

²⁸⁴ Jennifer K. Elek & Paula Hanaford-Agor, *Implicit Bias and the American Juror*, 51 Court Review: The J. of the Am. Judges Ass’n 116, 118 (2015), notes omitted.

²⁸⁵ Achieving an Impartial Jury Toolbox, *supra* note 269.

²⁸⁶ The AIJ instruction is supported by social science studies and references to address the concern raised that any implicit bias jury instruction be prepared with the knowledge and assistance of those with the necessary subject matter expertise.

²⁸⁷ These states include Washington, Illinois, and Arkansas.

²⁸⁸ Although beyond the scope of this memo, there is research that establishes that more diverse juries are less susceptible to actual and implicit bias held by individual jurors. (See, generally, Elek and Hanaford-Agor, *First, Do No Harm*, at page 5, FN 33.) The court system should deploy resources necessary to ensure that juries are as diverse as possible, including proposing amendments to current laws that result in non-representative jury pools in city court cases.

²⁸⁹ It is incumbent upon trial judges to be trained on implicit bias as well so that the judge understands the principles of implicit bias and how it may impact jurors decision-making.

a. Juror Education on Implicit Bias

Studies have established that through education and motivation the impact of implicit bias on decision-making can be lessened.

To the extent that there is good news in the current science about stereotypes, it is that while we may be unable to do much about their automatic activation, we can nevertheless behave in substantially non-prejudiced ways if we are so motivated. The effects of motivation can be introduced in many different ways. What seems to matter most is whether antidiscrimination norms are activated, either directly or indirectly. This might be done by argument, by jury instruction, or by implicit invocation of anti-prejudice norms.²⁹⁰

As it is possible to ameliorate the impact of implicit bias on potential jurors through education, potential jurors should be instructed on implicit bias at the earliest opportunity—during juror orientation.²⁹¹ Effective videos that provide a basic instruction to potential jurors on implicit bias have been created. The United States District Court for the Western District of Washington created a video to show to potential jurors to educate them on the principles of implicit bias.²⁹² The video is 11 minutes long.²⁹³ Revising the New York juror orientation video to include implicit bias principles would not result in a video that is too long.²⁹⁴

Additionally, research has shown that “priming” or forewarning jurors may be more effective than attempting to address implicit bias during the jury instruction phase.²⁹⁵ Jurors who watch an orientation video in which the principles of implicit bias are provided will likely be more receptive to *voir dire* on this issue, as well as listening and applying the court’s instructions on implicit bias.

b. Jury Instructions on Implicit Bias

New York should modify the existing preliminary jury instructions and final jury instructions to incorporate instructions to address implicit bias. Furthermore, these instructions should also include “tools” to help jurors address implicit bias.

²⁹⁰ Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241, 1276 (2002).

²⁹¹ Some researchers advance the argument that the Implicit Association Test (IAT) originally developed by researchers from Yale University and the University of Washington be given to all potential jurors. This seems impractical. See Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias The Evolving Temporality of Lawmaking*, 44 Conn L. Rev. 826 (2012); *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. Soc. Just. 1, 27.

²⁹² <https://www.wawd.uscourts.gov/jury/unconscious-bias>.

²⁹³ A transcript of the video is attached.

²⁹⁴ The current petit jury orientation video displayed to New York potential jurors does not mention implicit bias. The video is only 14 minutes long.

²⁹⁵ See *Achieving an Impartial Jury Toolbox*, *supra* note 269, at 16, n. 64.

As noted above, the current New York criminal jury instructions do not adequately address implicit bias. Instead, those charges simply state that “a fair juror will guard against the application of any stereotypes or attitudes a juror may harbor about people or groups that would lead to a biased decision based upon those stereotypes or attitudes.” These charges instruct the juror not to allow actual biases to impact their decision, but do nothing to inform the juror about the potential impact of implicit bias on their decision-making.²⁹⁶

The Model CJI Preliminary Instructions notes that the Court of Appeals has endorsed trial judges providing preliminary instructions that include other instructions beyond those contained in CPL § 270.40.²⁹⁷ Thus, the model instruction includes topics on credibility of witnesses and test of credibility, and other related topics.

As implicit bias affects how jurors interpret evidence, jurors should be instructed on implicit bias before the trial begins.

