

THE LOCALE AND DAMAGES OF FATAL POLICING

SCOTT JEFFREY & W. KIP VISCUSI[†]

ABSTRACT

George Floyd and Breonna Taylor’s violent deaths sparked global protests condemning police violence. Many agree that reforms to policing are necessary and while some changes have occurred, the structure, culture, and budgeting of policing are largely unchanged. This Article first introduces the term “fatal policing” to denote incidents in which police actions, such as shootings, result in victims’ deaths. This Article next reviews data on fatal policing to corroborate findings that Black people are disproportionate victims of fatal policing, calls for a complete census of fatal policing from independent governmental sources, and analyzes regional differences in fatal policing. This Article then considers financial incentives to deter fatal policing and advocates for three damages-related proposals: raising damages amounts after fatal policing, ending qualified immunity to increase access to these damages, and tying financial penalties more closely to police department budgets.

To understand the nature and extent of the problem of fatal policing, it is essential to have a reliable, complete database that tracks the numbers, locations, trends, and circumstances of fatal policing. No governmental database accurately provides this critical information, leaving the task to independent researchers. Such a comprehensive database exists for occupational fatalities, and this Article argues a similar database for fatal policing is possible and necessary. This Article uses the existing independent datasets to corroborate the finding that Black people have been disproportionately shot and killed by police, especially in circumstances where lethal force is the least justified. This Article provides statistical evidence that the incidence of these killings varies greatly among regions, providing a roster of the top ten states by counts and by rates of fatal police shootings, revealing a prevalence of fatal policing in western states, even after controlling for demographic factors and homicide rates. Regional variations suggest that, even though the policing problem is a national problem, it cannot be addressed at the federal level alone.

Diverse policing reforms need to be implemented at a local level, and jurisdictions have several reforms available. However, one common roadblock to many of these reforms is the lack of incentives for cities to curtail police behaviors that result in fatal policing. While Black Lives Matter

[†] Scott Jeffrey, JD / PhD Law and Economics Student, Expected 2023, Vanderbilt University Law School, 131 21st Avenue South, Nashville, TN, 37203. W. Kip Viscusi, University Distinguished Professor of Law, Economics, and Management, Vanderbilt University Law School. The authors would like to thank the editors at the *Denver Law Review* for their thoughtful edits.

protests have created pressure for politicians, other mechanisms should also be relied upon to induce changes in policing. Specifically, this Article examines financial incentives to deter fatal policing and ensure more generous levels of victim compensation following fatal policing.

For victim compensation to create adequate incentives for responsible policing, the amount must be at a meaningful level, the compensation must be obtainable, and the financial penalties must impact police officers or their departments. This Article presents data on jury verdicts and settlements showing that payouts following fatal policing are far smaller than how most federal government agencies monetize mortality risks. This shortfall in damages suggests that increased access to damages by itself is not enough to create appropriate financial incentives to deter fatal policing. This Article calls for courts to align damages awards from fatal policing with the concept of the value of a statistical life (VSL), commonly used by administrative agencies, in situations where punitive damages are warranted. Based on the VSL, the monetized value of fatal police shootings in the United States from 2015 to 2019 is \$54 billion.

Next, this Article reviews the goals, successes, and failures of qualified immunity and calls for ending qualified immunity to improve victims' access to damages awards following police violence. Recent scholarship shows that cities, not police departments or police officers, bear the costs of police misconduct. To ensure these financial incentives change police behavior, this Article calls for better aligning police department budgets with misconduct litigation costs. Forcing police departments to assume responsibility for the damages awards resulting from police misconduct creates financial incentives necessary to promote responsible policing.

Policing in America needs comprehensive reform. While any effective policing reform should be pursued, the financial incentives proposed in this Article will encourage jurisdictions to adopt further mechanisms to deter fatal policing. As such, more appropriate victim compensation can better communicate to cities and police departments the severity of the harms from policing and the importance of eliminating them.

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I. INTRODUCTION

On May 25, 2020, Minneapolis police officer Derek Chauvin pinned the already-handcuffed George Floyd to the street by kneeling on his neck for nine minutes and twenty-nine seconds.¹ Floyd, a forty-six-year-old Black man, repeatedly told Chauvin and three other officers, “I can’t breathe,” and, “Please, I can’t breathe.”² Bystanders filmed the brutal arrest and yelled at the officers to stop.³ Chauvin only released his knee after a medic took Floyd’s pulse.⁴ Floyd’s limp body was then lifted onto a stretcher.⁵ Floyd died shortly after. The killing evoked comparisons to the 2014 chokehold killing of Eric Garner in Staten Island, New York.⁶ Garner, a forty-three-year-old Black man, was killed after being placed in a chokehold by an officer in the New York City Police Department.⁷ Garner’s last words were also, “I can’t breathe.”⁸

The police officers responsible for Floyd’s death submitted paperwork that described a far less violent scene.⁹ Bystander videos quickly

1. Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds -- Not the Infamous 8:46*, CNN (Mar. 30, 2021, 6:27 AM), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> (describing how the initial time of 8:46 originated from bystander video began only after Chauvin started kneeling on Floyd, and that police body cameras corrected this); see also Evan Hill, Ainara Tiefertähler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>; Nicholas Bogel-Burroughs, *8 Minutes, 46 Seconds Became a Symbol in George Floyd’s Death. The Exact Time Is Less Clear*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/18/us/george-floyd-timing.html?action=click&module=RelatedLinks&pgtype=Article>.

2. See Hill et al., *supra* note 1; see also Shubham Kalia & Kanishka Singh, *Police Ignored George Floyd’s ‘I can’t Breathe’ Plea: Transcript*, REUTERS (July 9, 2020, 12:04 AM), <https://www.reuters.com/article/us-global-race-usa-floyd/police-ignored-george-floyds-i-cant-breathe-plea-transcript-idUSKBN24A0KX>.

3. Hill et al., *supra* note 1.

4. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/article/george-floyd.html>.

5. Omar Jimenez, *New Police Body Camera Footage Reveals George Floyd’s Last Words were ‘I can’t breathe’*, CNN (July 15, 2020, 2:04 PM), <https://www.cnn.com/2020/07/15/us/george-floyd-body-cam-footage/index.html>.

6. *Protests Continue to Rage After Death of George Floyd*, N.Y. TIMES, <https://www.nytimes.com/2020/05/28/us/minneapolis-protests-george-floyd.html?action=click&module=RelatedLinks&pgtype=Article> (May 25, 2021); Mirna Alsharif, *Eric Garner’s Mother Says George Floyd’s Death Feels like Déjà Vu*, CNN (May 27, 2020, 6:31 PM), <https://www.cnn.com/2020/05/27/us/eric-garner-mother-reax-floyd/index.html>.

7. Christina Carrega, *5 Years After Eric Garner’s Death, A Look Back at The Case and The Movement It Sparked*, ABC NEWS (July 16, 2019, 3:42 AM), <https://abcnews.go.com/US/years-eric-garner-death-back-case-movement-sparked/story?id=63847094>.

8. *Id.*; Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/nyregion/daniel-pantaleo-fired.html>.

9. The original report stated the officers responded to a call about suspected forgery. The report said he “physically resisted” and “appeared to be suffering medical distress.” Andy Mannix, *Minneapolis Police Cite ‘Fluid’ Situation for Troubling Misinformation Released after George Floyd Death*, STAR TRIB. (June 3, 2020, 5:08 AM), <https://www.startribune.com/mpls-police-still-haven-t-explained-misinformation-after-floyd-s-death/570970152>.

emerged and overshadowed the officers' description.¹⁰ The videos prompted the firing of all four officers involved, a second-degree murder conviction of Derek Chauvin, and protests worldwide.¹¹

George Floyd's family sued the city of Minneapolis under § 1983,¹² which holds officials acting under the color of law liable for civil rights violations.¹³ The city and the Floyd family settled for \$27 million,¹⁴ aiming to achieve the two purposes of § 1983: to deter such violations and to compensate victims.¹⁵ But based on other awards following what we term "fatal policing," or policing techniques with deadly results including shootings and chokeholds, § 1983 does not adequately serve these purposes.¹⁶ The \$27 million settlement from Floyd's death is far higher than the roughly \$1 million average payout based on payouts resulting from fatal policing.¹⁷ For nearly all families of victims of fatal policing, if they manage to secure compensation, the payout is relatively low and provides next to no financial deterrent against future fatal policing.

George Floyd joined the list of high-profile victims of fatal policing in 2020. Shortly after midnight on March 13, 2020, in a botched drug raid in Louisville, Kentucky, police officers shot and killed Breonna Taylor.¹⁸ Police were allegedly searching for drugs belonging to Taylor's ex-boyfriend when they executed a "no-knock" warrant using a battering ram to knock the door off its hinges.¹⁹ Whether the police announced their presence is disputed, but it is unnecessary for a no-knock warrant.²⁰ Taylor's then-boyfriend Kenneth Walker did not know who was intruding and fired one shot at the officers.²¹ In response, the officers fired thirty-two rounds,²² with five striking Taylor and none striking Walker.²³ She died shortly thereafter.²⁴

10. *Id.*

11. John Eligon, Tim Arango, Shaila Dewan, & Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (June 25, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html?name=styl-n-floyd-trial®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=LegacyCollection&variant=show&is_new=false.

12. Complaint at 1, *Schaffer v. Chauvin*, (D. Minn. 2020) (No. 20-cv-1577).

13. 42 U.S.C. § 1983; *see, e.g.*, *Scott v. Harris*, 550 U.S. 372, 375–76 (2007).

14. Nicholas Bogel-Burroughs & John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html>.

15. *See, e.g.*, *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488 (1980).

16. *See infra* Part II for discussion of the widespread problem of policing and *infra* Part III for discussion of the inappropriately low damages awards following fatal police shootings.

17. *See infra* Part III.

18. Richard A. Oppel Jr., Derrick Bryson Taylor, & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Breonna Taylor: Police Officer Charged but not Over Death*, BBC (Sept. 23, 2020), <https://www.bbc.com/news/world-us-canada-54273317>.

23. Oppel Jr. et al., *supra* note 18.

24. *Id.*

Here too, police officers submitted incorrect information that put them in a better light. In the initial police report released to the public, the “forced entry” box was checked “no” despite the use of a battering ram, and Taylor’s injuries were listed as “none” despite the five gunshot wounds that resulted in her death.²⁵ Taylor’s killing, Floyd’s murder, and the false police reports all contributed to the eruption of protests against police brutality in the summer of 2020.²⁶ While two of the three police officers involved in Taylor’s death were fired, no criminal charges were filed for Taylor’s death.²⁷ In September 2020, Taylor’s family settled with the city of Louisville for \$12 million for her death.²⁸ The settlement also required changes to the Louisville Police Department, including written approval for all search warrants, a warning system for problematic officers,²⁹ and housing credits for police officers to encourage them to live in the communities that they police.³⁰

Two other victims of fatal policing, who were also shot by Minnesota police officers, recently received payouts via settlements. In 2016, Philando Castile, a Black male, was pulled over in Minnesota for a traffic stop with his fiancée next to him and her daughter in the back seat.³¹ After Castile calmly informed the police officer that he had a gun, the officer, standing at Castile’s driver-side window, repeatedly instructed Castile not to reach for it.³² Despite Castile and his fiancée assuring the officer he was not reaching for the gun, the officer pulled out his gun and fired it seven times, striking Castile five times.³³ Twelve seconds elapsed from the time Castile informed the officer he had a gun to the shooting.³⁴ Castile’s family

25. Tessa Duvall, *Louisville Police Release the Breonna Taylor Incident Report. It’s Virtually Blank*, LOUISVILLE COURIER J. (Jan. 22, 2021, 8:30 PM), <https://www.courier-journal.com/story/news/crime/2020/06/10/breonna-taylor-shooting-louisville-police-release-incident-report/5332915002/>.

26. Linda Poon & Marie Patino, *CityLab University: A Timeline of U.S. Police Protests*, BLOOMBERG CITYLAB (Aug. 28, 2020, 2:57 PM), <https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality>.

27. David Li, *2 Louisville Police Officers Fired over Roles in Fatal Shooting of Breonna Taylor*, NBC NEWS (Jan. 6, 2021, 9:38 AM), <https://www.nbcnews.com/news/us-news/2-louisville-police-officers-fired-over-roles-fatal-shooting-breonna-n1252751>.

28. Rukmini Callimachi, *Breonna Taylor’s Family to Receive \$12 Million Settlement From City of Louisville*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html>.

29. See generally Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1758–71 (2020) (discussing the need for databases on problematic officers who “wander” from department to department).

30. Callimachi, *supra* note 28.

31. Alex Johnson, *Minnesota Officers in Fatal Shooting of Philando Castile Identified*, NBC NEWS (July 7, 2016, 9:44 PM), <https://www.nbcnews.com/news/us-news/minnesota-officers-fatal-shooting-philando-castile-identified-n605701>.

32. Matt DeLong & Dave Braunger, *Breaking Down the Dashcam: The Philando Castile Shooting Timeline*, STARTRIB. (June 21, 2017, 10:48 AM), <http://www.startribune.com/castile-shooting-timeline/429678313/> [<https://perma.cc/8G2D-2JZ4>].

33. *Id.*

34. *Id.*

settled a wrongful death suit with the City of St. Anthony for \$3 million for his wrongful death.³⁵

In addition to the killings of Castile, Taylor, and Floyd, police in Minnesota faced intense scrutiny for the fatal shooting of Justine Damond in 2017.³⁶ Unlike Castile, Taylor, and Floyd, Damond was a white woman.³⁷ She called the police to report a possible assault after hearing cries in her neighborhood, and two Minneapolis police officers responded to the call.³⁸ Finding no signs of an assault, the two officers cleared the area and prepared to leave.³⁹ Then, both officers heard a loud noise, and Damond appeared at their driver's side window.⁴⁰ While both officers reached for their guns, the officer in the passenger seat aimed across his partner's chest and shot Damond in the chest through the open window.⁴¹ She died twenty minutes later.⁴² Damond's family settled a wrongful death suit with the city for \$20 million.⁴³ Like the \$27 million settlement in the Floyd case, this settlement amount is an outlier because it does not reflect the generally low compensation victims and their families receive.⁴⁴

While more prominently covered by media for their egregiousness, these police killings are not unique. According to the *Washington Post's* Fatal Force database, police in the United States have fatally shot about 1,000 victims each year for the past five years.⁴⁵ Since 2000, the independent database Fatal Encounters has traced over 28,000 people killed from interactions with police.⁴⁶ Police violence and its video recordings on smartphones has spurred national movements, including Black Lives

35. Mitch Smith, *Philando Castile Family Reaches \$3 Million Settlement*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html> [<https://perma.cc/MNG3-CQHT>].

36. Mitch Smith, *A 911 Call, an Unarmed Woman and a Single Shot: The Mystery of a Police Shooting*, N.Y. TIMES (Apr. 13, 2019), <https://www.nytimes.com/2019/04/13/us/mohamed-noor-trial-minneapolis.html> [<https://perma.cc/T5WQ-MFL2>].

37. *Id.*

38. *Id.*

39. *Id.*

40. Tasneem Nashrulla, *A Former Minnesota Cop Dramatically Testified About the Moment He Shot and Killed an Unarmed Australian Woman*, BUZZFEED NEWS (Apr. 29, 2019, 1:47 PM), <https://www.buzzfeednews.com/article/tasneemnashrulla/mohamed-noor-testimony-murder-trial-minnesota-australia> [<https://perma.cc/9YYK-H3WE>].

41. *See id.*

42. Michelle Broder Van Dyke, *A Yoga Teacher Was Shot And Killed By Police After The Squad Car Was "Slapped" By A Woman*, BUZZFEED NEWS (July 25, 2017, 8:37 PM), <https://www.buzzfeednews.com/article/mbvd/a-woman-slapped-the-police-squad-car-moments-before-yoga>.

43. Andy Mannix, *Minneapolis Agrees to Pay \$20 Million in Death of Justine Ruszczyk Damond*, STAR TRIB. (May 4, 2019, 2:35 PM), <http://www.startribune.com/minneapolis-agrees-to-pay-20-million-in-fatal-police-shooting-of-justine-ruszczyk-damond/509438812/> [<https://perma.cc/VG5M-RT4X>].

44. *See infra* Part III.

45. *See* Julie Tate, Jennifer Jenkins, & Steven Rich, *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last updated Oct. 19, 2021) [hereinafter WASH. POST Database]. For an archived link of the 2019 data, see <https://perma.cc/273D-VYXH>.

46. *See* D. Brian Burghart, *Fatal Encounters*, FATAL ENCOUNTERS (Sept. 18, 2020), <https://fatalencounters.org/>.

Matter, and has resulted in calls from prominent politicians for institutional change to policing and the introduction of bills into both the House and Senate targeting police reform.⁴⁷

This Article begins by reviewing available data on fatal policing. Despite the prevalence of fatal policing and the public's attention on fatal policing, there is no reliable U.S. governmental data source that tracks fatal policing. This Article reviews this governmental shortcoming before considering independent data sources. These independent sources confirm that Black people are victims of fatal policing at disproportionately high rates. This Article argues that (1) a complete census of fatal policing incidents is necessary and (2) the complex circumstances surrounding fatal policing requires that a complete census provides key facts that courts have stressed in determining the reasonableness of fatal policing.

