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ESSAY

REMEDYING POLICE BRUTALITY THROUGH SENTENCE REDUCTION

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Police brutality is a widespread problem that causes significant physical and psychological trauma, undermines faith in the law, and disproportionately impacts communities of color. Existing remedies to police brutality—including civil suits for damages, criminal prosecution, and internal disciplinary procedures—have in many cases proven inadequate. They fail to sufficiently deter police brutality and fail to adequately compensate victims.

This Essay proposes a novel alternative: remedying police brutality by reducing the sentences of criminal defendants who have been victims of police brutality and subsequently convicted of a crime. When a victim of police brutality is convicted of a crime relating to an incident in which the police committed unnecessary violence, they would be eligible for a reduction in their resulting sentence. The magnitude of the sentence reduction would scale to the severity of the police's actions. Such a remedy would deter police brutality and adequately compensate victims. Because the remedy would occur within the very same process that produces police brutality—the process of criminal investigation and adjudication—it would restore procedural fairness

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and reaffirm victims' rights. The Essay concludes by exploring practical concerns with the remedy, particularly the relative roles of legislatures and courts in its implementation.

INTRODUCTION

Late on the night of May 24, 2020, Joseph Troiano left an overcrowded New York City homeless shelter, tired of waiting for a bed, and took his bags with him to the subway, setting the bags down in the seats around him.¹ The subway was nearly empty.² Just after midnight, an officer of the New York City Police Department (NYPD) approached him and ordered him to move because he was occupying multiple seats.³ Troiano moved to the next train car.⁴ The officer, joined by another officer, followed and ordered Troiano to exit, telling him “step off or I got to drag you off.”⁵

A bodycam video of the incident shows Troiano objecting to the officers' harassment, then one of them suddenly reaching out to grab him.⁶ Troiano swats the officer's hand.⁷ The officer grabs Troiano and throws a few quick punches to his head.⁸ As Troiano yells, the officer pulls him off the train by the back of the neck and throws him on the platform floor.⁹ Troiano gets up and stands against the platform wall, visibly shaken.¹⁰ The officer kicks his bags off the train, scattering them on the platform.¹¹ As Troiano yells for them to stop, his back still to the

¹ See Rosa Goldensohn, *De Blasio Renders Split Decision on Video of Cop Punching Homeless Man on Subway*, *The City* (July 20, 2020, 9:35 PM), <https://www.thecity.nyc/2020/7/20/21332157/de-blasio-subway-video-nypd-cop-punches-homeless-man> [<https://perma.cc/Y9EP-UV3U>]; Adam Harding, *Man Hit, Choked and Maced by NYPD in Violent Arrest Video Plans to File \$40M Lawsuit*, *NBC New York* (July 17, 2020 2:29 AM), <https://www.nbcnewyork.com/news/local/man-hit-choked-and-maced-by-nypd-in-violent-arrest-video-plans-to-file-40m-lawsuit/2518793/> [<https://perma.cc/Q6AF-ESP9>].

² Goldensohn, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ See Harding, *supra* note 1.

⁶ *The City*, *NYPD Subway Arrest*, YouTube (July 14, 2020), <https://www.youtube.com/watch?v=2lgK-apbl8Y> [<https://perma.cc/9FZ8-CFG8>].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

wall, the other officer sprays him with pepper spray at point-blank range.¹² The officers finally bring him to the ground and handcuff him.¹³

Manhattan District Attorney (D.A.) Cyrus Vance initially charged Troiano with felony assault (for allegedly kicking the officer's hand while on the platform) and misdemeanor resisting arrest.¹⁴ After widespread outrage, the D.A.'s office dropped the felony charge, leaving the resisting arrest charge,¹⁵ a Class A misdemeanor that carries a maximum penalty of one year in jail and a fine of up to \$1,000.¹⁶

While the most highly publicized incidents of police brutality tend to involve unjustified killing by the police, many instances of police brutality are non-lethal. It far more often occurs in incidents like the one between the NYPD and Joseph Troiano.¹⁷ In legal parlance, these more everyday instances of police brutality are often cast in other terms—"excessive use of force" or "unreasonable force"¹⁸—but represent essentially the same problem: the police's unjustified use of physical violence.¹⁹

¹² *Id.*

¹³ *Id.*

¹⁴ Goldensohn, *supra* note 1.

