

The Police Governance Project: A Prospectus¹

“Culture eats policy for breakfast.”²

Prologue

On his first night as a police officer at the 77th Los Angeles precinct in 1965, Frank Pinter was preparing to go out on patrol when a fellow officer called out: “LSMFT.” Pinter looked quizzically at his partner, who responded: “Let’s shoot a motherfucker tonight! Got your nigger knocker all shined up?”³

55 years later, on May 25, 2020, after arresting George Floyd and placing him on the ground with handcuffs behind his back, Derek Chauvin of the Minneapolis Police Department puts his knee on Floyd’s neck, pushing down with his full weight for 8 minutes and 46 seconds until Floyd was dead, all while looking nonchalantly into a video camera that recorded the incident.⁴

Following nationwide demonstrations in response to the lynching of George Floyd, three Wilmington, NC police officers are fired after a routine audit turns up a video recording containing statements of obscene, violent, and hateful speech directed at African Americans generally as well as at an African American magistrate. One of the officers says, ““We are just going to go out and start slaughtering them f — ni — . I can’t wait. God, I can’t wait.””⁵

Summary of Rationale and Objectives of this Project

1. Municipal police departments in the United States and their historical predecessors have never been fully under legal and political control. The informal and institutional components of their internal governance systems enable, condone, and protect criminal conduct by police officers and significantly undermine the police mission of promoting public order, assuring compliance

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² “Within a Police Department, culture eats policy for breakfast. You can have a perfectly worded policy, but it’s meaningless if it just exists on paper.” Former Chief of Police J. Scott Thomson in a panel discussion reported in “[Policing in America is Broken and Must Change. But How?](#)” *NY Times Magazine* (June 13, 2020).

³ Robert Conot, *Rivers of Blood Years of Darkness* 40 (Bantam Books, 1967), the definitive record of the Los Angeles Revolt of 1965. A “N**** knocker” is a baton. During the 50’s and 60’s, packages of Lucky Strike cigarettes bore the legend LSMFT on the bottom. It stood for Lucky Strike Means Fine Tobacco, but young boys made up different meanings such as Let’s Sitdown My Feet are Tired.

⁴ See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, “[How George Floyd Was Killed in Police Custody](#),” *New York Times* (May 31, 2020).

⁵ Michael Praats, “Fired Wilmington cop: [“We are just going to go out and start slaughtering them f — ni — . I can’t wait. God, I can’t wait.”](#)” *Port City Daily* (June 24, 2020).

with law, and protection from predation and violence with minimal physical force and in accordance with their fiduciary duties to the state.

2. The governance systems of municipal police departments continue to reflect, express, and perpetuate the ideological and institutional vestiges of slavery, Jim Crow, and a modern caste system that denigrates, subjugates, and humiliates people of color.
3. A non-profit organization could contribute to solving these problems by (a) developing ways to eliminate the vestiges of slavery from the internal governance systems of municipal police departments, (b) developing a model law of policing that could be adopted by all 50 states, and (c) developing a code of professional responsibility for compliance and protection officers at all levels and in all agencies of federal and state government.
4. Working with allies and partners among police-related associations, established and emerging organizations that work to eliminate the vestiges of slavery, bar associations, scholars and academic institutions, and the Uniform Law Commission, the **Policing the Police Project** will build a national organization with local chapters throughout the United States dedicated to eliminating the ideological vestiges of slavery from governmental institutions and society at large, developing a model law of policing, and drafting a code of professional responsibility for compliance and protection agents at all levels of government. In short, the goal is to subordinate the agents of the state's police power to the Rule of Law.⁶

The Factual Bases for this Project

Going back as far as documentary evidence takes us (ca. 600 CE), there has never been a time when any American state or our ancestors in England had a written system of controlling the means and methods of establishing public order, compliance with law, and protection from violent harm – namely, sheriffs, constables, coroners, justices of the peace, bailiffs, tithing men, watchmen, slave patrols, and our contemporary municipal police departments and officers. We have never had a thoroughgoing law of policing, that is, a comprehensive and integrated set of statutes that (a) defined the purpose and mission of a police force (laying out what it was (i) required to do, (ii) prohibited from doing, and (iii) allowed to do under specified conditions) and (b) that provided control mechanisms of accountability as well as incentives and disincentives to assure

⁶ “The Rule of Law” is more than a catch phrase to express opposition to the rule of a king or the arbitrary whims of an executive. The concept has roots as far back as Aristotle, and the realization of polities governed by law has a history reaching back at least to *Magna Carta* in Medieval England. See, e.g., Tom Bingham, *The Rule of Law* (Penguin Books, 2011); Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004).

compliance with the law.⁷ To Juvenal's historic question, "quis custodiet ipsos custodes? – Who watches the watchmen themselves?" our societal answer throughout Anglo-American history has been, for the most part, "not much of anyone; certainly, not the legislatures."⁸