Next, this Article uses location data from these independent sources to examine geographical patterns of fatal policing. States in the West and the South have particularly high counts and rates of fatal policing even when controlling for factors such as demographics, state political views, homicide rates, and number of law enforcement officers killed in action. States with larger white populations also have greater rates of fatal policing for Black victims. This Article argues that because western and southern states have relatively high rates of fatal policing, reforms must take place at local and state levels, not simply at the federal level.

After reviewing the data on fatal policing, this Article next considers how to reform damages awards in § 1983 claims arising from fatal policing. Many methods of reforming police conduct, culture, and institutions exist beyond the influence of courts. The diversity of available policy instruments exists because policing is shaped by federal, state, and local laws, in addition to “institutional structures, occupational norms, market pressures, political influences, and nonconstitutional laws.”⁴⁸ Nonjudicial policing reforms that are being discussed in the wake of Floyd's murder include changing police union contracts,⁴⁹ defunding the police,⁵⁰

47. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2d Sess. 2020); JUSTICE Act, S. 3985, 116th Cong. (2d Sess. 2020).

48. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 774 (2012) [hereinafter *Problem of Policing*].

49. See Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1199 (2017) (arguing for increased community involvement in police union contracts); Sukyi McMahon & Chas Moore, *To Reform the Police, Target Their Union Contract*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/opinion/austin-police-union-contract.html#click=https://t.co/JMqGgCZWxA> (discussing changes to the Austin Police Department's union contract with the city).

50. See Annie Lowrey, *Defund the Police*, THE ATLANTIC (June 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/> (comparing American spending on policing and safety nets, along with crime statistics, to other countries); Alex S. Vitale, *The Only Solution is to Defund the Police*, THE NATION (May 31, 2020), <https://www.thenation.com/article/activism/defund-police-protest/> (criticizing tweeks to policing and advocating for the elimination of federal police funding programs).

demilitarizing the police,⁵¹ requiring police departments to bear greater financial responsibility for litigation,⁵² mandating additional use-of-force training,⁵³ mandating additional anti-racism training,⁵⁴ and requiring policing videos from body-wearable cameras and from individuals.⁵⁵

While the court's role in shaping police conduct is constrained by legislative, political and cultural factors, courts still have significant power to influence police behavior.⁵⁶ Despite the constructive role that courts could have played over the past several decades, courts have instead muddied and raised the standards for which police officers are held liable for their actions.⁵⁷ In *Scott v. Harris*,⁵⁸ the Supreme Court required courts to “slosh . . . through the factbound morass of ‘reasonableness[,]’”⁵⁹ which gives courts wide discretion to analyze the reasonableness of a police officer's use of force. *Scott*, however, failed to define the specific factors to be considered in determining reasonableness.⁶⁰ In *Harlow v. Fitzgerald*,⁶¹ the Supreme Court granted public officials qualified immunity unless they violated a “clearly established” right.⁶² This decision set a precedent that requires plaintiffs to identify a case with nearly identical circumstances in which the court recognized a clearly established right. Without a factually similar case, courts have increasingly concluded that the plaintiff's rights were not clearly established, and thus the police officer was shielded from liability.⁶³

51. Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 106, 109 (2018); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612–14 (2016); Radley Balko, *Rise of the Warrior Cop*, WALL ST. J. (Aug. 7, 2013, 4:44 PM), <https://www.wsj.com/articles/rise-of-the-warrior-cop-1375908008> [<https://perma.cc/2HLH-8YCD>].

52. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 958 (2014) [hereinafter *Police Indemnification*]; Rachel M. Cohen, *Why Don't Settlements Over Police Brutality Come Out of Police Budgets?*, THE AM. PROSPECT (July 15, 2015), <https://prospect.org/civil-rights/settlements-brutality-come-police-budgets/> [<https://perma.cc/HB32-HR7L>].

53. Cynthia Lee, *Race, Policing and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 L. & CONTEMP. PROBS. 145, 150–51 (2016).

54. Al Baker, *Confronting Implicit Bias in the New York Police Department*, N.Y. TIMES (July 15, 2018), <https://www.nytimes.com/2018/07/15/nyregion/bias-training-police.html> [<https://perma.cc/3KKW-5YV2>].

55. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 396 (2016) (discussing the need for individuals to record policing); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 832–33 (2015) (discussing the chorus of voices from government officials, media, citizens, police unions, and the ACLU calling for body cameras).

56. See *Problem of Policing*, *supra* note 48, at 795 (reviewing areas of law outside of constitutional law that shape police conduct).

57. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1130–32 (2008) [hereinafter *Police Violence*] (reviewing the *Scott* and *Graham* decisions).

58. 550 U.S. 372 (2007).

59. *Id.* at 383.

60. See *Police Violence*, *supra* note 57, at 1131 (critiquing the *Graham* factors).

61. 457 U.S. 800 (1982).

62. *Id.* at 818.

63. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta, & Guillermo Gomez, *For Cops who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (investigating the accelerating trend of courts granting qualified immunity due to a lack of clearly established law, without deciding whether the force was excessive).

Despite these missteps, courts still have a chance to influence police conduct by creating financial penalties that will cause municipalities to appropriately bear the risks that its employees create. This Article proposes that courts increase damages awards, which in turn will raise settlement expectations, to at least \$11 million when punitive damages are warranted to align with how governmental regulation currently values lives.⁶⁴ Bolstering awards in this manner is consistent with other public policy and will further both goals of § 1983, including the reduction of fatal policing.⁶⁵ To ensure this proposal maximizes its deterrent effect on fatal policing, it should be coupled with other meaningful reforms. This Article discusses these other reforms and situates the damages reform proposal within the growing list of constructive reforms to policing, data, and damages awards.

Rare and low damages awards following fatal policing demonstrate that local governments do not appropriately bear the risks of its police officers. To address this problem, courts should both allow more claims of excessive force to be heard and more accurately award damages for the loss of a life when damages are warranted. Governmental risk assessments in regulatory impact analyses value the loss of a statistical life from \$9 million to \$11 million.⁶⁶ In contrast, damages awards for fatal policing, both in jury verdicts and settlements, are well below that—usually less than \$1 million.⁶⁷ In fact, because of qualified immunity, few victims of fatal policing are able to secure compensation at all.⁶⁸ To force governments to more appropriately bear the risk of the violence of their employees, this Article proposes that courts establish damages awards following fatal police shootings consistent with the value of a statistical life (VSL), widely used in governmental regulations to monetize mortality risk reductions. Courts can do so by awarding punitive damages beyond a compensatory damages award such that the total damages award establishes a more appropriate level of deterrence. These increased damages awards would hold governments more fully liable for the appropriate level of risk that their police officers create. The proposed reform of damages awards is coupled with a need to reform qualified immunity.⁶⁹ Although there

64. See W. Kip Viscusi, *Risk Guideposts for a Safer Society: Introduction and Overview*, 58 J. RISK & UNCERTAINTY 101, 108 (2019) (discussing the wide range of government agencies that apply the concept of the value of a statistical life whenever fatality risks are present).

65. See *infra* Parts II and III for further discussion.

66. See Viscusi, *supra* note 64, at 101 (providing examples of governmental agencies and their regulations that use the VSL, as well as the specific value that agencies used in 2017).

67. See *infra* Part III (reviewing damages amounts following fatal policing); W. Kip Viscusi & Scott Jeffrey, *Damages to Deter Police Shootings*, 2021 U. ILL. L. REV. 741, 775 (2021).

68. Chung et al., *supra* note 63.

69. See Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) [hereinafter *Case Against Q.I.*] (calling for the end of qualified immunity); The Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html> (calling for qualified immunity to be ratcheted back). Several sitting members of the Supreme Court have also expressed a desire to change qualified immunity. Justice Thomas stated in 2017 that the Supreme

have been frequent calls for qualified immunity reform, unless such reform is coupled with substantial bolstering of the damages amounts, it will fail to provide the level of incentives needed to deter fatal policing. Similarly, eliminating qualified immunity to enable victims' families to obtain compensation is essential for reform of damages awards to be fully effective.

While these two proposals will deter fatal policing by increasing access to damages awards and amounts of damages awards, this Article's final argument is for cities to tie police misconduct litigation costs more closely to police budgets. Currently, too many police departments are indemnified for costs their officers create.⁷⁰ For financial incentives to impart deterrent effects on police departments and police officers, those entities must feel financial pressure. The last Part reviews literature highlighting the absence of financial pressure on police department budgets and individual officers and calls for methods of tying police misconduct litigation costs to police budgets.

This Article's collection of damages-related proposals provide mechanisms for courts to serve a pivotal role in deterring fatal policing by better incentivizing cities to adopt the most effective policing reforms. Many effective policing reforms exist and are needed to curb fatal policing but have yet to be fully implemented due, in part, to the lack of monetary incentives to implement them. While sensible reforms should continue to be independently advocated for at all levels of government, this Article focuses on damages—primarily through reforms at the judicial level—to directly disincentivize fatal policing and thus incentivize effective police reform. By forcing cities and police departments to pay for their fatal policing, these entities will begin adopting effective reforms to deter fatal policing, and more victims of police violence will find justice at more appropriate levels of compensation.

Court "should reconsider our qualified immunity jurisprudence." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and in the judgment). Justice Sotomayor has repeatedly expressed concern that qualified immunity allows "a 'shoot first, think later' approach to policing." *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting); see also *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[The Court's decision] sends an alarming signal to law enforcement officers . . . that they can shoot first and think later . . ."). Beyond the agreement between Justices on opposite sides of the political spectrum, think tanks and advocacy groups on opposite sides of the political spectrum support the end of qualified immunity as well. See Clark Neily, *To Make Police Accountable, End Qualified Immunity*, CATO INST. (May 31, 2020), <https://www.cato.org/publications/commentary/make-police-accountable-end-qualified-immunity> (calling for the end of qualified immunity); *ACLU Statement on Supreme Court Qualified Immunity Denial*, ACLU (June 15, 2020), <https://www.aclu.org/press-releases/aclu-statement-supreme-court-qualified-immunity-denial> (calling for Congress to "abolish qualified immunity"); *Law Professors Letter Calling on Congress to Hold Police Accountable*, SCRIBD (July 2, 2020), <https://www.scribd.com/document/467739324/Law-Professors-Letter-Calling-on-Congress-to-Hold-Police-Accountable> (letter to Congress containing the signatures of over three hundred law professors calling for the end of qualified immunity). Finally, a recent poll found 63% of Americans favored ending qualified immunity. Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), <https://www.cato.org/publications/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police>.

70. Joanna C. Schwartz, *How Governments Pay*, 63 UCLA L. REV. 1144, 1174 (2016) [hereinafter *How Governments Pay*].

II. THE DATA OF FATAL POLICING

If the incidents involving Floyd, Taylor, Damond, Garner, and Castile were rare, random outliers in an otherwise well-functioning system, then the appropriate remedy might be limited to punishing the particular officers who failed to adhere to the usual standards of conduct. But the problem is more widespread than those incidents. The appropriate policy remedy must delve deeper into the underlying administrative and operational functioning of police forces. Determining the appropriate policy response requires an understanding of the magnitude of the problem, the locales that are affected, and whether the problem is intensifying or abating. Appropriately assessing the fatal policing problem requires using more comprehensive data that goes beyond consideration of the prominently publicized incidents of police violence. Accurate, relevant data can enable researchers and government officials to better identify the scale, severity, and sources of this nationwide problem.⁷¹ When reforms are put in place, continued gathering of policing data can help assess whether the killings have declined, making it feasible to determine the efficacy of the reforms.

A. Governmental Data Sources on Fatal Policing

Notwithstanding the fundamental importance of obtaining reliable documentation of the number of killings by police officers and the underlying facts of the killings, the United States government does not have a comprehensive official database of police killings.⁷² The existing government systems for monitoring fatal policing address only a subset of the killings, and some measures are not nationally comprehensive.⁷³ There are three government databases for measuring police killings: the National Vital Statistics System (NVSS), the Supplementary Homicide Reports (SHRs), and the National Violent Death Reporting System (NVDRS).⁷⁴ These governmental efforts to track police killings are deficient for multiple reasons. The Centers for Disease Control (CDC) tracks deaths by “legal intervention”⁷⁵ in its NVSS database. While the NVSS database dates back to 1933, it undercounts fatal policing due to misclassification when coroners fail to include police involvement in the death.⁷⁶ The Federal

71. See Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1128 (2014) [hereinafter *Data on Policing*] (“Without the necessary research and data, such analysis is guesswork.”).

72. Chung et al., *supra* note 63.

73. See Catherine Barber, Deborah Azrael, Amy Cohen, Matthew Miller, Deonza Thymes, David Enze Wang, & David Hemingway, *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics, and Supplementary Homicide Reports*, 106 AM. J. PUB. HEALTH 922, 922 (2016).

74. *Id.*

75. Legal intervention deaths are defined as “deaths caused by law enforcement and other persons with legal authority to use deadly force, but excluding legal executions.” Bridget H. Lyons, Katherine A. Fowler, Shane P.D. Jack, Carter J. Betz, & Janet M. Blair, *Surveillance for Violent Deaths—National Violent Death Reporting System, 17 States, 2013*, 65 MMWR SURVEILLANCE SUMMARIES 1, 2 (2016).

76. Colin Loftin, David McDowall, & Min Xie, *Underreporting of Homicides by Police in the United States, 1976–2013*, 21 HOMICIDE STUD. 159, 167–70 (2017).

Bureau of Investigation (FBI) has tracked “justifiable homicides”⁷⁷ in its SHRs since 1960. However, justifiable homicides do not track unwarranted police killings and are added into the database voluntarily, leaving the reported totals to police officers’ discretion.⁷⁸ The SHRs and the NVSS have been found to undercount police killings; one study found they only captured roughly half of all police killings over an eight-year period.⁷⁹ The CDC also administers the NVDRS. In 2003, the NVDRS began measuring legal interventions by state-level abstractors who collect information on violent deaths from death certificates, coroner reports, and police reports.⁸⁰ While the NVDRS has recently been expanded to all fifty states and early reports find it counts far more police deaths than the NVSS or the SHRs, not all states are reporting data yet.⁸¹

The lack of government data on fatal policing is a systemic problem based, in part, on unaligned incentives. Police officers, police chiefs, and public officials all have incentives to hide data that is unfavorable to law enforcement.⁸² While individual officers are often required to produce data in the form of police reports,⁸³ they need not record data beyond the bare minimum and often lie in official reports⁸⁴ or leave them blank.⁸⁵ Decisionmakers such as police chiefs and public officials often inhibit data collection by requiring secrecy in settlements, preventing the collection of search data, and refusing to release captured video.⁸⁶

Congress tasks federal agencies with collecting and recording policing data, but these agencies are influenced by law enforcement interests and as a result, fail to enforce thorough data reporting.⁸⁷ For example, the FBI releases the Uniform Crime Reporting (UCR) program, which includes the SHRs.⁸⁸ However, the UCR program collects data through a voluntary reporting system called the National Incident-Based Reporting System (NIBRS) that not all states or police departments have

77. Justifiable homicides are defined as “[t]he killing of a felon by a peace officer in the line of duty.” Colin Loftin, Brian Wiersema, David McDowall, & Adam Dobrin, *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976–1998*, 93 AM. J. PUB. HEALTH 1117, 1118 (2003).

78. *Id.*

79. See Barber et al., *supra* note 73, at 922.

80. *Id.* at 923.

81. *NVDRS State Profiles*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/datasources/nvdrs/stateprofiles.html> (last visited Oct. 20, 2021).

82. *Data on Policing*, *supra* note 71, at 1130.

83. *Id.* at 1129.

84. See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996) (describing testilying as officers lying in course of testifying).

85. Audrey McNamara, *Louisville Police Release Breonna Taylor Incident Report – it Lists her Injuries as “none,”* CBS NEWS (June 11, 2020, 1:12 PM), <https://www.cbsnews.com/news/louisville-police-breonna-taylor-death-incident-report/> (reporting that Louisville police wrote a “nearly-blank incident report” including that there were no injuries to Breonna Taylor and there was no forced entry in their fatal no-knock search of Taylor’s apartment).

86. *Data on Policing*, *supra* note 71, at 1129–30.

87. *Id.* at 1134.

88. Wendy Regoeczi & Duren Banks, *The Nation’s Two Measures of Homicide*, DEP’T OF JUST. (July 2014).

implemented.⁸⁹ Also, the FBI has made few efforts to ensure the accuracy of UCR program data, leading to criticisms about the value of the data.⁹⁰

B. Independent Data Sources on Fatal Policing

The best estimates of police killings in the United States come from independent sources. The *Washington Post* has tracked fatal police shootings since 2015, sourcing around 1,000 fatal shootings by on-duty police officers each year by aggregating local news reports and police reports.⁹¹ Notably, this database is not a measure of all fatal policing as it only contains deaths by police shootings.⁹² Consequently, the deaths of Floyd and Garner are not included in this database.⁹³ The database categorizes the shootings based on the race and sex of the victim and the circumstances of the event—in particular, whether the victim was armed or fleeing. Victims' threat situations are divided into five categories: (1) the victim is unarmed and fleeing, (2) the victim is unarmed and not fleeing, (3) the victim is armed and not fleeing, (4) the victim is armed and fleeing, and (5) the victim's armed and fleeing status is unknown.⁹⁴ A victim is only labeled as unarmed if their death report explicitly mentioned that they were unarmed.⁹⁵ Furthermore, "armed" in categories (3) and (4) does not necessarily imply that the victim had a loaded firearm.⁹⁶ While 59% of "armed" victims are reported to have guns, the definition of "armed" extends to the following types of arms: toy weapons, flashlights, wasp sprays, pens, staplers, claims to be armed, unknown weapons, and undetermined armed statuses.⁹⁷ Clearly not all of these victims were armed with weapons that posed a lethal threat to the police.

