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Rethinking the Evaluation of Police Shootings:

A Proposal to Enhance Public Credibility

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Executive Summary

In the aftermath of controversial police shootings going back decades, a divided public continues to struggle with how to respond. To those supporting police officers, the lack of criminal charges may mean nothing more than Wisconsin police officers have exercised appropriate discretion in each controversial shooting and no charges against any officers were warranted. To others, the lack of any charges in these cases supports a contention that the system was rigged in favor of law enforcement officers, particularly when a minority is the person who was shot or killed.

A change to state law would help bridge the gap between these two groups, as well as add credibility to the district attorney review of police shootings. Wisconsin should enact a civil rights law that changes the inquiry on fatal police shootings from whether the officer committed a homicide to whether the officer willfully used excessive force in violation of the U.S. Constitution.

Introduction

Controversy over police shootings in Wisconsin has developed into a familiar pattern: An individual is shot by police under questionable circumstances; protests (sometimes violent) ensue; a prolonged district attorney review is done, which usually results in a determination that no criminal charges are warranted; more protests follow.

Such was the case in Kenosha, in August 2020, when Jacob Blake, armed with a knife, was shot in the back by Officer Rusten Sheskey as Blake tried to enter a vehicle that contained his children. Blake survived, but violent protests followed in which two people were killed and millions of dollars in damages resulted. Professional sports teams, in support of Blake, temporarily suspended play. Four months later, Kenosha County District Attorney Michael Graveley concluded in a detailed written report that the officer was justified in shooting Blake.[1]

Similarly, in Wauwatosa, in February 2020, controversy arose when Officer Joseph Mensah shot and killed Alvin Cole, armed with a handgun — the third fatal shooting by Mensah during his five-year career with the department. Daily protests began, including a violent attack on Mensah's home. Seven months after the shooting, Milwaukee County District Attorney John Chisholm issued a detailed report that declared Mensah would not face criminal charges for the shooting. The report's conclusion was similar to findings that Chisholm's office made for the prior two shootings by Mensah.[2]

And in Milwaukee, in April 2014, Officer Christopher Manney shot and killed Dontre Hamilton, an unarmed homeless man, at Red Arrow Park near City Hall. Protests followed, including by a group that blocked traffic on a Milwaukee freeway during rush hour. Eight months later, in a detailed report, Chisholm declared that criminal charges were not warranted.[3]

Fueling the controversy of each shooting is this fact: In the past 50 years, *no* Wisconsin police officer has been convicted of a criminal offense in connection with the hundreds of fatal police shootings of suspects during that time, including when the suspect was unarmed. And only a handful have even been charged. A single conviction was secured in Milwaukee in 1979, but that stemmed from a fatal shooting in 1958 and occurred only after a fellow officer decades later admitted to lying about the shooting.[4]

As a result, police shootings have become a high-

stakes inkblot test. To those supporting police officers, the lack of criminal charges means nothing more than Wisconsin police officers have exercised appropriate discretion in each shooting and no charges were warranted. To others, the lack of charges shows that the system was rigged in favor of law enforcement officers, particularly when a minority is the person who was shot or killed.

Is there a way to bridge the gap between these two groups, to add credibility to the district attorney review of police shootings, without exposing officers to unwarranted liability? Wisconsin elected officials recently made an attempt at doing so when the work of various bipartisan task forces resulted in changes to state law to require more public disclosure on use-of-force incidents.[5] That change, however, did not address the single most important factor affecting how district attorneys evaluate controversial police shootings: the language of the state statutes.

Under the wording of current Wisconsin law, the prosecution and conviction of any police officer has become close to a practical impossibility. To add credibility to the public's consideration of how these shootings are judged, the statutes should be changed to adopt provisions similar to the federal civil rights statute.

