

Dissenting Statement of Commissioner Peter Kirsanow

The events that prompted this report were based on a lie. The Commission decided on this topic in the wake of protests in Ferguson, Missouri after the death of Michael Brown. “Hands up, don’t shoot,” became a mantra, the alleged last words of a supposed innocent black man callously murdered by a white police officer, an example of the disproportionate and unjustified targeting and use of force against blacks by cops.

But it was a lie.

Don’t take my word for it—take the Obama Justice Department’s word for it. The Criminal Section of the Department of Justice’s Civil Rights Division conducted an in-depth review of the shooting and concluded that Officer Darren Wilson’s actions were not objectively unreasonable and that he had not violated Brown’s constitutional right to be free of excessive force.

Wilson encountered Brown as he was responding to a report that a man matching Brown’s description had stolen several packages of cigarillos from a convenience store by intimidating the clerk with his large size. The Criminal Section wrote in its report:

As Wilson drove toward Brown and Witness 101, he told the two men to walk on the sidewalk. According to Wilson’s statement to prosecutors and investigators, he suspected that Brown and Witness 101 were involved in the incident at Ferguson Market based on the descriptions he heard on the radio and the cigarillos in Brown’s hands. Wilson then called for backup, stating, “Put me on Canfield with two and send me another car.” Wilson backed up his SUV and parked at an angle, blocking most of both lanes of traffic, and stopping Brown and Witness 101 from walking any further. Wilson attempted to open the driver’s door of the SUV to exit his vehicle, but as he swung it open, the door came into contact with Brown’s body and either rebounded closed or Brown pushed it closed.

Wilson and other witnesses stated that Brown then reached into the SUV through the open driver’s window and punched and grabbed Wilson. This is corroborated by bruising on Wilson’s jaw and scratches on his neck, the presence of Brown’s DNA on Wilson’s collar, shirt, and pants, and Wilson’s DNA on Brown’s palm. While there are other individuals who stated that Wilson reached out of the SUV and grabbed Brown by the neck, prosecutors could not credit their accounts because they were inconsistent with physical and forensic evidence, as detailed throughout this report.

Wilson told prosecutors and investigators that he responded to Brown reaching into the SUV and punching him by withdrawing his gun because he could not access less lethal weapons while seated inside the SUV. Brown then grabbed the weapon and struggled with Wilson to gain control of it. Wilson fired, striking Brown in the hand. Autopsy results and bullet trajectory, skin from Brown’s palm on the outside of the SUV door as well as Brown’s DNA on the inside of the driver’s door

corroborate Wilson's account that during the struggle, Brown used his right hand to grab and attempt to control Wilson's gun. According to three autopsies, Brown sustained a close range gunshot wound to the fleshy portion of his right hand at the base of his right thumb. Soot from the muzzle of the gun found embedded in the tissue of this wound coupled with indicia of thermal change from the heat of the muzzle indicate that Brown's hand was within inches of the muzzle of Wilson's gun when it was fired. The location of the recovered bullet in the side panel of the driver's door, just above Wilson's lap, also corroborates Wilson's account of the struggle over the gun and when the gun was fired, as do witness accounts that Wilson fired at least one shot from inside the SUV.

Although no eyewitnesses directly corroborate Wilson's account of Brown's attempt to gain control of the gun, there is no credible evidence to disprove Wilson's account of what occurred inside the SUV. Some witnesses claim that Brown's arms were never inside the SUV. However, as discussed later in this report, those witness accounts could not be relied upon in a prosecution because credible witness accounts and physical and forensic evidence, *i.e.* Brown's DNA inside the SUV and on Wilson's shirt collar and the bullet trajectory and close-range gunshot wound to Brown's hand, establish that Brown's arms and/or torso were inside the SUV.

After the initial shooting inside the SUV, the evidence establishes that Brown ran eastbound on Canfield Drive and Wilson chased after him. The autopsy results confirm that Wilson did not shoot Brown in the back as he was running away because there were no entrance wounds to Brown's back. The autopsy results alone do not indicate the direction Brown was facing when he received two wounds to his right arm, given the mobility of the arm. However, as detailed later in this report, there are no witness accounts that could be relied upon in a prosecution to prove that Wilson shot at Brown as he was running away. Witnesses who say so cannot be relied upon in a prosecution because they have given accounts that are inconsistent with the physical and forensic evidence or are significantly inconsistent with their own prior statements made throughout the investigation.

Brown ran at least 180 feet away from the SUV, as verified by the location of bloodstains on the roadway, which DNA analysis confirms was Brown's blood. Brown then turned around and came back toward Wilson, falling to his death approximately 21.6 feet west of the blood in the roadway. Those witness accounts stating that Brown never moved back toward Wilson could not be relied upon in a prosecution because their accounts cannot be reconciled with the DNA bloodstain evidence and other credible witness accounts.

As detailed throughout this report, several witnesses stated that Brown appeared to pose a physical threat to Wilson as he moved toward Wilson. According to these witnesses, who are corroborated by blood evidence in the roadway, as Brown continued to move toward Wilson, Wilson fired at Brown in what appeared to be self-defense and stopped firing once Brown fell to the ground. Wilson stated that

he feared Brown would again assault him because of Brown's conduct at the SUV and because as Brown moved toward him, Wilson saw Brown reach his right hand under his t-shirt into what appeared to be his waistband. There is no evidence upon which prosecutors can rely to disprove Wilson's stated subjective belief that he feared for his safety.

Ballistics analysis indicates that Wilson fired a total of 12 shots, two from the SUV and ten from the roadway. Witness accounts and an audio recording indicate that when Wilson and Brown were on the roadway, Wilson fired three gunshot volleys, pausing in between each one. According to the autopsy results, Wilson shot and hit Brown as few as six or as many as eight times, including the gunshot to Brown's hand. Brown fell to the ground dead as a result of a gunshot to the apex of his head. With the exception of the first shot to Brown's hand, all of the shots that struck Brown were fired from a distance of more than two feet. As documented by crime scene photographs, Brown fell to the ground with his left, uninjured hand balled up by his waistband, and his right, injured hand palm up by his side. Witness accounts and cellular phone video prove that Wilson did not touch Brown's body after he fired the final shot and Brown fell to the ground.

Although there are several individuals who have stated that Brown held his hands up in an unambiguous sign of surrender prior to Wilson shooting him dead, their accounts do not support a prosecution of Wilson. As detailed throughout this report, some of those accounts are inaccurate because they are inconsistent with the physical and forensic evidence; some of those accounts are materially inconsistent with that witness's own prior statements with no explanation, credible for[sic] otherwise, as to why those accounts changed over time. Certain other witnesses who originally stated Brown had his hands up in surrender recanted their original accounts, admitting that they did not witness the shooting or parts of it, despite what they initially reported either to federal or local law enforcement or to the media. Prosecutors did not rely on those accounts when making a prosecutorial decision.

While credible witnesses gave varying accounts of exactly what Brown was doing with his hands as he moved toward Wilson—*i.e.*, balling them, holding them out, or pulling up his pants up [sic]—and varying accounts of how he was moving—*i.e.*, “charging,” moving in “slow motion,” or “running”—they all establish that Brown was moving toward Wilson when Wilson shot him. Although some witnesses state that Brown held his hands up at shoulder level with his palms facing outward for a brief moment, these same witnesses describe Brown then dropping his hands and then “charging” at Wilson.¹⁰²²

¹⁰²² U.S. Dep't of Justice, *Department of Justice Report Regarding the Criminal Investigation Into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson*, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

I include this part of the DOJ report in my statement for several reasons. The fact that the prevailing narrative surrounding the death of Michael Brown and that launched protests against the police was a lie undermines this Commission report's narrative. DOJ issued its report exonerating Wilson a month and a half before the Commission held its hearing on police use of force.¹⁰²³ One would think this would deflate the Commission a bit and prompt it to reassess whether it should approach the topic based on an assumption that the police regularly engage in excessive force against minorities.¹⁰²⁴ One would be wrong. Instead, the report uncritically repeats the statement of Montague Simmons from the Organization for Black Struggle, who stated at the hearing:

The U.S. Commission on Civil Rights has now cast its eyes upon our community because the execution of Mike Brown, the corrupt and inept ways of the investigation as follows: The investigation that ended in a fiasco of a grand jury that would have amounted to business as usual, except for the anger, tenacity and determination of the people who have been in the streets over 250 days.¹⁰²⁵

The Commission includes Michael Brown's death in a list of police shooting deaths where "de-escalation" should have been employed. Yet according to the DOJ report, Brown attacked Wilson while Wilson was sitting in his vehicle.¹⁰²⁶ It was Brown who escalated the situation from a stop to investigate a theft of cigarillos to a life-and-death struggle. Brown's death is a tragedy for him and for his family, but this report should not contribute to the false narrative that his death was racially-motivated. Brown attacked a police officer who stopped him. There is no evidence he was killed because of his race.