Table 1 below shows that in the five years from 2015 to 2019, there have been at least 4,938 fatal shootings by police.⁹⁸ The two largest categories of fatal police shootings are likely to be the least blameworthy situations for the police. During this period, 59% of the police shootings involved victims who were armed and not fleeing, while 26% of the shootings killed victims who were armed and fleeing.⁹⁹ The use of fatal force is not always reasonable in these situations but, based on the Supreme Court's jurisprudence, these situations are more likely to involve the use

89. *Data on Policing*, *supra* note 71, at 1135.

90. *Id.*; Mark Greenblatt, Mark Fahey, Bernice Yeung, & Emily Harris, *FBI Moves to Fix Critical Flaw in Its Crime Reporting System*, PROPUBLICA (Dec. 6, 2018, 7:00 PM), <https://www.propublica.org/article/fbi-moves-to-fix-critical-flaw-in-its-crime-reporting-system> (describing the major reporting flaw in the NIBRS).

91. WASH. POST Database, *supra* note 45.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.*; Viscusi & Jeffrey, *supra* note 67, at 774–90 (reporting similar results through 2018).

99. WASH. POST Database, *supra* note 45.

of reasonable force than if the victim is unarmed.¹⁰⁰ In these five years, 130 victims were reported as unarmed and fleeing.¹⁰¹ Each of these killings is not only a tragedy, but also a legal failure given the Court's bright-line rule against fatal force in these instances.¹⁰² Despite this rule, the expanding doctrine of qualified immunity may protect police, in certain instances, who shoot and kill unarmed fleeing victims. For the shootings in which the race of the victim is known, deaths are about evenly divided between white victims, Black victims, Hispanic victims, and victims of other races and ethnicities.¹⁰³ Black victims comprise 24% of the overall fatalities, despite only constituting 13.4% of the general population of the United States.¹⁰⁴ Black victims account for 42% of shootings in which the victims were both unarmed and fleeing.¹⁰⁵ In this category, Black victims outnumber white victims despite the large differentials in their population shares.

100. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“[P]roper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”).

101. WASH. POST Database, *supra* note 45.

102. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (“A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.”).

103. WASH. POST Database, *supra* note 45.

104. See *id.*; *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Oct. 20, 2021) [<https://perma.cc/6ZBL-Z89P>].

105. WASH. POST Database, *supra* note 45.

TABLE 1. *Fatal Police Shootings from 2015 Through 2019 by Race/Ethnicity*¹⁰⁶

	Total	White	Black	Hispanic	Other	Missing Race
Total Fatal Police Shootings						
Count	4,938	2,242	1,179	834	203	480
Percent	100	45	24	17	4	10
Victim Unarmed and Fleeing						
Count	130	46	54	25	4	1
Percent	100	35	42	19	3	1
Victim Unarmed and Not Fleeing						
Count	166	79	47	28	9	3
Percent	100	48	28	17	5	2
Victim Armed and Fleeing						
Count	1,275	513	356	235	48	123
Percent	100	40	28	18	4	10
Victim Armed and Not Fleeing						
Count	2,921	1,418	608	458	123	314
Percent	100	49	21	16	4	11
Victim's Armed or Fleeing Status Not Reported						
Count	446	186	114	88	19	39
Percent	100	42	26	20	4	9

Another independent source of police killings is Fatal Encounters. Fatal Encounters is a crowdsourced database supervised by paid researchers and records victims' deaths from police interactions since 2000, including deaths other than from shootings.¹⁰⁷ Since 2013, Fatal Encounters has reported between 1,600 and 1,850 deaths each year from police interactions.¹⁰⁸ Fatal Encounters data from 2000 to 2013 showed a steady rise in annual deaths from police interactions from 850 deaths to 1500 deaths.¹⁰⁹ This rise may reflect the increased scrutiny on police killings given the prevalence of smartphones and body cameras, rather than an actual increase in fatal policing. Nevertheless, understanding trends in police killings is relevant to understanding the scope of fatal policing. The difficulty of ascertaining the extent to which the increase in annual deaths is due to an actual increase in the number of killings, as opposed to more vigorous reporting of deaths, highlights the importance of having a reliable, national census of fatal policing.

106. *Id.* Data comes from the *Washington Post's* Fatal Force database and covers the years 2015 to 2019. *Id.* The *Post* collected this data from local news reporting, police reports, social media, and other independent police shooting databases. *Id.* If the race or ethnicity of the victim is not reported or identified in any of the *Post's* reporting, they are marked as "missing race." *Id.* There are 240 victims for whom armed status is missing, 214 who are missing fleeing status, and 8 who have both missing. *Id.* A victim is recorded as "fleeing" by the *Post* if they fled on foot, in a vehicle, or otherwise. *Id.* A victim is recorded as "unarmed" by the *Post* only if they were explicitly reported as unarmed. *Id.* For details and examples of how victims were "armed," see the accompanying text.

107. This is a slightly different definition than most other sources because Fatal Encounters includes deaths in the police's presence, such as car crashes due to a police chase or suicides while being pursued by police, as well as death by off-duty police officers. See Burghart, *supra* note 46 (click download database, and search by cause of death for suicides, accidents, etc.).

108. *Id.* (click "data visualizations" to see a graph of fatal police interactions over time).

109. *Id.*

Fatal Encounters documents several features of the deaths including the location, demographics of the victim, cause of death, signs of mental illness, and circumstances of the killing. Fatal Encounters attempts to track every fatality during an interaction with police officers, and many of these deaths, such as hostage deaths during a standoff, deaths during a high-speed chase, and deaths from suicide, are not considered a “use of force” by a police officer.¹¹⁰ We restricted the Fatal Encounters dataset to only deaths that appear proximately caused by police officers in a similar method to previous research using this dataset.¹¹¹ Deaths under this analysis include non-suicide, non-accident deaths with the following codes in Fatal Encounters: gunshot (93% of remaining sample), asphyxiated/restrained (1.2%), beaten/bludgeoned with instrument (0.6%), chemical agent/pepper spray (0.1%), medical emergency (1.4%), stabbed (0.1%), and tasered (3.8%).¹¹²

A key feature of the *Washington Post* fatal shootings database and the Fatal Encounters database is documentation of critical facts of the deaths. Considering that the Supreme Court has established a bright-line rule against using fatal force on a fleeing, unarmed suspect,¹¹³ documentation of these two factors is critical to determine the reasonableness of the use of force and the officer’s liability. Was the suspect fleeing and, if so, on foot or in a vehicle? And was the suspect armed and, if so, how? Further facts are needed to address separate issues of police violence against minorities and the inability for police to properly respond to those having mental health episodes. Both independent databases discussed in this Article list the victim’s race and whether there were signs of mental illness. Continued independent tracking of police interactions with citizens, especially after a fatality, is necessary to understand the scope of the problems of fatal policing. Furthermore, police officers often misrepresent, downplay, or lie in police reports and sworn statements, so much so that police officers lying in sworn statements has been referred to as “testilying” for decades.¹¹⁴ Having a database of police misconduct independent of police

110. *Id.*

111. See Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116(34) PROC. OF THE NAT’L ACAD. OF SCIENCES. 16793, 16795–98 (2019).

112. Deaths we do not use in our primary analysis include suicides, and non-suicide deaths that are coded into Fatal Encounters as: Burned/Smoke inhalation, Drowned, Drug Overdose, Fell from a Height, Other, Undetermined, and Vehicle. Vehicle deaths represent 94% of these non-suicide deaths. We consider all types of deaths in robustness checks, and the main results are mostly similar. See Burghart, *supra* note 46.

113. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

114. See Slobogin, *supra* note 84, at 1041 (1996) (describing the phenomenon); Joseph Goldstein, ‘Testilying’ by Police: A Stubborn Problem, N.Y. TIMES (March 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html> (highlighting problematic cases of testilying).

officer accounts is a necessary first step to identify “wandering” officers, who often create problems.¹¹⁵

This Article supports the establishment of a national, comprehensive, public database by a governmental agency that, at the very least, identifies fatalities at the hands of law enforcement.¹¹⁶ Leaving basic data collection on a critical national issue to underfunded and unaccountable independent sources is a failure, and one that government agencies can correct. To be comprehensive, the data must be a complete census of deaths from fatal policing, rather than a sample of such deaths. The database should incorporate the level of detail in the *Washington Post*’s database and the Fatal Encounters database and have the same statistical integrity as the Bureau of Labor Statistics’ (BLS) Census of Fatal Occupational Injuries (CFOI), which the government uses to monitor occupational fatalities.¹¹⁷

The CFOI is a cooperative communication program between the state and federal governments that provides a comprehensive accounting of all fatalities at work.¹¹⁸ All fifty states plus U.S. territories participate in the CFOI usually by reporting labor statistics to the BLS.¹¹⁹ For each fatality in the CFOI the circumstances of the event, the characteristics of the worker, the scene, and the equipment involved are obtained by cross-referencing documents.¹²⁰ The circumstances of each fatality include the nature of the injury, illness, or death; the part of the body affected; and details on the event or exposure that led to the death, including primary and secondary sources.¹²¹ For each case, source records, death certificates, workers’ compensation files, and administrative agency reports are all analyzed.¹²² Finally, cases in the CFOI are verified as work-related via two or more independent source documents or one independent source document plus a follow-up questionnaire.¹²³

A census of fatal policing incidents is equally feasible and, given the national attention on the issue of fatal policing and the inadequacies of other governmental datasets on fatal policing, arguably more necessary than the CFOI. Similar to the CFOI, this database must be a census and not a sample. The fatal policing census must include demographic

115. See Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L. J. 1676, 1682, 1759 (2020) (defining “wandering officers” as those who are fired or resign under threat of firing and are later employed as police officers elsewhere and discussing the need for national databases of police behavior).

116. See *id.* at 1759; *Data on Policing*, *supra* note 71, at 1127–29.

117. *Census of Fatal Occupational Injuries (CFOI)*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/iif/oshfat1.htm> (last modified Aug. 17, 2012).

118. *Id.*

119. *State Occupational Injuries, Illnesses, and Fatalities*, U.S. BUREAU OF LAB. STATS. (last modified Oct. 4, 2021), <https://www.bls.gov/iif/oshstate.htm>.

120. See *Census of Fatal Occupational Injuries (CFOI) – Current*, U.S. BUREAU OF LAB. STATS. (last modified Dec. 22, 2020), <https://www.bls.gov/iif/oshcfoi1.htm>.

121. *Census of Fatal Occupational Injuries: Concepts*, U.S. BUREAU OF LAB. STATS. (last modified Dec. 08, 2020), <https://www.bls.gov/opub/hom/cfoi/concepts.htm>.

122. *Census of Fatal Occupational Injuries (CFOI)*, *supra* note 120.

123. *Id.*

characteristics of the decedents and officers as well as the circumstances that led to the death and must be gathered in a manner similar to the CFOI. Critically, the data must come from state-level data collectors and should be independent of police departments. Such a fatal policing census cannot simply rely on police reports, officer statements, death certificates, and media accounts. The police reports following the murders of Floyd and Taylor were vague and incorrect and demonstrated that police officers cannot be trusted to self-report information that might reveal their misconduct. The CFOI is accurate, and that attribute comes from its independence from the employers and agencies it reports on.¹²⁴ Like the CFOI, when possible, the database should use multiple sources to verify the information.¹²⁵ Such a fatal policing database is necessary for researchers, lawmakers, and police departments to understand the extent of the problem before beginning crucial reforms.

C. *Where Does Fatal Policing Occur?*

While fatal police shootings are a nationwide problem, analysis of available data indicates that the distribution of the deaths is not uniform throughout the country. Very few of the thousands of fatal police incidents in Table 1 have received national media coverage or have led to Black Lives Matter demonstrations.¹²⁶ Moreover, the geographical incidents of fatal policing do not coincide with the regions that have had the most prominent protests. Careful analysis of the *Washington Post*'s Fatal Force data suggest that some states and regions have significantly more counts and rates of fatal police shootings than others. Table 2 below displays fatal police shootings rates and counts in the four regions defined by the U.S. Census Bureau—West, South, Midwest, and Northeast—from 2015 to 2019.¹²⁷ The fatal police shooting rates are weighted by each state's 2019 population, such that the rates of smaller states do not equally balance out the rates of larger states.¹²⁸ This technique ensures the average fatal police shooting is representative of the region.

The South had the most fatal police shootings during this time period, in part, because it had the largest population of the four census regions. The West, however, had a higher average rate of fatal police shootings. Over that five-year period, the thirteen western states averaged a rate of

124. See BUREAU OF LAB. STAT., HANDBOOK OF METHODS 16, 20 (2020), <https://www.bls.gov/opub/hom/cfoi/pdf/cfoi.pdf> (describing the collection procedure, and data validation techniques for ensuring accuracy); *Work-Related Injury Trends*, NAT'L SAFETY COUNCIL, <https://injuryfacts.nsc.org/work/work-overview/work-related-fatality-trends/> (last visited Oct. 3, 2021) (stating the CFOI is the authoritative count of work-related deaths).

125. HANDBOOK OF METHODS, *supra* note 124, at 16.

126. See, e.g., Alysia Santo & R.G. Dunlop, *Where Police Killings Often Meet With Silence: Rural America*, N.Y. TIMES (Sept. 25, 2021), <https://www.nytimes.com/2021/08/13/us/police-shootings-rural.html>.

127. See *infra* Table 2.

128. *Id.*

4.51 fatal police shootings per one million people.¹²⁹ In total, this fatality rate represents 1,734 fatal police shootings in western states over these five years.¹³⁰ As Table 2 below shows, fatal policing in the West and South compares unfavorably with that of the Northeast, which averaged a rate of 1.23 fatal police shootings per one million residents over the same years, or less than one-third the rate in the West and under half the rate in the South.¹³¹

TABLE 2. *Fatal Police Shootings (FPS) by Region from 2015 Through 2019*¹³²

Census Region (No. of States)	Avg. FPS Rate (per million, per year)	5-year FPS Count	Total 2019 Pop. (in millions)
West (13)	4.51	1,738	77
South (16)	3.33	2,057	123
Midwest (12)	2.34	797	68
Northeast (9)	1.23	346	56
National (50)	3.04	4,938	324

To characterize fatal policing on a finer geographical level, Table 3 below lists the top ten states by the total count of fatal police shootings as compiled using the *Washington Post*'s Fatal Force database.¹³³ Unsurprisingly, many of the states that appear on this list have the largest

129. See WASH. POST Database, *supra* note 45 (choose year then hover over state to view total shootings for that year); *QuickFacts: Alaska; Arizona; California; Colorado; Hawaii*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/AK,AZ,CA,CO,HI/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Idaho, Montana, Nevada, New Mexico, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ID,MT,NV,NM,OR/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Utah; Washington; Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/UT,WA,WY/PST045219> (last visited Oct. 21, 2021).

130. See WASH. POST Database, *supra* note 45.

131. See WASH. POST Database, *supra* note 45; *Quick Facts: Connecticut; Maine; Massachusetts; New Hampshire; New Jersey*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CT,ME,MA,NH,NJ/PST045219> (last visited Oct. 21, 2021); *Quick Facts: New York; Pennsylvania; Rhode Island; Vermont*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NY,PA,RI,VT/PST045219> (last visited Oct. 21, 2021).

132. The data used in this table was pulled on May 11, 2020. The Washington Post and U.S. Census Bureau frequently update the numbers. For a recent look at these numbers, see sources cited *supra* notes 131 & 133; see also *QuickFacts: Alabama; Arkansas; Delaware; District of Columbia; Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/AL,AR,DE,DC,FL/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Georgia; Illinois; Indiana; Iowa; Kansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/GA,IL,IN,IA,KS/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Kentucky; Louisiana; Maryland; Michigan; Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/KY,LA,MD,MI,MN/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Mississippi; Missouri; Nebraska; North Carolina; North Dakota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MS,MO,NE,NC,ND/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Ohio; Oklahoma; South Carolina; South Dakota; Tennessee*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/OH,OK,SC,SD,TN/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Texas; West Virginia; Wisconsin; Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/TX,WV,WI,VA/PST045219> (last visited Oct. 21, 2021).

133. WASH. POST Database, *supra* note 45.

populations, including California, Texas, and Florida. Some less populated states also appear on the list, such as Oklahoma and Colorado. The top five states all have disproportionately large Hispanic populations compared to the U.S. average of 18.5%.¹³⁴ By census region, the top ten states are nearly evenly split between the South and the West, with Ohio as the only non-western or non-southern state to make this list.