The Impact of Wisconsin Law

The use of deadly force by law enforcement officers in Wisconsin is subject to three overlapping standards: those set forth in the U.S. Constitution, those imposed by Wisconsin law and those adopted as policy by individual police departments. The constitutional standard sets forth that a law enforcement officer's use of deadly force was permitted under the Fourth and Fourteenth Amendments of the U.S. Constitution when, from the objective standard of a "reasonable officer on the scene," the use of force was justified by: a) the severity of the alleged crime at issue; b) whether the suspect posed an immediate threat to the safety of the officers or others; and c) whether the suspect was actively resisting or attempting to evade arrest. This federal standard also considers whether the officer's response was proportional to the threat posed by the suspect; that is, deadly force is appropriate only when an officer in good faith believes such force is necessary to respond to a significant threat of great bodily harm to an officer or a nearby third party.[6]

The Wisconsin standard is encompassed by the state's implementation of Defense and Arrest Tactics (DAAT), which is a uniform policy required by Wisconsin Statutes § 66.0511 and administered by the State of Wisconsin Law Enforcement Standards Board. Under DAAT, officers must be trained on when and how to use force (including deadly force) in response to threats. The DAAT standard, among other provisions, requires an officer to use only the level of force necessary to respond to a dangerous situation and only after trying to de-escalate the situation, if possible.[7]

Finally, each individual police department is further required by state law to have procedures and policies in place that also govern an officer's use of deadly force — though these policies often mirror and incorporate the federal and state standards. For example, in Wauwatosa, where Mensah was involved in three fatal shootings, the Police Department had a written policy on use of deadly force that incorporated both the federal and state DAAT standards cited above. The Wauwatosa policy includes this language: "The use of deadly force is authorized as follows: [To] Protect the officer or others from what is reasonably believed to be an imminent threat of death or great bodily harm."[8]

It is important to note that a violation of any of the above standards is not in and of itself a criminal offense by the officer firing a weapon. In evaluating the potential charge against a police officer involved in a shooting, a district attorney must select from existing criminal statutes that contain prohibitions against both the specific act (a shooting resulting in harm) and a precise corresponding mental state of the officer at the time of the shooting. Under Wisconsin law, causing the death of another person carries significantly different consequences depending on the intent of the actor, as well as whether any "privilege" exists.

First-degree intentional homicide, which carries the potential for life imprisonment, must involve causing the death of another person while acting "with intent to kill that person or another." Lesser offenses — such as second-degree intentional homicide, reckless homicide and negligent homicide — carry maximum penalties of 10 to 20 years, corresponding to different mental elements of each offense, each below the "intention to kill" requirement for first-degree homicide.[9]

A Question of Privilege

In addition, and most critically for a district attorney review, Wisconsin law provides that law enforcement officers are privileged (immune from prosecution) when they use force "in good faith" and consistent with "authorized and reasonable fulfillment" of official duties. In a similar vein, officers are given the additional legal

Bipartisan Support for Change

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Biskupic proposes a change to Wisconsin law on the evaluation of police shootings, one that would enact a state civil rights statute. The statute would change the legal focus on police shootings from ***Did the officer commit a homicide?*** to ***Did the officer willfully use excessive force?***

During a recent Marquette Law School forum on police shootings, Milwaukee County District Attorney John Chisholm and Wisconsin Attorney General Josh Kaul, both Democrats, acknowledged the difficulties created by current Wisconsin legal standards and supported the enactment of a new state law that would provide more flexibility to Wisconsin district attorneys in the evaluation of officer shootings.

Both agreed that the public would benefit from a new statute that criminalized the willful deprivation of civil rights, similar to the current federal civil rights statute.

See *Policing and Accountability — A Community Conversation (at 1:57:14 et seq.).*

protection of self-defense, where they may respond to threats to themselves or third parties.[10]

As a result, the legal standards imposed by these combinations of Wisconsin laws frame the prosecutorial evaluation of police shootings as resting on two specific questions: 1) Did the officer have an actual subjective belief that deadly force was necessary to prevent imminent death or great bodily injury to himself and others? and 2) Was the belief objectively reasonable? As long as the answer to both questions is yes, then the shooting is justified and no charges are warranted. Moreover, the burden of proof rests with the district attorney: It is the prosecutor, not the officer, who then must disprove the potential serious threat to the life of the officer.[11]

Put another way, in the shootings at issue, individual officers, based on the training each received, will have pulled their respective firearms, aimed the weapons and fired multiple times with an intent to neutralize a perceived dangerous threat by causing bodily injury to the suspect. This physical act of shooting another person, with an intent to do so, otherwise fits the definition of homicide (or attempted homicide) under Wisconsin law. Yet, the intent to kill is then nullified by the privilege that the officer carries — the privilege to confront and neutralize the very same perceived threat, including by use of deadly force.

