Toward Abolitionist Remedies: Police (Non)Reform Litigation after the 2020 Uprisings

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TOWARD ABOLITIONIST REMEDIES: POLICE (NON)REFORM LITIGATION AFTER THE 2020 UPRISINGS

Cara McClellan & Jamelia Morgan*

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Conclusion

INTRODUCTION

On May 25, 2020, Derek Chauvin, a white Minneapolis Police Department officer, murdered George Floyd, a 46-year-old Black man, by pinning Mr. Floyd to the ground with his knee on his neck for nearly nine minutes.\(^1\) Mr. Floyd died begging for help and crying out: “I can’t breathe,” while three other police officers stood by watching.\(^2\) Across the country, Americans took to the street in protest of Mr. Floyd’s murder and the police killings of countless other Black people. In too many cases, police responded to protesters with excessive force and the very brutality that had led people to protest police in the first place.\(^3\) Tear gas, pepper spray, armored tanks, rubber bullets, and other munition became the hallmarks of a militarized and inhumane response to protesters.\(^4\)

In the wake of these horrific displays of force, over 40 lawsuits were filed nationwide that challenged police conduct at protests.\(^5\) Most of the prayers for relief were for damages or to temporarily or permanently enjoin local police from using military-style weapons against protesters, but did not reach the larger issues of discriminatory policing of Black and Brown communities that were the basis for the protests — though not the basis for the factual allegations that gave rise to the lawsuits.\(^6\)

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2. See id.
3. See Kim Barker et al., In City After City, Police Mishandled Black Lives Matter Protests, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html [https://perma.cc/UUJ5-7VLU] (“In city after city, the [after-action] reports are a damning indictment of police forces that were poorly trained, heavily militarized and stunningly unprepared for the possibility that large numbers of people would surge into the streets, moved by the graphic images of Mr. Floyd’s death under a police officer’s knee.”).
4. See id. (“Reviewers more often found that officers behaved aggressively, wearing riot gear and spraying tear gas or ‘less-lethal’ projectiles in indiscriminate ways, appearing to target peaceful demonstrators and displaying little effort to de-escalate tensions.”); Aubrey Whelan et al., Besieged, Then Betrayed, PHILA. INQUIRER (July 17, 2020), https://www.inquirer.com/crime/a/west-philadelphia-52nd-street-protest-police-response-tear-gas-20200717.html [https://perma.cc/BRX8-DNK].
6. For instance, in Portland, a 14-day ban on riot control agents was requested after a lawsuit last month. See Aimee Green, Portland Now Faces 8 Lawsuits Seeking an End to Tear Gas, Rubber Bullets, Explosives at Protests, THE OREGONIAN (June 14, 2020), https://www.oregonlive.com/news/2020/06/portland-now-faces-8-lawsuits-seeking-an-end-
Smith v. City of Philadelphia, one of the lawsuits brought on behalf of residents and protesters in Philadelphia, was unique. The tragic underlying facts in that case involved not only an attack on protesters, but also a broader attack on residents and bystanders who happened to be in a predominately Black community where the protests occurred. On May 31, 2020, when protesters took to the street in the 52nd and Market Street area of West Philadelphia, the Philadelphia Police (PPD) arrived en masse in armored vehicles. The PPD repeatedly unleashed a variety of dangerous military-style munitions, including rubber bullets, tear gas, and pepper spray against protesters, residents, and bystanders throughout the neighborhood. Later reports revealed that early in the day on May 31, Mayor Jim Kenney, Police Commissioner Danielle Outlaw, and other high-level city officials broadly authorized the use of “non-lethal munitions” in West Philadelphia in response to allegations of a dangerous situation and “looting” of commercial establishments. But the Department’s use of tear gas, rubber bullets,
other less-than-lethal munitions went far beyond the commercial corridor where businesses were located. They extended down streets that were entirely residential and where no protest activity occurred.12

As a result, many of the individuals who were tear gassed and subjected to police violence were not engaged in protest, but simply going about their daily activities in their neighborhood. For example, plaintiff Amelia Carter was walking down 52nd Street near her home when a gas canister landed right in front of her.13 As the gas surrounded her, she could not breathe or see.14 As she neared her home, gas canisters were shot down her residential street, and she was hit with tear gas again.15 When she reached her block, she saw other injured residents, including an elderly woman who had been hit in the head by a rubber bullet, sitting on her neighbor’s front steps.16 Ms. Carter attempted to enter her home, but it was full of tear gas, forcing her to go back outside.17 She saw armored vehicles continue firing tear gas onto residential streets, and she could hear residents yelling at the police that “kids live here” and to “go home.”18

Because the horrific injuries alleged in the Smith v. Philadelphia complaint implicated the policing of neighborhood residents, the plaintiffs believed that a remedy needed to address not only police interactions with protesters, but also police interactions with community members more generally. Moreover, as one of the first police misconduct lawsuits brought in the midst of a national reckoning in the wake of George Floyd’s killing, the timing of the lawsuit also created the opportunity to reimagine the potential for litigation — not simply to seek police reform, but to further an abolitionist movement.

Building on decades of abolitionist organizing, protesters during the summer of 2020 seized the moment and set forth public demands to end the institutions of policing and punishment as we know it.19 In this most recent iteration of the abolitionist movement, theorists and organizers have worked to discredit widespread justifications of punishment as necessary to reduce

https://twitter.com/PhillyMayor/status/1276242682453639168
[https://perma.cc/R4BA-UYCQ].

12. See CITY CONTROLLER REPORT, supra note 8, at 14.
13. Amended Complaint, supra note 9, at 23.
14. Amended Complaint, supra note 9, at 23.
15. Amended Complaint, supra note 9, at 23.
16. Amended Complaint, supra note 9, at 23.
17. Amended Complaint, supra note 9, at 23.
18. Amended Complaint, supra note 9, at 23.
crime. They have worked to decouple associations between crime and punishment altogether, define crime as a social construct, and explain punishment and the rise of the carceral state as a product of racial capitalism, settler colonialism, and social control, among other forms of subordination. Central to the abolitionist praxis is the decoupling of social responses to harm and conflict from the criminal legal system, or punishment bureaucracy, and into non-punitive, non-carceral systems of accountability and care. This project of dismantling reliance on carceral systems, racialized and gendered policing, and surveillance is accompanied by a set of positive projects. These are projects that are focused on recreating social systems, social relations, and social provisions that are not just alternatives but new ways of restructuring society. Local organizers made demands to reshape the material infrastructure of a community by investing in housing, mental health care, social welfare, and education. In this abolitionist future, society is organized to meet the needs of all people. It is organized to recognize and respond to structural, symbolic, and individual harms without any reliance on carceral systems of regulation, punishment, and control.

As impact litigators, the legal team in the *Smith* lawsuit tried to balance our responsibility to recommend a proposal that would be successful in reaching an agreement with local municipal actors, while also seizing the moment to creatively pursue our clients’ demands and visions for transformative and enduring change. Our clients’ demands and visions required pursuing what we term here as “abolitionist remedies.” Abolitionist remedies are those that further abolitionist theoretical and political commitments, goals, and practices, but with a specific focus on non-reformist reforms that may be achieved through litigation or policy change. Quoting Mariame Kaba, Daniel Berger, and Michael Stein, Dorothy Roberts writes that non-reformist reforms are “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the


These remedies are consistent with what abolitionist scholars and organizers term “non-reformist reforms” and provide a blueprint or framework for transformative social change. As Amna Akbar explains, “[t]he non-reformist reform then provides a framework for demands that will undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system.” Akbar emphasizes that non-reformist reforms have three main components:

First, non-reformist reforms advance a radical critique and radical imagination. Reform is not the end goal; transformation is. Non-reformist reforms are “conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands.” In advancing an agenda to meet human need, non-reformist reforms advance a critique about how capitalism and the carceral state structure society for the benefit of the few, rather than the many. They also posit a radical imagination for a state or society oriented toward meeting those needs.

Abolitionist remedies are a version of what Akbar calls “[c]ampaigns for non-reformist reforms,” that rely on “inside” and “outside” strategies, which “entail[] a combination of legal and extralegal strategies and tactics.” Litigation is an inside strategy, but some of the remedies from litigation can be used to support abolitionist goals. Of course, pursuing abolitionist goals through litigation comes with limitations — notably, it will not be possible to obtain all abolitionist remedies through settlement agreements or consent decrees. However, it is one inside strategy that can remove barriers to more transformative change in the future.