TABLE 3. *Top Ten States for Total FPS from 2015 Through 2019*¹³⁵

State	5-year FPS Count	Total Pop. (in Millions)	Black Pop. Share	Hisp. Pop. Share	Census Region
California	739	39.3	0.05	0.39	West
Texas	444	28.3	0.12	0.40	South
Florida	307	20.9	0.15	0.26	South
Arizona	233	7.1	0.04	0.31	West
Colorado	171	5.6	0.04	0.22	West
Georgia	165	10.4	0.31	0.10	South
Oklahoma	152	3.9	0.07	0.11	South
Ohio	145	11.7	0.12	0.04	Midwest
Washington	138	7.4	0.03	0.13	West
North Carolina	136	10.3	0.21	0.09	South

To account for population differences across states, Table 4 below lists the top ten states by rate of fatal police shootings. These states have a much higher rate of fatal police shootings than the national average of 3.04 per one million population. When adjusting for state population, the top ten states by rate of fatal police shootings is a list of mostly western states. While California, Texas, and Florida ranked high for the total number of fatal police shootings in Table 3, they are not among the states with the highest rates of fatal police shootings. Table 4 is led by New Mexico, Alaska, and Oklahoma. The top five states in Table 4 have fatal police shooting rates at least double the national average of 3.04 per one million, with New Mexico and Alaska being roughly three times that national average. Of the ten states with the highest rates of fatal police shootings, seven are in the West region and three are in the South region. Additionally, the states with the highest rates of fatal police shootings tend to have smaller total populations and lower than average (13.4%) Black populations.¹³⁶

134. *QuickFacts: United States*, *supra* note 104.

135. The data used in this table was pulled on May 11, 2020. The Washington Post and U.S. Census Bureau frequently update the numbers. For a recent look at these numbers, see WASH. POST Database, *supra* note 45; *QuickFacts: United States*, *supra* note 104; *QuickFacts: California; Texas; Florida; Arizona; Colorado*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA,TX,FL,AZ,CO/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Georgia; Oklahoma; Ohio; Washington; North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/GA,OK,OH,WA,NC/PST045219> (last visited Oct. 21, 2021).

136. *QuickFacts: United States*, *supra* note 104.

TABLE 4. Top Ten States for Rates of FPS from 2015 Through 2019¹³⁷

State	FPS Rate (per million, per year)	5-year FPS Count	Total Pop. (in millions)	Black Pop. Share	Hisp. Pop. Share	Census Region
New Mexico	9.65	100	2.1	0.02	0.49	West
Alaska	8.95	33	0.7	0.03	0.07	West
Oklahoma	7.73	151	3.9	0.07	0.11	South
Arizona	6.61	232	7.1	0.04	0.31	West
Colorado	6.08	171	5.6	0.04	0.22	West
West Virginia	5.83	53	1.8	0.04	0.01	South
Nevada	5.53	81	3.0	0.09	0.29	West
Montana	5.13	27	1.1	0.01	0.04	West
Arkansas	4.93	73	3.0	0.15	0.08	South
Wyoming	4.81	14	0.6	0.01	0.10	West

To better isolate the association between regional effects and police killings, Table 5 reports linear regression results for which the objective is to identify which factors are most strongly linked to the state rates of police shootings. Column one presents the estimates for fatal police shootings for all victims, and column two presents estimates for the fatal police shootings rate of Black victims only. The unit of observation is the annual rate of fatal police shootings per one million people by state and per year for each of the five years of data. Fatal police shootings rates come from the *Washington Post's* Fatal Force data.¹³⁸ Regression results are similar when using the dependent variable of rates of fatal encounters based on non-suicidal, non-accidental causes of death from the Fatal Encounters database.¹³⁹

The explanatory variables include many of the key state characteristics likely to be correlated with fatal policing. The variable for law enforcement officers feloniously killed in action comes from the FBI's UCR database on law enforcement officers killed and assaulted.¹⁴⁰ This variable reflects the annual state totals of law enforcement officers killed feloniously, and excludes officers that accidentally died in the line of duty.¹⁴¹ An increased number of law enforcement officers killed in action could reflect more hazardous encounters, which would have a positive relationship, or could reflect greater officer restraint that puts the officer at risk, or a negative relationship. The measure of political orientation of the state is the percentage of voters in the state who voted for Donald Trump in the 2016 presidential election.¹⁴² The 2020 voter trends, while not included

137. The data used in this table was pulled on May 11, 2020. The Washington Post and U.S. Census Bureau frequently update the numbers. For a recent look at these numbers, see WASH. POST Database, *supra* note 45; *QuickFacts: New Mexico; Alaska; Oklahoma; Arizona; Colorado; West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NM,AK,OK,AZ,CO,WV/PST045219> (last visited Oct. 21, 2021); *QuickFacts: Nevada; Montana; Alaska; Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/NV,MT,AK,WY/PST045219> (last visited Oct. 21, 2021).

138. See WASH. POST Database, *supra* note 45.

139. See Burghart, *supra* note 46.

140. See *LEOKA Data*, FBI: UCR, <https://ucr.fbi.gov/leoka> (last visited Oct. 20, 2021).

141. See, e.g., *2019 Law Enforcement Officers Killed & Assaulted*, FBI: UCR, <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-feloniously-killed> (last visited Oct. 3, 2021) (describing the data as separate from those who accidentally died in the line of duty).

142. See *infra* Table 5.

here, yield consistent results. The rate of violent crime is captured by the homicide rate in the state, and the urban percentage variable is the percentage of people living in urban areas or urban clusters, as defined by the Census Bureau.¹⁴³ The two state demographic variables included are the share of the state population that is Black and the share of the state population that is Hispanic.¹⁴⁴ The equation also includes indicator variables for three of the four Census regions so that the regional indicator variables are interpreted relative to the missing northeast indicator variable. The regression results are weighted by the total population of each state–year observation, such that a high fatal shooting rate in Wyoming—due to a small number of killings among a small population—does not disproportionately skew the results. Overall, the variables account for about two-thirds of the variation in fatal shooting rates by state for all victims and about a fourth of the variation in fatal shooting rates for Black victims.

TABLE 5. *Regression Results for Rates of FPS from 2015 Through 2019*¹⁴⁵

VARIABLES	Fatal Police Shootings Rate	
	<i>All Victims</i>	<i>Black Victims</i>
Black Population Percentage	-0.033 (0.027)	-0.349*** (0.113)
Hispanic Population Percentage	0.039** (0.018)	-0.207** (0.079)
Urban Percentage	-0.040** (0.015)	0.153 (0.099)
Southern States	0.866** (0.369)	3.875** (1.655)
Midwestern States	0.076 (0.277)	1.025 (1.340)
Western States	2.745*** (0.349)	9.380*** (1.701)
Law Enf. Officers Killed in Action	-0.139** (0.063)	0.012 (0.230)
Trump Vote Percentage 2020	0.056*** (0.018)	0.199* (0.118)
Homicides per 100,000	0.193*** (0.057)	0.195 (0.257)
Constant	1.443 (1.539)	-10.924 (11.600)
Observations	250	250
R-squared	0.64	0.24

Robust standard errors in parentheses

***p<0.01, ** p<0.05, * p<0.1

143. See *2010 Urban Area FAQs*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/about/faq/2010-urban-area-faq.html> (last revised Oct. 8, 2021).

144. See *infra* Table 5.

145. The data in this table reports regression results from Stata code using Excel data. Both the code and data are on file with the authors and *The Denver Law Review*.

Column one of Table 5 demonstrates that, after controlling for other variables, the rate of fatal police shootings in western states is annually, on average, larger by 2.8 fatal police shootings per one million people when compared to northeastern states. The differential for the West is a large effect compared to the mean fatal shootings rate for the sample. From 2015 to 2019, the average rate of fatal police shootings across all fifty states was 3.04 per one million people annually. The statistically significant coefficient on the western indicator variable reflects that states in the West have a fatal police shootings rate that is 90% higher than the average state's rate, even after controlling for other variables. As the descriptive statistics in Table 2 indicated, the fatal shootings rate in the West far exceeds that of other regions of the country. The regression analysis demonstrates that this discrepancy is not attributable to differences in state demographic composition or the other variables included in Table 5. The U.S. Census Bureau also breaks the four regions down into nine subunits called "divisions." These regression results remain unchanged when using Census divisions instead of regions.¹⁴⁶

Column one of Table 5 reports a positive relationship between overall homicide rates in the state and rates of fatal police shootings, such that an increase of one in the rate homicides per 100,000 people in a state is associated with an increase of 0.18 in the annual rate of fatal policing per one million people in a state. In percentage terms, this means a 24% increase in a state's homicide rate is, on average, associated with a 6% increase in rates of fatal policing.¹⁴⁷ However, when law enforcement officers are killed feloniously in the line of duty, states see a small decline in the rate of fatal police shootings.¹⁴⁸ One extra officer killed in the line of duty is associated with the rate of fatal police shootings decreasing by 0.14 per one million people. Assuming the average population of a state is 6.56 million,¹⁴⁹ a state with an additional officer killed in action would expect to see roughly one fewer fatality by police shooting. While, on average, states have just one feloniously killed law enforcement officer each year, the effect after holding all other variables constant represents an interesting trade-off between the lives of officers and the lives of the public. In states with more officers killed in the line of duty, fewer fatal police shootings occur. This relationship may be attributable to less violent police conduct during an encounter or selection into fewer armed confrontations. Greater police officer restraint may lead to more fatalities among officers

146. The western region is comprised of the Pacific division (CA, AK, WA, OR, and HI) and the Mountain division (NV, ID, AZ, NM, UT, CO, MT and WY). *Geographic Levels*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/economic-census/guidance-geographies/levels.html#par_textimage_34 (last revised Oct. 8, 2021). In regressions on fatal police shootings rates using division indicator variables instead of regional ones, the Mountain division has a coefficient of 3.56, relative to states in New England (CT, MA, ME, NH, VT, RI), and the Pacific division has a coefficient of 2.44. *Id.* Both t-statistics are above six.

147. See *supra* Table 5.

148. See *supra* Table 5.

149. Dividing 2019 total U.S. population of 328 million by 50 states. *QuickFacts: United States*, *supra* note 104.

but fewer among members of the public. Perhaps some police officers use more de-escalation techniques following reports of a fallen officer in their state such that fewer fatal shootings occur. Additionally, sometimes police may intentionally curtail their slow work following the felonious killing of officers,¹⁵⁰ resulting in fewer potentially fatal interactions between police and the public.

Column one of Table 5 demonstrates a statistically significant relationship between a larger Hispanic population and higher rates of fatal police shootings and encounters. This effect is relatively small, however, because a one percentage point increase in a state's Hispanic population leads, on average, to only a 0.04 increase in that state's rate of annual fatal police shootings per one million people. This statistically significant result may be influenced by the strong effect that western states have on fatal policing rates, because Hispanic population shares and western states have a strong positive correlation.

Furthermore, there is a statistically significant positive effect of the political orientation variable. A higher percentage of a state's 2016 presidential vote for Trump is associated with higher rates of fatal police shootings and encounters.¹⁵¹ This differential is consistent with then-President Trump's "law and order" 2020 campaign theme and advocacy of aggressive police tactics. A one percentage point increase in a state's 2016 Trump vote is associated with an increase of 0.06 in the rate of fatal police shootings, which is about a 2% increase in the rate of fatal police shootings from the nationwide average rate of 3.04.¹⁵²

The regional effects deepen when limiting the analysis to fatal police shootings of Black victims. In column two of Table 5, the western indicator variable shows that, compared to northeastern states, western states have a rate of fatal police shootings of Black victims that is larger by 9.25 per one million people per year. Based on the *Washington Post's* Fatal Force data, the average rate of fatal police shootings of Black people is 7.95 per one million Black people, more than two and a half times the rate of fatal police shootings of all Americans.¹⁵³ This means the western indicator variable represents 116% of the average rate of fatal police shootings of Black victims, an even stronger effect than that found in column one. Beyond the West, southern states also have a stronger effect in column two, with an increase in fatal police shooting rate of 4.7 per one million people controlling for other variables.

150. See Christopher M. Sullivan & Zachary P. O'Keefe, *Evidence that Curtailing Proactive Policing can Reduce Major Crime*, 1 NATURE HUM. BEHAV. 730, 730–37 (2017) (using an intentional slowdown in work by the New York Police Department following the killing of two police officers to show that the slowdown reduced crime and crime complaints).

151. See *supra* Table 5; see also *2016 Presidential Results*, N.Y. TIMES, <https://www.nytimes.com/elections/2016/results/president> (last visited Oct. 20, 2021) (displaying the 2016 election results by state).

152. See sources cited *supra* note 153.

153. See WASH. POST Database, *supra* note 45; *QuickFacts: United States*, *supra* note 104.

The increase in the magnitude of the variables in column two reflects interesting observations. For the fatal rate of Black shootings in column two of Table 5, the regional effects of the South and the West are much greater than in column one, as the coefficient for West increases more than threefold and the coefficient for South increases sevenfold. Police shooting rates generally are higher for Black victims and are disproportionately concentrated in the South and West. The demographic variables in column two of Table 5 are particularly interesting as well. The negative effects of the Black and Hispanic population share indicate that in states that are disproportionately white, the rate of fatal Black shootings is greater. The demographic effects are weaker in column one, without a statistically significant effect of the Black population percentage and a much smaller positive effect of the Hispanic population variable. Fatal killings of Black victims are most highly concentrated in states that are predominately white and in the South or West.

The estimates in column one of Table 5 indicate no statistically significant effect of living in a state with a greater share of Black people on fatal police shootings rates of all victims. In contrast, column two finds a relationship between the share of a state's Black population and the rate of fatal police shootings of Black people. Specifically, the larger the percentage a state's Black population is, the lower the rate of fatal police shootings of Black people. This is perhaps best reflected in the fact that the five states with the highest rates of fatal police shootings of Black people are Utah, Alaska, Oklahoma, West Virginia, and Idaho. Black people represent, respectively, 1%, 3%, 7%, 4% and 1% of the population of these states.¹⁵⁴ These results show that a one percentage point increase in the share of a state's Black population leads to a statistically significant decrease in the rate of fatal police shootings by 0.4 per one million Black people annually.¹⁵⁵ The reasoning behind this is not explained by the regression results, but perhaps reflects diversity throughout the state leading to mechanisms that result in police officers fatally shooting Black people less often.

Importantly, these results on race and ethnicity reflect a macro-level relationship between a state's racial composition and its fatal policing. Although the coefficient on the Black population percentage variable in column one is not statistically significant, this does not imply a lack of racial bias in policing for several reasons. First, other research has repeatedly shown that Black people are discriminated against by police more often and are more likely to be shot and killed by police than white people.¹⁵⁶

154. See *QuickFacts: Utah; Alaska; Oklahoma; West Virginia; Idaho*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/UT,AK,OK,WV,ID/PST045219> (last visited Oct. 21, 2021).

155. See *supra* Table 5.

156. See Edwards et al., *supra* note 111, at 16794 (using the Fatal Encounters dataset to show "Black men are about 2.5 times more likely to be killed by police over" their life than white men);

Second, these regressions reflect *rates* of fatal police shootings, not overall counts. The null result in column one on the coefficient of Black share of a state's population reflects that the difference between a state with a high rate of fatal policing for all victims (e.g., New Mexico) and a state with a low rate of fatal policing (e.g., New York) is likely not attributable to the difference in their Black population shares. Meanwhile, the negative result in column two on the coefficient of Black share in a state's population reflects that states with larger Black populations have lower rates of fatal policing of Black victims. In other words, fatal police shootings are not just a problem in states with higher Black populations, but in all states. Third, this macro-level analysis treats all deaths from fatal policing the same. Table 1, in contrast, demonstrates that Black victims account disproportionately for deaths from fatal police shootings, especially when the shooting is unjustified (such as when the victim was unarmed and fleeing).

These regional regression results highlight that, while fatal policing is a nationwide problem, some areas see much higher rates of fatal policing than others. The widespread nature of the problem along with regional differences suggest that policing reforms cannot only take place at a national level, but must also address specific issues at local levels, such as local police culture and interactions between the police and the community. Because many police reforms should incorporate fixes at the local level, cities and municipalities are best situated to spur these reforms. As discussed below, many reforms are likely stalled because cities lack the incentives to do so. However, if courts impose further financial incentives for cities to curb their fatal policing, cities will be more likely to implement the most effective policing reforms. With knowledge of their own financial constraints, and of the specific problems their police are generating, local governments will be best suited to respond to increased financial incentives that aim to deter fatal policing.

III. DAMAGES AWARDS AFTER FATAL POLICING

After a police officer violates an individual's rights, that officer may face a § 1983 claim, and the plaintiff may win damages, either through a jury award or a settlement. Section 1983 claims, and specifically damages awards, can and should incentivize better police officer behavior.¹⁵⁷ For these damages to appropriately incentivize behavior, however, it must be feasible to succeed in obtaining a damages award, the damages must be set at an appropriately high level, and other officers and police departments must believe that they could incur similar costs for violating an individual's rights. Currently, there is reason to believe that none of these

Mark Hoekstra & Carly Will Sloan, *Does Race Matter for Police Officer Use of Force? Evidence from 911 Calls 1–5* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26774, 2020) (showing police officer use of force rates increase when officers are randomly assigned to respond to 911 calls in communities with larger Black populations).