Findings in the scientific research literature demonstrate how implicit bias can operate to distort a person’s interpretations of the evidence in a case. Racial stereotypes have been found to play a role in how people perceive and interpret otherwise ambiguous events. For example, one study found that people interpret ambiguously hostile behavior as more hostile when performed by a black compared with a white actor. Similarly, people who test high on implicit racial bias were found to be more likely to interpret ambiguous expressions in a negative manner (i.e., as angrier) on black faces (but not white faces) compared with those who test low on implicit racial bias. Another recent study found that presenting mock jurors with images of darker-skinned (compared to lighter-skinned) perpetrators biased their interpretations of ambiguous evidence. Biased interpretations of the evidence, in turn, predicted subsequent guilty verdicts.²⁹⁸

The American Bar Association’s *Principles for Juries and Jury Trials*, also endorses preliminary instructions that include implicit bias instructions. Principle 6-C²⁹⁹ states:

The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

²⁹⁶ Elek and Hannaford-Agor have noted that “[w]hen considering this mixed evidence [that standard jury instructions may actually enhance racially biased decisions] in combination with (a) research indicating that people may not be able to consciously correct for the effect(s) of their implicit biases because they are often unaware that these biases exist and (b) evidence of racial discrimination in actual jury trials, standard legal instructions do not appear to offer a complete or reliable solution.” *Implicit Bias and the American Juror*, 51 Court Review: The J. of the Am. Judges Ass’n 116, 118.

²⁹⁷ See CJI Model Preliminary Instructions, citing *People v. Newman*, 46 N.Y.2d 126 (1978).

²⁹⁸ See Elek and Hannaford-Agor, *Implicit Bias and the American Juror*, at 117, notes omitted.

²⁹⁹ Principle 6 – Courts Should Educate Jurors Regarding the Essential Aspects of a Jury Trial. The Principles may be found here:

https://www.americanbar.org/content/dam/aba/administrative/american_jury/2016_jury_principles.pdf.

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings that may be based on attitudes toward race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, or gender expression.

Not surprisingly, implicit bias also affects jurors during deliberations.³⁰⁰ Thus, final instructions should also include an instruction on implicit bias.

Additionally, jurors must be provided “tools” to assist them in ameliorating the impact of implicit bias on their decision-making. The AIJ Toolbox proposed instructions provides the following instructions to assist jurors:³⁰¹

Focus on individual facts, don’t jump to conclusions that may have been influenced by unintended stereotypes or associations.

Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?

You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

Similarly, Professor Cynthia Lee³⁰² has proposed a de-biasing instruction referred to as a “race-switching” instruction to assist jurors in viewing evidence from a different perspective. This charge reads:

It is natural to make assumptions about the parties and witnesses based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group. If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a

³⁰⁰ See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *Duke L.J.* 345 (2007); see also *Achieving an Impartial Jury Toolbox*, *supra* note 254, at 18, N. 71.

³⁰¹ See AIJ Toolbox at 19–20.

³⁰² <https://www.law.gwu.edu/cynthia-lee>.

subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.³⁰³

c. Voir Dire on Implicit Bias

As noted in the Report from the Special Adviser on Equal Justice in the New York State Courts, there are areas of New York State where counsel are precluded by trial judges from questioning jurors on racial bias during *voir dire*.³⁰⁴ The Report recommended that the court system create uniform rules to explicitly permit addressing juror bias during *voir dire*.³⁰⁵

We endorse this recommendation, but would suggest that any promulgated rules require that attorneys be provided sufficient time to question jurors about actual or implicit bias.

Research has shown that judicial questioning does not always reveal juror bias and that attorney questioning may be more effective.³⁰⁶ Additionally, the amount of time attorneys are provided to explore racial bias must be sufficient. Currently, there exists substantial pressure upon trial attorneys by trial judges to complete *voir dire* within a prescribed period of time. This seriously impedes the ability of attorneys to reveal jurors' biases.

D. Accountability Measures in the Criminal Justice System

The Task Force identified other areas in the criminal justice system where additional accountability measures can provide fewer opportunities for misconduct to occur or strengthen the integrity of the system in handling police misconduct cases. The Task Force recommends: (1) implementing controls and guidelines for the gang databases; (2) reforming qualified immunity; (3) amendments to the criminal procedure law; and (4) minimizing the influence of police unions on the disciplinary actions.

