

**DISTINGUISHED JURIST IN RESIDENCE  
LECTURE**

**RACE AND POLICING: SOME THOUGHTS AND  
SUGGESTIONS FOR REFORM**

*The Honorable Solomon Oliver Jr.\**

DANIEL CAPRA: We are really honored here today at Fordham Law School's Center for Judicial Events and Clerkships to have as our guest speaker Judge Solomon Oliver of the Northern District of Ohio. I'm going to give a bio; I'm trying not to take up all the time allotted for the talk, because he's accomplished so much that I could probably do so.

Judge Oliver was raised, along with his five brothers and four sisters, by his parents in Bessemer, Alabama, where he attended segregated public schools. He was appointed to the U.S. District Court for the Northern District of Ohio by President Bill Clinton and served as the chief judge from 2010 to 2017. He holds a B.A. from The College of Wooster, which I know to be an institution close to his heart; an M.A. in political science from Case Western Reserve University; and a J.D. from New York University School of Law.

Judge Oliver was an assistant professor of political science at The College of Wooster, and then a law clerk for Judge William Hastie on the Third Circuit Court of Appeals, the first African American federal judge. He then became an assistant U.S. attorney in the Northern District of Ohio, where he served as chief of the civil division and chief of appellate litigation. He was a professor at Cleveland State University's Cleveland-Marshall College of Law, where he served as associate dean from 1991 to 1994 and lived to tell the tale—so that really says something about him too. He served on the Advisory Committee on Civil Rules of the Judicial Conference of the United States and also was the liaison to the Advisory Committee on Evidence Rules. He sits by designation on the Third, Sixth, and Ninth Circuit Courts of Appeals.

Judge Oliver received the Richard W. Pogue Award for Excellence in Community Leadership and Engagement from the Cleveland Metropolitan

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\* U.S. District Judge, U.S. District Court for the Northern District of Ohio. This Lecture was held virtually on October 27, 2020, at Fordham University School of Law through the Center for Judicial Events and Clerkships. The transcript has been lightly edited.

Bar Foundation.<sup>1</sup> And importantly, in 2018, he was a recipient of the Annual Ronald J. Kutak Award,<sup>2</sup> which is widely known to be the best award that a lawyer can receive in the United States. It is given annually by the American Bar Association Section of Legal Education and Admissions to the Bar to an individual who has made significant contributions to the collaboration of the legal academy, the bench, and the bar. Our own John Feerick got that award,<sup>3</sup> so you know how distinguished that is.

Judge Oliver is here to talk to us today about policing and his thoughts about police reform and I will give it over to him.

JUDGE SOLOMON OLIVER JR.: Thank you, Dan. Thank you very much and good afternoon. Though I would prefer to be there in New York with you in person, I am delighted to be here virtually today. Indeed, I am honored to serve as a jurist in residence at Fordham. When Professor Capra inquired about the subject of my lecture, I began to think that I might share some of my experiences and thoughts relating to police misconduct. When I was a law professor, now many, many years ago, as Professor Capra's made clear, I did some research and writing in this area.<sup>4</sup> I have also served for more than twenty-six years on the U.S. District Court in Cleveland, where I have presided over a number of 42 U.S.C. § 1983 civil rights cases alleging police misconduct. Additionally, I have presided for about five years over the enforcement of the consent decree between the U.S. Department of Justice and the City of Cleveland in respect to police practices.<sup>5</sup>

I concluded that, in light of the recent high-profile killing of Blacks by police officers,<sup>6</sup> and the protests that ensued after George Floyd and other killings,<sup>7</sup> I should focus on the unique perils Blacks face when they have

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1. Eric Heisig, *Cleveland Bar Foundation to Honor Longtime Federal Judge Solomon Oliver Jr.*, CLEVELAND.COM (Jan. 20, 2020), <https://www.cleveland.com/court-justice/2020/01/cleveland-bar-foundation-to-honor-longtime-federal-judge-solomon-oliver-jr.html> [https://perma.cc/8T7T-DECK].

2. *Honorable Solomon Oliver, Jr., Ohio Life Fellow, Honored with the 2018 Robert J. Kutak Award*, AM. BAR FOUND. (Aug. 15, 2018), <http://www.americanbarfoundation.org/fellows/news/2070> [https://perma.cc/PP6B-333K].

3. *Kutak Award Committee: Past Award Recipients*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/committees/kutak\\_committee](https://www.americanbar.org/groups/legal_education/committees/kutak_committee) [https://perma.cc/6V4Z-89HK] (last visited Apr. 14, 2021).

4. See, e.g., Solomon Oliver Jr., *Municipal Liability for Police Misconduct Under 42 U.S.C. § 1983 After City of Oklahoma v. Tuttle*, 64 WASH. U. L.Q. 151 (1986).

5. See Settlement Agreement, *United States v. Cleveland*, No. 15-CV-01046 (N.D. Ohio May 26, 2015); SCHUBERT CTR. FOR CHILD STUD., *A CITIZEN'S GUIDE TO THE CLEVELAND POLICE CONSENT DECREE 4* (2017), <https://case.edu/schubertcenter/sites/case.edu/schubertcenter/files/2020-04/Consent-Decree-Summary-Edited.pdf> [https://perma.cc/8SNJ-L32T].

6. See Khaleda Rahman, *From George Floyd to Breonna Taylor, Remembering the Black People Killed by Police in 2020*, NEWSWEEK (Dec. 29, 2020, 12:14 PM), <https://www.newsweek.com/george-floyd-breonna-taylor-black-people-police-killed-1556285> [https://perma.cc/W8YP-BFLA].

7. See Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump> [https://perma.cc/Q42Y-3S9K].

encounters with the police. Now, as most of you recall, Floyd's especially gruesome murder was carried out in the face of constant pleas that, "I can't breathe, I can't breathe," as an officer kept a knee on his neck for more than eight minutes, beyond the time when he had become lifeless.<sup>8</sup>

Videos capturing the incident were played and replayed around the nation and abroad to the horror of so many. Their viewing sparked not only street protests calling for police reform but a broader call by a myriad of individuals and institutions across the nation for racial equity and inclusion throughout our society.<sup>9</sup> I know, for my own part, that the Board of Trustees for The College of Wooster, on which I serve, has established a racial equity task force, which I chair.<sup>10</sup> We are making an effort to look at both our governance and our oversight responsibility through the lens of racial equity. I am aware of similar efforts at other colleges and universities across the nation. Some of them have been partly informed by readings, such as Ibram Kendi's book, *How to Be an Antiracist*,<sup>11</sup> or Robin DiAngelo's book, *White Fragility*.<sup>12</sup>

And so a lot of positive things have happened in the aftermath of the Floyd killing. But we cannot ignore the fact that there are those who have not only sought to discredit the movement but to demonize it as racist, in part because of the banner under which it was being carried out, "Black Lives Matter." Their explanation for doing so is, in my view, contrary to logic and fact. The Black Lives Matter movement never meant to suggest, as those who seek to discredit it have claimed, that *only* Black lives matter. The desired inference was that Black lives *also* matter, or Black lives *do* matter.

The operating assumption of the Black Lives Matter movement is that it's easy to see, by how whites have been treated in our society, that white lives matter.<sup>13</sup> But one might conclude, from how Blacks have fared by comparison, that their lives do not matter. While you may or may not agree with that, that is the basis of the slogan, Black Lives Matter. As the joint authors of an article on policing stated, "The bottom line is this: members of

8. See *What to Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Apr. 21, 2021, 5:23 AM), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/BR86-GQKP>].

