



# **BADGER INSTITUTE**

SPECIAL REPORT • NOVEMBER 2020

## **JUST THE FACTS**

- Police use of force
- Police discipline
- Defining violent crime

By Patrick Hughes  
and Julie Grace



**PRESIDENT'S NOTE**

These are volatile times.

Americans of all political persuasions are allowing snippets of video, preexisting biases, and class and racial conflicts to filter us into camps, hardening opinions and deepening rifts.

We send you this Special Report as part of our attempt to get beyond emotion and back to facts.

Each section focuses on objective research that we hope will be used to forge agreement on key aspects of police and corrections reform.

- *Police Use of Force: How Common Is It? A Call for Greater Transparency* was written by Badger Institute criminal justice and corrections consultant Patrick Hughes, a former high-ranking administrator in Wisconsin's Department of Corrections. The essential finding: Use of force is rare and usually does not involve a police weapon. We are hopeful Hughes' findings alleviate some of the distrust surrounding routine interactions with police and provide perspective beyond incidents seen online or on TV.
- *How to Make Police Discipline Fair, Quick, Transparent and Decisive* also by Hughes. Like police use of force, discipline appears to be quite rare. It also often occurs behind closed doors. We recommend several changes that legislators or local officials can make to assure Wisconsin communities that all officers are committed to protecting their fellow citizens. Among the recommendations: mandated reports and increased transparency, extension of Act 10 to police and elimination of arbitration.

- *Wisconsin DOC Classifies as Violent Many More Offenses Than Does the FBI* by Badger policy analyst Julie Grace. The essential finding: Wisconsin officials define a lot more offenses as "violent" than the FBI does — a habit that muddies any serious discussion of whether inmates released from Wisconsin prisons are likely to violently reoffend. The data in this report will help policymakers who are truly interested in finding ways to successfully reintegrate ex-offenders in communities.

The path forward must begin with common recognition of the facts. I hope this data-based policy report provides a starting point.

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The Badger Institute, formerly the Wisconsin Policy Research Institute, is a nonpartisan, not-for-profit institute established in 1987 working to engage and energize Wisconsinites and others in discussions and timely action on key public policy issues critical to the state's future, growth and prosperity. The institute's research and public education activities are directed to identify and promote public policies in Wisconsin that are fair, accountable and cost-effective. The Badger Institute is guided by a belief that competitive free markets, limited government, private initiative and personal responsibility are essential to our democratic way of life.

# Police Use of Force

How Common Is It? A Call for Greater Transparency

By Patrick Hughes

## Executive Summary

Police use of force has sparked an intense debate across America, including in our state Capitol. This policy report answers a simple question: How common is police use of force in some of the larger police departments in Wisconsin?

We focus only on larger departments because there is little information available on smaller law enforcement agencies' use of force and no comprehensive statewide database — deficiencies that state legislators should immediately rectify.

Both Gov. Tony Evers and state Sen. Van Wanggaard have proposed legislation that would require police departments to report to the Wisconsin Department of Justice (DOJ) all use-of-force incidents in which a police officer shoots a civilian or discharges a firearm at a civilian and incidents in which a civilian suffers great bodily harm. DOJ would be required to collect, organize and publish an annual report of these incidents on its website.

While these proposals would be an improvement, they would leave the vast majority of police use-of-force incidents unreported. Our research shows that the majority of use-of-force incidents involve physical contact between police officers and citizens or the use of tasers and pepper spray. Although these types of force rarely result in death or serious bodily harm, they do indicate the level of conflict between a community and its police department. More detailed reporting on all use-of-force incidents would identify areas where police departments can improve interactions and increase public confidence in its practices.

The Badger Institute recommends that the state require all law enforcement entities to track and report instances of use of force just as they are required to track and report the number of arrests.

Both citizens and police departments would then be able to compare the frequency and nature of use of force — information that likely would be of considerable interest.

In the meantime, in the absence of a statewide statistics, the Badger Institute developed a picture of use of force in three of the state's largest departments: Milwaukee, Madison and Green Bay. We also gathered publicly available information on the frequency of complaints in one of those three municipalities, Milwaukee.

An essential finding: The frequency of any sort of use of force during arrests in Wisconsin's largest cities — Madison and Milwaukee — is almost identical: one in every 29 or 30 arrests. It is difficult to compare use of force in Green Bay

because of the way that department tracks and reports data.

All three cities report a striking similarity in rates of the use of bodily force, by far the most common use of force. In Madison, 71.5% of use-of-force incidents involve bodily force only; in Green Bay, it's 72.7%; and in Milwaukee, it's 72.5%.

Some policymakers might feel that the overall frequency — once in every 29 or 30 arrests — is misleading because very few police interactions with citizens result in arrests. Most interactions, some 95%

**More detailed reporting on all use-of-force incidents would identify areas where police departments can improve interactions and increase public confidence in its practices.**

of all calls for service in Madison, for instance, are routine interviews or responses to complaints that do not result in arrests. These are routine interactions that very, very rarely result in force.

We provide statistics on those interactions as well.

There is a nationwide debate today over the use of force and when it is justified. We do not attempt to analyze the propriety of police procedures regarding use of force and what percentage of time use of force is justified in Wisconsin. That would require extensive investigation of hundreds of arrests and inherently subjective conclusions based on what is often incomplete information.

We do, however, break down statistics into categories such as bodily force to the use of a taser, baton, gun or canine. And we do provide some statewide information about officer-involved shootings — which are both rare and a small percentage of all uses of force but, for obvious reasons, garner the most media attention.

We hope the statistics alleviate some of the distrust surrounding routine interactions with police and provide perspective on the prevalence of use of force beyond incidents seen online or on TV.

## Frequency of Arrests and Use of Force in the State as a Whole

There were a total of 248,516 arrests by officers in 437 different agencies in Wisconsin in 2018, according to data compiled by the Wisconsin DOJ.

Many departments make relatively few arrests. Over 86%, or 376 agencies, made under 1,000 arrests — fewer than three per day that year. Of the 376, approximately 300 made fewer than 500 arrests, and 152 of them made fewer than 100. There are many small departments in the state that make only a couple of arrests, if that, per week.

The Milwaukee Police Department alone, in comparison, made over 18,000 arrests in 2018. The Madison Police Department made 8,044 arrests that year; the Green Bay Police Department made 6,081.