1. Implementing Controls and Guidelines for the Gang Databases

The Task Force also determined that police misconduct was likely to occur when police were able to label groups of individuals as “other,” creating the pretense for routine harassment. Local police departments use gang databases akin to the “Criminal Group Database” utilized by the NYPD. The people on these lists are reportedly subjected to routine harassment by police regardless of the factual accuracy of their label. Police are able to avoid significant public scrutiny, and even smear and dismiss victims of abuse or misconduct if the mistreatment

³⁰³ AIJ Toolbox at 21–22; see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

³⁰⁴ Special Adviser Report, New York State Unified Court System at 74, available at <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

³⁰⁵ Special Adviser Report at 83.

³⁰⁶ See Valerie P. Hans and Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi. Kent L. Rev. 1179 (2003); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harvard L. & Policy Rev. 149 (2010); Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investigation of Juror Candor*, 11 Law & Hum. Behav. 131 (1987).

becomes public, by referring to them in court and in the press as “known gang members.” **The Task Force recommends increasing transparency concerning the rules surrounding such databases and implementing procedures that hold departments accountable to following the rules.**

Police forces around the country use various types of databases to keep track of people they suspect of gang affiliation. These databases are often lightly regulated, if at all. Individuals are often included solely for associating with others who are, or are suspected of being, affiliated with gang activity. In New York, the highest profile example is the NYPD’s Criminal Group Database, which is maintained internally by the Department, subject only to limited internal rules with no public oversight. While the NYPD claims that it conducts regular reviews of its database to remove inactive listings, there is no way to verify this claim, or to hold the department accountable if it fails to do so. The criteria—both for initial inclusion and for removal—are opaque and determined solely by members of the Department. Criteria for inclusion often include vague and racially biased factors such as “living in a known gang neighborhood.”

These databases often disproportionately target Black and Latinx people, specifically young people. Incredibly, NYPD officials testified in 2019 that the individuals in the database were nearly 99% non-white. They also testified that it included nearly 500 minors, with some as young as 13 and 14 years old, and others added when they were 12.³⁰⁷

Often these databases are secret, with little to no transparency, but investigations around the country have uncovered significant accuracy issues, among other flaws.³⁰⁸ Therefore, the Task Force recommends that rules be established to govern the criteria for inclusion, removal, and use of any information in such databases, as well as a mechanism to hold police departments externally accountable so that they are not solely responsible for self-policing.

2. Reforming Qualified Immunity

The New York State legislature is currently considering a bill that if passed would “[p]rovide[] a civil action for deprivation of rights which is caused by any person or public entity.” The Task Force supports this bill, and encourages the legislature to pass, and Governor Andrew Cuomo to sign, this bill.

At its core, the bill amends the Civil Rights Law to create a remedy for violation of a person’s rights under the Federal and State Constitutions, similar to the federal private rights of action delineated in 42 U.S.C. §§ 1983, 1985–86. A.4331/S.1991 allows for a civil action to be brought either by the injured party or by the Attorney. It should be noted that the bill is supported and co-sponsored by a legion of State Senators and Assemblypersons.

³⁰⁷ City Council, City of New York, Transcript of the Minutes of the Committee on Public Safety 39, 29–30 (June 27, 2019), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=7538642&GUID=FC57AB60-3F54-4CEB-9D11-E202C24EA62F> (“2019 City Council Testimony”).

³⁰⁸ Chicago IG Review; Portland Audit.

In the most formal sense, “qualified immunity” is a federal doctrine available in federal lawsuits brought under U.S.C. § 1983. More explicitly, qualified immunity is an affirmative defense where the defense must provide evidence to negate one of two findings: (1) whether a public state official has violated a plaintiff’s constitutionally protected right; and (2) whether the particular right that an official state actor has violated was clearly established at the time of the violation. Only if both elements are met will qualified immunity be defeated. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Pearson v. Callahan*, 555 U.S. 223 (2009); It should be noted that the defense is only available for individuals sued in an individual capacity, and is a defense only to damages actions. If granted by the Court, the defendant is granted such immunity not just from liability, but from suit and burdensome discovery; thus, availability of interlocutory appeals at both 12(b)(6) and summary judgment.

