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Curbing Excessive Force: A Primer on Barriers to Police Accountability

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Because Philando Castile's girlfriend live streamed his last moments on Facebook, many are familiar with how he died at the hands of a police officer. On July 6, 2016, Officer Jeronimo Yanez saw Mr. Castile driving near the state fairgrounds with his girlfriend and her daughter. According to Officer Yanez, he believed that Mr. Castile's "wide-set nose" appeared to match surveillance video of a suspect involved in an armed robbery that occurred days earlier.¹ Because police officers had pulled over Mr. Castile multiple times in the past, he knew to have his seatbelt fastened, and gave the officer his insurance card.² Mr. Castile also informed Officer Yanez that he was carrying a firearm.³ Before he could assure Officer Yanez that he was not going for his gun, Officer Yanez fired seven shots, killing him. In his last breath Mr. Castile exclaimed, "I wasn't reaching for it."

Mr. Castile is just one of several unarmed African-American men who have died at the hands of the police over the last several years. Although tensions between police and communities of color have long been an issue, a succession of recent allegations of excessive force by police officers has garnered widespread public attention and admonition. The names of Michael Brown in Ferguson,⁴ Eric Garner in Staten Island, Tamir Rice in Cleveland, Freddie Gray in Baltimore, and Walter Scott in North Charleston⁵ are etched in the public consciousness as rally points for those who call for increased police accountability.

¹ Christina Capocchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES, (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html?_r=0.

² *Id.*

³ MINN. STAT. § 624.714 (1)(b) ("Display of permit; penalty. (a) The holder of a permit to carry [a weapon] must have the permit card and a driver's license, state identification card, or other government-issued photo identification in immediate possession at all times when carrying a pistol and must display the permit card and identification document upon lawful demand by a peace officer, as defined in section 626.84, subdivision 1.")

⁴ Jon Swaine & Oliver Laughland, *Darren Wilson Will Not Face Federal Charges in Michael Brown Shooting*, THE GUARDIAN (Mar. 4, 2015), <https://www.theguardian.com/us-news/2015/mar/04/darren-wilson-federal-criminal-charges-michael-brown-shooting>.

⁵ Joseph P. Williams, *Why Aren't Police Prosecuted*, U.S. NEWS (July 13, 2016), <https://www.usnews.com/news/articles/2016-07-13/why-arent-police-held-accountable-for-shooting-black-men>.

Police accountability has sparked fierce debate among scholars, media pundits, and the public at large.⁶ A 2016 Gallup poll highlights the stark divide in Americans' views of police, with just over half of Americans polled expressing a great deal or quite a lot of trust in the police,⁷ while 14% expressed very little or no confidence in the police.⁸ Unreliable governmental data may prevent us from knowing exactly how pervasive police shootings are in the United States, but a project of *The Guardian* to track the number of people killed by law enforcement suggests that roughly 1,090 people were killed by the police in 2016.⁹ These incidents include justified uses of force, suicide by cop, and excessive uses of force. Meanwhile, failure to hold individual police officers accountable for seemingly egregious uses of excessive force, coupled with a perceived lack of police accountability more generally, has led to increased political activism, most notably through the Black Lives Matter movement, as well as occasional civil unrest among members of some of the most deeply affected communities.

Despite increased public scrutiny, prosecution of officers involved in shootings is quite rare. According to data Philip Stinson at Ohio's Bowling Green State University collected, since 2005, only thirteen officers have been convicted of murder or manslaughter for a fatal, on-duty shooting.¹⁰ During the same timeframe, only fifty-four officers nationwide were criminally charged after they shot and killed someone in the line of duty. As of April 11, 2015, twenty-one of the officers had been acquitted and eleven were convicted, with the remaining twenty-two cases either pending or filed in the "other" category. The high acquittal rate is perhaps even more troubling given that in 80% of these cases, one of the following occurred: there was a video recording of the incident, the victim was shot in the back, other officers testified against the shooter, or a cover-up was alleged.¹¹

Even when what appears to be an excessive use of police force is captured on video, prosecutors often decline to prosecute the officers (e.g., the shooting of Tamir Rice) or juries fail to convict them if the case goes to trial (e.g., the shooting of Walter Scott). So what are the challenges to holding police officers accountable? Criminal prosecutions are notoriously difficult, but tort suits, internal investigations, and citizen oversight also have not been a panacea of reform. When a police officer is accused of using excessive force, they are afforded a multitude of protections that are unavailable to civilian defendants. These protections have proven to be effective shields for officers

⁶ Chris Fuchs, *Debate Over Police Accountability, After Peter Liang Conviction, Spans Generations*, NBC NEWS (Feb. 29, 2016), <http://www.nbcnews.com/news/asian-america/debate-over-police-accountability-after-peter-liang-conviction-spans-generations-n527926>.

⁷ Frank Newport, *U.S. Confidence in Police Recovers from Last Year's Low*, GALLUP (June 14, 2016), <http://www.gallup.com/poll/192701/confidence-police-recovers-last-year-low.aspx> (finding that that only 56% of Americans have a great deal or quite a lot of confidence in the police. This figure is up from 52% in 2015).

⁸ *Id.*

⁹ *The Counted: People Killed by Police in the U.S.*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Mar. 27, 2017).

¹⁰ Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da. This figure does not include instances where civilians died in police custody or were killed by other means or situations where officers faced lesser charges.

¹¹ *Id.*; see also Williams, *supra* note 5 ("A Wall Street Journal report in 2015 found approximately 1,200 people had been killed by police, but no officers were found guilty of murder or manslaughter.").

from both criminal and civil liability and in many cases lead to public mistrust of police, particularly in communities of color.

This Issue Brief summarizes some of the traditional mechanisms for holding police accountable for misconduct, offers a critique of each, and ends with suggestions for the future of police accountability. Part I focuses on some of the legal and structural impediments to police accountability including the inherent conflicts of interest that frequently prevent local prosecutors from prosecuting police officers accused of using excessive force. Part I also discusses how the doctrine of qualified immunity shields officers from civil liability when a suspect is harmed or dies in police custody. Part II explores how the Department of Justice (DOJ) has failed to properly leverage its authority to investigate patterns or practices of unconstitutional policing to increase police accountability. Part III discusses potential solutions, including the impact police-worn body cameras, prosecutorial independence, and increased civil oversight may have on police accountability.¹²

I. Structural and Legal Challenges to Police Accountability

Criminal and civil liability are two of the avenues available to hold individual police officers accountable for excessive use of force. Unfortunately, criminal prosecution of police officers seems precluded in all but the most exceptional cases, while qualified immunity often insulates officers from civil liability. Even where civil suits are successful or victims receive settlements, prosecutors rarely pursue criminal charges against police officers for excessive force.¹³

A. Inherent Conflicts of Interest Between Local Prosecutors and the Police

Experts have long argued that the lack of criminal prosecutions for excessive force is the result of the inherent conflict of interest that arises when local prosecutors are charged with investigating and prosecuting police officers.¹⁴ This conflict largely stems from the symbiotic relationship between prosecutors and the police.¹⁵ Prosecutors depend on the police for evidence, information, and witnesses.¹⁶ The police rely on prosecutors to provide legal advice and convict civilian defendants.¹⁷ If one entity fails to perform their duties as expected, the other suffers.

The police serve on the front lines of the criminal justice system. Police officers conduct investigations, gather evidence, and make arrests.¹⁸ These important functions occur largely out of the public view and are crucial to the success of any prosecution. Furthermore, police investigations usually implicate important constitutional rights that must be respected to avoid later challenges,

¹² 42 U.S.C. § 14141 (2000).

¹³ See, e.g., Kimberly Kindy & Kimberly Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> (“Only in rare cases do prosecutors and grand juries decide that the [force] cannot be justified”).

