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Importance of State Law in Police Reform

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## IMPORTANCE OF STATE LAW IN POLICE REFORM

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### INTRODUCTION

Citizens, judges, and scholars alike concerned about police misconduct traditionally believe that the federal, rather than state or local, government is best able to bring about police reform. Generations of law students have been taught that virtually the only way effectively to control the police is by excluding evidence in the possession of a criminal defendant that was obtained in an unconstitutional manner; alternative remedies have been deemed ineffective in United States Supreme Court opinions.<sup>1</sup> Omitted almost entirely from the discussion in Supreme Court opinions and criminal procedure courses is the role of state law in police reform efforts.

In recent Roberts Court opinions, four justices have indicated that they are opposed to excluding evidence even where it is obtained in violation of the Fourth Amendment because the costs of letting a guilty defendant go free are too high and there are other remedies that can protect Fourth Amendment interests.<sup>2</sup> They note that times have changed since the 1961 case of *Mapp v.*

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1. *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting) (“For there is but one alternative to the rule of exclusion. That is no sanction at all.”); *Mapp v. Ohio*, 367 U.S. 643, 652–53 (1961) (“The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*.”); Rachel A. Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 33 (2012) (“Here is the bad news: with respect to deterring police misconduct, federal remedies are almost as good as they are ever going to get. The remedies probably reduce police misconduct some now, and they can be tailored to induce somewhat more reform. However, legal, structural, and practical limits on the capacity of existing federal remedies to deter misconduct ensure that even with improvements they can be only marginally more effective.”).

2. *E.g.*, *Herring v. United States*, 555 U.S. 135, 147–48 (2009) (holding that the exclusionary rule is prudential rather than constitutional and the cost of letting a criminal go free should be weighed against the deterrent effect); *Davis v. United States*, 131 S. Ct. 2419, 2423–24 (2011) (“Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted [in violation of the Fourth Amendment] in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”).

*Ohio*, where the Court first imposed the exclusionary rule on the states for Fourth Amendment violations by state and local police officers.<sup>3</sup> At the time of *Mapp*, cities weren't civilly liable for misconduct by police departments under the Civil Rights Act, 42 U.S.C. § 1983, and attorneys representing victims of that misconduct weren't able to recover attorneys fees until the enactment of 42 U.S.C. § 1988 in 1976. Those justices also point to effective administrative remedies at the local police department level, such as civilian review boards and better training of officers than existed at the time of *Mapp*.<sup>4</sup> This Article will focus on state law, both its weaknesses as well as its potential to be a major source for police reform efforts, and suggest that courses in criminal procedure should include materials on state law remedies. After discussing the limitations of federal law in bringing about reform, I will describe the shortcomings of state law, point out current state laws that have been effective in addressing police misconduct, analyze the new laws enacted since Michael Brown's death in Ferguson in August 2014 and, finally, suggest ways that the federal government can work with the states to improve police accountability.

## I. LIMITATIONS OF FEDERAL REMEDIES

### A. *The Exclusionary Rule*

The current members of the Supreme Court are split 4–4 on the efficacy of the exclusionary rule (Justice Kennedy, as is often the case, is the swing justice).<sup>5</sup> The Court has clearly weakened the application of the rule in a great number of cases since the heyday of the rule during the Warren Court era in the 1960s (e.g. in *United States v. Leon*, the Court adopted the good faith exception, which permits the admission of evidence seized in violation of the Fourth Amendment<sup>6</sup>). But the purpose of this Article is not to review that

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3. *E.g.*, *Davis*, 131 S. Ct. at 2440 (Breyer, J., dissenting) (noting a “trend” and a change “which may already be underway”).

4. The Court cited the work of Professor Sam Walker who disagreed with the Court's conclusion that local remedies supplanted the need for the exclusionary rule. *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (accepting that it is proper to assume that police misconduct can be “dealt with appropriately” by local authorities, given “increasing professionalism of police forces” and their improved “internal police discipline” (quoting *United States v. Payner*, 447 U.S. 727, 733–34 (1980) and SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990 51 (1993))). However, Professor Walker maintains that Justice Scalia “twisted [Walker's] main argument to reach a conclusion the exact opposite of what I spelled out in this and other studies.” Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES (June 25, 2006), <http://articles.latimes.com/2006/jun/25/opinion/oe-walker25> [<http://perma.cc/FHF4-UQ87>].

5. *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) (“Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.”).

6. *United States v. Leon*, 468 U.S. 897, 905–06 (1984).

history but to make the point that even if the rule were applied vigorously, there is no empirical evidence to support the proposition that an officer who has been found to have violated the rule, resulting in dismissal of the charges against the defendant in the absence of other evidence, is disciplined for the violation by his department. And, even assuming the officer is fired for violating the Constitution or for other reasons, in many jurisdictions, the collective bargaining agreements provide for arbitration of the issue, and it is quite common for the officer to be put back on the job, leading to back pay and reinstatement.<sup>7</sup> And, even if the officer is terminated, and the termination is upheld by the arbitrator or civil service commission, the officer would be free to be hired by another department. Only state law could prevent the subsequent employment.

*B. Damage Suits Brought Pursuant to 42 U.S.C. § 1983*

Federal civil damages suits under § 1983 or equivalent state court suits brought against police officers,<sup>8</sup> their departments, and municipalities, which result in settlements in favor of the victim of the unconstitutional conduct, “[do not] seem to be a very effective tool for widespread reform.”<sup>9</sup> In some cities, the payouts are enormous.<sup>10</sup> Again, there is little empirical evidence that such judgments or settlements result in officer discipline. And, even if the officer is terminated, another department can rehire him, unless state law has a process for preventing that from occurring.

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7. Edward Mason & Tom Mashberg, *Court Orders Boston Police to Reinstated Fired Officer*, BOS. GLOBE (July 22, 2015), <http://www.bostonglobe.com/metro/2015/07/21/court-orders-bpd-reinstated-officer/5nFsG6xFYZzcJ3WiT8yzo/story.html> [<http://perma.cc/7C4A-TE6D>]; see also Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 559 (2001). Also, provisions in many police employment contracts prohibit public access to investigations into police misconduct or wrongdoing. George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016), <http://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> [<http://perma.cc/8FG7-QAFA>].

8. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014). Joanna Schwartz has shown that police officers rarely personally pay those judgments or settlements. *Id.*

9. Henry Gass, *The Freddie Gray \$6.4 Million Settlement Is Big, but Will It Send Right Message?*, CHRISTIAN SCI. MONITOR (Sept. 9, 2015), <http://www.csmonitor.com/USA/Justice/2015/0909/The-Freddie-Gray-6.4-million-settlement-is-big-but-will-it-send-right-message> [<http://perma.cc/79T8-E5YY>] (quoting Professor Kami Chavis-Simmons).

10. Amanda Bronstad, *Plaintiffs Bar Goes After Police Brutality Cases*, NAT’L L.J. (Aug. 12, 2015), <http://www.nationallawjournal.com/id=1202734621413/Plaintiffs-Bar-Goes-After-Police-Brutality-Cases> [<http://perma.cc/748Q-U4VC>] (“‘It’s one of the hot practices of law right now you see being reported and, because of that, you’ll see a lot of attorneys jump into it,’ said Daryl Washington, managing partner of The Law Offices of Daryl K. Washington in Dallas, who spoke about police brutality cases at the National Bar Association’s annual conference last month.”).

### C. Criminal Prosecutions

The dissenters in *Wolf* and the majority in *Mapp* were skeptical of criminal prosecution of police by states, noting that prosecutors must rely on the local police to investigate criminal cases.<sup>11</sup> There was little discussion of federal prosecution of state and local police officers because, at the time of the *Mapp* decision in 1961, federal prosecution of police officers by the Civil Rights Division was in its infancy—the Division was set up in 1957, and, between 1958 and 1960, there were only four convictions of police officers.<sup>12</sup> The number of prosecutions and convictions under 18 U.S.C. §§ 241 and 242 has risen dramatically since that time, but the total is still small: In Fiscal Year 2001, there were a total of approximately 6,000 complaints against law enforcement officers, there were ninety-seven prosecutions brought against law enforcement officers in that year, and, of the sixty-nine officers whose cases were resolved in that year, there were forty-two guilty pleas, fourteen convictions, and thirteen acquittals.<sup>13</sup> And, in the most recent report for cases brought in 2011,<sup>14</sup> out of 10,000 complaints, only 224 officers were charged.<sup>15</sup> As stated by one commentator, “prosecutions against police officers are too rare to deter misconduct.”<sup>16</sup> Unless the violence is gratuitous—for example,

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11. *Wolf v. Colorado*, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 670 (1961) (Douglas, J., concurring). State criminal prosecution of police officers will be discussed *infra* Part II(B).

