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# The Challenge of Deterring Bad Police Behavior: Implementing Reforms that Hold Police Accountable

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# THE CHALLENGE OF DETERRING BAD POLICE BEHAVIOR: IMPLEMENTING REFORMS THAT HOLD POLICE ACCOUNTABLE

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## ABSTRACT

Systemic racism in the United States is pervasive. It runs through every aspect of society, from healthcare to education. Changing all of the parts of society touched by racism is necessary; however, this Article does not provide a cure for systemic racism. It seeks to address a byproduct of this racism: police brutality. Over and over, headlines broadcast the deaths of Black Americans at the hands of the police—why has nothing changed? This Article argues that meaningful reform requires trust in U.S. law enforcement, which can only be achieved by holding police accountable and deterring misconduct. To do so, this Article proposes reconsidering police licensing to guarantee more third-party, unbiased oversight.

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## INTRODUCTION

"[C]hange has been too slow. And we have to have a greater sense of urgency about [police reform]."[1]—President Barack Obama

"We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality."[2]—Dr. Martin Luther King, Jr.

Racism in the United States is and always has been systemic; from housing to healthcare, racism permeates all parts of U.S. society.[3] In its 1968 report, the National Advisory Commission on Civil Disorders, colloquially referred to as the Kerner Commission, determined that "white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it."[4] For the entire history of this country, white society's role in discrimination against Black Americans has been clear. Some improve–ments have been made but certainly not enough. In 1985, the U.S. Government released the "Report of the Secretary's Task Force on Black and Minority Health," which determined that inequities in healthcare were responsible for 60,000 deaths of Black citizens per year in the United States.[5] Today, Black women are three times more likely

1. Barack Obama, U.S. President, Remarks on the Alton Sterling and Philando Castile Police Shootings (July 7, 2016), *in* TIME (July 7, 2016, 9:36 PM), https://time.com/4397600/obama-alton-sterling-philando-castile-speech-transcript/ [https://perma.cc/8AYH-YRTJ].

2. Dr. Martin Luther King, Jr., "I Have A Dream," Address Delivered at the March on Washington for Jobs and Freedom (Aug. 28, 1963), *in* STAN. UNIV. MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/king-papers/documents/i-have-dream-address-delivered-march-washington-jobs-and-freedom [https://perma.cc/7NET-EKB8] (last visited Mar. 14, 2021).

3. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 226–29 (10th anniv. ed. 2020) (describing the systemic racism permeating American society); Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the* Brown v. Board of Education *Decision*, 2004 U. ILL. L. REV. 1099 (providing an overview of systemic racism in American schools and other parts of society); Kimberly Gill, *Housing Discrimination in Detroit: An Example of Systemic Racism*, CLICK ON DETROIT (June 24, 2020, 1:26 PM), https://www.clickondetroit.com/news/local/2020/06/24/housing-discrimination-in-detroit-an-example-of-systemic-racism/ [https://perma.cc/L3TJ-B342] (explaining the impact of systemic housing discrim–ination in the city of Detroit following the passage of the National Housing Act of 1934).

4. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

5. J. Nadine Gracia, *Remembering Margaret Heckler's Commitment to Advancing Minority Health*, HEALTH AFFS. BLOG (Nov. 16, 2018), https://www.healthaffairs.org/do/10.1377/hblog20181115.296624/full/ [https: //perma.cc/Q6TB-PNKC].

to die in childbirth than white women.[6] In addition, the 2020 COVID-19 crisis has revealed further racial inequities in the healthcare system.[7] Black people in the United States are three times more likely to be infected by the coronavirus than white people; in addition, Black individuals are almost two times as likely to die from COVID-19 than white individuals.[8] These racial differences exist in big cities, like New York City, and suburban areas, such as Fairfax County, Virginia.[9]

Disparities do not exist only in healthcare.[10] In 1934, Congress passed the National Housing Act, offering government mortgages to those in good financial standing—so long as they were white.[11] In the 1960s, Congress passed the Fair Housing Act,[12] which aimed to right the wrongs done to Black Americans under the National Housing Act; unfortunately, segregation and disparities still exist today in U.S. housing.[13] Because the Fair Housing Act failed to fix the segregation of neighborhoods and other forms of racial control evolved, today housing is still significantly segregated, perpetuating racial inequities and oppression.[14] Although legal segregation has ended, discriminatory

6. Roni Caryn Rabin, *Huge Racial Disparities Found in Deaths Linked to Pregnancy*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/health/pregnancy-deaths-.html [https://perma.cc/N4Q5-9XV8]. White women die during childbirth at a rate of 13 per every 100,000 births. *Id.* In contrast, Black women die at a rate of 42.8 per every 100,000 births. *Id.*

7. Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html [https://perma.cc/N6JX-J4UQ].

8. *Id.* In addition, Latinx individuals were also three times more likely to be infected by the coronavirus than white individuals. *Id.*

9. *Id.*

10. *See* Gill, *supra* note 3 (explaining the racial disparities in housing in Detroit, Michigan).

11. *Id.*

12. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

13. *Id.*; *see also* Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 37–38 (2001) (arguing that Congress's attempts to fix the housing disparities in the United States only served to perpetuate the problem).

14. *See* Joe R. Feagin, *Excluding Blacks and Others from Housing: The Foundation of White Racism*, 4 CITYSCAPE: J. POL'Y DEV. & RSCH. 79, 81 (1999) (suggesting that although legal segregation and discrimination are no longer allowed in the United States today, informal modes of racial discrimination and segregation exist and contribute to inequities).

zoning and mortgage lending practices, "redlining," and other racially discriminatory practices still exist.[15]

Remnants of segregation still implicate education in the United States, even after many believed *Brown v. Board of Education*[16] fixed the system. Today, approximately two-thirds of minority children learn in schools that serve a majority minority student body.[17] Because most public schools are funded by property taxes, schools in poorer locales with a majority of students of color have less resources "on every tangible measure," including quality of teachers and range of courses offered.[18]

Racism is a systemic issue; however, this Article will only focus on one aspect—how racism intersects with policing.[19] Prior to the Civil War, police departments, which often had their roots in slave patrols,

15. *See* Kenn, *supra* note 13, at 39–41 (providing an overview of modern practices that discriminate against Black Americans in the housing market). "Redlining" refers to the practice of denying mortgages to individuals regardless of finances, typically Black Americans in U.S. cities, and marking the areas where these individuals lived as zones not to lend to. *See* Khristopher J. Brooks, *Redlining's Legacy: Maps are Gone, But the Problem Hasn't Disappeared*, CBS NEWS (June 12, 2020, 8:25 AM), https://www.cbsnews.com/news/redlining-what-is-history-mike-bloomberg-comments/ [https://perma.cc/W3TT-QEXR]. These areas were marked with a red pen, hence "redlining," to demonstrate which areas in a particular city were considered riskier to lend to; typically, these risky communities were home to many Black Americans. *Id.* Although redlining was made illegal in the Fair Housing Act, little has been done to rectify redlining's implications, leaving many cities segregated on racial lines. Kenn, *supra* note 13, at 39–41. Further, there is evidence that the practice of redlining may still exist in the United States—in 2018, a study of 31 million records found that there was a significant pattern of people of color being denied loans in major cities, such as Atlanta, Detroit, and Philadelphia. *See* Aaron Glantz & Emmanuel Martinez, *Kept Out*, REVEAL NEWS (Feb. 15, 2018), https://www.revealnews.org/article/for-people-of-color-banks-are-shut ting-the-door-to-homeownership/ [https://perma.cc/P8U2-U6EP]. The study determined that Black individuals were refused loans at rates significantly higher than white individuals in forty-eight cities. *Id.*

16. 347 U.S. 483 (1954).

17. Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS INST. (Mar. 1, 1998), https://www.brookings.edu/articles /unequal-opportunity-race-and-education/ [https://perma.cc/S76Y-STV2].

18. *Id.*; *see also* Sarah Jones, *Did America Set Public Schools Up to Fail?*, N.Y. MAG. (July 27, 2020), https://nymag.com/intelligencer/2020/07/the-triple-crisis-facing-americas-public-schools.html [https://perma.cc/D98X-XW3G] (explaining the way schools are funded in the United States, primarily via local property taxes, which contributes to inequality). Minority children are less likely than white children to receive any of the critical school resources tied to later success, including small classes, better teachers, smaller student bodies where teachers know individual students, and rigorous coursework. *See* Darling-Hammond, *supra* note 17.

19. *Infra* Part I; Part II.

sprung up across the United States.[20] Police departments were born to maintain control over Black Americans, and remnants of this initial practice remain in policing today.[21]

Following the Civil War, Congress ratified the Thirteenth Amendment to cement the abolition of slavery in the United States; although slavery was abandoned privately, the Thirteenth Amendment allows involuntary servitude "as a punishment for crime," creating a loophole for slavery in prisons.[22] Despite the promise of freedom within the Thirteenth Amendment, following its ratification Black Americans faced extreme marginalization and systemic inequities.[23] A number of states seeking to replace slavery enacted new laws, known today as "Black Codes."[24] Although proponents of these laws thought of them as mere criminal statutes, they were "poorly disguised substitutes for slavery," criminalizing Black Americans that attempted to work in certain jobs, restricting where Black Americans could live, requiring Black Americans to treat white people with deference, and more.[25]

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20. andré douglas pond cummings, *Reforming Policing*, 10 DREXEL L. REV. 573, 578–79 (2018).

21. *Id.* at 579, 582. Scholars have uncovered a clear link between the control of Black Americans and the original goals of U.S. law enforcement:

> [T]he literature clearly establishes that a legally sanctioned law enforcement system existed in America . . . for the express purpose of controlling the slave population . . . . The similarities between the slave patrols and modern American policing are too salient to dismiss or ignore. Hence, the slave patrol should be considered a forerunner of modern American law enforcement.

*Id.* at 578–79 (quoting VICTOR E. KAPPELER & LARRY K. GAINES, COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE 58–59 (2009)).

22. *See* U.S. CONST. amend. XIII; David S. Bogen, *From Racial Discrimination to Separate but Equal: The Common Law Impact of the Thirteenth Amendment*, 38 OHIO N.U. L. REV. 117, 117 (2011) (describing the birth of the Thirteenth Amendment).

23. *Jim Crow Laws*, History (Feb. 28, 2018), https://www.history.com/topics/early-20th-century-us/jim-crow-laws [https://perma.cc/JW67-BCC7].

24. *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 672–73 (1987) (Brennan, J., concurring in part and dissenting in part) (explaining the history of Black Codes in the United States).

25. *Id.* at 672–73. Black Codes also made it illegal for Black Americans to own weapons, "required proof of residence," and "prohibited the congregation of groups of [Black Americans]." *Id.* at 672–73 (quoting HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 319 (1982)). One particularly disturbing Black Code allowed white families to "take-in" Black orphans or Black children from Black families deemed unfit to care for their children. Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 UMKC L. REV. 697, 718 (2017). When these white families took the Black

Importantly, police officers enforced these laws and others, including vagrancy laws, which granted police officers wide discretion to arrest individuals for vague crimes of loitering and being "suspicious."[26] Black individuals found guilty of violating a Black Code or vagrancy law found themselves on chain gangs, paying fines, or serving as unpaid servants on white-owned plantations.[27] Although tasked with protecting *all* Americans, police officers largely turned a blind eye to the violence Black Americans faced from the Ku Klux Klan and other white terrorist groups.[28]

Today, Black Americans unfortunately face many similar problems with the police as they did following the Civil War and during the Civil Rights Movement. Black Americans are three times more likely to be killed by police officers than white Americans.[29] In response to both the systemic racial inequities in the United States and the disproportionate number of Black Americans who die at the hands of the police, in 2013, following seventeen-year-old Trayvon Martin's death at the hands of a so-called concerned citizen,[30] the Black Lives Matter ("BLM") movement was created.[31] Although the impetus for the movement was

children, they typically were placed in an "apprenticeship," which comprised of unpaid labor, without parental consent and with "corporal chastisement." *Id.*

26. *See* cummings, *supra* note 20, at 581–82 (describing how police officers played a role in the oppression of Black Americans); *see also* Risa L. Goluboff, *Before Black Lives Matter*, SLATE (Mar. 2, 2016, 12:21 PM), https://slate.com/news-and-politics/2016/03/vagrancy-laws-and-the-legacy-of-the-civil-rights-movement.html [https://perma.cc/QF2J-CD67] (explaining the history of vagrancy laws in the United States and the way police used these statutes to arrest anyone they disagreed with or found problematic).

27. Thompson, *supra* note 25, at 718–19.

28. *See id.* at 719–20 (summarizing the history of police violence against Black Americans).

29. Laura Bult, *A Timeline of 1,944 Black Americans Killed by Police*, VOX (June 30, 2020, 11:10 AM), https://www.vox.com/2020/6/30/21306843/black-police-killings [https://perma.cc/C6Z3-4VH8].

30. *See* Mark S. Brodin, *The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin*, 59 HOW. L.J. 765, 766 (2016) (footnotes omitted) (explaining that George Zimmerman, Trayvon Martin's murderer, "was a 'wannabe' cop, a 'neighborhood watch' civilian enrolled in criminal justice courses, armed with a semi-automatic handgun, who profiled 17-year-old Trayvon Martin, stalked him, and shot him to death").

31. *See* Linda S. Greene, Lolita Buckner Inniss, Bridget J. Crawford, Mehrsa Baradaran, Noa Ben-Asher, I. Bennett Capers, Osamudia R. James & Keisha Lindsay, *Talking About Black Lives Matter and #MeToo*, 34 WIS. J.L. GENDER & SOC'Y 109, 110–11 (2019) (recounting the beginning of the BLM movement). BLM, as an organization, is comprised of at least thirty

the shooting of Black Americans by the police, the movement gained traction from the indignities, injustices, and many other manifestations of systemic racism. Since 2013, BLM has used its large, international platform to raise awareness of injustices occurring across the United States, including the murders at the hands of police of Eric Garner in New York City in 2014, Michael Brown in Ferguson, Missouri in 2014, Tamir Rice in Cleveland, Ohio in 2014, Freddie Gray in Baltimore, Maryland in 2015, and most recently, George Floyd in Minneapolis, Minnesota and Breonna Taylor in Louisville, Kentucky in 2020.[32]

chapters globally. *Id.* at 121. As a movement, BLM refers to "a broad conceptual umbrella that refers to the important work of a wide range of Black liberation organizations." *Id.* (quoting Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (July 13, 2018, 3:45 PM), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-black-lives-matter-changed-way-americans-fight [https://perma.cc/7ACG-2ZKS]). BLM defines its work in the following words: "By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives." *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/74NP-TNPL] (last visited July 13, 2020). Importantly, BLM stresses that BLM aims to ensure justice for all Black lives, including "Black queer and trans folks, disabled folks, undocumented folks, folks with records, women, and all Black lives along the gender spectrum." *Id.* One scholar notes that the death of Trayvon Martin and the trial of his killer, Michael Zimmerman, which resulted in an acquittal, was a "turning point" in the BLM movement. Brodin, *supra* note 30 (quoting Mychal Denzel Smith, *The Rebirth of Black Rage*, NATION (Aug. 13, 2015), https://www.thenation.com/article/archive/the-rebirth-of-black-rage/ [https://perma.cc/PYE4-GP4V]). Furthermore, there are clear parallels between Trayvon Martin's death and the subsequent BLM movement and the infamous murder of Emmet Till, a young Black teen, in 1955, which arguably helped spark the Civil Rights Movement. *Id.*

32. Monica Anderson, *The Hashtag #BlackLivesMatter Emerges: Social Activism on Twitter*, PEW RSCH. CTR. (Aug. 15, 2016), https://www.pewresearch.org/internet/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/ [https://perma.cc/8KEW-QWDV] (demonstrating spikes in social conversation using #BlackLivesMatter surrounding the deaths of Black individuals at the hands of police); *see also* Alia E. Dastagir, *George Floyd. Ahmaud Arbery. Breonna Taylor. What Do We Tell Our Children?*, USA TODAY (June 11, 2020), https://www.usatoday.com/story/news/nation/2020/05/31/how-talk-kids-racism-racial-violence-police-brutality/5288065002/ [https://perma.cc/G3FX-ACAN]. In addition to raising awareness regarding the deaths of Black Americans at the hands of the police, the 2020 movement also responded to the murder of 25-year-old Ahmaud Arbery, an unarmed Black man killed by white men while jogging in Georgia, and the shooting of Jacob Blake, a Black man from Kenosha, Wisconsin, who was shot by a police officer in the back approximately seven times and was paralyzed as a result in August 2020. *See* Jason Slotkin, *After Ahmaud Arbery's Killing, Georgia Governor Signs Hate Crimes Legislation*, NPR (June 26, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/26/884003927/after-ahmaud-arberys-killing-georgia-gov-signs-hate-crimes-legislation [https://perma.cc/X954-GQCT]; *see*

In the wake of the 2020 BLM movement, people across the globe have called for reform of police practices and, more broadly, systemic racism.[33] Reforms range from banning chokeholds to completely dismantling and partially defunding American police departments in an effort to increase social services by allocating funds from police departments to these programs.[34] Although most of these reforms are needed and may improve policing practices, more must be done to actually deter the police and create trust of law enforcement in minority communities. This Article will review many of the reforms various cities and states have tried to address the problem of police brutality; in addition, this Article will suggest that meaningful reform requires police deterrence.[35] To accomplish this, it is imperative that neutral and detached adjudicatory bodies are able to punish and hold police officers accountable.[36]

Part I will look at the current state of policing in the United States.[37] We will look at the myriad factors inherent in most police forces that have allowed bad police officers to thrive.[38] Part II will provide an overview of Supreme Court jurisprudence that has not only failed to reign in police but has indeed encouraged bad acts.[39] Part III will explain that popular reforms, such as banning chokeholds and

*also* Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html [https://perma.cc/J34L-JYDV] (describing Jacob Blake's shooting and the protests that occurred as a result of the incident). The discrepancy between the police treatment of peaceful, mostly Black, protestors and violent, white rioters was on display in the U.S. Capitol on January 6, 2021. Brakkton Booker, *Protests in White and Black, and the Different Response of Law Enforcement*, NPR (Jan. 7, 2021, 7:36 PM), https://www.npr.org/2021/01/07/954568499/protests-in-white-and-black-and-the-different-response-of-law-enforcement [https://perma.cc/2GKA-RW4E]. When predominantly white rioters attacked the Capitol, the police did little to stop them. *Id.* In contrast, when BLM protestors (who were predominantly Black) peacefully protested, they were met with huge teams of police officers wielding military-grade weaponry and protection. *Id.*

33. *See* Jon Emont & Philip Wen, *How Protests Over George Floyd's Killing Spread Around the World*, WALL ST. J. (June 11, 2020, 10:02 AM), https://www.wsj.com/articles/social-media-helps-spur-global-protests-over-george-floyds-death-11591880851 [https://perma.cc/WD5T-GQ8X] (emphasizing the global impact of the 2020 BLM movement).

34. *See infra* Part III (providing an overview of some newly implemented reforms attempting to stop police brutality in the United States).

35. *See infra* Part IV.

36. *See infra* Part IV.

37. *See infra* Part I.

38. *See infra* Part I.

39. *See infra* Part II.

requiring body cameras, are insufficient to deter police because they do not shift the power of police accountability to an unbiased, third party.[40] Part IV will argue that meaningful reform requires cultivating trust in policing by mandating police licensing and granting licensing bodies considerable power to decertify officers.[41] In addition we will argue for less interaction between the police and citizenry, through decriminalization of petty crime.[42] Ultimately, this Article summarizes the challenges in obtaining meaningful police reform, and identifies viable solutions to the complex problem.

