

Michigan Journal of Race and Law

Volume 21

2016

Closing the Gap Between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions

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Recommended Citation

Jonathan M. Smith, *Closing the Gap Between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315 (2016).

Available at: <https://repository.law.umich.edu/mjrl/vol21/iss2/7>

<https://doi.org/10.36643/mjrl.21.2.closing>

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CLOSING THE GAP BETWEEN WHAT IS LAWFUL AND
WHAT IS RIGHT IN POLICE USE OF FORCE
JURISPRUDENCE BY MAKING POLICE DEPARTMENTS
MORE DEMOCRATIC INSTITUTIONS

Jonathan M. Smith[★]

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

—Union Pacific Railroad Co. v. Botsford¹

I can't breathe.

—Eric Garner²

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1. 141 U.S. 250, 251 (1891).

2. Eric Garner died on July 17, 2014, on the streets of Staten Island, New York, after having been placed in a chokehold by police. He was being arrested for selling loose untaxed cigarettes. The arrest and his death were captured on cell phone video by a bystander, which was widely released by the media. As he was dying, Garner can be heard on the video repeatedly saying, "I can't breathe." Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html>.

INTRODUCTION

On August 9, 2014, Michael Brown was shot to death in Ferguson, Missouri, by police officer Darren Wilson.³ Members of the Ferguson community rose up in response.⁴ Protests demanding that police violence against African Americans cease and that accountability for police misconduct be addressed erupted across the country, and they have not subsided since.⁵ Incidents in Baltimore, Maryland;⁶ Chicago, Illinois;⁷ Waller County, Texas;⁸ and elsewhere have kept the movement alive. The mass media, the political elite, and the White middle class woke up to a reality that had been long known to communities of color – force is used disproportionately against people of color, and this has caused a breakdown in trust between the police and the communities they serve.⁹

There are many causes for this breakdown in trust.¹⁰ Police officers are the faces of a criminal justice system that has dramatically disproportionate negative effects based on race and economic status. Practices like stop-and-frisk¹¹ and broken windows policing¹² have put people of color

3. Department of Justice Report Regarding The Criminal Investigation Into The Shooting Death Of Michael Brown By Ferguson, Missouri Police Officer Darren Wilson, U.S. DEP'T OF JUSTICE (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

4. See Emily Wax-Thibodeaux & DeNeen L. Brown, *Ferguson protesters: The peaceful, the elders, the looters, and the 'militants.'*, WASH. POST (Aug. 18, 2014), https://www.washingtonpost.com/politics/ferguson-protesters-the-peaceful-the-elders-the-looters-and-the-militants/2014/08/18/d6be1262-26f3-11e4-8593-da634b334390_story.html.

5. See Wesley Lowery, *On policing, the national mood turns toward reform*, WASH. POST (Dec. 13, 2015), https://www.washingtonpost.com/national/on-policing-the-national-mood-turns-toward-reform/2015/12/13/1174ef1e-a03f-11e5-a3c5-c77f2cc5a43c_story.html.

6. Sheryl Gay Stolberg, *Crowds Scatter as Baltimore Curfew Takes Hold*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/2015/04/29/us/baltimore-riots.html>.

7. Tony Briscoe, *Crowds shrink, but protesters say they won't stop push for police reforms*, CHI. TRIB. (Dec. 12, 2015, 8:15 PM), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-police-protests-met-1211-20151210-story.html>.

8. David Montgomery, *New Details Released in Sandra Bland's Death in Texas Jail*, N.Y. TIMES (July 20, 2015), <http://www.nytimes.com/2015/07/21/us/new-details-released-in-sandra-blands-death-in-texas-jail.html>.

9. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICE SERVICES, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) (“Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.”).

10. See *id.*

11. Stop-and-frisk is a practice used by some urban police departments and consists of police-initiated pedestrian stops followed by pat-down searches of the person stopped for weapons or contraband. The indiscriminate use of stop-and-frisk has been credited with creating significant hostility between police and communities of color. NANCY G. LA VIGNE AT AL., OFFICE OF CMTY. ORIENTED POLICING SERVS., STOP AND FRISK: BALANCING CRIME CONTROL WITH COMMUNITY RELATIONS 1, 9 (2014), <http://-inc.com//--pub.pdf>.

in hostile contact with law enforcement on a daily basis. The imposition of excessive fines and court fees in some communities has created severe criminal consequences often for traffic or other minor offenses.¹³

These practices have driven a wedge between the police and those most likely to be policed. When federal civil rights investigators entered a Cleveland, Ohio, police substation, they found a sign that read “Forward Operating Base.”¹⁴ The investigators noted that “[t]his reference to a military outpost in enemy territory was posted in the station’s vehicle bay.”¹⁵ The sign, in a graphic way, illustrates that far too often both police and communities believe that law enforcement is a hostile occupying force.

A significant factor in this mistrust is that police conduct is infrequently reviewed, and as a result, police officers and police departments are not held accountable for abuses. Judicial decisions are responsible, at least in part, for substantially eroding the protections provided by the Constitution against the excessive use of force by police.¹⁶ As is demonstrated below, the Fourth Amendment is increasingly interpreted as creating very limited rights for persons subjected to the use of force by police. Moreover, the Supreme Court has constructed procedural barriers, including strict standing rules and qualified immunity, to make judicial review of police practices difficult.¹⁷ The Court has placed outside of judicial review

12. Broken windows policing is based on the theory that serious crime is generated where there is general disorder and lawlessness. By strictly enforcing minor violations, police create order and disrupt crime. “Broken windows” were seen as symbolic of the general disorder that was addressed by the practice. Matthew C. Schneider, *Broken Windows and Community Policing*, CMTY. POLICING DISPATCH (Jan. 2009), http://cops.usdoj.gov/html/dispatch/January_2009/nugget.htm; see also George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, ATLANTIC MONTHLY (Mar. 1982).

13. See Loretta E. Lynch, *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty*, U.S. DEP’T OF JUSTICE 42 (Dec. 3, 2015), <http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and>; U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42 (2015), http://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf.

14. U.S. DEP’T OF JUSTICE, REPORT OF INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 6 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.

15. *Id.*

16. As is discussed in Part I below, the jurisprudence on the use of force has evolved substantially to reduce the protection the Constitution provides to individuals in encounters with police. The Supreme Court found unconstitutional the shooting of a fleeing suspected burglar in the 1985 case of *Tennessee v. Garner*, 471 U.S. 1 (1985), but fewer than thirty years later authorized deadly force against a suspect who attempted to flee from a traffic stop for an equipment violation in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

17. The Supreme Court has held that there must be a “robust consensus” in the case law that places the “statutory or constitutional question beyond debate” before an officer can be held liable. *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, 1778 (2015) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). The question must be subjected to an “exacting standard,” and the legal precedent must be “sufficiently definite.” *Id.* at 1774. Thus, a litigant, to be success-

police conduct that communities perceive as excessive and that erodes the trust between these communities and law enforcement officers.¹⁸ The Court's jurisprudence in this arena has created a substantial gap between what is lawful and what is right.

Moreover, criminal prosecutions, which are critical for individual accountability, are rare¹⁹ and thereby fail to hold police institutions accountable for systemic failures. As the law tilts heavily in favor of officers, prosecutors are reluctant to charge and juries are hesitant to convict.

Civil and criminal legal actions that create police accountability are instrumental to reform. However, it is inherently insufficient to address the national crisis in policing. This Article will describe the jurisprudential and practical limits to relying on the civil and criminal legal processes to control police behavior and create accountability and will offer recommendations on the need to democratize police departments through transparency and robust community oversight. Part I will explore barriers to private civil litigation and to criminal prosecutions in achieving reform. Part II will offer recommendations on measures to ensure that police departments are responsive to a meaningful democratic process that can overcome some of the failures of the current systems of accountability.

I. THE ILLUSION OF THE FOURTH AMENDMENT'S PROTECTION
AGAINST THE UNREASONABLE USE OF FORCE BY LAW
ENFORCEMENT CREATES BARRIERS TO CIVIL
AND CRIMINAL ACCOUNTABILITY

Police are given both extraordinary powers and extraordinary responsibilities. They are among the few public officials authorized by law to

ful, must be able to point to a case of nearly identical facts to prevail. *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that the plaintiff could not seek prospective relief to prevent the use of chokeholds unless he could show that he was likely to be subjected to a chokehold again); *see also Honig v. Doe*, 484 U.S. 305, 322 (1988) (“Our cases reveal that, for purposes of assessing the likelihood that state authorities will reinflct a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”).

18. The failure of the prosecutors in Cleveland, Ohio, to prosecute the shooting death of twelve-year-old Tamir Rice is but the latest example of a case caught on video that shocked the community but has avoided criminal prosecution. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0; Ryllie Danylko, *Tamir Rice Supporters Protest in Downtown Cleveland in Response to Grand Jury Decision*, CLEVELAND.COM (Dec. 29, 2015), http://www.cleveland.com/metro/index.ssf/2015/12/tamir_rice_supporters_block_tr.html.

19. Of the approximately 1,000 deaths from officer-involved shootings in 2015, fewer than twenty have been prosecuted. Kimberly Kindy, Marc Fisher, Julie Tate, & Jennifer Jenkins, *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2014), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>. The failure of prosecutors to pursue police-involved shootings is discussed in greater depth in Part I.C below.

routinely use force in the course of their duties. The execution of stops and arrests “necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it.”²⁰ The right to use force, while broad, is not unlimited. The Fourth Amendment²¹ established the right of “people to be secure in their persons” and to be protected from “unreasonable searches and seizures,” and as discussed below, it has long been understood to create boundaries on the use of force by law enforcement.