Although there is no complete database of all use of force in the state, there are some sources that provide at least a partial picture of more serious incidents.

In 2019, there were 32 officer-involved shootings in Wisconsin, of which 18 were fatal, according to the Wisconsin Professional Police Association (WPPA). This is the highest number of officer-involved shootings since the WPPA began collecting data in 2014. Between 2014-2019 there have been 164 officer-involved shootings, 93 of which were fatal.<sup>1</sup>

| Year | Total number of officer-involved shootings | Number of OIS that resulted in death |
|------|--|--------------------------------------|
| 2019 | 32   | 18                                   |
| 2018 | 25   | 12                                   |
| 2017 | 28   | 24                                   |
| 2016 | 26   | 17                                   |
| 2015 | 29   | 12                                   |
| 2014 | 24   | 10                                   |

*Wisconsin Professional Police Association data<sup>2</sup>*

The WPPA also provided some demographic information: 63% of the people shot by officers in 2019 were white, compared to 52% in 2018 and 57% in 2017. The report did not provide any additional details of the racial background of officers or subjects.

All but one of the 18 fatal shootings involved armed subjects, most of whom had guns.

## Frequency of Use of Force in Large Cities

While officer-involved shootings should always be the subject of media and law enforcement scrutiny, a more comprehensive analysis of data in three of Wisconsin’s larger departments shows that they are a small subset of all uses of force. Uses of force, in turn, occur during a small percentage of arrests and an even smaller percentage of all police interactions.

### Milwaukee

In 2018, Milwaukee Police Department officers made a total of 18,363 arrests for felonies, misdemeanors and ordinance violations, according to a Milwaukee Fire and Police Commission report.<sup>3</sup> Of those, one of every 30 involved some use of force.

Looked at another way, well over two-thirds of the 1,900 sworn police officers in Milwaukee never use any type of force over the course of a typical year, and in the most recent year for which statistics are available, over 86% never used force or only used force once. Even then, in 95% of cases with force, there was either no injury to the subject or no more than a minor injury.

But that still leaves 14% of officers in Milwaukee — 262 of 1,917 in 2018 — who were involved, justifiably or not, in more than one use-of-force incident over 12 months.

Of those, 39 used force five or more times.

One officer in 2018 was involved in 24 such incidents.

In Milwaukee, the statistics paint a picture of a department

where use of force is rare or nonexistent for most officers over the course of a given year, particularly in low-crime neighborhoods. But they also raise questions about why some officers are so far outside the norm.

Location matters. Officers in largely impoverished aldermanic districts with a lot of crime and more arrests use force over seven times as often as those who work in areas of Milwaukee surrounded by more affluent suburbs.

Some level of disparity makes sense. That said, a small percentage of officers are using force much more frequently than their colleagues working in the same areas.

### Madison

Data provided by the Madison Police Department shows that force during arrests is used by officers in Madison at similar rates to those in Milwaukee.

Madison officers used force against 290 individuals during 8,330 arrests in 2019, according to the Madison Police Department’s 2019 Accountability Report. This translates to a use of force occurring in 3.5% of arrests, or one of every 29.<sup>4</sup>

The Madison Police Department also uses a second, more comprehensive method for determining frequency of use of force. In total, 322 individuals had force used against them by Madison police, 290 who were arrested and 32 who were not.

It is unusual, though not completely surprising, that officers might occasionally use force against individuals they are not arresting. An officer, for instance, might have to use force to hold back a participant in a bar fight who gets only a citation but isn’t arrested.

The vast majority of police interactions with citizens — approximately 95% in Madison, for instance — do not result in arrest.

While there were — as noted above — 8,330 arrests in Madison in that year, there were a total of 145,205 calls for service, and even calls for service are not a complete measure of all police contact with citizens.

In sum, use of force occurs in fewer than one of every 451 calls for service, and it occurs even less frequently when considering all police interactions.

It is, not surprisingly, much more frequent when the interaction results in an arrest.

### Milwaukee

The “typical” use-of-force incident in Milwaukee in 2018 involved a 35-year-old white male officer with eight years of service who used “bodily force only” on a 28-year-old black male who sustained minor injuries. According to police, the subjects are typically not armed with a weapon but resist arrest during an altercation outside and at night.

In 2019, the typical use-of-force incident in Madison stemmed from an officer responding to a call for service (but not necessarily involving an arrest) for a disturbance in the north or central part of Madison. It likely involved a white male officer using some kind of bodily force on an African American subject who likely was under the influence of alcohol and/or drugs.

*An Analysis of 2018 Use of Force Incidents in the Milwaukee Police Department, Steven G. Brandl, 2019.*

### Green Bay

In 2019, Green Bay police made 6,052 arrests and reported that 283 citizens were involved in use-of-force incidents.<sup>5</sup> It is not clear if everyone against whom police used force was arrested. If they were, an estimated 4.7% of arrests involved the use of force, or one of every 21 arrests.

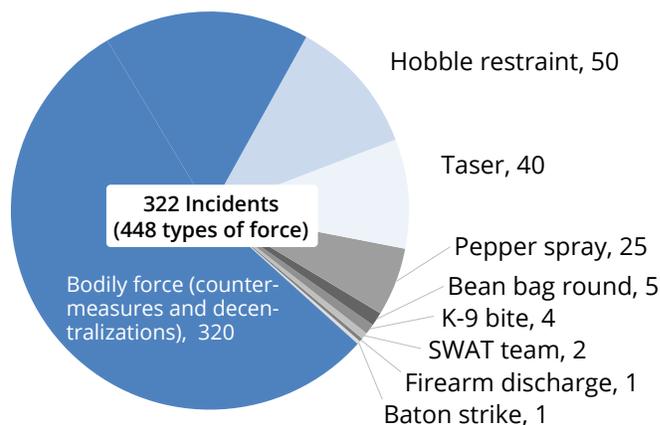
We cannot definitively determine whether use of force is more common in Green Bay because of reporting differences between the departments. In addition to the lack of clarity on the percentage of use-of-force incidents that occurred during arrests, Green Bay has a different definition of force. Green Bay, for example, classifies the use of the PIT maneuver (Pursuit Immobilization Technique), or ramming to stop fleeing vehicles, as a use of force, while neither Madison nor Milwaukee report any vehicle-related use-of-force incidents.

These reporting differences are one reason that universal reporting standards are necessary.