In practice, qualified immunity often prevents officers from being held accountable for even the most egregious actions. For example, in *Crawford v. Cuomo*, the Second Circuit upheld the lower court’s dismissal of two inmates’ claim that a corrections officer fondled their genitals during pat-frisks because “[a] reasonable officer could . . . have believed that the sexual abuse here alleged, even if it might violate state criminal law or subject him to tort liability, did not violate the Eighth Amendment.” Similarly, in *Amore v. Novarro*, the Second Circuit held that an officer was entitled to qualified immunity for an arrest based on a statute that had been declared unconstitutional over twenty years ago. Such abuses should not be tolerated.

The proposed bill should be applauded for its breadth and ability to open the courtroom doors to those who have their constitutional rights violated. Similar bills have been enacted in Colorado, Connecticut and New Mexico. The bills from New York and New Mexico apply to any “person or public entity acting color of law.” Additionally, the New York bill improves upon the Colorado, and the Connecticut bills in significant ways. Unlike the Connecticut statute, it does not provide a loophole for “good faith” violations of constitutional rights, an exception which could swallow the rule. And similar to the Colorado statute, the New York bill provides for an award of attorneys’ fees for prevailing plaintiffs, as opposed to only those where the officer’s actions were “deliberate, willful, or committed with reckless indifference,” as is the case in Connecticut.

This well-drafted bill would increase access to the courts for those who have their constitutional rights violated and force courts to address the merits of plaintiffs’ claims instead of procedural pitfalls. Creating a state-sponsored right of redress for those facing constitutional deprivations by police officers or other state actors would also create a public record of malfeasance by officers who have committed misconduct and abused New Yorkers, in accordance with other moves toward transparency including the recent repeal of Section 50-a of the Civil Rights Law. The Task Force supports this effort to provide victims of police misconduct their day in court, to create legal causes of action when abuse occurs, and to move toward public transparency in cases of police misconduct.

It should be noted that, in March 2021, New York City enacted New York City Ordinance 2220-A, effectively ending qualified immunity for police officers, becoming the first municipality in the United States to do so. The passage of the ordinance created a set of civil rights in New York City, mirroring those conferred by the 4th and 14th Amendments of the U.S. Constitution, so that people in New York City can hold officers accountable if those officers violate their civil

rights. It eliminated the shield of qualified immunity to allow victims the opportunity to seek justice. More specifically, the ordinance newly established a local right of security against unreasonable search and seizure and against excessive force regardless of whether such force is used in connection with a search or seizure.

Additionally, under New York City Ordinance 2220-A, if a NYPD employee, or a person appointed by the Police Commissioner as a special patrolman, allegedly deprives a person of this right, the person would be able to bring a civil action against the employee or appointee, as well as against the employee or appointee's employer, within three years after deprivation of the right. The employee or appointee (or their employer) will not be allowed qualified immunity, or any substantially equivalent immunity, as a defense. The Law Department is required to post details of these kinds otherwise such that the defendant could not reasonably have been expected to know whether their conduct was lawful.

3. Proposed legislation which prohibits certain practices in criminal proceedings that have a disparate impact on persons of color and/or constructively sanction police misconduct should be enacted as follows:
 - a. S.1281/A.5688 – A bill to prohibit prosecutors from unilaterally nullifying the Exclusionary Rule—a rule meant to deter police misconduct, as part of plea negotiations, in the use of appeal waivers for adverse suppression rulings. See <https://www.nysenate.gov/legislation/bills/2021/s1281>; <https://www.nysenate.gov/legislation/bills/2021/A5688>;
 - b. S.1280/A.5687 – A bill to prohibit prosecutors from unilaterally hamstringing attempts to fight off mass incarceration and racial disparities in sentencing, as part of plea negotiations, in the use of appeal waivers for excessive sentences. See <https://www.nysenate.gov/legislation/bills/2021/s1280>; <https://www.nysenate.gov/legislation/bills/2021/A5687>;
 - c. S.1279/A.5688 – Assist state trial-level public defenders and counsel assigned pursuant to Article 18B of the County Law in getting their clients assigned representation on appeal, an otherwise uncertain process. See <https://www.nysenate.gov/legislation/bills/2021/s1279>; <https://www.nysenate.gov/legislation/bills/2021/A5689>; and
 - d. S.324 – Bill to preclude inadmissible statements induced by law enforcement by providing materially false information to defendants. Also requires data collection of recorded confessions. See <https://legislation.nysenate.gov/pdf/bills/2021/S324>.