The Commission report offers Simmons's statement as a legitimate criticism of grand jury proceedings, the implication being that the grand jury system is flawed because the grand jury declined to indict Wilson. But over a month before Simmons testified, DOJ had concluded that there was no basis on which to charge Wilson. Simply because someone asserts that grand jury proceedings feel unfair to them does not mean the proceedings are unfair. It is clear that nothing would have satisfied Simmons short of the prosecution and conviction of Wilson, but both the grand jury and DOJ concluded that Wilson had not broken the law. The legal system is supposed to avoid scapegoating innocent people in order to placate angry mobs.

¹⁰²³ DOJ issued its report on March 4, 2015, and the Commission held its hearing on April 20, 2015.

¹⁰²⁴ Over the past several years, the Commission, alas, has shown a preference for holding hearings and conducting investigations of events in the headlines. Perhaps the fact that DOJ issued a report undercutting the premise of this hearing before the hearing was even held should lead the Commission to question whether it is wise to continue chasing headlines, rather than focusing on smaller discrete issues that we are better suited to address.

¹⁰²⁵ U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018 [hereinafter Commission Report] at notes 47.

¹⁰²⁶ Commission Report at notes 702.

The DOJ report illustrates that making sweeping generalizations about police brutality is useless. These incidents are fact-specific. The facts often do not support charges of police brutality, though, so the report falls back on “systemic” analysis and surveys.¹⁰²⁷

Flaws in Report

The report states:

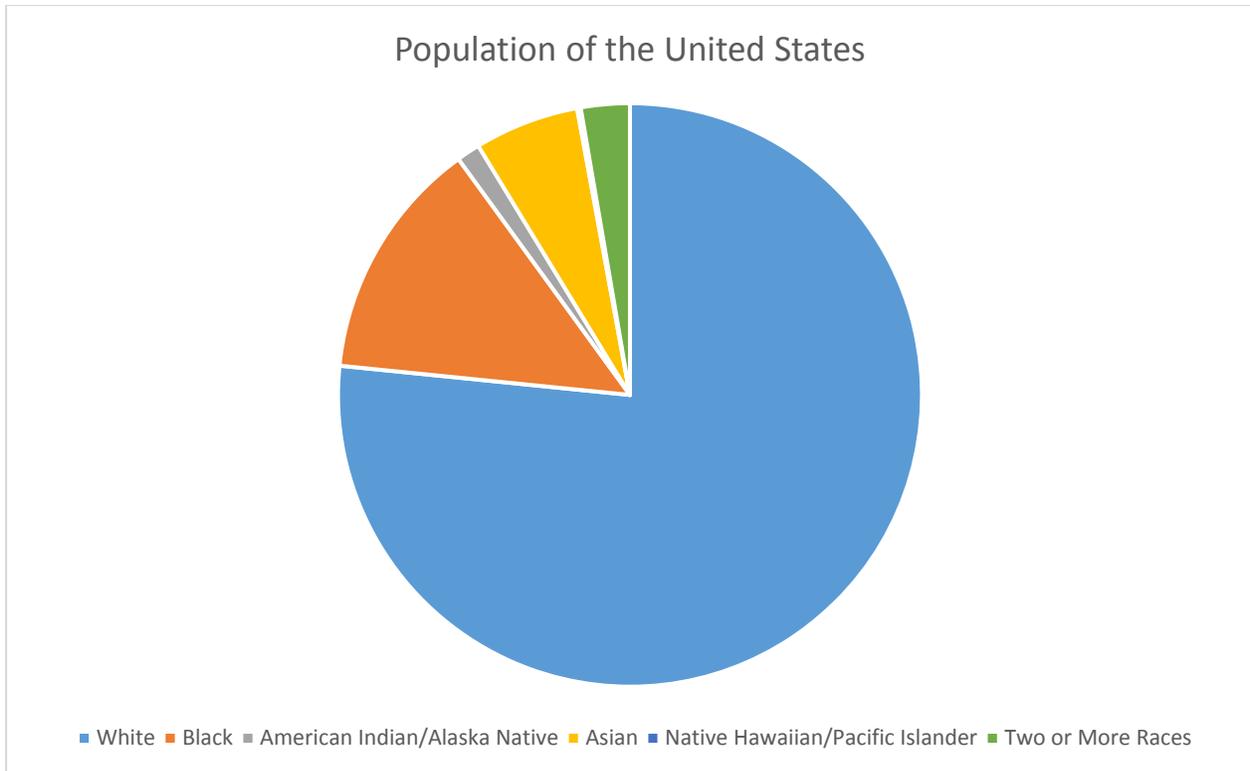
In her testimony to the Commission, Delores Jones-Brown from the Department of Law, Police Science, and Criminal Justice at the John Jay College of Criminal Justice also challenged the notion that black neighborhoods are inherently more violent than other neighborhoods, and thus the driver for excessive force statistics. Jones-Brown states that in some years during the past decade, the number of firearm-related homicides was the same for both black and white civilians, thus challenging the argument that violence in black neighborhoods can account for the disparate rates of fatal police shootings.¹⁰²⁸

Jones-Brown testified that “the *number* of firearm-related homicides was the same for both black and white civilians”. Because the white population and black population are not the same size, the *number* of homicides is of limited utility in analyzing the prevalence of violence in communities. What matters is the *rate* of violence. The Census Bureau estimates that in 2017, 76.6 percent of the U.S. population was “white alone,” which includes Hispanics. 13.4 percent of the U.S. population was “Black or African-American alone”.¹⁰²⁹ (This FBI table does not disaggregate offenders by both race and ethnicity, so it is impossible to determine how many non-Hispanic whites were arrested for murder.)

¹⁰²⁷ When the Criminal Division of the Civil Rights Division issued its report exonerating Wilson of having committed a crime or a constitutional violation, the Civil Rights Division as a whole issued a report accusing the Ferguson Police Department for committing constitutional violations in its collection of municipal fines and fees. The Commission dutifully followed suit and held two hearings on municipal fines and fees, culminating in issuing a report. *See* U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color*, 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

¹⁰²⁸ Commission Report at notes 163.

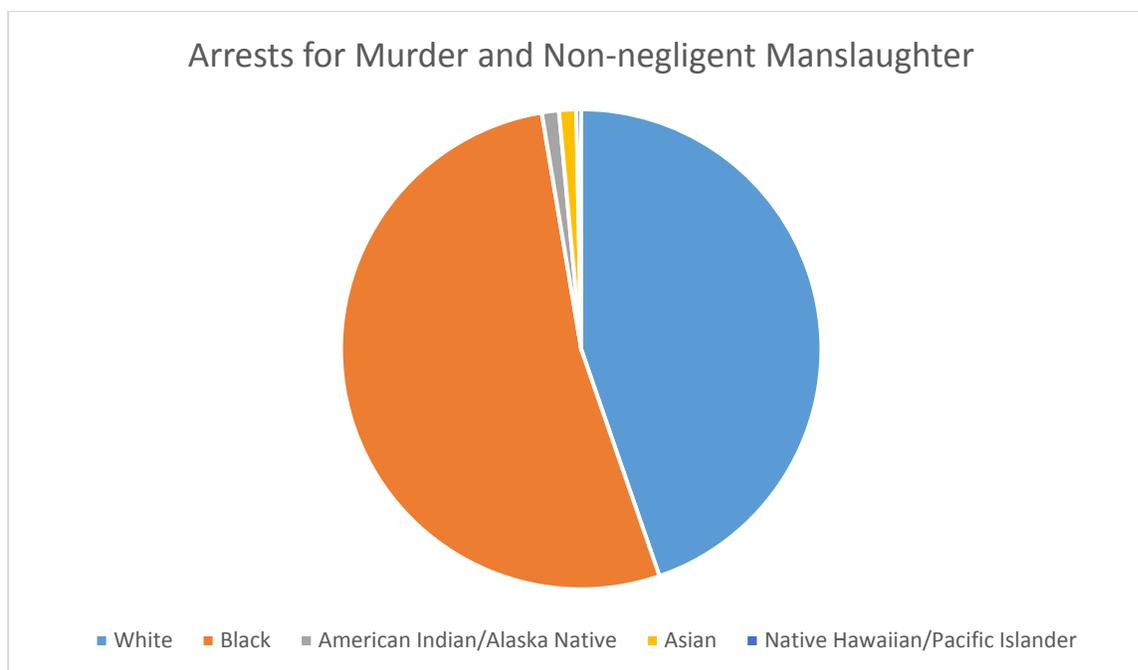
¹⁰²⁹ U.S. Census Bureau, “QuickFacts, United States,” <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last accessed Nov. 4, 2018).