¹⁴ Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J. L. & POL’Y 137 (2015).

¹⁵ Kindy & Kelley, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

including rights enshrined in the Fourth, Fifth, and Sixth Amendment.¹⁹ It is therefore paramount that prosecutors have full faith in the police.

Additionally, police officers are the primary fact gatherers and are afforded great deference when deciding how to build a case against a defendant.²⁰ Police officers can choose which leads to track down and decide what facts are relevant to a particular case. Prosecutors also rely on the police to inform them of any exculpatory evidence they may be constitutionally obligated to share with defense counsel.²¹ Furthermore, many local prosecutors personally know most of the officers that work in their jurisdiction.²²

These close ties results in a clear conflict of interest when prosecutors are called to prosecute police officers.²³ It seems questionable that prosecutors can maintain professional objectivity when investigating and prosecuting such close professional allies.²⁴ Furthermore, if a prosecutor's office successfully prosecutes an officer, resentment and distrust may jeopardize future cases. The tensions between supporting a trusted ally and zealously investigating and prosecuting criminal conduct is why prosecutors have an unwaivable conflict of interest when prosecuting police officers.

Since the police are the primary fact gatherer in any case, their testimony and credibility are crucial to the success of a criminal prosecution. According to former prosecutor Paul Butler, a prosecutor's main function is to ensure the fact finder believes a police officer's testimony.²⁵ At the same time, prosecutors are sworn to serve the public guided solely by their commitment to justice.²⁶ When civilians are charged with a crime, the prosecutor must do everything to ensure an officer testifying in that case is credible and trustworthy. Anytime an officer is accused of excessive force, his or her credibility and reasonableness is called into question.²⁷ This may jeopardize any pending or future cases involving that particular officer. Even beyond that particular officer's credibility, accusations of misconduct can undermine the entire department, as civilians question whether police officers are performing their duties in accordance with the law. When a prosecutor charges a police officer with excessive force, therefore, the prosecutor risks undermining the very trustworthiness he or she may need for justice to be done in other cases.²⁸

¹⁹ See generally Terry v. Ohio, 392 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 435 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

²⁰ Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15 (2016).

²¹ Emily Gillespie, *Legal System, Law Enforcement at Odds Over Brady List*, THE COLUMBIAN (Nov. 15, 2015), <http://www.columbian.com/news/2015/nov/15/legal-system-law-enforcement-at-odds-over-the-brady-list/>.

²² Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

²³ Kindy & Kelly, *supra* note 13.

²⁴ *Id.*

²⁵ Levine, *supra* note 22.

²⁶ *Id.*

²⁷ Conor Friedersdorf, *Judging the Cops: When Excessive Force Trumps Resisting Arrest*, ATLANTIC (Mar. 21, 2015), <https://www.theatlantic.com/national/archive/2015/03/where-excessive-force-meets-resisting-arrest/388297/>.

²⁸ See generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998).

At least one commentator equates the conflict arising in police defendant cases with situations in which a prosecutor is charged with a crime.²⁹ Prosecutors routinely conflict out of cases where another prosecutor from the same office is charged with a crime. This decision to conflict out is usually voluntary and is likely done to maintain the appearance of impartiality.³⁰ If prosecutors are so quick to conflict out of a case where a fellow prosecutor is charged with a crime, then why do prosecutors not recuse themselves when police officers stand accused?

The inherent conflicts that arise when prosecutors are called to investigate the police are also analogous to those that arise when the police investigate themselves. Internal affairs investigations face conflicts of interest because many officers do not “want to be seen as violating the ‘code of silence’ endemic in police culture or as disloyal to their fellow officers.”³¹ A clear example of this conflict of interest is the Danziger Bridge shooting cover-up in the wake of Hurricane Katrina. In that case, the supervisors tasked with investigating the officers who shot several unarmed civilians participated in the department’s cover-up attempt, and were later indicted for their participation.³²

When so few accusations of excessive force are subject to criminal investigation, it is important the prosecutors responsible for those cases evaluate them seriously and objectively.³³ Unfortunately, it may be difficult for a prosecutor to remain neutral when he or she is called to investigate their closest and most trusted professional ally.

B. The Grand Jury as a Prop for Prosecutors in Police Cases

When police officers are accused of excessive force, prosecutors can opt to present the case to a grand jury rather than make the charging decision themselves. On its face, this process seems to eliminate the inherent bias of local prosecutors, discussed above, by presenting evidence to an impartial group of people who make up the grand jury and allowing them to decide whether to indict. Too often, however, the grand jury operates as a tool for local prosecutors to effectively relieve themselves of the responsibility to make a charging decision and insulate themselves from public backlash if the grand jury does not indict.³⁴ Any appearance of objectivity dissolves when one considers the process by which a case is presented to the grand jury.

Generally speaking, the prosecutor plays a crucial role in grand jury proceedings. The prosecutor controls the proceedings by obtaining the evidence, calling witnesses, and instructing the grand jury members on the law.³⁵ Members of the grand jury are lay persons that are likely inexperienced with

²⁹ Levine, *supra* note 22.

³⁰ *Id.*

³¹ Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985 (2016).

³² See *Ex-New Orleans Cops Get Prison Time in Danziger Bridge Shootings*, CNN (Apr. 4, 2012), <http://www.cnn.com/2012/04/04/justice/louisiana-danziger-bridge-case/index.html>.

³³ Marshall Miller, *Police Brutality*, 17 YALE L. & POL’Y REV. 149, 154 (1998).

³⁴ Joshua Hegarty, *Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence*, 37 MITCHELL HAMLINE L. J. PUB. POL’Y & PRAC. 305 (2016).

³⁵ Douglas P. Currier, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L. J. 1077, 1079 (1984).

legal matters and therefore inclined to rely on the prosecutor.³⁶ With this much control over the process, it is a dubious assertion to say presenting a case to the grand jury removes bias from the charging decision in excessive force cases. The rate at which grand juries vote to indict police officers compared to civilian defendants justifies this skepticism. For example, in the span of one year, out of 150,000 potential federal prosecutions, only eleven grand juries refused to indict.³⁷ Over the same year period, less than a third of the 11,000 cases alleging police misconduct resulted in criminal charges.³⁸ This significant disparity is almost certainly influenced by the inherent conflict of prosecutors investigating police officers.

Observers have fiercely criticized the prosecutor's behavior and use of the grand jury in the failed indictment of Officer Darren Wilson for the shooting death of Michael Brown in Ferguson, Missouri.³⁹ Transcripts from the proceeding show prosecutors cross examining potential witnesses whose testimony may have supported criminal charges by suggesting a police officer is allowed to shoot a fleeing suspect regardless of the officer's fear of the suspect.⁴⁰ One commentator noted that the grand jury operated more as a trial court with the prosecutors serving as defense attorneys.⁴¹ Similar questionable prosecutorial behavior occurred during the grand jury proceedings against the officers involved in the shooting of twelve-year old Tamir Rice. In that case, the prosecutor, Timothy McGinty, presented three expert reports that stated the shooting was appropriate,⁴² described the death of Tamir Rice as "a perfect storm of human error,"⁴³ and successfully recommended the grand jury decline to indict.⁴⁴ The unusual nature of the proceedings in these cases casts doubt on the fairness of the grand jury and the impartiality of the prosecutor.⁴⁵ It also calls into question the value of the grand jury system in any excessive force case.

The inability to indict the officers in these cases defies the old adage that a prosecutor can get a grand jury to indict a ham sandwich.⁴⁶ Given what we have learned about prosecutor behavior from these high-profile cases, and the relatively low indictment rate in excessive force cases in general, it seems reasonable that, even when not making charging decisions themselves, prosecutors' conflicts of interest often results in grand juries unwilling to indict police officers.