There are also challenges with pursuing transformative change aimed at dismantling racially oppressive legal structures through litigation. In many

27. Id. at 103 (citation omitted); see also Amna A. Akbar, Non-Reformist Reforms and Struggles over Life, Death, and Democracy, 132 Yale L.J. 2497, 2507 (2023) (“Non-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons. They seek to redistribute power and reconstitute who governs and how. Today’s thinking about non-reformist reform is both an effort to rethink the kinds of laws, policies, norms, relationships, and modes of organization that we might build to govern society, and an effort to democratize relations of power: to have fundamentally different people at the helm.”).
28. Id. at 2562–63 (“Inside strategies are those that adhere to and abide by the rules of formal law and politics: lobbying, litigation, voting. Outside strategies rely, instead, on protest, disruption, strikes, even mutual-aid networks — the building and exercising of autonomous and unruly power. These strategies disrupt the rules and institutions of formal law and politics and make new pathways possible.”).
ways, the legal system itself is resistant to transformative change. Law reform strategies are very often at odds with what Sameer Ashar calls “deep critique,” which requires “thinking beneath and beyond liberal legalist approaches to social problems.” Yet for those of us who represent clients who have a deep critique, like clients pursuing abolitionist strategies, zealous advocacy necessitates identifying legal strategies for pursuing remedies that are aligned with clients’ transformative change goals. Zealously representing our clients required new ways of thinking about our legal strategies. In pursuit of what Scott Cumming calls, “constrained legalism,” which is legal practice that “deploy law in a way that is neither utopian in its hopes for legal reform nor rejectionist in its dismissal of legal avenues of transformation,” we surfaced a new mechanism for meeting our clients’ abolitionist goals.

Abolitionist remedies call for bold changes and radical transformation, which makes incrementalist litigation an unsuitable vehicle for meeting such goals. In this way, using civil litigation to pursue abolitionist remedies may appear to be a contradiction in terms. That said, prison abolitionists have pursued harm reduction strategies alongside abolitionist campaign goals because they have recognized the need to address the immediate harms facing those who are incarcerated.

We have tried to similarly approach police litigation as a form of harm reduction to address the immediate needs of the clients and communities that we represent.

As many have argued before, there is a role for lawyers working in and alongside movements seeking transformative social change. Though discussion of the role for lawyers seeking to support abolitionist movements is beyond the scope of this Article, we address how the legal team pursued abolitionist remedies in Smith v. City of Philadelphia on behalf of residents.

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31. There is ongoing discussion and disagreement within abolitionist movements as to what constitutes harm reduction and how to pursue harm reduction as a strategy while protecting such reform goals from cooptation by pro-carceral reformers. See, e.g., Next Week: Abolition in Action #4 — on Harm Reduction & Decriminalization!, NO NEW SF JAIL COAL., https://nonewsfail.org/2020/08/20/next-week-abolition-in-action-4-on-harm-reduction-decriminalization/ [https://perma.cc/3JQN-WB8C] (last visited Jan. 30, 2024).

and protesters in West Philadelphia. In particular, we address how we worked to navigate the tensions between our clients’ demands for non-reformist reforms and what reforms aimed at harm reduction can be achieved under the circumstances. By doing so, we hope to offer a case study into how lawyers can work toward abolitionist remedies while operating in the practical limitations of civil litigation.

In Part I, we provide historical context as to the long-standing pattern of police surveillance and excessive force against Black residents and activists in Philadelphia and in West Philadelphia specifically. In Part II, we provide an overview of the legal claims in the case, which included both excessive force and violations of the Equal Protection Clause. In Part III we discuss how we attempted to apply abolitionist principles to analyze which remedies to pursue in the context of the lawsuit. Finally, we offer a conclusion that recognizes some of the limitations of litigation for achieving non-reformist reforms.

I. POLICE SURVEILLANCE & EXCESSIVE FORCE AGAINST BLACK PHILADELPHIANS

For many West Philadelphia residents, the PPD’s use of force on May 31, 2020 was consistent with the PPD’s history of targeting Black communities with discriminatory policing and unreasonable excessive force. In response to public outcry over the PPD’s teargassing of Philadelphia protesters, the city hired two outside contractors, the Center for Naval Analyses and Montgomery McCracken Walker & Rhoads, to conduct an independent after-action investigation. According to the investigation report: “West Philadelphia residents opined that the police likely had no issue with using this type of disproportionate, indiscriminate, and excessive force in the area because of a long history of the PPD over-policing West Philadelphia and treating Black West Philadelphians with brutality.” This Section provides a brief overview of the historical policing of Black residents


34. See CNA Report, supra note 10, at 64 (“In interviews and testimony before Philadelphia City Council, individuals who protested along the 52nd Street corridor, a predominantly Black neighborhood in West Philadelphia, described the PPD’s actions on May 31, 2020, as an unnecessary, ineffective, and heavy-handed overresponse. Before these events, many residents of West Philadelphia already had an unfavorable view of the police, grounded in distrust and fear. The events on 52nd Street only reinforced this view and crystallized in the mind of West Philadelphians that the PPD is not there to serve and protect them.”).

35. CNA Report, supra note 10, at 65.
and activists in Philadelphia, which ultimately informed the community members’ interpretation of the events that took place on May 31, 2020.

A. Surveillance and Over-policing of Black Activists

On October 29, 1963, a Philadelphia police officer shot and killed a 24-year-old man named Willie Philyaw for allegedly stealing a watch at a local drugstore in the Susquehanna Avenue retail district.\(^{36}\) According to residents of the area, the shooting constituted unjustified excessive force; witnesses reported that Mr. Philyaw was shot while attempting to flee and that he was restrained due to a previous leg injury.\(^ {37}\) On August 28, 1964, another violent confrontation between two residents and police transpired during a traffic stop in the same retail district where Mr. Philyaw had been killed ten months prior. Community frustration erupted into riots that continued for nearly three days.\(^ {38}\)

The 1964 riots would impact policing in Philadelphia for years to come through the familiar pattern of reform and retrenchment.\(^ {39}\) Acquiescing to Black residents’ demands for change, Police Commissioner Howard Leary ordered patrol officers to stop pulling over “suspicious” cars and raiding “disorderly” houses without receiving a citizen complaint.\(^ {40}\) In an effort to quell future unrest, Mayor James Tate called on advocates and the police department to develop a new riot control plan for the city, and the police department established a special unit to monitor civil disobedience.\(^ {41}\) Mayor Tate also issued an order requiring that all citizen complaints against the police be reported to a new police advisory board and stationed lawyers from the Philadelphia National Association for the Advancement of Colored People (NAACP) in neighborhood police precincts to help investigate charges of police brutality.\(^ {42}\)

Police Commissioner Leary’s new riot control strategy was largely opposed by rank-and-file police officers and vocally criticized by the then-Deputy Police Commissioner Frank Rizzo. By this time, Rizzo had earned a reputation for his harassment of Black residents in West Philadelphia.\(^ {43}\) In
1965, when the local NAACP began protesting school segregation at the prestigious Girard College boarding school located in North Philadelphia, protesters were met by 800 police officers, including helmeted motorcycle cops at the direction of Rizzo. These officers repeatedly ran over protesters with their motorcycles. Dynamics between police and protesters remained tense for weeks and frequently escalated. On July 11, Deputy Commissioner Rizzo punched a demonstrator. In the violence that followed, a group of police officers used their billy clubs to beat one of the protesters unconscious. Over time, the focus of the Girard College protests shifted from school segregation to police brutality. Civil rights leader Cecil B. Moore pointed out that White protesters were not met with any violent response from police, including the striking members of the local Teamsters Union who had recently blockaded the street.

On May 22, 1967, Mayor Tate announced that he was appointing Frank Rizzo (who would later become Mayor Rizzo) as the new PPD Commissioner. Serving as police commissioner between 1963 and 1967, Rizzo made surveilling and punishing Black activist groups the hallmark of his tenure. Rizzo expanded the mission of the PPD civil disobedience unit to surveilling Black activists to counteract what the department alleged to be a threat of Black-led violence. On July 27, 1967, following Commissioner Rizzo’s assertion that: “Negro groups are planning to incite a riot in Philadelphia,” Mayor Tate announced that he was issuing a proclamation of limited emergency that would prohibit gatherings of 12 or more in the city “where there is a potential for violence.” Under Rizzo’s leadership, PPD would arrest over 35 Black activists associated with the Revolutionary Action Movement, and later attempt to frame Student Nonviolent

44. UP SOUTH, supra note 36, at 172.
46. See UP SOUTH, supra note 36, at 172.
47. UP SOUTH, supra note 36, at 173.
48. UP SOUTH, supra note 36, at 173.
49. UP SOUTH, supra note 36, at 171.
50. UP SOUTH, supra note 36, at 175.
51. UP SOUTH, supra note 36, at 215.
53. UP SOUTH, supra note 36, at 233.
54. UP SOUTH, supra note 36, at 235.
Coordinating Committee (SNCC) based on unfounded allegations of a plot to blow up Independence Hall in August of 1966.\textsuperscript{56}

Children were not protected from the PPD’s inhumane treatment under Rizzo’s leadership. On Friday, November 17, 1967, three thousand students walked out of school in a protest aimed at the Board of Education that demanded Black history courses in schools, the right to wear Afros, increased Black representation on the school board and in school administration, and the removal of police from all schools.\textsuperscript{57} At the direction of Police Commissioner Rizzo, more than 100 officers in full riot gear violently broke up the demonstration, wielding nightsticks and releasing dogs onto the students.\textsuperscript{58} Several witnesses reported hearing Rizzo directing officers to charge by saying: “Get their Black asses.”\textsuperscript{59} There were also reports that some police officers used racial epithets during the violence.\textsuperscript{60} Between 20 and 30 black students and adults were treated for injuries following the demonstration.\textsuperscript{61} In defense of his aggressive tactics against student protesters, Rizzo responded “these children ran through the streets in Center City, beating everyone in their path, I leave it to you to judge who is violent, and whether these are children.”\textsuperscript{62}

In perhaps the most infamous abuse of Black of activists, on August 29, 1970, during the Black Panther convention, Rizzo directed a police raid on the local Black Panther field offices.\textsuperscript{63} The police arrived at 5 AM to the North Philadelphia headquarters and, after shooting tear gas into the building, forced the members who were present to strip at gunpoint and march down the street backwards in the underwear.\textsuperscript{64}

While a complete retelling of PPD’s extreme and violent treatment of Black activists is beyond the scope of this article, it is important to note that one of the most horrific instances of violence against Black activists in PPD history occurred in West Philadelphia and continues to shape community

\textsuperscript{56} UP SOUTH, supra note 36, at 216–19 (describing how despite Rizzo’s allegations, three of the four individuals arrested in connection with an alleged plot to attack Independence Hall had no connection to SNCC, and none of the individuals possessed ammunition to carry out the alleged plot). Although these individuals were later exonerated, the arrest and Rizzo’s media campaign against SNCC had effectively disbanded SNCC organizing within Philadelphia. UP SOUTH, supra note 36, at 216–19.