## I. POLICE CULTURE: SYSTEMS THAT SUPPORT POLICE MISCONDUCT AND BRUTALITY

In 1991, a bystander, using his camcorder, captured the brutal beating of Rodney King by four police officers from the Los Angeles Police Department ("LAPD").[43] Although approximately twenty law enforcement officials were present at the beating, none of the officers intervened or submitted a report detailing the beating.[44] Had the video not existed, it would have been difficult for Rodney King to be believed, given the contrary testimony of the officers.[45] The advent of mobile phones and videos has documented what has been the culture of brutality in police departments, particularly against Black Americans, a constant in U.S. society since law enforcement's inception prior to the Civil War. The BLM movement was reignited in 2020 by the widely circulated and deeply disturbing nearly nine-minute video of George

40. *See infra* Part III.

41. *See infra* Part IV.

42. *See infra* Part IV.

43. *See* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 516 (1993) (recounting the details of Rodney King's brutal beating at the hands of the LAPD). During the course of the assault, King was beat more than fifty-three times and was kicked seven times. *Id.* In addition, King was shot with a Taser, an electrical shock gun, as many as three times. Michael Fleeman, *King Beating Focuses Attention on Police Taser, Nightstick*, AP NEWS (Mar. 29, 1991), https://apnews.com/b0c4c38f03f76a4f0c65c218998612d4 [https://perma.cc/GWG7-BJ3D]. The taser carried a "50,000-volt electrical charge." *Id.*

44. Levenson, *supra* note 43, at 520, 522.

45. *See* Jim Newton, Opinion, *Rodney King's Beating Provides a Road Map for Investigating Police Misconduct*, L.A. TIMES (June 11, 2020), https:// www.latimes.com/opinion/story/2020-06-11/rodney-king-police-misconduct-investigations [https://perma.cc/S7EF-QKNX] (describing the Rodney King beating and the police officer's decision to not file a report of misconduct).

Floyd's killing.[46] With the continued documentation of police brutally toward Black Americans, why has nothing changed?[47]

There are at least 18,000 different police departments in the United States with no central oversight; the following describes what is common to most police departments.[48] Although most police officers are committed to serving the public good with courage and without bias, those that do not follow the rules often overshadow the efforts of "good" cops. Furthermore, the structure and culture of police departments in the United States protect the bad actors. Imagine an apple tree. Most of the apples that grow from the trunk are good, however, the rotten apples also grow and are allowed to thrive because of support from the trunk. The trunk allows bad actors to thrive and fails to hold proble–matic police officers accountable.

Law enforcement is shaped by the institution's structure; "[i]t is the culture of 'us'—the brave warriors—against 'them'—the rabble of the street."[49] Rather than seeing people in their communities as constituents to protect, the police perceive themselves as "under siege."[50] This mentality gives birth to what some scholars call an officer's "working

46. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/G2KW-KLCU] (analyzing data of protestor turnout at BLM demonstrations across the United States and determining that the numbers indicated the biggest movement in U.S. history). As one scholar stated, "[i]f you aren't moved by the George Floyd video, you have nothing in you." *Id.* (quoting Professor Daniel Q. Gillion of the University of Pennsylvania, who has published works on demonstrations and U.S. politics). The video was shared widely across social media plat–forms, including Instagram, Facebook, and Twitter. Emont & Wen, *supra* note 33. Individuals across the globe were struck by the brutality the police inflicted upon George Floyd. *Id.* As one woman in Wales stated, "[s]eeing someone die brought me to reality." *Id.* Seeing the video led this woman to organize her own rally in Wales, which she promoted through her social media channels. *Id.*

47. *See* Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 522–23 (2017) (describing the impact the sharing of videos of police brutality have had on the BLM movement).

48. Leandra Bernstein, *America has 18,000 Police Agencies, No National Standards; Experts Say That's a Problem*, WJLA (June 9, 2020), https://wjla.com/news/nation-world/america-has-18000-police-agencies-no-national-standards-experts-say-thats-a-problem [https://perma.cc/XK5U-QE87].

49. *See* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 555 (2006) (describing the culture within police departments that perpetuates a culture of "us vs. them").

50. *Id.*

personality."[51] Working as a police officer naturally separates them from the rest of the community.[52] Then, when an officer does meet the public, he or she is always going to be in charge.[53] As a result, police officers tend to have a feeling of authority and solidarity with other officers.[54] In addition, officers on street patrol tend to be the low end of the hierarchical structure; unlike other business structures, like in the legal profession, these low-level officers have a great deal of discretion.[55]

Although solidarity within a profession may seem like a positive outcome of time spent in the workplace, in law enforcement it can have a more sinister effect.[56] Known colloquially as the "Blue Wall of Silence," the solidarity police officers form often leads to a refusal to testify against fellow officers in court, and a culture of protecting each other at all costs.[57] As early as 1931, the Wickersham Commission

51. *See* Aviva Twersky Glasner, *Police Personality: What Is It and Why Are They Like That?*, 20 J. POLICE & CRIM. PSYCH. 56, 63 (2005) (recounting the attributes of the police officer's "working personality," which is formed after joining police culture).

52. *Id.*

53. *Id.*

54. *Id.*

55. JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 7–8 (1978). As Wilson notes, most organizations structure themselves so that "the lowest-ranking members perform the most routinized tasks and discretion . . . increases with rank." *Id.* at 7. Police departments, in contrast, give the most discretion to street patrol officers, the lowest ranking, who are asked to make split-second decisions regarding citizen behavior. *See id.* at 8 (comparing the responsibilities given to low-level police officers to responsibilities of low-level factory-workers, who may repeat the same exact task many times per day without any discretionary responsibilities).

56. *See* Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 212–14 (2000) (telling the story of Abner Louima, a Haitian immigrant who suffered a brutal attack at the hands of New York police, and explaining that officers in the precinct refused to testify against each other); *see also* Marie Brenner, *Incident in the 70th Precinct*, VANITY FAIR (Dec. 1997), https://www.vanityfair.com/magazine/1997/12/louima199712 [https://perma.cc/VU9T-RK7U] (recounting the horrific details of the brutal assault upon Abner Louima).

57. *See* Koepke, *supra* note 56, at 213–14 (emphasizing the insidious nature of the Blue Wall of Silence). One particularly disturbing example of the implications of the Blue Wall of Silence is the Abner Louima police brutality case. *Id.* at 212–13. On August 9, 1997, New York Police Department ("NYPD") officers brutally sodomized Abner Louima, a Black Haitian immigrant, in the bathroom of the NYPD 70th Precinct. Beth Fertig & Jim O'Grady, *Twenty Years Later: The Police Assault on Abner Louima and What It Means*, WNYC NEWS (Aug. 9, 2017), https://www.wnyc.org/story/twenty-years-later-look-back-nypd-assault-abner-louima-and-what-it-

stated: "It is an unwritten law in police departments that police officers must never testify against their brother officers."[58] The code of silence may even lead officers to perjure themselves at suppression hearings to ensure evidence stays in, regardless of the means by which it was obtained.[59] Recall that the Rodney King tape, in 1992, showed about

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means-today/ [https://perma.cc/9AQK-ZLVC]. Louima was arrested after one officer, Volpe, thought he punched him during a street fight outside a club; this was later found to be an incorrect identification. *Id.* Following his brutal assault, Louima had significant surgeries on his organs and stayed in the hospital for two months. *Id.* The police union and Volpe's fellow officers defended him to uphold the Blue Wall of Silence. *Id.* During an investigation of the precinct following the brutal incident, investigators discovered that many officers had staunchly refused to help with the prosecution of officers involved. Koepke, *supra* note 56, at 212–13. Further, those that eventually decided to participate only agreed after the prosecutor pressured them with criminal charges. *Id.* at 213. During the investigation, approximately 100 police officers were offered immunity in exchange for information; of those 100, only two were willing to break the Blue Wall of Silence. 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, 242–44 (1998). Following the officers' decision to come forward with information, the city put the officers' families under a constant, 24/7 watch to guard against potential redress from the NYPD. *Id.* at 244. More broadly, two investigations, the Mollen Commission in New York and the Christopher Commission in Los Angeles, found significant evidence of a "code of silence" within the departments. *Id.* at 240. The Christopher Commission, appointed following the brutal Rodney King beating, determined that the Blue Wall of Silence was "perhaps the greatest single barrier to the effective investigation and adjudication of complaints" brought against LAPD officers. *Id.*

58. William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020), https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform [https://perma.cc/S6ZH-PEFZ] (quoting NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON POLICE 48 (1931)).

59. Chin & Wells, *supra* note 57, at 237. Notably, some states have begun to track officers who may have credibility issues when testifying in court. *See* Evan Allen, Milton J. Valencia & Andrew Ryan, *Suffolk DA Rollins Releases Watch List of 136 Area Officers Accused of Misconduct*, BOS. GLOBE (Sept. 26, 2020, 10:33 PM), https://www.bostonglobe.com/2020/09/25/metro/suffolk-da-rollins-releases-watch-list-136-area-officers-accused-misconduct/ [https://perma.cc/95G8-VXQB]. For example, in Massachusetts, Suffolk County District Attorney Rachael Rollins determined 136 police officers in her district should not be able to testify in court because of accusations of "lying, corruption, or misconduct." *Id.* District Attorney Rollins created the Law Enforcement Automatic Discovery (LEAD) database, which lists officers who should not be allowed to testify in court. *Id.* The goal of the database, according to District Attorney Rollins, is to "help us ensure that the legal process works and people charged with crimes by our office receive all of the information they are entitled to in order to properly defend themselves." *Id.* Furthermore, District Attorney Rollins stated that "[i]f testimony provided by prosecution witnesses is suspect, then the criminal legal system itself is suspect. All of us in law enforcement must be beyond reproach, because what we do impacts matters of life, death, and freedom for the gen–

twenty police officers who not only did not intervene but never reported what they saw.[60] Another example, occurring in 2018 in Chicago, involved the killing of seventeen-year-old Laquan McDonald by Officer Jason Van Dyke.[61] Van Dyke and other officers on the squad had stated McDonald attacked them with a knife prior to Van Dyke opening fire; one year later, dash-cam video revealed that McDonald was running away when Van Dyke shot him sixteen times in the back.[62] Without the video evidence eventually released in the McDonald case, it is unlikely that the truth would ever have been revealed, as a result of the Blue Wall of Silence.[63]

Officers face immense pressure to uphold the Blue Wall of Silence; if an officer comes forward to testify against another officer, he or she may face extreme retaliation.[64] As a result of the Blue Wall of Silence,

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eral public." *Id.* Other district attorneys have released similar lists, including districts in Florida, New York, and Maryland. *E.g.*, Amanda Dukes, *List Says More Than 3 Dozen Orange, Osceola Officers Have Questionable Credibility*, WESH (July 14, 2020, 5:00 PM), https://www.wesh.com/article/list-says-more-than-3-dozen-orange-osceola-officers-have-questionable-credibility/33314851# [https://perma.cc/P359-YNLT] (Florida); Tim Prudente, *Baltimore State's Attorney Says She Has List of "Hundreds of Officers" with Alleged Credibility Issues*, BALT. SUN (Oct. 18, 2019), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-mosby-lists-hundreds-of-officers-20191018-cakqslar5rgujp2sc6knwsklpm-story.html [https://perma.cc/PKJ3-C69R] (Maryland); Fred Mouniguet, *In First for NYC, Bronx DA Releases List of NYPD Officers with Questionable Credibility*, LEGAL AID SOC'Y (Oct. 7, 2019), https://legalaidnyc.org/news/bronx-da-releases-list-nypd-officers-questionable-credibility/ [https://perma.cc/6USF-PM7X] (New York).

60. *See* Levenson, *supra* note 43, at 520 (describing the Rodney King beating and noting that "[a]pproximately twenty" officers watched the brutal assault and did nothing to intervene).

61. Don Babwin, *Chicago Cops Reluctantly Testify Against 1 of Their Own*, AP NEWS (Sept. 18, 2018), https://apnews.com/847d4519ad3546cb95378f89df74e2ae [https://perma.cc/25SP-TGK2].

62. *Id.*; Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIB. (Jan. 18, 2019), https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html [https://perma.cc/9AGB-H9 9C].

63. Babwin, *supra* note 61. Obtaining the dash-cam video was a feat; the Chicago Police Department initially denied the May 26, 2015 Freedom of Information Act request for the video, and only released it due to a court order on November 19, 2015. Husain, *supra* note 62. Five days after the court order, on November 24, 2015, prosecutors charged Van Dyke with first-degree murder in the McDonald case—had the video never been released by the police department, it is unclear whether charges would have been brought. *See id.* (providing a detailed timeline of the McDonald case, from McDonald's shooting in 2014 to Van Dyke's sentencing in 2019).

64. Chin & Wells, *supra* note 57, at 240. The Mollen Commission determined that even honest officers will become entangled in the Blue Wall of Silence

when an individual brings an excessive force complaint against an officer, it is unlikely that other officers will substantiate the claim, even if they witnessed the act.[65] This mentality may also prevent officers from intervening when other officers act inappropriately.[66] For example, in the George Floyd case, Derek Chauvin, the officer who killed Floyd by kneeling on his neck for nearly nine minutes, was a police recruit trainer with nineteen years of police experience.[67] When he killed Floyd, he was accompanied by three other officers, two of whom had only been on the police force for four days and were trained by Chauvin.[68] In 2016,

because "[o]fficers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis." *Id.* at 253–54 (quoting THE CITY OF N.Y. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP'T, COMMISSION REPORT 53 (1994) [hereinafter MOLLEN COMMISSION]). The Mollen Commission recounted one particularly brutal example of retaliation—after an honest police supervisor disciplined subordinate officers and communicated corrupt acts to his superiors, the supervisor "had to be relocated thirty-eight times." *Id.* at 258. The Mollen Commission documented the reasons for his relocations, citing: "his locker was burned . . . his car tires were slashed . . . he received threats of physical harm." *Id.* (quoting MOLLEN COMMISSION, *supra*, at 54).

65. *See id.* at 254 (describing the implications of the Blue Wall of Silence on police testimony at trial against fellow officers). Professor Alan Dershowitz, who has conducted significant research and read many trial transcripts, discovered that when officers testify, "all of the officers involved parrot the bogus testimony," leaving the judge "in knowing frustration, but accept[ing of] the officers' account as credible." *Id.* at 255 (quoting Alan Dershowitz, *A Police Badge is Not a License to Commit Perjury*, SAN DIEGO UNION-TRIB., Apr. 4, 1991, at B11). In its investigation, the Mollen Commission determined that this particular type of police perjury occurs when officers illegally raided homes of known drug operations and stole items or cash. *Id.* When defending excessive-force claims, officers were known to uphold the Blue Wall of Silence by writing fake charges, such as resisting arrest, into police reports and, at trial, repeating the same lies. *Id.* at 255–56.

66. *See* Simone Weichselbaum, *One Roadblock to Police Reform: Veteran Officers Who Train Recruits*, NBC NEWS (July 22, 2020, 4:59 AM), https://www.nbcnews.com/news/us-news/one-roadblock-police-reform-veteran-officers-who-train-recruits-n1234532 [https://perma.cc/RA8U-7WWR] (suggesting that officers, particularly newer recruits, are unlikely to disobey orders even when it is clear that another officer is acting inappropriately).

67. *Id.*; Associated Press, *Officers Spoke Up but Didn't Intervene When Colleague Put His Knee on George Floyd's Neck*, BANGOR DAILY NEWS (June 7, 2020), https://bangordailynews.com/2020/06/07/news/officers-spoke-up-but-didnt-intervene-when-colleague-put-his-knee-on-george-floyds-neck/ [https://perma.cc/Z7VV-36SD].

68. Weichselbaum, *supra* note 66; *Officers Spoke Up but Didn't Intervene*, *supra* note 67. The other officers were charged with aiding and abetting, due to their failure to intervene. *Id.*

Minneapolis implemented a "duty to intervene" requirement for officers, but the rule is not enforceable in court, suggesting no independent body reviews the officers' failures to follow the policy.[69] None of the accompanying officers intervened to stop Chauvin, likely due to fear of becoming an outcast within the police department.[70] The trainee's argument at a court hearing emphasized the cruel impact of the Blue Wall of Silence—"[w]hat was my client supposed to do but follow what his training officer said?"[71]

How do police departments investigate reports of inappropriate conduct? The structure of law enforcement in the United States protects bad officers and allows them to thrive; like the trunk of the tree supporting bad apples, these systems safeguard officers even when they act out. There is no central federal oversight agency that holds each individual department accountable, nor do states necessarily have their own independent, oversight bodies.[72] Instead, departments largely handle misconduct internally, without any oversight from unbiased third parties.[73] When a police officer commits a bad act in the line of duty or a citizen files a misconduct report, the officer's actions typically will be reviewed by the "Internal Affairs" unit within the department.[74] Internal Affairs investigations into police officer misconduct are run by other police officers, who often have come through the ranks within the department and will protect their own, not the public or injured citizens.[75] Due to this clear conflict of interest, many investigations do

69. *Officers Spoke Up but Didn't Intervene*, *supra* note 67. In the aftermath of Floyd's death, Minneapolis is aiming to add teeth to the policy by ensuring the duty to intervene can be enforced in court proceedings. *Id.*

70. *Id.*

71. Weichselbaum, *supra* note 66.

72. DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, U.S. DOJ, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), https://www.bjs.gov/content/pub/pdf/nsleed.pdf [https://perma.cc/U75P-VD59] (demonstrating the volume of different law enforcement agencies in the United States).

73. *See infra* text accompanying notes 94–103 (describing the internal review structure in police departments).

74. *See* Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 852–53 (2016) (explaining the internal affairs unit and its role within police departments).

75. *Id.* at 853–54. For example, in Boston, an internal review process governed the punishments of at least twenty-two of the forty-six Boston police officers who were involved in an overtime-pay fraud. Matt Rocheleau, *Most State Police Troopers Implicated in Overtime Fraud Scandal Will Keep Their Jobs*, BOS. GLOBE (July 10, 2020, 11:15 AM), https://www.bostonglobe.com/2020/07/10/metro/most-state-police-troopers-implicated-overtime-fraud-scandal-will-keep-their-jobs/ [https://perma.cc/V89G-AMUM]. The scheme "stretched back more than two years and included phony tickets and

not provide satisfying results or deter bad conduct and, most importantly, tend to discourage citizen complaints.[76]

To trigger an investigation by the Internal Affairs department, there must be a complaint, which citizens may not feel comfortable filing because police departments may respond to these complaints with hostility or make the process so difficult that it discourages filing. The attitude of these officers and their treatment of complaints likely intensifies citizen distrust of law enforcement.[77] Even when a citizen

falsified time sheets to cover for hours never worked." *Id.* After an investigation, the police department suspended a number of officers, but the suspended officers were nonetheless allowed to return to the force. *Id.* Furthermore, in October 2020, the Boston Globe published an article that exposed a number of police captains who remain on the police force with copious allegations of misconduct. Matt Rocheleau, *Top-Ranking State Police Officers Have Troubling Pasts*, BOS. GLOBE (Oct. 19, 2020), https://www.bostonglobe.com/2020/10/19/metro/top-ranking-state-police-officers-have-troubling-pasts/?s_campaign=breakingnews:newsletter [https://perma.cc/7GCP-99ZS]. For example, Captain Thomas McCarthy has had twenty-eight misconduct charges alleged against him—yet he was still paid $283,000 in 2019. *Id.* Another officer, who received multiple misconduct charges during his time in the force, will begin receiving his pension shortly. *Id.*

76. *See* Moran, *supra* note 74, at 854–55, 859–61 (suggesting that internal affairs investigations are biased and, consequentially, typically do not yield satisfying results).