### Types of Force

The analysis shows that most force used by police does not involve a weapon, just bodily force. This is true to the same extent for all three of the police departments examined. In all three instances, bodily force alone was used 72% or 73% of all times that force was used. In all instances, the use of hobble restraints, tasers, pepper spray, dogs or guns was far less common.

Bodily force includes the use of both active countermeasures and passive countermeasures (decentralization). Active countermeasures include an officer striking, hitting

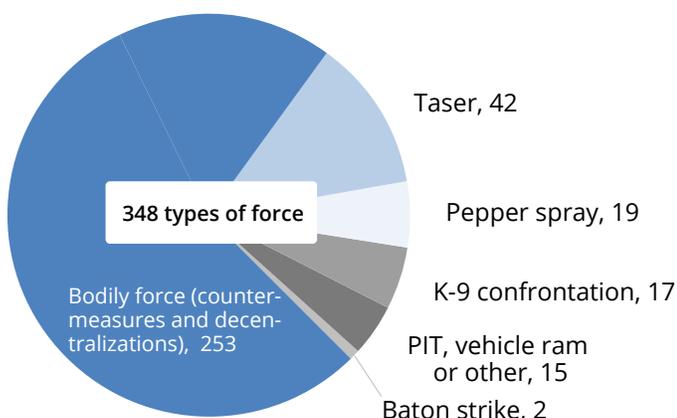


or kicking a subject with hands, arms, knees or feet. Passive countermeasures consist of pushing, pulling, holding, grappling or tackling a subject.

### Madison

In 2019, Madison did not break down the types of use-of-force incidents that occurred only during arrests, but the department did break down the types of use of force used against 322 individuals in all circumstances. Most of these individuals were arrested, but some were not.

More serious uses of force were uncommon. Only one involved discharge of a firearm, a fatal officer-involved shooting on Oct. 27. The combined number of types of force (448) exceed the reported 322 incidents because some



### Green Bay

There were no reports of police using guns as a use of force in Green Bay in that year.

In sum, all three cities report a striking similarity in rates of the use of bodily force, by far the most common use of force. In Madison, 71.5% of use-of-force incidents involve bodily force. In Green Bay, it's 72.7%, and in Milwaukee, it's 72.5%. Were the state to mandate data from all departments, policymakers and citizens could determine if the same pattern holds true in other larger departments or in departments with similar instances of crime.

It would be possible to identify and examine outliers. Police departments could use this data to improve policies, training and oversight. Lawmakers could use the information to make policy based on what is actually occurring in Wisconsin communities.

### Citizen Complaints in Milwaukee

We also examined citizen complaints in Milwaukee and found they are filed in relatively few use-of-force incidents.

Citizen complaints against the Milwaukee Police Department (MPD) are reported and investigated differently by the Milwaukee Police Department and the Milwaukee Fire and Police Commission (FPC). The result is a muddled picture of how many complaints are filed and how they are resolved. The situation is made even less transparent because the FPC has failed to publish an annual report since 2017, and the MPD does not address citizen complaints in its annual reports.

The citizen complaint process should be the same whether the complaint is received by the FPC or MPD. Detailed information on complaints with descriptions of the misconduct, resolution and discipline imposed should be regularly reported.

The lack of a complaint does not necessarily prove that use of force was appropriate. Some individuals may not know how to file a complaint or may be reluctant to challenge police. The paucity of complaints does suggest, however, that the vast majority of police/citizen interaction is routine and appropriate.

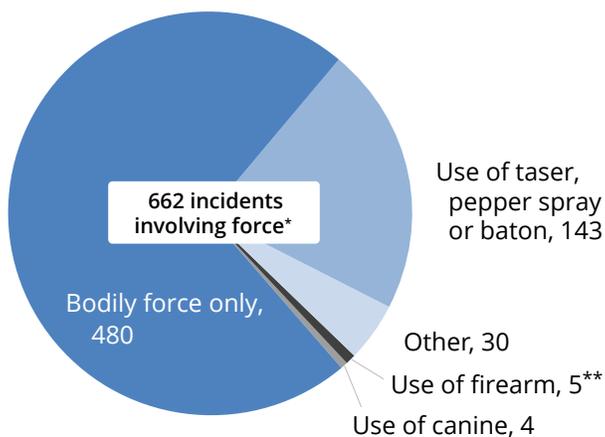
In 2018, there were 159 complaints that named 210 officers — about 11% of the force.<sup>6</sup> Thirty officers were the subject of more than one complaint, and nine were the subject of more than two complaints. Of those 159 total citizen complaints, 23 alleged improper use of force.

In Milwaukee, citizens can file complaints either directly with the Police Department or to the FPC.<sup>7</sup>

- Twenty-one use-of-force complaints were filed directly with the Police Department. Nine of those were open or

### 2018 Use-of-Force Statistics for Milwaukee Police Department

Arrests: 18,363 Traffic stops: Over 90,000



Source: An analysis of 2018 Use of Force Incidents in the Milwaukee Police Department by Steven G. Brand and further analysis by the Badger Institute.

\*Incidents that involve human beings exclusively and not animals.

\*\*Of these five, two resulted in fatal injuries, one in a non-fatal injury and two shots missed.

pending at the time the FPC report was filed. In three instances, it was found that the actions of the officer were not a violation of the code of conduct. Nine times, the allegations were deemed unfounded.

- The FPC investigated two formal complaints regarding use of force in 2018. Neither resulted in a finding of misconduct by police.

In sum, citizen complaints over use of force by officers are rare, and substantiated claims are even less common.

## Recommendations

Given the intense media and social media interest in police use of force, there is likely a common misperception regarding how frequently such incidents occur. Making statistics public and readily available could help restore confidence in police departments.

Without better data, it is difficult to fairly evaluate how a community is being treated by its police force, especially when high-profile incidents caught on camera are the main reference point and when most interactions between citizens and police are mundane. On those rare occasions when force is used, a common standard of acceptable use, a transparent discipline process and regular reporting of such incidents can help

establish the trust and support between citizens and police that is required for safe communities.

Information on use-of-force incidents, particularly those that result in death or injury, is necessary for building that trust. The lack of standards or legal requirements for reporting use-of-force incidents make it difficult to know what is occurring and how officers are being held accountable for their actions.