\textsuperscript{58} Id.

\textsuperscript{59} Gambacorta & Laker, supra note 45.

\textsuperscript{60} UP SOUTH, supra note 36, at 227.

\textsuperscript{61} UP SOUTH, supra note 36, at 227.

\textsuperscript{62} UP SOUTH, supra note 36, at 240.

\textsuperscript{63} See UP SOUTH, supra note 36, at 3, 282.

\textsuperscript{64} See UP SOUTH, supra note 36, at 3, 282.
police relations in the area to this day. On May 13, 1985, following years of conflict, PPD used helicopters to drop explosives on the home of MOVE, a Black liberation group, which resulted in a massive fire that killed six adults and five children. This bombing destroyed 61 neighborhood homes, leaving hundreds of people homeless. The Philadelphia Special Investigation Commission, which investigated the PPD’s actions, found the police fired “over 10,000 rounds of ammunition in under 90 minutes at a row house containing children.” Police also fired high-pressure water hoses and tear gas canisters.

B. PPD’s Over-policing and Excessive Use of Force Against Black Residents

Philadelphia police have a documented history of engaging in discriminatory use of stops, searches, and force against Black residents that is interconnected with PPD’s attempt to manage and control Black residents who engage in social dissent or attempt to challenge police authority. A 1952 study found that three-quarters of the arrests by the PPD for disorderly conduct were illegal and intended to punish lawful conduct that the police disapproved of when engaged in by Black people. As such, Black people often risked arrest when they asserted their rights against the police. For example, Black people were arrested for disorderly conduct for “protesting, at the police station, an illegal entry and beating; objecting to an
unauthorized search of the person and to being struck; or inquiring why a friend was in the police wagon.”

Black people have also long been the target of excessive force and violence by Philadelphia police officers. One of the first studies on police shootings, published in 1963, found that between 1950 and 1960, nearly 90% of the 32 men shot and killed by PPD officers were Black, even while Black people made up only 22% of the City’s population. During this period the PPD routinely engaged in “shotgun squads” in Black neighborhoods, patrolling in cars with an officer brandishing a sawed-off shotgun out the window as a show of force. Public outcry about police brutality during this period led to city council hearings where Black residents testified about illegal and baseless home raids, frisks conducted without a basis for suspicion, racist verbal harassment, and abusive use of force.

In October 1958, Mayor Richardson Dilworth established the nation’s first independent Police Advisory Board (PAB), then called the Police Review Board, to investigate complaints of police conduct. However, the Fraternal Order of Police (FOP) resisted civilian oversight, putting pressure on the PAB not to pursue meaningful consequences for police officers. Although the PAB handled 421 cases from 1965 through 1967, it only heard 71 cases, and recommended disciplinary action in 19 of those cases. In 1965, the FOP brought a lawsuit against the City of Philadelphia challenging the PAB as illegally established. On March 29, 1967 the Court of Common Pleas issued an injunction that shut down the board’s work. Although the decision was later overruled in 1969 by the Pennsylvania Supreme Court,

73. Id.
76. See Elkins, supra note 70; Saint et al., supra note 57.
78. See id.
Mayor James Tate had already disbanded the PAB and refused to reestablish it, saying, “the record of the Philadelphia Police Department is unparalleled throughout the nation.” 82  Increasingly, Black people organizing against police brutality rejected the view that reforms like the PAB were effective, recognizing that police brutality was deeply entrenched in the department beyond the actions of individual officers. 83

In response to the disbandment of the PAB, the Coalition of Organizations in Philadelphia for Police Accountability and Responsibility (COPPAR), led by community organizer Mary Rouse, wrote a report about police abuse and filed a lawsuit that detailed 250 instances of police brutality. 84  As a result of COPPAR’s organizing, the United States Commission on Civil Rights held public hearings on police-community relations. At these hearings, individuals like Mary Rouse testified that they had faced surveillance and harassment in retaliation for protesting police harassment. 85  The Civil Rights Commission concluded that the arrest process seemed to be used as a form of harassment and intimidation and called on the Department of Justice to investigate the police department. 86  In 1979, the Department of Justice conducted an investigation into the PPD and filed a lawsuit alleging that PPD had a pattern of shooting nonviolent suspects, beating people while they were handcuffed, and undermining the civilian complaint process. 87  While the 1979 lawsuit was later dismissed, 88  at least three lawsuits filed against the PPD in the 1980s that alleged a pattern or practice of racially discriminatory treatment resulted in injunctive relief. 89

82. See Saint et al., supra note 57. Following a five-year period in which the city paid more than $10 million to settle police misconduct cases, Mayor Ed Rendel created the Police Advisory Commission in a 1993 executive order. Id. The Police Advisory Commission was criticized for lacking enough power to provide effective oversight, and a bill proposing a new police oversight commission was introduced to the state legislature in June 2020. Philadelphians voted to amend the Philadelphia Home Rule Charter to create an independent Citizens Police Oversight Commission (CPOC) in the November election. Hans Menos & Anthony Erace, Citizens Police Oversight Commission Program Architecture, PHILA. GOV’T (Oct. 23, 2020), https://admin.phila.gov/media/20201116092153/Citizens-Police-Oversight-Commission-Program-Architecture.pdf [https://perma.cc/HJ7A-VA97].
83. See Up South, supra note 36, at 284.
84. See Up South, supra note 36, at 292; Gambacorta & Laker, supra note 45.
85. See Up South, supra note 36, at 292.
86. See Up South, supra note 36, at 292–93.
87. See Gambacorta & Laker, supra note 45.
88. See Gambacorta & Laker, supra note 45.
More recently, in 1996, a class of plaintiffs filed *NAACP v. City of Philadelphia,* alleging that officers of the 39th District unlawfully searched and arrested hundreds of persons on false or otherwise improper narcotics charges.90 Virtually all of the arrested individuals were Black or Latinx.91 The Parties reached a settlement that requires new arrest policies and training, and ongoing monitoring.92 However, the city’s data continued to show a severe racially disparate impact on Black and Latinx individuals through 2005, when monitoring of the 1996 Settlement Agreement terminated.93

In 2010, a class of plaintiffs sued the city yet again in *Bailey et al. v. Philadelphia,* alleging that the PPD illegally stopped and searched thousands of Black and Latinx men and youth, solely because of their race, which was in violation of the Fourth and Fourteenth Amendments.94 According to the complaint, of the 253,333 stops in 2009, over 183,000, or 72.2%, were of African-Americans, who make up 44% of the population of Philadelphia and only 8.4% of the 253,333 stops led to an arrest.95 Moreover, multiple reviews of the police reports showed the racial disparity in stops and frisks that could not be explained by factors other than racial bias.96 In an analysis of the city’s data, Dr. Lance Hannon, Professor of Sociology and Criminology at Villanova University, reviewed more than 350,000 pedestrian stops with over 45,000 pedestrian frisks conducted in 2014–2015.97 Dr. Hannon’s study found that PPD officers were more likely to stop and frisk residents of predominantly Black areas than non-Black areas.98 The Parties entered into a settlement agreement that required the Philadelphia Police Department to implement new training and supervision of law enforcement officials and ongoing monitoring through and electronic database civilian stops, with quarterly audits from an independent monitor.99 To date, the monitoring reports still show Black people are over 50% more likely to be stopped without reasonable suspicion than white

91. *See id.*
94. *Id.* at 3.
95. *Id.* at 21.
96. *Id.* at 20.
98. *Id.*
people, and are 40% more likely to be frisked without reasonable suspicion than white people.\textsuperscript{100} These disparities are not explained by non-racial factors.