Applying these questions to the controversial shootings in Kenosha, Wauwatosa and Milwaukee provides a greater understanding of why the prosecutors in each case declined to issue criminal charges against the officers. A suspect who possesses a firearm (or knife or sword) presents a situation that rarely will be viewed *objectively* as something less than a circumstance by which imminent death or great bodily harm *may* result.

In addition, what officer who actually fires his or her gun will not credibly believe, in most instances, that firing that weapon was *not subjectively* necessary? The very act of shooting manifests and corroborates the purported subjective intent. On top of these significant hurdles is the fundamental question of whether, even in the absence of such objective and subjective criteria, a jury would be willing to convict officers of homicide when the officers themselves are generally endangered during the daily performance of their duties.[12]

With this current legal standard in mind, it should come as no surprise that no police shooting in Wisconsin in decades has resulted in a criminal conviction against the officer who fired his or her weapon. Given the dangers that police officers routinely face, including in the chaotic circumstances of the shootings described above, the decision not to prosecute should hardly be shocking. Still, the combined history of the past 50 years of police shootings, with few charges and no convictions whatsoever, raises obvious questions. *Was every one of the hundreds of shootings justified? If not, why weren't charges issued and convictions obtained?* The answer, from the perspective of a prosecutor, is the difficult legal standards imposed by Wisconsin statutes.

A Civil Rights Alternative

One way for Wisconsin to bridge the credibility gap of public perception regarding police shootings would

be to enact a new state law, one criminalizing the willful deprivation of civil rights, similar to the current federal civil rights statute. A Wisconsin civil rights statute would:

- *Provide district attorneys with more flexibility in their charging decisions.*
- *Change the primary focus in such shootings from whether the officer committed a homicide to whether the officer willfully used excessive force.*
- *Provide prosecutors with the opportunity to directly consider racial animus under an equal protection analysis.*
- *Provide deterrence, even if no additional charges are brought.*

The roots of the federal civil rights statute are in the Reconstruction period just after the Civil War. Enacted in 1866 as part of a broad attempt to give freed slaves full rights of citizenship, the federal civil rights statute (Title 18, United States Code, section 242) makes it a federal crime for a law enforcement officer to willfully deprive another of his or her civil rights, including the right to be free from the excessive force of an unjustified shooting. The law also includes a provision prohibiting a law enforcement officer from acting with racial animus in violation of the Equal Protection Clause of the Constitution.[13]

The federal law was needed because law enforcement officers in the post-Civil War South routinely ignored the rights of Blacks and, in fact, actively contributed to the violent suppression of their civil rights. The civil rights statute, however, is not a panacea and by no means opens the floodgates to criminal prosecution of police officers making life-and-death decisions. In 2020, 134 federal prosecutions were brought nationally against police officers in the United States; the year before, there were 168. But these numbers include civil rights violations in a broader context beyond just police shootings. By contrast, there were approximately 1,000 fatal police shootings nationally in each of those years.[14]

Moreover, in each of the Wisconsin shooting cases described above, federal authorities had the option to use the federal civil rights statute to criminally charge the police officer involved in the shooting — but (to date) in each instance, the local U.S. attorney has chosen to decline prosecution.

One prominent commentator, U.S. Appeals Court Judge Paul J. Watford, has noted that the worth of the federal civil rights statute is not just in the number of cases that are charged but the deterrence that is applied against rogue police officers by the *potential* of civil rights cases to be brought. According to Watford, once police officers accept the realistic possibility of punishment for abusive conduct, the actual number of such abusive instances declines even when cases are not brought.[15]

In the context of police shootings, the statute provides greater prosecutorial flexibility on charging because it reframes the question from whether an officer essentially committed a homicide to whether the officer willfully violated the civil rights of the suspect by using force exceeding that allowed under the Fourth Amendment.

Perhaps the most notable use of the federal civil rights statute in Wisconsin was in a police brutality case that did not involve a gun being fired. In October 2004, Frank Jude attended a party at a Milwaukee police officer's home, at which a number of off-duty officers had gathered. As Jude was leaving, officers accused him of stealing a badge. They set upon him in brutal fashion, seeking to have him disclose the location of the badge by torturing him — breaking his fingers, puncturing his eardrums and kicking his groin. One officer placed a gun to Jude's head and threatened to shoot him if he did not produce the badge, which was never found. Others shouted racial epithets (Jude is biracial; the officers were white).