The information provided by groups like the Wisconsin Professional Police Association (WPPA) is valuable, but there are still gaps in important areas. The WPPA's report on officer-involved shootings does include both fatal and non-fatal shootings but does not cover other police conduct like the use of tasers, pepper spray or other uses of force that can result in serious injury or death.

Annual, standardized reports from government agencies are needed to accurately document use-of-force incidents. Legislative proposals by Gov. Tony Evers and state Sen. Van Wanggaard that would require police departments to report officer-involved shootings and incidents in which a civilian suffers great bodily harm are a good start, but the legislation should be amended to require annual reporting on all use-of-force incidents. Policymakers should also require departments to standardize how they define use of force to ensure uniform reporting methods. ❏

### About the author



**Patrick Hughes** is a Badger Institute corrections consultant. He previously served as assistant deputy secretary and division administrator in the Wisconsin Department of Corrections.

# How to Make Police Discipline Fair, Quick, Transparent and Decisive

By Patrick Hughes

## Executive Summary

Disciplinary actions against police officers in Wisconsin's largest cities, whether for use of force or anything else, are rare. In 2017, for instance, there were 61 disciplinary actions filed against 2,470 Milwaukee Police Department staff members, approximately one-fourth of whom were civilians — a rate of 2.5%.

In Madison in 2019, there were only seven disciplinary actions in a department with a head count of 650, more than 480 of whom were sworn and the rest civilian — a rate of 1.1%.

But when allegations of inappropriate force do occur or there is any other misconduct, police officers must be held accountable as fairly, quickly, transparently and definitively as possible in order to retain both the trust of the community and the confidence of all officers who serve within the ranks.

The Badger Institute surveyed an array of Wisconsin police departments to understand the processes used to discipline officers and ensure due process, then looked more extensively at Madison and Milwaukee. Many departments in the state are not transparent regarding discipline — a significant issue.

What we found in Madison and Milwaukee is a tale of two departments — one (Madison) that is laudably transparent regarding instances of discipline and one (Milwaukee) that is not. Lack of transparency leads to community distrust, especially since most departments have disciplinary processes that are redundant or do not encourage swift and decisive action.

We recommend several changes that legislators can make to assure Wisconsin communities that all officers are committed to protecting their fellow citizens, including better

transparency, extension of Act 10 to police, elimination of arbitration and extension of probationary periods.

Police officers who are disciplined have due process and appeal rights that are guaranteed by police department policy and various state statutes, including the right to appeal to police and fire commissions. Those guarantees must remain or, in some instances, be expanded if other avenues of appeal are eliminated.

***When allegations of inappropriate force do occur or there is any other misconduct, police officers must be held accountable as fairly, quickly, transparently and definitively as possible.***

## Frequency of Discipline

There are no readily available, regularly published disciplinary reports for law enforcement agencies (or any other public employees) in many cities in Wisconsin, and there is no statewide process for tracking

police misconduct or discipline.

The Milwaukee Police Department does make some limited information on discipline available, though not nearly as much as the comprehensive, up-to-date information made available by the Madison Police Department.

Throughout Wisconsin — including Milwaukee — discipline can be handed down both by department leaders and by the police and fire commissions.

Neither is transparent. In fact, a summary of Milwaukee Police Department employee discipline has not been made public since the Fire and Police Commission published its

last annual report in 2017, and even then, it did not include descriptions of misconduct — only the discipline imposed.

That year, there were 61 disciplinary actions in the department with 2,470 total positions (1,853 sworn positions, 617 civilian) — a rate of roughly 2.5%.

Fifty-two department employees received suspensions ranging from one day to 45 days. There were eight reprimands<sup>8</sup> and one demotion of a police lieutenant.

The Madison Police Department issues quarterly reports that contain the most detailed and up-to-date information available on police department employee discipline that we were able to find in Wisconsin. Madison reports include a brief summary of the behavior that prompted the discipline — a good model for other departments in the state.

In 2019, there were seven disciplinary actions in the department that had a head count of 650 (486 sworn, 184 civilian) — a 1.1% rate. Incidents included:

- Two attendance issues: A civilian and a police officer receiving a written warning for failing to show up for work as scheduled
- Two officers receiving letters of reprimand for failing to properly investigate or document cases
- Two accidental firearm discharges
  - ◊ One by an officer who received a letter of reprimand for an accidental discharge of a weapon in a squad car
  - ◊ Another by a probationary officer who accidentally discharged a personal firearm, which he did not have proper documentation to carry. He received a three-day suspension.
- An officer resigning, instead of being demoted, during an investigation for insubordination

There have been another seven disciplinary actions taken so far in 2020. Four of the incidents involved officers failing to follow policy in vehicle pursuits; the remaining three involved staff making inappropriate comments to other department employees.

It is notable that despite the nationwide controversy regarding police use of force, none of the Madison disciplinary actions were the result of misconduct related to force. Milwaukee's low level of detail in its reporting makes it impossible to know if this holds true for that department as well.

### **Process: Police and Fire Commissions and Arbitration**

An officer facing discipline has several options. The officer can choose to accept the discipline; the officer in most departments can file an appeal with the police and fire commission; in some departments, the officer can also — as an alternative — dispute the discipline through arbitration.

The process described in this report would be followed in most departments with minor differences based on how the department is organized and what policies are in place.

## **Police and Fire Commissions**

Wisconsin statute<sup>9</sup> requires all cities with a population greater than 4,000 to have a police and fire commission. Cities with fewer than 4,000 residents may form a commission if the city council votes to do so.

In every police department except the City of Milwaukee, the officer can appeal any discipline to the police and fire commission if there is one.

***The Madison Police Department issues quarterly reports that contain the most detailed, up-to-date information available on police department employee discipline.***

If an officer appeals, the commission schedules a hearing before at least three members, during which both the officer and the police department argue their case. Both sides may be represented by an attorney and call witnesses under subpoena. The commission then decides whether the discipline was justified and has the option to uphold the discipline or reduce it. These hearings and records are open to the public. If the officer loses, he or she may then appeal the ruling to the circuit court.

These hearings are essentially a form of trial conducted by the commission or on their behalf by a hearing examiner. The Wisconsin Supreme Court held in 2003 that it was within the authority of police and fire commissions to adopt rules to conduct trials with a hearing examiner in place of commission members.<sup>10</sup> Both Milwaukee and Madison rules give the commission the option of using hearing examiners. Later in this report, we examine this process in more detail.