¹⁵ *Id.*

¹⁶ N.Y. Penal Law §§ 70.15(1), 205.30 (McKinney 2019).

¹⁷ See Matthew J. Hickman, Alex R. Piquero & Joel H. Garner, Toward a National Estimate of Police Use of Nonlethal Force, 7 *Criminology & Pub. Pol'y* 563, 577–81, 588–89 (2008) (finding that several hundred thousand arrestees in 2002 experienced nonlethal force from an officer, such as being pushed, grabbed, kicked, hit, or held at gunpoint); Police Shootings, Vice News (Dec. 10, 2017), https://news.vice.com/en_us/article/a3jjpa/nonfatal-police-shootings-data [<https://perma.cc/KT6V-NH35>] (providing data on police shootings from 2010 through 2016 at the fifty largest local police departments in the U.S. and finding that "[f]or every person shot and killed by cops in these departments . . . police shot at two more people who survived"). Data on police brutality is extremely limited. In the past few years there have been some efforts to begin national data collection, but the complete results have not yet been published. See, e.g., National Use-of-Force Data Collection, FBI, <https://www.fbi.gov/services/cjis/ucr/use-of-force> [<https://perma.cc/5V8L-V4CF>] (last visited Mar. 18, 2021) (noting that "[t]he FBI released initial data when 40% of the total law enforcement officer population was reached" in July 2020 and that "[a]dditional data will be released at 60% and 80% participation levels").

¹⁸ See, e.g., *Griggs v. Brewer*, 841 F.3d 308, 313–14 (5th Cir. 2016).

¹⁹ Whether "police brutality" is coequal with those terms is subject to some disagreement. See, e.g., Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *Buff. L. Rev.* 1275, 1276 (1999) (distinguishing "[p]olice brutality" from "police misconduct" on the basis that the former "is conduct that is not merely mistaken, but taken in bad faith with the intent to dehumanize and degrade its target").

Police brutality is a dire problem with inadequate remedies. It is an old problem, tied to the nation's history of racism.²⁰ In 2020, a string of police killings of Black victims—Breonna Taylor, George Floyd, and Rayshard Brooks, among others—provoked widespread protests that were themselves met by police brutality.²¹ The effects of police brutality are immense. The most severe are, of course, suffered by victims themselves as physical and psychological trauma, but police brutality also has broader societal impacts. It undermines faith in the legal system.²² It is linked to lower academic achievement and school attendance.²³ It disproportionately impacts Black and Hispanic communities.²⁴

Despite how serious of a problem police brutality is, remedies for it are entirely inadequate. A victim can sue an officer for civil damages, but the officer's conduct might well be covered by qualified immunity.²⁵ They could sue the municipality for damages, but discovery would be difficult, the process long, and the settlement potentially inadequate.²⁶ They could seek criminal prosecution of the officers, but political pressures might not allow prosecutors to bring an indictment.²⁷ They could petition for an

²⁰ See generally Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 Soc. Just. 156 (2001) (detailing the history of race and policing from slave patrols to the war on drugs).

²¹ See, e.g., Richard Fausset and Shaila Dewan, *Elijah McClain Died After He Was Detained. Now He's Being Remembered.*, N.Y. Times (June 30, 2020), <https://www.nytimes.com/2020/06/20/us/elijah-mcclain-police-killings.html> [<https://perma.cc/LU93-HQ7Q>]; Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across U.S.*, The Guardian (June 6, 2020), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd> [<https://perma.cc/GQ3J-G5Q7>].

²² See Nathan James et al., *Cong. Rsch. Serv.*, R43904, *Public Trust and Law Enforcement—A Discussion for Policymakers 2–3* (2020) (tracking declines in public confidence in the police in recent years).

²³ See Desmond Ang, *The Effects of Police Violence on Inner-City Students*, 136 Q.J. Econ. 115, 117–18 (2021).

²⁴ See Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. Pol. Econ. 1210, 1213–14 (2019).