12. Alexis Agathocleous & Heather Ward, *Prosecuting Police Misconduct: Reflections on the Role of the U.S. Civil Rights Division*, VERA INST. JUST. (1998), <http://www.vera.org/sites/default/files/resources/downloads/misconduct.pdf> [<http://perma.cc/Q7PL-K3NN>]. Consequently, “the Division brought few prosecutions for police violence against civil rights volunteers during voter registration drives, sit-ins, and protests.” *Long Road to Justice: The Civil Rights Division at 50*, LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND (Sept. 2007), <http://www.judiciary.senate.gov/imo/media/doc/07-09-05HendersonTestimony.pdf> [<http://perma.cc/3VVK-C67S>]; see Jay Stewart, *NAACP v. The Attorney General: Black Community Struggle Against Police Violence 1959–68*, 9 HOWARD SCROLL: SOC. JUST. L. REV. 29 (2006).

13. The acquittal rate for law enforcement officers is in stark contrast to other non-law enforcement officer defendants. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, SUMMARY OF CRIMINAL SECTION ACTIVITIES (FY1985–FY2001) (last updated Sept. 30, 2001), included in a facsimile from Albert N. Moskowitz, Chief, Criminal Section, Civil Rights Div., U.S. Dep’t of Justice, to Roger Goldman, Professor of Law, St. Louis Univ. (Mar. 4, 2002) (on file with author); Roger L. Goldman, *State Revocation of Law Enforcement Officers’ Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 126 n.26, 127 (2003).

14. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, FY 2014 PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION 20–21 (2014), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/11/crt-justification.pdf> [<http://perma.cc/2WBL-XTQ4>].

15. See *id.* The report did not state how many officers were convicted, pled guilty, or were acquitted.

16. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009).

the victim is handcuffed or unconscious, and then he's beaten or shot—convictions can be obtained; but, if there is any resistance, flight, or movement towards the officer, juries will rarely convict. That conclusion is in accord with one author's assessment that only the most egregious behavior by an officer is reached by federal criminal prosecutions.<sup>17</sup>

*D. Pattern or Practice Suits Under 42 U.S.C. § 14141*

42 U.S.C. § 14141 makes it unlawful for state and local law enforcement officers to engage in a pattern or practice of conduct that deprives persons of rights protected by the Constitution or laws of the United States. The law was enacted in 1994 after the videotaped beating of Rodney King by several Los Angeles Police Department (LAPD) police officers, the state court acquittals of those officers, and the subsequent riots in Los Angeles.<sup>18</sup> It gives the Department of Justice (DOJ)—but not individuals—the power to seek equitable and declaratory relief to eliminate the pattern or practice. The law is enforced by the DOJ's Special Litigation Section of the Civil Rights Division.<sup>19</sup>

According to a 2014 law journal article on § 14141, there have been thirty-eight formal investigations by the DOJ, nineteen negotiated settlements, and nine monitors appointed.<sup>20</sup> A more recent source—perhaps including informal investigations—has the total at seventy investigations: twenty-four that cleared the law enforcement agency, thirty-five producing settlement agreements, and one advisory letter.<sup>21</sup> Seven have settlements currently being monitored.<sup>22</sup> Only one law enforcement agency has gone to trial and won.<sup>23</sup> Although that is progress compared to the pre-1994 years when the DOJ had no such authority, there are a total of 18,000 state and local law enforcement agencies in the country,<sup>24</sup> and “the DOJ has only been able to investigate around three law

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17. Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999).

18. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3207 (2014).

19. *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUST., <http://www.justice.gov/crt/conduct-law-enforcement-agencies> [<http://perma.cc/ET9K-NTCY>] (last visited Sept. 13, 2015).

20. Rushin, *supra* note 18, at 3226.

21. Stephen Deere, *The Cost of Change*, ST. LOUIS POST-DISPATCH, Feb. 1, 2016, at A1, [http://www.stltoday.com/news/local/crime-and-courts/ferguson-residents-weigh-cost-of-reform/article\\_c011c5b9-0644-535a-b3f6-e861f119a868.html](http://www.stltoday.com/news/local/crime-and-courts/ferguson-residents-weigh-cost-of-reform/article_c011c5b9-0644-535a-b3f6-e861f119a868.html) [<http://perma.cc/E5X5-J69T>].

22. *Id.*

23. *Id.*

24. See *Uniform Crime Reports*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/ucr> [<http://perma.cc/9AQV-GMDP>] (last visited Feb. 7, 2016).

enforcement agencies each year under § 14141—or less than 0.02% of the nation’s police departments.”<sup>25</sup>

In the wake of Ferguson, the DOJ has conducted two investigations in St. Louis County: one involving the Ferguson Police Department,<sup>26</sup> and the other involving the St. Louis County Family Court.<sup>27</sup> In the Ferguson case, the DOJ has proposed a consent decree.<sup>28</sup> The Ferguson City Council refused to accept the consent decree as written, offering several modifications: none of the police rules would be enforceable if Ferguson contracted services elsewhere, removed the required police salary increases, and extended effect dates for various provisions.<sup>29</sup> The fact that the reforms and monitoring provisions of the original decree would cost Ferguson nearly four million dollars the first year was the primary justification for not accepting it.<sup>30</sup> The DOJ quickly responded with a press release indicating that cost is no reason to continue failure to comply with constitutional requirements.<sup>31</sup> Since the existing decree was the result of months of careful negotiations, Ferguson’s unilateral modifications that would delay constitutional policing were unacceptable.<sup>32</sup> Within the day, the DOJ filed its lawsuit against Ferguson.<sup>33</sup>

It is thus understandable why Laurie Robinson, the co-chair of President Obama’s Task Force on 21st Century Policing (“Task Force”), stated that the primary responsibility for police reform cannot come from federal edicts:

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25. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 123 (2016).

26. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf) [<http://perma.cc/T7RG-C9SH>].

27. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT, ST. LOUIS, MISSOURI (July 31, 2015), [http://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis\\_findings\\_7-31-15.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf) [<http://perma.cc/6C9X-8TCX>].

28. Deere, *supra* note 21; Consent Decree, *United States v. City of Ferguson*, <http://assets.documentcloud.org/documents/2699153/Negotiated-Ferguson-Draft-Consent-Decree.pdf> [<http://perma.cc/9J85-E3MB>].

29. Stephen Deere & Kristen Taketa, *Ferguson Sends Decree Back*, ST. LOUIS POST-DISPATCH, Feb. 10, 2016, at A1, [http://www.stltoday.com/news/national/ferguson-council-s-vote-to-turn-back-consent-decree-could/article\\_b370242d-8ce5-5301-8706-0dd3f79e08b5.html](http://www.stltoday.com/news/national/ferguson-council-s-vote-to-turn-back-consent-decree-could/article_b370242d-8ce5-5301-8706-0dd3f79e08b5.html) [<http://perma.cc/7VF3-MVW6>].

30. *Id.*

31. Press Release, Dep’t of Justice, Statement from Head of the Civil Rights Division Vanita Gupta Regarding Ferguson, Missouri, City Council Vote on Proposed Consent Decree (Feb. 10, 2016), <http://www.justice.gov/opa/pr/statement-head-civil-rights-division-vanita-gupta-regarding-ferguson-missouri-city-council> [<http://perma.cc/NG8V-F57H>].

32. *Id.*

33. Stephen Deere, *U.S. Sues Ferguson*, ST. LOUIS POST-DISPATCH, Feb. 11, 2016, at A1, [http://www.stltoday.com/news/local/govt-and-politics/departments-of-justice-sues-ferguson-over-police-practices/article\\_8dc60c25-809a-51dc-865e-aff2c7947710.html](http://www.stltoday.com/news/local/govt-and-politics/departments-of-justice-sues-ferguson-over-police-practices/article_8dc60c25-809a-51dc-865e-aff2c7947710.html) [<http://perma.cc/R7H9-EQKF>].

“[C]riminal justice officials should step forward and ‘own this problem. . . . All of this has to come, of course, from the bottom up—from state and local leaders.’”<sup>34</sup> Her co-chair, Charles Ramsey, commissioner of the Philadelphia Police Department, has stated that, given the differences among police departments, there is “no one-size-fits all” solution.<sup>35</sup>

## II. SHORTCOMINGS OF STATE LAW

After the Task Force completed its work, interviews with the two co-chairs revealed concerns about the qualifications of police officers.<sup>36</sup> Ramsey stated that many of the problems stem from basic practices like hiring and training, noting that police hiring efforts typically display videos of SWAT teams and police helicopter deployments to applicants: “Who is going to apply?”<sup>37</sup> Robinson observed that the Task Force spent little time on hiring issues, and she recommended that “law enforcement training should include topics like ‘people and relationships,’ when in practice it tends to dwell on seemingly more practical items like ‘guns and cars.’”<sup>38</sup>

### A. *Employment Practices of Police Departments*

#### 1. Hiring Problems

Although it is generally assumed that police departments will not knowingly hire officers who have been fired or resigned under fire from other departments, there are many reasons why such officers are, in fact, hired.<sup>39</sup> One of the major reasons for the protests in Ferguson after the shooting of Michael Brown was the anger of residents of the ninety St. Louis County municipalities at the treatment by many of the fifty-seven St. Louis County

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34. *Ex-Assistant AG Urges Police to Adopt Task Force Ideas*, CRIME REP. (Aug. 4, 2015), <http://www.thecrimereport.org/news/crime-and-justice-news/2015-08-robinson-on-policing-leadership> [<http://perma.cc/AM8S-9M2L>].