The recent string of exonerations of men of color, who served lengthy prison sentences for crimes that they did not commit, suggests that they have not only been wrongfully targeted by the police, but they have also been subjected to tainted prosecutions when evidence, which established their innocence, is ignored. In 2013, Mr. Eric Glisson of the Bronx was released from prison, after 17 years, for a murder that he did not commit. The murder victim was a taxi driver, whose cell phone was apparently taken by the killer and used two minutes later. A review

of the victim's cell phone records would have established whether Mr. Gleeson was in possession of the cell phone of the victim. This exculpatory evidence was not examined and disclosed to the defense by the prosecutor in violation of the U.S. Supreme Court case *Brady v. Maryland*, 373 U.S. 83 (1963).

In March of this year, George Bell, Rohan Bolt and Gary Johnson were released from prison after they "were wrongfully convicted of a double murder in Queens and incarcerated for the last 24 years." The published accounting for what occurred here, as follows, is rather harrowing because

[n]o physical evidence connected any of the three men to the crime, not at the time of their arrests nor at any time since. For the last 24 years, Bell, Bolt and Johnson have maintained their innocence. When Bell's jury convicted him as being the shooter in the double homicide, Bell rejected the DA's plea offer and took the risk that a jury would sentence him to death rather than plead guilty to a crime that he did not commit. To compound this tragedy, the Queens DA cut a plea deal with a jailhouse informant in exchange for his perjured testimony implicating Bell and Johnson in the murders. Following his early release, the informant, Reginald Gousse, went on to murder a father of three in a robbery attempt.

Evidence existed at the time that pointed to other suspects, but prosecutors suppressed that evidence and withheld it from the defense teams and from the court. The evidence first started to come to light in October 2019, when defense attorneys for Bell, Bolt and Johnson learned that the Queens DA had concealed official police reports tying a criminal gang that committed several armed robberies in Queens to the Epstein/Davis murders. The suppressed reports came to light as part of the successful challenge by Robert Majors to his wrongful conviction as an accomplice in the May 9, 1997 armed robbery committed by the same Queens gang. Majors' post-conviction lawyer, Thomas Hoffman, won Majors' release when he proved that the prior Queens DA had wrongfully withheld evidence from Majors' defense attorneys establishing his innocence.

The most significant document, DD5 288, dated May 16, 1997, memorializes an NYPD interview of a member of the Queens armed robbery gang during which the gang member told officers that another member of the gang, Jamal Clark, had confessed to committing the Astoria Boulevard check-cashing robbery that resulted in the Epstein/Davis murders along with other gang members.

The Queens DA's Office was fully aware of this information before Bell, Bolt and Johnson's trials began, believed the information was credible and, despite this knowledge, tried the cases anyway, seeking the death penalty against Bell, and resulting in the wrongful convictions of these three innocent men.

These men will likely pursue a civil remedy against the City of New York for false arrest, malicious prosecution, denial of a right to a fair trial and other claims. But obtaining a civil

judgment against this municipality does not hold the prosecutor accountable for his or her misconduct. The establishment of a Commission for prosecutorial oversight and misconduct, would subject prosecutors to an investigation for how they handled these matters. Prosecutorial misconduct has a disparate impact on communities of color due to wrongful convictions, such as in the Central Park Five and the above-described cases.

That said, the Task Force agrees that improvements to the training, recruitment, retention, and development of better prosecutors are the best ways to ensure fair and just outcomes for criminal justice prosecutions. District Attorneys' offices must be prepared to police themselves and augment their own practices. Outside oversight at times may be necessary, but internal accountability from within the office is the best way to achieve lasting change.