In 2016, 4,192 white people (Hispanic and non-Hispanic) were arrested for murder and non-negligent manslaughter.¹⁰³⁰ But 4,935 black people were arrested for murder and non-negligent manslaughter. Even in absolute terms, the number of black Americans arrested for murder and nonnegligent manslaughter exceeds the number of white Americans arrested for murder and nonnegligent manslaughter, even though the white population is five-and-a-half times the size of the black population. The white alone (Hispanic and non-Hispanic) population of the United States was approximately 249,485,500 in 2017, and the black alone population was approximately 43,646,369.¹⁰³¹ This means that approximately 1.7 whites are arrested for murder per 100,000 whites, and approximately 11.3 blacks are arrested for murder per 100,000 blacks. Or to put it another way, *blacks are six times more likely to be arrested for murder than are whites*. And this is not because the criminal justice system is racist. Cases of murder are very straightforward. There is a dead body. No police officer wants a bunch of unsolved murders on his record. And often it is not too difficult to figure out who murdered someone, because the perpetrator frequently is a family member, friend, or known associate.

¹⁰³⁰ FBI: Uniform Crime Reporting, “2016 Arrests by Race and Ethnicity,” Table 21, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21>.

¹⁰³¹ U.S. Census Bureau, “QuickFacts, United States,” *supra* note 1029.



The report states:

[E]xperts also argue that bias may be increased by media outlets reinforcing the narrative of particular criminality by presenting African American and Latino people differently than white people—both quantitatively and qualitatively. News programs and newspapers over-represent people of color as crime suspects and white people as crime victims. Reporters may use language such as ‘black-on-black crime,’ but rarely phrase violent crime as ‘white-on-white crime’; this gives the impression that violent crime is more prevalent and uniquely an issue with the black community.¹⁰³²

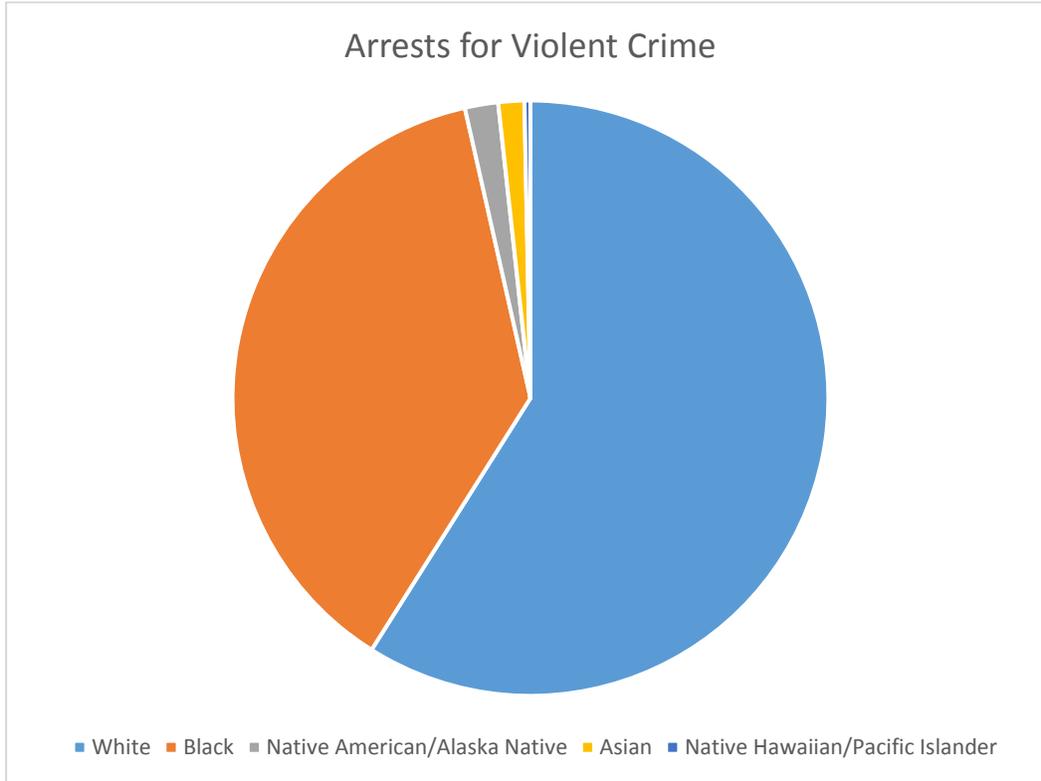
Unfortunately, “people of color” are overrepresented as crime suspects, and violent crime is more prevalent within the black community than within white or (especially) Asian communities. It may be that “White Americans overestimate the proportion of crime committed by people of color ... white respondents in a 2010 survey overestimated the actual share of burglaries, illegal drug sales, and juvenile crime committed by African-Americans by 20-30%”¹⁰³³, but that does not change the fact that African-Americans *are* overrepresented in criminal activity. The white respondents may have been wrong about the exact numbers, but they were correct in assuming that African-Americans are disproportionately involved in crime.

In 2016, there were 408,873 total arrests for violent crime. Since we do not have more granular data, let us be optimistic and assume that each of these arrests represents an individual who was only arrested once. 241,063 were white, 153,341 were black, 7,378 were Native American/Alaska Native, 5,755 were Asian, and 1,336 were Native Hawaiian/Pacific Islander. This means that 97

¹⁰³² Commission Report at notes 154-56.

¹⁰³³ Commission Report at notes 155.

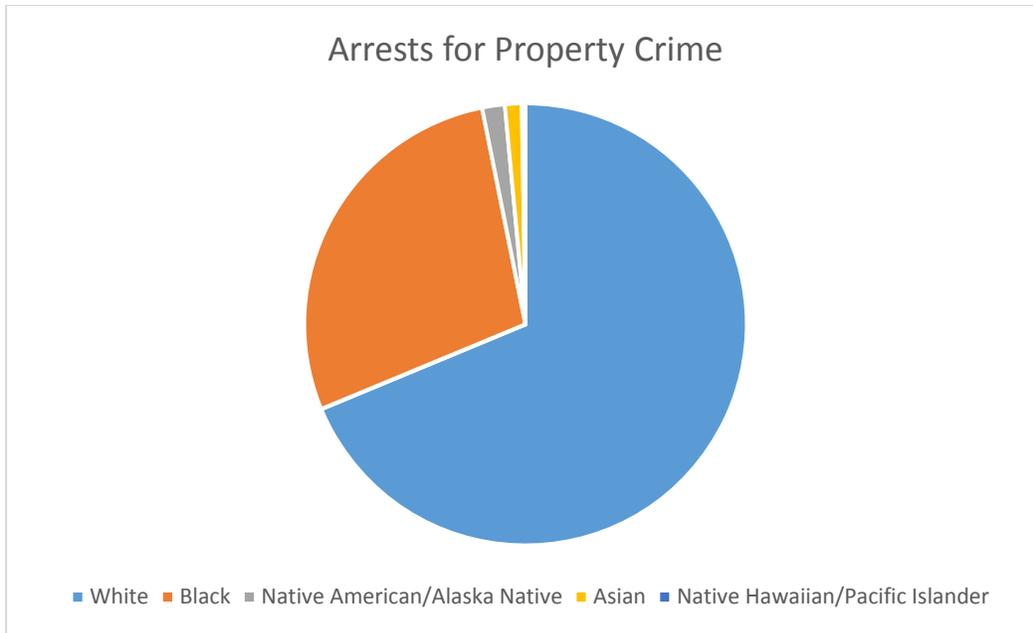
whites per 100,000 whites were arrested for violent crimes, and 351 blacks per 100,000 blacks were arrested for violent crimes.