On-duty Milwaukee officers responded to the scene after Jude's friend called 911, but instead of stopping the violence, they joined in the beating, with one officer kicking Jude in the face. A federal appellate court later provided this scathing assessment of the scene: "The distance between civilization and brutality, and the time needed to pass from one state to another is depressingly short. Police officers in Milwaukee proved this on the morning of October 24, 2004."[16]

Three off-duty officers at the party were charged in state court with assault, but the jury acquitted them. A federal civil rights investigation followed, and criminal charges were issued against nine officers. Eight of the nine were convicted and sentenced to prison.

Was the difference between the state charges and the federal convictions the availability of the specific federal criminal civil rights statute? The factual uniqueness of any criminal case makes that question almost impossible to definitively answer. No one fact or circumstance can be isolated to prove the point. Still, the conclusion was easily drawn that the civil rights statute *certainly helped* achieve the convictions.

Yet it is the state district attorneys, not federal prosecutors, who take the first and more detailed look at each shooting. That initial review, however, is undertaken within the limited constraints of existing state laws, as outlined above. The subsequent review by federal authorities comes only after a local district attorney has publicly announced his or her findings. Put another way,

while federal authorities may have the better tools at that point, the district attorney review already suggests to the federal prosecutor and the public that nothing may be broken. A state civil rights statute gives the district attorney more flexibility and more credibility in the charging decision that comes first.

Addressing the Question of Race

From one perspective, a state civil rights statute is needed only if one concludes that *some* officers involved in the hundreds of police shootings in Wisconsin over the past 50 years *should* have been criminally charged and convicted in state court but were not. That argument looks at the totality of the police shootings and concludes that something needs to change. Conversely, if each individual shooting was justified, then an alteration to state law is not needed.

In the Jude cases, the evidence strongly suggested guilt, but no convictions were secured without the use of the federal civil rights statute. The same is not necessarily the case in the Blake, Cole and Hamilton matters, where detailed reports of the district attorneys suggested that criminal charges against the individual officers were not justified. If one maintains that no officers in Wisconsin in the past 50 years deserved to be charged and convicted criminally for the actions at issue, then on that answer alone, there is no justification for a change in state law.

From a different perspective, however, the accumulation of the individual charging decisions (or lack thereof) cannot be separated from the distrust that now exists in large segments of minority communities in Wisconsin. The primary factor for that distrust is the perceived disparity in the respective racial makeup of those involved in the police shootings. In all of the controversial shootings discussed herein, the individuals who were shot were minorities. In Kenosha, the suspect was Black; in Wauwatosa, two of those who were shot were Black and one was Hispanic. At Red Arrow Park in Milwaukee, the person who was shot was Black. Of 106 police shootings in Wisconsin since Jan. 1, 2015, two-thirds of those shot were white and one-third were minorities in a state where the non-white population is about 17%.

Some commentators stress that crime rates can be higher and police interactions more frequent in neighborhoods with higher percentages of minorities, while some advocates in minority communities contend that these numbers show non-whites are disproportionately the ones who are shot by police.

The race of individuals who are shot, as well as the race of police officers and prosecutors, is usually quickly made public through press accounts. In most, but not all, of the shootings, the officer was white. In Kenosha, the officer was white; in Milwaukee at Red Arrow Park, the officer was white. In Wauwatosa, the officer was Black. In each of the Wisconsin cases discussed in this analysis, the district attorneys and U.S. attorneys were white.

A deprivation of rights statute could be used regardless of the race of any of the individuals involved. It could, in fact, be used in cases potentially involving the rights of either whites or minorities. Racial animus could, however, be a consideration in some cases, and a change in the Wisconsin laws may help alleviate the distrust in minority communities, just as the federal civil rights statute did more than a century ago.[17]

Conclusion

Police shootings are inevitable given the nature of the job, including the daily risk that officers face. Controversy over such shootings now seems inevitable but has not always been the case. Given Wisconsin's 50-year history of very few charges and no criminal convictions in police shootings, one way to minimize the next controversy is to change state law by adding a Wisconsin civil rights statute.