9. Amy Harmon et al., *From Cosmetics to NASCAR, Calls for Racial Justice Are Spreading*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/06/13/us/george-floyd-racism-america.html> [<https://perma.cc/RD5L-J2TR>].

10. Sarah Bolton, *On Support, Action and Next Steps*, COLL. OF WOOSTER (Aug. 28, 2020), <https://www.wooster.edu/about/leadership/president/writing/8-28-20/index.php> [<https://perma.cc/A34Z-QBS8>].

11. IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019).

12. ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018).

13. Rachel Elizabeth Cargle, *Why You Need to Stop Saying "All Lives Matter,"* HARPER'S BAZAAR (Apr. 16, 2019), <https://www.harpersbazaar.com/culture/politics/a27075028/black-lives-matter-explained> [<https://perma.cc/3NN2-PVZ2>] ("[T]he majority of experiences here in America already tend to center and highlight whiteness and cater to its safety. The country was built to function that way. Its roots of white supremacy and the marginalized concern for people of color has remained.").

the public want to believe that the authority they are dealing with—let’s say a police officer—believes they matter. And the public makes this assessment by evaluating how the police officer treats them.”<sup>14</sup> The leaders of the Black Lives Matter movement were, and are, asserting, in the wake of the Floyd and other killings, that Blacks are in many cases treated as if their lives do not matter.

Congressman John Lewis, the civil rights icon,<sup>15</sup> and many others who were heartened by the demonstrations that were occurring all over the country and many places abroad, thought this might be a turning point—not just in regard to America’s willingness to reckon with racism and discriminatory practices in police work but the legacy of racism in this country.<sup>16</sup> That legacy continues to negatively impact almost every aspect of the lives of African Americans, from education, to housing, to healthcare.<sup>17</sup>

Indeed, Congressman Lewis perceived the call for police reform and racial equity to be an extension of the civil rights work in the 60’s<sup>18</sup> and, more broadly, of his life’s work. He said, “It was very moving, very moving to see hundreds and thousands of people from all over America and around the world take to the streets to speak up, to speak out, to get in what I call ‘good trouble.’”<sup>19</sup> He stated, “This feels and looks so different.”<sup>20</sup> He noted that the Black Lives Matter movement, which served as the umbrella organization for the anti-racist demonstrations, was “much more massive and all-inclusive.”<sup>21</sup> It was Congressman Lewis’s view that “there w[ould] be no turning back.”<sup>22</sup>

Perhaps the connection of this movement to Congressman Lewis’s work was most vividly made upon his death, not long afterwards, as the nation celebrated his life. We were called to remember his young days as a Freedom

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14. Tracey Meares & Tom Tyler, *Policing: A Model for the Twenty-First Century*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 161, 165 (Angela J. Davis ed., 2017).

15. Katharine Q. Seelye, *John Lewis, Towering Figure of Civil Rights Era, Dies at 80*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/07/17/us/john-lewis-dead.html> [<https://perma.cc/2TW6-39YR>].

16. Jonathan Capehart, Opinion, *John Lewis to Black Lives Matter Protesters: ‘Give Until You Cannot Give Anymore,’* WASH. POST (June 10, 2020, 6:01 AM), <https://www.washingtonpost.com/opinions/2020/06/10/john-lewis-black-lives-matter-protesters-give-until-you-cannot-give-any-more/> [<https://perma.cc/V94R-KUXM>].

17. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 7 (2011) (“The effects of structural racism are interconnected across multiple social domains (housing, education, medical care, nutrition, etc.).”).

18. See, e.g., *John Lewis (February 21, 1940–July 17, 2020)*, NAT’L ARCHIVES, <https://www.archives.gov/research/african-americans/individuals/john-lewis> [<https://perma.cc/A7HU-K8XY>] (last visited Apr. 14, 2021).

19. *Rep. John Lewis Says Video of George Floyd’s Death Moved Him to Tears: ‘The Madness Must Stop.’* CBS NEWS, at 01:51 (June 4, 2020, 6:01 AM), <https://www.cbsnews.com/news/george-floyd-video-death-john-lewis/> [<https://perma.cc/E9SC-JFJL>].

20. *Id.* at 03:33.

21. *Id.*

22. *Id.* at 04:07.

Rider to integrate interstate transportation;<sup>23</sup> as an organizer and leader of the Student Nonviolent Coordinating Committee, which organized citizens to integrate lunch counters in the South;<sup>24</sup> and that he was one of the speakers at the historic March on Washington in 1963.<sup>25</sup> But the replay of that history that most garnered my attention, and I suspect that of many others, was the senseless beating he received at the Edmund Pettus Bridge in Selma, Alabama, at the hands of law enforcement officials, which resulted in a fractured skull.<sup>26</sup>

He and others on that aborted march from Selma to Montgomery were engaged in nonviolent protest of the racism embodied in the Jim Crow laws. Lewis's beating called to mind various instances of brutality by policemen and other law enforcement officials against Blacks in the South, where I grew up in the late 40's, 50's, and 60's, designed to protect the racist status quo.<sup>27</sup> I recall as an African American growing up in Bessemer, Alabama, right outside of Birmingham, that all the police officers were white, though our community was slightly more than half Black. These were the days when everything was segregated from top to bottom. As I've often said, there was no job in that society that I could have if a white person wanted it. Any encounter between Blacks in the community and police was likely to be unpleasant and often abusive. Any attempt to ask why you were being detained, or questioned, or to explain your actions might be met with a swift verbal rebuke and perhaps a physical attack. Indeed, throughout the South, there were many instances when law enforcement officials were found to be complicit in brutal attacks, and sometimes murders, of Blacks by white citizens. An example includes the murder of the three civil rights workers in the summer of 1964 in Philadelphia, Mississippi, as they were engaged in a project to increase Black voter participation.<sup>28</sup>

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23. Interview by Vicki Daitch with Congressman John R. Lewis, in Washington, D.C. (Mar. 19, 2004), <https://www.jfklibrary.org/sites/default/files/archives/JFKOH/Lewis%2C%20John%20R/JFKOH-JRL-01/JFKOH-JRL-01-TR.pdf> [https://perma.cc/M4X8-CJUJ].

24. See, e.g., RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 106–07 (2006).

25. Interview by Vicki Daitch with Congressman John R. Lewis, *supra* note 23.

26. Jessie Kratz, *On Exhibit: Bloody Sunday*, NAT'L ARCHIVES: PIECES OF HIST. (July 30, 2015, 10:14 AM), <https://prologue.blogs.archives.gov/2015/07/30/on-exhibit-bloody-Sunday> [https://perma.cc/K3XG-WE2Q].

27. An example of such arbitrary and brutal use of power is vividly described in Richard Gergel's book, *Unexampled Courage*. See generally RICHARD GERGEL, *UNEXAMPLED COURAGE: THE BLINDING OF SGT. ISAAC WOODARD AND THE AWAKENING OF PRESIDENT HARRY S. TRUMAN AND JUDGE J. WATIES WARING* (2019). It chronicles the brutal beating and blinding of a Black soldier, returning home in 1946 after three years of military service, by a local South Carolina police chief who dragged the soldier from the bus at the behest of the bus driver. The author credits this heinous act as having a profound impact on President Harry Truman and Southern Carolina U.S. district judge Waties Waring, with both taking bold steps thereafter within their respective spheres to address the profound effects of racism and segregation.