1,074,136 people were arrested for property crimes. 738,319 were white, 301,958 were black, 17,782 were Native American/Alaska Native, 13,217 were Asian, and 2,860 were Native Hawaiian/Pacific Islander.¹⁰³⁴

295 whites per 100,000 whites were arrested for property crimes, and 691 blacks per 100,000 blacks were arrested for property crimes. So in fact, black neighborhoods generally are more violent and have more crime than white neighborhoods.

¹⁰³⁴ FBI: Uniform Crime Reporting, “2016 Arrests by Race and Ethnicity,” Table 21, *supra* note 1030.



The data make clear that whites are slightly underrepresented among criminals relative to their share of the population (there are, of course, specific crimes where whites are overrepresented), Asians are dramatically underrepresented relative to their share of the population, and blacks and Native Americans are dramatically overrepresented. In murder and non-negligent manslaughter, violent crimes, and property crimes, blacks range from 28 percent to 53 percent of those arrested, despite comprising only 13 percent of the population. Native Americans and Alaska Natives are only 1 percent of the population, but they account for 2 percent of those arrested for violent crimes and property crimes.

In short, the data make clear that blacks are overrepresented among victims of police shootings, but they are *underrepresented* relative to their *overrepresentation* in crime, particularly violent crime. 22.5 percent of those killed by police in 2017 were black.¹⁰³⁵ But 26.8 percent of all individuals arrested in 2017 were black.¹⁰³⁶

The report then shifts gears to acknowledge that yes, black neighborhoods have higher crime rates, but that fails to take into account “systemic issues” that are to blame.¹⁰³⁷ “The “black-on-black” crime narrative as an explanation for police excessive use of force disregards the structural and historical issues that formed these neighborhoods, as well as the social and economic factors that currently sustain them.”¹⁰³⁸ Even if you grant the “structural and historical issues,” the police can’t solve this problem—really no one can, because these issues are now baked in the cake—but the police in particular can’t because their job is to enforce the law, not to engage in housing policy.

¹⁰³⁵ *Washington Post* “2017 Police Shootings Database,” <https://www.washingtonpost.com/graphics/national/police-shootings-2017/?noredirect=on> (last accessed Nov. 4, 2018).

¹⁰³⁶ FBI: Uniform Crime Reporting, “2016 Arrests by Race and Ethnicity,” Table 21, *supra* note 1030.

¹⁰³⁷ Commission Report at notes 171.

¹⁰³⁸ Commission Report at notes 170.

The report then claims that the assertion that African-Americans are disproportionately likely to be involved in crime “is also problematic because there is not an empirically sound way to ‘take a true measure of criminality within a population’” because the police are allegedly hopelessly biased. Then let’s take a look at the National Crime Victimization Survey, which asks *individuals* to report when they have been victims of crimes and to identify the sex and race of the offender, if known. The NCVS captures crimes that victims did not report to the police. According to the most recent NCVS publication regarding offenders, which covers the period from 2012-2015, survey respondents reported an annual average of 5,883,800 nonfatal violent victimizations per year. The respondents reported that 43.8 percent of the offenders were non-Hispanic whites, 22.7 percent were black, and 14.4 percent were Hispanic. So even according to victims—many of whom are black themselves—African-Americans are over-represented among criminal offenders.¹⁰³⁹ The Commission report’s approach however is, “Who do you believe—me or your lying eyes?”

I appreciate the report’s finding that the police have a difficult and admirable job.¹⁰⁴⁰ The body of the report itself does not take law enforcement officers’ fear of being killed or injured seriously enough.¹⁰⁴¹ The report states that the number of police officers killed has declined over the past 30 years—which is great! However, it is likely that a large part of that decline is due to the increased use of body armor by police. According to the International Association of Chiefs of Police in 2014, since 1987 there were 3,108 confirmed cases of law enforcement officers whose lives had been saved due to body armor.¹⁰⁴² In 2017 alone, there were at least 22 officers whose lives were saved thanks to their body armor.¹⁰⁴³ The report states that there were 42 firearms-related law enforcement fatalities in 2017. Had it not been for body armor, that number would likely be 65, which is comparable to the 63 average annual fatalities in the 1970s.¹⁰⁴⁴

It is also worth noting that law enforcement officers are more likely to be killed by African-Americans than they are to kill African-Americans. In 2017, 26 African-Americans and 34 non-Hispanic and Hispanic whites (all male) were charged with killing law enforcement officers.¹⁰⁴⁵ If we eliminate individuals who killed corrections officers while in prison, we are left with 14 African-Americans and 26 whites (both non-Hispanic and Hispanic) who were charged with killing law enforcement officers, in addition to 3 Native Americans and 1 Asian. According to the

¹⁰³⁹ Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders, 2012-2015*, Bureau of Justice Statistics, 2017, Table 5, <https://www.bjs.gov/content/pub/pdf/rhovo1215.pdf>.

¹⁰⁴⁰ Commission Report: Finding 3.

¹⁰⁴¹ Commission Report at notes 188-204.

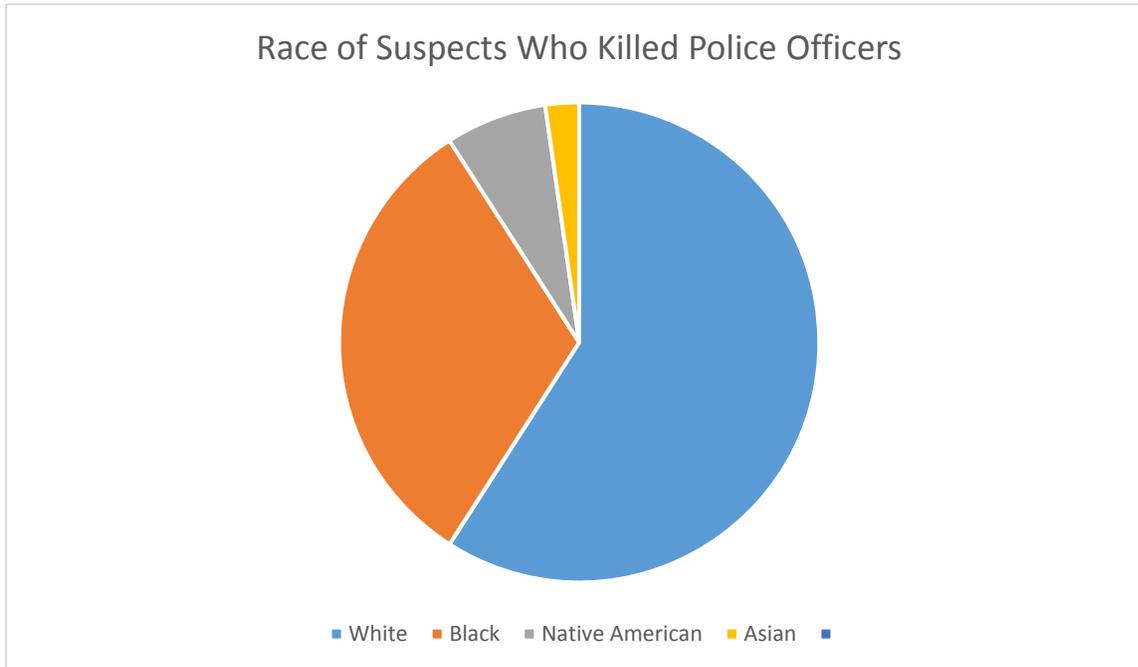
¹⁰⁴² *The Bulletproof Vest Partnership Grant Program: Supporting Law Enforcement Officers When it Matters Most: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2014), testimony of Chief Yousry A. Zakhary, President, International Association of Chiefs of Police, <http://www.theiacp.org/Portals/0/documents/pdfs/051414ZakharyTestimony.pdf>.