For much of the history of this Nation, courts have remained silent on the Fourth Amendment’s meaning in the context of the use of force. Beginning in the late 1960s and continuing to the 1980s, the Court announced a series of decisions that created the foundational doctrines to assess when and how the courts should analyze claims of excessive force and how the Constitution’s protections should be viewed as limits on police powers. These cases, however, were the high watermark in protecting individuals from officers’ use of excessive force. The Court’s more recent decisions have been less generous to individual rights and have instead converted the Fourth Amendment from a tool to protect the civil liberties of individuals to a shield from liability for law enforcement.²²

The next section discusses the landmark decisions expanding the protection of individual rights. It will then review recent cases that have substantially eroded those rights. Each group of cases—those expanding individual rights and those giving broad license to the police—are the product of their times. The first set was issued in the wake of the civil rights movement, while the latter set was issued in the era of mass incarceration and the War on Drugs.

20. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

21. The Fourth Amendment states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

22. Every significant use of force case heard by the Supreme Court in recent terms has found either that the conduct of the officer was objectively reasonable or that the officer was entitled to qualified immunity. *See, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305, 306, 312 (2015) (finding that shooting driver of car engaged in high-speed chase reasonable although less lethal strategies to stop car were available); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769, 1771, 1778 (2015) (holding that shooting woman with mental illness alone in her room in a group home does not create liability); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017–18, 2022–23 (2014) (determining that shooting driver of car pulling away from police officers after temporary cessation of high-speed chase where the driver had initially been stopped for a broken headlight does not create liability).

A. *The Creation of the Right to be Free From the Unreasonable Use of Force by Law Enforcement*

*Terry v. Ohio*²³ was the first in a string of cases that placed meaningful limits on the police's power to use force. The *Terry* Court recognized that any police restraint on movement, including a mere stop that does "not eventuate in a trip to the stationhouse and prosecution for a crime" implicates the Fourth Amendment.²⁴ A stop²⁵ even without an arrest is a seizure that constitutes "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."²⁶

The *Terry* decision was issued in 1968, against the backdrop of urban social unrest, which had a clear influence on the Court. The Court's opinion expressly noted that unrestrained police power to stop and restrain individuals "can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities."²⁷ In July 1967, the inner cities of Detroit and Newark experienced unrest, rebellion, and rioting that spread to other cities with similarly high concentrations of African-American poverty.²⁸ In seeking recommendations to address the underlying conditions that led to this unrest, President Johnson appointed the National Advisory Commission on Civil Disorders, led by Illinois Governor Otto Kerner, later known as the Kerner Commission.²⁹

23. 392 U.S. 1 (1968).

24. *Id.* at 16.

25. Significantly, *Terry* separately analyzed the Fourth Amendment implications for the stop and the frisk, noting that each required separate justification. A stop can be made when there is a reasonable suspicion that the person is engaged in criminal activity. *Id.* at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). However, an officer may only engage in a frisk where "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others is in danger." *Id.* at 27. Far too often, police treat the frisk and an integral part of the stop, ignoring the distinction drawn in the cases. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The "reasonable suspicion" standard articulated in *Terry* has been diminished in subsequent Supreme Court cases. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (holding that reasonable suspicion can be justified on a "totality of circumstances").

26. *Terry*, 392 U.S. at 17. Some scholars argue that the *Terry* decision itself gives police too much power, but in contrast to the cases that follow, *Terry* is a significant civil liberties victory. See, e.g., Craig Menchin, *Why NYPD Terry Stops Are More Problematic Than You Think*, 8 STAN. J. C.R. & C.L. 299, 301-02 (2012).

27. *Terry*, 392 U.S. at 12.

28. KERNER COMM'N, THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (Pantheon Books 1988) (1968) [hereinafter KERNER COMMISSION REPORT].

29. Exec. Order 11,365, 32 C.F.R. 11111 (Aug. 1, 1967). The Executive Order gave the Commission the following charge to investigate and to make recommendations about the following:

The Kerner Commission issued its now iconic report one year later.³⁰ The report examined the effects of police practices and housing and employment discrimination, as well as the persistent effects of racial segregation.³¹ Police and criminal justice practices were especially scrutinized in the report. The Commission concluded that, to many, police had come “to symbolize white power, white racism and white repression.”³² The Commission famously warned: “Our nation is moving toward two societies, one black, one white—separate and unequal.”³³

The two decades following the *Terry* decision were a period of social transformation. The Court continued to recognize that liberty interests were significantly impacted by police conduct and that the Fourth Amendment protections against the seizure of a person without cause must be preserved. The Court held that even the most limited restraint was subject to protection and that a seizure occurs at the moment a person is not free to leave.³⁴ Nevertheless, police officers are not restrained from approaching or posing questions to a person on the street; “[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.”³⁵

The Court also recognized that even when authorized to detain or arrest a person, the amount of force officers were permitted to use is subject to Fourth Amendment review. The Court first meaningfully addressed the appropriate amount of force when it examined the circumstances in

-
- (1) The origins of the recent major civil disorders in our cities, including the basic causes and factors leading to such disorders and the influence, if any, of organizations or individuals dedicated to the incitement or encouragement of violence.
 - (2) The development of methods and techniques for averting or controlling such disorders, including the improvement of communications between local authorities and community groups, the training of state and local law enforcement and National Guard personnel in dealing with potential or actual riot situations, and the coordination of efforts of the various law enforcement and governmental units which may become involved in such situations;
 - (3) The appropriate role of the local, state and Federal authorities in dealing with civil disorders; and
 - (4) Such other matters as the President may place before the Commission.

Id. at 11111.

30. KERNER COMMISSION REPORT, *supra* note 28.

31. *Id.* at 7-16.

32. *Id.* at 11.

33. *Id.* at 1.

34. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969).

35. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

which an officer could use deadly force in *Tennessee v. Garner*.³⁶ Garner, an unarmed teenager, was shot while running away from a Memphis, Tennessee, police officer who was called to the scene of a suspected burglary.³⁷ The officer relied on a State statute that permitted police to “use all necessary means to effect the arrest” of a fleeing suspect and the common law notion that deadly force was always justified to secure the arrest of a fleeing felon.³⁸

The Court struck down the use of the Tennessee statute to the extent that it was being used to justify deadly force against nonviolent suspects.³⁹ Deadly force, the Court held, is authorized only when:

the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.⁴⁰

In reaching this conclusion, the Court relied on a line of cases mandating that the constitutional analysis “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”⁴¹ The *Garner* Court concluded that the question of how much force is permitted is one of proportionality and requires a balancing of the harm to the individual against the interests of the state.⁴² In the more recent cases discussed below, the scales have tilted so far away from the individual’s interest such that it barely plays a role in the analysis.

*Graham v. Connor*⁴³ extends the analysis developed in *Garner* to all uses of force, not just to circumstances involving deadly force and fleeing felons. The Court clarified that the Fourth Amendment limits the circumstances that justify a police officer’s use of force and the amount of force that is reasonable in a particular circumstance.⁴⁴ Referencing its decision in *Garner*, the Court explained that the “‘reasonableness’ of a particular

36. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

37. *Id.* at 3.

38. *Id.* at 4-5 (quoting Tenn. Code Ann. § 40-7-108 (1982)).

39. *Id.* at 10.

40. *Id.* at 11-12.

41. *Id.* at 8.

42. *Id.* at 7.

43. 490 U.S. 386, 395 (1989).

44. *Id.* at 396.

seizure depends not only on *when* it is made, but on *how* it is carried out.”⁴⁵

The Court concluded that the balancing of the individual and governmental interests was not subject to a “mechanical” application, but rather must take into account all of the relevant facts and circumstances and be viewed “from the perspective of a “reasonable officer.”⁴⁶ In articulating what have become known as the *Graham* factors, the Court created a non-exclusive list of considerations: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁴⁷

Terry, *Garner*, *Graham*, and other Supreme Court decisions regarding the Fourth Amendment in the 1960s, ‘70s, and ‘80s placed substantial weight on balancing police powers against the intrusion on the individual’s Fourth Amendment interests.⁴⁸ The standards in these cases require a set of value-laden judgments that do not lend themselves to rigid application. In the cases decided before the radical transformation of the criminal justice system that resulted in mass incarceration and the criminalization of communities of color,⁴⁹ the Court emphasized the interests of those being apprehended when balancing the individual rights protected by the Fourth Amendment against the governmental interest in apprehending a suspect. In the cases decided in more recent terms of the Court, very little consideration is given to the interests of the individual. As a result, there have been no significant cases in the last decade in which the Supreme Court has held that the individual’s rights trumped the governmental interest. It is difficult to square the Supreme Court’s finding in *Garner* that the shooting in the back of a seventeen-year-old suspect was unjustified, with its ready acceptance of the shooting of fleeing suspects in the cases discussed below. Given this shift, it is unclear whether the current Court would maintain that shooting an unarmed, fleeing suspect is unjustified.⁵⁰

45. *Id.* at 395 (emphasis in original).

46. *Id.* at 398.

47. *Graham v. Connor*, 490 U.S. 386, 398 (1989).

48. *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977); *see also Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Place*, 462 U.S. 696, 703 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981); *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

49. In the *New Jim Crow*, Michelle Alexander demonstrates the use of the criminal justice system and the effects of collateral consequences of criminal justice involvement on maintaining racial segregation and suppressing African-American economic mobility. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

50. In *Brosseau v. Haugen*, the Supreme Court found that shooting an unarmed person who is fleeing the execution of arrest warrant for theft by attempting to start a car and drive away does not create liability. 125 S. Ct. 596 (2004).