³⁶ *Id.*

³⁷ Mark Motivan, *Federal Justice Statistics 2010—Statistical Tables*, BUREAU OF JUSTICE STATISTICS, (Dec. 2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

³⁸ Hegarty, *supra* note 34, at 320.

³⁹ Jake Halpern, *The Cop*, THE NEW YORKER (Aug. 10, 2015), <http://www.newyorker.com/magazine/2015/08/10/the-cop>.

⁴⁰ *Id.*

⁴¹ Victoria Knott, *Reconsidering the Use of the Grand Jury: Eliminating Prosecutorial Discretion to Indict Law Enforcement Officers*, 38 T. JEFFERSON L. REV. 202, 225 (2016).

⁴² Hegarty, *supra* note 34, at 322.

⁴³ Jamil Smith, *The Tamir Rice Rule*, NEW REPUBLIC (Dec. 29, 2015), <https://newrepublic.com/article/126737/tamir-rice-rule>.

⁴⁴ *Id.*

⁴⁵ Hegarty, *supra* note 34, at 321 ("The transcripts were then released to the public, which is unusual when considering that grand jurors are sworn to secrecy.").

⁴⁶ Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>.

If conflicts of interest prevent local prosecutors from pursuing cases against police officers or discouraging grand juries to indict, then why does the federal government not step in to prosecute the police? Federal officials can intervene and prosecute officers under 18 U.S.C. §§ 241 and 242 when states fail to effectively prosecute police officers.⁴⁷ Under these statutes, however, federal prosecutors must prove not only that a violation occurred, but the officer willfully violated someone's constitutional rights.⁴⁸ In addition, DOJ policy is to defer to state prosecution of police officers, with potential federal prosecution serving only as a back-stop.⁴⁹ Therefore, the vast majority of excessive force cases are handled in state court, where prosecutors with inherent conflicts of interest too often either refuse to prosecute the police or rely on grand juries to dispose of nearly all excessive force cases.

C. Difficulty in Overcoming Qualified Immunity

Under Section 1983 of Title 42 of the U.S. Code, a citizen who believes he or she was the victim of excessive force may seek civil damages against the responsible law enforcement officer for depriving the citizen of his or her constitutional right to be free from unwarranted government intrusion. The advantages of § 1983 suits compared to criminal charges are: there is a lower burden of proof required to prevail; citizens may sue the government directly; and a successful action results in compensation for victims and their families.

The doctrine of qualified immunity, however, creates a significant hurdle for plaintiffs seeking relief under § 1983.⁵⁰ This immunity is available to state actors, such as police officers, and shields them from civil liability, provided they did not violate an individual's constitutional rights. Therefore, in order to recover damages in a § 1983 action, a plaintiff must prove to the court or jury that the officer violated "clearly established" law at the time of the incident.⁵¹ This standard is highly deferential to the state actor, leading courts to dismiss many, if not most, cases prior to trial. The result is that too often courts have no opportunity to assess the accusations of excessive force and reviewing courts, including the Supreme Court, never have the opportunity to evaluate those lower courts' assessments. As a result, the unconstitutionality of seemingly egregious behavior never has the chance to become "clearly established" law, stymying efforts to increase accountability or secure institutional reform.⁵²

⁴⁷ Chavis Simmons, *supra* note 14, at 501–02.

⁴⁸ Ivana Dukanovic, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L. Q. 911, 914 (2016).

⁴⁹ Chavis Simmons, *supra* note 14, at 502.

⁵⁰ 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

⁵¹ Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008).

⁵² Alexandra Holmes, *Bridging the Information Gap: The Department of Justice's "Pattern or Practice" Suits and Community Organizations*, 92 TEX. L. REV. 1241 (2014).

Plaintiffs must overcome two substantial hurdles if they hope to succeed in a § 1983 action. First, the plaintiff must prove the officer's use of force was objectively unreasonable, and second, the law was so clearly established at the time of the incident, that a reasonable officer must have known the force was objectively unreasonable.⁵³ The court decides whether the facts alleged show the officer's conduct violated a constitutional right and whether a right is clearly established. Some say the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."⁵⁴ Consequently, victims of police force face an uphill battle to prove liability.

The seminal Supreme Court cases *Tennessee v. Garner*⁵⁵ and *Graham v. Connor*⁵⁶ and their progeny establish the legal standard applied in excessive force cases. The Court in *Garner* held that apprehension of a suspect through the use of deadly force constitutes a seizure subject to the Fourth Amendment's reasonableness requirement.⁵⁷ Courts "must 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."⁵⁸ This balancing test takes into account the totality of the circumstances, considering not only when the seizure was made but also the manner of seizure. The Court further held that "deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."⁵⁹ Furthermore, the Court advised that officers should provide a warning where feasible prior to application of deadly force.⁶⁰

The Court further clarified the constitutional requirements for application of force in *Graham v. Connor*. The Court held that use-of-force scenarios must be analyzed under the Fourth Amendment's objective reasonableness standard.⁶¹ The reasonableness of the officer's actions are judged from the perspective of a reasonable officer on scene taking into account the fact that "officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."⁶² This evaluation is made without regard to the underlying intent or motivation of the officer at the time force is applied.⁶³ Additional considerations include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, whether the suspect displays an

⁵³ Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409 (2016).

⁵⁴ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁵⁵ 471 U.S. 1 (1985).

⁵⁶ 490 U.S. 386 (1989).

⁵⁷ *Garner*, 471 U.S. at 11–12.

⁵⁸ *Id.* at 8 (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 11–12 ("[I]f 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.").

⁶¹ *Graham v. Connor*, 490 U.S. 386, 397 (1989).

⁶² *Id.*

⁶³ *Id.*

apparent, deadly weapon, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.⁶⁴

In addition to the framework discussed above, the Supreme Court provides further protection under the “could have believed standard” and the “mistaken belief standard” for assessing the reasonableness of an officer’s actions. The Court set forth the “could have believed standard” in *Hunter v. Bryant*.⁶⁵ Police officers are absolved of liability “if a reasonable officer could have believed [the conduct] to be lawful, in light of clearly established law and the information the [] officer possessed.”⁶⁶ This standard precludes liability if an officer incorrectly, yet reasonably, believes their use of force was lawful. This protection is described as a mistake of law defense that protects officers that misinterpret clearly established law.

While the *Hunter* case involved a mistake of law, the case of *Saucier v. Katz* involves mistakes of fact.⁶⁷ The Court held in *Saucier* that officers are immune from suits where a reasonable officer could have believed that his or her conduct was lawful relying on facts that later prove to be false. The Court went on to say “if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”⁶⁸ In *Saucier* situations, an officer can make a mistake as to the facts *and* the level of force necessary, provided it was objectively reasonable at the time the force was applied in light of any mistake of fact.⁶⁹

Case law and scholarly comment reveals that overcoming qualified immunity is a nearly insurmountable burden.⁷⁰ Police officers are afforded every benefit of the doubt. The force used is judged from the perspective of an officer on scene without the benefit of hindsight at the precise moment the force was used.⁷¹ Reasonable mistakes based on mistaken beliefs of both law and facts usually serve to insulate officers from liability. The test is not whether less drastic means were available, but whether the officer’s actions were objectively reasonable.⁷² Given these protections, it is not surprising that many civil suits against police officers fail.

II. The Unrealized Potential of DOJ’s Pattern or Practice Authority

⁶⁴ *Id.* at 396.

⁶⁵ 112 S. Ct. 534 (1991).

⁶⁶ *Id.* at 536 (explaining that a Ninth Circuit panel previously held that the secret service agents were entitled to qualified immunity for arresting the plaintiff without a warrant because the warrant requirement, at the time, was not clearly established in situations where the arrestee consented to law enforcement agents’ entry into a residence).