A review of vehicular search data conducted by the Defender Association of Philadelphia similarly suggests that the racial composition of a neighborhood is a predictor for how PPD officers will treat drivers in that area. The review found that PPD officers more likely to conduct a stop when a driver is in a district that has a higher percentage of Black residents.\textsuperscript{101} This data provided support for City Council to adopt “driving equality” legislation, which declassified eight low-level traffic violations to reduce police involvement in nonserious infractions.\textsuperscript{102} The law took effect in March 2022 and has decreased the number of overall stops, but not racial disparities.\textsuperscript{103}

Overall, research suggests that the various reform efforts have had little impact on reducing the racial disparities in PPD’s police practices documented over nearly seven decades. In 2015, a Department of Justice report showed the statistics on excessive and disproportionate use of force have remained largely unchanged: 80% of people shot by PPD officers between 2007 and 2014 were Black, a disparity that is only slightly below that identified in 1963.\textsuperscript{104}

### C. The 52nd Street Community

The 52nd Street Corridor, spanning the 12-block corridor from Arch Street to Baltimore Avenue, is known as the Main Street of West Philadelphia. In the mid-1950s through the mid-1970s, the 52nd Street

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\textsuperscript{101} Brief for Def. Ass’n of Phila. & The ACLU of Pa. as Amici Curiae Supporting Appellee, at 31–32, Pennsylvania v. Barr, 266 A.3d 25 (Pa. 2021) (No. 2347). The Philadelphia District Attorney’s Office also concluded that racial disparities in vehicle stops during the decade after the Bailey settlement agreement have worsened, indicating “that discriminatory enforcement is being shifted to other practices rather than eliminated.” PHILA. DIST. ATT’Y’S OFF., supra note 69, at 37.


\textsuperscript{104} See Saint et al., supra note 57; see also Joseph Rivera et al., Police Violence Is a Public Health Issue, DREXEL UNIV. URB. HEALTH COLLABORATIVE (Feb. 2021), https://drexel.edu/~/media/Files/uhc/briefs/Police%20Violence%20is%20a%20Public%20Health%20issue%202021%20Issue%20Brief.pdf?la=en [https://perma.cc/H2U7-26QN] (82% of homicides by police from 2013–2020 occurred in census tracts that are 50% or more Black or Hispanic).
Corridor was a thriving commercial and cultural center in West Philadelphia, due in part to its easy access to public transportation along Market Street and Baltimore Avenue.\textsuperscript{105} It included movie theaters, iconic fashion stores, restaurants, and offices.\textsuperscript{106} The 52nd Street Corridor was also home to the world-renowned jazz club, Aqua Lounge.\textsuperscript{107} The community has always included Black political and civic leaders as residents. The area is also home to the historic Malcolm X Memorial Park between Pine Street and Larchwood Avenue, a name that was selected by community members to inspire Black youth.\textsuperscript{108}

Today, 52nd Street remains a historical and cultural center in Philadelphia. The majority of businesses on 52nd Street are small or locally owned, and about one-half are Black-owned, some for multiple generations.\textsuperscript{109} These businesses include Hakim’s Bookstore, the oldest actively operating Black-owned bookstore in the country.\textsuperscript{110}

Despite its many assets, in recent decades, the 52nd Street Corridor has been impacted by economic disinvestment. The surrounding neighborhoods that are predominately Black have struggled to regain financial prosperity.\textsuperscript{111} In recent years, residents have accused the City of attempting to gentrify the 52nd Street area through community development aimed at attracting white and affluent residents, and pushing out Black and low-income residents through increased costs of living.\textsuperscript{112} Systemic racial discrimination in the

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\textsuperscript{106} See id.
\textsuperscript{109} See id.
\textsuperscript{112} Laughlin, supra note 107; Office of Councilmember Jamie Gauthier, \textit{Affordable Housing Study and Planning Tool for Phila’s 3rd District}, PHENND (Jan. 19, 2021),
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City’s housing policies, including redlining, has caused homes in predominantly Black areas to be valued significantly less than similar residences in predominantly white communities prior to new waves of gentrification. These practices deprive Black families, including families in the 52nd Street area, of their full home value.

Research suggests that nationwide, aggressive policing practices are often located in areas that are changing demographically to become more racially and economically diverse. Data confirms that the PPD engages in discriminatory stops and frisks of residents in the 52nd Street area. In June 2020, the City’s statistical expert in the Bailey litigation acknowledged that in Police Service Areas (PSAs) 181 and 182, which encompass the Cobbs Creek and the 52nd Street Corridor, “the annual numbers of stops per 100 residents are unusually high.”

II. THE LAWSUIT

A. The Events of May 31

On May 31, 2020, a group of protesters gathered along 52nd Street demonstrating against the killing of Mr. George Floyd, police officers outfitted in full body armor, helmets, and face shields entered the predominantly Black neighborhood surrounding 52nd and Market Street. They repeatedly attacked protesters, residents, and bystanders without provocation, using chemical irritants, such as tear gas, pepper spray, and other munitions, like rubber bullets. As these events progressed, “the PPD’s actions turned the 52nd Street Community into something resembling


113. See Daniel F. Reidy, Urban Housing Finance and the Redlining Controversy, 25 CLEV. ST. L. REV. 110, 110 n.1 (1976) (“Racial redlining refers to policies or practices by which lending institutions discriminate in the granting of, or in the setting of terms for home loans based upon the perceived racial characteristics (determined by present or projected occupants) of the neighborhood in which the borrower wishes to live.”).


117. See Amended Complaint, supra note 9, at 14–15.
a war zone.” PPD officers indiscriminately shot tear gas and pepper spray from handheld devices without warning.

Although the justification for the authorization of force was to control looting, PPD officers did not limit the attack to the 52nd Street commercial corridor. They used military-style armored vehicles and other means to indiscriminately deploy chemical and assaultive munitions in residential areas within the 52nd Street Community where there were peaceful protesters, street medics, who are volunteers trained to provide first aid at demonstrations, and residents of the 52nd Street Community who were merely standing on their front porches. Elderly people using walkers tried to flee clouds of tear gas. Young children hid under cardboard boxes to try and avoid injury from PPD’s actions. Tear gas canisters landed on residents’ porches and in their backyards, forcing families to flee indoors. Even indoors, the tear gas reached residents, causing respiratory distress. Volunteer medics, legal observers, journalists, and other individuals recording police misconduct were targeted with rubber bullets, tear gas, pepper spray, and other force at close range and without warning. The PPD’s use of excessive and unwarranted force resulted in serious injuries that required medical attention and the intervention of the fire department and EMT personnel who took injured persons to hospitals on stretchers.

118. Amended Complaint, supra note 9, at 16.
119. Amended Complaint, supra note 9, at 16; CNA REPORT, supra note 10, at 67.
120. Amended Complaint, supra note 9, at 15.
121. Amended Complaint, supra note 9, at 15.
122. Amended Complaint, supra note 9, at 16.
123. Amended Complaint, supra note 9, at 16.
124. Amended Complaint, supra note 9, at 16.
125. Amended Complaint, supra note 9, at 16.
127. Amended Complaint, supra note 9, at 16.
Tear gas was deployed along nearly a half mile of 52nd Street for at least three hours.128 Video footage further confirmed the time, locations, and indiscriminate use of tear gas and munition.129 Reports from the Philadelphia Inquirer constructed this map of where munitions and other measures of military-grade force were used by PPD on May 31, 2020:130

![Map of tear gas deployment]

Later in the evening of May 31, at around 8 PM, approximately 50 people gathered at 52nd and Arch streets. This included members of the organization Philly for REAL Justice131 who lived in the community and other community members that were gathered to protest the police violence

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130. Id.

131. The Philadelphia Coalition for Racial Economic and Legal Justice (REAL) is an inclusive grassroots organization whose mission is to eliminate the system of white supremacy and police terror across all areas of racial, economic and legal profession. *Futures*, PHILLY COALITION FOR REAL JUST., http://phlassembled.net/futures/index/philly_coalition_for_real_justice/ [https://perma.cc/2K4W-R8AT] (last visited Feb. 13, 2024).
that had just occurred.\textsuperscript{132} While there, they spoke out about the police violence that had occurred against their community that day and the larger issues of brutality across the United States, using a speaker to share their views and play music.\textsuperscript{133} Police were still patrolling the area with armored vehicles.\textsuperscript{134} Even as the crowd of people had dwindled to approximately 15–20 people, at around 10 PM, a large group of police officers again attacked the demonstrators and bystanders with pepper spray, rubber bullets, and tear gas.\textsuperscript{135} Some community members were arrested and then released in the early morning the following day, after being taken to precincts in other parts of the City.\textsuperscript{136}

Despite being frequently termed “non-lethal,” tear gas, pepper spray, and “less-lethal” projectiles are powerful, dangerous, and, on occasion, lethal.\textsuperscript{137} Individuals exposed to tear gas can continue to experience significant