B. *The Court's More Recent Narrow Application of the Fourth Amendment in the Context of the Use of Force by Law Enforcement Makes Private Civil Enforcement Very Difficult*

When the Kerner Commission issued its report in 1968, there were fewer than 190,000 prisoners in the United States, the majority of whom were White.⁵¹ The rate of incarceration was the lowest it had been since the 1920s at ninety-four persons incarcerated per 100,000 in the population.⁵² The “War on Drugs”⁵³ soon changed the face of prisons. Today, 2.3 million people are in prison or in jail and nearly seven million are under some form of correctional supervision.⁵⁴ For every 100,000 people, more than 400 are incarcerated.⁵⁵ The United States has 4.4 percent of the world’s population and twenty-two percent of its prisoners.⁵⁶ African-American men are six times more likely to be incarcerated than White men.⁵⁷ Nearly one out of every five African-American men is missing from his family and from his community because he is incarcerated.⁵⁸ The criminal justice system, with police at the forefront, has become the dominant governmental institution in many communities.

51. MARC MAUER, *THE RACE TO INCARCERATE* (1999).

52. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISON POPULATION 1925 – 81*, (Dec. 15, 2015), <http://www.bjs.gov/content/pub/pdf/p2581.pdf>.

53. In 1971, President Richard Nixon declared a war on drugs and led a fight for increased enforcement of drug laws and enhanced penalties for drug crimes. Frontline, *Thirty Years of America's Drug War*, PUBLIC BROADCASTING SERVICE, <http://.pbs.org/////>. While drug use and drug-related crime stayed relatively constant over time, arrests and incarcerations for drugs increased dramatically as a result of the War on Drugs policies. Tina Dorsey, *Drugs and Crime Facts*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2012), <http://www.bjs.gov/content/pub/pdf/DCF.pdf>.

54. Nick Wing, *America's Horrifying Mass-Incarceration System, In 1 Chart*, HUFFINGTON POST (Dec. 9, 2015), http://www.huffingtonpost.com/entry/us-prison-population_us_56686cf0e4b0f290e5217ff.

55. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2013* (Sept. 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

56. The United States population is 322 million, which is 4.4 percent of the world population of 7.29 billion. *U.S. and World Population Clock*, U.S. CENSUS (Dec. 30, 2015), <http://www.census.gov/popclock/>. There were 2.217 million prisoners in the United States, which is about twenty-two percent of the global prison population of 10.2 million. *Highest to Lowest – Prison Population Total*, INST. FOR CRIM. POL’Y RES. (DEC. 30, 2015), http://www.prison-studies.org/highest-to-lowest/prison-population-to-tal?field_region_taxonomy_tid=All&=Apply; see also *OECD Factbook 2010*, ORG. FOR ECON. COOPERATION AND DEV. (May 25, 2010), http://www.oecd-ilibrary.org/economics/oecd-factbook-2010_factbook-2010-en.

57. *Prison Population Reductions Stalled in 2013*, SENTENCING PROJECT (Sept. 16, 2014), http://www.sentencingproject.org/detail/news.cfm?news_id=1872&id=167.

58. Justin Wolfers, David Leonhardy & Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), <http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?abt%3D0002%26abg%3D1&r=0>.

Alongside the dramatic expansion of the prison system, the Supreme Court's application of the balancing test articulated in its Fourth Amendment cases tilted toward the justification of officer conduct. The Court heightened the wall to judicial review by relying on qualified immunity—a doctrine that holds that a public official “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it.”⁵⁹

The holdings in *Graham* and *Garner* that require a detailed analysis of the facts and circumstances of each case to determine whether the force used was reasonable did not clearly establish the law sufficient for officer misconduct to be judged unconstitutional. The current Court has set a nearly impossible bar, demanding that the “statutory or constitutional question be beyond debate . . . with a robust consensus of cases of persuasive authority.”⁶⁰ The Court found that “use of *Garner’s* ‘general’ test for excessive force” is insufficient.⁶¹ The Court has expressly designed qualified immunity “to protect officers from the sometimes ‘hazy border between excessive and acceptable force,’ ”⁶² even where the officer’s conduct is “constitutionally deficient.”⁶³ To avoid the application of qualified immunity, the plaintiff must show that “it was clearly established that the Fourth Amendment prohibited the officer’s conduct in the ‘situation [she] confronted.’ ”⁶⁴ Given that no two circumstances are exactly alike, meeting this threshold is often daunting.

Among the most stunning decisions on the use of force by police is the Court’s 2015 opinion in *San Francisco v. Sheehan*.⁶⁵ Sheehan had schizoaffective disorder and was living in a group home for persons with mental illness.⁶⁶ She had a private room on the second floor, and the facil-

59. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

60. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083-84 (2011).

61. *Plumhoff*, 134 S. Ct. at 2020; *see also* *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (holding that the right must be clearly established in a “particularized” manner).

62. *Saucier*, 533 U.S. at 206.

63. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

64. The full text without ellipses makes clear the level of identity between the challenged conduct and prior precedent that is required to overcome a qualified immunity challenge: “Use of *Garner’s* ‘general’ test for excessive force was ‘mistaken.’ The correct inquiry, the Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer’s conduct in the ‘situation [she] confronted’: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.’ The Court considered three court of appeals cases discussed by the parties, noted that ‘this area is one in which the result depends very much on the facts of each case,’ and concluded that the officer was entitled to qualified immunity because ‘[n]one of [the cases] *squarely governs* the case here.’” *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (internal citations omitted).

65. 135 S. Ct. 1765 (2015).

66. *Id.* at 1769.

ity had a social worker on its staff.⁶⁷ Sheehan stopped eating, taking medication, and speaking with her psychiatrist.⁶⁸ When the social worker checked on her, she told him that she had a knife, that she did not want his help, and that she would kill him if he returned.⁶⁹ The social worker then cleared the building and called the police to take her into custody on a temporary commitment.⁷⁰

Two officers responded to the call and knocked on Sheehan's door.⁷¹ When she did not answer, they entered her room.⁷² Sheehan grabbed a knife and threatened to kill them.⁷³ They retreated behind the door momentarily.⁷⁴ The officers then reentered the room without announcing themselves.⁷⁵ Ms. Sheehan came forward with the knife, and they sprayed her with pepper spray.⁷⁶ When she did not stop, they shot her repeatedly.⁷⁷

Two of the three *Graham* factors—"the severity of the crime at issue" and "whether the suspect poses an immediate threat to the safety of the officers or others"—weighed heavily in favor of Sheehan but were largely ignored by the Court. She had not committed a crime; the police were called to protect her welfare.⁷⁸ Moreover, the officers found safety behind the door and were in no danger until they reentered the room knowing that using force would be unavoidable. The only factor that the Court meaningfully took into account was her resistance to being taken into custody. The Court's heavy reliance on Sheehan's resistance, to the exclusion of all other factors, distorted the multi-factor inquiry required by *Graham*.

The Court had no trouble finding that the use of force during the second entry was constitutional.⁷⁹ Unlike the cases discussed above, the Court in *Sheehan* never considered the magnitude of the liberty interest of a severely mentally ill woman who was alone in a second-floor room.⁸⁰ Not even the testimony that the officer's conduct violated the San Fran-

67. *Id.* at 1770.

68. *Id.*

69. *Id.*

70. *Id.* at 1769-71.

71. *Id.* at 1771.

72. *Id.*

73. *Id.*

74. *Id.* at 1765.

75. *Id.*

76. *Id.*

77. *Id.*

78. The City of San Francisco attempted to prosecute Sheehan for assault with a deadly weapon, assault on a police officer with a deadly weapon, and criminal threats. The jury acquitted on the threats and hung on the other charges. *Id.* at 1771.

79. For reasons that are not clear from the opinion in the case, the warrantless first entry was never challenged. *Id.* at 1776.

80. *Id.*

cisco Police Department's policy and training persuaded the Court.⁸¹ The Department's policy was not to enter a barricaded room but instead to wait for back up and a trained negotiator.⁸² The Court nominally decided the case on the grounds of qualified immunity, finding that a "reasonable officer" might not know that it was unlawful to engage in the conduct that led to shooting Sheehan.⁸³ This was a marked departure from the language in *Terry* that "simple 'good faith on the part of the arresting officer is not enough If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate."⁸⁴

The driving principle in the *Sheehan* decision originated from a single line in *Graham*: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."⁸⁵ In an effort to avoid the balancing of interests required by the Fourth Amendment, the Court resolved the case on qualified immunity grounds.⁸⁶ Thus, the overwhelming concern of the *Sheehan* Court was considering whether the officers could have had a subjective belief that their conduct was lawful.⁸⁷ But in *Graham*, any deference to the officer's decision-making was placed in the context of "careful attention to the facts and circumstances of each particular case."⁸⁸ *Graham* also warns that the standard must be objective and that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."⁸⁹ Cloaking the analysis in qualified immunity may give the *Sheehan* Court doctrinal cover, but it still has a corrosive impact on the ability of individuals and communities to hold police accountable by creating a very high bar to secure relief from the courts.

Similar interpretations of *Graham* and *Garner* were applied in *Plumhoff v. Rickard*, a recent case challenging the use of deadly force to stop a driver who is evading arrest.⁹⁰ Rickard was pulled over for a broken headlight and windshield.⁹¹ When asked for his license, he sped away and led the

81. *Id.*

82. *Id.* at 1777.

83. *Id.*

84. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

85. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

86. *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015).

87. *Id.*

88. *Graham*, 490 U.S. at 396.

89. *Id.* at 397.