¹⁰⁴³ International Association of Chiefs of Police, “The IACP/DuPont Kevlar Survivors Club 2017 Update,” Dec. 4, 2017, <https://theiacpblog.org/2017/12/04/the-iacp-dupont-kevlar-survivors-club-2017-update/>; International Association of Chiefs of Police, “The IACP/DuPont Kevlar Survivors Club 2017 Update,” Dec. 5, 2017, <https://theiacpblog.org/2017/12/05/the-iacp-dupont-kevlar-survivors-club-2017-update-2/>.

¹⁰⁴⁴ Commission Report at notes 193.

¹⁰⁴⁵ Officer Down Memorial Page, “2017 Honor Roll of Heroes,” <https://www.odmp.org/search/year/2017> (last accessed Nov. 4, 2018); see also Appendix A.

FBI, in 2016 there were 652,963 sworn officers.¹⁰⁴⁶ This means that 2.1 per 100,000 sworn officers were killed by African-Americans in 2017.¹⁰⁴⁷ 3.9 per 100,000 sworn officers were killed by whites in 2016. Given the relative size of the populations, this means that 0.12 whites per million whites killed a police officer in 2016, but 0.37 blacks per million blacks killed a police officer in 2016. Are these numbers tiny? Yes. Does it mean that blacks are three times as likely to kill police officers as are whites? Yes.¹⁰⁴⁸



In 2017, 223 African-Americans were killed by police.¹⁰⁴⁹ The African-American population was about 43,646,369. This means that 0.5 African-Americans per 100,000 were killed by police officers. Also in 2017, 636 whites (including both Hispanic and non-Hispanic whites) out of 249,500,890 were killed by police officers. This means that 0.26 whites per 100,000 whites were killed by police in 2017.

This is important because since African-Americans are disproportionately likely to be involved in crime, they are also disproportionately likely to encounter police officers. Even the most law-abiding black men are, through no fault of their own, likely to encounter the police more frequently than white men. As Heather Mac Donald stated in her written testimony to the Commission, “This incidence of crime means that innocent black men have a much higher chance of being stopped by

¹⁰⁴⁶ FBI: Uniform Crime Reporting, “2016 Full Time Law Enforcement Employees,” Table 25, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-25/>.

¹⁰⁴⁷ Officer Down Memorial Page, “2017 Honor Roll of Heroes,” *supra* note 1045; *see also* Appendix A.

¹⁰⁴⁸ It is also worth noting that Native Americans are dramatically overrepresented among those who killed police officers in 2017, given that they are 1.3 percent of the total population.

¹⁰⁴⁹ *Washington Post* “2017 Police Shootings Database,” *supra* note 1035.

the police because they match the description of a suspect than white men. The police do not wish this; it is a reality forced on them by the facts of crime.”¹⁰⁵⁰

The report cites a study in which:

In a recent survey consisting of 802 African-American adults, researchers found that 50 percent of all black Americans (57 percent of black men and 44 percent of black women) said they have personally experienced racial discrimination when interacting with the police. Further, 61 percent responded that police officers are more likely to use unnecessary force against an African American person, compared to 26 percent who answered that police were just as likely to use unnecessary force against a white person. These perceptions of discrimination and unfair treatment by law enforcement have consequences for them personally and on society as whole, since the survey also showed that 31 percent of the respondents said that they avoided calling the police due to fear of discrimination.¹⁰⁵¹

There are several problems with uncritically reporting these survey results. First, just because someone thinks they experienced discrimination does not mean they actually experienced discrimination. Second, the police are more likely to use force (whether lawful or excessive) against individuals who are involved in crime, and since African-Americans are more likely to engage in crime than whites, the police are more likely to use force against them. People who live in majority-black neighborhoods see the police use force against other neighborhood residents because those residents are engaged in crime, but they may not realize that the police do not as often use force against individuals in majority-white neighborhoods because fewer people in those neighborhoods are involved in crime. Reports such as this one that obscure the black-white crime disparity only encourage confusion on this point.

In its eagerness to air the grievances of every racial, ethnic, and sexual minority, the report also uncritically reports the complaints of Native American and transgender advocates.

Simon Moya-Smith, an Oglala Lakota journalist and activist, states that the media rarely covers the number of police-involved killings that occur on tribal lands, and that these incidents are treated as isolated occurrences and largely ignored by the national media. Therefore, it is likely that there is less public awareness about police use of force in these communities, and in turn, considerably less public attention or outcry for reform. Moya-Smith states: “There are no white or black faces rallying around us, marching with us, protesting with us over this injustice. Why? Because we are a forgotten people.” Millet argues that of all police-involved killings of individuals from Native American and Alaskan Native communities over five

¹⁰⁵⁰ Heather Mac Donald, The Manhattan Institute, written statement for the “Police Use of Force: An Examination of Modern Policing Practices” Briefing before the U.S. Commission on Civil Rights, April 20, 2015, at 2 [hereinafter Mac Donald Statement].

¹⁰⁵¹ Commission Report at notes 212-214.

years, only two have received significant media coverage outside of the local community.¹⁰⁵²

It is a bit difficult to argue that police-involved killings on tribal lands are motivated by racism, because many police officers on reservations are tribal police who are themselves Native Americans.¹⁰⁵³ Local law enforcement generally does not have authority on the reservation¹⁰⁵⁴,

¹⁰⁵² Commission Report at notes 48.

¹⁰⁵³ It is possible local or federal authorities may be involved, but again, the tragic circumstances of these deaths do not support a “racist police slaughter minorities” narrative. There are two 2017 cases in the *Washington Post* database in which a Native American was killed on tribal land by non-tribal police. The first involved federal law enforcement. BIA agents were responding to a report of shots fired at a gas station. When they encountered George “Ryan” Gipp, he

[W]alked over to them with his hand in his pockets and didn’t follow police orders and was shot.

“The two FBI agents did give us an overview and a video, dash cam of the incident that occurred that night,” said Mike Faith, Standing Rock Sioux Tribal Chairman.

Faith says the case was reviewed by The U.S. Attorney’s Office in the District of Nebraska.

“Determined that Officer Sandland and Officer Webb did not violate George Ryan Gipp Jr. civil rights. And that no charges are warranted and have closed their case,” said Faith.

The FBI said Nebraska reviewed it because North Dakota and South Dakota felt a conflict of interest.

FBI agents say the investigation was thorough in an effort to show transparency since the case involved two officers.

“Like always, our condolences do go out to the family. It is a sad time, but the family wanted to know also, and the tribe. So the case has been closed,” said Faith.

Daniela Hurtado, “No charges for officers in Fort Yates October shooting death,” *KFYR*, May 11, 2018,

<http://www.kfyrtv.com/content/news/No-charges-for-officers-in-Fort-Yates-October-shooting-death-482432011.html>; see also Jack Dura, “Feds reviewing fatal shooting near Fort Yates,” *Bismarck Tribune*, March 27, 2018, https://bismarcktribune.com/news/local/crime-and-courts/feds-reviewing-fatal-shooting-near-fort-yates/article_21918f2b-d4ad-5460-b7d9-37126a642aa3.html.

In the second case, a police officer from Avenal, California was part of a county task force that “responded to reports of a violent man at the Santa Rosa Rancherita, an Indian reservation adjacent to the Tachi Palace Casino.... Putnam says on Friday night Phoenix threatened security officers on the reservation with a gun and then fled to a house.

“At this house, he repeatedly threatened other people inside the residence while continuing to brandish the handgun,” he said.

Putnam said deputies and other officers with the gang task force surrounded the house but Phoenix fled out of a window. He was then confronted by an officer of the Avenal Police Department.

“Mr. Phoenix turned and pointed his handgun at a law enforcement officer,” he said. “(Officer) Rivera, fired at Mr. Phoenix, obviously fearing for his life after having a gun pointed at him. The result was Mr. Phoenix was hit by gunfire and immediately fell to the ground.”

Four shots were fired Phoenix was pronounced dead at a local hospital. The fun Phoenix was holding was not real but looked like a semiautomatic handgun.

Stivers said it appeared Phoenix was under the influence.

Gene Haagenson, “Authorities release details of deadly officer-involved shooting near Tachi Palace,” *ABC30*, March 6, 2018, <https://abc30.com/news/authorities-release-details-of-deadly-officer-involved-shooting-near-tachi-palace/1787865/>.