Yet, throughout this history there is abundant evidence that those exercising the internal police function have frequently abused the trust placed in them as fiduciaries of the state (a) by engaging in criminal acts themselves, including extortion, bribery, theft, perjury, battery, rape, and murder, by engaging in torture, sadistic brutality, and other forms of excessive and illegal force, and (b) by law enforcement practices biased in favor of ingroups and against outgroups, particularly against people of color.⁹

⁷ See, e.g., William Alfred Morris, *The Medieval English Sheriff* 10-14 (Manchester University Press, 1927); Markus Dirk Dubber, *The Police Power* 81 (Columbia University Press, 2005, Kindle Edition) ("For centuries, it has been a commonplace of American legal and political discourse that the police power 'is, and must be from its very nature, incapable of any very exact definition or limitation.')(citation omitted); Samuel E. Walker and Carol A. Archbold, *The New World of Police Accountability* (SAGE Publications, 2020, Kindle Edition); David Alan Sklansky, "Police and Democracy," 103 Mich. L. Rev. 1699 (2005); Joe Soss and Vesla Weaver, "Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities," 20 Annu. Rev. Polit. Sci. 565-91 (2017). Randy Means, *The Law of Policing* (LRIS Publications, 2014) consists of a summary of court opinions on the 4th Amendment as applied to police conduct of searches and seizures. It does not describe a law of policing as envisioned by this project. Seth W. Stoughton, Jeffrey J. Noble, and Geoffrey P. Alpert, *Evaluating Police Uses of Force* (NYU Press, 2020, Kindle Edition), is a comprehensive presentation and discussion of the dozens of state laws and thousands of administrative policies that govern the use of force by municipal police officers. It may come closest to a study of the law of policing of anything we have; but it covers only the use of force, not the full spectrum of what a law governing police should address.

⁸ Police *governance* should not be confused with police *power*, which is the power of a social system, including a state or municipality, to establish public order and compel compliance with its norms, rules, and laws through agencies created for that purpose. Philosophers and others have studied and debated police power since at least Plato's *Republic*, with 18th-century political leaders referring to it as the "internal police" in state constitutions. See, e.g., Vermont Constitution, Art. 4 ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the **internal police** of the same.")(emphasis added); Christopher G. Tiedeman, *A Treatise On The Limitations Of Police Power In The United States Considered From Both A Civil And Criminal Standpoint* 1-2 (F.H. Thomas Law Book Co., 1886)("Nature wars upon nature , when subjected to no spiritual or moral restraint. The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. . . . The power of the government to impose this restraint is called Police Power"); Georg F.W. Hegel, "Die Polizei und Korporation," in *Philosophie des Rechts* §§ 230-256 (1821); Randy E. Barnett, "The Proper Scope of the Police Power," 79 *Notre Dame L. Rev.* 429 (2004). Instead of "police power," Locke uses the term "executive power" with the same meaning. See John Locke, *Second Treatise of Government* ch. 12 (1689.)

But debating the extent and limitations of the state's police power is not the same as examining and understanding the *exercise* of that power through various state agencies, including municipal police departments. About *how* the police power is actually carried out – what the agents of government in fact do to effectuate the political will as set forth in legislative acts – political scientists, sociologists, philosophers, and legislators have been largely silent.

⁹ Beginning with the 5-volume Lexow Committee Report of 1894 (Report and Proceedings of the Senate Committee Appointed to Investigate The Police Department of the City of New York) up to the

Whatever the particular form they have taken over the last 1,400 years, internal police forces have always been instruments of the dominant classes, castes, and interests (thegns, lords, kings, colonialists, slave owners, capital, corporate interests, dominant classes and castes) to control and subjugate lower classes and castes, particularly people of color.¹⁰

General laws granting protection from unreasonable searches and seizures, due process, right to counsel, and equality (e.g., the 4th, 5th, 6th, and 14th Amendments, civil rights statutes) have not been effective in preventing this abuse of power. The Constitution is not self-executing, and the exclusionary rule has not stopped Constitutional violations but rather led to more testilying.¹¹ Through police unions and entrenched informal governance systems (a/k/a culture), municipal police departments have become their own state within a state, largely beyond the control of mayors, prosecutors, and governors.¹² For the most part, state legislatures have abdicated their responsibility to exercise control of agencies authorized to use deadly force in any comprehensive way.

Presidential Commission on Law Enforcement and the Administration of Justice, appointed on January 21, 2020, over 25 city, state, and federal blue ribbon commissions have investigated and documented criminal activity in police departments, including those crimes listed above and others. For example, the Lexow Committee uncovered police involvement in extortion, bribery, counterfeiting, voter intimidation, election fraud, brutality, and scams. A list of the commissions and a summary of their findings will be available in the companion study to this project, *Don't Blame the Cops: A Brief Introduction to Governance Systems in Police Departments* (forthcoming). See also Michael J. Palmiotto, *Police Misconduct: A Reader for the 21st Century* (Prentice Hall, 2001).