²⁵ See Rachel A. Harmon, *Legal Remedies for Police Misconduct*, in *2 Reforming Criminal Justice: Policing* 27, 33–35 (Erik Luna ed., 2017).

²⁶ *Id.* at 35. See also Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 Calif. L. Rev. 325 (2018) (discussing how Black and Hispanic tort claimants' damage awards are under-calculated as a matter of course because of courts' reliance on race-sensitive data).

²⁷ Harmon, *supra* note 25, at 40–43. See also John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 789 (2000) (discussing the “cycle of impunity[] by which the reluctance of local government to prosecute bad cops empowers future misconduct and drives communities to regard the police as adversaries”).

internal departmental review of the officer, but the process would be polluted by conflicting incentives and bureaucratic limitations.²⁸ In short, existing remedies to police brutality are insufficient in both the frequency with which they are invoked and the amount they compensate the victim when they are invoked.

And, if the victim, like Joseph Troiano, has been charged with a crime, they could still end up going to prison. Existing remedies to police brutality treat the victim's prosecution as a distinct process from the processes through which they may seek a remedy. In a case like Troiano's where the victim of the police brutality is charged with a crime, the victim must go through their own criminal adjudication and separately seek a remedy to the brutality. But why should a remedy not be available within the very same process that produces police brutality—the criminal investigative and adjudicatory process? After all, victims of other kinds of police misconduct receive the benefit of the exclusionary rule,²⁹ and victims of prosecutorial misconduct can have their cases dismissed as a remedy,³⁰ which are both remedies internal to their criminal adjudication.

This Essay proposes a new remedy to police brutality: reducing the sentences of criminal defendants who have been the victims of police brutality. Part I details the mechanics of the proposal. Part II then describes the benefits of using remedial sentencing for police brutality. The remedy would have two particular benefits: one, it would deter police brutality, and two, it would adequately compensate victims. Finally, Part III explores how legislatures and courts could implement the remedy.

I. THE PROPOSAL

The possibility of remedying police brutality at the sentencing phase of a victim's criminal trial has not been proposed in prior scholarship. Some scholars have, however, proposed remedial sentencing schemes in other contexts. Some, including Judge Guido Calabresi, have proposed using

²⁸ Harmon, *supra* note 25, at 45–46.

²⁹ See *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

³⁰ See, e.g., *United States v. Cooper*, 983 F.2d 928, 929–30 (9th Cir. 1993) (affirming the dismissal of an indictment after the government destroyed evidence in spite of defendant's repeated requests to prosecutor to preserve the evidence); *United States v. Bohl*, 25 F.3d 904, 906 (10th Cir. 1994) (dismissing the case because the prosecution failed to adhere to the defendant's request to preserve evidence); see also Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 *Wash. U.L.Q.* 713, 815–19 (1999) (discussing different remedies for prosecutorial misconduct, including dismissal).

sentence reduction as an alternative remedy to the exclusionary rule.³¹ Other scholars have argued that sentence reduction could be used to remedy prosecutorial misconduct.³² And others have argued that it could help amend historical discrimination against minority groups.³³ None, however, have proposed using sentence reduction for police brutality.

Nor has any American court employed remedial sentencing for police brutality.³⁴ But it would hardly be unprecedented. There is a long tradition of remedying police and prosecutorial misconduct within the criminal trial, of which sentencing is a part. The exclusionary rule is the most prominent; a defendant who has been the victim of police misconduct—an illegal search, or perhaps a *Miranda* violation—receives a remedy within the context of their trial.³⁵ As it goes, “[t]he criminal is to go free because the constable has blundered.”³⁶ As another example, courts, on rare occasions, bar retrial to remedy particularly egregious instances of prosecutorial misconduct that result in mistrials, again providing a remedy within the context of the defendant’s trial.³⁷ Remedying police brutality at the sentencing phase of the trial would be consistent with those remedies: it provides a remedy internal to the victim’s criminal adjudication.

Consider what the remedy would look like in practice. First, there would have to be an occurrence of police brutality. The remedy should at

³¹ See Guido Calabresi, *The Exclusionary Rule*, 26 Harv. J.L. & Pub. Pol’y 111, 116 (2003); Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 Marq. L. Rev. 45, 73–74 (1994).