⁶⁷ 121 S. Ct. 2151 (2001).

⁶⁸ *Id.* at 2158.

⁶⁹ *See* *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (holding that, in resolving qualified immunity claims, courts need not first determine whether the facts alleged by a plaintiff make out a violation of a constitutional right).

⁷⁰ *See, e.g., Brosseau v. Haugen*, 125 S. Ct. 596 (2004); *Armstrong v. Village of Pinhurst*, 810 F.3d 892 (4th Cir. 2016); *Fenwick v. Pudimott*, 778 F.3d 133 (D.C. Cir. 2015); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001).

⁷¹ *Malley v. Briggs*, 475 U.S. 335, 395 (1986).

⁷² J. Michael McGuinness, *Practical Considerations in Prosecuting and Defending Police Misconduct Claims: Investigations, Law, Expert Evidence, Strategy and Tactics* (Georgetown University Law Center Continuing Legal Education, 2006 WL 5839041, 2006).

The previous sections focused on bars to accountability when a single officer is accused of excessive force. But what happens when an entire agency is accused of a pattern or practice of engaging in constitutional violations? Allegations of systemic police abuse of citizens are a complex problem without a straightforward cure.⁷³ While it is easy to identify the misconduct of individual officers when isolated incidents occur, these individual instances of misconduct may indicate the existence of a larger problem that permeates an entire law enforcement agency.⁷⁴ Therefore, reform efforts must address both the individual officers and the culture of the police department that fosters unconstitutional policing.

For this reason, in 1994, as part of the Violent Crime Control and Law Enforcement Act, Congress adopted 42 U.S.C. § 14141, which authorizes the DOJ to seek injunctive relief against law enforcement agencies that demonstrated a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁷⁵ Congress adopted § 14141 after recognizing the need for systematic reform of law enforcement agencies.⁷⁶ Prior to its enactment, there was no federal mechanism available to enjoin law enforcement agencies’ unconstitutional practices.⁷⁷ Many of the pattern or practice actions to date have resulted in reforms that aim to rehabilitate problem departments through the implementation of early warning tracking systems, mandating collection of racial profiling data, and implementing mechanisms for citizen oversight.⁷⁸

There is no consensus among scholars as to the impact of § 14141, though critiques abound.⁷⁹ Whether enforcement is limited by resources, political will, or a failure to fairly and effectively identify law enforcement agencies for which investigation is appropriate,⁸⁰ it is our conclusion that § 14141 is all bark and no bite. To understand why, one must consider the manner in which the DOJ has chosen to exercise its authority under § 14141.

For the most part, rather than filing lawsuits, the DOJ prefers to use the threat of litigation to pressure targets of an investigation to agree to a negotiated settlement.⁸¹ For many years, the focus

⁷³ Chavis Simmons, *supra* note 51, at 496.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 506–07 (explaining that the predecessor to § 14141, the Police Accountability Act, was passed in response to the Rodney King beating and was the result of a subcommittee investigative report that identified police misconduct as endemic and concluded that the federal government lacked statutory authority to address patterns or practices of police misconduct).

⁷⁷ *Id.*

⁷⁸ Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373 (2010).

⁷⁹ Stephen Rushin, *Competing Case Studies of Structural Reform Litigation in American Police Departments*, 14 OHIO ST. J. CRIM. L. 113 (2016).

⁸⁰ *Id.*; see Chavis Simmons, *supra* note 51, at 518–19 (“In addition, because authority to seek injunctive relief rests solely with DOJ, enforcement of the statute is completely reliant on the limited resources available within the Department of Justice. Thus, even an administration with a commitment to aggressively enforce the legislation would be limited to the available departmental resources. As with any federal mandate, without adequate appropriations from Congress to fund the enforcement of DOJ pattern or practice litigation, DOJ could be forced to shift its priorities to other civil rights agendas.”).

⁸¹ Chavis Simmons, *supra* note 51, at 493–94.

on negotiated settlements saved both time and money and allowed the DOJ to review more departments.⁸² While this tactic has resulted in some successful enforcement efforts, the practical effect has been a neutering of the statute and exclusion of the public from the negotiation process.

The policy of negotiating settlements and working with law enforcement to achieve reform carried the day until the DOJ arrived in Alamance County. A two-year DOJ investigation of the Alamance County Sheriff's Department had revealed widespread racial profiling of Hispanics.⁸³ The investigation uncovered significant indications of racial bias, the most egregious example being a captain who sent "his subordinates a videogame premised on shooting Mexican children, pregnant women, and other 'wetbacks.'"⁸⁴ This "systematic racial profiling of Latinos"⁸⁵ permeated the department, including the sheriff himself. Therefore, it is perhaps unsurprising that when the DOJ proposed that Alamance work with federal officials to develop a plan for reform, the sheriff declined to negotiate.⁸⁶ This failure to cooperate led the DOJ to pursue the first lawsuit under § 14141 since enactment of the statute in 1994.⁸⁷

Nearly a year after the case was argued, District Judge Thomas D. Schroeder issued his opinion. In a 253-page opinion, Judge Schroeder held that the DOJ failed to show a pattern or practice of unconstitutional behavior.⁸⁸ The judge found "no evidence that any individual was unconstitutionally deprived of his or her rights under the Fourth or Fourteenth Amendment."⁸⁹ The judge further rejected statistical evidence the DOJ offered purporting to show a pattern of discrimination.⁹⁰ Though the judge made certain to scold the Sheriff's Department for their decisions to use racial epithets and slurs, these instances of bias were deemed insufficient to show a pattern or practice that violated constitutionally protected rights.⁹¹

The failure of the Alamance County trial is significant. The DOJ's first attempt to *mandate* reform through the exercise of its authority under § 14141 resulted in devastating defeat. Unfortunately, the Alamance County case may lead more law enforcement agencies to resist negotiated settlements with the DOJ. Before the Alamance County case, police departments had little in the way of examples to gauge their chances of successfully defending a § 14141 suit. Agencies now have a benchmark of comparison for their own conduct. This may give some departments the confidence to resist negotiated settlements, forcing the DOJ to either abandon efforts to encourage reform in

⁸² Rushin, *supra* note 79, at 136.

⁸³ *Id.* at 137.

⁸⁴ *Id.*

⁸⁵ Michael Biesecker, *U.S. Files Civil Rights Complaint Against N.C. Sheriff*, ASSOCIATED PRESS (Dec. 21, 2012), <http://www.myrtlebeachonline.com/news/local/article16638044.html>.

⁸⁶ Rushin, *supra* note 79, at 137. Additionally, "[t]he Alamance County commissioner, all white, strongly supported Sheriff Johnson's resistance to federal intervention, 'praising his hard-line stance against illegal immigration.'" *Id.* (citing David Zucchini, *North Carolina Town Split Over Sheriff's Treatment of Latinos*, L.A. TIMES (Nov. 23, 2012), <http://articles.latimes.com/2012/nov/23/nation/la-na-sheriff-20121124>).

⁸⁷ *Id.* at 138.

⁸⁸ *United States v. Johnson*, 122 F. Supp. 3d 272 (2015).

⁸⁹ Michael D. Abernethy, *Judge Dismisses DOJ Case Against Johnson, Finds No Evidence of Unconstitutional Practices*, TIMES NEWS (Aug. 7, 2015), <http://www.thetimesnews.com/article/20150807/NEWS/150809283/?Start=1>.

⁹⁰ Rushin, *supra* note 79, at 138.

⁹¹ *Id.*

those departments or forego less resource intensive negotiated settlements for litigation that has now proven to be riskier than previously thought. This places the utility of § 14141 in jeopardy, since its reforms have, up to this point, depend significantly on departments' willingness to negotiate with the DOJ.