90. 134 S. Ct. 2012 (2014).

91. *Id.* at 2017.

police on a high-speed chase involving multiple officers on a crowded highway where Rickard and officers weaved in and out of traffic.⁹² The chase ended in a parking lot.⁹³ When Rickard again attempted to drive away from the police, the officers fired twelve shots, killing him and his passenger.⁹⁴

The Court found this use of force objectively reasonable, relying on its previous decision in *Scott v. Harris*,⁹⁵ in which it found that an officer's ramming of a suspect's car objectively reasonable because the driver posed a threat to pedestrians.⁹⁶ In *Plumhoff*, the Court failed to consider that Rickard was being apprehended for an equipment violation and disregarded that Rickard was driving away from officers at the time they shot at him and that there were no civilians around.⁹⁷ Instead, the Court relied heavily on his attempt to escape and involvement in a high-speed chase.⁹⁸

The emphasis on Rickard's flight dominates the opinion. In one passage, the Court noted:

Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path—underscores the point.⁹⁹

The centrality of flight to the finding of reasonableness in *Plumhoff* stands in sharp contrast to the language in the *Garner* opinion:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.¹⁰⁰

92. *Id.*

93. *Id.*

94. *Id.* at 2018.

95. *Id.* at 2022; *Scott v. Harris*, 550 U.S. 372 (2007).

96. *Scott*, 550 U.S. at 386.

97. *Id.* at 372.

98. *Plumhoff*, 134 S. Ct. at 2021-22.

99. *Id.* at 2022.

100. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

While the *Plumhoff* Court emphasized the dangerousness of a high-speed chase,¹⁰¹ it ignored the fact that the chase would cease as soon as the police stopped chasing the suspect. For this reason, many police departments have implemented a policy limiting high-speed chases and the circumstances in which an officer can shoot at a moving car.¹⁰² High-speed pursuits are extremely dangerous, killing and injuring hundreds of bystanders and passengers each year.¹⁰³ Ninety-one percent of chases are for non-violent offenses and forty-two percent are for traffic violations.¹⁰⁴ The danger, especially for pursuits based on minor offenses, has led the Department of Justice to recommend restrictive chased policies.¹⁰⁵ For example, the National Institute of Justice issued recommendations in 1990 to limit the use of high-speed chases and to pursue alternatives, including ceasing the pursuit and tracking down the car at a later time through its license plate number.¹⁰⁶

The Court's excessive deference to the judgments of police officers is demonstrated in other Fourth Amendment contexts as well. In *Whren v. United States*,¹⁰⁷ the Supreme Court authorized police to use any traffic law violation as justification for a pretext stop.¹⁰⁸ The use of "pretext" stops has been widely credited as the cause for racial disparities in stops and

101. *Plumhoff*, 134 S. Ct. at 2022.

102. The Court extended the rule the next term in *Mullenix v. Luna* to permit shooting at moving vehicles even when there is no immediate threat, making the use of deadly force in many automobile chases very hard to challenge. See, e.g., *MPD Change Pursuit Policy: Alderman Donovan to Hold News Conference*, CITY OF MILWAUKEE (Mar. 29, 2010), http://city.milwaukee.gov/ImageLibrary/Groups/ccCouncil/2010PDF/08MPD_pursuit_newseradvis.pdf; Lexi Belculfine, *Pittsburgh police chief 'locks down' rules for vehicle pursuits*, PITTSBURGH POST GAZETTE (Nov. 25, 2015), <http://www.post-gazette.com/local/city/2015/11/25/Pittsburgh-police-chief-aimed-to-tighten-pursuit-policy-with-order-following-Bloomfield-crash/stories/201511250302>.

103. More than 5,000 bystanders have been killed in police chases since 1979 and tens of thousands more have been injured. Thomas Frank, *High-speed police chases have killed thousands of innocent bystanders: Victims include small children, teenage drivers and the elderly*, USA TODAY (July 30, 2015), <http://www.usatoday.com/story/news/2015/07/30/police-pursuits-fatal-injuries/30187827/>.

104. *The Case for Banning High-Speed Police Chases*, PRICENOMICS, <http://priceconomics.com/the-case-for-banning-high-speed-police-chases> (last visited July 22, 2015).

105. Hugh Nugent et al., *Restrictive Policies for High-Speed Police Pursuits*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE 20 (May 16, 1990), <https://www.ncjrs.gov/pdffiles1/Digitization/122025NCJRS.pdf>; see also Laura J. Nichols, *Managing Police Pursuit Policy*, INT'L ASS'N OF CHIEFS OF POLICE (2004), <http://www.theiacp.org/portals/0/pdfs/ManagingPolicePursuitsExecBrief.pdf>.

106. Nugent et al., *supra* note 105, at 20.

107. 517 U.S. 806 (1996).

108. *Id.* at 816.

for the phenomenon of driving while Black or Brown.¹⁰⁹ Racial bias in stops has been corrosive to the legitimacy of law enforcement.¹¹⁰

Even where a litigant can clear the high hurdle of qualified immunity and the Court could otherwise recognize a constitutional violation, standing rules can make it difficult for an individual to bring a challenge in court. In *Los Angeles v. Lyons*,¹¹¹ an African-American man who was placed in a chokehold during a traffic stop sought to challenge the City's chokehold policy.¹¹² Since he could not show that the policy would ever be used against him again, the Court found that he could not seek an injunction to stop the practice, regardless of whether it was unconstitutional.¹¹³

C. *The Paucity of Criminal Prosecutions has not led to Accountability*

Along with other accountability measures, one of the central demands of the Black Lives Matters movement and those protesting police violence is for increased prosecution of abusive officers.¹¹⁴ Despite the rise in prosecutions of police last year,¹¹⁵ only a small fraction of the thousands of uses of deadly force, even force against unarmed individuals, are ever charged. In 2015, seventeen police officers were charged nationally in fatal shootings, up from an average of five.¹¹⁶ Of those charged, twelve of the cases were caught on video.¹¹⁷ By some reports, nearly 1,100 people have

109. See e.g., David A. Harris, *Driving While Black: Racial Profiling On Our Nation's Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>; *Justice on Trial, Willful Judicial Blindness, Justice on Trial—Chapter IV: Willful Judicial Blindness*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/publications/justice-on-trial/judicial.html> (last visited Dec. 27, 2015); see generally Christopher Kutz, *For a Safer America, Curtail Traffic Stops*, L.A. TIMES (Aug. 13, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0813-kutz-traffic-stops-20150812-story.html>.

110. Cf. Jody Feder, *Racial Profiling: Legal and Constitutional Issues*, CONG. RESEARCH SERV. 4-5 (Apr. 16, 2012), <https://www.fas.org/spp/crs/misc/RL31130.pdf> (setting forth the doctrinal and procedural barriers to proving discrimination in police stops created by *Whren*).

111. 461 U.S. 95 (1983).

112. *Id.* at 98.

113. *Id.* at 105.

114. *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <http://www.join-campaignzero.org/investigations> (last visited Dec. 28, 2015).

115. Conor Friedersdorf, *The Number of Cops Indicted for Murder Spikes Upwards*, THE ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-shocking-number-of-cops-recently-indicted-for-murder/401732/>.

116. *More US Police Charged With Murder or Manslaughter*, CBS NEWS (Dec. 3, 2015, 5:32 PM), <http://www.cbsnews.com/news/more-u-s-police-charged-with-murder-or-manslaughter-in-2015/>.

117. Brandon Patterson, *Here Are All of the Cops Who Were Charged in 2015 for Shooting Suspects*, MOTHER JONES (Dec. 17, 2015, 6:00 AM), <http://www.motherjones.com/politics/2015/12/year-police-shootings>.

died at the hands of police.¹¹⁸ More than 200 of the people who died were unarmed during the encounter.¹¹⁹

The death of Eric Garner from an officer's chokehold did not result in an indictment, despite being captured on video.¹²⁰ Garner was being arrested for violating a New York law that prohibited the sale of loose cigarettes.¹²¹ The grand jury that heard this case did not find probable cause to charge the officer with a crime.¹²² While the grand jury proceedings have remained secret and the prosecutor has provided very little insight on the deliberations,¹²³ it is difficult to imagine a grand jury that genuinely balanced Garner's individual interests against the government's desire to arrest him. If the police officer in *Tennessee v. Garner* 'may not seize an unarmed, nondangerous suspect by shooting him dead,' where the officer was investigating a suspected burglary,¹²⁴ it is hard to imagine that the State's interest in the sale of untaxed cigarettes was so strong that it justified choking Eric Garner to death.

The shooting of Tamir Rice in Cleveland just days before Thanksgiving in 2014, and for which the grand jury has declined to bring an indictment, also illustrates the barriers to prosecution.¹²⁵ Rice was play-

118. *The Guardian* maintains a database of media reports of deaths of civilians during encounters with police. *The Counted: People killed by police in the US*, THE GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database#> (last visited Dec. 15, 2015); see also, KILLED BY POLICE, <http://killedbypolice.net/> (last visited Jan. 30, 2016), and FATAL ENCOUNTERS, <http://www.fatalencounters.org/> (last visited Jan. 30, 2016), for similar data sets.

119. *The Counted, People Killed by Police in the US*, THE GUARDIAN <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Feb. 9, 2016).

120. Andrew Siff, Jonathan Dienst & Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC NEWS (Dec. 3, 2014), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Statens-Island-Chokehold-Death-NYPD-284595921.html>. The case is still under review by the Criminal Section of the Civil Rights Division of the United States Department of Justice at the time of this writing.

121. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: the Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

122. Statement by Richmond County District Attorney Daniel M. Donovan, Jr., *Regarding the No True Bill in The Matter of the Investigation into the Death of Eric Garner* 1 (Dec. 15, 2015), <http://www.capitalnewyork.com/sites/default/files/Statement%20by%20Richmond%20County%20District%20Attorney.pdf> [hereinafter Donovan Statement]; Eyder Peralta, *Grand Jury In Garner Case Heard From 50 Witnesses, Saw 4 Videos*, NPR (Dec. 4, 2014), <http://www.npr.org/sections/thetwo-way/2014/12/04/368519032/grand-jury-in-garner-case-heard-from-50-witnesses-saw-4-videos>.

123. Donovan Statement, *supra* note 122; Peralta, *supra* note 122.

124. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

125. Statement from County Prosecutor Timothy J. McGinty on the decision of the Grand Jury in the Tamir Rice case (Dec. 28, 2015), <http://prosecutor.cuyahogacounty.us/en-us/Investigation-Into-Death-of-Tamir-Rice.aspx>.

ing with a toy gun in a public park.¹²⁶ After a 911 call, a police car was dispatched to the scene.¹²⁷ Rice was alone when the police arrived.¹²⁸ The car pulled up less than ten feet from Rice, and within seconds the officer had fatally shot him.¹²⁹ Two experts hired by the Cuyahoga County Attorney concluded, applying *Garner* as understood through *Sheehan*, that the officers' conduct did not violate the Fourth Amendment.¹³⁰ One of the experts dismissed as a mere "tactic" the decision to drive within feet of Rice.¹³¹ "Tactics," the expert concluded, were beyond Fourth Amendment scrutiny, relying on the decision in *Sheehan*.¹³²

As the primary responsibility for prosecuting police misconduct falls on local prosecutors, it is no surprise that so few cases are brought. Local prosecutors are frequently elected, depend on the police for their work, and have deep ties to law enforcement. These are strong incentives to avoid strict accountability. Calls for independent prosecutors, grand jury reform, and other accountability measures¹³³ may help overcome the inherent problem of asking a prosecutor to pursue police misconduct while simultaneously relying on the police to make her or his cases.

Moreover, the federal role in prosecuting police officers for misconduct is limited. Federal prosecutors must rely on the portion of the Civil Rights Act that prohibits deprivation of rights under color of law.¹³⁴ To prosecute under this statute, the United States must show that the defendant officer was acting under color of law, that she or he deprived a victim of a right protected by the Constitution or laws of the United States, that she or he acted willfully, and that the deprivation resulted in bodily injury and/or death.¹³⁵ Willfulness is amongst the highest-level mens rea require-

126. CUYAHOGA CNTY. PROSECUTOR, REPORT ON THE NOV. 22, 2014 SHOOTING OF TAMIR RICE 2, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf (last visited Dec. 30, 2015).

127. *Id.* at 2-4.

128. *Id.* at 24.

129. *Id.* at 4.

130. S. LAMAR SIMS, REPORT (RE: THE INVESTIGATION INTO THE OFFICER-INVOLVED SHOOTING OF TAMIR RICE) 13-14 (Oct. 6, 2015), http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Sims-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf [hereinafter SIMS REPORT].

131. W. KEN KATSARIS, REPORT AND OPINIONS OF W. KEN KATSARIS 8 (Nov. 12, 2015), http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Katsaris%20Report%20on%20Tamir%20Rice_Redacted.pdf.

132. SIMS REPORT, *supra* note 130, at 13-14.

133. See, e.g., *Policy Solutions and Initiative for Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/investigations> (last visited Jan. 28, 2016).

134. 18 U.S.C. § 242 (2012).

135. *Id.* ("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

ments in the criminal law and requires a showing that the conduct was “in open defiance or in reckless disregard of a constitutional requirement which has been made specific or definite.”¹³⁶ Despite this very high burden, the Civil Rights Division prosecuted 254 law enforcement officers for color of law violations in the four-year period from 2009 to 2012.¹³⁷

II. THE DEMOCRATIZING OF POLICING CAN HELP OVERCOME THE BARRIERS ERECTED TO CIVIL LITIGATION OR CRIMINAL PROSECUTION AND CREATE A CULTURE OF POLICE ACCOUNTABILITY

Since the Europeans enslaved the first Native American in 1492, official force has been used to subjugate people of color.¹³⁸ The slavery of Africans was enforced by State power even in the face of a movement for abolition; police were used to ensure that slave owners sustained their dominion over the people they claimed as property.¹³⁹ The naked use of police to enforce White supremacy extended through the period of Jim Crow and was apparent to the Kerner Commission in 1968, when it concluded that police “symbolize white power, white racism and white repression” to many in the Black community.¹⁴⁰

With the advent of the civil rights movement, the enactment of the Civil Rights Act¹⁴¹ and other anti-discrimination laws, de jure discrimination by police was outlawed. But *Whren's* permission to use pretext to obscure “driving while Black/Brown/Native American,” the disproportionate criminalization of communities of color during the War on Drugs, and the opacity of the police department operations have enabled the oppression of communities of color to continue. Outward uses of shocking force, like Bull Connor’s dogs and fire hoses, have been replaced by stop and frisk, warrant squads, jump out teams, and SWAT. The application of

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.”).

136. See *Screws v. United States*, 325 U.S. 91, 101-07 (1945).

137. U.S. Department of Justice Civil Rights Division Accomplishments, 2009 – 2012, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/us-department-justice-civil-rights-division-accomplishments-2009-2012#_Protecting_Individuals_within (Nov. 20, 2015).

138. See HOWARD ZINN, A PEOPLE’S HISTORY OF AMERICA (1980).

139. *Dred Scott v. Sandford*, 60 U.S. 393, 414, 418 (1856).

140. KERNER COMMISSION REPORT, *supra* note 28, at 301.

141. The Civil Rights Act, 42 U.S.C. § 1981.

these measures are perceived by many to be applied in a discriminatory fashion.¹⁴²

Every year, more than one in four people in the United States encounter a police officer.¹⁴³ But African Americans are significantly more likely to interact with police than Whites, and African Americans are significantly more likely to view their encounters as unjustified.¹⁴⁴ Much of White America is screened from the experience of African Americans and other people of color in police encounters. Implicit, and in some cases explicit, biases allow the majority electorate and those in political power to avoid the reality of the African-American community.

Every few years, a high profile case brings the problem of excessive force and racial bias to the forefront of the Nation's consciousness. There is a flurry of reform initiative but far too quickly the country returns to business as usual. In 1984, Eleanor Bumpurs was killed by the New York City police while they were evicting her for being behind in rent.¹⁴⁵ While an officer was charged in Bumpurs's death, he was acquitted.¹⁴⁶ Reforms of police practices were implemented in the wake of this shooting.¹⁴⁷ In 1992, the acquittal of the officers who beat Rodney King set off a rebellion in Los Angeles.¹⁴⁸ In 1994, Ernest Stayon was suffocated and died while Staten Island police handcuffed him, and a grand jury refused to indict.¹⁴⁹ Abner Louima, a Haitian immigrant, was beaten and sexually tortured by New York City police in 1997,¹⁵⁰ setting off marches and

142. *Study Finds Some Racial Differences In Perceptions Of Police Behavior During Contact With The Public*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Sept. 2013), <http://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm>.

143. *Id.*

144. *Id.*

145. Frank J. Prial, *Judge Acquits Sullivan In Shotgun Slaying Of Bumpurs*, N.Y. TIMES, (Feb. 27, 1987), <http://www.nytimes.com/1987/02/27/nyregion/judge-acquits-sullivan-in-shotgun-slaying-of-bumpurs.html>.

146. *Id.*

147. Selwyn Raab, *Ward Shifts Procedure In Disarming Deranged*, N.Y. TIMES (Nov. 2, 1984), <http://www.nytimes.com/1984/11/02/nyregion/ward-shifts-procedure-in-disarming-deranged.html>.

148. *The L.A. Riots: 20 Years Later, 1992 Riots Timeline*, L.A. TIMES (Apr. 20, 2012), <http://timelines.latimes.com/los-angeles-riots/>.

149. *Notable Cases Involving Police Brutality Complaints*, N.Y. TIMES (Aug. 4, 2014), http://www.nytimes.com/interactive/2014/08/04/nyregion/notable-brutality-cases-in-new-york.html?rref=collection%2Ftimestopic%2FDiallo%2C%20Amadou&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&r=0.

150. David M. Herszenhorn, *The Louima Ruling; Chronology of the Case*, N.Y. TIMES (Mar. 1, 2002), http://www.nytimes.com/2002/03/01/nyregion/the-louima-ruling-chronology-of-the-case.html?rref=collection%2Ftimestopic%2FLouima%2C%20Abner&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=8&pgtype=collection. Original documents regarding the Louima case can be found at <http://www.thesmokinggun.com/documents/crime/abner-louima-torture-case-0>.

demonstrations.¹⁵¹ In 1999, four officers shot unarmed Amadou Diallo with forty-one bullets in New York.¹⁵² Their jury acquittal led to a protest movement.¹⁵³

The availability of video evidence of police abuse has been a game-changer and may make modern-day cases different. It is now beyond contention that these are not isolated incidents but institutional failures and that racial bias is built into the system. Cell phone, body-worn, and dash-cam videos have made it impossible to deny Black voices and Black testimony regarding abuse during police encounters. Videos have also allowed for media coverage, the importance of which cannot be overstated. This coverage has validated the daily experiences of people in communities of color that have largely been ignored. Since the death of Michael Brown in August 2014, there has been a relentless stream of videos of police shooting unarmed persons, using excessive force, or otherwise engaging in misconduct. This epidemic of misconduct did not just emerge—it has been there all along.