28. See Camila Domonoske, *Officials Close Investigation into 1964 'Mississippi Burning' Killings*, NPR (June 21, 2016, 10:14 AM), <https://www.npr.org/sections/thetwo->

Though this is not the South of the 40's, 50's, or the early 60's, today there is still plenty of abuse of Black citizens by police officers. The seriousness of the matter is reflected in, and underscored by, the outpouring of emotions after the killings that have taken place in recent times. While it is true that today one can bring a civil rights lawsuit for police brutality under § 1983, a remedy that was not available until the 1960's,<sup>29</sup> it is not surprising that much police misconduct never becomes the subject of a civil rights lawsuit, let alone a successful one. Apart from the practical problems associated with marshaling evidence in circumstances largely controlled by officers, there are doctrines that limit accountability for such misconduct. Individual officers are afforded qualified immunity from liability for the constitutional violations they commit where the law was not "clearly established" at the time of the violation.<sup>30</sup> Municipalities are not liable for constitutional violations of their officers unless they are acting pursuant to a policy or custom of the municipality.<sup>31</sup> Nevertheless, I have overseen a number of individual cases against officers and municipalities where the plaintiffs' civil rights were vindicated. But my work as a judge overseeing the consent decree between the City of Cleveland and the Department of Justice has allowed me to understand more about the goals of policing, which should include not only performing law enforcement duties within constitutional bounds but working to ensure the safety of communities in which officers serve.

The Cleveland consent decree is a very comprehensive one regarding use of force and searches and seizures.<sup>32</sup> I have a monitor who reports to me regarding progress under the decree. The monitor works on an ongoing basis with a team of professionals to assist the city and the Department of Justice in making sure that the requirements of the decree are being met. I knew, almost instinctively, that there was more to policing than what had been revealed to me through the limited but important window that I was afforded as a judge, hearing individual cases alleging violations of the Constitution by police officers. But it was not until I began to oversee the case under the consent decree that I began to learn about and explore policing in a broader context.

I knew beforehand, for example, that Blacks in many communities feel, in general, that the police are not there to protect them but to harass them and to keep them at bay. But in my experience as a judge primarily deciding

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way/2016/06/21/482914440/officials-close-investigation-into-1964-mississippi-burning-killings [https://perma.cc/2CBJ-4YHL].

29. See *Monroe v. Pape*, 365 U.S. 167, 184–87 (1961), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

30. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

31. *Monell*, 436 U.S. at 694 ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.")

32. See Settlement Agreement, *supra* note 5, at 39–43.

individual cases, I was not afforded the privilege of overseeing a relationship between the police and the community. Now, judges do hear class action lawsuits, which clearly involve multiple parties and may well involve multiple claims and issues. But we don't often get to oversee cases that address broad societal problems, such as how a police department should operate in carrying out its fundamental mission or something of that nature. That's relatively rare.

My Lecture today is based on what I have learned, especially in overseeing the consent decree, about police practices and the need for reform generally, but especially in regard to Black communities. It is in essence a practical talk, with no pretensions of being scholarly in the empirical or doctrinal sense, though it does draw insights from some such works. However, it is my hope and belief that the thoughts that I share with you today will prove useful in understanding the flaws, sometimes fatal, in the way Blacks are policed in many communities and why, and how, they must be changed. Thus I would entitle my remarks, "Race and Policing: Some Thoughts and Suggestions for Reform."

As I begin, let me tell you up front about the framework that guides my thoughts about police practices and the need for reform. This framework involves classifying the philosophy of policing into two very different types or approaches. I must hasten to inform you that these are not of my creation. One approach views police officers as guardians of the community.<sup>33</sup> That carries with it a set of assumptions. Those assumptions will define how police conduct themselves in a wide range of relationships and situations. The other approach views police officers to be like warriors.<sup>34</sup> It also carries with it a certain set of assumptions that will define how police officers are likely to conduct themselves. Guardians are there to work with and protect the community. Warriors are there to make sure that members of the community are kept under control. And so, these are the competing models that are going to be at play as I move forward through this talk. My preference for the guardian model will be evident as we proceed. The Cleveland consent decree embraces that model in large part. I have come to understand this model in the context of enforcing the consent decree and to believe that, when properly conceived and carried out, it has the best chance of bringing fair and effective policing to the Black community.

Back in 2015, President Barack Obama appointed the President's Task Force on 21st Century Policing in response to the fatal shooting of Michael Brown in Ferguson, Missouri.<sup>35</sup> The recommendations made by the task

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33. See, e.g., SUE RAHR & STEPHEN K. RICE, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., BULLETIN NO. NCJ 248654, FROM WARRIORS TO GUARDIANS: RECOMMITTING AMERICAN POLICE CULTURE TO DEMOCRATIC IDEALS 3 (2015), <https://www.ojp.gov/pdffiles1/nij/248654.pdf> [<https://perma.cc/2UGV-QRR2>].

34. *Id.* at 3–4.

35. Exec. Order No. 13,684, 3 C.F.R. 312 (2015); Tierney Sneed, *Obama's Policing Task Force Releases Report*, U.S. NEWS (Mar. 2, 2015, 6:13 PM), <https://www.usnews.com>

force embraced the concept of police as guardians, as opposed to police as warriors.<sup>36</sup> It was their way of distinguishing the hostile way some departments have approached policing the Black community from the manner that would be most effective in carrying out their constitutional and other duties to the community. I'm going to lay out some of the essentials of that model. I begin by saying that effective policing starts with the understanding of officers that they are public servants sworn to uphold the law, like judges and other public officials. As such, they're bound to treat all citizens equally and fairly. They're also to understand that citizens in the communities they serve are not to be perceived or treated as their adversaries or as subjects to be kept under control. In other words, they are not to act as warriors. Effective policing requires positive engagement and cooperation between officers and members of the community. In order for that to occur, the officers must develop a substantial level of trust with the community. That trust will only exist if the citizens believe that the officers have the best interests of the community at heart and if its members are treated fairly and their input is valued. The report of the President's Task Force emphasized this, stating:

Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority. The public confers legitimacy only on those whom they believe are acting in procedurally just ways. In addition, law enforcement cannot build community trust if it is seen as an occupying force coming in from outside to impose control on the community.<sup>37</sup>

If officers build up the requisite level of trust, their responsibilities are more likely to be carried out safely and responsibly.

Both anecdotal information and survey data suggest that the desired level of trust between officers and communities they serve is less likely to be achieved in Black communities.<sup>38</sup> I had a suspicion that this was the case based on the quite different responses I received from Blacks and whites during jury selection about their experiences with and perceptions of the police. Questions eliciting such information are routinely asked by lawyers or the court in almost all criminal cases because law enforcement officers are likely to be witnesses. Consequently, there is an interest in determining

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/news/articles/2015/03/02/obamas-policing-task-force-releases-report [https://perma.cc/7PFE-GDX6].

36. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 11 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [https://perma.cc/XY27-W5LH].

37. *Id.* at 1.

38. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004); Jodi Wilgoren & Ginger Thompson, *After Shooting, an Eroding Trust in the Police*, N.Y. TIMES (Feb. 19, 1999), <https://www.nytimes.com/1999/02/19/nyregion/after-shooting-an-eroding-trust-in-the-police.html> [https://perma.cc/L3F5-AM2Z].



whether the potential juror has had an experience or holds a perception about the police that might cause that potential juror to be inclined to favor or disfavor an officer's testimony before hearing it. My experience has been that white potential jurors are more likely than Black potential jurors to know police officers, to have had positive interactions with them, and to view them as people they can trust. This conclusion is confirmed by a Pew Research Center survey, which found that Blacks were only about half as likely as whites to have a positive view of the job that police officers are doing.<sup>39</sup> More specifically, while 75 percent of whites felt police treated racial and ethnic groups equally, only 35 percent of Blacks thought this to be true.<sup>40</sup> Similarly, while 70 percent of whites felt officers were held accountable when misconduct occurred, only 31 percent of Blacks felt this to be the case.<sup>41</sup> And 75 percent of whites were of the opinion that officers use the right amount of force for each situation, whereas only 33 percent of Blacks agreed with this assertion.<sup>42</sup>

Now, even if these were just perceptions, such perceptions are a serious barrier to building trust between Blacks and the police. But these are not just perceptions. There is empirical evidence that Blacks are mistreated more often than whites during police encounters and that more force is used in comparable situations in subduing Blacks than whites during the course of arrests and other encounters.<sup>43</sup> And this can't be explained by disparate crime rates between whites and Blacks or by variation in the types of crimes that the two races commit. Further, as one author reported in a relatively recent study involving the Austin Police Department, "[E]ven though both neighborhood crime and poverty were strong predictors of police force, neither was sufficient to explain increased use of force in Black and Latino neighborhoods."<sup>44</sup>

How do you go about increasing trust in Black and minority communities? The President's Task Force report highlighted the fact that people are more likely to accord respect to, and perceive as legitimate, those who act in procedurally just ways. The report stated:

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39. RICH MORIN & RENEE STEPLER, PEW RSCH. CTR., *THE RACIAL CONFIDENCE GAP IN POLICE PERFORMANCE 2* (2016), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2016/09/ST\\_2016.09.29\\_Police-Final.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2016/09/ST_2016.09.29_Police-Final.pdf) [<https://perma.cc/2QBL-7ZPD>].

40. *Id.*

41. *Id.*

42. *Id.*

43. See, e.g., Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16,793, 16,793 (2019); Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html> [<https://perma.cc/89SY-8W6G>].

44. Philip Atiba Goff, Proposal, *Identity Traps: How to Think About Race & Policing*, 2 BEHAV. SCI. & POL'Y, July 2016, at 11, 13 (reporting the results of PHILIP ATIBA GOFF ET AL., CTR. FOR POLICING EQUITY, *THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE* (2016), [https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) [<https://perma.cc/7YD6-QP87>]).

Procedurally just behavior is based on four central principles:

1. Treating people with dignity and respect
2. Giving individuals “voice” during encounters
3. Being neutral and transparent in decision making
4. Conveying trustworthy motives<sup>45</sup>

Bias-free policing policies are essential to the building of trust between officers and the citizens they serve. There is no question that one’s orientation, including one’s biases, can affect policing, just as they affect many other things in life. The dangers flowing from explicit bias are evident. But implicit bias can be a serious impediment to building trust as well. When I am involved in selecting a jury, I always say to them that we all have predispositions. They help us navigate through the world on a day-to-day basis. But when you come to the courtroom, you may find that some of your predispositions are not consistent with what is required of jurors. If not, the question is, “Can you put aside those predispositions or biases in favor of police officers and judge their testimony like that of any other witness?” “Can you put aside the predisposition that because the defendant has been charged he is likely guilty, or accept that the defendant is innocent until proven guilty, or that he has no burden of proof and follow the instructions I give you?” Sometimes the answer is yes, and sometimes it is no. Similarly, to effectively do their jobs, police officers must be trained to confront the racial and other biases that might influence the way they interact with citizens. Indeed, confronting such biases is essential to building the trust relationship with the community that is necessary to effectively doing their jobs. Indeed, as in the juror context, it is sometimes the case that an officer should not serve because he cannot set aside predispositions or biases that he might hold. This is why the concept of bias-free policing was incorporated into the Cleveland consent decree and why training programs are carefully tailored to take account of the realities discussed herein.

An additional way to increase trust between officers and communities is for the police department to develop a community- and problem-oriented policing model. What does this look like? It will involve promoting and strengthening partnerships with the community and constructively engaging with the community in ways that will increase the community’s confidence in the police. That means the officers must have complete familiarity with the areas they serve, including their assets, challenges, problems, and community groups and leaders.<sup>46</sup> And they must be very conversant with the residential and geographic profiles of the areas they serve. Officers are charged in this context with engaging in a collaborative partnership with the leaders of the community, as well as meeting on a regular basis with residential, business, religious, civic, and community-based groups in their

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45. See PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 36, at 10.

46. See Settlement Agreement, *supra* note 5, at 8.

districts to identify problems and challenges. And of course, it would be helpful to building trust if officers remained in the community for several years.<sup>47</sup>

There are other ways to bolster trust and community involvement. In Cleveland, we have what are called District Policing Committees that meet at least quarterly.<sup>48</sup> They are composed of citizens from the community and police officers and others, and they establish agendas to address problems of mutual concern.<sup>49</sup> Under the Cleveland consent decree, we have also established another entity for citizen input and involvement called the Cleveland Community Police Commission.<sup>50</sup> It is composed of thirteen members who represent diverse constituencies from the Cleveland community.<sup>51</sup> They are, for example, chosen from faith-based organizations, civil rights groups, philanthropic organizations, youth groups, and academia.<sup>52</sup> The commission is accorded a budget and a separate staff from the police department and the city.<sup>53</sup> It was given the authority to review, at the very inception, the police department's bias-free and training policies and practices and to give feedback and make recommendations in respect to them.<sup>54</sup> Indeed, it is charged on an ongoing basis with assisting, as appropriate, in the department's development of training related to bias and cultural competency, as well as making recommendations that the department might utilize to increase community engagement.<sup>55</sup> They have also spent time commenting on the department's use of force and search and seizure policies.<sup>56</sup>

From the discussion above, you can see that there is an attempt under the Cleveland consent decree to involve the community in many ways. This includes direct citizen interaction with the police, as well as citizen input into and assessment of police policies. These involvements have the tendency of moving the community and the police toward a trust relationship.

Having appropriate policies and training regarding the use of force is also important to effective policing, both in regard to building trust and avoiding police misconduct. Police misconduct can be attributable to a number of factors. It may be due to a so-called "bad apple" who is intent on wrongdoing. Hopefully, we do not have too many of those, but there are some for sure. Putting aside for a moment those who intentionally engage in

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47. *See id.* at 43.

48. CALVIN D. WILLIAMS, CLEVELAND POLICE, 2019 NEIGHBORHOOD DISTRICT POLICING COMMITTEE ENHANCEMENT STRATEGY 10 (2019), <http://www.city.cleveland.oh.us/sites/default/files/dojsettlement/DPC%20Approval%20Ex%20A.PDF> [<https://perma.cc/R8H6-FYUP>].

49. *See* Settlement Agreement, *supra* note 5, at 3–4.

50. *See id.* at 4–5.

51. *Id.* at 6.

52. *Id.* at 5.

53. *Id.* at 7.

54. *Id.* at 6.

55. *Id.* at 5.

56. *Id.* at 6.

misconduct, we know that a substantial amount of police misconduct is due to ineffective training or lack of necessary training.<sup>57</sup> The need for effective policies and training is paramount because of the various challenges that officers face; and I don't think any of us would want to underestimate those. I certainly don't. Officers are called upon in many communities to involve themselves in very difficult circumstances, which require them to often make snap judgments. Such circumstances may pose a danger to suspects, the officers, and the public at large. Knowing how to respond to the range of circumstances encountered by police cannot be left to the officers' unfettered discretion. Policies and training are needed so that officers do not employ unreasonable force in carrying out their duties. For example, well-developed policies on the use of force would make clear the various levels of force that might be used in a given situation. If certain types of force are prohibited, such as a neck hold, that should be spelled out. So also should policies prohibiting the firing of weapons at people who do not pose an immediate threat of death or serious bodily injury to officers or others.<sup>58</sup> Policies should also address effective use of nonlethal, or less lethal, techniques that may be used to subdue suspects—as well as when and how to utilize de-escalation techniques. In all cases, the policies for the use of force should be clearly stated and based on principles of reasonableness, proportionality, and necessity.