While the district court held that the DOJ failed to establish a pattern or practice, it did not clearly establish the standard of proof required for success.⁹² Consequently, the trial of the Alamance County Sheriff's Department unfortunately raises more questions than it answers. What evidence must the DOJ put forth to establish a pattern or practice within the meaning of the statute? Will the success of the Alamance County Sheriff's Department encourage other departments to push back against DOJ intervention? Can the DOJ successfully reform an agency under § 14141 without the cooperation of the agency itself?

The DOJ announced it will appeal the district court decision, providing the appellate court the opportunity to clarify many of these issues.⁹³ Unfortunately, unless and until those answers are provided, it is an open question whether the DOJ can successfully convince a district court to enjoin agencies under § 14141 at trial despite evidence of egregious behavior, such as that presented in the Alamance case.

In addition to the open question of the DOJ's ability to successfully litigate pattern or practice cases, the infrequency with which the DOJ undertakes such investigations calls into question its ability to identify problem police departments. Some of this difficulty stems from the DOJ's reliance on records produced by the departments it is tasked with investigating.⁹⁴ Records of use-of-force situations are often inaccurate or incomplete.⁹⁵ Without adequate records, the DOJ cannot properly identify whether a problem exists within the department and whether pursuing an investigation is appropriate. Relying on records produced by the department being investigated is counter-productive to reform efforts, as departments have strong incentives to stay off the DOJ's radar.

Furthermore, there are concerns that § 14141 fails to capture individual instances of misconduct, as it only targets misconduct that rises to a pattern or practice of misconduct.⁹⁶ It is easy to identify egregious instances of police misconduct involving one or a few bad officers in an isolated case. It is more difficult to string together instances of misconduct such that it constitutes a pattern or practice as required by the statute.⁹⁷ Victims of isolated incidents of abuse are left only with the traditional tort remedies in state court. For example, federal intervention in a jurisdiction whose policies would be considered inadequate or subpar when compared to other jurisdictions would not be possible unless a pattern of misconduct had emerged. Thus, § 14141's requirement that there be a pattern or practice of unconstitutional behavior might shield certain jurisdictions from scrutiny.

⁹² *Id.* at 139.

⁹³ Anna Johnson, *Despite DOJ Appeal, Alamance Sheriff's Office Once Again Eligible for State, Federal Grants*, TIMES NEWS (Oct. 29, 2015), <http://www.thetimesnews.com/article/20151029/NEWS/151028706>.

⁹⁴ Chavis Simmons, *supra* note 51, at 516–17.

⁹⁵ *Id.*

⁹⁶ *Id.* at 517.

⁹⁷ *Id.*

Finally, Congress granted sole discretion to initiate suits enjoining unconstitutional practices to the executive branch under § 14141.⁹⁸ Therefore, Congress precluded private citizens from suing for injunctive relief when they fall victim to a department's unconstitutional practice. The lack of a private cause of action leaves § 14141 vulnerable to the political whim of the administration in power. The current Attorney General, Jeff Sessions, has already noted his disdain for federal intervention in local law enforcement agencies and it is almost certain that enforcement of the pattern or practice authority will be severely curtailed, if not halted altogether under his leadership.⁹⁹

III. Solutions to Increase Police Accountability

The previous sections have described several impediments to police accountability at both the state and federal level that may explain why police officers are rarely held accountable for their actions when excessive force is alleged. Commentators have identified several avenues for reform to increase both transparency and accountability when officers are accused of excessive force.

A. Promoting Enforcement Under § 14141

Despite various shortcomings in its pattern or practice authority, there are several ways that the DOJ could improve its use of § 14141. First, the DOJ should commit to vigorously litigating § 14141 cases in which a law enforcement agency refuses to enter into a consent decree. If the DOJ backs down after the district court's adverse ruling in the Alamance County case, other departments may "roll the dice" and decline to come to an agreement with the DOJ. The threat of time consuming, costly litigation, and the negative publicity such litigation will create are critical to bringing non-compliant law enforcement agencies to the negotiating table.

The DOJ should also pursue more consent decrees as opposed to memoranda of agreement (MOAs). Some refer to consent decrees as "MOA[s] with teeth" because they are formal, court ordered settlements that provide for judicial oversight.¹⁰⁰ An MOA is simply a contract between the government and a suspect department without any real judicial enforcement ability.¹⁰¹ The benefit of consent decrees is they allow for the "federal government, states, and localities to agree on proactive systems of preventing future misconduct and civil rights violations."¹⁰² If the department fails to carry out its obligations under a consent decree, the judiciary can step in to provide the appropriate remedy.¹⁰³

The New Orleans Police Department (NOPD) consent decree represents one of the most comprehensive agreements the DOJ has entered to date, and should serve as a model for future consent decrees.¹⁰⁴ Most notable is the degree of transparency incorporated into the development of

⁹⁸ *Id.*

⁹⁹ Sheryl Gay Stolberg & Timothy Williams, *Obama Races to Overhaul Police in Baltimore and Chicago Before Trump Era*, N.Y. TIMES (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/us/police-racial-bias-baltimore-chicago-obama-trump.html?_r=0.

¹⁰⁰ See Dukanovic, *supra* note 48, at 919 (citing Darrell L. Ross, *Civil Liability*, in CRIMINAL JUSTICE 186 (Elisabeth Roszmann Ebben ed., 6th ed. 2014)).

¹⁰¹ *Id.* at 920.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 920–921.

the decree and selection process for the monitor. Pursuant to the consent decree, the NOPD must implement significant policy changes regarding “use of force, illegal stops, searches and arrests, custodial interrogations, photographic line-ups, discriminatory policing, community engagement, recruitment, training, officer assistance and support, performance evaluations and promotions, supervision, [and] misconduct investigations.”¹⁰⁵ This consent decree focuses particularly on the NOPD’s standards regarding use of force. It requires the NOPD to regulate uses of force ranging from empty-hand control, in which the officer uses bodily force to gain control, to lethal force.¹⁰⁶

Following the establishment of a consent decree, a special monitor is appointed to ensure compliance on the part of the department. This monitor is usually a team of consultants who have prior experience in law enforcement management, pattern or practice litigation, or other professional management reforms.¹⁰⁷ The monitor provides quarterly reports detailing the department’s compliance efforts. When the monitor determines the department has sufficiently complied with and satisfied at least 94% of the agreement and the district court accepts the judgment, the monitor team disbands.¹⁰⁸ Consent decree monitoring and reform can take anywhere from a few years to over a decade. In order to improve enforcement under § 14141, the DOJ could require closer to 100% compliance with the terms of the consent decree. While this may increase the time a department remains subject to a consent decree, requiring departments to more substantially comply may be necessary to ensure reform is complete and lasting.

The DOJ should also conduct follow up studies of targeted agencies to determine the extent to which reforms are durable past the monitoring phase.¹⁰⁹ The DOJ admits it has “not studied the long-term outcomes at the law enforcement agencies it has targeted.”¹¹⁰ The DOJ’s current model focuses on agencies under consent decrees achieving certain benchmarks, at which point the agency is again left to its own devices. Unless there is some mechanism to ensure that the measures undertaken to address unconstitutional policing practices will create durable reforms, departments run the risk of slipping back into old habits once the DOJ, monitors and courts have turned their attention elsewhere. This risk is particularly acute as a department’s personnel turns over, eroding the institutional memory of the reasons certain policies and procedures are necessary to ensure constitutional policing.¹¹¹

For example, in 1997, the Pittsburgh Bureau of Police became the first law enforcement agency subject to a consent decree under § 14141.¹¹² In the years since satisfying the consent decree, the Bureau has engaged in questionable practices that include “absence of timely and independent

¹⁰⁵ *Id.* at 921 (citing Consent Decree Regarding the New Orleans Police Dept. at 1, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (2013) (No. 2:12-cv-01924-SM-JCW)).