35. Ted Gest, *Police Reform in U.S.: Some Progress, a Long Way to Go*, CRIME REP. (Aug. 19, 2015), <http://www.thecrimereport.org/news/articles/2015-08-whither-us-policing> [<http://perma.cc/AZR2-XV68>].

36. *Id.*

37. *Id.*

38. *Id.*

39. See Roger Goldman, *Rogue Cops Should Not Be Recycled from One Police Department to the Next*, GUARDIAN (May 20, 2015), <http://www.theguardian.com/commentisfree/2015/may/20/rogue-cops-should-not-be-recycled-from-one-police-department-to-the-next> [<http://perma.cc/7MB4-C2WL>]; Matt Sledge, *Ferguson Hired Officer With History of Allegedly Hitting Children*, HUFFINGTON POST (Aug. 19, 2014), [http://www.huffingtonpost.com/2014/08/19/ferguson-eddie-boyd\\_n\\_5682454.html](http://www.huffingtonpost.com/2014/08/19/ferguson-eddie-boyd_n_5682454.html) [<http://perma.cc/SEW6-9KE4>] (explaining the Ferguson Police Department hired an officer who had resigned from two other departments).



police departments.<sup>40</sup> As was noted in a report commissioned by the DOJ's Office of Community Oriented Policing Services (COPS), "The close proximity and fragmented nature of policing in the St. Louis region coupled with heavy enforcement by some municipalities in the region has created an environment of distrust and difficulty for the SLCPD [St. Louis County Police Department] and the community it serves."<sup>41</sup> The proposed Ferguson-DOJ consent decree has a provision directed at this concern.<sup>42</sup>

Some of these municipalities are impoverished and cannot afford to pay their police officers a decent wage.<sup>43</sup> Because these communities do not have the ability to raise sufficient funds to support city services through sales taxes (because there are few, if any, businesses in the community) or through real property taxes (because the value of the property is low), they are forced to raise revenue by making arrests for minor traffic violations, mostly from their own residents who have a limited ability to pay.<sup>44</sup> And, when they don't pay, the fines go up, and they are often arrested and sent to jail.<sup>45</sup> In one St. Louis

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40. See POLICE EXEC. RESEARCH FORUM, OVERCOMING THE CHALLENGES AND CREATING A REGIONAL APPROACH TO POLICING IN ST. LOUIS CITY AND COUNTY 16–17 (Apr. 30, 2015), <http://www.bettertogetherstl.com/wp-content/uploads/2015/04/PERF-Report-Overcoming-the-Challenges.pdf> [<http://perma.cc/B44X-6SUV>]. As of the time of this writing, there are fifty-seven police departments in St. Louis County (including the County's). "It used to be higher but the Norco Police Collaborative absorbed a few." E-mail from Dave Leipholtz, Dir. of Cmty. Based Studies, Better Together, to author (Feb. 12, 2016) (on file with author).

41. BLAKE NORTON, EDWIN E. HAMILTON, RICK BRAZIEL, DANIEL LINSKEY & JENNIFER ZEUNIK, CMTY. ORIENTED POLICING SERVS. (COPS), U.S. DEP'T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF THE ST. LOUIS COUNTY POLICE DEPARTMENT 20 (2015), <http://ric-zai-inc.com/Publications/cops-p316-pub.pdf> [<http://perma.cc/ZQW2-PM76>].

42. It would require the department to check with the state Peace Officer Standards and Training Commission (POST), and the National Decertification Index (NDI) before hiring an officer. Consent Decree, *supra* note 28, at 66–67.

43. POLICE EXEC. RESEARCH FORUM, *supra* note 40, at 45–46.

44. *Id.* at 33.

45. Jeremy Kohler, Jennifer S. Mann & Walker Moskop, *Warranted Fear*, ST. LOUIS POST-DISPATCH, Sept. 21, 2014, at A1, [http://www.stltoday.com/news/local/crime-and-courts/for-people-livi...t-around-st-louis/article\\_5135fe78-02f4-5ff2-8283-3b7c0b178afc.html](http://www.stltoday.com/news/local/crime-and-courts/for-people-livi...t-around-st-louis/article_5135fe78-02f4-5ff2-8283-3b7c0b178afc.html) [<http://perma.cc/3XKG-JFFL>]. In a recent case in Texas, Sandra Bland was arrested for not signaling when she changed lanes, was taken to jail, and was found dead in her cell from hanging a few days after the arrest. Abby Ohlheiser & Abby Phillip, "I Will Light You Up!": Texas Officer Threatened Sandra Bland With Taser During Traffic Stop, WASH. POST: MORNING MIX (July 22, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says/> [<http://perma.cc/6A65-MAD9>]. Although the officer was later indicted for perjury, Mark Berman, *Trooper Who Arrested Sandra Bland Indicted by Grand Jury on Perjury Charge, Will Be Fired*, WASH. POST: POST NATION (Jan. 6, 2016), <http://www.washingtonpost.com/news/post-nation/wp/2016/01/06/texas-grand-jury-indict-s-trooper-who-arrested-sandra-bland/> [<http://perma.cc/2TKV-L2K3>], the reason why indictment for excessive force in cases like these is so difficult is that the Supreme Court, in a five-to-four decision, has found full custodial arrest for even the most minor of traffic offenses not to be an

County municipality, Pine Lawn, sixty-nine percent of its revenue in 2014 came from court fees and fines.<sup>46</sup> The second highest rate was in Edmundson, where the average annual court fine was \$600 per resident.<sup>47</sup> This dependence on fines inevitably leads to arrest quotas for police. As the mayor of Edmundson wrote to members of the Edmundson Police Department a few months before the shooting of Michael Brown, “I wish to take this opportunity to remind you that the tickets you write do add to the revenue on which the P.D. budget is established and will directly affect pay adjustments at budget time.”<sup>48</sup> (Compare that to the unincorporated part of the county, patrolled by the St. Louis County Police Department, where the per capita fine collections for traffic fines and bond forfeiture is twenty-one dollars per resident.)<sup>49</sup> After the mayor’s letter, there were twice as many arrests by the Edmundson Police Department the next month.<sup>50</sup>

The hiring of police officers with questionable backgrounds has been a problem not only in St. Louis County but also nationally.<sup>51</sup>

Charles Graner, the only person court-martialed for misconduct at Abu Ghraib prison, had serious allegations of misconduct at his previous job as a corrections officer in Pennsylvania.<sup>52</sup>

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illegal seizure under the Fourth Amendment. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323–24 (2001) (holding the arrest of a motorist for a seatbelt infraction that was not punishable by jail, hauling her into the station, and requiring her young children to be picked up by a relative was a legal seizure).

46. Kim Bell & Walker Moskop, *Pine Lawn May Contract for Police Coverage*, ST. LOUIS POST-DISPATCH, Sept. 2, 2015, at A6, [http://www.stltoday.com/news/local/crime-and-courts/pine-lawn-may-contract-for-police-coverage/article\\_d7903f97-956e-5832-ab35-1c5fd69d5277.html](http://www.stltoday.com/news/local/crime-and-courts/pine-lawn-may-contract-for-police-coverage/article_d7903f97-956e-5832-ab35-1c5fd69d5277.html) [<http://perma.cc/T9PQ-CBG7>].

47. Campbell Robertson, Shaila Dewan & Matt Apuzzo, *Ferguson Became Symbol of an Ill Plaguing U.S.*, N.Y. TIMES, Mar. 8, 2015, at A1, <http://www.nytimes.com/2015/03/08/us/ferguson-became-symbol-but-bias-knows-no-border.html> [<http://perma.cc/2J6D-N8VK>].

48. Brandie Piper, *Mayor: Write More Tickets*, KSDK (Apr. 24, 2014), <http://www.ksdk.com/story/news/local/2014/04/24/edmundson-write-more-tickets-memo/8115569/> [<http://perma.cc/3F9Q-KDVG>].