¹⁰ A comprehensive history of the means and methods of policing as distinguished from the history of law has yet to be written. Such a history will need to start with the patriarchal governance of households – the *pater familias* – during the early Anglo-Saxon period following the departure of the Romans from Briton, that is, 410 CE, Cf. Dubber, *The Police Power*, *supra*, and the stewards (*gerefa*) of large estates during the late 5th and 6th centuries. The latter eventually became the *scirefa* (sheriffs) of counties (*scira*), responsible, among other things, for collecting taxes, presiding over the *folkmote* (local court), and keeping the King's Peace. On the history of sheriffs, see Morris, *The Medieval English Sheriff*, *supra*, at 1-16; on the King's Peace, see, e.g., Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* 44-45 (Cambridge Univ. Press, 1968, first ed., 1895).

¹¹ See, e.g., Charles M. Sevilla, "The Exclusionary Rule and Police Perjury," *II San Diego L. Rev.* 839, 839-40 (1974) ("For the most part, police perjury in courtrooms of the United States is recognized by the defense bar, winked at by the prosecution, ignored by the judiciary, and unknown to the general public."); William Geller, "Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives," 1975 *Wash. Univ. L. Quart.* 621, 673 ("The effect of the exclusionary rule in search and seizure cases is not deterrence but perjury.") (citation omitted); Bennett Capers, "Crime, Legitimacy, and Testilying," 83 *Ind. L.J.* 835 (2008); Joseph Goldstein, "'Testilying' by Police: A Stubborn Problem," *New York Times* (March 18, 2018).

¹² On the impact of police unions, see, e.g., Mark P. Thomas and Steven Tufts, "Blue Solidarity: Police Unions, Race and Authoritarian Populism in North America," 34 *Work, Employment and Society* 126 (2019); James Surowiecki, "Why Are Police Unions Blocking Reform?" *The New Yorker* (Oct. 2, 2016); Mark Iris, "Police Discipline in Chicago: Arbitration or Arbitrary," 89 *J. Crim. Law and Criminology* 215 (1998); Melissa Morabito, "American Police Unions: A Hindrance or Help to Innovation?" 37 *Int'l J. Public Adm.* 773 (2014). The informal governance systems (a/k/a culture) are the subject of *Don't Blame the Cops*, *supra*.

How we got here

Just as it is important not to blame individual officers or even police departments for the current state of affairs, so too must we reject the notion that the mess is the fault of current members of society. “YAHWEH is longsuffering and abundant in mercy, forgiving iniquity and transgression; but He by no means clears the guilty, visiting the iniquity of the fathers on the children to the third and fourth generation.”¹³ The problem of the abuse of the police power by both those who wield political power and by state agents – particularly with respect to the vestiges of slavery, Jim Crow, and invidious discrimination – has its roots in choices our ancestors made centuries back. We are who we are because we were who we were. *Our* responsibility is to renounce, reject, and overcome that evil heritage. Failing to do that makes us complicit in the crimes of the past.

The Vision

By bringing together stakeholders from a wide range of communities and organizations, the Policing the Police Project will help work to (a) eliminate the vestiges of slavery and other forms of subjugation of people of color in our society, (b) create a uniform law of policing, and (c) develop a model code of professional responsibility for police and police departments, all of which together will help transform municipal police departments and eventually criminal justice systems into agencies that insure domestic tranquility, provide for protection from predation and violence, promote the general welfare, and secure the blessings of liberty to all residents and visitors of the United States. Our goal is to bring agencies of the state’s police power under the Rule of Law.

Next Steps

Begin: Form a committee to develop the concept further.

Next: Genchi Genbutsu (go and see). Interview stakeholders (community members, police officers, politicians, religious leaders, etc.) to get a better understanding of the problems.

Next: Revise the concept, share it with a larger circle of potential project members, and get their input.

Next: Begin the organization process

¹³ Numbers 14:18. *See also* Deuteronomy 5:9-10 (“Thou shalt not bow down thyself unto them, nor serve them; for I, the Lord thy God, am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate Me, and showing mercy unto thousands of them that love Me and keep My commandments.”).

Form the non-profit

Develop and initiate the fund-raising plan

Recruit paid employees (interns, Executive Director, financial manager, social media and web expert, other?)

Next: Create substantive content

Next: Enlist allies and partners

Reach out to similarly aligned organizations

Find allies and partners in education, religion, business, and political organizations

Next: Start work on the three projects

Overcoming the Legacy of Slavery and Jim Crow Laws in Government Institutions

The Uniform Law Project

Developing a Code of Professional Responsibility for Police

Next: Create a national organization with local chapters

Want to join us? Contact Mike Palmer, mike@winbeforetrial.com; 802 398 7737

We are who we are because we were who we were.

But we can fix that.