In addition, the Task Force examined the role of Adjournments in Contemplation of Dismissal (Criminal Procedure Law § 170.55) in shielding police misconduct. As Supreme Court Justice Kennedy noted in *Missouri v. Frye* (566 U.S. 134 (2012)) plea bargains have become “so central to the administration of justice” that our criminal justice system is, in reality, a system of pleas. “That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992). (*Missouri v. Frye*, 566 U.S. 134, 144. (2012).)

The Task Force found that the current jurisprudence of the Court Appeals should be changed to permit civil actions for allegations of civil rights violations during police encounters to proceed even if the underlying offense is resolved by way of an adjournment in contemplation of dismissal, (hereinafter an “ACD” or “ACOD”) as per the plain language of subsection 8 of Criminal Procedure Law Section 170.55. Currently, in certain instances, this adjudication serves as a barrier to many of these claims.

Subsection 8 of Criminal Procedure Law Section 170.55 states that “[t]he granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.”

Because ACDs lead to the ultimate dismissal of the charge or charges, they are an attractive plea bargain for any defendant who is offered the opportunity to accept an ACD. For that defendant, an ACD avoids having to incur the time and expense to litigate the underlying charges, and avoids the risk of a criminal conviction. Furthermore, once an ACD is granted and the case dismissed, the records of the arrest are sealed. Because of these obvious benefits, it is not uncommon for even the actually innocent to accept an ACD because the attendant risks of a criminal conviction are high, and the concomitant consequences of a criminal conviction are potentially devastating.

However, the New York Court of Appeals has held that defendants who accept an ACD are precluded from asserting a cause of action for malicious prosecution, as an ACD is not a termination of the criminal action in favor of the accused. (*Hollender v. Trump Vil. Coop.*, 58 N.Y.2d 420 (1983).) As a result, prosecutors commonly offer ACDs in cases where there are allegations of police misconduct to shield police officers, the police agency, and the

municipality from a civil lawsuit. Indeed, prior to a Court of Appeals case in 1989 (*Cowles v. Brownell*, 73 N.Y.2d 382 (1989)) which precluded conditioning plea offers on releases from civil liability for police misconduct, prosecutors often specifically required waivers of liability or acknowledgments that police conduct was proper before agreeing to an ACD. For example, it was the policy of the Monroe County District Attorney to condition all ACDs on the defendant executing a waiver of the right to pursue civil remedies against arresting officers. (See *Kurlander v. Davis*, 103 Misc. 2d 919 (1980).)

Post-*Brownell*, although such waivers of liability against police officers are no longer explicitly required as a condition of an ACD, in cases where police misconduct occurs ACD offers (especially ACDs without any conditions) are very common. As noted above, ACDs are a very attractive resolution for any criminal defendant, even those who are actually innocent. Prosecutors are keenly aware of this, and because they preclude a defendant from seeking civil damages for malicious prosecution, an ACD offer is often used by the prosecution to shield officers and municipalities from civil litigation. This shields the officer and municipality from not only potential damages, but also the civil discovery process and its likelihood of revealing the underlying police misconduct.

The ability of prosecutors to use ACDs as a vehicle to prevent an innocent defendant from pursuing a civil action operates to keep police or prosecutorial misconduct secret. Thomas Jefferson once said: “a criminal justice system that is secret and government-dictated invites abuse and even tyranny”. Barriers that prevent transparency in the criminal justice system, such as the use of ACDs to shield police misconduct should not be tolerated. The Task Force recommends a change in the law to prevent prosecutors from using adjournment in contemplation of dismissal pleas to keep police or prosecutorial misconduct secret.

4. Minimizing the Role of Police Unions in Disciplinary Actions

One of the biggest obstacles facing police reformers is the “Blue Wall of Silence,” which is an unwavering loyalty or an unspoken bond that police use to justify, in their mind, that they cannot stop another officer when they use excessive or deadly force or testify against another officer. It was painfully obvious in the murder of George Floyd.

Former Buffalo officer Cariol Horne has had firsthand experience dealing with the consequences of intervening when another officer was using excessive force. In 2008, while just months away from receiving her pension, she was fired from the Buffalo Police Department after stopping another officer who was using a chokehold on a suspect while he was handcuffed, for “disciplinary reasons.”