49. ST. LOUIS POST-DISPATCH, MUNICIPAL COURT STATISTICS: COLLECTIONS, TRAFFIC CASES AND DISMISSALS (Mar. 14, 2015), <http://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/e/ba/ebaf6abd-0690-54d7-adbc-36dbd70ce011/5503c75f7e08a.pdf.pdf> [<http://perma.cc/QZS6-F7SR>]. The *St. Louis Post-Dispatch* compiled these statistics from Census data and information from the Missouri Office of State Courts Administrator for Fiscal Year 2014. *Id.*

50. Brandie Piper, *Edmundson Officers Write More Traffic Tickets*, KSDK (May 7, 2014), <http://www.ksdk.com/story/news/local/2014/05/07/edmundson-ticket-surge/8835243/> [<http://perma.cc/DNM5-BNJH>].

51. *E.g.*, Nomaan Merchant & Matt Sedensky, *AP: Broken System Lets Problem Officers Jump from Job to Job*, AP: THE BIG STORY (Nov. 3, 2015), <http://bigstory.ap.org/article/4e3d597c0b7849a1a59fb4ad90b1cb75/ap-broken-system-lets-problem-officers-jump-job-job> [<http://perma.cc/K6CZ-VTUY>] (detailing flaws in state systems that allow bad officers—even those convicted of sex crimes, including rape—to find new jobs as police officers).

Tim Loehmann, the Cleveland police officer who shot and killed twelve-year-old Tamir Rice, never had his publicly available records from his previous department checked by the Cleveland Police Department.<sup>53</sup> Had the Cleveland Police Department checked the records, they would have read a letter from the deputy chief of the Independence Ohio Police Department that stated Loehmann was emotionally unprepared to cope with the stresses of the job and suffered a “dangerous loss of composure” during firearms training, becoming “distracted” and “weepy.”<sup>54</sup> “He could not follow simple directions, could not communicate clear thoughts nor recollections, and his handgun performance was dismal.”<sup>55</sup> In recommending that Loehmann resign, which he ultimately did, the deputy chief wrote: “I do not believe time, nor training, will be able to change or correct the deficiencies.”<sup>56</sup> After Rice’s death, the Cleveland Police Department has belatedly changed their policies to include checking the records of potential hires.<sup>57</sup> Finally, the prosecutor recommended that the grand jury not indict Loehmann, and the grand jury complied with his wishes.<sup>58</sup>

Daniel Pantaleo, the New York Police Department (NYPD) officer who administered the chokehold that led to the death of Eric Garner in Staten Island, had been “sued twice in the past for alleged racially motivated misconduct while on the job.”<sup>59</sup> Two black men accused him in 2012 of subjecting them to an illegal strip search in broad daylight. Pantaleo allegedly

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52. T.R. Reid, *Guard Convicted in the First Trial from Abu Ghraib*, WASH. POST, Jan. 15, 2005, at A1, <http://www.washingtonpost.com/wp-dyn/articles/A9343-2005Jan14.html>.

53. Adam Ferrise, *Cleveland Officer Who Shot Tamir Rice Had “Dismal” Handgun Performance for Independence Police*, CLEVELAND.COM (Dec. 4, 2014), [www.cleveland.com/metro/index.ssf/2014/12/cleveland\\_police\\_officer\\_who\\_s.html](http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_officer_who_s.html) [<http://perma.cc/95WU-JUKQ>].

54. *Id.*; *Memo on Cleveland-Area Officer in Tamir Rice Shooting*, L.A. TIMES (Dec. 3, 2014), <http://documents.latimes.com/memo-tamir-rice-officer-timothy-loehmann/> [<http://perma.cc/QV8Q-5YMH>].

55. *Id.*

56. *Id.*

57. Ferrise, *supra* note 53.

58. Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES, Dec. 29, 2015 at A1, <http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html> [<http://perma.cc/JHM3-YHPA>].

59. Thomas Barrabi, *Who Is Daniel Pantaleo? NYPD Officer Who Killed Eric Garner Was Accused of Misconduct Before Chokehold Death*, INT’L BUS. TIMES (Dec. 3, 2014), <http://www.ibtimes.com/who-daniel-pantaleo-nypd-officer-who-killed-eric-garner-was-accused-misconduct-1733094> [<http://perma.cc/D7VN-NGWX>]. By contrast, Bob McCulloch made clear that he did not give any particular recommendation to the grand jury for Darren Wilson’s shooting of Michael Brown. *See* Staff Reports, *No Charges Against Darren Wilson, Grand Jury Decides*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), [http://www.stltoday.com/news/local/crime-and-courts/no-charges-against-darren-wilson-grand-jury-decides/article\\_9afc71c9-a858-5f37-aba3-faba3fe12dfe.html](http://www.stltoday.com/news/local/crime-and-courts/no-charges-against-darren-wilson-grand-jury-decides/article_9afc71c9-a858-5f37-aba3-faba3fe12dfe.html) [<http://perma.cc/Z8FT-Y6UR>].

“tapped” the men’s testicles, claiming it was part of a search for contraband.<sup>60</sup> The parties settled this lawsuit in January 2013.<sup>61</sup> In another lawsuit, Rylawn Walker accused several NYPD officers, including Pantaleo, of arresting him even though he was “committing no crime at the time and was not acting in a suspicious manner” and of misrepresenting the incident in the police report in an attempt to justify the arrest.<sup>62</sup> Walker’s charges were later dismissed.<sup>63</sup>

Where a department is pressured to hire many officers in a short period of time, the results can be disastrous, as occurred in the Albuquerque Police Department, which “accepted officers from other police forces, even if they had been disciplined or fired, and it sometimes waived the psychological exam.”<sup>64</sup> According to the training director at the department’s academy, the new hires were “exhibiting some characteristics that I thought were a little strange. They were not in charge of their emotions . . . . People were breaking down into tears.”<sup>65</sup>

## 2. Lack of Training

During the Ferguson protests after Michael Brown’s death, criticism arose for the way the police dealt with the protesters and the reporters covering the events,<sup>66</sup> for excessive use of force, and for improper use of Department of Defense-supplied military equipment, among other issues.<sup>67</sup> In August 2015, Governor Jay Nixon issued a directive to the state Peace Officer Standards and Training Commission (POST) to come up with recommendations within six months “to improve access to effective and ongoing training in the key areas of tactical training, fair and impartial policing, and the health and well-being of officers.”<sup>68</sup> The training standards have not been updated since 1996.<sup>69</sup>

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60. Barrabi, *supra* note 59.

61. *Id.*

62. *Id.*

63. *Id.*

64. Rachel Aviv, *Your Son Is Deceased*, NEW YORKER, Feb. 2, 2015, at 36, <http://www.newyorker.com/magazine/2015/02/02/son-deceased> [<http://perma.cc/54NH-VTUP>].

65. *Id.*

66. Mark Berman, *Post Writer Charged in St. Louis County*, WASH. POST, Aug. 11, 2015, at A6, <http://www.washingtonpost.com/news/post-nation/wp/2015/08/10/washington-post-reporter-charged-with-trespassing-interfering-with-a-police-officer/> [<http://perma.cc/Y562-4GZN>]. Almost a year later, charges were filed against reporters from *The Washington Post* and *The Huffington Post* for trespassing and interfering with a police officer. *Id.*

67. Radley Balko, *After Ferguson, How Should Police Respond to Protests?*, WASH. POST: THE WATCH (Aug. 14, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/08/14/after-ferguson-how-should-police-respond-to-protests/> [<http://perma.cc/GNE7-NQFX>].

68. *Gov. Nixon Directs Commission to Enhance Law Enforcement Training Standards*, OFF. OF MO. GOVERNOR JAY NIXON (Aug. 6, 2015), <http://governor.mo.gov/news/archive/gov-nixon-directs-commission-enhance-law-enforcement-training-standards> [<http://perma.cc/M9AQ-WMUN>]. Since then, Missouri’s POST has updated the Continuing Law Enforcement Education

Currently, Missouri's statute regarding basic academy training mandates "at least thirty hours of training in the investigation and management of cases involving domestic and family violence."<sup>70</sup> With respect to continuing education, all peace officers who make traffic stops must receive three hours training every three years "concerning the prohibition against racial profiling."<sup>71</sup> There is no specific language addressing training on how to deal with persons who are mentally handicapped.