It is desirable that those use-of-force policies define each of the force options and the general circumstances under which an option might be used. For example, policies and guidelines might be implemented for the use of firearms.<sup>59</sup> That would be one category. And then there would also perhaps be a policy regarding the use of so-called electronic weapons, such as stun guns.<sup>60</sup> And then there would be a policy that would be laid out regarding the use of so-called pepper spray.<sup>61</sup> This is the approach that the Cleveland consent decree utilizes. Every officer should have initial training and periodic retraining regarding the policies.

The same is true with respect to other critical policies, such as in regard to searches and seizures. Officers must be thoroughly instructed, for example, that they cannot detain motorists or pedestrians based on racial stereotypes and on how to recognize such stereotypes.<sup>62</sup>

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57. See, e.g., George Wood et al., *Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*, 117 PNAS 9815 (2020).

58. See Settlement Agreement, *supra* note 5, at 12–14.

59. See *id.* at 15–16.

60. See *id.* at 16–18.

61. See *id.* at 18–19.

62. See *id.* at 10–11.

Beyond that, all officers and supervisors should receive training in strategies, such as problem-oriented policing,<sup>63</sup> procedural justice,<sup>64</sup> and recognizing implicit bias, to avoid conduct that may lead to biased policing or the perception of biased policing. They should also be trained on the historical perspectives of policing to give them a contextual understanding of why some communities have a negative perception of the police. The President's Task Force suggested that officers also receive cultural diversity training as a way of building trust and legitimacy in diverse communities.<sup>65</sup> Indeed, it is critical that the recruiting of candidates to be police officers should begin with officers' role as guardians in mind and their training from the inception should embody these concepts.

As I reflect on this suggestion by President Obama's task force, I must ask myself whether the current administration under President Donald Trump would consider funding such diversity initiatives. I must conclude that it would be highly unlikely. Although I have not reviewed it with scrutiny, I know that the current administration recently promulgated an executive order prohibiting diversity training, which would apply to federal agencies, the military, government contractors, and recipients of federal grants.<sup>66</sup> This would almost certainly include training with regard to racial biases and cultural diversity. The order indicates that the basis of the prohibition is that diversity training "is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country."<sup>67</sup> President Trump's approach came to mind as I thought about some of the helpful suggestions President Obama's task force made about what the federal government could do to encourage cities to carry out the policy reforms it was suggesting. In light of the current president's view on diversity training and some of his specific pronouncements in regard to policing,<sup>68</sup> it is highly unlikely that police reform will ever be on his agenda, let alone near the top of it.

Returning to a discussion of effective policing, it is clear that crisis intervention is a critical area and deserves some discussion. You know, there was a cry to defund the police by some, after the Floyd murder.<sup>69</sup> And I know some citizens are quite serious; they think the police shouldn't receive any funds. I don't think that extreme view will carry much traction in the

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63. See Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQUENCY 236, 243 (1979) ("To address the substantive problems of the police requires developing a commitment to a more systematic process for inquiring into . . . [and] identifying in precise terms the problems that citizens look to police to handle. Once identified, each problem must be explored in great detail.")

64. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 36, at 10.

65. *Id.* at 58.

66. Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,683 (Sept. 28, 2020).

67. *Id.*

68. See Katie Rogers, *Trump Continues Criticism of Movement to Defund the Police*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/trump-police-reform.html> [<https://perma.cc/DT46-77L8>].

69. See Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html> [<https://perma.cc/XPP6-GUEM>].

long run. But I do think a more modest version of the defunding argument might, in the area of crisis intervention, for example. The essence of the argument for defunding certain aspects of the police is that there are some areas of police work that might be better done by others. Thus, some of the funds that are allocated to the police might be allocated to other specialized entities that can better carry out aspects of work being currently carried out by police. One of those areas has to do with police interactions with persons with mental health issues. Sometimes, for example, police get a call from a family member seeking assistance with a relative. They are not calling on the police to pounce on the relative or to throw him in jail. But if the police officer isn't trained on how to deal with people who present a challenge based on their mental health, and this is too often the case, they may very well react in ways that involve much more force than is needed. And, in some cases, officers have actually killed people when, in fact, they do not pose a substantial danger or threat. Beyond lack of adequate training generally, such catastrophes may be partially the result of the warrior approach to policing, the notion that police are an outside force to control members of the community. It may also be partly due in minority communities to implicit racial bias against Blacks, for example. There are at least two ways to address police inadequacies in interacting with mental health challenges. First, one might fund a specialized unit of people, apart from the police department, trained to appropriately respond to circumstances in the community involving people with mental health challenges. The funding for such a unit might amount to "defunding the police" to the extent that funds previously allocated to the police for this function are utilized to fund this specialized unit. Second, one might house a special unit or program on crisis intervention within the police department itself. The City of Cleveland has approached the issue by developing a Mental Health Response Advisory Committee that provides guidance to the police department in improving, expanding, and sustaining its crisis intervention program.<sup>70</sup> The city has an intervention coordinator and other officers who are specially trained, called crisis intervention training officers.<sup>71</sup> The goal is to have one of these specially trained officers respond to every instance that can be identified as potentially involving a person in crisis. The City of Cleveland has acknowledged that the people involved in crisis intervention are not limited to police options; they can interact with the mental health community and the hospital community as well. But many, many police departments do not have a program such as the one that the City of Cleveland has begun to undertake.

For effective policing under the guardian model, there has to be transparency and accountability. Among other things, this is also key to

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70. CITY OF CLEVELAND MENTAL HEALTH RESPONSE ADVISORY COMM., 2018 ANNUAL REPORT 1 (2019), <http://www.city.cleveland.oh.us/sites/default/files/dojsettlement/MentalHealthResponseAdvisoryCommittee.pdf> [https://perma.cc/YJY5-TG3N].

71. See *Crisis Intervention Teams (CIT): An Invaluable Community Resource*, NAMI GREATER CLEVELAND, <https://namigreatercleveland.org/crisis-intervention-teams-cit-an-invaluable-community-resource> [https://perma.cc/M7AA-BHHE] (last visited Apr. 14, 2021).

building the requisite trust relationship with the community. How do you make sure force is used appropriately and that people are held accountable if it is used inappropriately? The City of Cleveland has developed a structure and a process for processing incidents of uses of force by the police.<sup>72</sup> The city keeps track of every instance of use of force; they are classified into three different categories that I talked about before—those involving firearms, electronic weapons, and pepper spray.<sup>73</sup> Of course, reporting requirements vary depending on the seriousness of that force. Then there is also a system of investigation relative to the various uses of force employed, as well as very clear standards regarding what kind of punishments are appropriate should there be an improper use of force requiring discipline.<sup>74</sup> There are two aspects to this process: one is handled by what's called Internal Affairs.<sup>75</sup> That's when the use of force occurs in the course of duty and does not involve a citizen complaint. There's another process that's involved when you're dealing with citizen complaints; these are processed by the Office of Professional Standards.<sup>76</sup> There is a timeframe by which the office must complete its investigation and then findings of the investigation are presented to the Police Review Board.<sup>77</sup> The Police Review Board then determines whether to make a recommendation with regard to disciplinary action to the public safety director.<sup>78</sup>

Let me just say something about officer wellness and then I'll conclude. Police officers do have a difficult job, and it's not one that I feel that I could carry out well. I think most citizens in the community don't think they could either. And I think most citizens in the community feel beholden to police officers for being willing to take on this most important responsibility. I might compare the respect we owe them as being similar to that we owe people in the military who perform such an important role in our government. However, I want to be clear that the roles of the police and that of the military are quite different. As one author has stated:

Although police officers wear uniforms and carry weapons, the similarity [to soldiers] ends there. The missions and rules of engagement are completely different. The soldier's mission is that of a warrior: to conquer.