¹⁰⁵⁴ Ian MacDougall, “Should Indian Reservations Give Local Cops Authority on Their Land?,” *The Atlantic*, July 19, 2017, <https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/>.

and local law enforcement officers near reservations may be Native American themselves.¹⁰⁵⁵ Furthermore, as with African-Americans, Moya-Smith's complaint ignores the sad reality that violent crime is endemic on reservations. "Given that the violent crime rate on reservations is between double and triple the national average, comparable communities would be large urban areas with high violent crime rates."¹⁰⁵⁶

In fact, two Native American police officers, Colt Allery and Houston Largo, were killed in 2017. Largo, a tribal police officer, was killed by a fellow member of the Navajo Nation. Allery, a county deputy who had previously served as a tribal police officer, was killed by a fellow member of the Turtle Mountain Band of Chippewa.¹⁰⁵⁷ Incredibly, the *Washington Post* database includes Deputy Allery's killer, Melvin Delong, in its list of individuals killed by police in 2017—which is technically correct, but leads the casual reader to believe that Delong was a victim of police brutality. Rather, "The video depicts Deputy Allery being shot in the face [after approaching Delong's truck] and Deputy Allery not firing any shots", after which other deputies shot and killed Delong.¹⁰⁵⁸

The facts in cases where Native Americans are shot off tribal lands similarly do not support the Commission report's allegations. Joshua Spottedhorse was shot in Spokane, Washington after robbing a grocery store cashier at gunpoint, being surrounded by police, fleeing on foot, and sticking his hand in his waistband after being repeatedly ordered to show his hands.¹⁰⁵⁹ Thomas Littlecloud began shooting a rifle through a motel room door as police approached to investigate a vehicle death.¹⁰⁶⁰ Littlecloud killed Sacramento Deputy Bob French and injured two California Highway Patrol officers. Littlecloud later died of a gunshot wound he sustained during the gun battle that he initiated.

¹⁰⁵⁵ See Stewart Wakeling, Miriam Jorgensen, Susan Michaelson, and Manley Begay, *Policing on American Indian Reservations: A Report to the National Institute of Justice*, U.S. Dep't of Justice, 2001,

<https://www.ncjrs.gov/pdffiles1/nij/188095.pdf>.

¹⁰⁵⁶ *Ibid.* at vii (citations omitted); see also National Institute of Justice, "Tribal Crime and Justice," April 24, 2018, <https://www.nij.gov/topics/tribal-justice/Pages/welcome.aspx>.

¹⁰⁵⁷ Andrew Hazzard, "Community, colleagues say goodbye to slain Rolette County deputy," *West Fargo Pioneer*, Jan. 24, 2017, <http://www.westfargopioneer.com/news/4205089-community-colleagues-say-goodbye-slain-rolette-county-deputy>; U.S. Dep't of Justice, U.S. Attorney's Office, District of New Mexico, "Kirby Cleveland Charged with Murder of Navajo Nation Tribal Police Officer," March 21, 2017, <https://www.justice.gov/usao-nm/pr/kirby-cleveland-charged-murder-navajo-nation-tribal-police-officer>.

¹⁰⁵⁸ April Baumgarten, "Suspect in Rolette County shooting fired first, killed Deputy Colt Allery, investigation reports say," *Grand Forks Herald*, May 2, 2017, <http://www.grandforksherald.com/news/4260251-suspect-rolette-county-shooting-fired-first-killed-deputy-colt-allery-investigation>.

¹⁰⁵⁹ Jonathan Glover, "Training pays off for Safeway employee held at gunpoint Tuesday," *The Spokesman-Review*, Dec. 28, 2017, <http://www.spokesman.com/stories/2017/dec/28/training-pays-off-for-safeway-employee-held-at-gun/>; KREM Staff, "Officer who killed Safeway robbery suspect justified in use of force," *KREM*, March 26, 2018, <https://www.krem.com/article/news/local/spokane-county/officer-who-killed-safeway-robbery-suspect-justified-in-use-of-force/293-532295939>.

¹⁰⁶⁰ Sarah Heise, "Deputy French fired at suspect even after he was shot, sheriff says," *KCRA*, Sept. 6, 2017, <https://www.kcra.com/article/deputy-french-fired-at-suspect-even-after-he-was-shot-sheriff-says/12175319>; Kevin Oliver, "Federal judge was warned not to release man who killed Sacramento Co. deputy," *KCRA*, Sept. 8, 2017, <https://www.kcra.com/article/federal-judge-was-warned-not-to-release-man-who-killed-sacramento-co-deputy/12206136>.

The report found that 59 percent of transgender respondents reported being stopped by police and being “profiled as sex workers when they were conducting routine daily tasks in the neighborhood.”¹⁰⁶¹ It should be noted that one of the Commission’s recent reports stated that nearly 20 percent of transgender respondents had engaged in prostitution or selling drugs.¹⁰⁶² The source the Commission relied on states that 11 percent of surveyed transgender individuals engaged in prostitution, in contrast to the perhaps 1 percent of U.S. women who have engaged in prostitution.¹⁰⁶³ So if the police are indeed profiling transgender individuals as prostitutes, they are behaving rationally.

It is worth noting here that “unarmed” is not a synonym for “harmless,” even though the report treats it as though it is. In 2016, 656 people were beaten to death by individuals who had no other weapon—more than the number killed by rifles and shotguns combined.¹⁰⁶⁴ Even though they are armed with lethal and non-lethal weapons, it is not irrational for police officers to be afraid of “unarmed” individuals who are attacking them or are acting in a threatening manner.¹⁰⁶⁵

For that matter, “mentally ill” is not a synonym for “harmless.” It may reduce the individual’s culpability for his behavior, but it does not mean that his behavior, even if beyond his control, is not objectively dangerous. Of the 236 people shot by police in 2017 whom the *Washington Post* classified as “mentally ill,” only 12 were unarmed.¹⁰⁶⁶ 122 were armed with a gun, 65 with a knife,

¹⁰⁶¹ Commission Report at notes 291.

¹⁰⁶² U.S. Commission on Civil Rights, *LGBT Employment in America*, 2017, at 19,

https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf.

¹⁰⁶³ Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at 21, http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

¹⁰⁶⁴ FBI, “Expanded Homicide Data Table 4,” 2016, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-4.xls>.

¹⁰⁶⁵ In 2017, four corrections officers, one in Delaware and three in North Carolina, were beaten to death by inmates. See Brittany Horn, “Here are the 18 inmates charged in officer’s death,” *Delaware Online*, Oct. 17, 2017, <https://www.delawareonline.com/story/news/crime/2017/10/17/delaware-inmates-charged-connection-death-It-steven-floyd/772597001/>; Kevin Green, “Autopsy: NC corrections officer hit with boiling water then beaten with fire extinguisher,” *WNCN CBS North Carolina*, Oct. 26, 2017, <https://www.wavy.com/news/autopsy-nc-corrections-officer-hit-with-boiling-water-before-being-beaten-with-fire-extinguisher/1078266151/>; “Durham man who shot trooper in 2013 among 4 charged in attempted prison break,” *WRAL*, Oct. 20, 2017, <https://www.wral.com/durham-man-who-shot-trooper-in-2013-among-4-charged-in-attempted-prison-break/17031550/>.

¹⁰⁶⁶ For example, Jean Pedro Pierre chased a deputy from his apartment and down the hallway, did not back down after the deputy deployed his Taser, knocked the deputy to the ground and dragged him by the leg, and began to charge another deputy, who shot him. Brian Hamacher, “Body Camera, Cellphone and Surveillance Videos Show Fatal BSO Deputy-Involved Shooting in Lauderdale Lakes,” *NBC Miami*, Dec. 8, 2017, <https://www.nbcmiami.com/news/local/Cellphone-Video-Shows-Fatal-BSO-Deputy-Involved-Shooting-in-Lauderdale-Lakes-462793703.html>. William Porubsky (who was white) attacked a deputy who had given him a ride to a homeless shelter after a woman reported Porubsky was pounding on her door and acting erratically. Porubsky tried to knock the deputy’s stun gun out of his hand, and when the deputy discharged the stun gun, it had no effect. Porubsky knocked the deputy to the ground and punched him in the face, at which point the deputy shot Porubsky. The Summit County Prosecutor determined that the shooting was justified. Evan MacDonald, “Stow police officer’s fatal shooting was justified, prosecutor says,” *Cleveland.com*, Feb. 15, 2018, https://www.cleveland.com/akron/index.ssf/2018/02/stow_police_officers_fatal_sho.html. On the other hand, an Oklahoma police officer was charged with murder for shooting Dustin Pigeon, who was suicidal and trying to set

12 with a toy weapon, and 20 with some other weapon (such as a pitchfork¹⁰⁶⁷ or an ax¹⁰⁶⁸). And as panelists Bob Metzger and Felix Vargas noted at our hearing, particularly when a person is both mentally ill and is on drugs, it may be very difficult to subdue him.¹⁰⁶⁹ Unfortunately, it may be impossible to subdue an individual without using deadly force.