The television reports and newspaper photographs of police suppression of the 1950s and '60s civil rights movement and of the enforcement of Jim Crow laws had an enormous impact on the success of the passage of the Civil Rights Acts.¹⁵⁴ The videos we see today will also be important when we look back at this time from the vantage point of history.

At the same time that the videos expose a problem with policing, they reveal a deeper issue about why the reports and the testimony of people of color have not been believed by the media, political leaders, or the courts. In answering this question, we will find a solution that creates accountability in policing and that will genuinely address the rift in trust between police and the communities they are sworn to protect and serve.

The project of “fixing” policing is complex. It will take time and effort and will require changes in culture, policy, training, hiring practices, supervision, accountability systems, and tactics. In response to the demonstrations and rebellion across the nation since Michael Brown’s death, President Obama appointed a Task Force on 21st Century Policing in

151. *Demonstrators in New York protest police brutality*, CNN (Aug. 29, 1997), <http://web.archive.org/web/20070105150456/http://www.cnn.com:80/US/9708/29/police.torture.rally/>.

152. *Notable Cases Involving Police Brutality Complaints*, *supra* note 149.

153. William K. Rashbaum, *The Diallo Case: The Protests; Marchers Protest Diallo Verdict, Taunting Police Along The Way*, N.Y. TIMES (Feb. 27, 2000), <http://www.nytimes.com/2000/02/27/nyregion/diallo-case-protests-marchers-protest-diallo-verdict-taunting-police-along-way.html?pagewanted=all>.

154. ANTHONY LEWIS, *MAKE NO LAW, THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991). President John Kennedy repeatedly mentioned the protests in Birmingham, Alabama, and elsewhere in the speech he gave in June 1963, calling on Congress to enact civil rights legislation. *Radio and Television Report to the American People on Civil Rights*, <http://www.presidency.ucsb.edu/ws/?pid=9271> (last visited Jan. 1, 2016).

December 2014.¹⁵⁵ The Task Force issued a report containing hundreds of recommendations in six separate domains: Building Trust and Legitimacy; Policy and Oversight; Technology and Social Media; Community Policing and Crime Reduction; Training and Education; and Officer Wellness and Safety.¹⁵⁶ The complexity of the undertaking is further demonstrated by the detailed injunctions and the years of litigation and implementation of reform orders where private or Civil Rights Division litigation has been brought to secure reform.

No single component of reform will be successful alone. The project requires deep and sustained changes inside departments, monitoring, and oversight. This Article, however, focuses on one critical component of the solution: the need to democratize the institution of policing through meaningful community participation in the governance of police departments and in the transparency of police practices. This will require the transfer of power and authority from current structures to new entities that more fairly represent the range of people who make up a given community and includes those most likely to be policed, including communities of color, communities living in poverty, LGBT persons, and youth. It will also require making data on police practices widely available, so the public and decision-makers will know in real time whether policing reflects the values of fairness and dignity and promotes public safety. As Justice Louis Brandies famously wrote: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹⁵⁷

Civilian participation in governance and increased transparency, as a part of a broader set of strategies that includes civil litigation and criminal prosecution, legislative reforms, and other measures, offers a path out of the narrow construction of the Constitution demonstrated by the Supreme Court decisions discussed above. The role of litigation remains important, as is demonstrated by the federal injunctions designed to end to racial profiling in Maricopa County, Arizona;¹⁵⁸ stop-and-frisk in New York;¹⁵⁹ and discriminatory practices in other communities. But in each of those communities, trust in police remains low and abuses continue. Without litigation, the reform process would not begin in many places; but without creating greater democracy in policing, the process will never be complete. They are indispensably tied together.

155. Exec. Order No. 13684, 79 C.F.R. 76865 (Dec. 14, 2014); *The Executive Order—Establishment of the President’s Task Force on 21st Century Policing*, THE WHITE HOUSE (Dec. 18, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/18/executive-order-establishment-presidents-task-force-21st-century-policin>.

156. FINAL REPORT OF PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 9.

157. LOUIS BRANDEIS, OTHER PEOPLE’S MONEY—AND HOW BANKERS USE IT (2014).

158. *Melendres v. Arpiao*, 784 F.3d 1254 (9th Cir. 2015).

159. *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014).

There are important lessons to be learned from the work of the Civil Rights Division of the United States Department of Justice in creating transparency and oversight as part of litigated reform.¹⁶⁰ Before discussing the essential role of the Civil Rights Division in ensuring police accountability, it is important to disclose that I served in the Division from 2010 to 2015 as the Chief of the Special Litigation Section. The Special Litigation Section was charged with enforcing provisions of the Violent Crime and Law Enforcement Act of 1994,¹⁶¹ which authorized the Attorney General of the United States to bring litigation to address patterns or practices of a law enforcement agency that violate the Constitution or federal law. The United States has standing under 42 U.S.C. § 14141 to seek prospective injunctive relief and thus avoids some of the barriers that private litigants face in overcoming *Lyons* and qualified immunity. I had the honor to work with an extraordinary team of lawyers, investigators, paralegals, and other staff on more than two dozen police accountability matters, including investigations, litigation, and consent decree enforcement.¹⁶²

Civil Rights Division investigations are an effective tool—arguably the most effective tool—to address widespread constitutional violations inside a police department. In one of the few comprehensive studies of a consent decree, a researcher looking at the Los Angeles Police Department found that not only had the pattern or practice of illegal conduct been addressed but that the police department was “noticeably different from what it was only a few years ago. The quality of service to residents is

160. It is important to note that the federal government is not a monolith on these issues. Federal law enforcement agencies engage in some of the same practices and suffer from some of the same deficiencies as the local police departments that are subject to review by the Civil Rights Division. Ryan J. Reilly, *Feds Urge Crackdown On Bad Cops, But Agencies Haven't Gotten The Message: Internal affairs departments at federal agencies have the same transparency problems as the local authorities the DOJ has investigated*, HUFFINGTON POST (Dec. 17, 2015), http://www.huffingtonpost.com/entry/doj-transparency-problems_567060fee4b0e292150f72b8. Moreover, the guidance issued by the Attorney General on the use of race by federal law enforcement agents allows federal officials to target specific ethnic and religious groups in certain circumstances, such as by mapping population concentrations of specified ethnic groups. *Guidance For Federal Law Enforcement Agencies Regarding The Use Of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Or Gender Identity*, U.S. DEP'T OF JUSTICE (Dec. 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

161. Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141; *Special Litigation Section*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/special-litigation-section> (last visited Feb. 9, 2016).

162. The Civil Rights Division posts all significant documents concerning its police accountability work on the Section's webpage. *Special Litigation Section Cases and Matters*, U.S. DEP'T OF JUSTICE (Jan. 12, 2016), <http://www.justice.gov/crt/special-litigation-section-cases-and-matters0>.

higher, the perception of the LAPD as fair has risen, and the use of force is down.”¹⁶³

During the course of an investigation, the Section’s experienced staff and a team of consultants undertake a comprehensive review of a department’s practices, identify not only the pattern of violation but the systemic cause, and work with the department to develop a remedy. Investigations are time-consuming and intensive. Even with the resources of the United States, the Section is unable to investigate or litigate in every community where there is a serious problem. There are approximately 18,000 police departments across the Nation,¹⁶⁴ and many have a problem with excessive use of force. In a national survey of 925 officers, researchers found:

Almost 22 percent agreed or strongly agreed that officers in their departments sometimes (or often or always) use more force than necessary, and only 16 percent reported that their fellow officers never do so. Although more than 90 percent found it inappropriate for officers to respond to verbal abuse with physical force, almost 15 percent indicated that officers in their departments engaged in such behavior at least sometimes.¹⁶⁵

Civil Rights investigations of law enforcement agencies play multiple roles:

- In communities where there is a pattern of unconstitutional conduct by police, an investigation and a consent decree, or in appropriate circumstances, an out-of-court settlement, can fix the problem. While agreements under prior administrations may have been less than robust,¹⁶⁶ the Obama Justice Department has prioritized comprehensive court-enforceable agreements and has invested significant staff time in ensuring that these agreements are enforced.

163. Christopher Stone, Thomas Fogelstone & Christine Cole, *Policing Los Angeles Under a Consent Decree: The Dynamics Of Change At the LAPD*, HARVARD KENNEDY SCH. OF GOV’T 1 (May 2009), <http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>.

164. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 at 2 (July 2011), <http://www.bjs.gov/content/pub/pdf/cslea08.pdf>.

165. David Weisburd et al., *Police Attitudes Toward Abuse of Authority: Findings From a National Study*, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE 3 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181312.pdf>; see also Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 23 (Yale Univ. Press 1996) (finding thirty-nine percent of police uses of force to be excessive).

166. See, e.g., Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON C.R. L.J. 479, 502-05 (2009).

- The findings and agreements reached by the Civil Rights Division provide guidance to other police departments. While each community is unique and each city must find the solutions that precisely address its problems and build on its strengths, there are lessons to be drawn from the outcomes in other cities facing similar issues.
- Activists and political leaders working to create accountability in other communities can also use the findings and agreements to guide their efforts. The investigative findings and the reform agreements can provide insights for their reform processes and ideas for effective remedies.