157. See *Problem of Policing*, *supra* note 48, at 772 (discussing the incentives that § 1983 claims create).

prerequisites are met. First, qualified immunity often shields officers from all liability.¹⁵⁸ Second, even among those who are awarded damages, average payouts are less than \$1 million.¹⁵⁹ And third, when plaintiffs are awarded damages, individual officers are nearly always indemnified,¹⁶⁰ and police department budgets are rarely tied to litigation costs stemming from the misconduct. If there is indemnification by the municipality, for there to be incentives on officer behavior, these influences must be transmitted by the municipality rather than relying on the officer to respond to the financial incentives.

This Part first reviews the amounts that families of victims of police violence receive in settlements and jury verdicts. Next, this Part argues for three reforms to damages awards from fatal policing that address the three prerequisites for incentivizing the police behavioral change described above.

In the relatively rare instances when plaintiffs receive payouts for wrongful deaths from fatal policing, the awards are usually less than \$1 million. Thomson Reuters compiled data on original compensatory jury awards and settlements for claims of wrongful death from 2007 to 2017.¹⁶¹ While the median jury award in all wrongful death cases was \$969,457, when focusing only on wrongful death cases due to police negligence, the median jury award for males drops to \$787,500.¹⁶² The median settlement for wrongful death cases stemming from police negligence of males was \$650,000.¹⁶³

Another data source on police misconduct payouts comes from the Chicago Law Department, which was required to release all city payouts from police misconduct from 2011 onward.¹⁶⁴ Between on-duty and off-duty officers, a total of thirty-one fatal police shootings resulted in total payouts of \$54,287,712 with a median award of \$1 million.¹⁶⁵ When limiting the shootings to just those by on-duty police officers, the median award dropped to \$350,000.¹⁶⁶

158. See Chung et al., *supra* note 63.

159. See *infra* Tables 6, 7, and 8 and accompanying text.

160. See *Police Indemnification*, *supra* note 52, at 889–90.

161. See THOMSON REUTERS, BASIC INJURY VALUES FOR WRONGFUL DEATH OF ADULT MALES: 4 PERSONAL INJURY VALUATION HANDBOOK 2017; Viscusi & Jeffrey, *supra* note 67, at 773–74.

162. Viscusi & Jeffrey, *supra* note 67, at 774–76 (citing THOMSON REUTERS, *supra* note 161). Police negligence jury award and settlement data for females was not reported.

163. *Id.* at 776 (citing THOMSON REUTERS, *supra* note 161).

164. Jonah Newman, *Settling for Misconduct: About This Project*, CHI. REP. <http://projects.chicagoreporter.com/settlements/about.html> [<https://perma.cc/KW3F-VZTJ>] (last visited Oct. 21, 2021); Jonah Newman, *Chicago Spent More Than \$113 Million on Police Misconduct Lawsuits in 2018*, CHI. REP. (Mar. 7, 2019), <https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/> [<https://perma.cc/GVT9-9FW5>].

165. Jonah Newman, *Settling for Misconduct*, CHI. REP. (last visited Oct. 21, 2021), <http://projects.chicagoreporter.com/settlements/search/cases> (under “Filter Cases,” select “Type of Misconduct” as “Shooting” and “Outcome” as “Killed by Officer” to see the 31 wrongful death cases from 2000 to 2015 that resulted in a total of \$54,287,712 paid out).

166. Viscusi & Jeffrey, *supra* note 67, at 781.

One last method of examining payouts from fatal policing comes from aggregating settlements and jury verdicts from prominent cases that received media attention. This sampling technique is nonrandom, as higher value payouts attract more media attention than lower value payouts, but still provides context for average values. Previously, the authors found fifty-four settlements and nine jury verdicts through this process.¹⁶⁷ This Article updates that data, adding details on nine other payouts. Table 6 summarizes the seventy-two payouts; Table 7 presents details of sixty-three shooting victims' payouts via settlements; and Table 8 presents similar details on the nine payouts via jury verdicts.

Table 6 summarizes the seventy-two shootings with prominent media coverage from 1999 to 2020 that resulted in payouts via settlement or jury verdict. The median payout was \$1,500,000—higher than the median jury verdict or settlement from wrongful deaths due to police negligence found by Thomson Reuters. The higher median value in this dataset is likely influenced by the media's bias toward covering controversial shootings and larger awards. Still, the median value falls far short of how other government regulatory agencies value the risks associated with a fatality.

TABLE 6. *Wrongful Death Payouts in Prominent FPS*¹⁶⁸

	Median Award	Minimum Award	Maximum Award	Sample Size
All Cases	\$1,500,000	\$4	\$20,000,000	72
Jury Verdicts	\$1,050,000	\$4	\$3,700,000	9
Settlements	\$1,600,000	\$7,500	\$20,000,000	63
Male	\$1,500,000	\$4	\$6,500,000	61
Female	\$2,500,000	\$300,000	\$20,000,000	11
Black	\$1,600,000	\$4	\$20,000,000	53
Non-Black	\$1,100,000	\$20,000	\$20,000,000	19

167. *Id.* at 780.

168. *See infra* Appendix and accompanying citations. This nonrandom sample of fatal police shootings that resulted in a jury award or settlement was compiled from the prominent cases found in Tables 7 and 8. All jury awards refer to the nominal value of original compensatory jury verdicts before award reductions. The names of the victims and details of the shooting, including the payouts, are listed in Tables 7 and 8. Sources are found in the Appendix.

TABLE 7. *Sample of Sixty-Three Settlements for Prominent FPS*¹⁶⁹

Name	Age	Race	Sex	Date of Shooting	Location of Shooting	Payout (\$)
Justine Damond	40	White	F	7/15/2017	Minneapolis, MN	20,000,000
William Green	43	Black	M	1/27/2020	Temple Hills, MD	20,000,000
LaTanya Haggerty	26	Black	F	6/4/1999	Chicago, IL	18,000,000
Bettie Jones	55	Black	F	12/26/2015	Chicago, IL	16,000,000
Breonna Taylor	26	Black	F	3/13/2020	Louisville, KY	12,000,000
Walter Scott	50	Black	M	4/4/2015	North Charleston, SC	6,500,000
Danroy Henry Jr.	20	Black	M	10/17/2010	Westchester, NY	6,000,000
Tamir Rice	12	Black	M	11/23/2014	Cleveland, OH	6,000,000
Eric Harris	44	Black	M	4/2/2015	Tulsa, OK	6,000,000
James Boyd	38	White	M	3/16/2014	Albuquerque, NM	5,000,000
Laquan McDonald	17	Black	M	10/20/2014	Chicago, IL	5,000,000
Kathryn Johnston	92	Black	F	11/21/2006	Atlanta, GA	4,900,000
Samuel Dubose	43	Black	M	7/19/2015	Cincinnati, OH	4,800,000
Flint Farmer	29	Black	M	6/7/2011	Chicago, IL	4,100,000
Miles Hall	23	Black	M	6/2/2019	Walnut Creek, CA	4,000,000
Ramarley Graham	18	Black	M	2/2/2012	New York, NY	3,900,000
Esau Castellanos	31	Hispanic	M	3/16/2013	Chicago, IL	3,750,000
Sean Bell	23	Black	M	11/25/2006	New York, NY	3,250,000
John Geer	46	White	M	8/29/2013	Springfield, VA	3,000,000
Amadou Diallo	22	Black	M	2/4/1999	New York, NY	3,000,000
Philando Castile	32	Black	M	7/6/2016	Falcon Heights, MN	3,000,000
Cedrik Chatman	17	Black	M	1/7/2013	Chicago, IL	3,000,000
Ryan Whitaker	40	White	M	5/21/2020	Phoenix, AZ	3,000,000
Oscar Grant	22	Black	M	1/1/2009	Oakland, CA	2,800,000
Tarika Wilson	26	Black	F	1/4/2008	Lima, OH	2,500,000
Emil Mann	45	Nat. Am.	M	4/1/2006	Mahwah, NJ	2,420,000
Stephon Clark	22	Black	M	3/18/2018	Sacramento, CA	2,400,000
MiChance Dunlap-Gittens	17	Black	M	1/25/2017	King County, WA	2,250,000
Jonathan Ferrell	24	Black	M	9/14/2013	Charlotte, NC	2,250,000
Emmanuel Lopez	23	Hispanic	M	9/16/2005	Chicago, IL	2,200,000
Davinian Williams	36	Black	M	5/9/2012	Jacksonville, FL	1,900,000
Jashon Bryant	18	Black	M	5/7/2005	Hartford, CT	1,600,000
Timothy Russell	43	Black	M	11/29/2012	Cleveland, OH	1,500,000
Malissa Williams	30	Black	F	11/29/2012	Cleveland, OH	1,500,000
Michael Brown	18	Black	M	8/9/2014	Ferguson, MO	1,500,000
Danielle Willard	21	White	F	11/2/2012	West Valley City, UT	1,425,000
Anthony Smith	24	Black	M	12/20/2011	St. Louis, MO	1,400,000
Paul Childs	15	Black	M	7/5/2003	Denver, CO	1,325,000
Larry Jackson Jr.	32	Black	M	7/26/2013	Austin, TX	1,300,000
Aaron Campbell	25	Black	M	1/29/2010	Portland, OR	1,200,000
Ernest Satterwhite	68	Black	M	2/9/2014	North Augusta, GA	1,200,000
Yvette Smith	47	Black	F	2/16/2014	Bastrop County, TX	1,200,000

169. See *infra* Appendix and accompanying citations. This nonrandom sample of fatal police shootings that resulted in a settlement was compiled from prominent cases, and all cases are sourced in the Appendix.

Name	Age	Race	Sex	Date of Shooting	Location of Shooting	Payout (\$)
Jason Kemp	31	White	M	7/20/2010	Grand Junction, CO	1,100,000
Joseph Erin Hamley	21	White	M	3/7/2006	Tontitown, AR	1,000,000
Keith Vidal	18	White	M	1/5/2014	Boiling Springs Lake, NC	1,000,000
Ryan Rogers	27	Black	M	3/20/2013	Chicago, IL	1,000,000
Lane Martin	31	White	M	7/30/2019	Portland, OR	975,000
Dakota Bright	15	Black	M	11/8/2012	Chicago, IL	925,000
Willie Miller	25	Black	M	4/2/2010	Chicago, IL	750,000
Niles Meservey	51	White	M	6/10/2009	Everett, WA	500,000
Bernard Bailey	54	Black	M	5/2/2011	Eutawville, SC	400,000
Bobby Stacy	26	White	M	3/28/2010	Southwest City, MO	375,000
Edward Lamont Hunt	27	Black	M	1/30/2008	Baltimore, MD	375,000
Patricia Ann Cook	54	White	F	2/9/2012	Culpeper, VA	300,000
Roy Glenn Jr.	29	Black	M	2/22/2009	Humboldt, TN	209,000
Rickey Childs	16	Black	M	10/28/2016	Chicago, IL	100,000
Warren Robinson	16	Black	M	7/5/2014	Chicago, IL	100,000
Tatioun Williams	15	Black	M	5/25/2011	Chicago, IL	100,000
Eric Williams	40	Black	M	4/14/2005	Detroit, MI	85,000
William Sheffield	45	White	M	12/29/2005	Society Hill, SC	75,000
Arthur Hutchinson	40	Black	M	3/16/2000	Chicago, IL	60,000
Angelo Miller	17	Black	M	3/23/2007	Cleveland, OH	35,000
Vincent Smith Jr.	16	Black	M	1/15/2006	Gary, IN	7,500

TABLE 8. *Sample of Nine Jury Verdicts for Prominent FPS*¹⁷⁰

Name	Age	Race	Sex	Date of Shooting	Location of Shooting	Original Jury Verdict (\$)	Payout (\$)
Prince Jones	25	Black	M	9/1/2000	Fairfax, VA	3,700,000	3,700,000
Malcolm Ferguson	23	Black	M	3/1/2000	Bronx, NY	3,500,000	500,000
Mohamed Bah	28	Black	M	9/25/2012	New York, NY	2,200,000	1,900,000
Alfontish Cockerham	23	Black	M	6/20/2015	Chicago, IL	1,180,000	1,180,000
Quintonio Legrier	19	Black	M	12/26/2015	Chicago, IL	1,050,000	0
Zachary Snyder	23	White	M	2/14/2008	Cape Gir., MO	1,000,000	1,000,000
Korryn Gaines	26	Black	F	8/1/2016	Baltimore, MD	300,000	0
James Ahern	47	White	M	1/20/2010	Bella Vis., AK	20,000	0
Gregory Hill	30	Black	M	1/14/2014	Fort Pierce, FL	4	0

Table 8 reports original jury verdicts and the final payouts. Original jury awards for police misconduct are often decreased or vacated, representing yet another hurdle for plaintiffs seeking justice. An award of \$38 million to the family of Korryn Gaines was vacated two and a half years after her death when a judge decided the officer should have been given qualified immunity.¹⁷¹ Both the compensatory and punitive damages for the fatal shooting of Malcolm Ferguson were reduced from a total of \$10

170. See *infra* Appendix and accompanying citations. This nonrandom sample of fatal police shootings that resulted in a jury award was compiled from prominent cases, and are all sourced in the Appendix. For comparison to other reported data, jury verdicts refer to the nominal value of original compensatory jury verdicts before award reductions, whereas payouts account for later award reductions.

171. Julia Jacobs, *Judge Rescinds \$38 Million Award to Family of Maryland Woman Shot by Police*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/us/korryn-gaines-shooting-verdict.html> [https://perma.cc/B23H-S2J7].

million to around \$3 million.¹⁷² Ten years after Ferguson's death, the court decided that there was not enough proof Ferguson was alive long enough to qualify for damages for pain and suffering and that \$7 million in punitive damages was excessive.¹⁷³ After a jury awarded \$1.05 million in damages to the family of Quintonio Legrier, the court immediately revoked the award because the jurors signed a special interrogatory stating that they believed the officer acted reasonably when he shot Legrier.¹⁷⁴ In interviews after the trial, the jury's foreman stated that the jury believed the \$1.05 million would still be awarded.¹⁷⁵

It is notoriously difficult to win wrongful death claims against police officers due to qualified immunity. Because this doctrine protects individual officers, and the cities that indemnify the officers, the deterrent effect that damages awards normally provide is significantly weakened.¹⁷⁶ Furthermore, in cases of fatal policing where damages are provided, the payouts are usually less than \$1 million.¹⁷⁷ If the decedent's family won that award through a jury verdict, the family will likely need to continue litigation for years before they can collect the damages awarded by verdict.¹⁷⁸

Floyd's family settled their wrongful death suit with the city of Minneapolis for \$27 million.¹⁷⁹ This amount may influence settlements and damages amounts from jury verdicts in the future. But if a settlement is not reached, how do courts typically consider and award damages for wrongful deaths? The following discussion illustrates how damages for wrongful deaths are often calculated, using Floyd's real-life characteristics to demonstrate how a court assesses hypothetical damages as an example. The focus here is on the economic loss from the death typically estimated in wrongful death damages calculations. Many components of damages factor in, such as those pertaining to pain and suffering. Of course, the brutality of Floyd's killing, the fact that all four officers were charged with his death, and the worldwide protests all factored into, and increased, the actual amount his family received. However, countless victims of fatal policing do not have a clear video recording of their death at the hands of police, and their deaths do not draw global outrage. If these victims

172. See *Ferguson v. City of New York*, 901 N.Y.S.2d 609, 610–12 (N.Y. App. Div. 2010).

173. *Id.* at 611–12.

174. See Dan Hinkel, *Conflicting Verdict Favors Chicago Cop in Fatal Shooting as Trial Ends in Confusion*, CHI. TRIB. (June 28, 2018, 5:46 AM), <https://www.chicagotribune.com/news/breaking/ct-met-quintonio-legrier-police-shooting-trial-20180628-story.html> [https://perma.cc/VT4G-XDX4].

175. *Id.*

176. See *Police Indemnification*, *supra* note 52, at 887, 940.

177. See Viscusi & Jeffrey, *supra* note 67, at 775; 4 THOMSON REUTERS, *supra* note 161, at 17.

178. See, e.g., Stephen Rex Brown, *NYC Agrees to Pay \$1.9 Million for NYPD Killing of Mohamed Bah*, DAILY NEWS (Mar. 21, 2019, 6:01 AM), <https://www.nydailynews.com/new-york/ny-mohamed-bah-settlement-20190321-qw42dtzovabhpadsaohajsu-story.html> [https://perma.cc/C55X-SQ2C] (detailing a case that took seven years for the family of the victim to receive their jury-awarded compensation).

179. Steve Karnowski & Amy Forliti, *Floyd Family Agrees to \$27M Settlement Amidst Ex-Cop's Trial*, AP NEWS (Mar. 12, 2021), <https://apnews.com/article/minneapolis-pay-27-million-settle-floyd-family-lawsuit-52a395f7716f52cf8d1fbeb411c831c7>.

manage to win damages at trial, the following is an example of the method courts use to calculate the victim's present value of lost earnings (PVLE).