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72. See CLEVELAND DIV. OF POLICE, USE OF FORCE TRAINING 21–26 (2017), [http://city.cleveland.oh.us/sites/default/files/forms\\_publications/2017UseOfForceTraining.pdf](http://city.cleveland.oh.us/sites/default/files/forms_publications/2017UseOfForceTraining.pdf) [<https://perma.cc/WW7V-937W>]; CLEVELAND DIV. OF POLICE & CITY OF CLEVELAND, 2017 USE OF FORCE REPORT (2018), [https://www.city.cleveland.oh.us/sites/default/files/forms\\_publications/2017UseOfForce.pdf?id=13640](https://www.city.cleveland.oh.us/sites/default/files/forms_publications/2017UseOfForce.pdf?id=13640) [<https://perma.cc/V2FM-5JYS>].

73. CLEVELAND DIV. OF POLICE & CITY OF CLEVELAND, *supra* note 72, at 5–6.

74. Cleveland Div. of Police, General Police Order No. 2.01.03 (2018), [https://www.city.cleveland.oh.us/sites/default/files/forms\\_publications/01.10.2018General.pdf](https://www.city.cleveland.oh.us/sites/default/files/forms_publications/01.10.2018General.pdf) [<https://perma.cc/Z4DT-JAF4>]; see also CLEVELAND POLICE MONITORING TEAM, SEVENTH SEMI-ANNUAL REPORT 41–55 (2019), [http://www.city.cleveland.oh.us/sites/default/files/dojsettlement/Seventh%20Semiannual%20Report\\_09132019\\_0.pdf](http://www.city.cleveland.oh.us/sites/default/files/dojsettlement/Seventh%20Semiannual%20Report_09132019_0.pdf) [<https://perma.cc/8KMP-S342>].

75. See sources cited *supra* note 74.

76. See sources cited *supra* note 74.

77. See sources cited *supra* note 74.

78. See sources cited *supra* note 74.

The rules of engagement are decided before the battle. The police officer's mission is that of a guardian—to protect. The rules of engagement evolve as the incident unfolds. Soldiers must follow orders. Police officers must make independent decisions. Soldiers come into communities as an outside, occupying force. Guardians are members of the community, protecting from within.<sup>79</sup>

But in terms of service, as I say to jurors in explaining the importance of their service, there is no higher public service we require than that required of the members of our military. And I think most of us appreciate that. And I think that a similar kind of respect should be accorded police officers who carry out their responsibilities in the proper manner.

Police officers have a tough job. If they are not well, mentally or physically, this can lead to great harm to themselves, their fellow officers, and certainly to those they encounter in the community. Consequently, it is paramount that each department have a really robust process for determining whether there are physical or mental health challenges that an officer faces. Then, the services that officers need to address those problems must be provided. Recommendations by the President's Task Force promoting officer wellness are set forth in quite some detail in its report.<sup>80</sup>

The President's Task Force made many recommendations that will facilitate police reform. The task force urged the federal government to create funding for regional centers focused on changing the cultural orientation of policing.<sup>81</sup> It recommended that the Justice Department provide models for the various aspects of policing that are required to attain the guardian model.<sup>82</sup> It also recommended that cities and the federal and state governments provide incentives for the education of police officers so that even if they're hired without education beyond high school, they're involved in further education in an environment that advances openness and fairness.<sup>83</sup>

I say to you today, in conclusion, that the recent killings of Blacks by police officers, and other incidents of violence against Blacks, seem to have ignited a broad movement across America, involving all races, for police and other reform. It involves, more broadly, coming to a better understanding of America's history of racism and its languishing effects. Whether it will be long-lasting remains to be seen. But currently, many institutions, individuals, and in some cases, government institutions, are making commitments to racial equity and fairness that could not have been easily imagined at any time in recent memory. Let me just pause to say, who would have thought that the Mississippi flag, which has Confederate written all over it, would

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79. Sue Rahr, *Transforming the Culture of Policing from Warriors to Guardians in Washington State*, IADLEST NEWSL. (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Ind.), Oct. 2014, at 3, 3.

80. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 36, at 61–68.

81. *Id.* at 53.

82. *Id.* at 25.

83. *Id.* at 59–60.



now be a thing of the past? Having existed for over one hundred some years, the government of Mississippi was forced to officially abandon it in the context of these police killings.<sup>84</sup> People were moved to stand up and to speak out boldly about the injustice Black people faced every day in having to face the official flag of Mississippi, a flag that was a grim reminder of the slavery that Blacks so long endured.

That is the kind of excitement and action that has been prompted by this movement. Who would have thought that Princeton University, with billions of dollars in endowment and its prestige, would decide that it should take the late President Woodrow Wilson's name off the Woodrow Wilson School of Public and International Affairs because of racism attributed to him many, many years ago? And yet it happened.<sup>85</sup> While it's too early to say how far-reaching and how long-lasting change will be, the late civil rights icon John Lewis was moved to think, as I said before, that the movement was a continuation of the civil rights work, his life's work, to ensure that America's promise would one day be fully extended to its Black citizens and, indeed, all of its citizens. Indeed, he touted those marchers in cities across America and some abroad, calling for racial justice and police reform, for their willingness to get in what he called "good trouble." I think we are all now getting used to those words. I think we all know what he means; it's when you're putting yourself out there, on the line, with a willingness to suffer for a good cause.

A month after John Lewis, in his drawn casket, was ceremoniously carried across the Edmund Pettus Bridge, those involved in the ceremony were saying something I couldn't understand. So I asked my wife, "What are they saying? What are they saying?" And she told me, "They're saying we got it from here; we got it from here." They were saying, in other words, "You've done your part. You can trust us to carry on the fight for full racial equality."

Now, just one aspect of that fight involves police reform, and some suggested that, as I said before, police departments be completely defunded. That's unlikely to happen. But the police reform movement, which existed before the George Floyd murder but waned in recent years, has taken on greater visibility and a heightened importance and urgency in the wake of the protests led by the Black Lives Matter movement. In going forward, there is a foundation on which to build. And as I have mentioned, after the Michael Brown shooting in 2014, President Barack Obama convened the President's Task Force on 21st Century Policing. The task was to rethink policing in America, and the task force report, issued May 2015, set out a comprehensive set of best practices and explained how those practices can promote effective crime reduction by building public trust. And the guardian model, on which the task force based its recommendations, is more consistent, in my view,

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84. H.R. 1796, 2020 Leg., Reg. Sess. (Miss. 2020).

85. Bryan Pietsch, *Princeton Will Remove Woodrow Wilson's Name from School*, N.Y. TIMES (June 27, 2020), <https://www.nytimes.com/2020/06/27/nyregion/princeton-university-woodrow-wilson.html> [<https://perma.cc/ENX6-LHRJ>].

with the role of police in a democracy than the warrior model that many police departments have employed in the past. Those recommendations made by the task force gained some momentum after they were issued, but they have been less influential in the last few years.<sup>86</sup> But there is other thoughtful and encouraging work going on in the area of police reform that's consistent with, and complementary to, the task force's work. However, in order for change from the warrior model to the guardian model to be made across the country, as advocated by the task force, there needs to be national leadership. While there's no certainty about what the future will hold, there is no such leadership at this time, as Congress cannot agree on a bill and the Trump administration appears to have a different philosophy from that of the task force.