With the exception of Hawaii, every state requires that police officers graduate from an approved training academy.<sup>72</sup> The number of hours needed vary among the states.<sup>73</sup> Local departments can require more training than that mandated by the state. Not every state requires police officers to undergo in-service (continuing) education, a serious shortcoming if the officers graduated from the academy before issues of racial profiling, domestic violence, dealing with mentally ill suspects, etc. had surfaced.<sup>74</sup>

Some states permit a newly hired officer to start working at a police department without having undergone training; typically, the time frame to get trained is one year or less from the date the officer begins working. For example, in Arkansas, a person may work as a police officer for nine months without going through the thirteen-week police academy training with the possibility of a three-month extension for extraordinary circumstances, so long as the officer successfully completes a firearms course and reviews departmental policies, specifically those covering the use of force, criminal law, and emergency vehicle operations.<sup>75</sup> To prevent such an officer from working for one department just short of the time limit, leaving that department, then going to work for another department without training, some

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(CLEE) standards. *Details of Changes to Continuing Law Enforcement Education (CLEE) Training Requirements for Missouri Peace Officers*, MO. DEP'T PUB. SAFETY, <http://dps.mo.gov/dir/programs/post/clee-training.php> [<http://perma.cc/EDC2-45LJ>] (last visited Feb. 10, 2016).

69. *Nixon Plans Announcement About Officer Training Commission*, CBS: ST. LOUIS (Aug. 6, 2015), <http://stlouis.cbslocal.com/2015/08/06/nixon-plans-announcement-about-officer-training-commission/> [<http://perma.cc/X2UB-FVKT>].

70. MO. REV. STAT. § 590.040.1 (2010).

71. *Id.* § 590.050.1.

72. Nick Grube, *Want to Be a Cop in Hawaii? No License Needed*, HONOLULU CIV. BEAT (Mar. 12, 2015), <http://www.civilbeat.com/2015/03/want-to-be-a-cop-in-hawaii-no-license-needed/> [<http://perma.cc/X72H-VACB>].

73. *Training/Academy Life*, DISCOVERPOLICING.ORG, [http://discoverpolicing.org/what\\_does\\_take/?fa=training\\_academy\\_life](http://discoverpolicing.org/what_does_take/?fa=training_academy_life) [<http://perma.cc/S5DC-R3L5>] (last visited Nov. 5, 2015).

74. Thomas J. Jurkanin, *Police Licensing and Revocation*, 81 POLICE CHIEF, no. 2, Feb. 2014, at 30, [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=3266&issue\\_id=22014](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=3266&issue_id=22014) [<http://perma.cc/U4BZ-XSQW>].

75. 37 Ark. Reg. § 1002 (Dec. 2013).

states specifically state that the time limit is cumulative.<sup>76</sup> The justifications for permitting a person to work as an officer prior to being trained include the needs of departments, especially in rural areas, where it is hard to find already trained officers as well as the problem caused by recent academy graduates not being available at the time they are needed by a department.<sup>77</sup>

Another issue that arises in the area of training is that of the use of reserve (auxiliary) officers.<sup>78</sup> These are officers, paid or unpaid, who work less than full time for a department. Although training requirements vary among the states—in some states, their training is the same as that of full-time officers; in others, about half the number of hours; while in Louisiana, no training is required by the state other than firearm qualifications.<sup>79</sup> In terms of their powers, in some states, they have the same authority as a police officer; in others, their duties are more limited. Often, the motivation to become a reserve officer is to be able to carry a weapon.<sup>80</sup> In one recent incident, a seventy-three-year-old reserve deputy in Tulsa, Robert Bates, was involved in a fatal shooting during an undercover operation by the sheriff's Violent Crimes Task Force.<sup>81</sup> He said he had taken an active-shooter firearms training course given by the Maricopa County, Arizona Sheriff's Department in Dallas, but

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76. MISSISSIPPI PEACE OFFICER STANDARDS & TRAINING: THE BOARD ON LAW ENFORCEMENT OFFICER STANDARDS AND TRAINING (BLEOST) PROFESSIONAL CERTIFICATION POLICY AND PROCEDURES MANUAL § 101.04 (2013).

77. Leon Neyfakh, *No Experience, No Problem*, SLATE (May 8, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/05/police\\_training\\_in\\_arkansas\\_and\\_indiana\\_you\\_can\\_become\\_a\\_cop\\_without\\_any.html](http://www.slate.com/articles/news_and_politics/crime/2015/05/police_training_in_arkansas_and_indiana_you_can_become_a_cop_without_any.html) [<http://perma.cc/C3YN-8JVV>] (providing an example of an officer who hadn't been through the academy and killed a suspect, and who was prosecuted but acquitted by the jury).

78. VOLUNTEERS IN POLICE SER. PROGRAM, VOLUNTEERS IN POLICE SERVICE ADD VALUE WHILE BUDGETS DECREASE, [http://www.theiacp.org/Portals/0/documents/pdfs/VIPS\\_police\\_service\\_add\\_value\\_while\\_budgets\\_decrease.pdf](http://www.theiacp.org/Portals/0/documents/pdfs/VIPS_police_service_add_value_while_budgets_decrease.pdf) [<http://perma.cc/GXZ7-KZV4>] (providing a description of the prevalence of and reasons for the use of reserve officers).

79. Zusha Elinson & Scott Calvert, *Badges, Guns—But Not the Same Training*, WALL ST. J., Apr. 16, 2015, at A3, <http://www.wsj.com/articles/some-reserve-officers-get-badges-guns-but-not-the-same-training-1429141610> [<http://perma.cc/ZKP5-YMGF>] (quoting Caddo Parish, Louisiana Sheriff Steve Prator's criticism of the work-first, train-later approach: "You can't even cut hair or work on plumbing in someone's house without the proper training . . . Yet you can ride around and stop people and make life-and-death decisions and not be trained at all.").

80. Tom Dart, *150 Cops, Population 300: Pay-to-Play Policing, from Tulsa to Kid Rock's Town*, GUARDIAN (Apr. 17, 2015), <http://www.theguardian.com/us-news/2015/apr/17/oakley-michigan-pay-to-play-police> [<http://perma.cc/Z5ED-N8X7>].

81. CNN Wire, *Video Released of Deadly Shooting in Tulsa; Police Say Deputy Accidentally Used Firearm*, FOX 13: SALT LAKE CITY (Apr. 12, 2015), <http://fox13now.com/2015/04/12/video-released-of-deadly-shooting-in-tulsa-police-say-deputy-accidentally-used-firearm/> [<http://perma.cc/C8RK-TW6J>].

allegations surfaced that he had not.<sup>82</sup> As is quite common for reserve officers, they will make donations to the chief or sheriff—Bates had donated five vehicles to the Violent Crimes Task Force and was the sheriff's campaign manager for his 2012 reelection campaign.<sup>83</sup>

*B. Criminal Prosecution of Police Officers in State Court*

The deaths of Michael Brown, Eric Garner, Tamir Rice, and Walter Scott—unarmed black men who died at the hands of white police officers—raised expectations among many citizens that the officers would be quickly charged, tried, and convicted. But it is quite common for such cases not to be taken to the grand jury at all. Between 2005 and 2014, there were 213 deaths from police-involved shootings in Washington state; since 1986, charges were brought in only one case and the jury acquitted the officer.<sup>84</sup> In a study of the twenty-four police-involved shootings in Memphis between 2009 and mid-2015, twenty-two were deemed justifiable and thus were not taken to the grand jury (the two others were pending investigation at the time of the study).<sup>85</sup> Commenting on the lack of charges in Memphis, Loyola Law School Professor Laurie Levenson, a former federal prosecutor, said: “Police officers are always given the benefit of the doubt and prosecutors don’t want to file charges because they don’t want to lose . . . . An officer has to show that they had a reasonable fear for their own safety or the safety of others.”<sup>86</sup>

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82. Dylan Goforth & Ziva Branstetter, *Sources: Supervisors Told to Falsify Reserve Deputy's Training Records; Department Announces Internal Review*, TULSA WORLD (Apr. 16, 2015), [http://www.tulsaworld.com/homepage1/sources-supervisors-told-to-falsify-reserve-deputy-s-training-records/article\\_a6330f10-a9fb-51e3-ab5e-4d97b03c6c04.html](http://www.tulsaworld.com/homepage1/sources-supervisors-told-to-falsify-reserve-deputy-s-training-records/article_a6330f10-a9fb-51e3-ab5e-4d97b03c6c04.html) [<http://perma.cc/GD96-77YK>].

83. *Id.* Six months after the shooting, a grand jury indicted the sheriff on two misdemeanor counts for misconduct and recommended he be removed from office. Lenzy Krehbiel-Burton & Richard Pérez-Peña, *Tulsa Sheriff to Resign Over Killing by Deputy*, N.Y. TIMES, Oct. 1, 2015, at A18, <http://www.nytimes.com/2015/10/01/us/tulsa-sheriff-indicted-on-misconduct-charges-in-killing-by-a-deputy.html> [<http://perma.cc/JUM8-EMLA>]. When the indictment was made public, the lawyer for the sheriff said he would resign. *Id.*

84. Steve Miletich et al., *Shielded by the Law*, SEATTLE TIMES (Sept. 26, 2015), <http://projects.seattletimes.com/2015/killed-by-police/> [<http://perma.cc/VKL2-768P>].