Police and fire commissions throughout the state also have the authority to discipline officers without the involvement of the chief of police. This can be initiated by the commission when it learns of misconduct or when charges have been filed by a citizen against an officer.

This is uncommon and most often occurs in response to media attention or public protests over a high-profile incident.

Police and fire commission involvement in disciplinary issues in most of Wisconsin is relatively rare. In Madison, none of the discipline imposed in 2019 or 2020 was appealed to Madison's Police and Fire Commission. Milwaukee's Fire and Police Commission also has not been as busy in recent years as it once was.

The role of the Fire and Police Commission in Milwaukee, Wisconsin's only first-class city, is unique.

Only the most serious disciplinary actions — suspensions of five days or greater or demotions or terminations — can be appealed to the Milwaukee Fire and Police Commission, something that occurred only once in 2017. In that instance, the commission upheld 15-day suspensions of two police officers for failing to follow department policy during a field interview.

The Badger Institute was able to secure a summary of cases appealed to the Milwaukee FPC in 2018 and 2019 after filing an open records request. But we were unable to acquire information on discipline imposed by the MPD after 2017 that was not appealed to the FPC.

In response to a public records request for annual reports or summaries of police discipline from 2018 and 2019, the Milwaukee FPC stated that it did not have any records and directed the Institute to the Milwaukee Police Department. An open records request to the MPD for discipline records received no response, and the Institute has opted thus far to push for mandated transparency rather than pursue prolonged legal action.

Public knowledge, in other words, is currently limited to cases appealed to the Fire and Police Commission. It does not include discipline that is not appealed or is appealed through a different process, i.e., arbitration.

In 2018, there were three cases in which the chief of police ordered discharges of police officers that were appealed to the FPC. In two cases, the FPC upheld the discharges, and, in the third case, the officer withdrew the appeal and accepted the discharge. In 2019, the FPC held three hearings to completion. In one instance, the commission reduced a discharge to a 15-day suspension without pay; in a second case, it upheld a demotion in rank and a 10-day suspension. In the third instance, a 10-day suspension was upheld. There were several other cases dropped at the request of the officer, and others were pushed to 2020 for scheduling purposes.

Milwaukee FPC involvement in disciplinary issues has been relatively rare in recent years — a reflection perhaps of the dysfunction or composition of the commission. But in years past, it was more common for Milwaukee officers suspended for more than five days, reduced in rank or fired to exercise their right to appeal to the FPC.

The number of FPC cases has varied significantly from year to year:

- There were 68 hearings over the five years ending in 2011 (under police chiefs Nannette Hegerty and Ed Flynn), according to the *Milwaukee Journal Sentinel*.
- In 2016, seven hearings were held, four involving police and three involving firefighters.
- In 2017, the commission held just one appeal hearing, a 15-day suspension for two police officers that was upheld.

When appeals were more common, so were reversals of disciplinary actions. Of the 68 hearings over the five years ending in 2011, for example, approximately three dozen actions against police or firefighters were reduced.<sup>11</sup>

During the period of time that the Badger Institute sought disciplinary records, the Milwaukee FPC was mired in conflict and dysfunction.<sup>12</sup> The state can help restore some semblance of order and community trust by mandating the regular public disclosure of detailed disciplinary cases, including the nature of alleged misconduct and outcomes.

While it is beyond the scope of this report to determine whether more (or less) discipline is needed in the Madison and Milwaukee police departments, the low number of disciplinary actions means that there is not a significant burden on law enforcement agencies to provide comprehensive information

***The state can help restore some semblance of order and community trust by mandating the regular public disclosure of detailed disciplinary cases.***

to the public on these incidents. Timely, detailed descriptions of what misconduct has occurred and how the department disciplined the officer will help develop trust with the community and build morale among officers who do not want the entire department's reputation besmirched by occasional rogue or lazy colleagues.

As previously noted, there is no statewide source tracking discipline for law enforcement, but other cities in Wisconsin report a fairly low level of activity by police and fire commissions.

In Green Bay, there have been three hearings before the Police and Fire Commission regarding police officer discipline since 2008 (resulting in two terminations and a retirement that resulted in the disciplinary action being dropped).

There were no hearings in Eau Claire over the past four years.

## Arbitration and Collective Bargaining

Many police officers in Wisconsin have an alternative for appealing disciplinary actions: arbitration made possible by extensive collective bargaining rights.\*

Throughout much of the country's and state's history, a wide spectrum of elected officials — including liberal icon Franklin Delano Roosevelt — opposed collective bargaining for public-sector unions. Even Frank Zeidler, the last Socialist

*\*Editor's note: Jim Palmer, executive director of the Wisconsin Professional Police Association, pointed out that in 2011, the Wisconsin Legislature (in Act 32) greatly reduced the ability of law enforcement officers to arbitrate disciplinary actions. We thank Mr. Palmer for bringing this error to our attention.*

mayor of Milwaukee, opposed giving municipal employees collective bargaining rights.

Nevertheless, Wisconsin, in 1959, first gave some municipal employees the right to bargain as part of a union at the very end of Zeidler's tenure in Milwaukee. Police officers and sheriff's deputies were initially excluded, but police in municipalities with more than 2,500 residents were granted collective bargaining rights in the early 1970s.

That development was driven at least in part by fear of public-sector strikes that had become common in Wisconsin. There were at least 99 illegal public-employee strikes prior to 1978, including a 1971 Milwaukee police strike that came to be known as the "blue flu" and the famous Hortonville teachers' strike from 1973-'74.<sup>13</sup>

Elected officials, many of whom relied on unions for political support, responded by allowing public sector collective bargaining. Some union leaders, in turn, used their newfound bargaining powers to insist on a procedure that officers could use to challenge discipline imposed by department leaders, among other things.

Expansive collective bargaining rights in Wisconsin have made arbitration rights for even lower levels of police discipline possible.

If arbitration is included in the union contract, an officer who is disciplined may choose to exercise the right to a mutually agreed upon independent arbitrator or agree to arbitration conducted by the Wisconsin Employment Relations Commission (WERC).

Although all contracts do not include this option, its legislative history and impact on transparency is important for criminal justice reform.

The arbitration process is not open to the public, and the limited success of Badger Institute efforts to obtain information on how often it occurs revealed how little information is available to the public.