77. *Id.* at 854–56. In fact, one American Civil Liberties Union (ACLU) study determined that police departments in Connecticut had "widespread resistance to accepting misconduct complaints." *Id.* at 855 (quoting ACLU OF CONN., PROTECT, SERVE AND LISTEN: ACCEPTING CIVILIAN COMPLAINTS AT CONNECTICUT POLICE DEPARTMENTS 1 (2012)). During the course of the study, the ACLU encountered numerous police officers that would not answer questions regarding the complaint-filing process, departments that required the complaint be brought in person, and some departments that did not allow individuals to file complaints about issues considered "minor." *Id.* Although some departments in Connecticut were not so upfront about their discouragement of complaints, many "refused to accept anonymous complaints, third-party complaints, or complaints from minors unaccompanied by a parent or guardian." *Id.* In Cleveland, the process is even more difficult, requiring those who file complaints to use their name and signature. *Id.* Otherwise, the Cleveland Department of Police would not investigate the alleged misconduct. *Id.* Finally, many police departments threaten individuals who file complaints with criminal charges for false reports. *Id.* at 855–56. Taken together, these types of practices deter individuals from complaining about poor police conduct. *Id.* at 856. It is no surprise, then, that only thirty-six percent of Black Americans trust law enforcement. Grace Sparks, *Polling Highlights Stark Gap in Trust of Police Between Black and White Americans*, CNN POL. (June 2, 2020, 7:35 PM) https://www.cnn.com/2020/06/02/politics/polls-police-black-protests/index.html [https://perma.cc/6D6U-8W8V]. Black Americans, furthermore, are less likely to call the police in an emergency than white Americans, due to distrust of officers and their ability to handle emergency situations without racial bias. Adam

files a complaint, many police departments fail to actually investigate these complaints, especially when the complaint alleges excessive force.[78] For example, following Michael Brown's death in Ferguson, Missouri, the Department of Justice ("DOJ") conducted an investi–gation of the police department.[79] The investigation revealed that the police department in Ferguson infrequently responded to complaints of misconduct, and these complaints were unlikely to be investigated.[80] Many police departments require officers to self-report any use of force so that the department can investigate and determine whether the force was appropriate.[81] But even when officers reported uses of force, departments frequently failed to review these reports.[82] The courageous officers who ignore the so-called Blue Wall of Silence should be rewarded for their integrity, not ostracized.

Police unions are centralized organizations with many members. For example, in New York City, the Police Benevolent Association has 24,000 members.[83] In addition, it has a "hefty political budget," which keeps it and other similarly situated unions largely immune from legis–

Harris, *When Calling the Police Is a Privilege*, ATLANTIC (Apr. 21, 2018), https://www.theatlantic.com/politics/archive/2018/04/when-calling-the-police-is-a-privilege/558608/ [https://perma.cc/VJD5-PZUF].

78. Moran, *supra* note 74, at 856.

79. *Id.*

80. *Id.* Another example of the failure to conduct investigations into citizen complaints is the Denver Sheriff's Departments' Internal Affairs Bureau. *Id.* at 857. From 2011 to 2013, citizens filed fifty-four police misconduct complaints. *Id.* During this time period, the Internal Affairs Bureau only investigated nine of the fifty-four. *Id.* Further, six of these investigations were the direct result of the citizen filing an additional complaint with another agency, leading the Internal Affairs Bureau to investigate the alleged misconduct. *Id.*

81. *Id.* at 861; *see, e.g.*, U.S. DOJ, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 38 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/43RA-NM7U] (noting that though Ferguson Police Chief Jackson had implemented new use-of-force reporting policies, "these policies are routinely ignored").

82. Moran, *supra* note 74, at 861. In Ferguson, the DOJ determined that the individuals tasked with reviewing uses of force "do little to no investigation" and "either do not understand or choose not to follow [the Ferguson Police Department's] use-of-force policy in analyzing officer conduct; rarely correct officer misconduct when they find it; and do not see the patterns of abuse that are evident when viewing these incidents in the aggregate." *Id.* (quoting U.S. DOJ, *supra* note 81, at 38).

83. Finnegan, *supra* note 58. The Police Benevolent Association in New York is the biggest U.S. police union. *Id.* Initially, it aimed to help widows of officers who died in the line of service. *Id.*

lative oversight because no politician wants to offend the police union.[84] These unions often contribute to the continued existence of rotten apples. The police unions do not deter bad behavior; instead, unions often *protect* all officers, good and bad alike, from accountability.[85] State statutes govern union activities, and typically permit police unions to collectively bargain "on any matter related to wages, hours, and other conditions of employment."[86] This language is extremely broad, and grants police unions the ability to bargain on many different issues, including procedures for internal review of bad police acts.[87] In addition, police unions advocate heavily on behalf of the creation of Law Enforcement Bills of Rights ("LEOBORs"), which provide a range of rights for police officers in state statutes or collective bargaining agreements.[88] Police unions claim LEOBORs aim to ensure police officers have some rights in their dangerous roles protecting the public.[89] In reality, however, LEOBORs may serve a more insidious purpose;

84. *Id.* Interestingly, police unions are supported by both sides of the political aisle, existing in a "political paradox." *Id.* Typically Republicans do not support unions, but they *do* support police. *Id.* In contrast, Democrats frequently criticize U.S. policing tactics, but will not often criticize unions because of the Party's general support of labor unions. *Id.* Unions are involved in a variety of political activities, including "electoral politics, in litigation, and in the media." Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 744 (2017). In the media, police unions have criticized the BLM movement and the American Civil Liberties Union, as well as reforms, such as citizen review of police misconduct. *Id.*

85. Initially, the police did not have the right to unionize in the United States; today, however, the majority of police officers belong to unions. *See* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 557–58 (2019) (explaining the birth of police unions). In 1919, more than one thousand Boston police officers went on strike, demanding more pay and less intense working hours. *Id.* at 557. Due to the refusal to report for duty, death and destruction broke out in Boston. *Id.* at 557–58. Arguably, this event in Boston stopped police from unionizing until the 1960s. *Id.* at 558.

86. *Id.* at 558.

87. *See id.* at 558–60.

88. *See* Nick Place, *Double Due Process: How Police Unions and Law Enforcement "Bills of Rights" Enable Police Violence and Prevent Accountability*, 52 U.S.F. L. REV. 275, 276–77 (2018) (describing how LEOBORs enable police to skirt public accountability for bad acts). Congress has attempted to pass a federal LEOBOR multiple times since the 1970s. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 197 (2005) (recounting the history of LEOBORs, including multiple Congressional attempts at federal legislation). State statutes, however, have been extremely effective; as of 2005, fourteen states enacted statutory LEOBORs and a number of others had introduced legislation. *Id.*

89. Place, *supra* note 88, at 276–77.

often, these contracts make it extremely difficult to hold police accountable for bad acts.[90] LEOBORs have granted a number of rights to police officers, including: required "waiting periods" after a bad act prior to questioning or investigating the situation; "not allowing officers to be re-interviewed without seeing the story they had previously given investigators;" "do not call lists" that state certain officers are unreliable and should not be forced to testify in court; specific rules for interrogation of officers; and more.[91] These extra rights make police reform difficult.[92] For example, when communities attempt to implement citizen-review processes, a union may have a LEOBOR that only allows officers to be questioned by other police officers.[93]

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90. *Id.* at 277. Often, LEOBORs grant police officers even greater protection than the Constitution. *Id.* at 287. Unions defend the need for extended rights for the following reasons, as stated by the Vera Institute of Justice Special Counsel Kevin Keenan and University of Nebraska Professor of Criminal Justice Samuel Walker:

> Other typical arguments for LEOBORs advanced by police unions include: (1) Officers need special protections, because policing is perhaps the only job in which people are forced to answer questions or be fired; (2) The lack of due process rights has led to a loss of officer confidence in the disciplinary process and a loss of morale; (3) Unfair treatment of officers may deter or prevent officers from carrying out their duties effectively and fairly; (4) The perception or reality of unfair treatment may negatively impact recruitment and retention efforts; (5) Effective policing depends on stable employer-employee relations, which the LEOBOR promotes; and (6) LEOBORs are needed to provide more uniform fairness among and between different departments that currently have widely different protections.

*Id.* at 288 (quoting Keenan & Walker, *supra* note 88, at 199).

91. *Id.* at 290, 292–95.

92. *See* Keenan & Walker, *supra* note 88, at 188–89 (describing how LEOBORs can impede progress in police reform).

93. *See id.* at 189 (explaining a provision in a Maryland LEOBOR statute that "precludes the operation of a civilian review board (or other independent citizen oversight agency) where complaints are investigated by non-sworn investigators"). Union agreements may also impede the ability of DOJ consent decrees to create change within police departments. Fisk & Richardson, *supra* note 84, at 755–56 (describing how police unions may impede progress attempted via DOJ consent decrees). DOJ consent decrees are agreements between police departments and the DOJ lasting a specific number of years that impose new measures to improve department behavior and culture. *Civil Rights Consent Decree*, L.A. POLICE DEP'T, http://www.lapdonline.org/search_results/content_basic_view/928 [https://perma.cc/56R7-4G87] (last visited Mar. 28, 2021). Unfortunately, police union agreements and state statutes may stand in the way of these agreements, as DOJ consent decrees often can only be imposed in ways that do not clash with union contracts, causing some provisions to go ignored. *See* Fisk & Richardson, *supra* note 84, at 755–56. For example, some consent decrees

If a police department decides to investigate alleged misconduct, the investigation typically favors the police officers, largely due to the union's negotiations and LEOBORs.[94] As stated above, unions structure LEOBORs to ensure that officers are constantly protected.[95] Unions may require: (1) misconduct to be investigated solely by other officers; (2) investigators to warn officers when those officers are under investigation; and (3) "waiting periods" prior to interrogation of officers under investigation.[96] In New York City, for example, officers are given a free attorney, and, if suspended pending investigation, typically still receive pay.[97] Investigation requirements in LEOBORs are not the only hurdle when filing complaints—in addition, many departments impose rigorous standards of proof for citizen complaints.[98] In Cleveland, for a citizen to prevail on his or her complaint, he or she must demonstrate that the conduct occurred "beyond a reasonable doubt," which is "the highest standard in American law."[99] In San Jose, if a citizen files a

may impose new conditions for working in specific departments; union contracts, however, state that working conditions must be subject to collective bargaining. *Id.* at 755–56. Thus, due to the union contract, the offending department may not actually have to abide by the consent decree because it was not entered into via collective bargaining, lessening the impact of the consent decree. *Id.* at 755–56. In one study, researchers determined that seven of seventeen consent decrees entered into between 1997 and 2016 were affected by union contracts, leading to less effective police department reforms. *Id.* at 755 (citing Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), https://inthesetimes.com/features/police-killings-union-contracts.html [https://perma.cc/KEP2-SNMW]).

94. *See* Moran, *supra* note 74, at 859.

95. *See supra* notes 88–94 and accompanying text (explaining the impact LEOBORs may have on the ability to investigate police acts).

96. *See* Place, *supra* note 88, at 290, 295–96 (summarizing provisions in LEOBORs that impede unbiased investigation of police misconduct).

97. Finnegan, *supra* note 58.

98. Moran, *supra* note 74, at 859.

99. *Id.* In fact, a DOJ report on Internal Affairs investigations revealed that many officers aim to "cast the accused officers in the best light possible" during investigations, rather than aim to determine the truth of what happened during the incident. *Id.* (quoting U.S. DOJ, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 5 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [https://perma.cc/R3RR-C5UZ]). The DOJ report found that, in Cleveland, these investigations "cut[] at the heart of the accountability system" of the police department. *Id.* (quoting U.S. DOJ, *supra*, at 6).

complaint alleging racial bias, the individual must demonstrate that the offending officer was "motivated by race."[100]

When a police department does conduct an investigation of an officer's misconduct, it is unlikely that Internal Affairs will impose significant punishment.[101] Further, even when warranted, the police are unlikely to share relevant information with prosecutors' offices to allow criminal charges against the offending officers.[102] As a result of challenging complaint-filing processes, union-shaped LEOBORs, and perilously high standards of proof for citizen complaints, the review process fails to hold officers accountable and does not deter poor police conduct.[103]

Finally, when an officer's conduct is potentially criminal, the case is typically handled by a local prosecutor who often has both personal and professional relationships with the local police, which may discourage prosecutors from bringing criminal charges against police officers.[104] Police officers are engaged in nearly every aspect of a criminal

100. *See id.* at 859–60 (recounting the San Jose police department's process for handling complaints that allege racially biased police practices).

101. *Id.* at 866. Even in clear-cut cases, police departments avoid disciplining their own. *Id.* For example, in Ferguson, there was significant evidence of officers sending emails with racially charged language. *Id.* (citing U.S. DOJ, *supra* note 81, at 71–72). The emails, which were never reported to Internal Affairs, were "stereotyping minorities as lazy, unemployed, living off welfare, and prone to committing crimes." *Id.* Similarly, in Seattle, many officers used derogatory racial slurs when speaking to each other about minority suspects. *Id.* (citing U.S. DOJ, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 27 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/ZN5V-VYE4]). One officer even threatened to "beat the f'ing Mexican piss out of a suspect." *Id.* This incident was recorded and seen by a number of officers; not a single person reported it and the offending officer faced no discipline until an individual who had seen and recorded the incident released the video publicly. *Id.*

102. *Id.* at 867. For example, the DOJ found "multiple instances in which credible complaints of potentially criminal uses of force were not referred to prosecutors for review, even though by any objective measure they should have been" in an investigation of the Newark Police Department. *Id.* (citing U.S. DOJ, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 28 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/4J4R-3KNQ]).

103. *See generally id.* (arguing that police department review procedures fail to hold officers accountable for bad acts and suggesting reforms that could improve the process).

104. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1494–95 (2016) (suggesting that special prosecutors may be necessary to avoid conflicts of interest in prosecutions of police officers). Appointing a special prosecutor may ensure that the prosecution is fair, as local

case, which means prosecutors must have a good relationship with law enforcement to ensure convictions.[105] Thus, it is unlikely that prosecutors will hold police officers accountable in court for misconduct, and when they do, the case will likely be tainted by pro-police bias; prosecutors need their working relationships with police, and bringing charges against an officer could endanger their alliance.[106]

## II. HOW THE SUPREME COURT FAILS TO HOLD OFFICERS ACCOUNTABLE

From the 1953 appointment of Chief Justice Earl Warren to his retirement in 1969, the Warren Court decided a number of cases that provided significant constitutional protections to criminal defendants.[107]

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prosecutors' offices typically have a close working relationship with the local law enforcement office. *See id.* at 1469–70.

105. *See id.* at 1465–70 (suggesting that conflicts of interest exist between prosecutor offices and law enforcement, resulting in prosecutors being unable or unwilling to charge police officers with criminal misconduct). As one scholar stated, "one ought not underestimate the unifying influence of a shared commitment to 'getting the bad guys,' hardened by the adversarial process, nurtured by mutual respect and need, and on occasion lubricated by alcohol." *Id.* at 1469 (quoting Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003)).

106. *See id.* at 1472 (arguing that any prosecutor who decides to charge officers with misconduct would lose his or her relationship with the police, which leads many prosecutors to ignore police misconduct). In addition, prosecutors are under immense pressure to have a strong conviction record. *Id.* at 1471. Conviction records are critical to advancing a career in prosecution. *Id.* Prosecuting police officers could ruin a relationship with the district's law enforcement, which could make it more difficult to obtain convictions and, subsequently, stunt a prosecutor's career advancement. *Id.* at 1471–72. As Supreme Court Justice Frank Murphy stated in his dissenting opinion in *Wolf v. Colorado*, "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered." 388 U.S. 25, 42 (1949) (Murphy, J., dissenting).

107. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351–52 (1967) (holding that an expectation of privacy under the Fourth Amendment is based on reasonableness, not solely the trespass doctrine); Miranda v. Arizona, 384 U.S. 436, 471–72 (1966) (establishing the *Miranda* Warning, which requires officers to warn arrested individuals of their rights to counsel and silence when arrested); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (requiring states to use the exclusionary rule remedy); Corinna Barrett Lain, *Counter–majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1362 n.7 (2004) (stating the Warren Court's time period). Notably, Chief Justice Warren had extensive law enforcement experience. Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as*

The Warren Court examined a number of police practices resulting in violations of an individual's constitutional rights, including interro–gations, eye-witness identifications, and searches and seizures.[108] Through these decisions, the Court aimed to restrain the police.[109] Most importantly, to deter the police from violating constitutional rights, the Warren Court established that the exclusionary remedy, which excludes illegally obtained evidence at trial, applies to the states.[110]

In *Mapp*, the Warren Court applied the exclusionary remedy for constitutional violations, established in *Weeks v. United States* for federal actions, to the states.[111] After reviewing the status of U.S. juris–

*Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 11–13 (2005). Prior to his tenure as California's governor, Chief Justice Warren served in various law enforcement roles over a period of twenty-two years; he spent five years as deputy district attorney, thirteen years as the chief of the Alameda County District Attorney's Office, and four years as the attorney general of California. *Id.* at 11–12. One scholar suggests that these experiences in law enforcement may have informed the Chief Justice's approach to criminal procedure. *Id.* at 12–13. During his tenure as district attorney of Alameda County, Chief Justice Warren required his deputy district attorneys and agents to conduct themselves with the utmost integrity, which led to the nickname of the "Boy Scouts" within the state. *Id.* at 12. In his time as district attorney, "[h]is office had a higher conviction rate than the great majority of district attorney offices in the state and none of the convictions his office obtained were ever reversed on appeal." *Id.*

108. The Warren Court considered the requirements for lineup procedures. Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (requiring lineup procedures to not be unnecessarily suggestive under the totality of the circumstances). The Court also considered the Sixth Amendment and the right to counsel. United States v. Wade, 388 U.S. 218, 236–37 (1967) (determining that the Sixth Amendment right to counsel attaches for a post-indictment lineup); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that the Sixth Amendment right to counsel requires the states to appoint counsel for indigent defendants). The Warren Court introduced the famous *Miranda* warning. *Miranda*, 384 U.S. at 444–45 (establishing the *Miranda* warning, which requires law enforcement to advise a suspect of his rights to counsel and silence prior to questioning to safeguard the privilege against self-incrimination). The Court significantly expanded the right to privacy. *Katz*, 389 U.S. at 351–52 (determining that an expectation of privacy under the Fourth Amendment is based on reasonableness, not solely property rights or trespass law). Most importantly, the Court determined that the exclusionary rule applies to the states. *Mapp*, 367 U.S. at 655 (applying the exclusionary remedy to the states).

109. *See supra* note 108 (listing a number of Warren Court decisions that provided individuals with significant rights and aimed to restrain law enforcement).

110. *See infra* notes 111–117 and accompanying text (summarizing the Warren Court's decision, *Mapp v. Ohio*, which applied the exclusionary rule to the states).

111. *Mapp*, 367 U.S. at 655. The exclusionary rule, first applied in *Weeks v. United States* in 1914, provided a remedy for an individual subjected to an

prudence and noting that the Fourth Amendment right to privacy was incorporated via the Fourteenth Amendment, the Court determined that the exclusionary rule must be enforceable against the states as well as the federal government.[112] Without the exclusionary remedy, the Court found that the Fourth Amendment would have no teeth and be a mere "form of words."[113] *Mapp* introduces a critical element of the Warren Court's approach to criminal procedure—deterring the police from bad acts by excluding evidence obtained illegally.[114] The goal of the exclusionary remedy, which suppresses illegally obtained evidence at trial, is to incentivize the police to conduct themselves in line with the law to ensure evidence can be used at trial.[115] The Warren Court's

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illegal search under the Fourth Amendment and facing federal charges. 232 U.S. 383, 398 (1914) (holding that evidence obtained illegally could not be used against the defendant at trial, and thus, establishing the exclusionary rule in federal prosecutions). Noting that the Fourth Amendment assures the right to be safe from "unreasonable searches and seizures," but fails to provide an explicit remedy for those subjected to illegal searches, the Court determined that the appropriate remedy would be exclusion of the illegally obtained evidence at trial. *Id.* at 389, 398 (quoting U.S. CONST. amend. IV). Following *Weeks* and prior to *Mapp*, the Court declined to apply the exclusionary remedy to the states in *Wolf v. Colorado*, a 1949 decision. 338 U.S. 25, 26, 33 (1949) ("[T]he Fourteenth Amendment did not subject criminal justice in the States to specific limitations.").