85. Maria Ines Zamudio, *MPD Officers Fatally Shoot 24 in Five Years; All Closed Cases Ruled Justified*, COM. APPEAL: INVESTIGATION (Aug. 23, 2015), [http://www.commercialappeal.com/news/investigations/ca-investigation-mpd-officers-have-fatally-shot-24-in-five-years-all-concluded-investigations\\_23290653](http://www.commercialappeal.com/news/investigations/ca-investigation-mpd-officers-have-fatally-shot-24-in-five-years-all-concluded-investigations_23290653) [<http://perma.cc/T2Z9-7ZHR>].

86. *Id.*; see also Nicholas K. Geranios, *Prosecutor: No Charges for Pasco Officers Who Fatally Shot Rock-Throwing Immigrant*, SEATTLE TIMES (Sept. 10, 2015), <http://www.seattletimes.com/seattle-news/prosecutor-to-announce-his-charging-decision/> [<http://perma.cc/FJ22-Q9M3>] (highlighting a recent case where the prosecutor refused to charge three Pasco, Washington police officers who shot and killed a rock-throwing Mexican immigrant who was high on meth).

Even where the prosecutor does take the case to state grand juries, they rarely indict. For example, in Harris County, Texas, where Houston is located, in the period from 2004 to 2012, grand juries refused to return indictments in police-involved shooting cases 288 consecutive times.<sup>87</sup> Since Bob McCulloch took over as prosecutor in St. Louis County in 1991, his office has taken five officer-involved shootings to grand juries, including the case of Darren Wilson, and no indictments have been returned.<sup>88</sup> In a *Washington Post* study, of the thousands of police shootings between 2005 and mid-2015, there have been only fifty-four indictments.<sup>89</sup> The *Post* study noted that there are exceptional factors, other than the suspect's being unarmed, necessary for there to be an indictment, including: "a victim shot in the back, a video recording of the incident, incriminating testimony from other officers or allegations of a cover-up."<sup>90</sup>

Since the death of Michael Brown, there has been a dramatic increase in the number of indictments.<sup>91</sup> "More U.S. police officers have been charged with crimes for deadly on-duty shootings in 2015 than in any year going back a decade. But not a single officer has been convicted of murder or manslaughter this year."<sup>92</sup> One reason for the increase in charges and indictments is because of changes in the system of prosecution of police officers in use of force cases. California enacted legislation to do away with grand juries altogether for police-involved shootings, instead of leaving it up to prosecutors whether to file charges; if charges are filed, judges will hold preliminary hearings to

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87. James Pinkerton, *Unarmed & Dangerous*, HOUS. CHRON., <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-1-Unarmed-and-Dangerous-24419.php> [<http://perma.cc/RV37-54YZ>].

88. Heather Cole, *Background Check: Looking at McCulloch's Prosecution History*, MO. LAW. WKLY. (Sept. 8, 2014), <http://molawyersmedia.com/2014/09/08/background-check-looking-at-mccullochs-prosecution-history/> [<http://perma.cc/9EBG-YUYG>]. In non-officer involved shootings, e.g. cases of domestic violence, off-duty crimes, etc., during McCulloch's tenure, there have been indictments and successful prosecutions of police officers. *Id.*

89. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST, Apr. 12, 2015, at A15, <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> [<http://perma.cc/JE8E-F3LW>].

90. *Id.*

91. Conor Friedersdorf, *The Number of Cops Indicted for Murder Spikes Upward*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-shocking-number-of-cops-recently-indicted-for-murder/401732/> [<http://perma.cc/8A6H-TSXW>]; see also Ian Simpson, *Prosecution of U.S. Police for Killings Surges to Highest in Decade*, REUTERS (Oct. 26, 2015), <http://www.reuters.com/article/us-usa-police-idUSKCN0SK17L20151026> [<http://perma.cc/BX3P-D2X5>] (noting that very few officers are convicted despite an increase in prosecutions).

92. Zusha Elinson, *More Police Face Trials*, WALL ST. J., Sept. 24, 2015, at A3, <http://www.wsj.com/articles/more-police-go-to-trial-in-killings-but-convictions-remain-rare-1443044871> [<http://perma.cc/QBC3-VT8Z>].



determine whether there is probable cause to go to trial.<sup>93</sup> To address the problem of a local district attorney's prosecutor's "real or perceived conflict of interest," Governor Andrew Cuomo issued an order requiring the appointment of a special prosecutor "to investigate and, if warranted, prosecute" law enforcement officer in cases "involving the death of unarmed civilians."<sup>94</sup> The special prosecutor "may" investigate and prosecute in cases where there is a question of whether the civilian "was armed and dangerous at the time of his or her death."<sup>95</sup>

The *Washington Post* article noted that even in those few cases that are brought to trial, "the majority of the officers whose cases have been resolved have not been convicted."<sup>96</sup> Among the reasons are that the jury's verdict must be unanimous;<sup>97</sup> officers don't want to testify against fellow officers; defense counsel in closing argument will assert that police officers will not aggressively fight crime if they are subject to second guessing by juries; and jurors may believe that the fault belongs not with the officer on the street but with the chief for failure to have better training or supervision. In the view of a former district attorney who prosecuted police officers, the shootings were

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93. Tracey Kaplan, *California Bans Grand Juries in Fatal Shootings by Police*, MERCURY NEWS (Aug. 11, 2015), [http://www.mercurynews.com/crime-courts/ci\\_28621966/gov-brown-oks-nations-1st-ban-grand-juries](http://www.mercurynews.com/crime-courts/ci_28621966/gov-brown-oks-nations-1st-ban-grand-juries) [<http://perma.cc/B4MJ-2CSZ>]; Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHERJONES.COM (Aug. 13, 2015), <http://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases> [<http://perma.cc/VJT7-VNQU>].

94. Press Release, N.Y. State Governor Andrew M. Cuomo, Governor Signs Executive Order Accompanied by Dozens of Community Advocates (July 8, 2015), <http://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-appointing-nys-attorney-general-special-prosecutor-cases> [<http://perma.cc/4HXR-ME4J>].

95. N.Y. Exec. Order No. 147 (July 8, 2015), <http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO147.pdf> [<http://perma.cc/7TKA-WZLE>]. A similar policy was instituted by the head of the State's Attorney's Office in Connecticut. *Conn. Chief State's Attorney Backs Impartial Prosecutors for Police Shooting Cases*, CBS: NEW YORK (Mar. 19, 2015), <http://newyork.cbslocal.com/2015/03/19/conn-chief-states-attorney-backs-impartial-prosecutors-for-police-shooting-cases/> [<http://perma.cc/V8SZ-QF7J>].

96. Kindy & Kelly, *supra* note 89; Gross, *supra* note 93.

97. Mark Berman, *Prosecutors Won't Retry North Carolina Police Officer Who Shot and Killed Unarmed Man*, WASH. POST: POST NATION (Aug. 28, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/08/28/prosecutors-wont-retry-north-carolina-police-officer-who-shot-and-killed-unarmed-man/> [<http://perma.cc/FS9T-9XKW>] (In a recent shooting in Charlotte, North Carolina of an unarmed black suspect by a white officer, eight jurors voted to convict, four jurors voted to acquit, and the prosecutor decided not to retry the officer: "In consideration of the jurors' comments, the evidence available to the state, and our background in criminal trials, it is our prosecutors' unanimous belief a retrial will not yield a different result . . ."); see also James B. Stewart, *Dewey Jury's Deadlock Exposes a System's Flaws*, N.Y. TIMES, Nov. 6, 2015, at B1, <http://www.nytimes.com/2015/11/06/business/dewey-jurys-deadlock-exposes-a-systems-flaws.html> [<http://perma.cc/B3MV-YLRH>].

“almost never premeditated . . . . They arise spontaneously out of a situation, and most jurors have the idea the cops are out to do the best job they can.”<sup>98</sup>

Another problem in getting criminal convictions arises where the suspect is fleeing from the scene of a felony and is shot by the officer; in some states, the officer will have a defense that he is authorized to use deadly force to stop *any* fleeing felon. For example, Missouri law authorizes deadly force if the officer “reasonably believes” it is necessary in order “to effect the arrest and also reasonably believes that the person to be arrested has committed or attempted to commit a felony.”<sup>99</sup> Under federal law, established in the 1985 United States Supreme Court case *Tennessee v. Garner*, an officer may not use deadly force to apprehend a suspect unless it is necessary to prevent escape, and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.<sup>100</sup> However, the Missouri Approved Instructions (MAI) incorporated the standard of the *Garner* case, raising the question: should instruction on the statutory defense or the MAI be given to the officer?<sup>101</sup> Arguably, as a matter of due process, an officer should be able to rely on the statute rather than the MAI. Although several bills were introduced in the 2015 Missouri legislative session that would change current law, none passed,<sup>102</sup> putting Missouri police officers in the untenable position of being told by the Missouri statute that they may use deadly force to apprehend any fleeing felon; but, in doing so, the officers would be violating federal law under 18 U.S.C. § 242.