Milwaukee police have long had the right to arbitration in their union contracts. In 2007, Gov. Jim Doyle gave other departments in Wisconsin the right to bargain for arbitration in disciplinary matters.\* A review of a cross section of police contracts in 10 Wisconsin cities and counties by the Badger Institute reveals that, while there is variation, many of those departments did subsequently negotiate some type of arbitration process that to this day applies to at least some disciplinary matters.

The specific process varies from department to department and contract to contract.

In some places, including Kenosha, Oshkosh and the Racine County Sheriff's Department, all appeals to arbitration

*\*Editor's note: In 2011, the Wisconsin Legislature (in Act 32) greatly reduced the ability of law enforcement officers to arbitrate disciplinary actions.*

**Unlike arbitration, police and fire commission trials are open to the public.**

are handled by WERC.

In places like Wausau and Madison, the two sides initially try to agree on the use of an arbitrator but, if they fail, the case is moved to WERC.

In Green Bay, disciplinary cases are not open to arbitration. All other grievance cases go to WERC.

In response to requests from the Badger Institute, WERC provided information on the number of cases involving police that it has heard over the past five years. They ranged from as few as nine in fiscal year 2018 to 28 in fiscal year 2015.

In fiscal year 2020, the commission heard 14 cases. It did not provide information about whether the cases were related to misconduct or non-disciplinary disputes over other issues.

Use of arbitration is rare in many Wisconsin police departments. In Wausau, for instance, Deputy Police Chief Matthew Barnes says in his 20 years on the force, they have never had any issue, disciplinary or otherwise, go to arbitration. The department in his tenure has also never fired an officer — although there have been resignations as the result of suspensions or investigations.

## Milwaukee

Milwaukee, the state's only first-class city, is often treated separately in state statute and has a well-established, powerful police union. The collective bargaining agreement between the City of Milwaukee and the Milwaukee Police Association includes the right to seek arbitration for lesser disciplinary penalties, such as suspensions of five days or less.<sup>14</sup>

It's not clear how frequently arbitration occurs in Milwaukee. The Badger Institute submitted a public records request to the MPD for information on how often arbitration is used, the issues settled and the outcomes. We have received no response. Since neither the city nor the Police Association is required to report on the arbitration process, the public has no way of finding out how this process is being used.

Arbitration should be eliminated. Taxpayers don't benefit from giving public employees the option to take disputes over discipline, decisions by management or work rules to a closed-door negotiated settlement with unaccountable arbitrators. The courts or WERC can provide legal remedies if rights or civil service rules have been violated, and police and fire commissions can still hear appeals if officers so desire.

Police and fire commissions or elected officials, all accountable to voters, can also hold police and fire department leadership accountable for management of their departments.

It is important to reiterate that unlike arbitration, police and fire commission trials are open to the public.<sup>15</sup> The trials

can be administered by the commission board itself or by a hearing examiner, who is either a member of the commission board or an attorney selected by the board. If the trial is heard by a hearing examiner, the examiner schedules and conducts the trial, records and organizes the evidence and drafts a report that includes a recommendation to the commission board. Both parties are then provided copies of all of the evidence and the examiner's report and recommendations and given 30 days to file a response.

The board is then given the trial transcript, trial recordings, evidence, testimonies, the examiner's report and recommendations and responses, if any, from the parties. The board review is conducted in closed session, and it has the right to approve in full or in part, modify or set aside as it sees fit any recommendation from the examiner to reach a final determination. The final decision authority is held solely by the commission board.

If the trial is conducted by the board, an examiner may be assigned to assist with the trial and make rulings on evidence and procedure. The main difference between trials by the board and those conducted by a hearing examiner is that in trials conducted by the board, the final decisionmakers (board members) directly hear testimony, examine evidence and listen to the arguments of the two parties, rather than simply reviewing the testimony transcripts, evidence, trial recordings and report organized and written by the hearing examiner.

Regardless of the extent to which a hearing examiner is used, police and fire commission actions are public throughout the state.

While the Milwaukee Fire and Police Commission has been largely dysfunctional recently, public accountability does exist. FPC members in Milwaukee — as elsewhere — are appointed by elected officials directly accountable to the public.

“The seven part-time civilian Commissioners and full-time Executive Director are appointed by the Mayor and must be approved by the Common Council. The Commissioners serve as the citizens' voice in police and fire matters and as a means of ensuring more responsive and effective city government,” according to the FPC website. The same is not true of arbitrators.

Our difficulty in even finding out how often police employees in Milwaukee use arbitration is evidence of its undemocratic and secretive nature.

Arbitration for most departments is a relatively recent development made possible by expanded collective bargaining rights for government workers. Act 10, the 2011 legislative action that reduced collective bargaining rights, was in part a remedy for these kinds of issues and should be extended to all public sector employees.

## Extension of Act 10

For many years — in the late 1950s, 1960s and early 1970s — state and local government employees had collective bargaining rights, while police and firefighters did not. Today, the situation is reversed.

**Collective bargaining currently allows elected and appointed leaders to avoid responsibility for police conduct.**

In 2011, under Gov. Scott Walker, Act 10 eliminated the rights of most government employees, including teachers, to collectively bargain for anything other than wages. Citing concerns about public safety if police and fire departments joined strikes or walkouts, Walker exempted police and firefighters from the reform. As a result, they still have

full collective bargaining rights and, in some places, extensive arbitration rights in union contracts.

Collective bargaining currently allows elected and appointed leaders to avoid responsibility for police conduct. Union contracts and state law prevent them from swiftly and decisively disciplining employees. Limiting collective bargaining rights would restore responsibility to department leaders and politicians and expedite removal of officers who act inappropriately.

Extending Act 10 would have multiple additional benefits. Among them:

*Shift assignments:* Act 10 transformed the relationship between the government and workers from a collective relationship to an individual one. This fundamental change makes it easier for government entities to make policy changes regarding, for instance, how shifts are assigned.

*New rules and regulations:* Police unions typically have the right to negotiate with chiefs of police regarding new rules and regulations outside those governed by statute. This means that everything from changes in officer uniforms to rules governing the use of force and body cameras are subject to negotiation with the union. Although the chief in Milwaukee does have the authority to proceed with the rule change if no agreement is reached, the process makes it difficult to quickly and efficiently impose needed policies that are unpopular with police officers.

*Drug testing:* The MPD conducts drug tests upon promotion, transfer to specialized units, following an incident that results in death or great bodily harm, and randomly. While a positive drug test can result in termination, the agreement prevents a positive drug test from being used as evidence in a criminal or municipal ordinance proceeding.