112. *Mapp*, 367 U.S. at 654–57.

113. *Id.* at 655.

114. *Id.* at 656 ("Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))); *see* Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1567 (2015) (describing the *Mapp* decision and emphasizing the Warren Court's desire to deter bad police conduct).

115. Ristroph, *supra* note 114, at 1567. Arguably, this remedy places the police officer's behavior at the forefront; the goal of the remedy is to ensure that police activity is conducted with the utmost respect for the law. *Id.* The exclusionary remedy is not without its critics. *See* Donald V. MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608, 634 (1985) (describing John Wigmore's critique of the exclusionary remedy). John Wigmore, the author of the prominent evidence treatise, *Wigmore on Evidence*, described the exclusionary rule as "indirect and unnatural." *Id.* at 635 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2184a n.1, at 31 (John T. McNaughton rev., 1961)). Wigmore had four primary reasons why he did not approve of the exclusionary rule:

> (1) it ignores the proper complaint, investigation process and trial of an alleged violation of law; (2) as an incidental violation it jeopardizes (by delay, confusion, etc.) the primary litigation; (3) it

decisions are often referred to as the criminal procedure "revolution."[116] Although there is much debate as to whether it actually deterred police or incentivized officers to act within the law, at a minimum the exclusionary rule increased police training and forced police to think about the rights of individuals.[117]

The Burger, Rehnquist, and Roberts Courts have largely cut back on the individual rights created by the Warren Court, and have tended to favor law enforcement practices.[118] The major cutback has been to

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> is unnecessary because persons harmed have more direct means of redress; and (4) "the judicial rules of evidence were never meant to be used as an indirect method of punishment."

*Id.* (citing and quoting WIGMORE, *supra*, at § 2183, at 7). Other scholars suggest that the remedy is ineffective because it fails to "connect" to the violation and because its costs fall on individuals who did not inflict the wrong. *See* Robert C. Fellmeth, *The Optimum Remedy for Constitutional Breaches: MultiAccessed Civil Penalties in Equity,* 26 PEPP. L. REV. 923, 925 (1999) (arguing that the exclusionary rule is ineffective and alternatives to the rule would better serve the criminal justice system). Famously, in 1926 in the Court of Appeals of New York case *People v. Defore*, then-Judge and later Supreme Court Justice Benjamin Cardozo stated that the exclusionary rule is flawed: "[t]he criminal is to go free because the constable has blundered." 150 N.E. 585, 587 (N.Y. 1926).

116. *E.g.*, Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3 (2010) (explaining the typical narrative of the Warren Court's criminal procedure decisions, which is often described as a "revolution" for individual rights).

117. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 420–21 (1971) (Burger, C.J., dissenting) (criticizing the exclusionary remedy, but arguing that removing the rule would be counter to the public interest because police officers would believe "that an open season on 'criminals' had been declared").

118. A number of cases demonstrate cutbacks to rights and procedures created by the Warren Court. The *Miranda* decision's impact has been significantly reduced. *See* Berghuis v. Thompkins, 560 U.S. 370, 374, 381–82 (2010) (requiring a suspect, paradoxically, to speak to invoke the right to silence because remaining silent for three hours is too "ambiguous"); New York v. Quarles, 467 U.S. 649, 651 (1984) (creating an exception to the *Miranda* warning requirement when there is a threat to "public safety"); Connecticut v. Barrett, 479 U.S. 523, 525, 527–28 (1987) (determining that a defendant's *Miranda* waiver is legitimate even if he or she has given mixed signals about his or her willingness to engage with law enforcement, such as an unwillingness to write a confession but a willingness to speak to officers); North Carolina v. Butler, 441 U.S. 369, 375–76 (1979) (deciding that waiver of *Miranda* rights does not need to be explicit and implicit waivers may be sufficient). Similarly, the eyewitness identification standards created by the Warren Court have received much negative treatment. *See* Perry v. New Hampshire, 565 U.S. 228, 232–33 (2012) (holding that eye-witness identifications are admissible, even when suggestive, so long as the police themselves were not responsible for the suggestive nature of the procedure); Manson v. Brathwaite, 432 U.S. 98, 113–14 (1977) (casting aside *Stovall*,

the exclusionary remedy.[119] These Courts were often concerned that reliable evidence was being excluded, thus distorting the truth-finding process.[120] With this in mind, the Burger Court adopted a balancing test, weighing the benefits of the exclusionary rule—deterring bad police behavior—against the drawbacks—excluding reliable evidence.[121] Initially this balance was used to restrict the exclusionary remedy for proceedings other than criminal trials.[122] In 1984, however, in *United States v. Leon*, the Supreme Court applied the balancing test to a criminal trial.[123] The Court created a good-faith exception to the exclusionary rule when police officers rely upon a warrant that later was determined to be invalid.[124] When police mistakenly rely on a

which required a totality-of-the-circumstances test for eyewitness identifications and excluded those determined to be suggestive, and declaring "reliability is the linchpin," such that even suggestive identifications may be admissible if reliable). Even Sixth Amendment rights have been reduced after the Warren Court. *See* United States v. Ash, 413 U.S. 300, 300–02 (1973) (holding that the Sixth Amendment right to counsel does not apply to post-indictment photo arrays); Kirby v. Illinois, 406 U.S. 682, 684–85, 689–90 (1972) (determining that the Sixth Amendment right to counsel does not attach until "the initiation of adversary judicial criminal proceedings," which does not include pre-indictment lineups).

119. *See infra* notes 121–128 and accompanying text (providing an overview of the many cutbacks to the exclusionary rule following the Warren Court).

120. *See* United States v. Leon, 468 U.S. 897, 907 (1984) (emphasizing the "substantial social costs" of the exclusionary rule and suggesting that an "unbending application" of the rule "would impede unacceptably the truth-finding functions of judge and jury" (quoting United States v. Payner, 447 U.S. 727, 734 (1980))).

121. *See* United States v. Calandra, 414 U.S. 338, 349 (1974) ("In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.").

122. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (declining to apply the exclusionary rule in parole board hearings after applying a balancing text); Immigr. & Nationalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (applying a balancing test and refusing to apply the exclusionary rule in civil deportation proceedings); United States v. Janis, 428 U.S. 433, 448, 454 (1976) (holding that the exclusionary rule does not apply in civil tax actions after using a balancing test); *Calandra*, 414 U.S. at 349 (determining that the exclusionary rule does not apply in grand jury proceedings, following a balancing test).

123. *See Leon*, 468 U.S. at 906–07, 913 (extending the balancing test approach to criminal trials and holding that the exclusionary rule does not apply when an individual acts in good-faith reliance upon a warrant later determined to be lacking probable cause).

124. *Leon*, 468 U.S. at 908 ("[W]hen law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude

warrant, signed by a neutral and detached magistrate, the Court determined that the deterrent effect of excluding the evidence would be negligible.[125]

In *Leon*, a neutral, detached magistrate evaluated the evidence and issued the warrant, suggesting the good-faith exception was only applicable if the police got a warrant. But the *Leon* good-faith exception has been extended and manipulated significantly.[126] *Illinois v. Krull* created an exception for good-faith reliance on a statute and *Arizona v. Evans* created an exception for good-faith reliance on an incorrect, outstanding arrest warrant.[127] Most recently, in *Herring v. United States* in 2009, the Supreme Court determined that even when an officer wrongfully relies on the negligent bookkeeping of a fellow police officer, the good-faith exception applies—even though the mistake is directly attributable to law enforcement, the Court still found the deterrent effect to be negligible.[128] Taken together, these exceptions swallow up the exclusionary remedy and send a message to police: so long as you seem to be acting in "good-faith," your actions will be considered appropriate, even when unconstitutional.

*Terry v. Ohio*, a 1968 Warren Court case, aimed to provide additional rights for individuals on the street.[129] In *Terry*, the Court

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of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system"). The Court noted that the exclusionary rule is only used when its "remedial objectives" of police deterrence is "efficaciously served." *Id.* (quoting *Calandra*, 414 U.S. at 348). In *Leon*, the Court considered a case where police officers obtained a warrant to search two different residences for drugs; the warrant, however, was subsequently found to be lacking requisite probable cause. *Id.* at 903–04. Thus, although the police officers had relied upon a legitimate warrant from a judge, the evidence was excluded at trial. *Id.* at 903. At the motion-to-suppress hearing, the government argued for a good-faith exception to the exclusionary rule when officers rely upon a warrant when conducting a search; although the district court found that the officers acted in good faith, it declined to create a good-faith exception for the exclusionary rule. *Id.* at 904.

125. *Leon*, 468 U.S. at 908.

126. *Compare id.* at 913 (explaining that the officers in *Leon* relied upon a warrant issued by a magistrate), *with* Illinois v. Krull, 480 U.S. 340, 356–57 (1987) (finding an exception to the exclusionary rule when an officer relies upon an unconstitutional statute).

127. *Krull*, 480 U.S. at 356–57 (creating an exception to the exclusionary rule when an officer reasonably relies, in good faith, on an unconstitutional statute); Arizona v. Evans, 514 U.S. 1, 4 (1995) (holding that good-faith reliance on an incorrect, outstanding arrest warrant will not result in the exclusionary rule being applied).

128. 555 U.S. 135, 137 (2009).

129. *See* 392 U.S. 1, 20 (1968) (holding that the Fourth Amendment applies in stop-and-frisk encounters, but does not require the typical standard of probable cause).

addressed the police action of stopping and sometimes frisking an individual without any justification.[130] The Court decided that this practice was governed by the Fourth Amendment.[131] Because this activity did not amount to a full-scale arrest, however, the Court created a "reasonable suspicion" standard of justification for these types of interactions, which required justification less than probable cause.[132]

Despite the Warren Court's good intentions to provide consti–tutional protection for a common (and, at some times, necessary) police practice, the reasonable-suspicion standard has become another method for racist action by the police. In a 2016 Supreme Court case concerning a stop based on the *Terry* reasonable-suspicion standard, *Utah v. Strieff*, the misuse of the standard was clear.[133] In *Strieff*, a police officer, operating on an anonymous tip, observed a suspected drug house for a week, watched individuals come and go in short intervals, and determined that it was likely that the tip was correct.[134] The officer stopped the respondent, Strieff, after merely seeing him leave the residence, detained him, demanded he identify himself, and asked him what he had been doing at the house.[135] Once Strieff identified himself,

130. *See id.* at 4 ("This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.").

131. *Id.* at 20.

132. *Id.* at 27 ("And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."). "Probable cause," which is necessary to obtain a warrant for a full-scale arrest or search, is defined as "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime." *Probable Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019). Probable cause "amounts to more than a bare suspicion but less than evidence that would justify a conviction." *Id.* In contrast, "reasonable suspicion," which is required to stop an individual on the street and in some cases conduct a brief search for weapons, requires "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." *Reasonable Suspicion*, BLACK'S LAW DICTIONARY (11th ed. 2019). The lesser requirement of reasonable suspicion reflects the lesser intrusion of being stopped on the street, as opposed to being arrested or subjected to a full-scale search. *See Terry*, 392 U.S. at 26 ("An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different.").

133. 136 S. Ct. 2056, 2062 (2016) (holding that an outstanding arrest warrant attenuated the taint of an unconstitutional application of the reasonable suspicion standard).

134. *Id.* at 2059.

135. *Id.* at 2060.

the officer called into dispatch and relayed Strieff's information; a search of the records revealed an outstanding arrest warrant, which the officer used to arrest Strieff and conduct a search incident to arrest.[136] The search revealed a bag of methamphetamine and other drug-related items.[137] The Court determined that the stop itself was inappropriate because the officer lacked reasonable suspicion, but found that the outstanding arrest warrant attenuated the taint of the illegal stop and ruled the evidence was admissible, declining to apply the exclusionary remedy.[138]

Justice Sonya Sotomayor, in dissent, raised significant concerns regarding the *Terry* standard and its manipulation in this case.[139] First, Justice Sotomayor drew attention to the vast number of outstanding arrest warrants in the United States that would legitimize this kind of stop; officers often stop individuals on the street merely to run a warrant check, and "93% of the stops would [be] considered unsupported by articulated reasonable suspicion," according to a DOJ study.[140] Thus, the *Strieff* decision undercuts the Warren Court's intent in creating the reasonable suspicion standard—given the quantity of outstanding arrest warrants, many illegal stops will ultimately be considered justified.[141] Further, Justice Sotomayor noted the Supreme Court-approved justifications for stopping individuals on the street—ethnicity, clothing, location, and behavior—may all be factored into an officer's judgment.[142] Justice Sotomayor drew attention to the harsh

136. *Id.* Notably, the warrant was for a traffic violation. *Id.*

137. *Id.*

138. *Id.* at 2063. The Court found that once the officer found the outstanding warrant, "he had an obligation to arrest Strieff." *Id.* at 2062.

139. *See id.* at 2068–71 (Sotomayor, J., dissenting) (describing the impact *Terry* and its progeny have upon people of color, and Black Americans specifically, and emphasizing the massive database of outstanding warrants, which would legitimize these kinds of stops).

140. *Id.* at 2068–69.

141. *See generally id.* at 2068–69. As Justice Sotomayor explains, there are more than 7.8 million outstanding warrants in the United States. *Id.* at 2068. Many of these warrants are for minor violations, such as traffic infractions. *Id.* For example, at the time of *Strieff*, Ferguson, Missouri had 16,000 outstanding arrest warrants against individuals—the town itself had a population of just 21,000. *Id.* Thus, officers could essentially stop anyone without fear of any evidence discovered being excluded. *See id.*

142. *See id.* at 2069 (providing an overview of Supreme Court cases that allowed police officers to consider factors such as race, attire, location, and an individual's behavior in the reasonable suspicion determination); *see also* Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (stating that "unprovoked flight" from the police may be considered in the reasonable suspicion evaluation); United States v. Sokolow, 490 U.S. 1, 4–5 (1989) (determining that an individual's clothing, such as a "black jumpsuit and [wearing] gold

reality of the standard—although innocent people of all races will likely be subjected to stops by police, "it is no secret that people of color are disproportionate victims of this type of scrutiny."[143] As Justice Sotomayor suggested in her dissent, the implications of *Terry* are far-reaching and grant substantial discretion to law enforcement.[144] *Terry* set the legal basis for New York City's infamous stop-and-frisk procedure, which overwhelmingly affected people of color and resulted in more than five million innocent individuals being stopped by the police.[145] Notably, President Barack Obama's Task Force on 21st Century Policing suggested departments implement procedures requiring officers to record their reasons for stopping individuals on the street.[146] The goal of this reform is to trace whether officers are stopping people due to racial biases, and hold officers accountable.[147]

In 1996 in *Whren v. United States*, the Court granted police officers significant discretion to stop automobiles.[148] The Court determined that when an officer has probable cause to stop a car for anything, including a minor traffic violation, a subsequent search and seizure is justified even when the officer had other subjective intentions and the traffic

jewelry," can be considered when evaluating reasonable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 885–86 (1975) (allowing police officers to consider "apparent Mexican ancestry" when determining reasonable suspicion to stop an individual to determine if he or she is an undocumented immigrant); Adams v. Williams, 407 U.S. 143, 147–48 (1972) (giving police officers the ability to consider location, including being in a "high-crime area," in the reasonable suspicion determination).

143. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting). As Justice Sotomayor noted, Black children are subjected to a conversation that no white children must ever endure—"the talk." *Id.* Due to the disproportionate criminalization of Black Americans, parents of young children of color must remind them "never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Id.*

144. *See generally* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 965 (1999) (arguing that the Supreme Court's failure to protect individuals from being stopped on the basis of race has led to Black Americans' disproportionate stops by police).

145. *See Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/stop-and-frisk-data [https://perma.cc/Q4Q2-39NG] (reporting data collected from 2002 to 2019 regarding stop-and-frisk in New York) (last visited Feb. 26, 2021). From 2003 to 2019, Black Americans consistently comprised more than 50% of people stopped in New York City. *Id.*

146. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 27 (2015).

147. *See id.* at 2.

148. 517 U.S. 806, 819 (1996).

stop was pretextual.[149] The facts of this case lead to a reasonable conclusion that the officers engaged in racial profiling.[150] In *Whren*, two vice-squad police officers, in a "high drug area," stopped two young Black men who were sitting in a car and looking down.[151] After the car sat at an intersection for "an unusually long time," it drove off at a high speed and made a right turn without signaling; the officers claimed they stopped the car due to the illegal right turn.[152] During the traffic stop, the officers saw bags of crack cocaine in plain view, leading to the individuals' arrests.[153] It strains one's imagination to think that vice cops were enforcing traffic violations; they used the traffic violation to see if they were sniffing cocaine. At first blush the holding in *Whren* may not seem problematic, as it merely allows officers to make a stop when they have probable cause.[154] Unfortunately, however, the application of *Whren* and the reality of driving provides police with substantial power and leeway to stop anyone on the road.[155] As a driver,

149. *Id.* at 817–19. At trial, the petitioners argued that the police officers did not have probable cause, or the lesser standard of reasonable suspicion, to believe that the car and the petitioners were involved with illegal drugs. *Id.* at 810–11. The petitioners argued that the stop was pretextual, meaning "the police use[d] a legal justification to make a stop . . . in order to search a person or his vehicle, or interrogate him, for an unrelated and more serious crime for which they do not have the reasonable suspicion necessary to support a stop." United States v. Huguenin, 154 F.3d 547, 559 n.10 (6th Cir. 1998) (quoting United States v. Morales-Zamora, 974 F.2d 149, 152 (10th Cir. 1992)). In the words of one scholar, the government argued for a "could have" standard for stopping cars—"any time the police *could have* stopped the defendant for a traffic infraction, it does not matter that police *actually* stopped him to investigate a crime for which the police had little or no evidence." David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 544 (1997). In contrast, the defense advocated on behalf of a "would have" standard—"a seizure based on a traffic stop would only stand if a reasonable officer *would have* made this particular stop." *Id.*

150. *See generally Whren*, 517 U.S. at 810 ("Petitioners, who are both [B]lack, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants.").

151. *Id.* at 808, 810.

152. *Id.* at 808–10.

153. *Id.* at 808–09.

154. *See* Harris, *supra* note 149, at 544–45 (suggesting that the outcome in *Whren* was predictable because the Supreme Court merely affirmed police officers' ability to stop and search an individual when they have probable cause to believe the individual has broken the law).

155. *See* David A. Harris, *The Stories, the Statistics and the Law: Why Driving While Black Matters*, 84 MINN. L. REV. 265, 311 (1999) ("*Whren* means that police officers can stop any driver, any time they are willing to follow

it is nearly impossible to drive perfectly at all times; any number of infractions would warrant probable cause for a traffic stop, including driving above the speed limit, or, like the petitioners in *Whren*, failing to use a turn signal.[156] Although the Supreme Court suggested that the Fourteenth Amendment's Equal Protection Clause would protect against racially motivated stops, it did not offer remedies for individuals stopped due to their race, nor did it provide a framework to prove that a police officer had intentionally discriminated on the basis of race.[157]

Prior to *Whren*, there was concern that police officers dispro–portionally stopped Black drivers.[158] Post-*Whren*, there is considerable evidence that Black Americans are stopped at disproportional rates when compared to white Americans.[159] An individual would need to

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the car for a short distance."). In the 1960s, during a study of police officers, one officer stated:

> You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made. In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law.

*Id.* at 311 n.183 (quoting LAWRENCE P. TIFFANY, DONALD M. MCINTYRE & DANIEL L. ROTENBERG, DETECTION OF CRIME 131 (Frank J. Remington ed., 1967)).

156. *See Whren*, 517 U.S. at 808 (describing the petitioners' traffic violation —failing to use a turn signal); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 318–19 (2001) ("[V]irtually every driver commits violations of the traffic laws on a regular basis . . . .").

157. *See Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause . . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); Rudovsky, *supra* note 156, at 320 (noting that the Supreme Court did not provide clear steps to allege intentional race discrimination under the Fourteenth Amendment during traffic stops).