Ferguson Effect

Report finding Number Six states:

Department of Justice engagement with police departments through police-requested assistance and at times enforcement and monitoring has proved beneficial to the police and their communities. Recommendations made by the Civil Rights Division, the Office of Community Oriented Policing Services (COPS) and the Community Relations Services office (CRS) have led to police departments implementing policies and practices that uphold constitutional standards. Departments that have undergone DOJ investigation and made agreements for reform, and those who have sought voluntary engagement, continue to see improved policies on use of force, better training of officers, and implementation of more advanced internal accountability and information systems.¹⁰⁷⁰

Contrary to the tone of this finding such investigation and reforms have not been an unqualified success. For example, Chicago and Baltimore are two cities that have been made prominent targets of DOJ investigations and consent decrees. Both witnessed dramatic spikes in crime, particularly murders.¹⁰⁷¹ Maybe the investigations and consent decrees made some members of the community feel better, but they seem to have mostly emboldened the criminal community—and it is doubtful that an increased number of listening sessions are of much comfort to the parents of a child hit by a stray bullet.

himself on fire, after another officer shot Pigeon with beanbag rounds to no effect (Pigeon was of Asian descent). Crimesider Staff, “Oklahoma officer charged with murder in shooting of suicidal man,” *CBS*, Dec. 5, 2017, <https://www.cbsnews.com/news/oklahoma-officer-charged-with-murder-in-shooting-of-suicidal-man/>; *Washington Post* “2017 Police Shootings Database,” *supra* note 1035.

¹⁰⁶⁷ Joseph Serna, “‘Despondent’ man with pitchfork fatally shot by Sacramento County sheriff’s deputy,” *Los Angeles Times*, Nov. 2, 2017, <http://www.latimes.com/local/lanow/la-me-ln-sacramento-ois-pitchfork-20171102-story.html>; Nashelly Chavez, “Man shot by Sacramento County deputy posted a suicidal message the night before his death,” *Sacramento Bee*, Nov. 3, 2017, <https://www.sacbee.com/news/local/crime/article182630416.html>.

¹⁰⁶⁸ “Reserve deputy cleared in fatal shooting of woman with ax,” *Las Cruces Sun-Times*, Jan. 24, 2018, <https://www.lcsun-news.com/story/news/2018/01/24/reserve-deputy-sergio-gotbeter-cleared-fatal-shooting-woman/1063925001/>.

¹⁰⁶⁹ Vargas, *Briefing Transcript* at 127, 91. Mr. Vargas argued that Mr. Zambrano, the individual who was shot by police in Pasco, Washington, could have been controlled through physical force because he was a small man, although a taser was ineffective. I offer no opinion as to the feasibility of Mr. Vargas’s suggestion.

¹⁰⁷⁰ Commission Report, Findings: Finding 6.

¹⁰⁷¹ Kevin Rector, “In 2016, Baltimore’s second-deadliest year on record, bullets claimed targets and bystanders alike,” *Baltimore Sun*, Jan. 2, 2017, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-homicides-2016-20170102-story.html>.

The Chicago consent decree likely will hamstring police officers in their efforts to enforce order and will endanger them. For example, the proposed consent decree states:

CPS officers will treat each application or standard cycle (five seconds) of a Taser as a separate use of force that officers must separately justify as objectively reasonable, necessary, and proportional. CPD will continue to require officers to, when possible, use only one five-second energy cycle and reassess the situation before any additional cycles are given or cartridges are discharged. In determining whether any additional application is necessary, CPD officers will consider whether the individual has the ability and has been given a reasonable opportunity to comply prior to applying another cycle.¹⁰⁷²

The consent decree reads as if police officers are going to be making these decisions in a clinical environment where they can calmly observe whether the Taser is effective before activating it again. Watching dash cam and body cam footage of struggles with suspects quickly reveal that is rarely how these scenarios unfold. Tasers were a great innovation because they allow officers to use non-lethal force. Are they harmless? No. But an exhaustive investigation by Reuters found only 153 deaths attributed to Tasers over the entire country from 1983-July 31, 2017 (Reuters inflates the numbers by reporting 1,005 deaths that occurred after Taser use, but that were not attributed to Taser use—for example, 17 people who died after choking on bags of drugs, because the use of a Taser might have made choking more likely).¹⁰⁷³ Although each death is a tragedy for the individual and his family, this simply is not very many people, and certainly not enough to place additional restrictions upon the use of Tasers—particularly because Tasers are not always effective, so police officers are already taking an increased risk to themselves by using a Taser rather than a firearm.¹⁰⁷⁴

The consent decree also will drown police officers in paperwork, thus giving them less time to engage in patrol work and other non-paperwork duties. For example:

CPD members must report and document any reportable use of force. Beginning January 1, 2019, a reportable use of force will be defined as any use of force by a CPS member included in any of the following three levels:

- a. A level 1 reportable use of force is the use of any force by a CPD member to overcome the active resistance of a subject that does not rise to a level 2

¹⁰⁷² Consent Decree, Draft for Public Review, *Illinois v. Chicago*, Case No. 17-CV-6260, at 51 (N.D. Ill. July 28, 2018), <http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/07/Illinois-v.-Chicago-Consent-Decree-Draft-for-Public-Review-2018-7-27.pdf>.

¹⁰⁷³ Peter Eisler, Jason Szep, Tim Reid, and Grant Smith, “Shock Tactics,” *Reuters*, Aug. 22, 2017, <https://www.reuters.com/investigates/special-report/usa-taser-911/>.

¹⁰⁷⁴ Joe Sutton and Joe Sterling, “Police officer in Oklahoma dies after shootout,” *CNN*, March 27, 2017, <https://www.cnn.com/2017/03/27/us/oklahoma-officer-killed/index.html> (“Terney chased and used a Taser on the person—but he was able to scramble through a wooded area into a pasture. The officer and suspect later “were involved in gunfire,” Kidney said.”).

or level 3 reportable use of force. This would include force that is reasonably expected to cause pain or an injury, *but does not result in injury or complaint of injury*. The following techniques are level 1 reportable uses of force when applied in response to active resistance: pressure point compliance techniques; joint manipulation techniques; wristlocks; armbars; and any leg sweep, weaponless defense techniques, or takedown that does not result in injury or complaint of injury. It is not a reportable use of force for a CPD member to escort, touch, or handcuff a person with minimal or no resistance. [emphasis added]¹⁰⁷⁵

Whenever a CPD member engages in a reportable use of force, the member must complete a TRR, or any similar form of documentation CPD may implement, prior to the end of his or her tour of duty. In addition to completing the TRR, officers must also document the reason for the initial stop, arrest, or other enforcement action per CPD policy. . . .

In completing the TRR, or whatever similar documentation CPD may implement, CPD members must include a narrative that describes with specificity the use of force incident, the subject's actions, or other circumstances necessitating the level of force used; and the involved member's response, including de-escalation efforts attempted and the specific types and amounts of force used. The narrative requirement does not apply to CPD members who discharged a firearm in the performance of duty or participated in an officer-involved death in the performance of duty. Any CPD member who observes or is present when another CPD member discharges a firearm or uses other deadly force must complete a written witness statement prior to the end of his or her tour of duty. CPD members will note in their TRRs the existence of any body-worn camera or in-car camera audio or video footage, and whether any such footage was viewed in advance of completing the TRR or any other incident reports. CPD members must complete TRRs, or whatever similar documentation CPD may implement, and other reports related to the incident, truthfully and thoroughly

All reportable uses of force by CPD members must be reviewed by CPD supervisors.¹⁰⁷⁶

The Baltimore consent decree is similar.¹⁰⁷⁷

¹⁰⁷⁵ Consent Decree, Draft for Public Review, *Illinois v. Chicago*, Case No. 17-CV-6260, at 55 (N.D. Ill. July 28, 2018).