\textsuperscript{132} Amended Complaint, \textit{supra} note 9, at 15.
\textsuperscript{133} Amended Complaint, \textit{supra} note 9, at 15.
\textsuperscript{134} Amended Complaint, \textit{supra} note 9, at 15.
\textsuperscript{135} Amended Complaint, \textit{supra} note 9, at 15–16.
\textsuperscript{136} Amended Complaint, \textit{supra} note 9, at 15.
\textsuperscript{137} Tear gas, or “CS” gas, is a synthetic compound that causes irritation of mucous membranes, the skin, and the eyes, resulting in tearing, extreme pain, coughing, and difficulty breathing. Tear gas is usually disbursed through the firing of canisters, which explode and release the compound in the air. When used in close spaces or in large amounts, these effects can be enhanced, or even fatal. Lisa Song, \textit{Tear Gas Is Way More Dangerous than Police Let On, Especially during the Coronavirus Pandemic}, ProPublica (June 4, 2020), \url{https://www.propublica.org/article/tear-gas-is-way-more-dangerous-than-police-let-on-especially-during-the-coronavirus-pandemic} [https://perma.cc/24CA-QPC2]. The Geneva Convention bans the use of tear gas in warfare. Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65, reprinted in 14 I.L.M. 49 (1975), \url{https://2009-2017.state.gov/t/isn/4784.htm} [https://perma.cc/66G7-EYSD]. Pepper spray, also known as oleoresin capsicum or OC spray, is different from tear gas in that it is not synthetic. It causes extreme pain in the eyes, often described as a “bubbling” or “boiling” sensation causing eye damage that can sometimes be permanent and even lead to blindness. Pepper spray is disbursed through aerosolizing the compound in liquid streams or mists. It is also sometimes fired in a projectile known as a “pepper ball.” Pepper spray is particularly dangerous for people with preexisting respiratory disabilities, such as asthma. Amy McKeeer, \textit{From Tear Gas to Rubber Bullets, Here’s What ‘Nonlethal’ Weapons Can Do to the Body}, Nat’l Geographic (June 5, 2020), \url{https://www.nationalgeographic.com/science/article/what-nonlethal-weapons-can-do-to-the-body-george-floyd} [https://perma.cc/8H57-DQGK]. “Non-lethal” projectiles, broadly defined, are munitions made from many different substances, including rubber-coated steel bullets, wood, or wax, fired from specially designed weapons. Although designed not to cause fatalities, such projectiles are known to cause severely incapacitating and often permanent injuries, including the loss of eyes, broken bones, and damaged internal organs. Ayodola Adigun & Eden David, \textit{Rubber Bullets Can Be Deadly, Experts Say, as George Floyd Protests Put Spotlight on Police Use of TheProjectiles}, ABC News (June 9, 2020), \url{https://abcnews.go.com/Health/rubber-bullets-deadly-experts/story?id=71153062} [https://perma.cc/6KG8-TBB7].
adverse health consequences for at least one month after exposure.\textsuperscript{138} Centers for Disease Control (CDC) guidance explains that long-lasting exposure to tear gas, especially in close settings, can lead to severe effects, including blindness, glaucoma (a serious eye condition that can lead to blindness), immediate death due to severe chemical burns to the throat and lungs, and respiratory failure possibly resulting in death.\textsuperscript{139}

The PPD’s use of tear gas during the COVID-19 pandemic created additional risks for those exposed. COVID-19 is transmitted through respiratory droplets, which are spread by coughing, sneezing, and talking.\textsuperscript{140} In addition to the burning of the eyes, nose, and mouth, tear gas exposure can cause increased nasal secretions, immediate coughing, and sneezing,\textsuperscript{141} and thereby increase the risk of spreading COVID-19. The virus is disproportionately harming Black communities compared to predominantly white communities.\textsuperscript{142} Public health guidance advises that wearing a respiratory mask is one of the most important ways to prevent the spread of COVID-19,\textsuperscript{143} but because tear gas causes respiratory problems, many individuals exposed to tear gas cannot keep their masks on. When large groups of people congregate, remove their masks, and cough or sneeze, the risk of becoming infected with COVID-19 skyrockets. On May 31, the use of tear gas and pepper spray prompted many individuals, including our clients, to remove their protective facial coverings. This in turn created an additional level of harm during the current COVID-19 pandemic.

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141. Karagama et al., \textit{supra} note 138.
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B. The Allegations

On July 14, 2020, the NAACP Legal Defense Fund, the Abolitionist Law Center, and the law firm of Kairys, Rudovsky, Messing, Feinberg & Lin filed Smith v. City of Philadelphia, on behalf of 20 plaintiffs whom the May 31 events directly impacted (also referred to as “our clients”). The lawsuit alleged the PPD’s use of militarized violence against the 52nd Street Community violated the plaintiffs’ Fourth Amendment rights to be free from unwarranted seizures and excessive force and their Fourteenth Amendment right to be free from racially discriminatory treatment by the police. The Complaint also alleged the excessive use of force by police was in retaliation for the exercise of First Amendment rights, including freedom of speech and assembly, by plaintiffs and Black residents of the 52nd Street Community.

The allegations that the use of force against protesters and residents was racially discriminatory were unique from the claims in other protest lawsuits that were filed in the aftermath of George Floyd’s death. The lawsuit alleged that the PPD’s unjustified and excessive use of force on May 31 in the 52nd Street Community was motivated, at least in part, by the race of some of the plaintiffs and the fact that the 52nd Street Community is a predominantly Black neighborhood. Specifically, the suit alleged that the PPD’s use of excessive force in the 52nd Street Community on May 31 was part of a pattern and practice of racially biased policing that has long been known to the City, but which the City had failed to rectify. The PPD’s actions included not only an attack on protesters, but a broader attack on residents and bystanders who happened to be in a Black community where protests occurred.

Despite the justification Philadelphia officials provided — that the violent tactics were appropriate responses to looting — the PPD chose not to use force in other neighborhoods that experienced looting in the days surrounding May 31. In Center City Philadelphia, along the Chestnut and

145. Amended Complaint, supra note 9, at 38–41.
146. Amended Complaint, supra note 9, at 44–45.
148. Amended Complaint, supra note 9, at 34–37.
149. Amended Complaint, supra note 9, at 37, 41, 43.
150. Amended Complaint, supra note 9, at 2–4.
151. Amended Complaint, supra note 9, at 3.
Walnut Streets’ commercial corridor, where residents are predominantly non-Black, there were widespread incidents of looting on May 30, 2020.\textsuperscript{152} However, the PPD did not use tear gas and other munitions there — either on the commercial streets themselves or in the residential blocks surrounding that area.\textsuperscript{153} In the overlapping Philadelphia neighborhoods of Port Richmond, Kensington, and Fishtown, which are other areas where residents are predominantly non-Black, there were reports of widespread looting from May 31 into June 1.\textsuperscript{154} Yet the PPD did not use tear gas and other munitions there — either on the commercial streets or in the residential blocks surrounding that area.\textsuperscript{155}

In fact, while police terrorized residents in the 52nd Street Community, during the same weekend of protests, officers permitted a vigilante mob of approximately 100 men armed with baseball bats, clubs, and hammers to roam the streets even after the citywide curfew near the PPD’s 26th District headquarters in the predominantly white Fishtown neighborhood.\textsuperscript{156} A smaller group of counter-protesters, largely women and people of color, were also present and gathered peacefully.\textsuperscript{157} Dozens of PPD units and officers were on the scene.\textsuperscript{158} At various points, members of the white group of protesters attacked the peaceful counter-protesters physically and verbally with racial slurs and threats.\textsuperscript{159} Even while this mostly white vigilante group threatened and assaulted bystanders, using racist and homophobic slurs, PPD officers did not arrest them or respond with tear gas or other military munitions. Rather, PPD officers simply stood by.\textsuperscript{160}

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\footnote{153. Amended Complaint, \textit{supra} note 9, at 3.}


\footnote{155. Amended Complaint, \textit{supra} note 9, at 3.}


\footnote{157. Amended Complaint, \textit{supra} note 9, at 35–36.}

\footnote{158. Amended Complaint, \textit{supra} note 9, at 35–36.}

\footnote{159. Amended Complaint, \textit{supra} note 9, at 35–36.}

\footnote{160. Samantha Melamed, \textit{Protest Observers Say Police Allowed South Philly Columbus ‘Defenders’ to Assault Them}, PHILA. INQUIRER (June 16, 2020),}
The City’s reaction in the aftermath of the use of force against protesters in various parts of Philadelphia also demonstrated racial bias. Facing criticism from reporting that the City had given broad authorization for the use of tear gas, Mayor Kenney and Police Commissioner Outlaw issued a statement announcing an independent investigation into police actions on the 676 Expressway. While Mayor Kenney and Police Commissioner Outlaw apologized for the “unjustifiable” use of force when officers teargassed more racially diverse protesters marching on the 676 Vine Street Expressway, neither has apologized for the egregious violence against the predominantly Black 52nd Street Community. Although the Mayor expressed “regret” after video footage of the 676 tear gassing surfaced, he maintained that the situation in which he gave consent to use tear gas in West Philadelphia was “a totally different situation” than the protests on 676.

In fact, a report by the City Controller concluded that the Police Department used disparate approaches as to the level of force used against protesters. This was based on the race of the protesters and whether they were critical of police. The report goes on to state that “the aggressively militant policing in West Philadelphia stood in stark contrast to the lack of response during much of the looting in Center City,” which is a predominately white and wealthy area. “And the well-documented instances of excessive force in mostly Black neighborhoods or against pro-Black Lives Matter protesters clearly differed from what appeared to be a friendly relationship with mostly White vigilantes” in other predominately white areas.
In response to the Mayor’s statement, Philadelphia Councilmember Jamie Gauthier, who represents the 52nd Street corridor, demanded that the Mayor explain why police fired tear gas canisters into the streets of West Philadelphia for hours. She pointed out: “[T]he conversation around tear gas and use of force by police continues to focus on 676, without a realization or recognition that these same tactics and more were used on a residential Black neighborhood.”  