During the Obama administration, significantly greater emphasis has been placed on community engagement during an investigation, and ongoing engagement has been built into the remedies for patterns of violations found during investigations. In nearly every city investigated, the pattern of constitutional violations led to breakdowns in the relationships between sectors of the community and the police. Repairing the trust between them is an essential element of sustainable reform. Unless the public views the police as fair and the process as equitable, cooperation in the creation of public safety will be limited and hostility will increase the likelihood of abuse.¹⁶⁷ As one of the leading scholars in police legitimacy noted, “Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their law enforcement practices, it will undermine their effectiveness.”¹⁶⁸

167. See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

168. INST. ON RACE AND JUSTICE, NORTHEASTERN UNIV., OFFICE OF CMTY. ORIENTED POLICING SERVICES, U.S. DEP’T OF JUSTICE, *PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING 20-21* (2008); see also U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE, N. DIST. OF OHIO, *INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 49* (2014)(demonstrating in practical terms the effect of unrestrained misconduct: “During our investigation, we found that CDP’s method of policing contributes to the community’s distrust of and lack of respect for officers—officers escalate situations instead of diffusing them and using them as an opportunity to build trust and rapport; officers draw their service weapons on people who are suspected of minor crimes or who do not otherwise pose a threat; and officers use force against people in mental health crisis after family members have called the police in a desperate plea for assistance. Any attempt CDP makes to establish and maintain a positive and beneficial relationship with the community is potentially also undermined by the frequency with which officers appear to stop and search people without meeting the requisite threshold of reasonable suspicion or probable cause. As noted previously in the Summary section of this letter, it appears preliminarily that officers often subject people to stops and searches without the requisite level of suspicion. In addition, despite the fact that we are making no finding regarding racial profiling, we must report that when we interviewed members of the community about their experiences with the police, many African-Americans reported that they believe CDP officers are verbally and physically aggressive toward them because of their race. We also found that, when community members attempt to file complaints about is treatment at the hands of CDP officers, they are met with barriers and resistance.”).

The City of Ferguson, Missouri, is a particularly acute example of the hostility that forms when police practices are abusive and unchecked, although it is far from unique. The Ferguson investigation found that “the disconnect and distrust between much of Ferguson’s African-American community and FPD is caused largely by years of the unlawful and unfair law enforcement practices by Ferguson’s police department and municipal court.”¹⁶⁹ Hundreds of conversations that the Civil Rights Division staff had with Ferguson residents and those who lived nearby revealed that African-American residents felt particularly ill-treated:

One white individual who has lived in Ferguson for 48 years told us that it feels like Ferguson’s police and court system is “designed to bring a black man down . . . [there are] no second chances.” We heard from African-American residents who told us of Ferguson’s “long history of targeting blacks for harassment and degrading treatment,” and who described the steps they take to avoid this—from taking routes to work that skirt Ferguson to moving out of state. An African-American minister of a church in a nearby community told us that he doesn’t allow his two sons to drive through Ferguson out of “fear that they will be targeted for arrest.”¹⁷⁰

The remedies sought by the Department of Justice must be closely tied to a pattern or practice of a violation of law. As demonstrated in Ferguson and elsewhere, the fundamental reasons that patterns of violations developed and were permitted to continue were a lack of trust between certain communities and the police and a lack of community oversight. Therefore, remedies for sustainable reform must account for mistrust and develop strategies to overcome it. The oversight provisions discussed below illustrate the kinds of measures that can be narrowly tailored to meet the unconstitutional practices found.

Transparency is critical to building trust. To model the behavior that is expected of law enforcement agencies, all Civil Rights Division pattern-and-practice police misconduct investigations have been announced publicly since 2010, often with a press conference in the city being investigated.¹⁷¹ Email addresses and phone hotlines were set up for each city to begin collecting information directly from those who wanted to give input.¹⁷² The investigative team met with the many communities that make

169. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 79 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf.

170. *Id.*

171. Press releases for investigations, findings, and settlements can be found at *Special Litigation Section*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/special-litigation-section> (last visited Jan. 29, 2016).

172. *Id.*

up each jurisdiction—those who experienced civil rights violations, faith leaders, business leaders, police unions, rank and file officers, neighborhood associations, and others.¹⁷³

To provide the populace with an understanding of the conclusions reached by the Department of Justice, letters with detailed findings were issued and released to the public.¹⁷⁴ Where there were large language mi-

173. Each investigative report contains an explanation of the methodology, including community outreach strategies. *E.g.*, JOCELYN SAMUELS & DAMON P. MARTINEZ, REPORT OF THE INVESTIGATION OF THE ALBUQUERQUE POLICE DEPARTMENT 7 (Apr. 10, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf (“We conducted our evaluation of the department’s use of force in three major phases: fact-gathering, incident analysis based on applicable legal standards, and a comprehensive review of policies and practices to identify significant factors that cause or contribute to misconduct. Our review was informed by many sources, including: (1) individuals participating in community town hall meetings and separate witness interviews; (2) agency stakeholders, such as the department’s officers, supervisors, and command staff; (3) other stakeholders in the City, including the officers’ union representatives, police oversight commissioners and investigative staff, City officials, and community group leaders; (4) department documents, including use-of-force and shooting files; and (5) information and insights provided by our expert police consultants. . . . In this fact-gathering phase, we also sought to learn more from those who had direct interactions with the department. We held four community town hall meetings in different regions of the City and conducted initial and follow-up interviews of hundreds of people. We also interviewed dozens of people through additional community outreach efforts. We verified these accounts by reviewing available documentary, photographic, and video support, as well as department records.”).

174. See generally THOMAS E. PEREZ, UNITED STATES’ INVESTIGATION OF THE MARI-COPA COUNTY SHERIFF’S OFFICE (Dec. 15, 2011), http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf; THOMAS E. PEREZ, INVESTIGATION OF LOS ANGELES COUNTY SHERIFF’S DEPARTMENT STATIONS IN ANTELOPE VALLEY (June 28, 2013), http://www.justice.gov/crt/about/spl/documents/antelope_findings_6-28-13.pdf; THOMAS E. PEREZ, INVESTIGATION OF THE EAST HAVEN POLICE DEPARTMENT (Dec. 19, 2011), http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (Mar. 16, 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf; THOMAS E. PEREZ & MICHAEL W. COTTER, THE UNITED STATES’ INVESTIGATION OF THE MISSOULA POLICE DEPARTMENT (May 5, 2013), http://www.justice.gov/crt/about/spl/documents/mis-soulapdfind_5-15-13.pdf; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE, DIST. OF N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (July 22, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf; JOCELYN SAMUELS & DAMON P. MARTINEZ, REPORT OF THE INVESTIGATION OF THE ALBUQUERQUE POLICE DEPARTMENT (Apr. 10, 2014), http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf; VANITA GUPTA & STEVEN M. DETTELACH, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (Dec. 4, 2014), http://www.justice.gov/crt/about/spl/documents/cleveland_findings_12-4-14.pdf; THOMAS E. PEREZ & AMANDA MARSHALL, INVESTIGATION OF THE PORTLAND POLICE BUREAU (Sept. 12, 2012), http://www.justice.gov/crt/about/spl/documents/ppb_findings_9-12-12.pdf; SHANETTA Y. CUTLAR, INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (Sept. 5, 2011), http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf; JONATHAN M. SMITH & JENNY A. DURKAN, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (Dec. 16, 2011), http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf.

nority populations, the reports were translated so that limited English-speaking community members could read them more easily.¹⁷⁵ Following the issuance of the findings letters, Division lawyers and investigators re-engaged stakeholders to discuss remedies before beginning negotiations with the city and police officials.

Community engagement and civilian oversight were built into consent decrees negotiated by the Civil Rights Division. For example, the New Orleans, Louisiana, consent decree was designed to bring comprehensive reform to a department that was deeply troubled. The patterns of violations included excessive force, discrimination against sexual assault victims, discrimination based on gender identity, and illegal searches and seizures.¹⁷⁶ Prior to the decree, the community had very little information on the practices of the department and had a very limited oversight role. To leverage community engagement to address the patterns and practices that violated the constitution, the agreement requires:

- The comprehensive collection and reporting of data. The New Orleans Police Department must make public all of their reports concerning the implementation of the agreement, all department policies and procedures that do not implicate confidential practices, and other data necessary “to facilitate and ensure transparency and

175. *E.g.*, U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., UNITED STATES’ INVESTIGATION OF THE MARICOPA COUNTY SHERIFF’S OFFICE (2011), http://www.justice.gov/crt/about/spl/documents/mcso_findletter_espanol_12-15-11.pdf (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF LOS ANGELES COUNTY SHERIFF’S DEPARTMENT STATIONS IN ANTELOPE VALLEY (2013), http://www.justice.gov/crt/about/spl/documents/antelope_findings_spanish.pdf (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE EAST HAVEN POLICE DEPARTMENT (2011), <http://www.justice.gov/crt/about/spl/documents/ehpdfindspan.pdf> (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), http://www.justice.gov/crt/about/spl/nopd_letter_espanol.pdf (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), http://www.justice.gov/crt/about/spl/nopd_letter_vietnamese.pdf (Vietnamese translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), <http://www.justice.gov/crt/file/764731/download> (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (2014), http://www.justice.gov/crt/about/spl/documents/npd_findings_spanish.pdf (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (2014), http://www.justice.gov/crt/about/spl/documents/cleveland_summary_span_12-4-14.pdf (Spanish translation); U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011), http://www.justice.gov/crt/about/spl/documents/prpd_letter_espanol.pdf (Spanish translation).

176. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT vi-xi (Mar. 16, 2011), http://www.justice.gov/crt/about/spl/nopd_report.pdf.

wide public access to information related to NOPD decision making and activities.”¹⁷⁷

- The collection of data and the issuance of an annual report regarding civilian complaints.¹⁷⁸
- The creation of a community outreach and public information program that requires semi-annual meetings in each police district.¹⁷⁹
- An enhanced role for the Police-Community Advisory Board, an already existing entity with the mission of providing feedback to department leadership.¹⁸⁰
- A community-based restorative justice project to “help remedy mistrust between NOPD and the broader New Orleans community and create an environment for successful problem-solving partnerships.”¹⁸¹
- Increased support for the Office of the Independent Police Monitor, an arm of the City’s Inspector General.¹⁸²
- An annual community survey on attitudes about the police department and police practices.¹⁸³

In Seattle, Washington, in addition to other transparency and community oversight measures, the consent decree included the creation of the Community Police Commission.¹⁸⁴ The City and the Department of Justice agreed to the following:

- “Effective and constitutional policing requires a partnership between the Police Department, its officers, community members, and public officials. The Parties are committed to developing reform strategies that will work for Seattle and leverage the unique assets of all components of the community.”¹⁸⁵
- “There is significant community interest in this reform effort. The community is a critical resource. Certain aspects of the reform efforts embodied in the Agreements are best developed by dialogue and wide-spread input. Moreover, ongoing community input into

177. Consent Decree Regarding the New Orleans Police Department at 110-11, *United States v. City of New Orleans*, No. 12-1924 (E.D. La. Jan. 11, 2013), http://www.justice.gov/sites/default/files/crt/legacy/2013/01/11/nopd_agreement_1-11-13.pdf.

178. *Id.* at 110.

179. *Id.* at 111.

180. *Id.* at 112-13.

181. *Id.* at 113.

182. *Id.*

183. *Id.* at 67-68.

184. Settlement Agreement and Stipulated [Proposed] Order of Resolution at 6-8, *United States v. City of Seattle*, No. 12-CV-1282 (W.D. Wash. Jul. 27, 2012), http://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentdecree_7-27-12.pdf.

185. *Id.* at 6.

the development of reforms, the establishment of police priorities, and mechanisms to promote community confidence in SPD will strengthen SPD and facilitate police/community relationships necessary to promote public safety.”¹⁸⁶

- “Police officers also bring an important voice to the reform process. Their views, whether presented through their labor organizations or through other channels, should inform the development of the reform effort and its implementation.”¹⁸⁷

The Community Police Commission was charged in part with reviewing the monitor’s reports and was given the power to issue its own reports on compliance.¹⁸⁸ Significantly, the Community Police Commission participated in the development of the Seattle Police Department’s new use of force policy. The Commission was the only civilian body in the Nation to have a role in the formulation of a use of force policy. As one scholar noted, “This outcome is the first time in American police history where community representatives had a formal voice in the drafting of police policies.”¹⁸⁹

Different strategies have been employed in others cases. For example, the Albuquerque, New Mexico, Police Department consent decree calls for the creation of a formal Police Civilian Oversight Agency as one of several community oversight provisions.¹⁹⁰ The Oversight Agency has a formal role in police officer discipline, but it also has a right to obtain a wide variety of Police Department records and to meet with and obtain information from police personnel¹⁹¹ and the authority to issue policy recommendations.¹⁹² To ensure that the recommendations receive meaningful consideration, the agreement provides:

For any of the agency’s policy recommendations that the Chief decides not to follow, or any concerns that the agency has regarding changes to policy that Chief finds unfounded, the Chief shall provide a written report to the agency explaining any reasons why such policy recommendations will not be followed or why the agency’s concerns are unfounded.¹⁹³

186. *Id.*

187. *Id.*

188. *Id.* at 7.

189. Samuel Walker, *Community Voice in Police Policy in Seattle*, SAMUEL WALKER (Aug. 25, 2015), <http://samuelwalker.net/2015/08/community-voice-in-police-policy-in-seattle/>.

190. Settlement Agreement at 82-87, *United States v. Albuquerque*, No. 1:14-CV-1025 (D. N.M. Nov. 14, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/apd_settlement_11-14-14.pdf.

191. *Id.*

192. *Id.*

193. *Id.* at 86.

Well before the current generation of Civil Rights Division consent decrees, a community engagement model proved effective in Cincinnati, Ohio. In litigation initiated by private litigants and later joined by the Department of Justice, a “collaborative agreement” gave community groups a powerful voice alongside a court-enforceable agreement.¹⁹⁴ The collaborative agreement not only required the implementation of a comprehensive problem-solving policing strategy but also gave the community representatives an active voice in the development of policies and trainings and in measuring success.¹⁹⁵ While implementation was not seamless, and the City fell out of compliance at times,¹⁹⁶ officers’ use of force declined significantly and community perceptions of the department improved.¹⁹⁷ The final court monitor’s report concluded:

The Collaborative has been successful in laying a strong foundation for police reform. . . . [T]he City made significant changes in the way it polices Cincinnati. . . . In addition, efforts to improve relations between the police department and the community, particularly the African American community, are continuing. . . . The Parties’ performances under the Agreements were initially halting and defensive. With time and the emergence of impressive leadership throughout the Cincinnati Community, significant compliance with the Agreements were achieved resulting in the Cincinnati Collaborative being one of the most successful police reform efforts ever undertaken in this Country.¹⁹⁸

194. Collaborative Agreement at 7-11, *In re Cincinnati Policing*, No. 1:99-cv-3170 (S.D. Ohio).

195. *Id.* at 7-11.

196. See Decision and Recommendation, *In re Cincinnati Policing*, No. 1:99-cv-3170, (S.D. Ohio Jan. 26, 2005).

197. SAUL A. GREEN & RICHARD B. JEROME, CITY OF CINCINNATI INDEPENDENT MONITOR’S FOURTEENTH REPORT 2 (Sept. 1, 2006), http://www.acluohio.org/assets/issues/PolicePractices/CincinnatiAgreement/2006_September_monitor_report.pdf (“Use of force by Cincinnati police officers has changed significantly in the past four years. There has been a significant decline in serious uses of force such as batons (PR-24s), physical strikes or punches, or takedowns involving injury. The use of force statistics for the first quarter of 2006 continue to reflect the substitution of the Taser for other kinds of use of force. There were 139 Taser deployments in this quarter, a slight increase in deployments from the previous quarter, which was the lowest number of deployments since the Tasers were implemented throughout the Department. The number of chemical sprays, physical force and takedowns has significantly decreased over the past two years.”).

198. SAUL A. GREEN & RICHARD B. JEROME, CITY OF CINCINNATI INDEPENDENT MONITOR’S FINAL REPORT 1, 36, 55-56 (Dec. 2008), <http://www.cincinnati-oh.gov/police/linkservid/97D9709F-F1C1-4A75-804C07D9873DC70F/showMeta/0/>.

The success of the strategy employed in Cincinnati is a model that reform advocates should look to in combination with or when federal government involvement is not possible.¹⁹⁹

The strategies applied in the cases discussed above are neither exclusive nor unique. What is critical about each is that civilians have a meaningful policy role and that the entire community has access to information about police practices. Police must truly become democratic institutions that are part of and governed by the communities they serve.

CONCLUSION

The operation of police departments is opaque, but that opacity is neither necessary nor healthy in a democratic society. Accountability will bring much needed trust between officers and the communities they serve, and that trust will ensure both constitutional policing and public safety. Officers and civilians will both be better off. Unfortunately, the courts have declined to play a comprehensive role in effectively providing necessary accountability.

The proposal to import the strategies utilized by the Civil Rights Division into the development of public policy regarding policing does not require writing on a blank slate. There is a long tradition of civilian oversight in the United States with more than 200 oversight agencies and a national organization, the National Association of Civilian Oversight in Law Enforcement (NACOLE).²⁰⁰ NACOLE has developed standards, training, and a code of ethics for oversight bodies.²⁰¹ The work of NACOLE and others provides a foundation that can be built upon to increase democratic control over policing and transparency.

In addition, states across the Nation have begun to mandate data collection by statute. One study found that thirty of the fifty states prohibit racial profiling in some form and mandate the collection and publication of data.²⁰² Many of these statutes have been criticized as ineffective.²⁰³ To

199. Alana Semuels, *How to Fix a Broken Police Department, Reforms were slow to take hold in Cincinnati, but when they did, they drove down crime while also reducing arrests*, THE ATLANTIC (May 28, 2015), <http://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-reform/393797/>; U.S. DEP'T OF JUSTICE, TAKING STOCK: REPORT FROM THE 2010 ROUNDTABLE ON THE STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM (42 USC § 14141) (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/nij/234458.pdf>.

200. *About Us*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENF'T, <https://nacole.org/about-us/> (last visited Dec. 15, 2015).

201. Standards and Practices, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENF'T, <https://nacole.org/nacole-resources/standards-and-practices/> (last visited Dec. 15, 2015).

202. NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 19 (Sept. 2014), http://naacp.3cdn.net/f25ade969b0d091f2f_q4m6vwqi6.pdf.

203. *Id.* at 19.

achieve greater transparency, these statutes should be amended to make the requirement more robust and to collect a broader scope of information.

As a final note, courts are creatures of their times, and opinions are influenced by the historical moment. The development of Fourth Amendment law demonstrates the influence of what is happening in the broader society. No greater evidence of the effect of changing community attitudes on the courts can be found than the recent decision on same-sex marriage.²⁰⁴ Had there not been a social movement and a well-orchestrated state-by-state strategy, it is impossible to imagine the Supreme Court ruling as it did. That lesson should not be lost on those protesting in the streets for justice and accountability in policing. The influence of their actions may not come quickly, but it will come. They may be a driving force in rescuing the relevance of the Fourth Amendment for the protection of important individual rights.

204. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).