¹⁰⁷⁶ *Id.* at 56-57, 59.

¹⁰⁷⁷ Consent Decree, *United States v. Police Dep't of Baltimore City*, Case No. 1:17-CV-00099-JKB, at 46-47 (D. Md. Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download>.

BPD will ensure that it continues to categorize Reportable Force into levels for the purposes of reporting and reviewing each use of force. These levels will be based on the following factors: potential of the technique or weapon to cause injury or disability; degree of actual injury or disability; duration of force; potential for abuse or

It is ironic that the report cites Chicago as an example of a successful implementation of a consent decree.¹⁰⁷⁸ Given the violence raging across Chicago (and yes, it is generally “black on black” violence)¹⁰⁷⁹, it is peculiar to cite Chicago as a successful example of anything related to criminal justice. A police commander was shot seven times while attempting to apprehend a four-time felon who was wearing body armor and carrying a weapon, which suggests Chicago needs a stricter approach to law enforcement, not consent decrees.¹⁰⁸⁰ In an interview with the *Chicago Sun-Times*, Chicago police superintendent Eddie Johnson stated that he believed public backlash against his department in the wake of the Laquan MacDonald shooting contributed to the horrific violence that swept Chicago in 2016.

“You couple that with the national anti-police narrative, that set us up for a disastrous 2016, and we saw it,” Johnson said. “Don’t get me wrong, you have to look at those things to ensure it doesn’t happen again. But I think a lot of criminals felt emboldened because of the national narrative. They didn’t feel like we were holding them accountable.”¹⁰⁸¹

This phenomenon is popularly known as the “Ferguson Effect,” which was first identified by panelist Heather Mac Donald the year after the Commission’s hearing.¹⁰⁸² The “Ferguson Effect”

misuse of weapon or force; and physical vulnerability of the subject. Each level of Reportable Force, as defined below, will require increasingly rigorous reporting, investigation, and review.

- a. Level 1: Level 1 Reportable Force includes: (1) force that causes only transient pain or disorientation during its application as a means of gaining compliance, including hand control or escort techniques (e.g. elbow grip, wrist grip, or shoulder grip) and pressure point compliance techniques, but that is not reasonably expected to cause injury; (2) pointing a firearm or Conducted Electrical Weapon (“CEW”) at an individual; (3) “cycling” a CEW as a form of warning (“Displaying the Arc”); and (4) forcible takedowns that do not result in actual injury or complaint of injury. It does not include escorting, touching, or handcuffing a person with minimal or no resistance. Pointing a firearm or CEW at a person is a Level 1 use of Reportable Force, subject to the following exceptions:
 - i. SWAT Team Officers and officers assigned to work on a federal task force will not be required to report the pointing of a firearm at a subject as a use of force during the execution of SWAT Team or federal task force duties; and
 - ii. Pointing of a firearm at a subject will not be a use of Reportable Force if done solely while entering and securing a building in connection with the execution of an arrest or search warrant and a supervisor prepares a report detailing the incident.

¹⁰⁷⁸ Commission Report at notes 554-55.

¹⁰⁷⁹ Chicago Tribune Crime Team, “In Chicago, 374 people have been killed this year. That is 118 fewer than 2017,” *Chicago Tribune*, Sept. 9, 2018, <http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicides-data-tracker-htlstory.html>.

¹⁰⁸⁰ Gregory Pratt, “Shomari Leghette, charged with Chicago commander’s murder, compares himself to Trayvon Martin,” *Chicago Tribune*, April 9, 2018, <http://www.chicagotribune.com/news/local/breaking/ct-met-shomari-leghette-paul-bauer-chicago-magazine-20180407-story.html>; Jessica D’Onofrio, “Suspect in killing of Chicago Police Cmdr. Bauer appears in court Friday,” *ABC 7*, March 9, 2018, <https://abc7chicago.com/suspect-in-killing-of-cpd-cmdr-bauer-appears-in-court-friday/3193483/>.

¹⁰⁸¹ Mitchell Armentrout, “Chicago homicides down sharply in 2017, still over 650 slain,” *Chicago Sun-Times*, Dec. 31, 2017, <https://chicago.suntimes.com/news/chicago-murders-homicides-2017-steep-decline/>.

¹⁰⁸² Heather Mac Donald, “The Ferguson Effect,” *Washington Post*, July 20, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/20/the-ferguson-effect/?noredirect=on&utm_term=.88e954adb4d7.

refers to sudden spikes in violent crime, particularly homicides, that occurred across the country following unrest surrounding the death of Michael Brown. The spikes were particularly pronounced in large urban areas. Cleveland, for instance, had a 90.5 percent increase in homicides in 2015, Baltimore had a 58.5 percent increase, Milwaukee had a 72.6 percent increase, and Chicago had a 15.0 percent increase.¹⁰⁸³

Mac Donald argues that the increase in unrest and belief that they lacked governmental support caused police officers to reduce “proactive policing,” which helps maintain order, and instead respond only to calls. As Rahm Emanuel said before capitulating to anti-police forces, “They [police officers] have pulled back from the ability to interdict . . . They don’t want to be a news story themselves, they don’t want their career ended early, and it’s having an impact.”¹⁰⁸⁴ Richard Rosenfeld of the University of Missouri-St. Louis believes that some form of the Ferguson Effect—either that police have backed off from proactive policing or loss of confidence in the police leading to increased private violence—is likely responsible for the surge in homicides among African-Americans since 2014.¹⁰⁸⁵

It doesn’t really matter if “the community” feels better about the police if consent decrees and protests hamstring the police in their efforts to maintain order. The unfortunate fact of the matter is that even if every single police officer were perfectly trained, had not a shred of explicit or implicit racial bias, and never made a mistake under pressure, many individuals would still be killed by police every year. A situation where a man refuses to follow an officer’s orders, punches her in the face after she pepper-sprays him, and grabs her Taser and attempts to shoot her with it is almost certainly going to end with either the man or the officer dead.¹⁰⁸⁶ Likewise, a man may be unarmed and have a mental illness, but if he chases a deputy out of his apartment and down the hallway, is unaffected by the use of a Taser and baton, knocks the deputy to the ground and continues kicking and dragging him after being ordered to stop by another deputy, and then charges the second deputy, there is a reasonable likelihood that deadly force will be used.¹⁰⁸⁷ There are certainly individuals like Walter Scott who are completely innocent of wrongdoing, but it is far more common that individuals are killed by police after they have escalated a situation to a point where it is a life-or-death struggle.

In the end, perhaps Michael Brown’s untimely death is an accurate archetype of so many individuals who die at the hands of police. An individual is involved in a crime, and the police are called. That individual behaves aggressively and the situation escalates. In the end, either the police officer or the suspect or both are wounded or dead.

¹⁰⁸³ Richard Rosenfeld, *Documenting and Explaining the 2015 Homicide Rise: Research Directions*, National Institute of Justice, 2016, at 9, <https://www.ncjrs.gov/pdffiles1/nij/249895.pdf>.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Ibid.*; Richard Rosenfeld, Shytierra Gaston, Howard Spivak, Seri Irazola, *Assessing and Responding to the Recent Homicide Rise in the United States*, National Institute of Justice, 2017, <https://www.ncjrs.gov/pdffiles1/nij/251067.pdf>.

¹⁰⁸⁶ Jonathan Cooper, “Officer undergoes surgery after struggle leading up to fatal metro officer-involved shooting,” *KOCO News*, Dec. 11, 2017, <https://www.koco.com/article/officer-undergoes-surgery-after-struggle-leading-up-to-fatal-metro-officer-involved-shooting/14411231>.

¹⁰⁸⁷ Carey Codd, “Body Cam Video Captures Tense Moments Leading Up to Deadly Deputy-Involved Shooting,” *CBS Miami*, Dec. 8, 2017, <https://miami.cbslocal.com/2017/12/08/video-shows-moments-leading-up-to-deadly-deputy-involved-shooting/>.