158. *See* Harris, *supra* note 149, at 546 (expressing concern regarding the application of *Whren* because Black drivers already faced biased treatment by police). As Harris states in his article, it has become so common for the police to stop Black Americans that "African-Americans sometimes say they have been stopped for the offense of 'driving while black.'" *Id.*

159. *See, e.g.*, Jackie Bensen & Sophia Barnes, *Data Shows Police Stop Black People at Disproportionately High Rate in DC*, NBC WASH. (June 17, 2020, 6:30 PM), https://www.nbcwashington.com/news/local/data-shows-black-people-stopped-at-disproportionately-high-rate-in-dc/2335746/ [https://perma.cc/9LJQ-7PZK] (reporting data that showed "[m]ore than 70%" of the individuals stopped by police officers in Washington, D.C. between July 2019 and December 2019 were Black, although Black Americans constitute less than 50% of D.C.'s population); Darwin BondGraham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, GUARDIAN (Jan. 3, 2020, 1:00 PM), https://www.theguardian.com/us-ne

show direct discrimination, which is extremely difficult because the most damning evidence would be the arresting officer's testimony.[160] Only the individual who conducted the stop knows his or her intention, and unfortunately, police officers are known to lie (and even commit perjury) to protect their true reasons for stopping motorists.[161] Thus, Black Americans face an uphill battle to show that they are facing racial discrimination; statistics are insufficient, and showing direct evidence may be impossible.[162]

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ws/2020/jan/02/california-police-black-stops-force [https://perma.cc/KW28-Y5JD] (stating that 28% of individuals stopped by police in Los Angeles in 2018 were Black, although Black individuals made up only 9% of Los Angeles' population at the time); Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html [https://perma.cc/NU75-EQMF] (recounting statistics from North Carolina demonstrating that Black Americans are disproportionately stopped by the police); *see also* Harris, *supra* note 149, at 560 (arguing, in 1997, that Black Americans would be disproportionally stopped post-*Whren*, even though no statistical evidence existed at the time). Pretextual stops that aim to investigate other crimes in particular—as opposed to stops driven by traffic violations—are largely driven by the race of the individual. *See* Kathryne M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1324–25 (2016) (book review) (explaining the clear racial differences in individuals stopped by police for investigatory reasons). In fact, race, youth, and gender are the most consistent predictors of whether a police officer will make an investigatory stop. *Id.* Young, Black men are the most likely to be stopped in these situations. *Id.*

160. *See* Tracey Maelin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 379–81 (1998) (explaining the issue of police testimony).

161. *Id.* at 379–84. In 1994, New York City conducted a study to determine the pervasiveness of police perjury and misconduct within the city. *Id.* at 379–80 (citing MOLLEN COMMISSION, *supra* note 64). The Mollen Commission determined that although "it is impossible to gauge the full extent of police falsifications . . . [s]everal officers . . . told [the Commission] that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: 'testilying.'" *Id.* at 380 (quoting MOLLEN COMMISSION, *supra* note 64, at 36).

162. Notably, some states have adopted reforms requiring officers to record the reason for their stops to avoid racial bias and track whether officers are using racist tactics in their stops. In Buffalo, New York, for example, the Mayor requires police officers to issue a "stop receipt" after all traffic stops. Eileen Buckley, *Phase One of Mayor's Police Reforms Begin Today*, WKBW (June 24, 2020, 11:35 AM), https://www.wkbw.com/news/local-news/mayor-brown-ready-to-implement-phase-one-of-police-reform [https://perma.cc/PT2L-CSYP]. In the receipt, the officer must state exactly what he or she observed that led to the stop. *Id.* Furthermore, the officer must state his or her reasons to the individual driving the vehicle, in addition to recording the reasons for Buffalo's records. *Id.* Similarly, in Connecticut in June 2020, Governor Ned Lamont's Police Accountability and Transparency Task Force released its twenty-two priorities for police reform, which included requiring police

These decisions following the Warren Court clearly indicate that police practices resulting in criminal prosecution will not receive significant scrutiny.[163] This brings to mind Chief Justice Burger's admonition in the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[164] His dissenting opinion clearly indicated his disdain for the exclusionary rule; nevertheless he refused to eliminate it because "[o]bviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."[165] Unfortunately, based on the cutbacks to Warren Court decisions, it seems the Chief Justice's concerns have come to fruition.[166]

Although there is little hope that the Supreme Court will take action to reform its police-accountability jurisprudence, state courts have an opportunity to step in to protect the rights of individuals.[167] State constitutions may extend greater rights to citizens than the federal constitution, and state courts are in a position to uphold the rights granted by the state.[168] For example, in *Commonwealth v. Long* and *Commonwealth v. Evelyn*, two 2020 Massachusetts Supreme Judicial Court (SJC) opinions, the SJC expanded the protections against racial profiling in police stops granted under the Massachusetts

officers to explain their reasons for stopping individuals. Kelan Lyons, *Policing Task Force Outlines 22 Reform Priorities*, CT MIRROR (June 16, 2020), https://ctmirror.org/2020/06/16/policing-task-force-outlines-22-reform-priorities/ [https://perma.cc/8ADF-SN7L].

163. *See supra* notes 133–162 and accompanying text (describing subsequent Courts' cutbacks to the individual rights provided by Warren Court decisions and explaining how later Courts have given police officers enormous discretion).

164. 403 U.S. 377, 421 (Burger, C.J., dissenting).

165. *Id.*

166. *See supra* notes 133–162 and accompanying text (suggesting that Courts after the Warren Court have cutback substantially on the rights of individuals to provide discretion and power to law enforcement).

167. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (discussing the role of federalism in protecting individuals from government intrusion). After subsequent Courts cut back on the Warren Court's decisions, Justice Brennan argued that state courts must "step into the breach" to protect individual liberties. *Id.* Justice Brennan argued that "[w]ith federal scrutiny diminished, state courts must respond by increasing their own." *Id.*

168. *See id.* at 495 ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.").

constitution.[169] In *Evelyn*, the SJC determined that a Black individual's "nervous and evasive" actions cannot be used as evidence of guilt.[170] In *Long*, the SJC revisited its standard for finding racial bias in a police stop and held that an individual can show racial bias "by evidence of the totality of the circumstances surrounding the stop itself," an easier standard.[171] Thus, the SJC provided additional rights to citizens that would not be granted under the federal constitution, demonstrating the important role state courts can play in protecting the rights of individuals when federal courts are unwilling to step in.[172]

One final Supreme Court doctrine that fails to deter police officers is qualified immunity, which may apply in civil suits alleging constitutional violations against police officers.[173] These suits are somewhat rare, difficult to prove, and rarely result in significant damages.[174] When a suit *is* brought, police typically enjoy the protection

169. *See* Commonwealth v. Evelyn, 152 N.E.3d 108, 125 (Mass. 2020) (discounting evidence of "nervous and evasive behavior" that the prosecution suggested showed guilt because the individual could have been nervous due to racial profiling at the hands of police); Commonwealth v. Long, 152 N.E.3d 725, 737 (Mass. 2020) (lowering the evidentiary standard for proving racial bias in police stops); Gal Tziperman Lotan & John R. Ellement, *SJC Confronts Systemic Racism in Interactions Between Police and People of Color*, BOS. GLOBE (Sept. 17, 2020, 2:13 PM), https://www.bostonglobe.com/2020/09/17/metro/sjc-confronts-systemic-racism-interactions-between-police-people-color/ [https://perma.cc/4A5B-WLQJ] (describing the SJC ruling in *Commonwealth v. Long* and its impact). The SJC decisions were met with praise from advocates like Iván Espinoza-Madrigal of Lawyers for Civil Rights, who stated: "In its opinion today, the court underscores the troubling racialized history of traffic stops and outlined a clear standard for challenging them." *Id.*

170. *Evelyn*, 152 N.E.3d at 125–26 ("Just as an innocent African-American male might flee in order to avoid the danger or indignity of a police stop, the fear of such an encounter might lead an African-American male to be nervous or evasive in his dealings with police officers. We therefore significantly discount the weight of the defendant's nervous and evasive behavior." (citing Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016))).

171. *Long*, 152 N.E.3d at 738.

172. *See Evelyn*, 152 N.E.3d at 125; *Long*, 152 N.E.3d at 738.

173. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) ("In many ways, qualified immunity's shield against government damages liability is stronger than ever."). Qualified immunity is typically raised as a defense to civil actions brought under 42 U.S.C. § 1983, which holds state officials liable for violation of individual's constitutional rights. *See* 42 U.S.C. § 1983 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 49–55 (2018). The defense is, notably, not codified in the statute itself. *Id.* at 50.

174. *See* Baude, *supra* note 173, at 83–84 (summarizing the history of qualified immunity cases reviewed by the Supreme Court). *See generally* Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV.

of qualified immunity.[175] In 1967 in *Pierson v. Ray*, the Supreme Court granted qualified immunity to police officers for the first time, holding that officers can assert the defense of good faith and probable cause, based on defenses established at common law, granting them immunity from prosecution.[176] The doctrine of qualified immunity elucidated by the Court in *Pierson* has significantly evolved over time to give additional protections to police officers.[177] Today, to prove that an

525 (2016) (providing an overview of § 1983 claims and pointing out a number of difficulties inherent in bringing a case).

175. Baude, *supra* note 173, at 82–84. From 1982 to 2017, thirty qualified immunity cases appeared before the Court. *Id.* at 82. The Court granted qualified immunity to the defendant in twenty-eight of these cases. *Id.* Furthermore, because the Supreme Court so frequently grants qualified immunity, lower courts typically follow suit, as it becomes more difficult to find "a violation of clearly established law," required to deny qualified immunity. *Id.* at 83.

176. 386 U.S. 547, 556–57 (1967) (allowing police officers to bring a defense of "good faith and probable cause" in response to a § 1983 claim); *see also* Marcus R. Nemeth, Note, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 999 (2019) ("The origin of qualified immunity lies with the Court's 1967 holding in *Pierson v. Ray*."). Specifically, *Pierson* granted qualified immunity to officers in § 1983 cases: when a police officer violates the constitutional rights of an individual, the individual may bring a claim under 42 U.S.C. § 1983 for damages. *See* David P. Stoelting, Comment, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243, 243 (1989) (providing an overview of § 1983); *see also* 42 U.S.C. § 1983.

177. *See* Nemeth, *supra* note 176, at 1004–09 (arguing that the Supreme Court has continued to expand the immunities for police officers). In 2001, the Court first created a two-part test for qualified immunity. *Saucier v. Katz*. 533 U.S. 194, 201 (2001); *see also* Nemeth, *supra* note 176, at 1001 (describing the two-part test adopted by the Court in *Saucier*). First, a "threshold question" of whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. If the Court determines that there was no constitutional violation, the inquiry into qualified immunity ends. *Id.* Then, if a court determines a police officer violated a constitutional right, the court must "ask whether the right was clearly established," based on the facts of the case, "not as a broad general proposition." *Id.* The Court went on to state that the goal of this part of the inquiry is to ensure officers may "avoid the burden of trial if qualified immunity is applicable." *Id.* Following *Saucier*, in *Pearson v. Callahan* in 2009, the Court narrowed the two-step inquiry to one step: whether, at the time of the law enforcement act, it was "clearly established" that the officer's actions were unconstitutional, a standard courts struggled with until 2015. 555 U.S. 223, 227 (2009); *see also* Jessica R. Sarff, Note, *Qualified Immunity Not Accident-Proof, Official Discretion Advised: The Need to Clearly Establish the Right to Raise Qualified Immunity in Civil Rights Claims Under 42 U.S.C. § 1983*, 38 S. ILL. U. L.J. 309, 316 (2014) (providing an overview of the Supreme Court's decision in *Pearson* and

officer violated the rights of an individual, the individual must show that the constitutional violation was "clearly established."[178] If the violation is not "clearly established," the officer will be granted qualified immunity.[179] Under the current jurisprudence, established by the Court in 2015 in *Mullenix v. Luna*, for something to be "clearly established," there must be clear precedent—in close cases, a tie will go to the police officer.[180]

Under the "clearly established" doctrine applied in *Mullenix*, there must be precedent extremely similar to the case a citizen brings to defeat qualified immunity defenses.[181] This requirement has chilled the

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demonstrating how it substantially narrowed the qualified immunity inquiry); Tahir Duckett, Note, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 428 (2016) (describing the inconsistent applications of the "clearly established" requirement following *Saucier*).

178. *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (holding that the "clearly established" violation must be demonstrated specifically, and not "at a high level of generality" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011))).

179. *Id.*

180. *See id.* (stating that "specificity" is important in these cases, and that individuals courts should not use generalizations to define "clearly established"); *see also* Nemeth, *supra* note 176, at 1011 (arguing that courts apply the qualified immunity defense even "if a mere possibility exists that the officer did not know they were infringing upon a constitutional right"). In *Mullenix v. Luna*, the Court reviewed the "hazy legal backdrop" of cases similar to *Mullenix,* and determined that qualified immunity applied because there was not clear precedent that defined the right asserted by the petitioner. 577 U.S. at 14. Thus, qualified immunity protects police when the precedent is murky. *See id.* at 18 ("Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'" (quoting Brosseau v. Haugen, 543 U. S. 194, 201 (2004))). Justice Sotomayor wrote a blistering critique of the majority decision in *Mullenix*. *See id.* at 20–26 (Sotomayor, J., dissenting). Justice Sotomayor stated that the majority was "sanctioning a 'shoot first, think later' approach to policing . . . [which] renders the protections of the Fourth Amendment hollow." *Id.* at 26.

181. Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, APPEAL (June 19, 2019), https://theappeal.org/qualified-immunity-explained/ [https://perma.cc/HN56-A8Q6] ("Qualified immunity takes away the other avenue that victims of police violence should have available to hold police accountable."). Between 2005 and 2014, U.S. police officers may have killed as many as 10,000 individuals; prosecutors only charged 153, just over one percent, of officers involved in these deaths. Tom Jackman & Devlin Barrett, *Charging Officers with Crimes is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020, 7:25 PM), https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/ [https://perma.cc/QD2E-PK3S]. It is difficult to prove manslaughter or murder in these cases because the prosecutor must show the intent of

evolution of excessive-force jurisprudence, protecting citizens from police only in circumstances that courts found warranted protection prior to the adoption of the "clearly established" doctrine.[182] The "clearly established" doctrine is so specific that the facts of the cases must be nearly identical.[183] A difference in fact as small as someone sitting down, rather than lying down, can alter the outcome for a plaintiff.[184] Unfortunately, the Supreme Court has indicated that it does

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the officer. *Id.* Without criminal charges as a viable avenue, § 1983 claims become even more important to hold officers responsible.

182. Ali & Clark, *supra* note 181.

183. *See, e.g.*, Baxter v. Bracey, 751 F. App'x 869 (6th Cir. 2018) (finding that the use of a canine to apprehend a stationary suspect per the canine's training and after warning the suspect did not violate clearly established law despite previously determining that the use of a canine to apprehend suspects who were not fleeing constituted excessive force), *cert. denied*, 140 S. Ct. 1862 (2020) (mem.).

184. In 2018 in *Baxter v. Bracey*, the U.S. Court of Appeals for the Sixth Circuit granted qualified immunity to a police officer after determining the alleged constitutional violation was not "clearly established." *Id.* at 873. Baxter, a burglary suspect, brought a § 1983 claim after Bracey, a police officer, released his dog, Iwo, on him while he was seated and raising his arms in a sign of surrender. *Id.* at 870. Even though prior case law established that releasing a canine on an individual lying down on the ground was unconstitutional, the Sixth Circuit granted the officer qualified immunity. *Id.* at 872 (citing Campbell v. City of Springboro, 700 F.3d 779, 789 (6th Cir. 2012)). In *Campbell v. City of Springboro*, officers released a police dog onto a criminal suspect who had "decided to lie on the ground . . . in an attempt to avoid a confrontation with the police." 700 F.3d at 784. After reviewing the facts of the case and emphasizing that the suspect was "lying face down with his arms at his side," the court determined that the individual had clearly made an initial showing of excessive force, declining to grant qualified immunity to the police. *Id.* at 787; *see also* Josh Gerstein, *Supreme Court Turns Down Cases on "Qualified Immunity" for Police*, POLITICO (June 15, 2020, 3:08 PM), https://www.politico.com/news/2020/06/15/supreme-court-qualified-immunity-police-cases-320187 [https://perma.cc/YQ8N-V8V9] (describing the facts of *Baxter* and noting the seemingly strange outcome that allowed an individual lying down to raise a claim but applying qualified immunity to Baxter, who was sitting with arms raised). Thus, *Baxter* demonstrates just how close the facts of a case must be to show "clearly established" precedent—a fact as simple as sitting down, instead of *lying down*, can alter the outcome. *Compare Baxter*, 751 F. App'x at 870 (granting qualified immunity to a police officer who set his dog onto a suspect who was sitting down with hands raised in a surrender position), *with Campbell*, 700 F.3d at 787–89 (denying qualified immunity to officers that set a dog onto a suspect who was lying down in a surrender position). As one judge stated, qualified immunity allows officials to "duck consequences for bad behavior . . . as long as they were the *first* to behave badly," which in turn fails to deter police behavior. Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

not intend to reconsider the qualified immunity doctrine.[185] In June 2020, the Court declined certiorari in at least seven qualified immunity cases, including *Baxter*.[186]

## III. COMMONLY CITED REFORM TACTICS: WHY THEY FAIL TO CHANGE POLICE PRACTICES & CULTURE

Diversity within police departments has improved over time; fifty years ago, the vast majority of law enforcement was white men.[187] Affirmative action policies in the 1970s and 1980s helped to diversify departments, but many law enforcement departments remain majority white and male.[188] Although diversity in police departments likely improves the culture within law enforcement, evidence is murky regarding the actual impact of police race on police practices.[189]

185. *See* Debra Cassens Weiss, *Supreme Court Rejects Cases on Qualified Immunity Used to Shield Police Officers*, ABA J. (June 16, 2020, 10:30 AM), https://www.abajournal.com/news/article/supreme-court-rejects-cases-on-qualified-immunity-used-to-shield-police-officers [https://perma.cc/97UT-5283] (recounting the Supreme Court's denial of certiorari in at least seven, potentially eight, qualified immunity cases).

186. *See id.* (describing the Supreme Court's decision to deny certiorari in the *Baxter* case). Notably, Justice Clarence Thomas dissented from the Supreme Court's decision to deny certiorari in *Baxter*. *Baxter*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting). Justice Thomas reiterated his doubts regarding the Court's qualified immunity decisions. *Id.* at 1863–65. He stated he would have granted the writ of certiorari because the Court's jurisprudence "appears to stray from the statutory text [of § 1983]." *Id.* at 1862. Justice Thomas emphasized that § 1983 does not provide for defenses, and "applies categorically to the deprivation of constitutional rights under color of state law." *Id.* at 1862–63. In his dissent, Justice Thomas recounted the Court's qualified immunity jurisprudence, and criticized its approach to the doctrine. *Id.* at 1863. Specifically, Justice Thomas criticized the Court for straying from its initial approach to qualified immunity, which relied upon immunities granted in the common law. *Id.* at 1864; *see also Pierson v. Ray*, 386 U.S. 547, 556–57 (determining that police officers may raise a defense of good faith, or qualified immunity, based on the common law's recognition of the defense). Justice Thomas would like to reshape the qualified immunity analysis to "at least . . . return to the approach of asking whether immunity 'was historically accorded the relevant official' in an analogous situation 'at common law.'" *Baxter*, 590 U.S. at 1864 (Thomas, J., dissenting) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017)).

187. David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 40–41 (2017).

188. *Id.* at 41.

189. *See* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1224–25 (2006) (suggesting that data related to race and police practices may not show the results many scholars would expect).