Police unions, whose leadership is vastly white, are the mortar that holds the Blue Wall of Silence together. For example, in the NYPD today people of color constitute slightly more than half the uniformed force. The leadership in each of the five different police unions for each rank are overwhelmingly white.

Many of the recommendations of this Task Force will likely be opposed by police unions throughout the state. According to the *New York Times*, “police unions have emerged as one of the most significant roadblocks to change. The greater the political pressure for reform, the more defiant the unions often are in resisting it.” Police unions often use their political clout by influencing lawmakers via campaign donations to derail police accountability and reform

efforts. In fact, NYPD's police unions have vocally opposed police reforms in Albany, including attempting to keep the disciplinary records of officers private.

Minneapolis Mayor Jacob Frey identified the most significant “nearly impenetrable barrier” to police reform—the union contract, which makes it extremely difficult to discipline and terminate officers. Frey noted that the “elephant in the room with regard to police reform is the police union” preventing a “culture shift” and making it difficult to make “the changes necessary to combat [. . .] institutionalized racism.”

Reuters reviewed 82 police union contracts in large cities and found their contracts often obstructed discipline, allowed discipline records to be erased and worked to shield rogue police officers from justice. Police contracts also limit officer interrogations after alleged misconduct, limit the length of internal investigations, ban civilian oversight, indemnify officers in civil suits and mandate the destruction of disciplinary records.

It is clear that municipalities need to renegotiate collective bargaining provisions in police contracts to clear the way for meaningful police reform, accountability and discipline.

In New York City, the Mollen Commission, which was created in 1992 to investigate police corruption, popularized a word for the false testimony of certain cops: “Testilying.” Officers also use the terms “articulating” or “getting their story straight.” Fortunately, this has become somewhat less of a problem with body worn cameras, surveillance cameras and ubiquitous cellphone cameras. However, there are still incidents that are not caught on video.

Another way to reduce union influence in assisting officers in “getting their story straight” is for internal investigators and criminal prosecutors to interview union representatives and ask what the subject officer told them. Historically, for some reason, this has been viewed as off-limits and taboo, with rare exceptions, one of which was the infamous Abner Louima incident. On the night of August 9, 1997, NYPD officers arrested Louima at the scene of a fight. On the ride to the station house, the arresting officers (including the PBA representative) beat Louima with their fists, nightsticks, and hand-held police radios. In potentially the most barbaric act of police brutality in NYPD history, Officer Justin Volpe kicked Louima in the testicles, and while Louima's hands were handcuffed behind his back, he forced a broken broomstick up his rectum. Volpe was later sentenced to 30 years in jail.

The officers involved met with union representatives who received incriminating admissions of criminal behavior. Instead of promptly reporting this information as required by NYPD's policy, the PBA members orchestrated an affirmative strategy of obstruction and falsification, including convening a meeting allegedly to devise a common story to cover up their actions and to defame and publicly humiliate Mr. Louima claiming to the news media and internal investigators that he had sustained his injuries, not as a result of the officers' vicious assault, but rather through “consensual homosexual activity.”

Federal prosecutors took a novel approach. They sought to interview the PBA officials, who initially claimed attorney-client privilege and the non-existent “delegate-member privilege to orchestrate cover-ups among co-conspirators and to identify and silence police witnesses who would otherwise give honest testimony.” Ultimately, Federal prosecutors subpoenaed PBA officials “to testify before a Federal grand jury investigating charges that officers brutalized

Abner Louima,” specifically seeking to have the union officials “tell the panel what the four officers charged in the case, and possibly other officers, told them about the Louima incident.”

Not surprisingly, the PBA moved to quash the subpoena. Eastern District Judge Reena Raggi ruled that New York City police union officials could not claim their conversations with four officers accused of the brutal attack were privileged and the PBA officials were forced to testify before the federal grand jury. This aggressive tactic broke the Blue Wall of Silence. Ultimately, the officers responsible for the attack were charged and convicted in Federal court, and Volpe is still in federal prison serving his 30-year sentence.

Another way to reduce the influence of the police unions is for municipalities to understand what police disciplinary powers they already have by virtue of their charters, and how those charters have been interpreted by the Court of Appeals. **The Task Force recommends studying existing laws to clearly define what authority municipalities currently have.** Many municipalities already have greater power to discipline police than they are utilizing, and we should make that known.