¹⁰⁶ *Id.*

¹⁰⁷ Dukanovic, *supra* note 48, at 920 (citing Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 511 (2009)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

¹¹¹ Dukanovic, *supra* note 48, at 532–33.

¹¹² *Id.* at 532.

investigations into officer misconduct, extreme uses of excessive force, and shuffling of police chiefs.”¹¹³ It is possible that the underlying causes of these incidents could have been addressed through additional monitoring and review after the termination date of the consent decree.

One observer found that DOJ officials support creating follow-up teams to return to agencies previously under consent decree to assess their continued compliance and prevent backsliding.¹¹⁴ To ensure reform is permanent, the DOJ should incorporate this follow-up process into consent decrees.¹¹⁵ Ideally, DOJ would include a follow-up clause in every consent decree, but in reality, the DOJ may not have sufficient resources to follow-up with every department. Therefore, it is necessary to tailor follow-up efforts by identifying signs of resistance early in the process, under the theory that departments resistant to reform may also be more likely to backslide. Follow-up requirements could incentivize departments to sustain reform and avoid further federal intervention.

Unfortunately, the near-term future of § 14141 investigations is uncertain, given the election of Donald Trump and the appointment of Jeff Sessions as Attorney General. Prior to Trump’s inauguration, the DOJ signed a consent decree with the Baltimore Police to address concerns over a pattern or practice of constitutional violations.¹¹⁶ The administration also released a report concerning excessive use of force by the Chicago Police Department. The Chicago Police Department appears receptive to working with the DOJ; however, reform efforts are in flux under the Trump Administration.¹¹⁷ Attorney General Sessions has been a fierce critic of federal intervention that forces local police to adopt reforms, calling federal consent decrees “undemocratic” and an “end run around the democratic process.”¹¹⁸ In a March 31, 2017, memorandum to U.S. attorneys and DOJ department heads, Attorney General Sessions stressed the need for local accountability, asserting that, “[i]t is not the responsibility of the federal government to manage non-federal law enforcement agencies.”¹¹⁹ He further directed his staff to review all “existing or contemplated consent decrees . . . ensure that they fully to promote” these principles.¹²⁰ On April 3, 2017, DOJ lawyers unsuccessfully sought to delay implementation of a consent decree with the embattled Baltimore Police Department that was announced towards the end of the Obama

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Appointing a permanent internal monitor in the department may be a useful additional safeguard. This solution is more effective in departments with significant internal deficiencies. This method of oversight, though used with success in reforming the LAPD, may be too intrusive federal intervention. Departments are likely inclined to consent to some external oversight for a period of time and the possibility of follow-up investigations before consenting to appointment of a permanent neutral monitor. *Id.* at 930–31.

¹¹⁶ Kami N. Chavis, *The Future of Police Reform Under the Trump Administration*, REG. REV. (Feb. 13, 2017), <http://www.regblog.org/2017/02/13/chavis-police-reform-trump-administration/>.

¹¹⁷ Mark Berman & Matt Zapotosky, *Chicago Police Officers Have Pattern of Using Excessive Force, Scathing Justice Dept. Report Says*, WASH. POST (Jan. 13, 2017) https://www.washingtonpost.com/news/post-nation/wp/2017/01/13/justice-dept-to-announce-results-of-investigation-into-chicago-police/?utm_term=.0e19832c9a3c.

¹¹⁸ Chavis, *supra* note 116.

¹¹⁹ Memorandum from Jefferson B. Sessions III, U.S. Attorney General, to Heads of Department Components and U.S. Attorneys (Mar. 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html>.

¹²⁰ *Id.*

administration.¹²¹ These signals from the Trump administration and Attorney General Sessions suggest that we will witness a substantial curtailment of pattern or practice investigations in the coming years, placing the future of § 14141 as a viable tool to promote police accountability in doubt.

B. Implementing Police Body-Worn Cameras

Widespread adoption and implementation of body-worn cameras could potentially mitigate some difficulty victims of police misconduct experience, especially in § 1983 cases. Body cameras objectively capture interactions police officers have with citizens. This is valuable given the objective reasonableness standard applied in officer use-of-force cases. Furthermore, if the victim passes away, body camera footage is the most reliable evidence to rebut an officer's account of the event. A camera has no agenda, it simply records what happens.

A threshold question when an officer is accused of excessive force is whether the force applied was objectively reasonable at the moment it was applied.¹²² If a prosecutor, court, or jury determines the force applied was reasonable, then criminal and civil penalties are no longer available. As discussed above, the reasonableness of the force applied depends on several factors, including, the actions of the suspect, the presence and proximity of weapons, and the immediacy of the threat to officers and others.¹²³ Without body camera footage, it becomes the word of a victim or other witnesses against the officer regarding the nature of the interaction leading to the use of force.

The problem with this dynamic is, generally, the victims in excessive force cases are not sympathetic victims.¹²⁴ Furthermore, juries tend to believe police officers are credible people who tell the truth.¹²⁵ Couple this with the fact that the account of the officer that applied the force is usually bolstered by the reports of other officers present when the force was applied. If a jury is inclined to believe one officer over the victim, they will surely believe multiple officers corroborating each other's accounts over that of the victim. When used correctly, body cameras resolve this dilemma by offering an unbiased perspective, in real time, of the interaction between the officer and victim.¹²⁶ The recording will show the actions of all parties captured, in addition to statements given by officers and the victim.¹²⁷ Furthermore, it will show the exact length of time between first contact and the application of force.¹²⁸ This recording takes much of the guess work out of the equation and serves as a check for the reliability of the officers' reports.

¹²¹ Sheryl Gay Stolberg & Eric Lichtblau, *Sweeping Federal Review Could Affect Consent Decrees Nationwide*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/justice-department-jeff-sessions-baltimore-police.html? r=0>.

¹²² *Malley v. Briggs*, 475 U.S. 335, 395 (1986).

¹²³ McGuinness, *supra* note 72.

¹²⁴ See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 798 (2000).

¹²⁵ Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 998 (2009) ("Juries are often more inclined to believe police officers over a citizen, who may have a criminal record, when that citizen makes an allegation of police misconduct.").

¹²⁶ Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*, 58 HOW. L. J. 881 (2015).

¹²⁷ *Id.* at 885.

¹²⁸ *Id.*

Additionally, there is research indicating the presence of body cameras deters police misconduct.¹²⁹ For example, a study in Rialto, California, randomly assigned cameras to officers then collected data for a year.¹³⁰ The results of the study are promising. Reported use-of-force incidents on shifts without body cameras were double that of shifts where officers were equipped with a body camera.¹³¹ Throughout the department, use-of-force incidents dropped by 60% and citizen complaints dropped by 88%.¹³² Similar results have been found across multiple studies in different cities.¹³³ These results are promising, as they suggest the presence of body cameras can prevent misconduct before it occurs, because when officers and citizens know they are being recorded, it changes the way they interact with one another.