Regardless of whether data clearly indicates the importance of a diverse police force, arguably diversifying these departments could lessen the "us vs. them" mentality by redefining the identity of officers.[190] Furthermore, hiring a diverse workforce may challenge implicit biases about Black Americans and propensity to commit crime.[191] Recruiting a diverse workforce of individuals "who have had positive interactions with people of various cultures and backgrounds" may lead to more unbiased policing; people tend to hold less biases against "groups with which they have had positive experiences."[192] Although racial diversity within police forces may have inconclusive results, there is significant evidence that female police officers are less likely to use force than male officers.[193] Women officers may use policing tactics that emphasize communication, rather than force.[194] Thus, one possible incremental

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Many anticipated diversity, particularly hiring more Black officers, would improve law enforcement relationships with diverse communities. *Id.* at 1224. Officers from racial minorities may believe that they have "special competencies," such as "greater *understanding* of minority communities, and greater *credibility* in minority communities." *Id.* Unfortunately, however, the data is largely inconclusive. *Id.* at 1224–25. Some studies determined that Black police officers fire weapons as frequently as white peers, and that Black officers may be just as biased against Black people as white officers. *Id.* at 1224. Others suggested that Black officers are more likely to receive cooperation from Black individuals, and that Black officers are less biased against Black people. *Id.* at 1224–25.

190. *Id.* at 1240 ("By weakening the social solidarity of the police, the growing diversity of law enforcement workforces makes it more likely that departments will be able to take advantage of the special competencies of minority officers, female officers, and openly gay and lesbian officers."). Diversifying police departments may even help facilitate additional reforms to departments, such as "civilian oversight, community policing, and systematic efforts to ameliorate racial bias in policing." *Id.*

191. *See* Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, *in* RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 39, 39 (Michael J. Lynch, E. Britt Patterson & Kristina K. Childs eds., 2008); *see also* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 146, at 17.

192. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 146, at 17.

193. Christina Asquith, *Why Aren't U.S. Police Departments Recruiting More Women?*, ATLANTIC (Aug. 30, 2016), https://www.theatlantic.com/politics/archive/2016/08/police-departments-women-officers/497963/ [https://perma.cc/HM9N-R6GU] ("This . . . is clear: Women officers are less likely to use excessive force or pull their weapon.").

194. *Id.* Furthermore, female officers are more likely to write reports in response to domestic-violence allegations than their male counterparts. *Id.*

reform for U.S. law enforcement is recruiting more women, who could be less likely to use force than male officers.[195]

Beyond recruitment, U.S. law enforcement training may be another avenue for reform. Germany requires its police officer recruits to attend between two and a half and four years of training.[196] In the United States, however, training may take only twenty-one weeks, with an average of 672 basic training hours to become a police officer.[197] There are no national standards for police training, leaving state police commissions to determine the appropriate amount of training.[198] In North Carolina, for example, police officers must complete 620 hours of training; notably, barbers in North Carolina must complete 1,528 hours to be licensed.[199] Police training focuses on officer safety, despite the fact that most police officers will never need to fire a gun during their

195. Drake Baer, *If You Want Less Police Violence, Hire More Female Cops*, CUT (July 15, 2016), https://www.thecut.com/2016/07/more-female-cops-less-police-violence.html [https://perma.cc/D67Q-YPFR].

196. Yasmeen Serhan, *What the World Could Teach America About Policing*, ATLANTIC (June 10, 2020), https://www.theatlantic.com/international/archive/2020/06/america-police-violence-germany-georgia-britain/612820/ [https://perma.cc/GAZ2-77Z7]. Further, in Germany, police recruits are offered the opportunity to study for an advanced degree, bachelor's or master's, focused on policing. *Id.* German training covers a wide variety of situations, with an emphasize on de-escalation. *Id.* Lethal force is used sparingly, as "the emphasis [of training] is not on using weapons or shooting." *Id.*

197. *Id.*; Kelly McLaughlin, *The Average US Police Department Requires Fewer Hours of Training Than What it Takes to Become a Barber or a Plumber*, INSIDER (June 12, 2020, 10:23 AM), https://www.insider.com/some-police-academies-require-fewer-hours-of-training-plumbing-2020-6 [https://perma.cc/VNZ9-QZPU]. Less time training may limit the amount of energy spent teaching officers how to de-escalate situations—as Paul Hirschfield, a professor of sociology and criminal justice, stated: "If you only have 21 weeks of classroom training, naturally you're going to emphasize survival." Serhan, *supra* note 196.

198. *See* Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 18–19 (2018) (recounting the various states' requirements for police training). The range in required hours may differ substantially state to state—in Louisiana, officers are only required to attend 360 hours of training, while Hawaii requires 1068 hours. *Id.* at 18. Of these hours, only 12.52% on average focus on legal subjects, such as statutory law, criminal charges, and traffic law. *Id.* at 26–28.

199. Holly Yan, *States Require More Training Time to Become a Barber Than a Police Officer*, CNN (Sept. 28, 2016, 4:03 PM), https://www.cnn.com/2016/09/28/us/jobs-training-police-trnd/index.html [https://perma.cc/8Q7Q-KCLL].

time in law enforcement.[200] Although weapons are clearly rarely required, police training features an average of 110 hours of "military-style training," which includes using weapons and learning self-defense tactics.[201] In contrast to the 110 hours of military-like training, de-escalation practices received only eight hours of attention during training.[202] Thus, police officers enter the workforce prepared to use deadly force (even though they will likely never need this training), and grossly under-educated in de-escalation.[203] In addition, few police training regimens include implicit-bias training, and in those that do, the training is extremely short.[204] Finally, officers are typically woefully unprepared to help people living with mental illness.[205] Although ten percent of police calls deal with mental illness, some states do not require officers to be trained in mental illness.[206] Due to the lack of training in this area, many families of those with mental illness lack trust in the police and do not feel comfortable calling 911 in crisis

200. *See* cummings, *supra* note 20, at 607 (stating that the focus of law enforcement training is "returning home alive each night," despite the reality of most officers never facing a situation requiring weapons).

201. *Id.* During this training, officers may be "repeatedly exposed to scenarios in which seemingly innocuous interaction with the public, such as traffic stops, turn deadly. The endlessly repeated point is that any encounter can turn deadly in a split second . . . ." *Id.* at 606–07 (quoting ALEX S. VITALE, THE END OF POLICING 9–10 (2017)) Training thus encourages officers to be prepared to use deadly force. The belief that each interaction with the public may result in death creates a hostile environment, and encourages police to "control [citizens] rather than communicate with them." *Id.* at 607 (quoting VITALE, *supra*).

202. *Id.*

203. *See id.* (describing the misplaced emphasis on military-esque training in police academies).

204. *See id.* at 591–95 (providing an example of the implicit bias training at the University of Illinois). Although the University of Illinois' Police Training Institute offers training on implicit biases to police recruits, the training is only nine hours. *Id.* at 591. The goal of the training is to teach police recruits about the impact of racial biases in police work to improve police relationships with their communities and lessen biased policing practices in the state. *Id.* at 592–93.

205. *See* Megan Pauly, *How Police Officers Are (or Aren't) Trained in Mental Health*, ATLANTIC (Oct. 11, 2013), https://www.theatlantic.com/health/archive/2013/10/how-police-officers-are-or-aren-t-trained-in-mental-health/280485/ [https://perma.cc/TU6S-FVWC] (summarizing the lack of training police officers receive in mental health).

206. *Id.* The amount of training officers receive for individuals with mental illness varies state-by-state; some states, like Florida, receive forty hours of training, while others, like Alaska, have no training whatsoever. *Id.*

situations.[207] Perhaps instituting rigorous training regimens, like Germany's, or increasing de-escalation, racial bias, and mental health training would improve U.S. police departments.

But additional training alone cannot fix law enforcement; even when new recruits receive adequate training, they will likely be told by officers in their departments, "I don't care what you learned in the academy; this is how you do it on the street."[208] Regardless of the level of training a trainee receives, older officers in the department may "re-train" new recruits to fall in line with department practices, which may erase any improvements gained by new training.[209] Furthermore, many police departments allow officers who have received multiple complaints to serve as trainers or mentors for new recruits.[210] Remember the recent case of George Floyd—two recently trained police officers were present when Chauvin, the trainer, suffocated Floyd.[211] Chauvin was allowed to train new recruits even though he had at least twelve misconduct complaints on his record.[212] These individuals then pass on these bad behaviors to their trainees.[213] In fact, one researcher found that when new officers receive citizen complaints in the first two years as an officer, "it [is] likely that their trainers had histories of allegations filed against them."[214] Thus, without proper safeguards, it is unlikely that training will accomplish much for reform.

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207. *See* Rich Schapiro, *Families of Mentally Ill Fear Calling Police May Turn Into Deadly Encounter*, N.Y. DAILY NEWS (Apr. 5, 2018, 11:01 PM), https://www.nydailynews.com/new-york/families-mentally-ill-fear-calling-police-turn-deadly-article-1.3917552 [https://perma.cc/2ANC-2Y8A] (re–counting the fears of New Yorkers who have family members that live with mental illness).

208. Weichselbaum, *supra* note 66.

209. *See id.* (describing the attitude of veteran officers toward training new recruits).

210. *Id.* In one 2011 report, the DOJ determined that officers who train new recruits in New Orleans were "unqualified and unsuitable to supervise and train recruits." The same was found to be true in Cleveland, Baltimore, Chicago, and Albuquerque. *Id.* Derek Chauvin, the officer who killed George Floyd by kneeling on his neck, was a trainer even though he had accumulated approximately twelve complaints throughout his nineteen-year tenure as an officer in Minneapolis. *Id.* He never received discipline for his misconduct. *Id.*

211. *See supra* notes 67–71 and accompanying text (summarizing the individuals involved in George Floyd's death and noting that two of the officers had only been on the force for four days).

212. Weichselbaum *supra* note 66.

213. *Id.* ("There is a definite association between [field training officers] and their issues and the trainees' later success or deviance in their careers.").

214. *Id.*

Other reforms target specific practices, like chokeholds and use of weapons, or call for officers to wear body cameras at all times.[215] These reforms, however, are lackluster without systems that hold officers accountable—without oversight, even with a body camera, there is no real incentive to act appropriately. The following Part will propose reforms that include unbiased review systems to hold police officers accountable, deter misconduct, and build trust in the Black community.[216]

## IV. REFORMS THAT DETER

As Justice John Paul Stevens emphasized in his dissenting opinion in *Illinois v. Wardlow* in 2000, minorities may have significant distrust of police officers, believing "that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."[217] Justice Stevens's observation highlights the significant distrust of police within the Black community—forty-eight percent of Black Americans "have very little or no confidence" that law

215. *See* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 146, at 32 (recommending that police departments utilize body cameras to reform policing in the United States); Monika Evstatieva & Tim Mak, *How Decades of Bans on Police Chokeholds Have Fallen Short*, NPR (June 16, 2020, 5:11 AM), https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short [https://perma.cc/3YRW-T4CA] (summarizing the history of chokehold bans in the United States and explaining the shortcomings of this approach). For example, since George Floyd's death due to suffocation, Democrats in Congress have drafted legislation that would ban the use of chokeholds. *Id.* The 2020 legislation would also make lynching a federal crime, increase the requirements for data collection by law enforcement agencies, expand police training requirements, and incentivize police departments to incorporate body cameras into their practices. *See* Emily Cochrane & Luke Broadwater, *Here Are the Differences Between Senate and House Bills to Overhaul Policing*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/17/us/politics/police-reform-bill.html [https://perma.cc/2827-73S8] (pointing out significant differences between two bills to reform policing, one from the Senate Republicans and one from the Senate Democrats). In addition, the Democrats' bill would modify the qualified immunity doctrine, aim to eliminate racial profiling or biases in law enforcement, and make prosecution of officers for poor conduct easier. *Id.*

216. *See infra* Part IV.

217. 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part). The Court held that unprovoked flight may be considered in the reasonable-suspicion justification. *Id.* at 121, 124–25 (majority opinion). Justice Stevens rejected the majority decision because he believed unprovoked flight does not always reflect guilt; instead, it may reflect distrust of the police. *See id.* at 132–33 (Stevens, J., concurring in part and dissenting in part) (describing other reasons an individual might flee the police, such as minority individuals' distrust of law enforcement).

enforcement treats Black and white Americans the same, and an additional seventeen percent of Black Americans only had "some" confidence in police officers to act without bias.[218] Studies of social science have revealed that trust, defined as the citizen's belief that "police and court procedures are in accord with people's sense of a fair process," is paramount to building better relations between communities and the police.[219] Without building trust between the Black community and law enforcement, reform efforts are meaningless; the best reforms, therefore, hold police accountable and demonstrate "fair process" to the public.[220]

President Obama's Task Force on 21st Century Policing determined that when offices are wearing body cameras, they are likely to behave better in interactions with the public.[221] Implementing body-camera requirements are a step in the right direction, however they must be paired with an accountability system of third-party review that works and with strict rules regarding their use.[222] In addition to requiring officers to wear cameras, there should be stringent requirements for the *use* of the camera—for example, officers should not be able to turn off body cameras without facing repercussions, and the public and oversight body should be able to access the body-camera

218. Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWS HOUR (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do [https://perma.cc/YV6Y-W8B3]. In contrast, forty-two percent of white Americans have "a great deal" of confidence that police will treat individuals without racial bias. *Id.* Overall, only eighteen percent of Americans polled "have very little or no confidence that police officers in their community treat people with different skin colors the same." *Id.*

219. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017) (quoting TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW, at xiv (2002)).

220. *See id.* at 840 ("We need to do more as a country to build trust so that when the next incident occurs that captures national attention, there is a sense that it will be handled fairly—and that it is not representative of the way the police and the community interact.").

221. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 146, at 32. The Final Report also suggests that the public is likely to behave better when police officers are wearing body cameras. *Id.*

222. *See* Lindsey Van Ness, *Body Cameras May Not Be the Easy Answer Everyone Was Looking For*, PEW (Jan. 14, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/14/body-cameras-may-not-be-the-easy-answer-everyone-was-looking-for [https://perma.cc/L8KX-9WMA] (explaining that merely requiring police officers to wear body cameras is insufficient to improve police practices, and instead, states should pair the requirement with specific rules for reviewing the footage and keeping the body cameras turned on at pivotal moments).

footage without delays.[223] Knowing that an outsider will review body-camera footage as a part of a yearly review of the individual's license could serve to deter poor police behavior. Mandatory body cameras are only useful when officers know that their actions will be reviewed and misconduct judged by unbiased reviewers, not other police officers within their department.[224] New training focused on de-escalation rather than force, and banning certain practices, like chokeholds, are steps in the right direction, however these types of reform fail to ensure police are held accountable for bad acts.[225] The Supreme Court's precedent has granted police officers broad discretion and has offered few means

223. *See Body Cams/Film the Police*, CAMPAIGN ZERO, https://www.joincampaignzero.org/solutions#film-the-police [https://perma.cc/3DV8-A8JV] (last visited Aug. 2, 2020) (offering a variety of reforms for body cameras, including granting the public better access to footage); Arijeta Lajka, *Reports Suggest Body Cameras Only Effective When Cops Can't Turn Them Off*, VICE NEWS (Mar. 25, 2015, 10:30 PM), https://www.vice.com/en_us/article/qvagmd/reports-suggest-body-cameras-are-only-effective-when-cops-cant-turn-them-off [https://perma.cc/G68U-GG37] (explaining that body cameras are considered more effective when police officers do not have the discretion to decide when to turn the cameras on or off). Of note, some scholars argue that body cameras need carefully crafted rules to ensure citizens' privacy is protected; *see, e.g.*, Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 399–400 (2016) (highlighting the tension between body cameras providing police oversight and infringing on individuals' privacy); Ethan Thomas, Note, *The Privacy Case for Body Cameras: The Need for a Privacy-Centric Approach to Body Camera Policymaking*, 50 COLUM. J.L. & SOC. PROBS. 191, 196 (2017) (advocating for an approach to body-camera legislation that prioritizes privacy). Technology today may be able to help mitigate privacy concerns. *See Axon Signal Vehicle,* AXON (last visited Dec. 21, 2020), https://www.axon.com/products/axon-signal-vehicle [https://perma.cc/2AZK-ATDA]. For example, Axon Signal Vehicle technology allows compatible body cameras to "sense nearby events and start recording." *Id.* One such event could be an officer's decision to open the car door. *See Axon Body 2*, AXON (last visited Dec. 21, 2020), https://www.axon.com/products/axon-body-2 [https://perma.cc/QS5V-5RA7]. An officer or his or her department can identify the "triggers" that cause the body camera to start capturing; thus, an officer may not be as concerned about his or her privacy because only certain events turn the camera on. *See Axon Signal Vehicle*, *supra*. (describing the capabilities of the Axon Signal Vehicle technology). Furthermore, the technology could also ensure that police officers cannot control when a body camera records. *Id.*

224. *See* Van Ness, *supra* note 222 (suggesting that mandatory body cameras are only effective when the requirement to wear the cameras is paired with rules for the review and uses of the footage).

225. *See supra* notes 187–228 and accompanying text (summarizing reforms that are steps in the right direction but fail to hold police fully accountable).

to deter police and hold officers accountable.[226] In addition, police departments themselves and unions are unwilling to hold the bad actors accountable.[227] Reforms must focus on ensuring accountability, trust, and deterrence.[228] There needs to be neutral, speedy, adjudication of police malfeasance. In addition, there needs to be power to punish.

This Part will offer two different ways to hold police accountable, deter bad acts, and rebuild trust in U.S. law enforcement.[229] First, Section A will argue that a comprehensive police licensing and decertification scheme, maintained by an independent body, is the type of reform needed to deter bad police acts and hold police accountable; furthermore, this practice ensures that the public can trust that police officers have oversight, as review of bad acts will no longer be conducted by police officers themselves.[230] Second, Section B will argue that district attorneys can play a role in deterring bad acts by decrim–inalizing certain offenses, which cuts back on police and prosecutorial discretion, and minimizes officer interactions with the community.[231]

### *A. Meaningful Licensing and Decertification Statutes Can Hold Police Accountable*

Nearly 25% of workers in the United States need a government-approved license, including makeup artists in thirty-six states and security guards in thirty-seven states, to conduct their work; this percentage is up from only 5% in the 1950s.[232] The majority of states require police officers to obtain licenses or certifications to serve in law enforcement—in fact, only four states have no licensing requirement for officers.[233] Since the 1960s, however, only approximately 30,000 officers

226. *See supra* notes 118–157 and accompanying text (providing an overview of Supreme Court precedent that grants police officers broad discretion and does not offer means to hold police accountable for bad acts).

227. *See supra* notes 57–107 and accompanying text (describing the lack of accountability in police departments and police unions).

228. *See supra* notes 217–227 and accompanying text (arguing that meaningful reform requires deterrence and accountability to unbiased parties).

229. *See infra* Part IV.

230. *See infra* Part IV.A.

231. *See infra* Part IV.B.

232. D. Bruce Johnsen & Adam David Marcus, *Pension Forfeiture and Police Misconduct*, 14 J.L. ECON. & POL'Y 1, 29 (2017); *see also* Business News Daily Editor, *10 Jobs You Didn't Know Need Licenses*, BUSINESS NEWS DAILY (Feb. 20, 2020), https://www.businessnewsdaily.com/2492-occupations-requiring-licenses.html [https://perma.cc/7AF9-DKXG] (listing a number of surprising jobs that require state licenses).