Another factor that may affect the outcome of a trial is the racial composition of the jury. The state trial of the four white police officers who were shown on tape to have beaten Rodney King, an African American, was moved from Los Angeles to Simi Valley, a largely white suburb in California.<sup>103</sup> There were no blacks on the jury; none of the officers was found

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98. Elinson, *supra* note 92.

99. MO. REV. STAT. § 563.046 (2010).

100. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

101. Letter from Sherrilyn A. Ifill, President and Director-Counsel of the NAACP Legal Def. and Educ. Fund, Inc., to The Honorable Maura McShane, Twenty-First Judicial Circuit Presiding Judge 3–5 (Jan. 5, 2015) (on file with the *Saint Louis University Law Journal*).

102. David A. Lieb, *Missouri Lawmakers Quit Early, Failing to Pass Ferguson-Inspired Changes to Deadly Force Law*, U.S. NEWS & WORLD REP. (May 15, 2015), <http://www.usnews.com/news/us/articles/2015/05/15/missouri-legislature-enters-final-day-of-session-in-turmoil> [<http://perma.cc/U5UY-4P9M>]; Niraj Chokshi, *Dozens of Ferguson-Related Reforms Were Proposed in Missouri. Just One Passed*, WASH. POST: GOVBEAT (May 16, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/05/15/the-missouri-legislature-is-about-to-end-its-session-having-passed-almost-none-of-the-dozens-of-ferguson-related-bills-proposed/> [<http://perma.cc/J4D6-BRXH>].

103. Doug Linder, *The Trials of Los Angeles Police Officers in Connection With the Beating of Rodney King*, UMKC SCH. L. (2001), <http://law2.umkc.edu/faculty/projects/ftrials/lapd/lapdac>

guilty.<sup>104</sup> Subsequently, in a federal prosecution of the Rodney King case in Los Angeles, with two blacks on the jury, two of the four officers were convicted and two were acquitted.<sup>105</sup> Had there been a trial of Darren Wilson for the killing of Michael Brown in Ferguson, a city that is two-thirds African American, the case would have been heard in a St. Louis County circuit court where the population is twenty-three percent African American;<sup>106</sup> although, after peremptory strikes from the pool of jurors, the racial composition of the jury would in all likelihood be much lower in terms of African Americans.<sup>107</sup>

The hope of the proponents of the recent changes to the investigation and prosecution of cases involving police-involved shootings is that not only will there be more indictments but also that there will be more convictions of police officers. But, given the difficulty of getting convictions in those cases that do go to trial under current law, there is a good chance there won't be a significant increase in convictions with these measures. And thus one would anticipate that attention will have to be given to the barriers to getting convictions—perhaps banning peremptory strikes altogether or changing current state jury provisions that require unanimous verdicts in criminal cases.<sup>108</sup>

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count.html [http://perma.cc/YNC5-ZAQD] (“The key victory for the defense came in July when the California Court of Appeals unanimously granted their change of venue motion . . .”).

104. *Id.*

105. *Id.* (“Unlike the Simi Valley jury, the federal jury was racially mixed. Although the defense made a considerable effort to exclude African-Americans, two blacks were seated as jurors.”).

106. *Quick Facts: Ferguson (city) Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/2923986.html> [http://perma.cc/TTA9-WCUK] (last visited Feb. 6, 2016); *Quick Facts: St. Louis County Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29189.html> [http://perma.cc/C67S-W35A] (last visited Feb. 6, 2016).

107. See Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, REPRIEVE AUSTL. (Aug. 2015), [http://www.blackstrikes.com/resources/Blackstrikes\\_Caddo\\_Parish\\_August\\_2015.pdf](http://www.blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf) [http://perma.cc/RN8B-JNRY] (explaining a recent study of peremptory strikes of blacks from the jury by prosecutors in Caddo Parish, Louisiana); Kevin Cole, *Joy on Race and Jury Selection*, CRIMPROF BLOG (Oct. 15, 2015), [http://lawprofessors.typepad.com/crimprof\\_blog/2015/10/joy-on-race-and-jury-selection.html](http://lawprofessors.typepad.com/crimprof_blog/2015/10/joy-on-race-and-jury-selection.html) [http://perma.cc/K7E7-83QB]. The United States Supreme Court has held that peremptory strikes based on race, whether by the prosecution, *Batson v. Kentucky*, 476 U.S. 79, 88 (1986), or by the defense, *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), violate the Equal Protection Clause. See Edward Conlon, *The Racial Reality of Policing*, WALL ST. J., Sept. 5, 2015, at C1, <http://www.wsj.com/articles/the-racial-reality-of-policing-1441390980> [http://perma.cc/LKB3-X688] (illustrating a former New York City police officer's view of why some African American jurors may not vote to convict African American defendants despite clear evidence of guilt).

108. In *Apodaca v. Oregon*, the Supreme Court held that the Sixth Amendment requirement of jury unanimity in criminal cases does not apply to the states. *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972). In a very recent oral argument, Justice Sotomayor suggested that the decision in *Apodaca* might be unconstitutional. Transcript of Oral Argument at 11, *Hurst v. Florida*, 136 S.

## III. HOW STATES CAN EFFECTIVELY ADDRESS POLICE MISCONDUCT

A. *Pre-Ferguson*

Despite the shortcomings of federal, state, and local governments to either prevent or remedy police misconduct, there have been some successful efforts in recent years: the enactment of state licensing laws that follow the model of other professions and occupations. Forty-four states currently have such a system, typically administered by a state POST.<sup>109</sup> Like other state commissions, POSTs set basic and continuing education requirements, establish minimum selection standards, often administer an exam like the Bar Exam, and provide for loss of licensure/decertification if the officer, after a due process hearing, is found to have violated one of the grounds set forth in the statute.<sup>110</sup>

Some states have vigorously exercised this decertification authority. Georgia, for example, decertified 1727 officers from 2012 to 2014.<sup>111</sup>

As discussed above, there are often economic pressures on small departments that don't have the financial resources to pay for a new recruit's training and salary while in training: the officer who was terminated has successfully passed his state-mandated basic training, he won't be hired by a better-paying department given his prior record, and he is immediately available for work.<sup>112</sup> For these reasons and others, it cannot be solely left up to local departments to decide whom to hire; the ultimate authority must reside with the state, just as it does for virtually every other profession and occupation that deals with the public. One of the best examples of how an effective decertification process can serve the public interest involved the termination by the Webster Groves Police Department in St. Louis County of four police officers who were found to have engaged in improper sexual contact both on and off duty with teenage girls.<sup>113</sup> Two of the officers were

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Ct. 616 (2016) (No. 14-7505), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-7505\\_mko1.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-7505_mko1.pdf) [<http://perma.cc/72GC-ZRMT>].

109. Roger L. Goldman, *Police Officer Decertification: Promoting Police Professionalism Through State Licensing and the National Decertification Index*, POLICE CHIEF, Nov. 2014, at 40, 40.

110. See Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 147, 150 (2012) (describing one proposal of what a model law should contain).

111. Shelly Bradbury, *Interactive: Chattanooga Police Chief Says Fired Cops Shouldn't Work as Officers Again*, TIMESFREEPRESS.COM (Apr. 26, 2015), <http://www.timesfreepress.com/news/local/story/2015/apr/26/fletcher-says-fired-cops-shouldnt-work-office/300842/> [<http://perma.cc/9VXY-UV84>].

112. See Goldman, *supra* note 109, at 41 (offering a particularly egregious example of the hiring of a clearly unfit officer by another department).

113. Elizabeth Vega, *When Officers Quit Under Suspicion, State Wants to Know Details*, ST. LOUIS POST-DISPATCH, Jan. 14, 2001, at C1.

subsequently hired by neighboring departments, despite all the publicity surrounding the problems at the first department.<sup>114</sup> At the time, Missouri law permitted an officer to be decertified for “gross misconduct indicating inability to function as a peace officer;” there was no need for a criminal conviction and the officers were not prosecuted criminally. The administrative hearing commissioners found that three of the officers were subject to discipline and the director of the Department of Public Service revoked their licenses; the fourth, whose acts were found not to be as serious and were committed off duty, was not subject to discipline.<sup>115</sup>

Currently, six states<sup>116</sup> (with over twenty-five percent of the total number of police officers in the United States) have no authority to decertify; thus, officers committing the kind of misconduct that resulted in decertification in the Webster Groves cases would be able to be hired not only in those states but also in the many decertification states that require conviction of a felony or certain misdemeanors before an officer can be decertified. Every state should enact a comprehensive law that takes away the ability of unfit officers to continue in law enforcement, treating police professionals the way they treat other professionals. If anything, the need for such a system is even more needed for police officers who have the power to arrest, search, and use deadly force.