³² See generally Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509 (2009) (proposing sentence reduction as a remedy that would deter prosecutorial misconduct and have corrective and expressive value).

³³ See Makenzie Way, *Remedial Sentencing Legislation as a Tool for Reducing Overrepresentation in Correctional Facilities*, Penn L. News (Jan. 6., 2020), <https://www.law.upenn.edu/live/news/9534-remedial-sentencing-legislation-as-a-tool-for> [https://perma.cc/4AJW-88SX].

³⁴ Although the Supreme Court of Canada has notably used a similar remedy at least once. See *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, 208–10 (Can.).

³⁵ See *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

³⁶ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

³⁷ See Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 Seton Hall L. Rev. 335, 344–46 (2007) (discussing how double jeopardy bars retrials where a mistrial has been declared for prosecutorial conduct that was specifically “intended to provoke the defendant into moving for a mistrial” (quoting *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982)) but not where the prosecutor’s conduct was intended to win at trial using impermissible means).

least be available for any occurrence of police brutality that violates the Constitution,³⁸ but could also be defined by statute or within sentencing guidelines in order to broaden the scope of the conduct captured beyond a constitutional standard.

The victim would then have to be charged with an offense. The offense could be the offense that the police were investigating or executing an arrest for when the brutality occurred,³⁹ or it could be an offense arising out of the police-victim interaction itself (resisting arrest, assault on an officer) as in Troiano's case. When there is a charge relating to conduct that precedes the brutality, there might have to be some kind of fact-finding process to determine that the police brutality incident is sufficiently related to the charge—that it arises from the investigation of, or arrest for, *that particular charge*. Needless to say, the remedy is only available if the victim is actually charged with a crime. This means that many victims of police brutality, ones who are never charged with an offense, would not reap its benefits. But the remedy's limited scope would not render it any less impactful when it does apply.

Victims could invoke the remedy at one of several stages. First, they could indirectly benefit from it during plea bargaining. If a defendant has been the victim of police brutality and might consequently receive a lower sentence if the factfinder finds them guilty, they would likely receive a more favorable plea offer. The potential sentence reduction would act as an extra bargaining chip. Considering how many criminal cases result in plea deals,⁴⁰ the indirect benefits at this stage would be significant. Second, the victim could invoke the right at sentencing if they go to trial and the factfinder finds them guilty. Legislatures or sentencing commissions could establish specific downward departures for victims of police brutality, or judges could take it into account under existing sentencing factors. Third, a victim could invoke the remedy on direct appeal, or, fourth, in a post-conviction proceeding.

³⁸ Namely, the Fourth Amendment's prohibition on unlawful seizures and the Fifth and Fourteenth Amendments' Due Process Clauses.

³⁹ As in the case of Jacob Blake, whose shooting in Kenosha, Wisconsin, has received significant media attention. See Christina Morales, What We Know About the Shooting of Jacob Blake, N.Y. Times (Jan. 5, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html> [<https://perma.cc/MX7Q-47QB>].

⁴⁰ See Report: Guilty Pleas on the Rise, Criminal Trials on the Decline, Innocence Project (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> [<https://perma.cc/9ZNF-MHQA>] (finding that "97 percent of [criminal] cases were resolved through plea deals").

Regardless of when the victim invokes the remedy, the magnitude of the compensation—the reduction in the victim’s sentence time—would still have to be determined. In general, more severe instances of police brutality would warrant greater sentence reductions. The compensation should be commensurate with the harm. In cases where the brutality is severe and the defendant’s offense insignificant, the sentence reduction could be complete, producing a sentence without a term of incarceration; in cases where the brutality is less severe and the defendant’s offense significant, the sentence reduction could be relatively minor. This ability to appropriately tailor the size of the compensation to the harm helps produce the deterrent and compensatory effects that make sentence reduction such a promising remedy for police brutality.

II. BENEFITS OF THE REMEDY

Existing remedies to police brutality provide, at least in theory, two main benefits: deterring further police brutality and compensating victims.⁴¹ Remedying police brutality through sentence reduction should deter further brutality, and is uniquely situated among potential remedies to police brutality to adequately compensate victims.