Body cameras benefit both the public and the police. When a person is killed by a police officer during an encounter, citizens often demand accountability. Determining whether the officer was at fault is often difficult without a truly objective means to evaluate the officer's conduct. Body cameras are a tool capable of providing the objective perspective necessary to ensure accountability. As a result, body cameras can aid in holding officers accountable for misconduct, because citizens will have access to valuable information to rebut officer claims that force was reasonable.¹³⁴ Cameras can also insulate officers from liability against frivolous complaints of misconduct by allowing officers to use the footage to support the reasonableness of their actions.¹³⁵ In fact, some police chiefs have publicly endorsed the use of body cameras as a law enforcement tool. One chief encourages his officers to let citizens know the camera is recording believing that "it elevates behavior on both sides of the camera."¹³⁶

Body cameras alone will not clear the path for successful litigation of legitimate excessive force cases. This is due, in part, to the standards used to establish qualified immunity, which remain unaffected by the use of body cameras. When assessing the reasonableness of an officer's use of force, courts and juries must still take into account that "officers are forced to make split second decisions in situations that are tense, uncertain, and rapidly evolving." This allows officers to argue that even if, in hindsight, video appears to show unreasonable use of force, in the heat of the moment their decision to use force was, in fact, objectively reasonable. Department policies regarding use of force can also affect how courts assess the reasonableness of an officer's use of force. Unfortunately, too many departments fail to provide sufficiently robust guidelines against the unnecessary use of force.¹³⁷ Additionally, in those cases in which video can establish that the use of

¹²⁹ *Id.*

¹³⁰ *Id.* at 886.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Chavis, *supra* note 116, at 987–88.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ A survey of ninety-one law enforcement agencies revealed that only one-third "require officers to de-escalate situations, when possible, before using force" or "exhaust all other reasonable alternatives before resorting to using deadly force." DERAY MCKESSON, ET AL., CAMPAIGN ZERO, POLICE USE OF FORCE POLICY ANALYSIS 4, 6 (Sept. 20, 2016),

force was objectively unreasonable, a victim of excessive force must still show that the officer violated a “clearly established” law.¹³⁸ Until the Supreme Court revisits the standard set in *Garner, Connor* and their progeny victims of excessive force will find only limited success in using body camera footage to hold police accountable.

C. Avoiding Conflicts of Interest Through Independent Prosecutors

As discussed above, local prosecutors face an inherent conflict of interest when called to prosecute police officers.¹³⁹ To resolve this conflict, local prosecutors should be required to recuse themselves when police officers in departments with which they work are accused of excessive force.¹⁴⁰ The best way to ensure neutrality in the prosecution of police officers is to bring in an impartial prosecutor from outside the district. Policies could include appointing a prosecutor from a neighboring district, or the state’s attorney general’s office to handle excessive force cases.¹⁴¹

I. Appoint Prosecutors from Neighboring Districts

Assigning prosecutors from neighboring districts to handle cases involving officers’ excessive use of force offers several advantages. First, it removes the appearance of impropriety on the part of the prosecution. Prosecutors and law enforcement from different jurisdictions rarely come into contact with one another. An outside prosecutor likely does not have as close of a working relationship with the officer and therefore, arguably, faces less of a conflict of interest. The independent prosecutor will feel less restricted to investigate and charge an officer and is less likely to use the grand jury process to avoid an indictment.

Second, prosecutors from neighboring districts in the same state are already familiar with the laws and procedure in the state where they practice. Therefore, an appointed, outside prosecutor will be well versed in the laws, allowing officer cases to proceed as any normal criminal case.

Finally, district attorneys’ offices routinely require prosecutors to recuse themselves when conflicts arise in other situations, such as when another member of their office is accused of a crime.¹⁴² Therefore, it would be relatively seamless for district attorneys’ offices to simply extend this policy of recusal to cover officer cases.

This approach is, however, susceptible to criticism. State prosecutors from neighboring jurisdictions are still vulnerable to some of the pressures local prosecutor’s face.¹⁴³ Potential conflicts could arise because of political pressures, the impact that aggressive prosecution of a police officer could have

<https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e1b5cc2994ca4ac1d97700/1474409936835/P+lice+Use+of+Force+Report.pdf>.

¹³⁸ Chavis, *supra* note 116.

¹³⁹ See generally *supra*, Part I.

¹⁴⁰ Levine, *supra* note 22, at 1477–87.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1488.

¹⁴³ *Id.* at 1495–96.

on a prosecutor's relationship police in their own district, and the statewide influence that powerful police unions can exert.¹⁴⁴

2. Appoint State Attorneys General

Appointing the state attorney general's office to handle police cases is another way to remove bias from the process. If the attorney general's office handles all police cases, this will foster the opportunity for prosecutors to specialize in the prosecution of officer cases. Additionally, if all officer cases are handled from a central location, it is easier to collect data on these types of cases.¹⁴⁵ The attorney general's office is also less susceptible to the local and personal influences that may cause conflicts with prosecutors from neighboring districts.¹⁴⁶

One commentator notes that most states have a procedure in place for the attorney general's office to step in when a district attorney's office identifies a conflict.¹⁴⁷ However, the attorney general's office rarely takes over a case absent the district attorney's office's voluntary recusal.¹⁴⁸ Increasing public and political support for this approach may incentivize district attorneys to conflict out of officer cases and allow the attorney general's office assume responsibility for these prosecutions.

3. Special Prosecutor Laws and Their Shortcomings

To date, only Connecticut has enacted legislation to allow for the appointment of a special prosecutor in police-related deaths.¹⁴⁹ Under the law, police-involved death cases are referred to the Division of Criminal Justice and the state's chief attorney is empowered to, at his or her discretion, appoint a special prosecutor.¹⁵⁰ Other states lawmakers have attempted to introduce similar legislation requiring independent prosecutors in use of force cases, including Missouri and Pennsylvania.¹⁵¹ In other states, such as New York, the executive branch has taken the lead in enacting reform. After a grand jury failed to indict the officers involved in the death of Eric Garner, New York Governor Andrew Cuomo issued Executive Order No. 147, which directs the state attorney general to prosecute cases where unarmed civilians die at the hands of the police.¹⁵²

There are two primary criticisms of existing statutes or executive action relating to independent prosecutors. First, in both Connecticut and New York an independent prosecutor may only be

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1490.

¹⁴⁶ *Id.*

¹⁴⁷ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 550–55 (2011).

¹⁴⁸ *Id.* at 551–52.

¹⁴⁹ Chavis Simmons, *supra* note 14.

¹⁵⁰ CONN. GEN. STAT. § 51-277(a) (2012).

¹⁵¹ Mike Lear, *MO Rep, Sen Want Special Prosecutors in All Police Shootings*, MISSOURINET (Oct. 13, 2014), <http://www.missourinet.com/2014/10/13/two-mo-lawmakers-want-special-prosecutors-in-all-officer-involved-shootings/>; Press Release, Sen. Art Haywood, Haywood to Seek Independent Prosecutor for Deadly-Force Incidents (Dec. 19, 2014), <http://www.senatorhaywood.com/haywood-to-seek-independent-prosecutor-for-deadly-force-incidents>; see also *Special Prosecutors: Investigations and Prosecutions of Police Use of Deadly Force*, FED'N OF AM. SCIENTISTS (Dec. 12, 2014), <https://www.fas.org/sgp/crs/misc/specpro.pdf> (citing Conn. Gen. Stat. § 51-277(a) (2012)).

¹⁵² Noah Remnick, *Cuomo's Order for Special Prosecutor in Police Deaths Is Criticized*, N.Y. TIMES (July 9, 2015), <http://www.nytimes.com/2015/07/09/nyregion/cuomos-order-for-special-prosecutor-in-police-deaths-is-criticized.html>.

appointed in instances where an officer's use of force results in death. However, there is a strong argument that independent prosecutors should also be utilized when the amount of force is excessive, resulting in significant injuries, yet falls short of lethal force. Second, it is important to recognize that if the office that is conflicted is allowed to choose their replacement, this could undermine the independence that the law seeks to create. Therefore, legislation addressing the appointment of independent prosecutors should specifically include a mechanism to ensure objectivity in choosing a special prosecutor, by requiring the state attorney general or the DOJ to appoint the special prosecutor.