In support of the *Monell* allegations, plaintiffs alleged that when authorizing the use of tear gas and other munitions, Mayor Kenney, Commissioner Outlaw, and other City policymakers refused, with deliberate indifference, to account for the City’s long-standing failure to train, supervise, and discipline its officers in connection with the aggressive use of force. In particular, officers were criticized for the aggressive use of force in a predominantly Black area like the 52nd Street Community. In short, the city’s policymakers disregarded the high risk that police would abuse this authorization and would use unlawful force against plaintiffs and other innocent victims of police abuse. These citizens could not constitutionally be met with tear gas and other munitions.

Research shows that police officers are more likely to falsely perceive predominantly Black communities as dangerous, threatening, and violent due to stereotyping and racial bias. These false beliefs are deep-seated; in 1957, survey research found that most white PPD officers believed Black people were predisposed to crime. These stereotypical and racist beliefs persist today and lead to excessive surveillance, stops, frisks, seizures, and force against individuals in predominantly Black communities because they are located in a predominantly Black community. The after-action review of the Philadelphia Police Department’s actions that were commissioned by

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168. *See generally* Monell v. Dep’t Soc. Servs., 436 U.S. 658 (1978) (holding that a municipal government may be held liable under Section 1983 if a plaintiff can demonstrate that a deprivation of a federal right occurred as a result of an official policy or practice).


the city found that while PPD officers described the crowd in West Philadelphia as “the most violent crowd they had ever encountered,” residents and individuals present that day described the protesters in this area as “generally peaceful, other than yelling at the police to stop the tear gas and rubber bullets in the area.” “In fact, many protesters stated that the only acts of violence that occurred on May 31 were those of the PPD.” The gap between the level of dangerousness reported by the PPD and the lack of danger reported by members of the West Philadelphia community on May 31, 2020 strongly suggests that stereotypical bias impacted officers’ assessment of the threat.

III. SEEKING ABOLITIONIST REMEDIES

It was evident that the horrific events alleged in the Complaint required remedies that not only addressed police interactions with protesters, but also police interactions with the community members more generally. This Part recounts how, based on our clients’ expressed concerns, we sought remedies by considering a harm reduction lens. In furtherance of abolitionist goals, we brainstormed solutions that we termed as abolitionist remedies. We divide these remedies into three major categories: (1) increasing transparency and access to data; (2) demilitarizing police; and (3) investing funds towards social services.

A. Increase Public Accountability and Transparency Around PPD Misconduct, Including Racial Profiling and Discriminatory Use of Force by the PPD

Our clients were deeply concerned that despite widespread public attention and condemnation on May 31, no PPD officer had come forward to report or take responsibility for the extreme misconduct that occurred on May 31, 2020. They felt that this reality revealed that the systems put in place to purportedly ensure accountability and transparency for PPD misconduct were broken and in need of repair. Based on our clients’ experiences and encounters, there was consensus among the clients that PPD officers who engaged in misconduct were confident that they would not be held accountable for their misconduct and could act with impunity. Some of the most egregious behavior that occurred on May 31, 2020 were in direct defiance of PPD directives, suggesting that officers knew the directives would not be enforced and their behavior would not be punished. For

172. CNA REPORT, supra note 10, at 56.
173. CNA REPORT, supra note 10, at 65.
174. CNA REPORT, supra note 10, at 65.
example, Directive 8.12\footnote{PHILA. POLICE DEP'T, DIRECTIVE 8.12, PICTURES, VIDEO, AND AUDIO RECORDINGS OF POLICE OFFICERS WHILE PERFORMING OFFICIAL FUNCTIONS IN PUBLIC/ NON-PUBLIC SPACES (2022), https://www.phillypolice.com/assets/directives/D8.12-PicturesVideoAndAudioRecordingsOfPoliceOfficers.pdf [https://perma.cc/W5MT-UVLG].} provided that PPD personnel shall not interfere with the ability of press personnel, legal observers, protesters, or residents to film or record the actions of the police. Yet, our clients were repeatedly attacked while recording police misconduct. Furthermore, PPD’s Disciplinary Code at the time had rules prohibiting whistleblower activity but no preventative mechanisms, like a Duty to Intervene, that would decrease the need to search for accountability on the back end. All of this led us to believe that PPD’s priorities were largely geared toward protecting the department against liability and protecting the careers and reputations of the police officers, rather than actually responding to our clients’ concerns.

Determining how to craft our proposed remedies such that they both responded to our clients’ needs and started the process of addressing these deep, systemic problems was a challenging task. Through the NAACP LDF’s policy team’s previous research on police union contracts,\footnote{See generally LEGAL DEFENSE FUND, COMMUNITY OVERSIGHT OF POLICE UNION CONTRACTS (2020).} we knew that many accountability mechanisms were explicitly barred by the PPD’s contract with the Fraternal Order of Police contract (PPD/FOP).\footnote{See Award, In re Fraternal Order of Police & City of Philadelphia, American Arbitration Association, AAA Case No. 0-21-0002-3120 (2021), https://www.phila.gov/media/20210913125918/FOP-Award-Executed-9-14-21.pdf [https://perma.cc/4N66-DHN2].} For example, several clauses in the PPD/FOP contract serve to perpetuate harmful practices of secrecy around misbehavior and limit transparency and accountability for officers who engage in misconduct.\footnote{See Community Oversight Police Union Contract, NAACP LEGAL DEF. & EDUC. FUND, at 1 (Aug. 2020), https://www.naacpldf.org/wp-content/uploads/LDF_07242020_PoliceContractToolKit-12c.pdf [https://web.archive.org/web/20230910152825/https://www.naacpldf.org/wp-content/uploads/LDF_07242020_PoliceContractToolKit-12c.pdf] (providing a framework to assess whether a police union framework “contains provisions that inhibit investigations of police misconduct complaints or shield officers from discipline”).}

Our clients felt it was essential to mandate data collection and public reporting on the use of force (including discharges of firearms or use of pepper spray and other “less lethal force”) and to provide the community the opportunity to ask questions and provide direct feedback to the PPD on recent incidents. Ultimately, we reached an agreement under which the City will make a Deputy Commissioner available to attend a bi-annual meeting hosted by the Southwest Inspector and open to the public. The Commissioner will report on the use of force incidents in PSA 181 and 182.
that have occurred during the prior six months and will be available for questions and to hear from community members in attendance. The bi-annual report given at this meeting will include a written summary of data on stops, frisks, arrests, and any incident for which a Use of Force Report is required under PPD’s Directive 10.2.179

These efforts do not ensure that police will be accountable for longstanding and ongoing harms to Philadelphia’s Black communities. That said, we did view such reforms as harm reduction in that they increase the various mechanisms for accountability and facilitate greater transparency and voice for our clients, Black communities, and other communities directly impacted by police violence. For our clients who ascribed to abolitionist values, accountability and transparency are pursued in alignment with abolitionist remedies. Moreover, as Alexis Yeboah-Kodie has written, transparency works to “provide abolitionist organizers with access to resources, language,” and in so doing provides a means for divesting from systems of punishment and control.180

Our proposed reforms center these goals, though there is no guarantee that they will remain central in the future. While these legal tools remove impediments to transformative and abolitionist change at some point, they do not ensure them. This is the central tension in using legal tools to pursue abolitionist remedies. At the same time, pursuing these remedies does at least remove traditional barriers to transparency, data collection, oversight, and participation in state-led accountability measures.

B. Divesting in Over-Policing & Demilitarizing the PPD

As discussed above, on May 31, 2020, the PPD arrived in West Philadelphia in armored vehicles and repeatedly unleashed a variety of dangerous military-style munitions — including rubber bullets, tear gas, and pepper spray — against protesters, residents, and bystanders throughout the neighborhood. Our utmost priority in fashioning the remedies around the harm caused by the PPD employing these weapons was to ensure that they could not be used again.

The legal team learned that the PPD gets much of its military-style munitions from the federal government, either through the Department of Defense’s (DoD) Law Enforcement Support Office (LESO) or grants from the Department of Homeland Security to purchase such equipment. Under


the National Defense Authorization Act, the DoD is permitted to transfer its excess or obsolete property to federal, state, and local law enforcement agencies through what has been dubbed the “1033 Program.” While most of the transfers are considered “non-controlled property” (i.e., items that the local departments would generally be able to acquire on the commercial market, like weapon accessories, cameras, and computers), law enforcement agencies are also permitted access to more tactical equipment like tanks, night goggles, mine-resistant vehicles if request it. As of June 2020, 8,200 law enforcement agencies across the country participated in the 1033 Program. Considering that Black and minority communities are disproportionately and overly policed — both in Philadelphia and the country at large — it is no surprise that these weapons are most often deployed against these communities.