A. Remedial Sentencing’s Deterrent Effects

Remedying police brutality through sentence reduction should tend to deter further brutality when the costs it imposes on police officers exceed the benefits they gain by committing brutality.⁴² Neither of those factors is precisely or easily calculable, but there is enough empirical evidence on police behavior to suggest that remedial sentencing would have a deterrent effect.

What costs does the remedy impose on officers? Empirical evidence suggests a few clear incentives that control police behavior. Most relevantly here, police have an incentive to secure convictions and sentences; they consistently act in ways that will tend to produce more convictions with longer sentences.⁴³ Evidence emerging out of studies of

⁴¹ See Harmon, *supra* note 25, at 27–30.

⁴² See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. Legal Stud.* 289, 292 (1983) (arguing that to satisfy the criminal law goal of deterrence, the criminal process must set “[t]he optimal price for the offense,” which is “just high enough to require offenders to pay for all of the harm their crimes inflict”).

⁴³ See, e.g., John Pfaff, *The Perverse Incentives of Punishment*, *The Appeal* (May 18, 2018), <https://theappeal.org/the-perverse-incentives-of-punishment-7c1e32b18d07/>

wrongful convictions indicates that officers tend to act in a way that secures convictions and long sentences even if, in doing so, they sometimes act unlawfully or in bad faith.⁴⁴ Because police have such a demonstrated interest in securing convictions and long sentences, remedial sentencing should impose costs on them: it produces shorter sentences when they act unlawfully.

An important factor in determining the exact costs that the remedy imposes on police is the likelihood that it would actually be invoked when it is available.⁴⁵ This is the failing of many existing remedies to police brutality: they might produce a deterrent effect if they were actually used, but police officers are generally immune from civil suits due to qualified immunity and immune from criminal prosecution because of political insulation.⁴⁶ Remedial sentencing would be comparatively easy to invoke. The victim would be automatically eligible for it at sentencing, and would not have to overcome the institutional barriers involved with civil suits or prosecuting officers. In addition, there would also be no concern with providing the victim an unwarranted windfall because the size of the sentence reduction would be made commensurate with the severity of the police conduct, so judges, generally speaking, should not be reluctant to allow it. Evidence shows that judges might be reluctant to provide a windfall—as the exclusionary rule is in many cases—but they should be less reluctant to provide a remedy that is commensurate with what the defendant deserves.⁴⁷

What benefits do the police gain from committing brutality? It is perhaps unintuitive to think of the issue in those terms, so it might be easier to consider the correlative: the costs the police incur by *not* committing brutality. This factor is crucial to understanding how sentence reduction could deter police brutality. To be sure, the reasons that police

<https://perma.cc/WUF5-AZRV>] (reporting an especially egregious example of this phenomenon, wherein Todd Entrekin, a sheriff in Etowah, Alabama, “pocketed at least \$750,000 budgeted for feeding the people detained in his county jail,” enabling him to purchase a beach house while those incarcerated the jail ate meat “labeled ‘not fit for human consumption’”).

⁴⁴ See Anthony W. Batts, Maddy deLone & Darrel W. Stephens, Policing and Wrongful Convictions, *Nat'l Inst. Just.* 4 (2014), <https://www.ojp.gov/pdffiles1/nij/246328.pdf> [<https://perma.cc/K5SJ-WCZK>].

⁴⁵ See Easterbrook, *supra* note 42, at 292 (emphasizing that the price of committing an offense is a product of “[t]he penalty” imposed and “the probability that it will be imposed for a given offense”).

⁴⁶ See Harmon, *supra* note 25, at 34–35, 43.

⁴⁷ See Starr, *supra* note 32, at 1521.

brutality occurs are nebulous, subject to active debate, and hardly reducible to a few easily-defined factors.⁴⁸ But the evidence suggests that police brutality is at least partially a product of training and budget shortfalls; police departments that have invested in force-reduction trainings have lower reported instances of excessive force.⁴⁹ In order to mitigate police brutality, then, municipalities would have to invest in counter-measures, better training in particular. Those measures have costs, and the money that police departments and municipalities save by *not* investing in them might be considered the “benefits” they receive by committing brutality.