D. Promoting Citizen Oversight

A final way to improve police accountability is for jurisdictions to establish a means for citizen oversight in police cases through the creation of civilian review boards.¹⁵³ Such a board could assist the prosecutor and law enforcement in investigating allegations of excessive force.¹⁵⁴ Members could include community leaders, retired law enforcement, local attorneys, and former judges.¹⁵⁵

Though civilian review boards can increase the sense that police are accountable to the community, there are several issues that constrain civilian review boards. First, critics have long argued that civilian review boards are generally “weak, ineffective, and poorly led.” Too often, these boards’ oversight is largely retrospective, making them ineffective at addressing police misconduct until well after it occurs.¹⁵⁶ These boards generally lack any real power to hold officers or departments accountable.¹⁵⁷ Because they typically neither have access to the entire court file, nor the power to investigate while the case is ongoing, civilian review boards often do not gain access to valuable information until well after the case is resolved.¹⁵⁸ Second, these boards are plagued by lack of funding.¹⁵⁹ Without money to pursue investigations, it is difficult to fully evaluate the case. This limits the number of cases the board can review, forcing them to pick their battles, much like the DOJ under § 14141.

Finally, existing review boards generally have limited leverage over the police departments they are tasked with investigating.¹⁶⁰ They can usually only report their findings and make a recommendation to the chief of police or the local government, who have the ultimate enforcement authority to either carry out or ignore the review board recommendation. Additionally, because these boards often include an equal number of current or former law enforcement officers as civilians, they are

¹⁵³ Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 872 (2012) (“Approximately twenty percent of large police departments have some form of civilian review.”); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1802–03 (2005) (“The vast majority of big-city police departments are now subject to some form of civilian oversight. The institutional structure of that oversight varies widely.”).

¹⁵⁴ Levine, *supra* note 22, at 1494.

¹⁵⁵ *Id.*

¹⁵⁶ Chavis Simmons, *supra* note 14.

¹⁵⁷ *Id.*

¹⁵⁸ See Thomas Moriarty, *Court Order Leaves Newark Police Review Board Toothless, Activists Say*, NJ.COM (Dec. 15, 2016), http://www.nj.com/essex/index.ssf/2016/12/injunction_against_newark_police_review_board_prom.html (detailing a 2016 injunction, which limited the investigatory and subpoena power of the Newark Civilian Review Board).

¹⁵⁹ Joanna C. Schwartz, *Who Can Prosecute the Police?*, 2016 U. CHI. LEGAL F. 437 (2016).

¹⁶⁰ *Id.*

viewed as overly sympathetic to the interests of police officers, even in cases involving excessive use of force.¹⁶¹ While these boards need to work closely with local law enforcement and government, disproportionate association with law enforcement leadership can run the risk of over-sympathizing with the very entities they are tasked with overseeing.¹⁶² If review boards are designed to include individuals who are motivated to seek justice, not play sides, they will have more legitimacy in the eyes of the public and will more effectively review cases with independence and impartiality.

Currently, there are more than 200 citizen oversight entities in existence across the country with various structural models.¹⁶³ For example, the Berkeley, California, citizen review board conducts its independent investigations alongside the police department's internal affairs division.¹⁶⁴ The D.C. Office of Police Complaints makes the facts and their findings in a case available to the public, thereby increasing transparency.¹⁶⁵ In Flint, Michigan, prior to its dissolution, the Office of the Ombudsman's citizen review board maintained independence in the face of local pressures by having the city council appoint members.¹⁶⁶ The Office of Professional Accountability in Seattle, Washington, has an office a few blocks away from the police department so civilians can file complaints about police conduct without having to go to a police station.¹⁶⁷

As these examples demonstrate, civilian review boards need to have real power to effectuate change.¹⁶⁸ To ensure they have the power they need to be effective, jurisdiction should design civilian review boards with the following features:

- Power to subpoena, investigate, and bring charges against officers.¹⁶⁹
- Authority to compile reports they can distribute to the general public summarizing their findings and recommendations.
- Membership that includes licensed attorneys to participate in the review process with the authority to file suit against an officer under § 1983.
- Adequate funding to conduct thorough investigations.
- Freedom from political influence with a non-partisan board committed to increasing accountability.¹⁷⁰

¹⁶¹ Levine, *supra* note 22, at 1495–96.

¹⁶² *Id.*

¹⁶³ Martin Kaste, *Police Are Learning to Accept Civilian Oversight, But Distrust Lingers*, NPR (Feb. 21, 2015), <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers>.

¹⁶⁴ CATO INST., *Civilian Review Boards*, POLICEMISCONDUCT.NET, <https://www.policemisconduct.net/explainers/civilian-review-boards/> (last visited Apr. 17, 2017).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Kaste, *supra* note 163.

¹⁶⁸ Michael P. Weinbeck, Note, *Watching the Watchmen: Lessons for Federal Law Enforcement from America's Cities*, 36 WM. MITCHELL L. REV. 1306, 1317 (2010) (“[A] corollary flaw of civilian oversight agencies is their inability to require discipline.”); *but see* Schwartz, *supra* note 159, at 872 (“[A] quarter of . . . civilian review boards have independent investigatory authority.”).

¹⁶⁹ Levine, *supra* note 22, at 1494.

¹⁷⁰ *Id.*

While there are positive aspects of existing civilian review boards, no single board combines each of the features described above. However, if properly implemented, civilian review boards can provide the public with the opportunity to have its voice heard and the power to effectuate lasting reforms.

IV. Conclusion

Police officers are tasked with a valuable function in our society—keeping individuals and communities safe from violence and crime and maintaining public order. Discharging these duties may put a police officer’s own personal safety at risk. Current policies and legal standards reflect the belief that to maintain public safety and their own safety police must be allowed to use force when discharging their duties. *Because* of this ability to use force, however, our legal system must also provide mechanisms to hold law enforcement officers accountable. When a police officer’s use of excessive force injures or kills an individual, or when a police department engages in a pattern of unconstitutional behavior, public trust is eroded and tensions between police officers and the communities they serve are heightened. A failure to hold law enforcement officers and agencies accountable further deepens this mistrust and threatens their legitimacy. Holding law enforcement accountable for misconduct, therefore, is inextricably linked with maintaining the safety of our communities and enforcing the rule of law.

About the Authors

Kami Chavis is a Professor of Law and Director of the Criminal Justice Program at Wake Forest University School of Law. In 2015, she was appointed as a Senior Academic Fellow at the Joint Center for Political and Economic Studies. She has substantial practice experience and writes and teaches in areas related to criminal law, criminal procedure and criminal justice reform. After receiving her J.D. from Harvard Law School, she worked as an associate at private law firms in Washington, D.C. In 2003, she became an Assistant United States Attorney for the District of Columbia, involving her in a wide range of criminal prosecutions and in arguing and briefing appeals before the District of Columbia Court of Appeals. Professor Chavis frequently makes presentations on law-enforcement issues and is a leader in the field of police accountability. Her articles have appeared in the *American Criminal Law Review*, the *Ohio State Journal of Criminal Law*, *The Journal of Criminal Law and Criminology*, the *University of Alabama Law Review*, and the *Catholic University Law Review*, and other legal journals. She writes in the areas of police and prosecutorial accountability, federal hate crimes legislation and enforcement, and racial profiling. She was elected to the American Law Institute in 2012. She has appeared on CNN, CTV, and NPR. She has written for the *New York Times* and the *Huffington Post*, and has been quoted in the *Wall Street Journal*, *BBC News*, *U.S. News and World Report*, *International Business Times*, *Deutsche Welle*, and other outlets regarding police accountability and the structural reform of law enforcement agencies.

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