I would say, candidly, that I think President Trump's philosophy seems akin to that of the warrior model. He's been heard to say, "When the looting starts, the shooting starts," a statement he attributed to Frank Rizzo.<sup>87</sup> Now, some of you are too young to know who Frank Rizzo is, but he was the police commissioner of Philadelphia from 1967 to 1971; and the mayor of that city from 1972 to 1980.<sup>88</sup> Now, the statement that the president attributed to Rizzo was not made by him.<sup>89</sup> But the president's embracing of that statement and his attribution of that statement to Rizzo was both revealing and disturbing. His statement might be read as embracing the kind of policing Rizzo did. Rizzo maintained some of the most brutal, aggressive, and, some would say, racist policing policies in modern times. Rizzo once said, "The way to treat criminals" is to "break their heads."<sup>90</sup> His pattern of brutality against African Americans has been documented in a Pulitzer Prize winning series by the *Philadelphia Inquirer*.<sup>91</sup> At one antipolice

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86. See Charles H. Ramsey et al., Opinion, *There Is a Playbook for Police Reform*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/police-reform-obama-task-force.html> [https://perma.cc/4PK7-T6QW].

87. See Rob Tornoe, *Trump Incorrectly Cites Former Philly Mayor Frank Rizzo for Racist Phrase Aimed at Protesters*, PHILA. INQUIRER (June 12, 2020), <https://www.inquirer.com/news/donald-trump-fox-news-frank-rizzo-protests-philadelphia-looting-shooting-starts-george-floyd-20200612.html> [https://perma.cc/4YY4-MC7H].

88. See Jake Blumgart, *The Brutal Legacy of Frank Rizzo, the Most Notorious Cop in Philadelphia History*, VICE (Oct. 22, 2015, 3:00 PM), <https://www.vice.com/en/article/kwxp3m/remembering-frank-rizzo-the-most-notorious-cop-in-philadelphia-history-1022> [https://perma.cc/37P2-MBYR]; Tommy Rowan, *The Moments That Made Frank Rizzo Philly-Famous*, PHILA. INQUIRER (Aug. 21, 2017), <https://www.inquirer.com/philly/news/pennsylvania/philadelphia/philly-history/frank-rizzo-top-moments-philadelphia-history.html> [https://perma.cc/SQ93-W7YG].

89. See Barbara Sprunt, *The History Behind 'When the Looting Starts, the Shooting Starts'*, NPR (May 29, 2020, 1:13 PM), <https://www.npr.org/2020/05/29/864818368/the-history-behind-when-the-looting-starts-the-shooting-starts> [https://perma.cc/TD57-Z3U8].

90. See Alan Rappeport, *In Philadelphia, a Brash Ex-mayor Draws Comparisons to Donald Trump*, N.Y. TIMES (Apr. 24, 2016), <https://www.nytimes.com/2016/04/25/us/politics/frank-rizzo-philadelphia-donald-trump.html> [https://perma.cc/6VD2-SGFE].

91. *The 1978 Pulitzer Prize Winner in Public Service: The Philadelphia Inquirer*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/philadelphia-inquirer> [https://perma.cc/BP55-PAVE] (last visited Apr. 14, 2021).

demonstration, he's reported to have said "I'm going to make Attila the Hun look like a faggot."<sup>92</sup>

Apart from the Trump administration's refusal to embrace police reform, the Justice Department has, in recent years, not exercised the authority it previously utilized to bring civil rights actions and pursue consent decrees, as in Cleveland and other cases.<sup>93</sup> Despite that fact, the momentum for police reform brought on after Floyd's death is unprecedented. With demonstrations being carried out in so many cities and states, perhaps this has the makings of a grassroots movement. Right now, as I look through and peruse the internet, I see that several municipalities have announced a ban on chokeholds, including San Diego, California,<sup>94</sup> Davis, California,<sup>95</sup> Denver, Colorado,<sup>96</sup> and Tacoma, Washington.<sup>97</sup> And a few cities have banned or limited the use of tear gas as a method of crowd control, including Berkeley, California,<sup>98</sup> New Orleans, Louisiana,<sup>99</sup> and the District of Columbia. And in response to the Breonna Taylor killing, Louisville, Kentucky, banned the use of no-knock warrants; and Louisville now requires police to turn their body cameras on before carrying out a search.<sup>100</sup>

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92. See Reid Wilson, *Philadelphia Removes Statue of Ex-mayor Seen as 'Deplorable Monument to Racism, Bigotry, and Police Brutality,'* HILL (June 3, 2020, 8:12 AM), <https://thehill.com/homenews/state-watch/500856-philadelphia-removes-statue-of-ex-mayor-seen-as-deplorable-monument-to> [<https://perma.cc/U9TG-9EAD>].

93. See Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html> [<https://perma.cc/Q23R-3E8U>].

94. See Ken Stone, *SDPD Chief Announces Immediate Ban on Chokeholds; Move Called 'Historic,'* TIMES OF SAN DIEGO (June 1, 2020), <https://timesofsandiego.com/crime/2020/06/01/sdpd-chief-tells-immediate-ban-on-chokeholds-move-called-historic> [<https://perma.cc/4SUM-UHG3>].

95. David Greenwald, *Davis Suddenly Announces Ban on Carotid Control Hold in Wake of Governor's Policy Announcement*, DAVIS VANGUARD (June 6, 2020), <https://www.davisvanguard.org/2020/06/davis-suddenly-announces-ban-on-carotid-control-hold-in-wake-of-governors-policy-announcement> [<https://perma.cc/N2A7-YZW3>].

96. Shelly Bradbury, *Denver Police Ban Chokeholds, Require Officers to Report When They Point Gun at Someone*, DENV. NEWS (June 8, 2020, 12:38 PM), <https://www.denverpost.com/2020/06/07/denver-police-ban-chokeholds> [<https://perma.cc/8XST-49MW>].

97. Stacia Glenn, *Tacoma Police Chief to Ban Chokeholds, Require Officers to Intervene in Excessive Force*, NEWS TRIB. (June 16, 2020, 12:47 PM), <https://www.thenewtribune.com/news/local/article243577152.html> [<https://perma.cc/M6MQ-LM34>].

98. Julia Musto, *Berkeley Bans Tear Gas, Police Use of Pepper Spray During Demonstrations*, N.Y. POST (June 12, 2020, 2:50 PM), <https://nypost.com/2020/06/12/berkeley-bans-tear-gas-police-use-of-pepper-spray-during-demonstrations> [<https://perma.cc/D2BG-JD5G>].

99. *New Orleans Sets Policy After Tear Gas Is Used on Protestors*, ASSOCIATED PRESS (Dec. 21, 2020), <https://apnews.com/article/police-new-orleans-racial-injustice-3eb43ff104c12cd911d9685960c4744f> [<https://perma.cc/8V8G-2SHQ>].

100. Barbara Campbell & Suzanne Nuyen, *No-Knock Warrants Banned in Louisville in Law Named for Breonna Taylor*, NPR (June 11, 2020, 9:40 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/11/875466130/no-knock-warrants-banned-in-louisville-in-law-named-for-breonna-taylor> [<https://perma.cc/3B7U-4C8D>].

That's the essence of my talk. The consent decree in Cleveland gave me a chance to expand my horizons by dealing with more than just the one-off case, which is not unimportant. But, with the consent decree, I am having the opportunity to be involved in the process of trying to ensure that an institution, the police department, is one that is responsive to community needs. In doing so, I concluded the guardian model of policing urged by President Obama's task force, as opposed to the warrior model, was most effective for carrying out police responsibilities.