Because that second factor—the benefits the police receive by committing brutality—is so nebulous, it is hard to determine the extent to which remedial sentencing would deter police brutality. But the fact that the remedy would impose costs on the police is clear, and it is also clear that it would likely impose greater costs on the police than alternative remedies because it is so much more likely to be invoked. Therefore, remedial sentencing should tend to deter police brutality at least as well as alternative remedies. Regardless, because the remedy would exist alongside existing remedies to police brutality, its deterrent effects would aggregate with theirs.

⁴⁸ The genesis of police brutality is a broad and hotly contested subject, but a few key ingredients include poor hiring and training practices, the militarization of the police, and institutionalized racism. See Robert E. Worden, *The “Causes” of Police Brutality: Theory and Evidence on Police Use of Force*, in *Criminal Justice Theory: Explaining the Nature and Behavior of Criminal Justice* 149–64 (Edward R. Maguire and David E. Duffee eds., 2d ed. 2015) (providing an overview of various theories and studies of police use of force); Rosa Brooks, *Stop Training Police Like They’re Joining the Military*, *The Atlantic* (June 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859/> [<https://perma.cc/MBR9-68K5>] (addressing the relationship between militarizing the police and police brutality and discussing promising efforts to train police to critically engage with the history of paramilitary police forces in the United States); Wayne McElrath & Sarah Turberville, *Poisoning Our Police: How the Militarization Mindset Threatens Constitutional Rights and Public Safety*, *Project on Gov’t Oversight*, (June 9, 2020), <https://www.pogo.org/analysis/2020/06/poisoning-our-police-how-the-militarization-mindset-threatens-constitutional-rights-and-public-safety/> [<https://perma.cc/KF74-5CHA>]. (arguing that the militarization of police forces imperils public safety and freedom, and recognizing that racism is a fundamental feature of American policing).

⁴⁹ See George Wood, Tom R. Tyler & Andrew V. Papachristos, *Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*, 117 *Proceedings of the Nat’l Academy of Sciences of the United States of America* 9815, 9815 (May 5, 2020), available at <https://www.pnas.org/content/117/18/9815/> [<https://perma.cc/2VJL-2BFR>] (finding that large-scale implementation of procedural justice training reduced complaints and use of force).

B. Remedial Sentencing's Corrective Effects

The single most important reason to adopt sentence reduction as a remedy to police misconduct is the unique compensatory benefits it offers to victims. Sentence reduction is categorically unlike other remedies to police brutality because it is the only remedy—existing or conceivable—that matches the form and scale of the harm done to the form and scale of the compensation provided.

1. Correspondence in Form

First, in remedial sentencing, there is a corrective effect in the sense that a state-imposed harm (the physical and psychological damage police brutality inflicts upon victims) is compensated by a correlative reduction in a related state-imposed harm (victims' terms of incarceration). The *form* of the compensation matches the form of the harm. That correspondence is important in light of the retribution principle for criminal punishment. The idea behind the retribution principle is that, because a defendant has performed a moral wrong, they *deserve* punishment.⁵⁰ The punishment is its own end, one's just deserts. The punishment scales to the severity of the crime; more serious crimes beget longer sentences because their perpetrators are thought to deserve more punishment.

The problem when it comes to victims of police brutality who have been convicted of a crime is that they have already suffered a state-imposed harm—the police brutality. Those sentenced without regard to the police brutality suffer a total amount of state-imposed harm disproportional to the severity of the crime they committed: their term of incarceration plus the injury caused by the police. The retribution principle, then, necessitates remedial sentencing. The remedy reduces the term of incarceration to the degree that the total amount of state-imposed injury is commensurate with the severity of the offense. It matches the form of the harm to the form of the compensation—a state-imposed injury and a reduction in a state-imposed injury, respectively.

In a closely related vein, there is also a procedural correspondence between the harm and compensation in remedying police brutality through sentence reduction. Police brutality typically takes place in the

⁵⁰ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659, 1686 (1992).

process of a criminal investigation or arrest.⁵¹ The investigative stops, seizures, and arrests in which brutality takes place are part of the process that ultimately leads to the victim's criminal adjudication, which in turn results—if the victim is convicted—in sentencing. Remedying police brutality by reducing the victim's sentence, then, provides compensation within the very same process that produces the harm. The harm takes place as police investigate or execute an arrest for a victim's alleged crime, and the compensation frees the victim of the consequences of that investigation.