Floyd was a forty-six-year-old man who attended South Florida State College from 1993 to 1995¹⁸⁰ and worked as a security guard at a restaurant for five years before he was laid off during the COVID-19 pandemic.¹⁸¹ The national average wage of a security guard is \$13 per hour.¹⁸² Assuming Floyd had no other major income sources and worked forty hours a week for fifty weeks a year, Floyd would earn \$26,000 per year. Based on labor force participation data, the typical forty-five-year-old man in the labor force with some college experience, but no college degree, works an additional eighteen years.¹⁸³ Multiplying his current expected annual salary of \$26,000 by his total work-life expectancy of eighteen years, Floyd would expect to earn about \$468,000 over the rest of his working career. Courts will often add the value of benefits such as insurance, retirement savings, and social security, which, on average, comprise 18.5% of the value of a civilian's wages.¹⁸⁴ Factoring in this additional 18.5%, the total value of Floyd's expected lifetime earnings would be \$554,580. This income stream is then converted to present value.¹⁸⁵ The present value calculation discounts the future payoffs because a dollar in the future is worth less than a dollar now as that money could be invested. For example, suppose that the interest rate minus inflation is 2%. Applying this discount rate to the future earnings stream reduces the total present value of Floyd's lost earnings plus benefits to \$471,142.

Additionally, courts could award damages based on the victim's unnecessary pain and suffering, which can dramatically increase the payout.¹⁸⁶ These noneconomic damages vary greatly based on the circumstances and often amplify the economic damages.¹⁸⁷ For example, in fatal medical malpractice cases, noneconomic damages for pain and suffering can represent 75% of the total damages award.¹⁸⁸ Some jurisdictions may make deductions from the lost earnings amount based on taxes and the

180. Alisha Ebrahimji, *This is How Loved Ones Want us to Remember George Floyd*, CNN (June 3, 2020, 6:22 PM), <https://www.cnn.com/2020/05/27/us/george-floyd-trnd/index.html>.

181. Paul Walsh, *Man who Died in Police Incident was Good Friend and like Family to his Boss, Others*, STAR TRIB. (May 26, 2020, 11:38 PM), <https://www.startribune.com/boss-remembers-george-floyd-as-a-good-friend-person-and-a-good-tenant/570775702/?refresh=true>; Associated Press, *Before His Deadly Encounter with Police, George Floyd had Begun a New Life in Minnesota*, L.A. TIMES (May 28, 2020, 3:33 AM), <https://www.latimes.com/world-nation/story/2020-05-28/george-floyd-begun-new-life-minneapolis-before-police-encounter>.

182. *How Much Do Security Guard Jobs Pay per Hour?*, ZIPRECRUITER (last visited Oct. 21, 2021), <https://www.ziprecruiter.com/Salaries/How-Much-Does-a-Security-Guard-Make-an-Hour>.

183. Kurt V. Krueger & Frank Slesnick, *Total Worklife Expectancy*, 25 J. FORENSIC ECON. 51, 66 (2014).

184. BUREAU LAB. STAT., EMPLOYER COSTS FOR EMPLOYEE COMP. – MARCH 2020 2.

185. *Id.*

186. Joni Hersch, Jeffrey O'Connell, W. Kip Viscusi, Wesley A. Magat, & Joel Huber, *An Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD. S231, S242 (2007).

187. *Id.*

188. *Id.*

decendent's share of the household's consumption. These awards vary greatly and depend on the judge and the jury.¹⁸⁹

In the cases of victims of fatal policing, damages are calculated as described above. Without videos proving Floyd suffered prior to his death, his family may not have "sufficient evidence" for pain and suffering damages,¹⁹⁰ and the damages award in this scenario may have been approximately \$500,000 for the present value of his lost earnings. Even in a best-case scenario where pain and suffering damages equal three times the amount of economic damages for lost earnings, Floyd's family would receive about \$2 million. While \$2 million is about twice the median payout from fatal policing, it falls short of the \$27 million his family received in the settlement and is still five times less than the amount that government agencies pay to avoid the risk of one expected death.

Government agencies have rightly shifted towards applying the VSL when considering fatality risks in decision-making. The judiciary should also recognize its role in influencing decision-making and more appropriately valuing fatality risks. To that extent, the authors offer three proposals for how damages awards following fatal policing can provide stronger deterrent effects. First, this Article proposes increasing damages awards following fatal policing. To ensure more victims receive compensation and to amplify our first proposal, this Article next joins the spectrum of voices calling for the end of qualified immunity, which is a reform that will have increased importance if damages award levels are increased. Finally, this Article argues that for police departments and officers to change their behavior, cities must adopt policies that put the litigation costs from police misconduct on police departments and create comparable pressures to reform police conduct.

A. Raise Damages Amounts

The standard compensation measure in wrongful death cases addresses the financial losses that the family will experience because of the death, principally medical expenses and lost income, and allows for compensation for the victim's pain and suffering. While that compensatory damages approach is generally appropriate for wrongful death cases, if the objective of the damages award is to send the appropriate signal to the one responsible for that economic loss, then this cost of death measure will be too small.

In some cases, depending on jurisdictional rules, punitive damages can be added to compensatory damages. For this to occur, certain criteria must be met, depending on the state. Manuals for model jury instructions for federal circuits identify malice as a trigger for allowing punitive

189. See *infra* Part III for a discussion of the revocation of pain and suffering damages for Malcolm Ferguson's death ten years after his death.

190. *Id.*

damages.¹⁹¹ For example, the Third Circuit only allows punitive damages in § 1983 cases if the defendant acted “maliciously or wantonly” in violating the plaintiff’s rights.¹⁹² Case law also supports awards of punitive damages in § 1983 claims. In *Morgan v. Woessner*,¹⁹³ the Ninth Circuit stated, “It is well established that a ‘jury may award punitive damages under [§] 1983 either when a defendant’s conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others.’”¹⁹⁴

In Floyd’s case, the criteria for punitive damages were easily met. The mayor of Minneapolis, Jacob Frey, described the killing as “malicious.”¹⁹⁵ The governor of Minnesota, Tim Walz, said the killing reflected a “lack of humanity.”¹⁹⁶ While courts can differ on applying the legal definition of malice or callous indifference to the rights of others, it is clear that a court could apply punitive damages here. This Article argues that, not only can courts apply punitive damages in cases of fatal policing, but also that courts should. The reasoning behind applying punitive damages in such cases is to align the damages award with the typical governmental valuation of mortality risks.

Government agencies use a different measure to monetize the benefit of reducing mortality risks. Each expected death is given an economic value according to the VSL. While court awards are compensation measures linked to the financial cost of death, the VSL is a deterrence-oriented measure that reflects how society values the elimination of one expected death. Specifically, the VSL measures how much people are willing to pay to reduce the risk of death.

Consider the following example based on workers facing occupational risks, which is a prominent source of evidence regarding the VSL. Suppose that a worker faces an annual fatality risk on the job of 1/10,000, meaning for a group of 10,000 workers who are similarly situated, there will be one expected death. To face that risk, each worker agrees to receive extra pay of \$1,000 annually. In total, this group of workers will be paid \$10 million for the risk, or 10,000 workers multiplied by \$1,000 each. In this example, \$10 million is the VSL, or the amount that workers are willing to be paid for each expected death. The reasoning is similar for product

191. See, e.g., Committee on Model Civil Jury Instructions Within the Third Circuit, MODEL CIV. JURY INSTR. 3RD CIR. 4.8.3 SECTION 1983 – DAMAGES – PUNITIVE DAMAGES 100 (West 2018).

192. *Id.*

193. 997 F.2d 1244, 1255 (9th Cir. 1993).

194. *Id.* (citing *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991)).

195. Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES, <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html> (last updated Mar. 5, 2021).

196. Emily Haavik, *Officers Identified in George Floyd Death, Minneapolis Mayor Calls for Charges*, KARE11 (May 27, 2020, 8:13 PM), <https://www.kare11.com/article/news/local/minneapolis-mayor-jacob-frey-calls-on-county-attorney-to-charge-officer-in-george-floyds-death/89-e16456bc-a719-4222-a1f5-a717828598c8>.

risks. The VSL for products reflects how much consumers are willing to pay to avert each expected product-related death.

The economic literature on the VSL has examined these relationships based on actual risky decisions made by workers and consumers. The focal value for the VSL in the recent review by Viscusi is that \$10 million is the pertinent average VSL across the population in 2015, or \$11 million in 2019.¹⁹⁷ This is consistent with practices currently in place throughout the federal government. For example, the U.S. Department of Transportation has adopted a VSL of \$10 million, the U.S. Department of Health and Human Services has adopted a VSL of \$10.4 million, and the U.S. Environmental Protection Agency has adopted a VSL of \$10.9 million.¹⁹⁸ For purposes of this discussion, we will use a VSL of \$11 million.

Based on a VSL of \$11 million, the mortality cost associated with the fatal policing in Table 1 is \$54.32 billion, consisting of the following components: \$1.43 billion for unarmed/fleeing victims, \$1.83 billion for unarmed/not fleeing victims, \$14.03 billion for armed/fleeing victims, \$32.13 billion for armed/not fleeing victims, and \$4.91 billion for armed/fleeing status for victims not reported.

Specifically, this Article advocates using the VSL to establish total wrongful death compensation levels to create incentives for safe police behavior. Typically, that situation will arise when various criteria for punitive damages are met. Floyd's murder likely would have met these criteria for punitive damages had the issue of punitive damages gone to a jury. As indicated in Minneapolis Mayor Frey's assessment, Floyd's murder by the Minneapolis police was "malicious."¹⁹⁹

Suppose an incident of fatal policing meets the criteria such that a court would likely award compensatory damages and punitive damages. In this instance, the VSL would (or should) set the appropriate value for the total damages amount.²⁰⁰ For example, if the compensatory damages award was \$1 million, then there should be an additional \$10 million penalty to align the total damages with adequate incentives to reduce such risks.

Although using a VSL measure to set damages amounts may increase jury awards and settlements, it may decrease the awards in some instances and decrease the variability of payouts. Adopting the VSL approach to determine damages awards establishes a more structured approach that can serve as a form of discipline for juries and reflect the appropriate economic value for deterrence. Cases of extreme police behavior, such as in the deaths of Damond and Floyd, result in substantial public outcry that will

197. See Viscusi, *supra* note 64, at 108, 113, 118.

198. *Id.* at 111, 113 (values in dollars as of 2017).

199. See Burch & Eligon, *supra* note 197.

200. See generally Viscusi & Jeffrey, *supra* note 67, at 784–89; Viscusi, *supra* note 64, at 101–03; Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers: Exxon Shipping Co. v. Baker*, 18 SUP. CT. ECON. REV. 259–63 (2010).

likely be reflected in anger among jurors. How should jurors think about the appropriate value of damages in these situations? Should the appropriate damages amount be \$1 million, \$10 million, \$100 million? Current jury instructions provide no meaningful guidance for mapping the outrage that jurors may be feeling into a dollar amount. The VSL provides the appropriate conceptualization for thinking about this value and for setting the level of damages. Although damages based on the VSL exceed nearly all compensation amounts in wrongful death cases, they will be below the awards or settlements in rare situations, such as Damond's \$20 million settlement. But the principal issue is not whether this approach will raise or lower awards, but whether it will reflect the value that society places on eliminating each expected death. In effect, the risks of death to victims stemming from excessive police actions will be accorded the same economic value that government agencies place on reducing mortality risks of all other kinds.

But is it appropriate to use the same VSL for all victims irrespective of their personal characteristics? Wrongful death awards generally reflect the decedent's income loss. Using a common VSL suppresses this heterogeneity and would be a more uniform approach in which all victims of police violence were treated equally. Based on the standard economic theory, the amount people are willing to pay to reduce risks increases with income. Consequently, the person-specific VSL will also be greater for those with higher income levels, although not proportionally.²⁰¹ Should these differences in income levels be considered if the victim has an income level that is below that of the average blue-collar worker, which is the source of most VSL evidence? This Article advocates that there should be no discounting of the VSL for poorer victims and that an equal value for all victims of fatal policing should be used.

The first reason for this equalization of damages awards is that this equality is consistent with current government practices. Whether pollution levels are reduced in rich neighborhoods or poor neighborhoods, the job risks are reduced for workers in minimum wage jobs or higher income earners, or the improvements in transportation safety are modified for wealthier or poorer airline passengers are not reflected in governmental assessments of the benefits of reducing these risks.²⁰²

A second rationale for equalizing damages amounts is based on the intent of the award. The impetus for using the VSL is to establish

201. Many studies indicate that the income elasticity of the VSL in the United States is 0.6, or a 10% increase in income increases the VSL by 6%. W. KIP VISCUSI, *PRICING LIVES: GUIDEPOSTS FOR A SAFER SOCIETY*, 117–18 (2018).

202. For example, the U.S. Department of Transportation guidance establishes a uniform department-wide policy of valuing mortality risks. See Memorandum from Molly J. Moran, Acting Gen. Counsel, & Carlos Monje, Assistant Sec. for Transp. Policy, on Guidance on Treatment of the Econ. Value of a Stat. Life (VSL) in U.S. Dep't of Transp. Analyses – 2016 Adjustment (Aug. 8, 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf>.

incentives for future behavior. The approach is a forward-looking approach that is designed to affect police behavior toward potential future victims irrespective of the personal characteristics of past victims. In much the same way that government agencies set regulations that are sensible for a broad swath of the population, the damages in these cases should be pertinent to the valuations of the set of people likely to be protected in the future.

The proposal to increase damages awards for the families of victims is also a proposal to incentivize governments to adopt effective policing reforms. This concept—making government pay—has been theorized before.²⁰³ Daryl Levinson has argued that governments do not respond to incentives in the same way that private firms do because governments are motivated by political factors, not financial ones. Elected officials are not profit-maximizing firms, but rather, individuals motivated by reelection. Levinson argued that “street-level” officers do not face the same costs as city budgets, and further civil penalties against governments will not influence officers’ actions.

But other scholars have pointed out that financial penalties tied to lawsuits can and do serve as deterrents.²⁰⁴ The financial costs of lawsuits create political costs, and lawsuits reveal information that “can trigger embarrassing political inquiry and even firings, resignations, or election losses.”²⁰⁵ While most victims of police violence likely do not sue, and thus do not impose these deterrent effects, advocates of increasing governmental liability in these cases still believe litigation causes government officials to take steps to reduce future claims and violations.²⁰⁶

Financial deterrent effects may be lower for public actors than private actors, but cities and police departments still have budgets that constrain them. In turn, increasing damages awards would increase both political and financial deterrents. Empirical data, however, suggests that financial deterrents have limited effects on police conduct when police departments do not suffer the direct financial burden of officer misconduct.

B. Lower the Bar to Receive Damages: End Qualified Immunity

Obtaining damages awards following fatal policing is difficult due to many legal obstacles. While § 1983 claims allow for individuals to sue police officers for violating their constitutional rights, the qualified immunity doctrine shields public officials from liability unless they violated

203. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000).

204. See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 849 (2001); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 849 (2012) [hereinafter *What Police Learn*].

205. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. F. 1555, 1681 (2003).

206. See *What Police Learn*, *supra* note 204, at 845 n.19 (listing several studies calling for further governmental liability due its effective deterrence).

clearly established rights.²⁰⁷ To demonstrate a clearly established right, a plaintiff must show precedent in a highly similar fact pattern, or an “indistinguishable” case from their own.²⁰⁸ Requiring clearly established law allows courts to stray from precedent based on minute distinctions, including whether police officers are trained to know what violates a victim’s constitutional rights.

For example, in one recent case, *Corbitt v. Vickers*,²⁰⁹ an officer shot a compliant ten-year-old child, shattering the child’s knee, while the child was lying face-down eighteen inches from the officer, surrounded by three other children.²¹⁰ The officer claimed he was trying to shoot the family’s dog and, after missing once, accidentally shot the child eight to ten seconds later when the nonaggressive dog approached its owners.²¹¹ The Eleventh Circuit refused to describe shooting into a group of compliant children to kill a dog as unreasonable enough to warrant a Fourth Amendment violation.²¹² In considering precedent on whether the shooting violated clearly established law, the Eleventh Circuit previously ruled that shooting at a truck and hitting a passenger is a violation of clearly established law.²¹³ But here, the court distinguished that case from one of shooting at a dog and hitting a child because the shooting of the child was more accidental.²¹⁴ Ultimately, the Eleventh Circuit granted qualified immunity to the officer and the Supreme Court denied certiorari.²¹⁵

While *Corbitt* reveals the breadth of qualified immunity protections, by no means is it the only case in which a court granted qualified immunity to shield egregiously reckless police behavior.²¹⁶ Courts and policing scholars find that qualified immunity severely constrains plaintiffs seeking damages under § 1983 claims.²¹⁷ An investigation by Reuters of appellate cases from 2005 to 2019 where the defendants claimed qualified immunity shows a growing trend of courts granting qualified immunity, whether or

207. See *Case Against Q.I.*, *supra* note 69, at 1801; Chung et al., *supra* note 63.

208. See *Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) (discussing that the Supreme Court’s qualified immunity jurisprudence “effectively eliminate[s] § 1983 claims against state actors” due to the “clearly established prong”).