In 2006, the Court of Appeals held that “police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials.” *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563 (2006). The litmus test for whether police discipline is a permissible subject of bargaining lies in the charter powers granted to a municipality by the State Legislature. Where a city's charter reserves police disciplinary power, the ultimate power to discipline police lies with the city, regardless of the provisions of the collective bargaining agreement. In other words, where a city's charter grants the city (or one of its officers) the power of police discipline, Section 75 of the Civil Service Law is not controlling on disciplinary matters. Despite this ruling and others that have supported it (*see Matter of Town of Wallkill*, 19 N.Y.3d 1066 (2012), *see also Matter of City of Schenectady v. NYS PERB*, 30 N.Y.3d 109 (2017)), cities and towns throughout the state like Buffalo still allow arbitrators and CBA provisions to have the final word on police discipline when they aren't required to be bound by those decisions. For example Buffalo's charter has, since at least 1949, stated that the power to discipline police rests with the Police Commissioner. That power was given to the police commissioner by the Common Council, which was in turn given the power to discipline police by the State Legislature in the City Charter of 1914. Making municipalities aware of these powers could allow them to fire bad cops and discipline them more effectively instead of being forced to keep them on per provisions of collective bargaining agreements that the Court of Appeals has held are not controlling. These charter powers also support our recommendation for stronger civilian oversight of police.

CONCLUSION

Policing is an essential component of our democracy. While this report addresses many concerns and problems with policing in New York, and beyond, the Task Force nonetheless recognizes the dedicated men and women who faithfully serve in the policing ranks across the state. The problem is not with policing, but bad policing. It is our hope that the recommendations set forth herein will add to the search for answers to remedy the racial injustice we've long seen in policing. The killing of George Floyd started a movement across the country, and globe. As lawyers we must seize the opportunity to add our constructive voice to the need for change.

Adoption of this report and its recommendations will demonstrate a clear commitment to doing just that.



COMMITTEE ON MANDATED REPRESENTATION

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MEMORANDUM

FROM: Committee on Mandated Representation

RE: Report and Recommendations from the Task Force on Racial Injustice and Police Reform

DATE: May 27, 2021

The Committee on Mandated Representation strongly supports the Report and Recommendations of the Task Force on Racial Injustice and Police Reform. One of our committee’s missions is to advance and support measures that will increase access to the appellate courts by indigent criminal defendants, many of whom are Black and Latinx clients.

For that reason, we strongly support legislative recommendations, contained in Part 4(D), that would allow appellate courts to review excessive sentences and suppression rulings regardless of the usage of appeal waivers. We also support legislation that would streamline assignment of appellate counsel by allowing poor person status to continue on appeal upon an attorney certification, thereby preventing indigent defendants from going through an onerous application process.

Current provisions of the Criminal Procedure Law broadly allow the appellate courts to both reduce sentences in the interests of justice—to combat racial disparities in sentencing and reduce mass incarceration—and to review suppression rulings that may involve police misconduct. Indeed, the Legislature determined that these powers are so important that they may be exercised even when the defendant has pleaded guilty, and even where the sentence is the result of a plea bargain. However, this legislative purpose is thwarted when defendants are required to waive their right to appeal in exchange for a plea deal. As a result, those who plead guilty are unable to access appellate review of their cases for adverse suppression rulings and excessive sentences.

Similarly, we support the recommended legislation that would streamline assignment of appellate counsel for indigent criminal defendants by allowing assigned counsel at the trial level to certify continued poor person status. This same method of verification is used in Family Court and civil cases. It is only in criminal cases that defendants do not receive the same benefit when applying for appellate counsel.

Finally, current case law allows police interrogators to extract confessions from defendants using trickery and deceit. Although these ploys encourage false confessions, they are perfectly admissible under the current Criminal Procedure Law. We agree that the law should be amended, with a simple fix, to bar the use of such unreliable statements.

Enabling appellate review of criminal convictions, and preventing false confessions, will further justice for all defendants, including those of color, and we strongly support adoption of the Task Force's Report and Recommendations.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert S. Dean". The signature is written in a cursive, slightly slanted style.

Robert S. Dean
Chair, Committee on Mandated Representation