Why does matching the form of the harm to the form of the compensation matter? After all, other remedies do not match the form of the compensation to the harm; they provide monetary damages or directly punish the offending officers. The proposed remedy's correspondence in form matters because of what it expresses about the nature of police brutality. The remedy has an *expressive* benefit in the sense that it sends a message about the inherent wrongfulness of the police's actions; more so than alternative remedies, it sounds in moral terms. Reducing a defendant's sentence because they have been a victim of police brutality signals that the legal system recognizes and takes seriously the exact nature of the harm they have suffered. As one scholar puts it, “‘expressive legal remedies’ matter because they express recognition of injury and reaffirmation of the underlying normative principles for how the relevant relationships are to be constituted.”⁵² Providing a remedy in the same form as the injury affirms the nature of the injury—a *state-imposed* injury that occurs *within the criminal process*. When the police commit brutality, they produce a state-imposed harm and undermine the process of criminal investigation and adjudication. By reducing a defendant's sentence, the remedy mitigates the particular damage that the brutality has done to both the victim and the system. It reaffirms the rights of the victim and restores procedural justice.

2. *Correspondence in Scale*

The second corrective benefit of remedial sentencing is its commensurability. Sentence reduction is a particularly good remedy to

⁵¹ See Hickman, Piquero & Garner, *supra* note 17, at 577; see also Worden, *supra* note 48, at 149–51 (describing brutality in investigation and arrest).

⁵² Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1529 (2000).

the harm caused by police brutality because it is so tailorable to the severity of the harm the defendant has suffered. Not all instances of police brutality are equally severe, so the compensation must be tailorable to the severity of the harm. Remedial sentencing does just that: compensates serious instances of police brutality with significant sentence reductions, and more minor instances of police brutality with relatively token ones.

The ability of remedial sentencing to provide compensation commensurate in scale with the severity of the harm matters for expressive purposes. The remedy cannot just generally affirm the rights of the victim or restore procedural justice; it must do those things in the right magnitude. Providing compensation commensurate in scale with the harm sends a signal about just how morally repugnant the officer's conduct was, and just how much the victim's rights have been violated. Of course, there is no easy or inherent way to convert the wrongfulness of a particular incident of police brutality to an amount of sentence time. How many months or years is a beating worth? That conversion process depends on subjective judgments about the severity of police brutality and the meanings of particular amounts of sentence time. The important thing is that there is some scaling. It would be up to legislatures, sentencing commissions, and judges to ensure its consistency.⁵³

3. Comparison with Alternative Remedies

Some remedies for police brutality (real or proposed) match the form of the compensation to the form of the injury. Others match them in scale. But none do both, which is why sentence reduction, when it would be applicable, could be such a powerful remedy.

Consider potential remedies to police brutality that match in form but not scale. Courts might want to expand the exclusionary rule to cases of police brutality, refusing to admit evidence arising out of police-defendant interactions in which the police commit physical violence. Similarly, courts could outright dismiss cases against defendants who have suffered police brutality. These remedies would match the form of the harm to the compensation by taking place in the process of the victim's criminal adjudication and would result in a lower state-imposed harm (because the defendant would not be sentenced at all, having not been convicted). But they would not necessarily scale the compensation

⁵³ See *infra* Part III for discussion of the possible roles of legislatures, sentencing commissions, and courts.

to the harm. They might provide a windfall by freeing a defendant entirely from a looming sentence.⁵⁴

Then consider potential remedies that match in scale but not form. Civil suits for damages at least theoretically scale to the severity of the injury but do not match in form. In the police brutality context, they reward physical and dignitary harms with liquid money. Likewise, prosecuting offending officers—even if warranted for other reasons—does not restore procedural fairness to the victim’s own adjudication, even if the officer’s sentence should loosely scale to the severity of their actions.