209. 929 F.3d 1304 (11th Cir. 2019).

210. *Id.* at 1308.

211. *Id.*

212. *Id.* at 1321–22.

213. *Id.* at 1318.

214. *Id.*

215. *Id.* at 1304.

216. See Chung et al., *supra* note 63 (describing pairs of cases of reckless behavior by officers with minor differences in which officers were not granted qualified immunity in one and were granted qualified immunity in the other because of the minor difference. Another example described, beyond *Corbitt v. Vickers*, is *Nelson v. City of Battle Creek*, where the court granted qualified immunity after an officer shot a fourteen-year-old complying with orders to drop his toy BB gun. *Nelson v. City of Battle Creek*, 802 F. App’x 983 (6th Cir. 2020). The court refused to apply precedent from *Bletz v. Gribble*, where qualified immunity was denied to officers who shot a man complying with orders to lower his shotgun, because the child in *Nelson* had to first remove the toy BB gun from his waistband before complying with orders. *Id.*; see also *Bletz v. Gribble*, 640 F. Supp. 2d 907 (W.D. Mich. 2009).

217. See *Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); *Case Against Q.I.*, *supra* note 69, at 1802.

not the force was excessive, due to the clearly established right requirement.²¹⁸

Extracting damages from a municipality presents an even tougher barrier to recovery. The *Monell* doctrine allows damages against a municipality under § 1983 claims only if the plaintiff can show there was an unconstitutional policy or custom that caused the violation of their rights, and that the final decision on the policy was made with knowledge or deliberate indifference.²¹⁹ Recovery under the *Monell* doctrine is very difficult, and deterrent effects on individual defendants are lessened because municipalities often indemnify the defendant officer.²²⁰

Although the doctrine of qualified immunity limits liability for officers, it could be redeemable if it achieves other goals. The goals of qualified immunity are to shield officers from financial burdens of litigation and prevent overdeterrence of policing.²²¹ However, empirical scholarship has revealed that qualified immunity achieves neither goal. In a study of eighty-one law enforcement agencies over a six-year period, officers “virtually never contributed” to payouts that were not shielded by qualified immunity.²²² In 9,225 cases with payouts, individual officers in the largest agencies paid 0.02% of the total payouts to plaintiffs.²²³ Qualified immunity does not protect individual officers from financial burdens because even in the absence of qualified immunity, officers rarely pay for their conduct.²²⁴ Qualified immunity also rarely protects officers from the burdens of litigation. In a study of 1,183 § 1983 cases, only seven cases (0.6%) were dismissed on qualified immunity grounds before discovery, and just thirty-eight (3.2%) were dismissed on qualified immunity grounds before trial.²²⁵ Finally, studies show that officers rarely reflect on their civil liability when exercising force, indicating that qualified immunity neither encourages use of force nor prevents overdeterrence of use of force.²²⁶

With few benefits to public officials and, in Justice Sotomayor’s words, the costs of “render[ing] the protections of the Fourth Amendment hollow[,]”²²⁷ we join the call to end qualified immunity.²²⁸ The judiciary created this doctrine and can end it, either through the Supreme Court or potentially through agreement among lower courts.²²⁹ Such a move would give the judiciary a role in reducing fatal policing and strengthening other

218. See Chung et al., *supra* note 63.

219. *Police Indemnification*, *supra* note 52, at 896.

220. *Id.* at 900 n.72.

221. See *Case Against Q.I.*, *supra* note 69, at 1803–14.

222. *Id.* at 1805.

223. See *Police Indemnification*, *supra* note 52, at 890; *Case Against Q.I.*, *supra* note 69, at 1805.

224. *Police Indemnification*, *supra* note 52, at 890; *Case Against Q.I.*, *supra* note 69, at 1805.

225. *Case Against Q.I.*, *supra* note 69, at 1809; Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 19–25 (2017).

226. See *Case Against Q.I.*, *supra* note 69, at 1811–12 n.98.

227. *Mullenix v. Lena*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

228. See Chung et al., *supra* note 63.

229. *Case Against Q.I.*, *supra* note 69, at 1832.

policing reforms. If more plaintiffs can reach trial and receive damages with the removal of the qualified immunity doctrine, then this Article's proposal of assigning higher damages awards in cases of fatal policing will have a greater deterrent effect than if the proposal was enacted alone. If qualified immunity is ended, then the proposal means more damages awards would reflect current estimates of how people and governments value lives, and more cities would face greater financial and political incentives to reform their police forces.

C. Tie Damages to Police Budgets

But even if qualified immunity is proscribed and damages awards are based on the VSL, many police departments and individual officers still may not change their behavior due to their indemnification from litigation costs. Over 60% of the largest law enforcement agencies in the United States face no financial consequences for payouts their jurisdictions make because of police misconduct and ensuing litigation costs.²³⁰ Even the agencies that do face some financial pressures from litigation are relieved of these pressures through budgeting arrangements.²³¹ Furthermore, nearly all individual police officers are entirely indemnified for the payouts their jurisdictions must make on their behalf.²³² For damages awards to impose any deterrent effect, the agencies and officers making the decisions that lead to wrongful deaths, litigation, and payouts must feel consequences, and other officers and agencies must be incentivized to learn from others' mistakes. While large lawsuits do carry political costs, financial costs create more predictable deterrent effects, which can allow other parties to learn from the financial penalty.

Empirical work on the deterrent effects of police misconduct litigation has recently emerged. Joanna Schwartz found that in a study of one hundred law enforcement agencies, only fifty contribute in some way towards lawsuits brought against them.²³³ However, she determined there is little deterrent effect even in these fifty agencies who do contribute to litigation for various department-specific reasons. Often, this is because many larger agencies receive funding only for litigation, which does not roll over into the police department's budget if not used and is supplemented by general city funding if exhausted.²³⁴ However, smaller agencies often rely on outside insurance, which can become costly following litigation.²³⁵ Changes to insurance policies have previously forced small law enforcement agencies to shut down. These findings suggest that smaller police departments do face financial pressures from litigation, which serve as an effective deterrent to departments that worry about their budgets.²³⁶

230. *How Governments Pay*, *supra* note 70, at 1193.

231. *Id.* at 1173–74.

232. *See Police Indemnification*, *supra* note 52, at 890.

233. *How Governments Pay*, *supra* note 70, at 1148.

234. *Id.* at 1176–78.

235. *Id.* at 1159.

236. *Id.* at 1190.

Litigation costs are ineffective as a deterrent only when budgets are so large that no outside force exerts sufficient pressure on the police department to incentivize reform.

Currently, individual officers face nearly zero financial costs for their role in police misconduct litigation.²³⁷ A study by Schwartz of 9,225 civil rights damages cases surrounding police misconduct found police officers personally paid 0.02% of the roughly \$735 million spent by cities.²³⁸ Forcing individual officers to pay a larger portion of settlements and jury awards for their misconduct could provide greater financial incentives to reduce fatal policing. Many individual officers, however, are likely judgment-proof due to a lack of funds when it comes to police misconduct payouts, especially ones greater than \$1 million. To reconcile this problem, Schwartz proposes that cities continue to pay victims of police violence but impose financial sanctions on officers to achieve both the compensation and deterrence goals of § 1983 litigation.²³⁹ Financial sanctions for individual officers would directly disincentivize fatal policing while allow families to recover awarded damages in full. Ensuring that victims of police violence and their families actually receive damages is crucial for incentives to bring lawsuits in the first place.

Few jurisdictions have a model in place for ensuring that payouts carry adequate deterrent effects for their police department. Many police departments are indemnified for their litigation costs, passing those costs onto their jurisdiction's general budget.²⁴⁰ However, at least ten police departments have reported tangible financial consequences for their excess litigation costs.²⁴¹ For example, the Minnesota State Patrol reported that excess litigation and settlement costs have required the department to draw funds from other areas of its own budget and that planned purchases for equipment have been put on hold because of these extra costs.²⁴²

Schwartz has also identified a pattern in some jurisdictions that reinforces the deterrent effect of litigation on police misconduct.²⁴³ Some large police departments gather information from complaints, discovery, and final opinions to recommend policy proposals for systematically preventing similar misconduct.²⁴⁴ This practice of collecting information to prevent further lawsuits has created changes to departments. For example, the Los Angeles Sheriff's Department followed its board's recommendations after high-profile incidents and costly litigation by creating a Risk Management

237. *Police Indemnification*, *supra* note 52, at 912–13.

238. *Id.*

239. *How Governments Pay*, *supra* note 70, at 1209–10.

240. *Id.* at 1174.

241. *Id.* at 1180.

242. *Id.* at 1181.

243. *See What Police Learn*, *supra* note 204, at 844–45, 887–89.

244. *Id.* at 844–45.

Bureau and an Office of Independent Review, which is a civilian body that oversees internal investigations.²⁴⁵

While there are theoretical concerns over the deterrent effect of making government pay for civil litigation, empirical research finds that, in certain circumstances, the deterrent effect is strong. This Article's proposal of additional costs to civil litigation would expedite the decision of cities to offload their payments of police misconduct litigation costs onto police department budgets. Furthermore, once budgets of police departments more fully internalize litigation costs, the deterrent effect of this proposal will strengthen. To this extent, this Article supports shifting police misconduct litigation costs from general police department budgets to financial sanctions against individual officers.²⁴⁶

There are multiple models for how police departments can and should bear their litigation costs.²⁴⁷ Cities that want the strongest deterrent effect could force police departments to fully internalize their litigation costs. Police departments that exceed their allotted budget for litigation costs would have to draw funds from elsewhere in their budget. These police departments would be incentivized to reduce litigation costs and the incidents that cause litigation not only to avoid budgeting shortfalls, but also to retain unused litigation funds. Cities that do not wish to put such financial risks onto their police departments could cover litigation costs exceeding an amount specified from the department's budget. Such partial indemnification would be a weaker deterrent than imposing the entirety of the litigation costs on the police department.

IV. CONCLUSION

There must be major changes to the structure, budgeting, and culture of policing for reforms to succeed in drastically reducing police violence. To achieve this goal, courts, legislators, and police departments should "work on parallel tracks."²⁴⁸ This Article has highlighted various nonjudicial reforms that other legal scholars have recommended. In parallel with those reforms, judicial reforms that increase both the access to damages and the amount of damages can expedite these reforms and reduce police violence.

The judicial reforms to police violence center around families of victims receiving damages awards at trial. While most payouts to victims of police violence come via settlements, these settlements are based on expectations of possible awards at trial. Previous work has shown that in wrongful death cases that the plaintiff wins, jury verdicts and settlements

245. *Id.* at 849–50.

246. *See How Governments Pay*, *supra* note 70, at 1208–10; *Police Indemnification*, *supra* note 52, at 953–55.

247. *See How Governments Pay*, *supra* note 70, at 1207–11; *id.* app. A at 1212–23.

248. *See* Christy E. Lopez, *Defund the Police? Here's What that Really Means*, WASH. POST (June 7, 2020), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means>.

are usually less than \$1 million.²⁴⁹ When the wrongful death case is due to police misconduct, that payout is even smaller due to the legal hurdles necessary to win damages against police.²⁵⁰ These payouts supposedly act as a deterrent to further fatal policing, but they are far below \$11 million, which is roughly what government agencies use to monetize and deter mortality risk reductions in accordance with the VSL. Since most cases of fatal policing which end with damages awards can satisfy standards for punitive damages, we have proposed that courts use punitive damages to ensure damages awards more adequately deter fatal policing.²⁵¹ While increasing amounts of damages awards will more fully compensate families of victims that receive payouts, still too many victims of police violence will be denied access to damages. To ensure greater access to damages, courts should also limit the scope of qualified immunity. This Article joins the chorus of voices from the legal community calling for the end of qualified immunity.²⁵²

With courts providing greater access to damages, and greater amounts of damages—based on empirically validated and commonly used methods—cities that normally indemnify the police will face greater monetary and political incentives to reform their police department. With these incentives, and with growing independent calls for policing reforms, cities will begin to enact nonjudicial reforms that can reduce fatal policing. Reforms discussed in this Article center around damages, and include increasing access to damages, and increasing the amount of damages, and placing larger financial burdens on police department budgets and individual officers following police misconduct litigation.

But beyond deterring police violence via financial incentives, other reforms show promise to directly reduce police violence. Further reforms advocated by legal scholars include demilitarizing the police, negotiating for police union contracts that allow for removal of problematic officers, reducing federal policing grants, and defunding police budgets to reassign social work away from police officers. Such reforms target policing in ways outside of financial incentives for traditional methods of deterrence. Instead, several versions of these reforms would represent transformational shifts in how our society values the role of policing. Making it easier to secure large damages amounts will lead municipalities to adopt reforms, many of which will decrease the likelihood of future fatal policing events. In their efforts to avoid these larger and more frequent payouts, cities will adopt the reforms that prove most effective in reducing police violence.

The *Washington Post*'s Fatal Force data show varying rates of fatal policing across states, suggesting local reforms are necessary to address

249. See 4 THOMSON REUTERS, *supra* note 161, at 7, 11; see also *supra* Part II; Viscusi & Jeffrey, *supra* note 67, at 773–75.

250. See 4 THOMSON REUTERS, *supra* note 161, at 12, 17; see also *supra* Part II; Viscusi & Jeffrey, *supra* note 67, at 775–78.

251. See Viscusi & Jeffrey, *supra* note 67, at 787–88.

252. See *supra* note 69 and accompanying text.

local policing problems.²⁵³ Some states and cities have implemented such reforms. For example, Taylor's family negotiated for reforms such as requiring all search warrants in writing and a monitoring system for problematic police officers.²⁵⁴ In April 2021, New Mexico prohibited the defense of qualified immunity, following Colorado's ban in June 2020.²⁵⁵

Legislative reforms at a national level have also begun to take shape but have recently stalled. The Democrat-controlled House passed a bill titled the George Floyd Justice in Policing Act, both in 2020 and in 2021.²⁵⁶ Each proposed legislation from Democrats in the House used identical language and aimed to make changes to hold police accountable in the courts, including limiting the scope of qualified immunity to increase access to damages by removing defenses of "good faith" and lack of clearly established rights.²⁵⁷ Such legislation can directly target qualified immunity, but courts view the doctrine of qualified immunity as largely one of judicial jurisprudence.²⁵⁸ While legislation may lower the number of successful uses of qualified immunity, courts may still remove or weaken the defense of qualified immunity.²⁵⁹

Another judicial reform to policing in this proposed legislation features the change from allowing fatal force when reasonable to only when necessary.²⁶⁰ It is unclear how this change will impact the analysis of courts. Currently, courts give great leeway to officers who use fatal force and to their "reasonable beliefs" that their life was in danger.²⁶¹ If an officer tells a court that they feared for their life, a court will likely find their use of force necessary. However, the change itself should serve as a signal to the judicial branch that more cases on the margin should be decided against police officers who simply claim they feared for their life.

The George Floyd Justice in Policing Act also seeks to ban chokeholds, ban no-knock warrants, require de-escalation before use of deadly

253. WASH. POST Database, *supra* note 45.

254. See Callimachi, *supra* note 28.

255. Daniele Selby, *New Mexico Is the Second State to Ban Qualified Immunity*, INNOCENCE PROJECT (Apr. 7, 2021), <https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability>.

256. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2d Sess. 2020). For a discussion on the recent stall of these legislative efforts, see Felicia Sonmez & Mike DeBonis, *No Deal on Bill to Overhaul Policing in Aftermath of Protests over Killing of Black Americans*, WASH. POST (Sept. 22, 2021, 7:35 PM), https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34b_story.html.

257. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2d Sess. 2020); see Sean Collins, *The House has Passed the George Floyd Justice in Policing Act*, VOX (Mar. 3, 2021), <https://www.vox.com/2021/3/3/22295856/george-floyd-justice-in-policing-act-2021-passed-house>.

258. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 81 (2018).

259. See *Case Against Q.I.*, *supra* note 69, at 1832–36 (discussing how the Supreme Court could overrule or revise qualified immunity or how lower courts can interpret qualified immunity reasonably, but more narrowly).

260. H.R. 7120 § 364(b)(3).

261. Viscusi & Jeffrey, *supra* note 67, at 756–57.

force, and condition federal grants on some of these requirements.²⁶² To the extent that these reforms can reduce fatal policing without deterring effective policing, such reforms serve a constructive role. Finally, the Act proposes lowering the standard for which police officers may be charged for violating an individual's constitutional rights.²⁶³ Currently, an officer violates an individual's rights under color of law if the officer is shown to have violated an individual's rights willfully, whereas the Act proposes to make that standard "knowingly or recklessly."²⁶⁴ This change in standard gives more power to courts. Here, courts can undertake an objective analysis of whether the violation of constitutional rights was reckless, without an inquiry into the subjective intent of the police officer. Of course, such a shift in power will face political challenges, and already police unions are seeking to prevent or limit these changes.²⁶⁵ While the George Floyd Justice in Policing Act passed the Democrat-controlled House, Senate Republicans prevented the bill from a vote in 2020 and have stalled the bill in 2021 as well.²⁶⁶

The clear video evidence of a white police officer fatally kneeling on the neck of a handcuffed Black man sparked a movement that is demanding change to American policing.²⁶⁷ The institution of policing needs reform to prevent, or at least reduce, further atrocities. Many prominent politicians and legal scholars have proposed reforms, and this Article suggests a further reform, aimed at enhancing the role of the judiciary. As legislative reforms unfold, courts should simultaneously update their methods of awarding damages in wrongful death suits from police misconduct to the VSL more accurately. This would provide meaningful financial and political incentives to encourage local governments to adopt reforms that most effectively deter fatal policing. Courts, like many powerful institutions, have an obligation to address this systemic police violence. These reforms strengthen the court's ability to satisfy that obligation and to deter fatal policing.