233. *See* Christopher Gavin, *Mass. Lawmakers are Readying for a Police Certification System. Here's What Would Make it Strong, According to Experts*, BOSTON.COM (June 16, 2020), https://www.boston.com/news

have lost their certifications, with nearly fifty percent of decertification occurring in California, Florida, and Georgia.[234] Decertification relies on state statutes, and some states only allow decertification when an officer has committed a felony, which likely contributes to the low number of decertifications.[235] This Article argues that certification statutes must be strong enough to hold police officers accountable and ensure that *all* misconduct, not just misconduct egregious enough to be charged in court, is brought to the review of third parties.[236] Furthermore, this

/policy/2020/06/16/massachusetts-police-certification-system [https://perma.cc/MHY3-KMQV] (noting that Massachusetts is one of only four states that do not require police officers to obtain a certification); Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, ATLANTIC (Apr. 9, 2017), https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/ [https://perma.cc/5K75-65YC] (stating that "around 44 states" have certification programs for police officers). Although in June 2020 Massachusetts introduced legislation to offer civilian accountability for police officers, in December 2020, Governor Charlie Baker sent the legislation back for changes. Matt Stout, *Baker Sends Police Bill Back to Legislature Asking for Changes*, BOS. GLOBE (Dec. 10, 2020), https://www.bostonglobe.com/2020/12/10/metro/baker-sends-police-bill-back-legislature-asking-changes/ [https://perma.cc/7NXF-CAF8]. Governor Baker stated that the state "desperately need[s] an accountability system," but opposed the idea of accountability being in the hands of civilians. *Id.* Instead, Governor Baker suggested that the accountability should remain with the Municipal Policing Training Committee, which is under the control of the executive branch. *Id.* Governor Baker stated that he does "not accept the premise that civilians know best how to train police." *Id.*

234. Norwood, *supra* note 233. Although Florida has decertified around 7,000 officers, some states that decertify officers have decertified as few as ten since the beginning of their certification requirements. *Id.* New Mexico, in 1960, was the first state to create laws that allowed the state to decertify officers. Johnsen & Marcus, *supra* note 232, at 29.

235. Norwood, *supra* note 233. Notably, some states will allow police officers *charged* but not *convicted* of crimes to return to the police force. *See* Jeffrey Benzing, *In Disciplining Cops, Pennsylvania's Standards Trail Other States*, PUB. SOURCE (Nov. 19, 2018), https://www.publicsource.org/in-disciplining-cops-pennsylvanias-standards-trail-other-states/ [https://perma.cc/97PG-DWER] (explaining Pennsylvania's standard for decertification). For example, an officer in Pennsylvania was accused of misconduct in the death of Antwon Rose II and charged with criminal homicide. *Id.* If the officer is convicted of criminal homicide, he will be decertified. *Id.* If he is *not* convicted, the officer can return to law enforcement, even though his conduct was questionable enough to warrant a criminal trial. *Id.* In Pennsylvania, misdemeanors are not grounds for decertification. *Id.* There are six states that have the power to revoke an individual's license to be a barber, but *do not* have the power to revoke an individual's police license. Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 155 (2012).

236. *See infra* notes 238–255 and accompanying text (arguing that state licensing and decertification statutes must include key elements to be

Article identifies two ways the federal government can play a role in strengthening state certification policies and procedures.[237]

Most states with decertification statutes create an independent agency, often called the Peace Officers Standards and Training Commission ("POST"), that investigates officer misconduct and decides when an officer should be decertified or face other consequences.[238] Recently, in January 2021, former Attorney General William P. Barr of the Trump Administration released a report from the President's Commission on Law Enforcement and the Administration of Justice, which called for independent review of lethal police shootings and other uses of force and the creation of independent agencies to ensure sufficient training and accreditation of officers.[239]

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effective deterrents for police officers). Permanently keeping officers out of a job may be the most powerful deterrent of all; as one New York-based civil rights lawyer experienced, officers are not afraid of civil penalties, as departments often bear the monetary loss. *See* Joel Berger, Letter to the Editor, *How to Reduce Police Brutality*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/opinion/letters/police-brutality-george-floyd.html [https://perma.cc/88QA-J8A4]. In one case, an officer even told the civil rights attorney, "[g]o ahead and sue, the money isn't coming out of my pocket." *Id.* Perhaps the officer would not have been so cavalier had his job, rather than the department's money, been on the line. *See id.* (suggesting that monetary damages to the police department are not a strong deterrent for officers).

237. *See infra* notes 258–277 and accompanying text (demonstrating the role the federal government can play in ensuring states use strong licensing and decertification statutes).

238. Goldman, *supra* note 235, at 147.

239. Tom Jackman, *Trump Policing Commission Calls for Independent Probes of Officer Shootings, More Technology Use*, WASH. POST (Jan. 3, 2021, 8:00 AM) https://www.washingtonpost.com/nation/2021/01/03/trump-police-commission-report/ [https://perma.cc/27B4-QR86]; *see also* U.S. DOJ, PRESIDENT'S COMM'N ON L. ENF'T & THE ADMIN. OF JUST., FINAL REPORT 14 (Dec. 2020) https://www.justice.gov/file/1347866/download [https://perma.cc/Q5AP-5AWW] ("States should enact legislation that requires law enforcement agencies to have an independent, external agency that has met minimum training and accreditation standards conduct the criminal investigation of use-of-force incidents that result in death or serious bodily injury."). The report also calls for new technologies to help analyze crime, additional types of care for individuals living with mental illness or substance use disorders, and more. *See id.* at xxiii (providing an overview of the Commission's recommendations). Although many components of the Commission's report signal positive change to come, critics—including the defense bar, individuals involved with civil rights and, more—emphasize that the Report "was compiled by 18 police, prosecution and Justice Department officials, aided by 15 working groups composed of 120 members who are also mostly police and prosecutors." Jackman, *supra*. Due to the lack of diversity and representation on the Commission, the NAACP Defense and Educational Fund brought suit against former Attorney General Barr, which resulted in the court requiring a disclaimer in the

State licensing and decertification statutes currently vary widely.[240] Successful licensing statutes, one scholar argues, would have four primary elements: (1) the licensing body has oversight over police officers *and* other actors within the criminal justice system; (2) the licensing body can revoke licenses and decertify police officers for a variety of types of misconduct, not just criminal convictions; (3) the licensing body can both incentivize law enforcement to report misconduct and reprimand law enforcement when it fails to report misconduct, and; (4) the licensing body may impose punishments when police departments, and more specifically, chiefs of police departments, fail to report misconduct.[241]

The oversight of the POST or otherwise named licensing body must be complete and exclusive.[242] Having oversight over the department grants the licensing body control both in establishing police licensing requirements *and* in establishing conduct worthy of decertification—if it has control, it can also determine appropriate punishments, like decertification or suspension.[243] Furthermore, if the licensing body also

report stating the Commission lacked diversity and was imbalanced. *See id.* Following the release of the Trump Administration report, President-elect Joseph R. Biden has signaled his intention to create a new commission on policing, which puts the Trump report in limbo. *Id.*

240. *See* Goldman, *supra* note 235, at 150–53. Professor Roger Goldman has identified three different approaches to defining misconduct that warrants decertification. First, some states decertify as a result of criminal convictions, with some including misdemeanors as decertifiable offenses and others only allowing decertification for felonies. *Id.* at 150–51. Second, some states allow decertification after a hearing in front of an administrative law judge that finds the officer has "engaged in statutorily prohibited conduct." *Id.* at 151–52. Finally, other states decertify and revoke an officer's license when he or she is fired or agrees to leave a department rather than be fired. The third approach, which Professor Goldman argues "is the least desirable," is the narrowest, with revocation only resulting when the police department takes an action. *Id.* at 152–53.

241. *See id.* at 149 (outlining Professor Goldman's criteria for a strong decertification law).

242. *See id.* at 150 (recognizing that state decertification laws must be broad in scope to stop previously terminated police officers from finding a new role in law enforcement); *see also supra* notes 94–103 and accompanying text (describing the problem of police departments overseeing their own misconduct inquiries).

243. *See supra* notes 187–214 and accompanying text (summarizing the problematic training and hiring practices within law enforcement). For example, Florida's licensing entity has stringent requirements for applicants to receive their police license—"candidates must clear a basic abilities test, graduate the police academy, and then pass a written certification examination." Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1691–92 (2020). In addition, candidates in Florida must have "good moral character." *Id.* at 1692 (quoting FLA. STAT. § 943.13(7) (2020)). Any of the following are considered poor moral character

has oversight of other roles within the criminal justice system, such as the hiring of correctional officers, campus safety officers, parole officers, and others, it can ensure that when a police officer is fired, he or she cannot merely re-enter law enforcement in another capacity.[244] Finally, when a licensing body truly has complete oversight, body-camera reforms and chokehold bans may hold more water; if officers know that a third party, as opposed to a fellow officer, will review their body-camera footage or illegal misconduct, these reforms may serve a greater deterrent effect.[245]

When defining the type of conduct that can result in losing a police license, it is critical that the oversight body has considerable discretion to decertify for a variety of types of misconduct.[246] As previously

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in Florida, and would keep an individual from obtaining his or her police license.

> [C]ommitting any felony or certain misdemeanors (regardless of criminal prosecution), using excessive force, misusing an official position to secure a privilege or benefit, participating in sexual conduct while on duty, engaging in sexual harassment, making false statements during the job application process, subverting training and testing processes, and making false statements in a court proceeding.

Grunwald & Rappaport, *supra*, at 1692.

In Florida, the licensing body even has oversight of training. *Id.* This could allow it to require specific types of ongoing training, such as implicit biases or mental health training.

244. Goldman, *supra* note 235, at 150.

245. *See* Van Ness, *supra* note 222 (arguing body cameras alone have not had significant effect on police use of force); Martin Katse, *Should the Police Control Their Own Body Camera Footage?*, NPR, (May 25, 2017, 5:00 AM), https://www.npr.org/2017/05/25/529905669/should-the-police-control-their-own-body-camera-footage [https://perma.cc/W9Y5-R8T9] (suggesting that independent entities should review police body camera footage to increase accountability).

246. *See* Goldman, *supra* note 235, at 152 ("A hybrid approach, combining revocation for specific misconduct and more general language, is probably the best solution."). One example of an effective decertification statute is in Missouri. Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 381–82 (2016). Professor Goldman provided an example in which police officers in the St. Louis County Webster Groves Police Department "engaged in improper sexual contact both on and off duty with teenage girls." *Id.* at 381. Some of the offending officers were then hired in other police departments. *Id.* at 381–82. The Missouri statute stated that an officer could lose his or her certification for "gross misconduct indicating inability to function as a peace officer." *Id.* at 382. As Professor Goldman emphasized, there was no requirement that the officer be criminally convicted; because of the broad language of the statute, some of these officers lost their licenses. *See id.* at 381–82. Thus, as a result of the

mentioned, some states only decertify officers when they commit a felony; ideally, statutes would be considerably broader, granting the authority to decertify when an officer commits certain types of misconduct or engages in patterns of problematic behavior, such as repeatedly targeting Black Americans in *Terry* stops.[247] It is in this oversight capacity that body cameras can be useful. When police officers wear body cameras, it is less likely that they will engage in misconduct.[248] To enhance trust in law enforcement, the state's oversight body should implement body-camera requirements for all officers.[249] The oversight body must have the power to review body-camera footage, not only in the event of officer misconduct, but also at random intervals to ensure that officers consistently act appropriately[250]—not dissimilar to requirement of a driver's license, which is renewed periodically. Granting the oversight body the power to review, particularly when officers may not be expecting it, ensures that officers will be held accountable for misconduct and helps to build additional trust in the community.[251] Furthermore, if the review of the footage reveals persistent racial bias, for example in an officer's *Terry* stop practices, the oversight body could sanction the officer.[252] Finally, as suggested earlier in this Article, officers should be punished for breaking body-camera rules, such as turning off the camera when unauthorized.[253]

broader statutory language, the officers could be held accountable for their actions.

247. *See* Norwood, *supra* note 233 (summarizing state decertification statutes and noting that some only decertify when an officer has committed a felony offense); Goldman, *supra* note 235, at 150–52 (suggesting that decertification statutes must grant oversight bodies the ability to decertify for more misconduct than only felonies).

248. *See* Obama, *supra* note 219, at 864 ("In several research studies, body-worn cameras are shown to help decrease reported complaints about officers.").

249. *See id.* at 865 (suggesting that requiring police officers to wear body cameras can increase the community's trust).

250. *See id.* (arguing that body-camera requirements "must be implemented . . . in cooperation with thoughtful policies, initiatives, and technological safeguards to ensure that civil rights are upheld, privacy interests are respected, and cameras are part of a cost-effective approach to transparency and public safety.").

251. *See id.* at 864–65 (recommending that body-worn cameras must be coupled with thoughtful policies in order to ensure law enforcement accountability).

252. *See generally id.* (suggesting that body cameras can be a powerful tool in holding officers accountable and building trust of police in the community).

253. *See* Eddy Rodriguez, *Chicago Mayor Calls out Officers Who Turn Off Body Cams, Says "We Will Strip You of Your Police Powers"*, NEWSWEEK (June 6, 2020, 10:45 AM), https://www.newsweek.com/chicago-mayor-calls-out-

Even when states have comprehensive licensing and decertification statutes, if misconduct is covered up by police departments, the benefits of these third parties may not be significant; thus, licensing bodies must have the personnel and considerable power to (1) incentivize reporting of misconduct; (2) conduct investigations of police departments, including via subpoena; and (3) reprimand departments and individual police chiefs when misconduct is not reported.[254] To ensure officers report misconduct, the oversight body can require officers to intervene when another officer is committing a bad act or risk losing their own license.[255]

Ultimately, a credible and accessible reporting and reviewing system could result in both more citizen complaints and citizen trust in police.[256] To ensure this positive result, the reporting and reviewing system must be widely disseminated to the public.[257]

Although the states primarily control police departments, there are two important roles the federal government can play in holding law

officers-who-turn-off-body-cams-says-we-will-strip-you-your-police-1509167 [https://perma.cc/PBR8-UZXB] (describing a new Chicago policy that would remove officers from the police force who either cover their identification or turn off their body cameras during the course of duty). Modern body cameras have many innovative features that can aid in holding police accountable. *See generally* AXON: PRODUCTS CATALOG, https://www.axon.com/products?productCategory=cameras [https://perma.cc/D9YC-Z3FX] (last visited Feb. 19, 2021) (summarizing new features on body cameras). For example, as mentioned previously, police departments can program cameras to record and save footage only when a specific event occurs. *See Axon Signal Vehicle*, *supra* note 223. In addition, the camera can be configured so that it captures as much as two minutes prior to the event to record the full situation. *See Axon Body 2, supra* note 223.

254. Goldman, *supra* note 235, at 153–54. For example, in Oregon, the POST can impose penalties as great as $1,500 upon law enforcement departments that fail to comply with reporting requirements. *Id.* at 154. Alternatively, if the failure to report is particularly egregious or systemic, the whole department could lose their licenses. *Id.*

255. *See Officers Spoke Up but Didn't Intervene*, *supra* note 67 (describing Minneapolis's "duty to intervene" rule and noting that the City hopes to make the rule enforceable in court to hold officers accountable).

256. *See Community Oversight*, CAMPAIGN ZERO https://www.joincampaignzero.org/solutions#oversight [https://perma.cc/F68C-AB9K] (last visited Aug. 2, 2020) (suggesting that establishing review processes outside of law enforcement to review misconduct would better hold bad officers accountable). Currently, less than "1 in every 12 complaints of police misconduct nationwide results in some kind of disciplinary action against the officer(s) responsible." *Id.*

257. *See id.* ("For all stops by a police officer, require officers to give civilians their name, badge number, reason for the stop and a card with instructions for filing a complaint . . . .").

enforcement accountable through state licensing.[258] First, the federal government should partner with state law enforcement to create a national registry to record all officers who have been decertified to ensure that officers decertified in one state cannot be re-hired and recertified in another state.[259] Although a National Decertification Index already exists, data entry relies on individual POSTs inputting the information.[260] Each POST may have different criteria for reporting decertification, making the National Decertification Index woefully incomplete.[261] If the DOJ were given funding and oversight to expand the National Decertification Index, as the President's Report on 21st Century Policing suggests, the Index could become a valuable tool to ensure decertified officers are held accountable and would ensure certification policies for police mirrors "the way states' licensing laws treat other professionals" because "the need for such a system is even more important for law enforcement, as officers have the power to make arrests, perform searches, and use deadly force."[262]

258. *See infra* notes 259–267 and accompanying text (describing two different roles the federal government can play in encouraging police licensing statutes). The federal government also has the power to grant funding to state law enforcement to encourage strong licensing laws. Goldman, *supra* note 246, at 386–88. When determining which departments to grant funding, the federal government should preference those that have a strong certification and decertification program, actively report decertified officers to the Index, and implement specific training for officers in the areas of mental illness, domestic violence, and racial bias. *Id.* at 387. This type of pressure may help to mitigate the reluctance of state officials to enact legislation the police unions oppose. *See id.* at 386–87 (suggesting that unions hold significant control over state officials, but the federal government can impose pressure by linking funding to strong certification statutes for police officers). Professor Goldman also argues that the federal government can play a larger role in accountability, as it does in Medicare and Medicaid. *Id.* at 387–88. If a police officer is found guilty or pleads guilty in a prosecution by the DOJ's Civil Rights Division, Goldman suggests that the officer should be required to notify his or her state licensing body. *Id.* at 387–88. Upon notification, the officer's license would be revoked; this would ensure that the police officer cannot serve anywhere in law enforcement, including in alternative states. *Id.* at 387–88.

259. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 146, at 29.

260. *Id.* at 29–30.

261. *Id.* at 30. In addition, the National Decertification Index is not publicly available; instead, each POST has the power to give hiring departments access to the Index to screen new hires. *Id.*

262. *Id.* (quoting Roger L. Goldman, *Police Officer Decertification: Promoting Police Professionalism through State Licensing and the National Decertification Index*, POLICE CHIEF, Nov. 2014, at 40, 40). Furthermore, a national Index could help solve the problem of the "wandering officer," law enforcement officers "who are fired or who resign under threat of termination and later find work in law enforcement elsewhere." Grunwald

Second, the federal government can act as a second line of defense; if police departments fail to comply with the licensing body's requirements (or sanctions for misconduct), the licensing body should refer the case to the DOJ.[263] Under the Violent Crime Control and Law Enforcement Act of 1994, the federal government has the power to investigate and take legal action against police departments that repeatedly use practices that violate individuals' constitutional rights.[264] Through this statute, the Attorney General can investigate law enforcement practices in the offending jurisdiction, and may pursue "equitable and declaratory relief," via court order or consent decree.[265] Often, police departments avoid litigation in favor of consent decrees, which require the department to commit to specific practices, such as training, for a set period of time to reform the department.[266] In the event that a police department fails to comply with the state licensing body's requirements, the entity should have the power to refer the police department to the DOJ for investigation.[267]

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& Rappaport, *supra* note 243, at 1682. A national index of decertified officers could help to mitigate this problem, but only if it is sufficiently complete. *Id.* at 1688.

263. *See* Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 STAN. J. C.R. & C.L. 137, 141–42, 142 n.31 (2019) (describing the role the federal government can play in issuing consent decrees).

264. *Id.*; *see also* 34 U.S.C. § 12601 (2018).

265. *See* Hardaway, *supra* note 263, at 153 (quoting 34 U.S.C. § 12601).

266. *Id.* For example, after the DOJ filed a civil lawsuit against the LAPD stating that the LAPD was "engaging in a pattern or practice of excessive force, false arrests and unreasonable searches and seizures" in 2000, the LAPD entered into a consent decree to avoid going to trial. *Civil Rights Consent Decree*, L.A. POLICE DEP'T, http://www.lapdonline.org/search_results/content_basic_view/928 [https://perma.cc/ZP6E-6BVZ] (last visited Mar. 8, 2020). The consent decree included a number of different provisions, including "management and supervisory measures to promote Civil Rights Integrity; Critical incident procedures, documen–tation, investigation and review; Management of Gang Units; Management of Confidential Informants; Program development for response to persons with mental illness; Training" and more. *Id.* Furthermore, after a judge approves a consent decree, he or she will appoint an independent supervisor to ensure the department abides by the rules, which provides needed accountability. *See* Ian Millhiser, *Trump's Justice Department Has a Powerful Tool to Fight Police Abuse. It Refuses to Use it.*, VOX (June 30, 2020, 5:00 AM), https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse [https://perma.cc/2K9H-U2C3].