Remedial sentencing, by matching both the form and scale of the compensation to those of the harm, reaffirms the rights of the victim and restores procedural fairness. Sentence reduction has unique corrective power to remedy the particular harms done by police brutality.

III. IMPLEMENTING THE REMEDY

There are multiple possible paths to implementing a remedial sentencing scheme for police brutality, but choosing among those paths might prove difficult. A particularly crucial choice is whether it would be primarily legislature-driven or court-driven.

If the remedy were to be primarily legislature-driven, legislatures could create statutory downward departures for defendants who have been victims of police brutality during an interaction with the police relating to their instant case. The downward departure could be either advisory or mandatory. There would be no obvious constitutional issue with imposing a mandatory downward departure because, even though the Supreme Court has held mandatory sentence *enhancements* unconstitutional where the factfinder has not found the elements of the enhancement beyond a reasonable doubt,⁵⁵ there is no such issue with mandatory sentence

⁵⁴ They also might discourage judges from applying the remedy at all. There have been indications that judges are less likely to apply the exclusionary rule because it might overcompensate victims for the government’s violations of their rights—as Judge Calabresi has noted, judges “are not in the business of letting people out on technicalities.” Calabresi, *supra* note 31, at 112.

⁵⁵ See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *United States v. Booker* 543 U.S. 220, 244 (2005) (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”).

reductions. In jurisdictions with sentencing commissions, including the federal system, the sentencing commission might have to promulgate the downward departure in its guidelines.⁵⁶ But establishing the remedy by either statute or guideline would provide the benefits of a fixed rule. Of course, a fixed rule would also have drawbacks, such as reduced case-by-case flexibility.

On the other hand, the major benefit of courts driving the remedy's implementation is that it could, in some jurisdictions, happen immediately, with no new statutory authorization required. In jurisdictions with indeterminate or largely standards-driven sentencing guidelines, judges could factor a defendant having been the victim of police brutality into their sentence under existing sentencing guidelines—as, for instance, in the federal system. The factors listed in the federal sentencing statute, 18 U.S.C. § 3553, are broad enough that judges already have the discretion to consider police brutality. Under § 3553(a), judges must consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” and “the need for the sentence imposed . . . to provide just punishment for the offense.”⁵⁷ For the reasons discussed in Part II *supra*, having been a victim of police brutality is part of the “history of the defendant” that reduces the need for a long sentence to provide just punishment for the offense. The capaciousness of the sentencing factors should already permit the courts to consider police brutality in issuing sentences.

Both legislature-driven and court-driven approaches have their benefits and drawbacks. A legislative (statutory or guideline-based) remedy would be more definite, but potentially less tailorable. Establishing fixed statutory guidelines for converting the severity of particular instances of police brutality to sentence time would be difficult. If courts were to instead lead the way, the remedy would be easier to implement—perhaps requiring no specific authorization—and easier to tailor in individual cases. But if the remedy were entirely a judicial creation, it might be applied more inconsistently, and some victims might go undercompensated.

⁵⁶ See, e.g., U.S. Sent'g Guidelines Manual § 1A1.1–3 (U.S. Sent'g Comm'n 2018).

⁵⁷ 18 U.S.C. § 3553(a).

CONCLUSION

This Essay has made the case for remedying police brutality through remedial sentencing. It has sought to show that remedial sentencing would deter police brutality and adequately compensate victims. It has focused on a few key details about the remedy. First, that it exists within the same process of criminal investigation and adjudication that produces police brutality. Second, that it provides victims a reduction in a state-imposed punishment as compensation for a state-imposed injury—compensation in the same form as the injury. Third, that it provides compensation commensurate in magnitude with the severity of the harm. Fourth, and finally, that it could be easily implemented, whether by legislatures, courts, or both.

Remedying police brutality through sentence reduction would not be a panacea to the problem of police brutality. It would deter it, but not entirely. It would go a long way towards restoring procedural fairness and reaffirming victims' rights, but it would not bring victims complete justice—no remedy could. And it would never be available to victims of police brutality who are not actually charged with a crime. But the stakes of police brutality are so dire, and existing remedies so inadequate, that a remedy that could deter police brutality even a little further and bring some victims a little more justice would be well worth implementing.