This Article's proposals for deterring fatal policing all rely on an ability to monitor fatal policing, to provide meaningful incentives to deter fatal policing, and to ascertain which reforms work and which do not. The first critical component of the fatal policing policy strategy is to establish a national database that provides a comprehensive census of killings by police, including information on the circumstances of the event and the

262. H.R. 1280 §§ 362–64.

263. *Id.* § 101.

264. *Id.*

265. Trevor Hunnicutt & Sarah N. Lynch, *Biden Pledged Police Reform, but Asking Congress to Act First*, REUTERS (Apr. 14, 2021, 4:16 AM), <https://www.reuters.com/world/us/biden-police-reform-pledge-faces-limits-presidential-power-2021-04-14>.

266. See Li Zhou, *The Uncertain Prospects for Police Reform in the Senate, Explained*, VOX (Apr. 22, 2021, 9:00 AM), <https://www.vox.com/22388199/george-floyd-police-reform-bill-senate-explained>.

267. Meredith Deliso, *Timeline: The Impact of George Floyd's Death in Minneapolis and Beyond*, ABC NEWS (Apr. 21, 2021, 1:35 PM), <https://abcnews.go.com/US/timeline-impact-george-floyds-death-minneapolis/story?id=70999322>.

demographic characteristics of the victim. That there is no such comprehensive informational base administered by a U.S. government agency is an appalling gap that impedes efforts to assess the scope of the killings by police and determine which efforts have been most productive in reducing killings by police. The second component of the fatal policing policy strategy is to make it feasible to create financial incentives to foster more responsible police behavior by ending the doctrine of qualified immunity. The current barriers to obtaining compensation for the deaths inflicted by police officers severely limit the role financial incentives can play. Third, in situations where deterrence of fatal policing is a paramount concern, the level of damages for the wrongful deaths of the victims of police should be based on the VSL so that the risk to life of those killed by the police will be given the same value as the value the government routinely places on reducing mortality risks. This set of proposals will not only serve to provide more meaningful levels of compensation to the families of the deceased but will also serve to communicate to municipalities the severity of the harms caused by the police and the importance of rectifying this behavior.

APPENDIX: SOURCES FOR POLICE SHOOTING VICTIMS IN TABLES 7 & 8

Name	Payout (\$)
Settlements	
Justine Damond ²⁶⁸	20,000,000
William Green ²⁶⁹	20,000,000
LaTanya Haggerty ²⁷⁰	18,000,000
Bettie Jones ²⁷¹	16,000,000
Breonna Taylor ²⁷²	12,000,000
Walter Scott ²⁷³	6,500,000
Danroy Henry Jr. ²⁷⁴	6,000,000
Tamir Rice ²⁷⁵	6,000,000

268. WCCO, *Judge Approves \$20M Settlement for Justine Ruzczyk Damond's Family*, CBS MINN. (June 25, 2019, 11:13 AM), <https://minnesota.cbslocal.com/2019/06/25/judge-approves-20m-settlement-for-justine-ruzczyk-damonds-family/> [<https://perma.cc/GX5L-DLVT>].

269. Heather Murphy, *\$20 Million Settlement Reached in Officer's Fatal Shooting of Handcuffed Man*, N.Y. TIMES (Sept. 28, 2020), <https://www.nytimes.com/2020/09/28/us/william-green-settlement.html>.

270. Timothy Williams & Mitch Smith, *\$16 Million vs. \$4: In Fatal Police Shootings, Payouts Vary Widely*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/police-shootings-payouts.html> [<https://perma.cc/W59L-NSZ4>].

271. *Id.*

272. Rukmini Callimachi, *Breonna Taylor's Family to Receive \$12 Million Settlement From City of Louisville*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html>.

273. Greg Botelho & Sonia Moghe, *North Charleston Reaches \$6.5 Million Settlement with Family of Walter Scott*, CNN (Oct. 9, 2015, 1:05 AM), <https://www.cnn.com/2015/10/08/us/walter-scott-north-charleston-settlement/index.html>.

274. Ryllie Danylko, *Tamir Rice Settlement: How Cleveland's \$6 Million Payout Compares with Similar Cases in US*, CLEVELAND.COM (May 19, 2019, 1:44 PM), https://www.cleveland.com/metro/2016/04/how_the_tamir_rice_settlement.html [<https://perma.cc/8MVQ-2AVW>].

275. *Id.*

Eric Harris ²⁷⁶	6,000,000
James Boyd ²⁷⁷	5,000,000
Laquan McDonald ²⁷⁸	5,000,000
Kathryn Johnston ²⁷⁹	4,900,000
Samuel Dubose ²⁸⁰	4,850,000
Flint Farmer ²⁸¹	4,100,000
Miles Hall ²⁸²	4,000,000
Ramarley Graham ²⁸³	3,900,000
Esau Castellanos ²⁸⁴	3,750,000
Sean Bell ²⁸⁵	3,250,000
John Geer ²⁸⁶	2,950,000
Amadou Diallo ²⁸⁷	3,000,000
Philando Castile ²⁸⁸	3,000,000
Cedrik Chatman ²⁸⁹	3,000,000
Ryan Whitaker ²⁹⁰	3,000,000
Oscar Grant ²⁹¹	2,800,000
Tarika Wilson ²⁹²	2,500,000

276. Corey Jones, *Tulsa County Settles Eric Harris Excessive Force Lawsuit for \$6 Million Days After Robert Bates Renews Appeal*, TULSA WORLD (Mar. 9, 2018), https://tulsaworld.com/news/local/crime-and-courts/tulsa-county-settles-eric-harris-excessive-force-lawsuit-for-6-million-days-after-robert-bates/article_3305adab-79c2-5fa9-8003-73207eb82424.html.

277. Steven Rich, Derek Hawkins, & Scott Higham, *Fatal Shootings by Police Lead to a Wide Range of Settlements for Families*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/graphics/investigations/police-shootings-civil-suits/> [<https://perma.cc/GQM9-V3FB>].

278. Williams & Smith, *supra* note 270.

279. Rich et al., *supra* note 277.

280. Sheryl Gay Stolberg, *University of Cincinnati to Pay \$4.85 Million to Family of Man Killed by Officer*, N.Y. TIMES (Jan. 18, 2016), <https://www.nytimes.com/2016/01/19/us/university-of-cincinnati-to-pay-4-85-million-to-family-of-man-killed-by-officer.html> [<https://perma.cc/5ZQY-YAGB>].

281. Stacy St. Clair & Jeremy Goner, *Chicago Set to Pay \$4.1 Million in Police Shooting*, CHI. TRIB. (Feb. 9, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-02-09-ct-met-chicago-cop-settlement-20130209-story.html> [<https://perma.cc/KLF7-Q5ZB>].

282. Johnny Diaz & Maria Cramer, *City in California Reaches \$4 Million Settlement in Fatal Police Shooting*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/us/miles-hall-shooting-walnut-creek.html>.

283. Rich et al., *supra* note 277.

284. Ted Cox, *\$3.75M Settlement Approved for Fatal Police Shooting of Esau Castellanos*, DNAINFO: CHI. (July 19, 2016, 4:06 PM), <https://www.dnainfo.com/chicago/20160719/downtown/375m-settlement-approved-for-fatal-police-shooting-of-esau-castellanos> [<https://perma.cc/23PJ-XBJS>].

285. Williams & Smith, *supra* note 270.

286. Rich et al., *supra* note 277.

287. Williams & Smith, *supra* note 270.

288. *Id.*

289. Fran Spielman, *\$3 Million Settlement to Family of Teen Shot by Chicago Police*, CHI. SUN TIMES (Dec. 9, 2016, 5:13 PM), <https://chicago.suntimes.com/2016/12/9/18334765/3-million-settlement-to-family-of-teen-shot-by-chicago-police> [<https://perma.cc/EY4Z-3BL2>].

290. Rudy Rivas, *Phoenix Approves \$3 Million Settlement to Family of Man Shot and Killed by Police*, AZ FAM. (Dec. 2, 2020), https://www.azfamily.com/news/phoenix-approves-3-million-settlement-to-family-of-man-shot-and-killed-by-police/article_9e670f58-34e9-11eb-bf8c-1f3e8aa2264b.html.

291. Brakkton Booker, *California District Attorney Says Probe of Oscar Grant Killing Will Be Reopened*, NPR (Oct. 6, 2020, 6:05 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/06/920895464/california-district-attorney-says-probe-of-oscar-grant-killing-will-be-reopened>.

292. Danylko, *supra* note 274.

Emil Mann ²⁹³	2,420,000
Stephon Clark ²⁹⁴	2,400,000
MiChance Dunlap-Gittens ²⁹⁵	2,250,000
Jonathan Ferrell ²⁹⁶	2,250,000
Emmanuel Lopez ²⁹⁷	2,200,000
Davinian Williams ²⁹⁸	1,900,000
Jashon Bryant ²⁹⁹	1,625,000
Timothy Russell ³⁰⁰	1,500,000
Malissa Williams ³⁰¹	1,500,000
Michael Brown ³⁰²	1,500,000
Danielle Willard ³⁰³	1,400,000
Anthony Smith ³⁰⁴	1,400,000
Paul Childs ³⁰⁵	1,300,000
Larry Jackson Jr. ³⁰⁶	1,250,000
Aaron Campbell ³⁰⁷	1,200,000
Ernest Satterwhite ³⁰⁸	1,200,000
Yvette Smith ³⁰⁹	1,200,000

293. Rich et al., *supra* note 277.

294. Neil Vigdor, *Stephon Clark's Sons Reach \$2.4 Million Settlement Over Police Killing*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/us/stephon-clark-shooting-settlement.html>.

295. Christine Hauser, *King County in Washington Agrees to \$2.25 Million Settlement in Teen's Shooting*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/us/king-county-shooting-lawsuit-settlement.html>.

296. Michael Gordon, *Charlotte Settles with Jonathan Ferrell's Family for \$2.25 Million in Police Shooting*, THE CHARLOTTE OBSERVER (May 15, 2015, 9:36 AM), <https://www.charlotte-observer.com/news/local/crime/article20983929.html>.

297. Justin Madden, *Chicago to Pay \$3.2 Million to Settle Two Fatal Police Shooting Cases*, REUTERS (May 18, 2016, 3:25 PM), <https://www.reuters.com/article/us-chicago-police-idUSKCN0Y92XD> [<https://perma.cc/W6W6-A6D2>].

298. Ben Conarck, *City of Jacksonville Reaches \$1.9 Million Settlement in Fatal Shooting of Unarmed Man During Traffic Stop*, FLA. TIMES-UNION (Apr. 13, 2017, 11:08 AM), <https://www.jacksonville.com/news/metro/public-safety/2017-04-13/city-jacksonville-reaches-19-million-settlement-fatal-shooting>.

299. Kevin Brookman, *City to Pay Estate of Jashon Bryant \$1,625,000*, WE THE PEOPLE (Mar. 21, 2012), <http://wethepeoplehartford.blogspot.com/2012/03/city-to-pay-estate-of-jashon-bryant.html>.

300. Danylko, *supra* note 274.

301. *Id.*

302. Williams & Smith, *supra* note 270.

303. Rich et al., *supra* note 277.

304. Robert Patrick, *After Claims of Withheld Evidence, New \$500k Settlement for Family of Man Killed by Jason Stockley*, ST. LOUIS POST-DISPATCH (Dec. 7, 2018), https://www.stltoday.com/news/local/crime-and-courts/after-claims-of-withheld-evidence-new-k-settlement-for-family/article_ba30e41e-93ec-574d-bc75-04dae117bea3.html [<https://perma.cc/P4XP-EC68>].

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306. Rich et al., *supra* note 277.

307. Sarah Mirk, *City Pays Family of Aaron Campbell \$1.2 Million, Largest Payment Ever for Claim Against Police*, PORTLAND MERCURY (Feb. 1, 2012, 11:09 AM), <https://www.portlandmercury.com/BlogtownPDX/archives/2012/02/01/breaking-city-pays-family-of-aaron-campbell-12-million-largest-payment-ever-for-claim-against-police>.

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309. *Id.*

Jason Kemp ³¹⁰	1,100,000
Joseph Erin Hamley ³¹¹	1,000,000
Keith Vidal ³¹²	1,000,000
Ryan Rogers ³¹³	1,000,000
Lane Martin ³¹⁴	975,000
Dakota Bright ³¹⁵	925,000
Willie Miller ³¹⁶	750,000
Niles Meservey ³¹⁷	500,000
Bernard Bailey ³¹⁸	400,000
Bobby Stacy ³¹⁹	375,000
Edward Lamont Hunt ³²⁰	375,000
Patricia Ann Cook ³²¹	300,000
Roy Glenn Jr. ³²²	209,000
Rickey Childs ³²³	100,000
Warren Robinson ³²⁴	100,000
Tatioun Williams ³²⁵	100,000
Eric Williams ³²⁶	85,000
William Sheffield ³²⁷	75,000

310. *Id.*

311. *Id.*

312. F.T. Norton Staff, *Civil Lawsuit Settled for \$1 Million in Case of Teen Killed by Police*, STAR NEWS ONLINE (Mar. 14, 2017, 5:17 PM), <https://www.starnewsonline.com/news/20170314/civil-lawsuit-settled-for-1-million-in-case-of-teen-killed-by-police> [<https://perma.cc/7ZEE-U7VH>].

313. Madden, *supra* note 297.

314. Alex Zielinski, *Portland Pays \$975,000 Settlement to Family of Man Slain by Police*, PORTLAND MERCURY (Sept. 9, 2020, 12:34 PM), <https://www.portlandmercury.com/blog-town/2020/09/09/28811506/portland-pays-975000-settlement-to-family-of-man-slain-by-police>.

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317. Rich et al., *supra* note 277.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. Jonah Newman, *Settling for Misconduct, Case 13-CV-7541*, CHI. REP., <http://projects.chicagoreporter.com/settlements/case/13-cv-7541/> (last visited Oct. 22, 2021) [<https://perma.cc/JH29-4R74>].

324. Carol Marin & Don Moseley, *City of Chicago Withholds Documents Involving Police Shooting of a Minor*, NBC 5 CHI. (Apr. 18, 2017, 6:25 PM), <https://www.nbcchicago.com/news/local/chicago-withholds-documents-involving-police-shooting-of-a-minor/12125/> [<https://perma.cc/MS64-CM65>].

325. Jonah Newman, *Settling for Misconduct, Case 12-CV-4118*, CHI. REP., <http://projects.chicagoreporter.com/settlements/case/12-cv-4118/> (last visited Oct. 22, 2021) [<https://perma.cc/A6BS-HAQU>].

326. Rich et al., *supra* note 277.

327. *Id.*

Arthur Hutchinson ³²⁸	60,000
Angelo Miller ³²⁹	35,000
Vincent Smith Jr. ³³⁰	7,500
	Original Compensa- tory Jury Verdict
Jury Verdicts	
Prince Jones ³³¹	3,700,000
Malcolm Ferguson ³³²	3,500,000
Mohamed Bah ³³³	2,200,000
Alfontish Cockerham ³³⁴	1,180,000
Quintonio Legrier ³³⁵	1,050,000
Zachary Snyder ³³⁶	1,000,000
Korryn Gaines ³³⁷	300,000
James Ahern ³³⁸	20,000
Gregory Hill ³³⁹	4

328. Jonah Newman, *Settling for Misconduct, Case 00-L-5230*, CHI. REP., <http://projects.chicagoreporter.com/settlements/case/00-l-5230/> (last visited Oct. 22, 2021) [<https://perma.cc/23AZ-FGKY>]; see also Carri Karuhn, *Protesters Call for Probe in Killing of Homeless Man*, CHI. TRIB. (Mar. 20, 2000), <https://www.chicagotribune.com/news/ct-xpm-2000-03-20-0003200157-story.html> [<https://perma.cc/97HZ-YDQQ>].

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335. Williams & Smith, *supra* note 270.

336. Rich et al., *supra* note 277.

337. Jacobs, *supra* note 171. While the total original compensatory verdict was over \$38 million, the estate of Korryn Gaines received only \$300,000, with most of the compensatory award going towards her son. *Id.*

338. Rich et al., *supra* note 277.

339. Julia Dahl, *Attorney: \$4 Verdict Meant to "Punish" Family of Man Shot by Police in his Garage*, CBS NEWS (June 2, 2018, 2:51 PM), <https://www.cbsnews.com/news/gregory-hill-case-attorney-4-dollar-verdict-in-police-shooting-meant-to-punish-family-for-bringing-case/>.