



George Floyd and the Future of Police Misconduct

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June 1, 2020

The death of George Floyd at the hands of a cop with a history of excessive force complaints has spurred protests, demonstrations, and riots across the nation. Unfortunately, the violence some protesters have unleashed on these cities is likely to exacerbate existing cultural and political schisms, making meaningful policy reform even more difficult. In fact, the violence and destruction is leaving deep scars on the urban landscape.

Restoring these places—which include scores of small businesses with deep roots in their cities and neighborhoods—is unlikely without a re-affirmed commitment to the just application of the rule of law to protect persons and property, particularly minorities. Indeed, George Floyd’s death may well be an example of the tragic effects of treating some individuals differently based on prejudice and unwarranted fear.

Ironically, the nation has made little progress on police brutality and the unequal application of its laws despite heightened awareness of the racial inequities associated with mass incarceration and law-enforcement tactics. But this persistent inequity and injustice does not have to be the case in the aftermath of George Floyd’s killing. Policy proposals are emerging that may well help move this discussion, and reform, meaningfully along. In the process, we can make progress toward a just application of the rule of law.

Racism and the Drug War

First of all, many people of good will are simply unaware of the actual racist origins of the U.S.’s “progressive,” 140-year war on drugs and that this history is well established. (I review these origins in my 1992 book, *Drug Policy and the Decline of American Cities*.) Legally, the “war” was a slow burn, beginning with the anti-Chinese sentiment that led to prohibition on opium imports in 1880. Then, the prohibition effort extended to marijuana, using racist tropes about its effect on Mexican immigrants in the 1930s. The war’s most recent iteration saw a dramatic ramp

up in incarceration beginning with Richard Nixon’s presidency. Ronald Reagan officially dubbed it a “war” in the early 1980s and doubled down with harsh sentencing laws and dramatically expanded the numbers of felony crimes.

The nation hasn’t looked back. The nation’s jails, prisons, and federal correctional facilities now house more than 2 million Americans. America accounts for about 25% of the world’s total imprisoned population.

But the drug war is only part of the problem. Fordham University professor John Pfaff, author of *Locked In: The True Causes of Mass Incarceration and How to Achieve Reform*, lays some of blame on overcharging by prosecutors (district attorneys) responding to unfounded fears in the community at large. A “tough on crime” political ethic has led to systems that put a premium on incarcerating suspected offenders rather than addressing the root causes of the offense, “restoring” or reintegrating ex-offenders back into the mainstream, or even achieving justice.

Prosecutorial Misconduct

The vast majority of convictions result from plea bargaining, which significantly disadvantages poor, minorities, and other marginalized populations. Without access to adequate legal representation, a “bargain” that included pleading “guilty” to a lesser crime with a short sentence, even if someone did not commit the crime, looks better than the even scarier outcome if a jury fails to acquit you of a dozen or more charges. Even without structural racism, our prisons would be disproportionately populated by minorities and the poor by pure socioeconomics (which are correlated but independent effects).

“Structural racism,” however, *is* at play, but because of government mandates. This case is powerfully made in the award-winning 2016 documentary film *13th* (now streaming on Netflix). The film’s title—*13th*—refers to the Thirteenth Amendment to the U.S. Constitution, which barred slavery. Specifically, the text reads “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

The movie seems to suggest that if we simply remove the clause “except as a punishment for a crime,” then the racist nature of the criminal justice system would be undermined. But this implies to a typical American reader that prisons themselves would have to be abolished, even for those who commit crimes. Abolishing all prisons or forms of incarceration is a nonstarter for the vast majority of Americans. The movie offers no resolution to this dilemma. As a result, the film, like the current protests over the killing of unarmed black men, provides little insight into practical steps toward reform.

Practical Policy Reforms to Reduce Police Brutality

Which brings us back to George Floyd and police brutality. If we continue to believe that at least some people who commit crimes must be removed from society—incarcerated—how do we address obvious racial inequities, let alone police brutality against minorities and the poor?

Several organizations have been mobilizing for decades to roll back destructive mandatory minimums and three strikes sentencing laws. These laws have incarcerated hundreds of thousands of nonviolent offenders with little social benefit (see [here](#) and [here](#) for summaries of

the issue). Moreover, while reform in these areas would reduce the “in take,” they don’t address police brutality per se.

Enter [Rashawn Ray](#), a sociologist and David M. Rubenstein Fellow in Governance Studies at the Brookings Institution. [Ray argues that two reforms](#) could have a meaningful impact on law enforcement agencies and reduce police brutality. First, an officer’s previous work history should be part of the hiring process. If an officer was dismissed from their previous job for excessive force or inappropriate conduct, they should be barred from being hired back into law enforcement.

Second, and perhaps more important (because it also addresses the first recommendation), Ray argues law enforcement agencies should not use taxpayer funds to compensate victims of police misconduct—civil payments. Instead, law enforcement agencies should, like doctors and other professionals, buy the equivalent of private malpractice insurance. Then, their insurance premiums would reflect the relative risk the departments face from institutionalized misconduct. Minimizing conflict with the community and suspected offenders becomes a fiscal and strategic priority within the agency. Minorities will be direct beneficiaries of this change in policy.

Another policy reform I would add to the list would be rolling back [qualified immunity](#), a legal shield created by the U.S. Supreme Court for police officers (and other state actors) even if they violate the law. This threshold has made it very difficult to prosecute police officers for criminal acts even when they violate the constitutional rights of a suspect. According to the Cato Institute’s Jay Schweikert, [the U.S. Supreme Court may be ready to review several cases](#) that might challenge this judicial doctrine (which is not constitutionally based). (See also the work by the [Institute for Justice](#).)

Time for Law Enforcement Agencies to Step Up

In the meantime, law enforcement agencies can impose their own standards. They could, for example, adopt minimally necessary force guidelines for arresting suspects. This step would put the emphasis on deescalation and prompt questions about whether the force needed to arrest a suspect is commensurate with the crime. A violent criminal suspect, for example, with a warrant for their arrest might properly require a higher level of force compared to someone pulled over for a traffic violation, or, in the case of George Floyd, is suspected of passing a forged \$20 bill.

Protest movements, whether the Tea Party or Black Lives Matter, can be quite effective at tearing institutions down. What they don’t do effectively is build, or reconstruct, just institutions. The unfortunate side-effects of the current protests put the deficiencies of mass protest in start relief.

In almost all cases the protests started peacefully. Many, however, degenerated into chaotic and violent riots as looters and anti-establishment groups hijacked the demonstrations for their own disruptive political and personal purposes. Blocks of businesses have been destroyed and pillaged, including small businesses that have served as cultural connections to our past and bulwarks against decline. Some people have even been killed protecting their personal property from looters.

Rebuilding civil society will be a critical task in the aftermath of the George Floyd riots. This task will be left to the policy experts and elected officials. But reconstructing just institutions can't even begin unless we have solid proposals for what the building blocks for reform are. Addressing police brutality and its racial consequences is one step on that long-term path toward reform and restoration.