There have been a number of attempts to “demilitarize” the police in the wake of persistent killings of unarmed citizens. These efforts have ranged from reforming the relationship that local police departments have with the DoD’s LESO to ensuring that those departments are not able to acquire militarized weapons through other means. In 2015, President Obama signed an Executive Order (the EO) limiting the amount and type of equipment that the DoD (and other federal agencies) were able to transfer. As a result of the EO, 126 armored vehicles, 138 grenade launchers, and 1,623 bayonets were returned to LESO. President Trump rescinded the EO in August


2017, leading to more than 15,750 military-style weapons being transferred to police departments across the country.186

The “Stop Militarizing Law Enforcement Act,” first introduced in 2014 following the murder of Mike Brown in Ferguson, Missouri, strived to create more transparency regarding the so-called offensive equipment (e.g., armored vehicles, drones, etc.) the DoD has transferred through the 1033 program and which local agencies received that property.187 In the wake of Trump’s rescinding of the EO, bi-partisan groups of politicians have again introduced this bill.188 As of this writing, that legislation is stalled in Congress.

There have also been numerous reform efforts on the state and local level. For example, in 2015, the Montana Legislature passed a law that would prohibit state and local law enforcement agencies from receiving grenades or grenade launchers, silencers, weaponized drones, aircraft, and other militarized or armored vehicles from the federal government.189 Though the Montana bill did not preclude the ability of local agencies to purchase the equipment on their own, it has been hailed as a necessary first step toward demilitarization because local agencies almost never have the funds to make these kinds of purchases themselves.190 Communities from San Jose, California,191 to Oxford County, Maine,192 have either sent back or discontinued solicitation of military-style weaponry for their police departments. Though promising and effective, these isolated efforts have


188. See id.


not been able to stop or slow the militarization of other departments like the PPD.

In light of this seeming intransigence on the national level and the disparate nature of local efforts, we, the legal team, and our clients decided to recommend an end to any existing contract under the 1033 program that allows the PPD to access military weapons. Ultimately, the Parties reached an agreement under which the City affirmed in writing that it had terminated its participation in the Federal Law Enforcement Support Office/1033 program, and that any equipment previously received through that program had been returned.\footnote{193 See Consent Order, Smith et al. v. City of Philadelphia, No. 20-3431, Hough et al. v. City of Philadelphia, No. 20-03508, Welch et al. v. City of Philadelphia, No. 20-3432, Zolitor et al. v. City of Philadelphia, No. 20-3612 (E.D. Pa. Mar. 20, 2023), https://www.naacpldf.org/wp-content/uploads/Consent-Order.pdf [https://perma.cc/H7KP-6E6U].}

Moreover, in November 2020, after hearing powerful testimony from the plaintiffs in this and other lawsuits filed in the aftermath of the George Floyd protests,\footnote{194 Press Release, NAACP LDF, LDF Clients Testify at Philadelphia City Council Hearing about Police Violence Employed against Residents of a Predominantly Black Neighborhood (Oct. 7, 2020), https://www.naacpldf.org/press-release/ldf-clients-testify-at-philadelphia-city-council-hearing-about-police-violence-employed-against-residents-of-a-predominantly-black-neighborhood/ [https://perma.cc/79FU-7RHR].} Philadelphia City Council passed a bill that would permanently ban — in the case of protests, demonstrations, and “First Amendment activities” — weapons like tear gas, rubber bullets, pepper spray, flash grenades, long-range acoustic devices, and stinger balls.\footnote{195 Anna Orso, Most Major Cities Haven’t Banned Tear Gas during Protests. Will Philly Be Different?, PHILA. INQUIRER (Oct. 9, 2020), https://www.inquirer.com/news/tear-gas-rubber-bullet-ban-philadelphia-police-other-cities-20201009.html [https://perma.cc/R5ZX-CB4U].} PPD directives recognized that, given the dangerous nature of tear gas, pepper spray, rubber bullets, and other projectiles, their deployment must be limited to only the most extreme circumstances, and not for the purposes of crowd control,\footnote{196 PHILA. POLICE DEP’T, DIRECTIVE 10.3, USE OF LESS LETHAL FORCE: THE CONDUCTED ENERGY WEAPON (CEW) (2021), https://phillypolice.com/assets/directives/D10.3-UseOfLessLethalForce.pdf [https://perma.cc/5XEW-GNXS]; see also PHILA. POLICE DEP’T, DIRECTIVE 8.3, DEMONSTRATIONS, LABOR DISPUTES AND CIVIL DISTURBANCES (2022), https://www.phillypolice.com/assets/directives/D8.3-DemonstrationsAndLaborDisputes.pdf [https://perma.cc/3EAQ-CAPO].} and the City Council resolution was an important step further recognizing the unique protection that protests deserve.\footnote{197 THE PHILA. CODE, Bill No. 20053800 (Oct. 29, 2020).} Although some have advocated for police departments to retain the authority to use such force in situations of imminent danger, citing in particular the January 6 insurrection and attack of the Capitol, the reality is that tear gas has rarely been used in
Philadelphia history, excluding notably against Black Lives Matter protesters and during the MOVE bombings.

C. Investing in Residents in Predominantly Black Neighborhoods

Our clients believed that to root out this legacy of discrimination, the City must reevaluate how its funding and other policy decisions contribute to racial disparities in police contact and the racialized criminalization and punishment of Black residents. As the after-action report found, “West Philadelphians fear for the future of their children and their neighborhood, and . . . want to see alternatives to public safety employed as a remedy to what they perceive as over-policing in their area.” Like many West Philadelphia residents, our clients “expressed a desire for de-militarizing the PPD and reallocating funding from the PPD budget to mental health and education resources.”

Our clients wanted to follow a divest/invest model to shift money away from the most egregious of PPD’s spending priorities toward more empowering (and less punitive) community assistance programs. The divest/invest approach proceeds from the belief that “what we feed will grow, and what we starve, will starve.” It is the recognition that continuous investments in police departments and military equipment leads to over-policing of vulnerable communities and mass incarceration, while dis-investment in social programs, education, alternative mechanisms for public safety leaves vulnerable communities less safe in the long-run.

From this perspective, many forms of injunctive relief traditionally sought in police reform litigation (trainings, body-worn cameras, and the hiring of a more diverse police force) were off the table as they would only grow the infrastructure and budget of the police department.

The legal team’s decision to follow a divest/invest model was situated in a growing movement to divest from systems of surveillance, policing, and punishment. Prior to the current iteration of social movements, invest/divest demands were featured in the 2016 “A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice.” Since then, these

198. CNA REPORT, supra note 10, at 65.
199. CNA REPORT, supra note 10, at 65.
201. See CRITICAL RESISTANCE, supra note 24.
202. Policy Platform, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/ [https://perma.cc/FM7K-3VAG] (last visited Jan. 30, 2024); see also Akbar, supra note 23, at 107 (“The demand to defund and dismantle the police stems from decades of abolitionist organizing against the carceral state — organizing that has proliferated since the Ferguson and Baltimore rebellions and the rise of the Movement for Black Lives.”).
demands have turned towards unapologetically abolitionist goals. As abolitionist thinkers and organizers have emphasized, there is a distinction between “defund” as a call for budget reallocation and modification of spending priorities and “defund” as a pathway to abolition.203 Defund as a pathway to abolition is a movement to invest in material resources, social provision, and collective care while reframing existing power relationships. And it is a bold call to divest in punitive forms of carceral control, policing, and surveillance.204

For example, the ACLU put forth a three-part formula to divest from law enforcement and reinvest in the Black and Brown communities they unjustly target. This includes (1) prohibiting police from enforcing a range of non-serious offenses, including issuing fines and making arrests for non-dangerous behaviors, and eliminating many of the unnecessary interactions between the police and community members that have led to so much violence and so many deaths; (2) reinvesting savings from the current policing budgets into alternatives to policing that will keep local communities safe and help them thrive; and (3) implementing commonsense, iron-clad legal constraints and other protections on the rare instances in which police officers do interact with community members.205

For practical implementation strategies, the legal team looked at what divestment actions other cities were taking in the wake of the protests that occurred during the summer of 2020. Some cities had already announced intentions to redirect some of the funding they spend on policing toward more community-based programs. In Los Angeles, the Mayor and City Council president announced their intention to invest more than $200 million into Black communities, $100–150 million of which would come from LAPD’s $1.8 billion budget.206 The money was reinvested toward community intervention officers, homeless prevention and services, gang prevention, domestic violence support, school repairs, the improvement of streets and park, a COVID-19 bereavement fund, tenant advocacy programs,

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204. Akbar, supra note 23, at 109–11 (discussing how defund movements have surged across the country alongside “campaigns to oppose policing and jail infrastructure projects”).


and arts initiatives, amongst other programming.\textsuperscript{207} Similarly, New York City’s FY2021 budget cut nearly $1 billion from the New York Police Department’s spending budget.\textsuperscript{208} The new budget reinvested $450 million into the City’s Housing Authority and Park’s Department, and $430 million into community initiatives: $115 million for summer youth programs, $116 million to education, and $134 million for family and social services.\textsuperscript{209}

Our clients felt it was especially important to identify a community-wide remedy, in addition to negotiating individual damages, because the events of May 31, 2020 created a community-based harm that went beyond the individuals who were able to obtain representation in damages actions. Community funds established to remedy damage caused by police or other state sanctioned action have been developed at the state and local level in environmental justice cases, but rarely applied in the context of police litigation, despite the well-established research that demonstrates the community-wide impact of police violence. There is, however, precedent for a community fund in a pathbreaking agreement reached in 2016 in the context of the Chicago torture cases. This sought to hold the Chicago Police Department accountable for a two-decade program where officers tortured and mutilated more than one hundred people.\textsuperscript{210} In addition to direct compensation to 57 individual victims, the city of Chicago created the Chicago Torture Justice Center, a center where survivors can access specialized trauma counseling services, and benefits including job placement and free tuition at city colleges for the survivors and their families.\textsuperscript{211}


\textsuperscript{209} Id.