*Body and squad car camera footage:* Officers under investigation currently have the right to review body camera, squad camera video and audio footage before an interrogation during a disciplinary investigation. Permitting this review creates the risk that the officer will provide statements to match the video recording rather than independent recollection. Body camera footage is not accessible to officers in the normal course of their duties,\* and this is not a right given to citizens under interrogation by the police.

*Use of vacation days:* Officers suspended for misconduct can use vacation days to keep getting paid — a policy that undermines the punitive aspect of discipline.

## Due Process

It is important to note that extending Act 10 to police and firefighters would not eliminate appropriate due process. The Milwaukee Police Department's discipline procedure, for instance, is outlined in Standard Operating Procedure 870. Even without collective bargaining, this procedure would still govern disciplinary actions and rights. Officers would also still be allowed to appeal any discipline to WERC, and state statutes would still govern some disciplinary actions.

In addition, officers would still have rights to appeal to police and fire commissions that are appointed by elected officials and, by statute, must hold trials that are open to the public.

## Recommendations

### Create Transparency

The Madison Police Department publishes detailed quarterly reports of all discipline issued for sworn and civilian employees — a model that should be emulated or required for all departments in the state.

State and local government employee personnel files including disciplinary actions are subject to public records laws and may be obtained via public records requests. While it is possible to obtain records related to an employee's discipline — usually disciplinary letters, forms or employee personnel files — there is no requirement for state agencies, local governments, police departments, WERC, or fire and police commissions to publish regular reports on employee discipline or hearings that result in reductions in discipline.

The case-by-case approach to public records requests makes it difficult to evaluate the level of employee

*\*Editor's note: When related to a disciplinary action.*

misconduct or the effectiveness of supervision of police behavior without regular extensive public records requests.<sup>16</sup>

Publicizing disciplinary actions is very unpopular among employees and rarely occurs until the media covers a high-profile misconduct case and requests the relevant documents. Statutory requirements are needed to ensure regular and uniform reporting by state and local governments.

### Extend Act 10 to Police and Firefighters

See details above.

### End Arbitration for Disciplinary Cases

Cities like Milwaukee should remove arbitration for disciplinary cases in future contracts with police unions.

**Statutory requirements are needed to ensure regular and uniform reporting by state and local governments.**

Although the extension of Act 10 to police and fire unions would end arbitration for discipline cases, cities already have the ability to refuse to include arbitration for discipline cases in future negotiations with police unions under current law.

There is no requirement to allow arbitration, and cities should not agree to any new contracts that include this provision going forward.

A statute change would be required for first-class cities to make all discipline subject to appeal to the Fire and Police Commission. Current law does not permit police and fire department employees in first-class cities the right to appeal a discipline of less than five days to the FPC. If arbitration is removed from the contract, the statute should be changed to give officers in Milwaukee the same right of appeal as those in other cities.

### Extend the Probationary Period

Grievance and arbitration protections do not apply to Milwaukee police officers in the 16-month probationary period. An alternative to removing arbitration would be to extend the probationary period. A longer probationary period would give departments more time to evaluate and remove low-performing officers. There also could be a process for returning officers with discipline issues to probationary status.

### Assembly Bill 506

This bill is part of Gov. Tony Evers' and state Sen. Van Wanggaard's criminal justice reform package and would require police officers' employment files to be shared when they apply for positions with a new department. This should be expanded to cover all public employees (teachers, social workers, etc.), not just police.

## Conclusion

The complicated processes used for police officer discipline, citizen complaints and reportage of use of force described in this report are evidence of the need for reform. The public should be able to understand how police departments identify misconduct and apply discipline, what complaints are being filed and investigated and how often police are using force against citizens. It is unreasonable to expect citizens to use extensive public records requests, statutory interpretation and arcane collective bargaining agreements to understand what is going on within their local police departments.

Effective reforms — including the end of arbitration and regular reports on employee discipline, use of force and complaints — will increase public trust if the process is transparent, fair and holds law enforcement officers accountable for their actions. Arbitration rights included in some union contracts shield this from public oversight.

Ending collective bargaining for law enforcement is not the final step to improving accountability and reforming the criminal justice system, but failing to extend Act 10 will make all other reforms more difficult. ❌

### About the author



Patrick Hughes is a Badger Institute corrections consultant. He previously served as assistant deputy secretary and division administrator in the Wisconsin Department of Corrections.

# Wisconsin DOC Classifies as Violent Many More Offenses Than Does the FBI

By Julie Grace

In 2019, 18% of people sent to a state prison in Wisconsin committed what the FBI defines as a violent crime: murder, nonnegligent manslaughter, forcible rape, robbery or aggravated assault.

The rest, 82% of a total of 9,128 people, were found guilty of lesser offenses that the FBI does not classify as violent under its Uniform Crime Reporting (UCR) data collection program.

The percentages vary dramatically from those used by the Wisconsin Department of Corrections (DOC) and sometimes cited by politicians or policymakers concerned that inherently violent individuals will reoffend. According to the DOC's definition, about a third of 2019 prison admissions were for violent offenses, and 67% of all inmates in a Wisconsin prison today are there for a violent offense.

The state's definition of violent crime encompasses the FBI offenses and many others, including driving while intoxicated and causing injury or death, pointing a firearm at a person, causing great bodily harm without intent and threatening use of force.

To get a better sense of what "violent" crimes that people are convicted of in Wisconsin, the Badger Institute partnered with Court Data Technologies of Madison. Using the same hierarchy of crimes that the DOC uses, we filtered and counted only the most serious charge in each case. If there were two charges under the same crime category or level of "violence," we determined the more severe crime based on the higher felony — or in some cases, misdemeanor — classification.

## Analyzing the Data

Our analysis determined that 3,542 people were sentenced to prison in 2019 for crimes the state designates as violent.<sup>17</sup> This corresponds to the number reported by the DOC. Of this group, only 1,666 were sentenced for offenses that the FBI defines as violent:

- Murder and nonnegligent manslaughter: 120
- Negligent manslaughter: 140
- Forcible rape: 498
- Robbery: 384
- Aggravated assault: 524

Those convicted of violent crimes usually serve longer sentences than do nonviolent offenders. So, at any given time, more than 18% of the prison population is composed of people who were at some point convicted of a violent offense as

defined by the FBI. The DOC — using its own, broader definition of violent crimes — puts that figure at 67%.