About the author

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Endnotes

[1] For a review of the Kenosha case and its aftermath, see *Report on the Officer Involved Shooting of Jacob Blake*, *Kenosha Police: 55 more charged for violence during protests* and *How NBA players are responding to Jacob Blake shooting.*

[2] For a review of the Wauwatosa cases, see *Report of Independent Investigator Steven M. Biskupic to the Wauwatosa Police and Fire Commission Regarding the Conduct of Wauwatosa Police Officer Joseph Mensah* and *February 2nd 2020 Critical Incident Involving Officer Joseph Mensah and Alvin Cole at Mayfair Mall* (hereafter "Cole Report"). For the protests at Mensah's home, see *Wauwatosa police: Officer Mensah physically assaulted, shot at by protesters at his home*. As of this writing, Mensah still faced the possibility of criminal charges for the second fatal shooting after a Milwaukee County judge ordered the appointment of a special prosecutor: *A Wisconsin Officer Will Be Charged in the 2016 Slaying of a Black Man*.

[3] For a review of the Milwaukee Red Arrow Park shooting and its aftermath, see *Report on the Officer Involved Fatality Involving Milwaukee Police Officer Christopher Manney* and *Dontre Hamilton and Dozens Arrested at Milwaukee Protest Over Death of Dontre Hamilton*.

[4] Historically, no single database for Wisconsin has tracked police shootings over the past 50 years. My summary of the lack of criminal prosecutions/convictions over the past 50 years comes from personal research and experience, interviews with others who have tried to keep track of this information and reporting from the Milwaukee Journal Sentinel. See, for example, Luthern, Ashley, *Officers are rarely charged with shootings in Milwaukee County. It's even rarer for them to be convicted*, Milwaukee Journal Sentinel (Oct. 7, 2020). One officer was charged and convicted in 1979 (based on a confession of a fellow officer), but that involved a shooting from 1958. Since that time, three officers, all in Milwaukee, have been criminally charged for fatal police shootings: One committed suicide the day he was charged, one was acquitted by a jury and one had the charges dismissed after a hung jury. A *Washington Post database* has tracked police shootings by state since Jan. 1, 2015. In the nearly six-year period since, according to the database, as of Nov. 1, 2021, Wisconsin has had 107 fatal police shootings, an average of about 17 fatal shootings per year.

[5] Dabruzzi, Anthony, *Here's How 12 new bills would change policing in Wisconsin*. Rehm, Sierra, *Gov. Evers signs 4 police reform bills into law*. The new laws also banned chokeholds.

[6] The overlapping standards are discussed in Stoughton, Noble and Alpert, *Evaluating Police Uses of Force* (New York University Press 2020). Two key cases from the United States Supreme Court are *Graham v. Conner*, 490 U.S. 386, 396-99 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

[7] The Wisconsin standards were discussed in *Manney v. Board of Fire and Police Commission of the City of Milwaukee,* 2017 WI App 85, 33; and *Milwaukee Police Association v. Board of Fire and Police Commission of the City of Milwaukee*, 787 F. Supp. 2d 888 (E.D. Wis. 2011).

[8] Wauwatosa Use of Force Policy 20-01.

[9] Wisconsin's homicide statutes are set forth at §§ 940.01 et seq.; for a discussion of the distinction on intent, see *State v. Head*, 2002 WI 99, 54-70; 255 Wis.2d 194, 648 N.W.2d 413, quoting Dickey, Schultz & Fullin, *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 Wis.L.R. 1323, 1330.

[10] The privilege/self-defense statutes are set forth at §§939.45, 939.48.

[11] The two basic questions are often repeated in the district attorney written reports. See, for example, the Cole Report cited in endnote 2, at page 14.

[12] According to the Officer Down Memorial Page website, 298 officers in Wisconsin have died in the line of duty, 125 by gunfire.

[13] The federal civil rights statute reads in full as follows. "Under color of law" means, in part, while acting as a law enforcement officer.
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual

abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.
The history of the statute is traced in Watford, Paul J., *Screws v. United States and the Birth of Federal Civil Rights Enforcement,* 98 Marquette Law Review 465 (2014).

[14] The statistics on civil rights prosecutions are set forth in the United States Attorneys Annual Statistical Reports. The number of police shootings both nationally and in Wisconsin are tracked in the Washington Post database referenced in endnote 4.

[15] See 98 Marquette Law Review 465 (2014).

[16] See *United States v. Bartlett, et al.*, 567 F.3d 901 (7th Cir. 2009).

[17] The racial component of police shootings is tracked by The Washington Post database referenced in endnote 4 and by the news website FiveThirtyEight: *The Police Departments With The Biggest Racial Disparities In Arrests And Killings*.