267. Unfortunately, the Trump Administration has undercut the Violent Crime Control and Law Enforcement Act. *See* Ian Millhiser, *supra* note 266 (summarizing the Trump Administration's refusal to utilize consent decrees

Different administrations have pursued consent decrees with varying levels of enthusiasm.[268] The Obama Administration took an aggressive stance, investigating twenty-five police departments.[269] For example, following Michael Brown's death at the hands of police in Ferguson, Missouri in 2014, the DOJ entered into a consent decree with the City of Ferguson to implement significant changes in the Ferguson Police Department's policies.[270] Following an investigation of the police department, the DOJ identified "a pattern or practice of unlawful conduct within the [Ferguson Police Department] in violation of the First, Fourth, and Fourteenth Amendments," including the use of excessive force, discrimination against Black Americans, and more.[271] To avoid litigation, in 2016 the City of Ferguson agreed to a 121-page consent decree that included a variety of requirements, including: strengthening relations between law enforcement and the community, implementing new training, requiring "bias-free policing," reforming use of force reporting, and more.[272] Since 2016, Ferguson has made "substantial progress" in implementing the consent decree's requirements, including hiring a "consent decree coordinator."[273]

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to reform policing). During the Obama Administration, the DOJ obtained fourteen consent decrees to reform police departments; the Trump Administration has pursued zero. *Id.* Although few police departments may ever face a consent decree, these agreements "set a tone, established best practices and put police leaders on notice." Shaila Dewan & Mike Baker, *Rage and Promises Followed Ferguson but Little Changed*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/13/us/unrest-ferguson-police-reform.html [https://perma.cc/KQ9X-3R7P]. As former DOJ official Christy Lopez stated: "There is something irreplaceable about the leadership of the federal government and Department of Justice." *Id.*

268. *See* Millhiser, *supra* note 266 (comparing the Obama Administration's aggressive use of consent decrees to reign in rogue police departments with the Trump Administration's refusal to hold police departments accountable).

269. Brianna Hathaway, *A Necessary Expansion of State Power: A "Pattern or Practice" of Failed Accountability*, 44 N.Y.U. REV. L. & SOC. CHANGE 61, 87 (2019).

270. *See* Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 857–67 (2016) (summarizing Michael Brown's death, the DOJ's investigation, and the resulting consent decree).

271. *Id.* at 861–62 (quoting U.S. DOJ, *supra* note 81, at 1); *see also* Consent Decree at 2, United States v. City of Ferguson, 4:16-cv-00180-CDP (E.D. Mo. Apr. 19, 2016) (noting that the DOJ's report found significant misconduct).

272. *See generally* Consent Decree, *supra* note 271 (summarizing the variety of requirements under the DOJ's consent decree).

273. Valerie Schremp Hahn, *Work Continues on Ferguson Consent Decree, Despite Pandemic and Protests*, ST. LOUIS POST-DISPATCH (June 5,

In contrast to the Obama Administration's commitment to bringing actions to reform police departments across the United States, the Trump Administration has refused to use its power under the Violent Crime Control and Law Enforcement Act of 1994 to reform police departments.[274] The federal government's resistance to investigating police department misconduct is yet another example of the failure to deter police.[275] Hopefully the Biden administration will reflect the Obama Administration's commitment to reform, rather than the Trump Administration's abdication of duty.[276]

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2020), https://www.stltoday.com/news/local/crime-and-courts/work-continues-on-ferguson-consent-decree-despite-pandemic-and-protests/article_d09e3f59-77d1-5adb-8da2-eff720b6a016.html [https://perma.cc/A6GP-9WNR]. Other consent decrees, like Chicago's, have had strong results; in Chicago, incidents involving the use of force decreased from 2015 to 2019 and "shootings decreased by almost half." Dewan & Baker, *supra* note 267.

274. Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1005–06 (2020) (describing the Trump Administration's explicit statement that it would not pursue police reform under the federal statute). Notably, the commitment to pursuing consent decrees is largely a political ideological split—Democratic administrations are responsible for more than 70% of all law enforcement investigations under the Violent Crime Control and Law Enforcement Act of 1994. *See* Hathaway, *supra* note 269, at 87–88.

275. *See* Jeremy Stahl, *How the Trump Administration Undid Obama's Response to Ferguson*, SLATE (June 2, 2020, 6:17 PM), https://slate.com/news-and-politics/2020/06/trump-doj-obama-policing-reform.html [https://perma.cc/Z4L7-H5DH] (arguing that the Trump Administration's refusal to investigate police departments encourages bad police behavior and fails to deter misconduct). Not only has the Trump Administration refused to pursue consent decrees, but it also has rolled back other Obama Administration attempts to reign in police. *Id.* For example, the Trump Administration has reversed limits the Obama Administration placed on the sharing of military equipment with police departments. *Id.*

276. President Joseph R. Biden has indicated that his administration will have a renewed commitment to police accountability. *See The Biden Plan For Strengthening America's Commitment to Justice,* BIDEN HARRIS, https://joebiden.com/justice/ [https://perma.cc/4HQ6-LDCT] (last visited May 27, 2021). The Biden Administration has included the following in its plan to reform policing in the United States: (1) "[r]educing the number of incar–cerated individuals," particularly for drug-related crime; (2) re-committing the DOJ to addressing police issues with consent decrees; (3) "[i]nvest[ing] in public defenders' offices"; (4) "[r]einvigorat[ing] community-oriented policing"; and (5) "[e]xpand[ing] federal funding for mental health and substance use disorder services and research." *Id.*

### *B. The Role of the District Attorney in Deterring Police Misconduct*

District attorneys can play a significant role in deterring the police and implementing change in communities.[277] Unfortunately, the close relationship between prosecutor offices and law enforcement may discourage prosecutors from bringing criminal charges against police officers.[278]

Although prosecutors are unlikely to bring criminal charges against police officers, today progressive prosecutors are implementing reforms that cut back police officers' discretion and reduce interactions with the public.[279] The goal of these practitioners is to use the power inherent in the role of the prosecutor to dismantle mass incarceration and reform the criminal justice system.[280] A number of cities have elected progressive prosecutors, including Boston, Chicago, Philadelphia, and San Francisco.[281] The effect of these prosecutors could be widespread—

277. *See generally* Sklansky, *supra* note 187 (offering guidelines for newly elected prosecutors aiming to make positive change in their communities).

278. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 2, 4–5 (2d ed. 2013) (explaining conflicts of interest in prosecutions of police officers). Appointing a special prosecutor may ensure that the prosecution is fair, as local prosecutors' offices typically have a close working relationship with the local law enforcement office. Levine, *supra* note 104, at 1472. Notably, Massachusetts proposed a new measure which would allow the Attorney General's office to handle criminal cases of misconduct. John R. Ellement & Matt Stout, *In Major Shift, Mass. AG's Office Would Get New Role in Police Deadly Force Investigations Under House Reform Bill*, BOS. GLOBE (July 20, 2020, 6:50 PM), https://www.bostonglobe.com/2020/07/20/metro/major-shift-attorney-generals-office-would-get-new-role-police-deadly-force-investigations-under-house-reform-bill/ [https://perma.cc/HPK3-E67V]. The goal of this legislation is to take the role of investigator out of district attorney offices, which frequently have close ties with the officers who are under investigation. *Id.*

279. Kristy Parker, *Prosecute the Police*, ATLANTIC (June 13, 2020), https://www.theatlantic.com/ideas/archive/2020/06/prosecutors-need-to-do-their-part/612997/ [https://perma.cc/UF24-6E9G]. Although there are a number of definitions for "progressive prosecutors," the term typically refers to prosecutors that aim to implement practices to decrease the punitive nature of the U.S. criminal justice system. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1540–41 (2020). In fact, both Democrats and Republicans have been labeled "progressive prosecutors" in the past. *Id.*

280. Hessick & Morse, *supra* note 279, at 1541–42. The prosecutorial reform movement has aimed to (1) find appropriate, progressive individuals to challenge incumbent prosecutors in state district attorney elections, and (2) ensure donations are used to support progressive district attorney candidates. *Id.* at 1542. The progressive prosecutor movement represents a shift from "tough-on-crime" rhetoric and rethinks the role prosecutors should play in the criminal justice system. *Id.* at 1542–43.

281. *Id.* at 1542.

if 150 of the biggest prosecutor offices in the United States elected progressive prosecutors, reforms would reach and impact more than 50% of the U.S. population.[282] District attorneys can decriminalize or choose not to prosecute certain types of conduct, which significantly cuts back on police presence in communities and police interactions with citizens.[283] Often prosecutors decriminalize conduct considered a part of "Broken Windows policing," a style of policing that led to "the criminalization and over-policing of communities of color" by crimin–alizing public alcohol consumption, jaywalking, spitting, loitering, trespassing, possession of marijuana, and other crimes that do not put the public in danger.[284] By decriminalizing these behaviors, prosecutors can minimize the presence of police in minority communities and decrease police discretion to arrest or stop and frisk on suspicion of minor crimes or nonviolent behavior.[285]

Following his election to Philadelphia District Attorney in 2017, former civil rights attorney Larry Krasner released a memo outlining a number of low-level offenses that his office would no longer prosecute.[286] The memo requires the prosecutors to (1) "decline certain charges," such as marijuana possession or low-level prostitution, (2) reduce the level of charges from felony to misdemeanor in retail theft cases, (3) "divert" cases more frequently, (4) grow "re-entry programs" in Philadelphia, (5) lessen requirements in plea agreements, and (6) state the pros and cons of the suggested sentence for crimes at sentencing.[287]

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282. *Id.* at 1547.

283. *See* Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 752 (2018) (describing prosecutors' discretion to decriminalize, or not enforce, certain crimes).

284. *Solutions: End Broken Windows Policing*, CAMPAIGN ZERO, https://www.joincampaignzero.org/solutions#solutionsoverview [https://perma.cc/8H5Z-E6Y8] (last visited Feb. 28, 2021). Notably, in 2018, just 5% of arrests in the United States were related to violent crimes, suggesting a significant volume of arrests are for conduct related to Broken Windows policing. *Id.*

285. *See id.* (arguing that decriminalization of petty crime will reduce police presence in minority communities).

286. *See* Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, INTERCEPT (Mar. 20, 2018, 3:59 PM), https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/ [https://perma.cc/W4UW-SEL4] (summarizing District Attorney Larry Krasner's progressive policies aimed at decreasing mass incarceration and "bring[ing] balance back to sentencing.").

287. Memorandum from Dist. Att'y Larry Krasner to Phila. Assistant Dist. Att'ys (Feb. 15, 2018) [hereinafter Krasner Memorandum]. Notably, District Attorney Rachael Rollins released a similar memorandum to the Suffolk County, Massachusetts District Attorneys' Office in 2019. *See generally* Memorandum from Dist. Att'y Rachael Rollins to Suffolk Cnty. Assistant Dist. Att'ys (Mar. 25, 2019) [hereinafter Rollins Memorandum]

In addition, the memo requires "supervisory approval" when an assistant district attorney wants to bring a charge that is not aligned with the policies.[288]

These practices serve two important purposes. First, as stated in District Attorney Krasner's memo, these reforms aim to lessen mass incarceration, which disproportionately has affected communities of color.[289] Second, and arguably even more important, these policies remove prosecutorial and police discretion.[290] Today, prosecutors hold significant discretion when determining what charges to bring and whom to bring charges against.[291] Thus, prosecutors can eliminate classes of crimes that disproportionately impact certain communities, which means police officers will be deterred from pursuing these types of crimes and lack the discretion to determine whom to charge.[292] As a result of the decriminalization of certain crimes, police officers have less reason to stop individuals, decreasing the opportunities for misconduct, and building trust in law enforcement.[293]

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(documenting over 60 pages of data and policy changes). Like District Attorney Krasner, District Attorney Rollins aimed to stop charging certain crimes and reform sentencing. *Id.* In addition, her memo emphasized the importance of cash bail reform and mitigating harsh immigration consequences for low-level crimes. *Id.*

288. Krasner Memorandum, *supra* note 287. "[S]upervisory approval" requires assistant district attorneys to receive approval from their supervisor and subsequently, the supervisor must receive approval from either District Attorney Krasner or First Assistants to the District Attorney. *Id.*

289. *See id.* ("These policies are an effort to end mass incarceration and bring balance back to sentencing."). *See generally* ALEXANDER, *supra* note 3 (providing a detailed overview of the disproportionate impact mass incar–ceration has had on communities of color, and in particular, on Black communities).

290. *See infra* notes 291–293 and accompanying text.

291. *See* Olwyn Conway, *"How Can I Reconcile With You When Your Foot Is on My Neck?": The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. STATE L. REV. 1349, 1392 (2018) ("The American prosecutor today has the power to shift the decision-making framework of the criminal system from retributive to restorative without a single legislative act.").

292. *See id.* at 1393–94 (describing the impact district attorneys can have on what charges police investigate and what charges assistant district attorneys can bring to trial); *see also* Rollins Memorandum, *supra* note 287, at 26 (noting that the crimes decriminalized under District Attorney Rollins are "commonly driven by poverty, substance use disorder, mental health issues, trauma histories, housing or food insecurity, and other social problems rather than specific malicious intent").

293. *See* Obama, *supra* note 219, at 843–44 (suggesting that certain crimes criminalize nothing but poverty, and "destroy trust, deprive our fellow Americans of their fundamental rights, and have too often led to a two-tiered system in which the poor are not accorded the equal protection

## CONCLUSION

Systemic racism, which permeates every aspect of U.S. society, is engrained in law enforcement. This systemic racism has fostered distrust of law enforcement in Black communities. Although additional oversight of police officers through strong, meaningful licensing and de-licensing statutes will not alone solve systemic racism in police departments, it is a step towards rebuilding trust in law enforcement. Implementing neutral review processes that grant considerable power to oversight bodies will help to increase communities' trust in law enforcement by holding officers accountable for misconduct and ensuring unbiased review of bad acts. As mentioned, there are more than 18,000 police forces in the United States.[294] As a result, it will take a commitment by local, state, and federal government to take on the police unions to provide meaningful oversight of police forces without which reforms will be impossible.[295]

The various horrendous incidents of police overreaching and the expansion of the BLM movement has made the time for meaningful reform at least a possibility. Even the federal government under the Trump Administration, made up of mostly law enforcement profess–ionals, has recognized the importance of neutral independent oversight to restore credibility of police forces.[296] Ultimately, meaningful police

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under the laws to which they are entitled under the U.S. Constitution"). President Obama highlighted the DOJ's findings in Ferguson. *Id.* at 844. There, crime was seen as a way to increase city funding: "The city used its justice system as a cash register . . . ." *Id.* Furthermore, the majority of fines were levied against Black members of the Ferguson community. *Id.*

294. Bernstein, *supra* note 48.

295. *See* The Editorial Board, *Police Reform: A Roadmap For the Future,* BOS. GLOBE (Dec. 31, 2020, 4:00 AM), https://www.bostonglobe.com/2020/12/31/opinion/police-reform-roadmap-future [https://perma.cc/SG68-MTMH] (suggesting that massive reforms are needed to overhaul police departments); *see also* Sarah A. Seo & Daniel Richman, *Police Reform Won't Work Unless it Involves Federal and State Governments*, WASH. POST (July 7, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/07/07/police-reform-wont-work-unless-it-involves-federal-state-governments/ [https://perma.cc/DXX8-89WD] ("[R]eal accountability [for police officers] also requires action by the states and the federal govern–ment."). Because U.S. policing has relied heavily on various individual departments, "the federal government has allowed localities to police without sufficient oversight, with devastating consequences for communities of color." *Id.* To improve the current status of policing, there must be more accountability, from both the state and the federal government. *Id.*

296. *See* U.S. DOJ, *supra* note 239, at 14 (calling upon the states to "enact legislation that requires law enforcement agencies to have an independent, external agency that has met minimum training and accreditation standards," which can investigate misconduct of police officers).

reform that deters police requires more than a simple ban on certain practices or new training regimens. Since George Floyd's tragic death and other, more recent examples of police brutality, such as Jacob Blake's paralysis at the hands of police, there have been some reforms of police practices, however, accountability measures are still lacking.[297] Hopefully, future policies will prioritize reforms, like strong licensing laws, that hold officers accountable and help to rebuild the centuries-long distrust of law enforcement in Black communities. New legislation and initiatives should embrace a larger commitment to listening to Black individuals and communities, as there is "not a magic bullet to reverse the pain and injustice endured by communities of color and those disproportionately affected by law enforcement."[298] No one reform can cure systemic racism, but at the very least, it is critical to permanently remove bad officers from the system and commit to doing the work to improve police accountability.

297. Ian Prasad Philbrick & Sanam Yar, *What Has Changed Since George Floyd*, N.Y. TIMES: MORNING NEWSL. (Aug. 3, 2020), https://messaging-custom-newsletters.nytimes.com/template/oakv2?campaign_id=9&emc=edit_nn_20200803&instance_id=20930&nl=the-morning&productCode=NN%C2%AEi_id=11106884&segment_id=35086&te=1&uri=nyt%3A%2F%2Fnewsletter%2Ffb23b07d-d4cc-5dac-9c4c-564ed1e5ce86&user_id=1fd6c1b3f52f12c9c95cac92e46c0dea [https://perma.cc/7TQB-B285]; Phil Helsel & Tim Fitzsimons, *Jacob Blake Describes the Struggle With Police That Left Him Partially Paralyzed*, NBC NEWS (Jan. 13, 2021, 11:15 PM), https://www.nbcnews.com/news/us-news/jacob-blake-thought-he-had-told-his-children-he-loved-n1254217 [https://perma.cc/AQP5-ABU9]. From March 2020 to August 2020, 31 of the 100 biggest cities in the United States have introduced new restrictions for the use of chokeholds, increasing the number of cities restricting the use of chokeholds to 62. Philbrick & Yar, *supra*. In addition, prior to the death of George Floyd, only 51 cities had policies that required police officers to intervene when another officer uses excessive force—in August 2020, 69 cities have this requirement. *Id.* These policies are a step forward, however, accountability systems must be implemented. *See id.* As one activist stated, "One of the key challenges moving forward will be, now that these standards have been raised, how are we making sure officers who violate them are held accountable?" *Id.*

298. The Editorial Board, *supra* note 295 (quoting Massachusetts Senate President Karen E. Spilka). For example, Massachusetts passed police accountability legislation in late 2020; although it is certainly a step in the right direction, the legislation's success relies heavily on implementation of different commissions and initiatives, and will require constant monitoring to ensure success. *See id.* (describing the different commissions and programs included the Massachusetts police accountability legislation and underscoring the importance of committing whole-heartedly to the legislation's implementation).

## Post Script

May 25, 2021 marked the anniversary of the death of George Floyd under the knee of Derek Chauvin. Immediately after his death there was greater awareness of the plight of Black males at the hands of the police and increased support for the Black Lives Matter movement. The hope resulting from this increased awareness, as indicated in this Article, was that meaningful reforms would be realized.

There have been a number of positive developments. Derek Chauvin was convicted by a jury in Minneapolis of all the charges against him, including second degree murder. At his trial the blue wall of silence showed some cracks as the police chief and other supervisory officers testified against Chauvin. The United States Justice Department, under the Biden administration, has shown a renewed interest in overseeing various police departments, including those in Minneapolis and New Orleans.

The major premise of this article —addressing the few rotten apples within a police force so as to restore the image of police— especially in minority communities, has not been accomplished. Keep in mind that since 2001, Chauvin's first year on the police force, he has had 18 citizen complaints—including some that involved excessive violence. Despite this record on the day of the murder of George Floyd, Chauvin was assigned to train the new officers with him. The Federal George Floyd Justice in Policing Act of 2021 passed the United States House on March 3, 2021 but has been languishing in the Senate. This Act sought to address physical excesses (chokeholds), qualified immunity stan–dards, as well as greater transparency through a national data base. Legislators in the states have shown a reluctance to address the bad apples. Ultimately, federal and state legislators are stalling reforms that are so desperately needed to begin rectifying the disproportionate negative impact Black communities and individuals face at the hands of the police.