But the Badger Institute analysis of statutes determined that many of the individuals deemed violent by the DOC — more than 1,800 in 2019 alone — committed crimes that the FBI classifies differently.

For instance:

- One of the most charged violent crimes as defined by

***The Badger Institute analysis of statutes determined that many of the individuals deemed violent by the DOC committed crimes that the FBI classifies differently.***

the DOC was fleeing an officer and causing harm. There were 88 such offenses in our data.

- Half of the 10 most-charged violent crimes according to the DOC are not considered violent by the FBI's classification. These include first-degree (197) and second-degree (323) recklessly endangering safety, battery (121) and battery or threat to a judge, prosecutor or law enforcement officer (121) and false imprisonment (92).
- Other crimes that the DOC defines as violent but the FBI does not include stalking, reckless use of a firearm, intimidating a witness or threatening harm.
- Second OWI offenses that result in injury are classified as violent by the state but don't fall into the same category for the FBI. There were 32 such offenses in our data.

All told, 483 people were convicted of crimes in which the most serious offense was related to contact with the criminal justice system. These offenses include crimes such as witness or victim intimidation, fleeing or eluding a police officer and

***The state defines as violent many individuals who did not actually commit a violent act.***

causing harm, threatening a witness or battery by prisoners. Additionally, 152 people were convicted of crimes related to drug or alcohol abuse.

The state defines as violent many individuals who did not actually commit a violent act.

Still, there are some inherently violent crimes that the FBI does not classify as such, for instance, certain child abuse statutes or certain charges of battery.

The state needs better criminal justice data to present information like this to the public.

## Recommendations

Wisconsin should adopt a model similar to Florida's, where detailed information on convictions is reported. Florida reports over 100 different types of offenses. Wisconsin reports just four: violent, property, drug and public order offenses.

The state should work to implement better data and reporting standards. Until we have better data on who is incarcerated in Wisconsin's prisons and why, efforts to implement smart and safe reforms will be hamstrung. ❌

### About the author



Julie Grace is a policy analyst for the Badger Institute's Center for Opportunity.

## Endnotes

<sup>1</sup> The WPPA report cites 95 fatalities but only lists 93 fatal shootings in the year-by-year statistics. These kind of discrepancies are common in use-of-force reports.

<sup>2</sup> <https://wppa.com/wisconsin-officer-involved-shootings-deaths-rose-in-2019/#:~:text=Wisconsin%20Officer-Involved%20Shootings%20%26%20Deaths%20Increased%20in%202019,the%20WPPA%20began%20collecting%20this%20data%20in%202014>

<sup>3</sup> <https://city.milwaukee.gov/ImageLibrary/Groups/cityFPC/Reports/Use-of-Force-Reports/2018yearendUOFreport.pdf>, p. 4

<sup>4</sup> <https://www.cityofmadison.com/police/documents/AccountabilityRpt2019.pdf>

<sup>5</sup> In some instances, more than one type of force was used against a single citizen in Green Bay. As a result, there were 348 uses of force reported in the 283 incidents.

<sup>6</sup> The number of citizen complaints against officers is declining in Milwaukee. As recently as 2009, there were 481 complaints filed. Since 2013, annual complaints have been under 250.

<sup>7</sup> Complainants raise myriad issues through complaints to both the Milwaukee Police Department itself (113 in 2018) and the Fire and Police Commission (46 in 2018). This divided structure is further complicated by the fact that the two organizations do not accept or categorize complaints the same way. The Police Department counts any complaint received from the public (in person, phone call, written or emailed) as a “complaint” and investigates its validity. The FPC separates complaints into informal and formal complaint categories. When a citizen calls the FPC with a complaint, an investigator informs the citizen how to file a formal complaint with the FPC. If the individual does not file a formal complaint, it is not recorded in the file of the officer and is not investigated. If the citizen follows the process provided by the FPC, it becomes a formal complaint, is investigated by the FPC and entered into the officer’s file. For the purposes of this report, the data covers only complaints designated by FPC as formal complaints and all complaints filed with the MPD.

<sup>8</sup> The Milwaukee Police Department’s lowest level of discipline is a district level reprimand, while the next higher level is an “Official Reprimand”; these are documented in the personnel file of the officer but result in no suspensions or demotions. The Fire and Police Commission report does not separate out whether the reprimand was district level or official.

<sup>9</sup> [https://docs.legis.wisconsin.gov/document/statutes/62.13\(1\)](https://docs.legis.wisconsin.gov/document/statutes/62.13(1))

<sup>10</sup> *Conway v. Bd. of Police & Fire Comm’rs of City of Madison*, 2003 WI 53

<sup>11</sup> “Panel holds power over jobs – after a trial-like hearing, it can overturn a firing,” Gina Barton, *Milwaukee Journal Sentinel*, March 27, 2011

<sup>12</sup> <https://www.jsonline.com/story/news/local/milwaukee/2020/10/09/milwaukee-police-chief-search-commission-considers-changes-process/5937121002/>

<sup>13</sup> Collective bargaining rights were “generally aimed at avoiding public employee labor unrest and strikes,” according to an informational paper published by the Wisconsin Legislative Fiscal Bureau in 2019, “State and Local Government Employment Relations Law.”

<sup>14</sup> “Police contract may aid in firings – Use of arbitration could be broadened under MPD deal,” *Milwaukee Journal Sentinel*, Larry Sandler, October 18, 2007, and Agreement Between City of Milwaukee and The Milwaukee Police Association, Local #21 I.U.P.A, AFL-CIO, Effective January 1, 2018 through December 31, 2019.

<sup>15</sup> <https://city.milwaukee.gov/ImageLibrary/Public/ImageLibrary/Photos/FPCRrules.pdf>

<sup>16</sup> The public records law permits the withholding of disciplinary records until the final discipline is determined. This means that the records requests related to the discipline would be denied until all investigations and hearings are completed and the discipline is imposed.

<sup>17</sup> This number is slightly lower than the Department of Correction’s count of violent prison admissions in 2019 (3,820). That is likely because some (though few) statutes can be violent in some instances and another category in other instances, depending on case by case circumstances. The DOC also categorizes based on case details, while the Badger Institute conducted its search based on statute numbers and descriptions.

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