This model pertains to effective police practices generally; however, because African Americans are more likely to have contact with police officers and more likely to have contact that involves force, I thought that emphasizing good police practices in the context of African Americans' experiences would be most instructive. So I'll stop there, Professor.

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DANIEL CAPRA: Thank you, Judge, and that was wonderful. I want to start with this question. I received a number of questions from students in advance of your talk so I'll start with this one, and then I have some of my own questions. Here is one from a student: "Some reform groups, like Campaign Zero, have called for external and independent investigations and prosecutions of police misconduct against civilians. Do you believe this is an effective way to cut down on instances of police using excessive force?" So, for example, would you support the establishment of a special prosecutor's office to deal with cases of police violence? Is that something that would be a good idea?

JUDGE SOLOMON OLIVER JR.: The use of special prosecutors is something that the President's Task Force talked about; so let me just acknowledge that first. And I don't mean that's the Bible, either, but I just want to be clear. And I'll tell you what the situation is in Cleveland, and then I'll make a comment. So in Cleveland, the consent decree provides for the possibility of an outside investigator being appointed and provides for the possibility of an outside prosecutor being appointed, as well. It does not require or mandate that. I do think it's a good idea, perhaps, in cases resulting in death or where people die in custody, to have at least an outside investigator.

I'm not sure about a prosecutor, but there are concerns because police will work with prosecutors all the time. But I'm not sure. I think the prosecutors might be able to keep a distance, but formal independence is certainly not a bad idea, at least in the most serious cases.

We need to be careful about how much is turned over in the area of discipline. One reason why you want to be careful is you really want to locate the values within the police departments themselves, from reporting, to being responsible, to ferreting out problems, and so forth. So you don't just say, "That belongs to somebody else." If you can ever get a model established where someone who's in charge in the police department will make hard calls, then I think you really have an effective system.

It is hard to know whether the outcomes will be different if an independent investigator or prosecutor is used. But it would bring more apparent fairness, in terms of the process.

DANIEL CAPRA: Following up on your comment about the relationship between prosecutors and the police, there have been some notable recent events in which police officers have used force resulting in death, and the prosecutor was unable, I guess would be the word, to obtain a grand jury indictment. I'm just wondering what your thoughts are about that? Because you know what Judge Wachtler said, "The Grand Jury will indict a ham sandwich"—but apparently not police officers.

JUDGE SOLOMON OLIVER JR.: Well, I don't know. You have to be there, you know? Because a lot of what the grand jury will do does turn on what the prosecutor tells them, like you say. I don't know if they'd indict a ham sandwich, but I've heard that too. But I do know that it's not too often that they come back with a no bill. When a prosecutor goes into the grand jury, there's a monopoly there. As the prosecutor, of course, you can't go in tiptoeing if you want an indictment. You have to tell the grand jurors what you want, and they know if you're being soft. So I'd have to be there to know.

DANIEL CAPRA: There's a question from a student about, in terms of changes, would it be a useful to abolish the qualified immunity defense? Would that be a good idea?

JUDGE SOLOMON OLIVER JR.: I think that everything is on the table right now. The problem is you've got to get the U.S. Supreme Court to get rid of it because it's difficult to get rid of it legislatively. So the question is, is it practical to think that qualified immunity can be abolished? I read a couple of articles recently, one was out of the *Notre Dame Law Review*, I think it was 2018, and some other articles, to brush up a little bit on that area. The author in the *Notre Dame Law Review* argues that the rationale for qualified immunity, as expressed by the courts, is unsupported.<sup>101</sup> One argument is that common law, which has sometimes been articulated as part of the basis for qualified immunity, didn't exist in the way that has been suggested.<sup>102</sup> The other argument is that it doesn't save a lot in terms of litigation.<sup>103</sup> Under qualified immunity, you are not supposed to have to do discovery or anything if, based on the allegations, it is clear that the doctrine applies. As the author points out, however, there are not a lot of motions that are granted based on qualified immunity.<sup>104</sup> And qualified immunity doesn't deter plaintiffs because, if there's a judgment, the city normally pays. But it sounds like it would be good for individual litigants to be able to vindicate their rights when the Constitution has been violated. In terms of the overall impact on policing, I'm not sure it will be so substantial. But it would be more important to an

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101. See Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1791 (2018).

102. See *id.* at 1801–03.

103. See *id.* at 1808–11.

104. See *id.* at 1809.

individual litigant; the thought is with the individual litigant, “my rights have been violated.”

The problem with the qualified immunity defense is basically that officers say there is no other case almost exactly like theirs. The law is very particular and fact dependent; the officer argues, “Maybe I violated somebody’s rights, but it’s never been clearly determined in a context like this.” And so the officer is found not liable, but some pretty egregious violations have occurred. There is a colleague we have down in Mississippi, an African American colleague, who wrote a huge opinion that got national coverage, saying he had to grant qualified immunity despite how harmful and egregious the police action was.<sup>105</sup> Judge Carlton Reeves presided, and it’s garnered a lot of press. So I don’t know that I could give a definitive opinion on qualified immunity. But it seems like the qualified immunity defense means that officers are not deterred from misconduct.

DANIEL CAPRA: Thank you so much. I did want to ask you one last question because of your extensive experience with law schools and law students. One of the students asked this: “You’ve mentioned in a prior interview that you were drawn to the legal profession to become an instrument for change. Today, many people are drawn to the profession (law students) for the very same reason, both in seeking to improve the legal system and society at large. What steps do you believe law students and aspiring lawyers can take, both in and out of the courtroom, to be that instrument for change?”

JUDGE SOLOMON OLIVER JR.: Well, you know, I’ve had a lot of law clerks over the twenty-six years I’ve been on the court, and they’ve gone into all kinds of fields. And I think they have most admired being instruments of change. I don’t think you’re limited in terms of the range of options. So you could work in the immigration area, for example. You could work in the environmental area. You could work for the Department of Justice. I did.

I was a civil litigator. I first thought I would never want to do any criminal work at all. Of course, I’ve changed my view on that as a judge. I think as an assistant U.S. attorney, you come before the court; it’s unique; because you’re representing the United States, but you’re representing people and you have some discretion to do what you think is right. And you can back off, if you find out something that causes you to change your mind. And I enjoyed my work with the Justice Department, and I have a number of law clerks enjoying that. There are some teaching law and some in the civil rights division of the Department of Justice. And some in law firms. Even the ones that are working in law firms, for example, are doing pro bono work. I always tell them, “You represent a corporation, you still can do some good, you’re not just a fly on the wall, you can help them if they’ve got employment policies. You’re not trying just to help them avoid the law, you want them to get the benefit of law but to help them in a positive way.”

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105. *See* Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

I wasn't sure I wanted to do it for a long time; but I ultimately chose the jobs I did because I thought about civil rights, and the lawyers involved, and the struggle they had to eradicate discrimination. And I clerked for one of those judges, William Hastie, who was part of that early development strategy that led to *Brown v. Board of Education*.<sup>106</sup> I began to see that there were more options for me and the different directions I could go; and I could carry a kind of justice bent wherever I served, so that's how I approach it.

DANIEL CAPRA: Well, no better place to have a justice bent than where you are, Judge; and so our talk is over. We want to thank Judge Oliver so much. Everybody on the call wants to thank you; and thank you so much for being here at Fordham and talking about these important issues. It was really a treat, Judge, and a real honor to have you here, thanks.

JUDGE SOLOMON OLIVER JR.: Thank you. It's my pleasure.

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106. 347 U.S. 483 (1954).