Currently in its seventh year of operation, the Chicago Torture Justice Center provides counseling to individuals impacted by police violence, including families of survivors.\textsuperscript{212} We sought to design a remedy that would heed abolitionist organizers' advice to creatively imagine the "potential vision of what justice could look like when people are harmed."\textsuperscript{213} In particular, we sought to heed the Movement for Black Lives call to critically consider reparations as an abolitionist strategy.\textsuperscript{214}

Ultimately, the Parties reached an agreement in which the City committed to provide $500,000 toward community wellness and healing through a community grant to serve the West Philadelphia community surrounding the 52nd Street Corridor.\textsuperscript{215} Under this agreement, the City will designate an additional $75,000 to Bread & Roses,\textsuperscript{216} a community-based grantmaking fund, to cover the cost of administering the grant. The West Philadelphia Community Fund is intended to serve three purposes. The first is to hire a therapist, counselor, clinician or other community wellness specialist to be co-located within a pre-existing, trusted community service provider(s) or community-based organization(s) to provide culturally responsive, community-based mental health services to individuals impacted by the police violence that occurred on May 31, 2020, regardless of insurance status. The second is to promote wellness, build resilience, and improve the

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\textsuperscript{212} See id.


\textsuperscript{214} MOVEMENT FOR BLACK LIVES, REPARATIONS NOW TOOLKIT 66–72 (2019), https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf [https://perma.cc/2Z3Q-RMGS]; see also Alexis Karerton, Reparations for Police Violence, 45 N.Y.U. REV. L. & SOC. CHANGE 405, 410 (2021) (urging activists, lawyers, and others "to broaden the conversation about redress for police violence to include reparations directed to impacted communities").

\textsuperscript{215} See generally Consent Order, supra note 193. Under the settlement for all four lawsuits, including Smith et al. v. City of Philadelphia, No. 20-3431 (E.D. Pa. Mar. 20, 2023), Hough et al. v. City of Philadelphia, No. 20-03508 (E.D. Pa. Mar. 20, 2023), Welch et al. v. City of Philadelphia, No. 20-3432 (E.D. Pa. Mar. 20, 2023), Zolitor et al. v. City of Philadelphia, No. 20-3612 (E.D. Pa. Mar. 20, 2023) the City of Philadelphia agreed (1) to pay monetary damages totaling $9,250,000 collectively to those harmed by the PPD’s conduct in the summer of 2020, (2) to disengage from the 1033 program, (3) to meet every six months with the West Philadelphia community to present data around the Department’s use of force and respond to questions and comments from the community; and (4) to commit $500,000 to a fund that will provide interdisciplinary, trauma-informed counseling to victims of police violence and provide support for and promote community-led programming in the aftermath of police violence and misconduct.

quality of life in the greater West Philadelphia community through direct services and programming. The third is to increase agency and support equity and racial/social justice by having community partners and residents direct funding decisions. Individuals who currently reside or who were present and impacted in the West Philadelphia area on May 31, 2020 will be eligible to apply to utilize the grant money. The funds will be awarded through a community-led grant making process where plaintiffs and other West Philadelphia residents serve on the committee to select grantees and determine how the community fund should be distributed to nonprofits providing community programming and related services.

CONCLUSION

Just a few months after the plaintiffs filed Smith v. City of Philadelphia, on October 26, 2020, two Philadelphia police officers responded to a call for assistance for an individual experiencing a mental health crisis. Upon arrival, they encountered Walter Wallace, Jr., a young Black man with a history of mental illness, who was carrying a knife. The officers fired their weapons 14 times, killing Wallace. Following Walter Wallace’s killing, there were confirmed reports of police again responding with excessive force against West Philadelphia protesters and legal observers in the aftermath of yet another police killing of a Black West Philadelphia resident.

Police violence and excessive force in predominately Black communities can feel cyclical. It is indeed systemic. This is the reason that so many residents and organizers have shifted from working to reform police to an approach that focuses on revisioning what it means to keep a community safe through a fundamentally different kind of response.

In crafting the remedies for this lawsuit, we wanted to be sure that we captured those policy changes that our clients felt were most important, while also balancing our ethical obligations to recommend a proposal that would

217. The Philadelphia District Attorney’s Office has recognized that “[w]ell-resourced community organizations and community-based efforts also play an important role in preventing and addressing violence.” PHILA. DIST. ATT’Y’S OFF., supra note 69, at 55.
be successful in reaching an agreement with local actors. The divest framework of the abolitionist movement provided an effective approach for us to creatively pursue our clients’ demands and visions for meaningful and enduring change. Our experiences offer a case study for how lawyers can work with clients interested in pursuing abolitionist remedies to seek both non-reformist reforms and reforms focused on harm reduction that do not merely repackage punitive approaches and carceral logics.

So much work is still needed. Critically, and as the City’s own investigation recognized, West Philadelphia residents believe that the first step to healing is a recognition of the harm and apology from the City and the PPD for the disproportionate actions that were taken against them on May 31, 2020. This has yet to occur.

In addition, while we pursued an investment in the infrastructure of mental health and wellness that communities need to thrive, there was no corresponding divestment in police funding. This is a major limitation of police reform litigation; while monetary damages are routinely recognized as remedy, that money comes from the City and not from the police budget (or a police officer themself). There is no real precedent for a remedy that would serve to defund the police as opposed to affirmatively funding other programs. We thus chose to focus our energy on affirmatively harnessing resources for the programing and infrastructure we hope will one day replace the carceral state, such as mental health and wellness programing.

Other remedies we recommend for reducing the footprint of policing include:

1. Decriminalizing quality of life offenses such that they are not subject to criminal sanction or prosecution. The plaintiffs in Bailey v. City of Philadelphia have advocated that the PPD should no longer engage in stops, frisks, or searches of persons suspected of committing “quality of life” offenses. PPD should issue and implement a directive prohibiting stops,
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searches, citations, or arrests for suspected quality of life offenses, and obligate officers to permit individuals engaging in such conduct to voluntarily cease that conduct without any stop, search, citation, or arrest occurring. As Michelle Alexander has argued, there was a sharp turn in the Supreme Court’s Fourth Amendment jurisprudence during the War on Drugs so that “it is no longer necessary for the police to have any reason to believe that people are engaged in criminal activity or actually dangerous to stop and search them.”

Today, police have greater authority to stop civilians for minor, nonthreatening legal violations or even a pretextual justification than ever before. With increased authority to stop and seize comes new opportunities for police officers to both assert power and use force. As Professor Devon Carbado explains, an ordinary stop “can be a gateway to extraordinary police violence” and “Fourth Amendment law help[s] to stage” the “ordinary police interaction whose life-and-death boundaries Fourth Amendment law helps to produce.”

(2) The development of an alternate responder program (as distinct from a co-responder program that works directly with police). The City of Philadelphia could look at the model that the City of Eugene, Oregon, adopted more than 30 years ago. There, a nonprofit mobile crisis intervention program called CAHOOTS operates in place of the police


225. See generally Whren v. United States, 517 U.S. 806 (1996) (holding that when police officers have probable cause to stop vehicles for traffic infractions, a pretextual reason for conducting the stop is irrelevant).


department, dispatching social workers instead of officers to respond to mental health or otherwise non-violent assistance inquiries.\textsuperscript{229} Though the program has an annual budget of only $2 million, it is estimated to save the City nearly $8.5 million in public safety expenses annually. Philadelphia should expand its existing 311 system, and dispatchers within both the 311 system and the existing 911 system should be trained to identify interventions involving homeless persons, calls for assistance based on physical, developmental, or mental health needs, welfare checks, conflict resolution, substance abuse, housing crises, and other related service calls. Teams of two — consisting of a medic (either a nurse or EMT) and either a crisis worker or a social worker with relevant experience and training in the type of intervention required of a situation (e.g., lack of housing, conflict resolution, or mental health) — should respond to calls dispatched through 311 or 911 to the alternate responder program.

(3) Third, as discussed infra, we believe the City should adopt a complete ban on the use of tear gas. We believe tear gassing is inhumane and that police use of tear gas cannot be appropriately limited or reformed. Instead, the events of May 31, 2020, demonstrate that discretion to use tear gas and munition has on two occasions lead to the gassing and military style attack of a predominately Black community in West Philadelphia, traumatizing residents including children.

Abolitionist remedies permit a radical imagining of how to achieve legal remedies consistent with the goals of clients who are part of abolitionist movements. These remedies are consistent with abolitionist goals of promoting harm-reduction while pursuing non-reformist reforms. Though litigation is often thought of as a vehicle for incremental change, pursuing abolitionist remedies is feasible through impact litigation as we have demonstrated. We encourage scholars and practitioners to build on this work and continue to examine the strategies for helping abolitionist clients to achieve legal remedies, as well as the ethical challenges such representation presents.