In contrast to the Webster Groves cases where the officers’ prior conduct was common knowledge, in other cases, a prospective hiring department will be unaware of the prior misconduct despite contacting the prior department. In some cases, there will be an agreement between the chief and the officer not to give a negative recommendation if the officer agrees to resign rather than be terminated. This occurred several years ago where two officers left under a cloud from two different departments and applied to work at the West Palm Beach Police Department. The chief called the prior departments but was not told about the problems there, and the two officers were later involved in the

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114. *Id.*

115. Goldman & Puro, *supra* note 7, at 548–49.

116. The six states without such a law are California, Hawaii, Massachusetts, New Jersey, New York, and Rhode Island. Goldman, *supra* note 109, at 41 n.1. New Jersey does have a forfeiture of office provision that in effect does the same thing: it provides that in the case of a finding by a judge that a police officer (or any person working for the government) has been convicted of or pled guilty to an offense above a certain degree, the judge must, or for some lesser offenses may, order the office be forfeited and the person may never again serve in any governmental position. N.J. STAT. ANN. § 2C:51-2(b)(1) (West 2007); California POST does have the power to cancel the certificate that was obtained through misrepresentation or fraud, or that was issued as the result of administrative error on the part of the POST or the employing agency. CAL. PENAL CODE § 13510.1(e) (West 2004).

death of a West Palm Beach hitchhiker. They were tried for first-degree murder but were acquitted.<sup>117</sup>

The West Palm Beach case points out the need for a way to track law enforcement officers who have engaged in serious misconduct so that a department will not unknowingly hire an unfit officer. After the West Palm Beach incident, there was a bill introduced in Congress that would have required states to report peace officer and correctional officer license revocations, but the bill never made it out of committee.<sup>118</sup> Approximately 30,000 law enforcement officers in the United States have lost their licenses since New Mexico first got that power in 1960.<sup>119</sup> Although there is no federally mandated databank, there is a databank, the National Decertification Index (NDI), which is administered by the International Association of Directors of Law Enforcement Standards and Training (IADLEST).<sup>120</sup> Thirty-nine of the forty-four states that have the authority to decertify have submitted the names of over 19,500 officers to the NDI.<sup>121</sup> The executive directors of all the state POSTs may query the NDI. They may also authorize law enforcement agencies in their states to access the NDI.

#### B. *Post-Ferguson Developments*

The only post-Ferguson statute enacted in Missouri was Senate Bill 5.<sup>122</sup> What is most important about the law is that it focused on the inadequacy of many of the fifty-eight police departments in St. Louis County and set forth several minimum standards that must be met; if not met, a court may order, or the voters of the municipality may vote, to disincorporate.<sup>123</sup> The minimum

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117. For a discussion of this case, see Goldman & Puro, *supra* note 7, at 561–62.

118. Law Enforcement and Correctional Officers Employment Registration Act of 1996, H.R. 3263, 104th Cong. (1996); Law Enforcement and Correctional Officers Employment Registration Act of 1995, S. 484, 104th Cong. (1995).

119. Goldman, *supra* note 109, at 41; N.M. STAT. ANN. § 29-7-13 (1978).

120. Goldman, *supra* note 109, at 41. IADLEST is the national association of the executive directors of state POSTs. Goldman & Puro, *supra* note 7, at 547–48.

121. E-mail from Michael N. Becar, Exec. Dir., IADLEST, to author (Feb. 12, 2016) (on file with author) (“[T]o date, there are 20,260 actions reported in the National Decertification Index by 39 states.”). Based on the list of the thirty-nine states that decertify provided by Mr. Becar and the list of the six non-certifying states, see *supra* text in note 116, that leaves five states that decertify officers without reporting to the NDI: Delaware, Georgia, Louisiana, North Carolina, and Wisconsin.

122. Senate Bill 5, 2015 Mo. Laws 453, 453–62 (codified in scattered sections of MO. REV. STAT. ch. 67, 302 & 479 (2010)).

123. MO. REV. STAT. § 67.287.3(2) (2010). A bill was introduced in Arizona in 2013 (H2648) that would have decertified police departments if more than half the sworn officers had been decertified in the previous eight years, provided that the state attorney general had found the problem was systemic and the County Board of Supervisors voted to have the local sheriff take over the local law enforcement. The law was not enacted. *Corrupt Colorado City Cops Subject of*

standards regarding a municipal police department are: the department must be accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA) or the Missouri Police Chiefs Association, or it must contract for services with an accredited police department; there must be written policies regarding operation of emergency vehicles, police pursuit, use of force by officers, and collection and reporting of crime police stop data; and there must be written general orders for the department.<sup>124</sup> All the standards must be met within three years of the effective date of the law (September 1, 2015) except the standard requiring accreditation, which must be met within six years.<sup>125</sup> Significantly, the requirement of accreditation applies only to police departments in St. Louis County, not in the rest of the state; the sponsors realized that by excluding all other counties, the legislators outside St. Louis County would not face opposition from police departments in their districts.<sup>126</sup> Also of importance is the fact that Missouri is the first state to establish mandatory accreditation of police departments.<sup>127</sup>

The law also addressed one of the major concerns of the Ferguson protesters: the reliance on traffic fines to keep the municipalities financially viable. This part of the law applies to the entire state, not just to St. Louis County. It provides that the percentage of a municipality's annual general operating revenue received from minor traffic violations may not exceed 12.5% (for municipalities in St. Louis County) or 20% (for municipalities in the rest of the state). Any revenues from fines in excess of those amounts must be sent to the state director of revenue who will then distribute that money to the schools in the county where the municipality is located. If the municipality fails to remit the excess revenue, the law sets forth several procedures to enforce compliance; and, if these are insufficient, the final step is a vote of the residents of the municipality to disincorporate. Already twelve St. Louis County municipalities have sued to prevent enactment of this provision of Senate Bill 5.<sup>128</sup>

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*H2648*, ARIZ. DAILY INDEP. (Feb. 21, 2013), <http://arizonadailyindependent.com/2013/02/21/corrupt-colorado-city-cops-subject-of-h2648/> [<http://perma.cc/Q443-H8HS>].

124. Senate Bill 5, 2015 Mo. Laws 453, 453–55 (codified in § 67.287).

125. *Id.*

126. *Id.* In 2012, Illinois enacted a law that set up the Metro East Police District Commission to improve policing in four departments with a long history of serious problems in St. Clair County. 70 ILL. COMP. STAT. 1750/10 (2013).

127. Many states encourage, but do not mandate, that law enforcement agencies become accredited. *E.g.*, FLA. STAT. § 943.125 (2015).

128. Jeremy Kohler, *North County Cities Sue to Block Law That Limits Revenue from Traffic Cases*, ST. LOUIS POST-DISPATCH, Nov. 20, 2015, at A1, [http://www.stltoday.com/news/local/crime-and-courts/north-county-cities-sue-to-block-law-that-limits-revenue/article\\_842a6e6b-562b-5045-9458-a5d2901a3ae4.html](http://www.stltoday.com/news/local/crime-and-courts/north-county-cities-sue-to-block-law-that-limits-revenue/article_842a6e6b-562b-5045-9458-a5d2901a3ae4.html) [<http://perma.cc/5SQY-KP9F>]; Complaint, *Normandy v. Nixon*, 15AC-CC00531 (Nov. 19, 2015), <http://bloximages.newyork1.vip.townnews.com/stltoday.com/>

It is likely that many of the minimum standards could never be met by many of the police departments,<sup>129</sup> particularly the requirement of becoming accredited; and, within a day of the law taking effect, one municipality—Pine Lawn—was considering dissolving its department and contracting with other departments.<sup>130</sup> And, even if a department was able to meet the minimum standards within the three- or six-year time frame, it will be virtually impossible for the municipality to stay financially solvent under the 12.5% cap on traffic fines. But there is a potential loophole: the municipality may shift its enforcement from traffic to such matters as housing code violations.<sup>131</sup>

Meanwhile, St. Louis County has enacted an ordinance imposing minimum standards on municipal police departments.<sup>132</sup> As with Senate Bill 5, the municipalities were quick to mount a legal challenge.<sup>133</sup>

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content/tncms/assets/v3/editorial/f/0a/f0a4d562-ee89-5bd2a035f8ced682832e/564e2b7c13b02.pdf.pdf [http://perma.cc/7QKP-B49L].

129. For example, smaller departments may find it prohibitively difficult to recruit police officers. Karen Zamora, *Heightened Scrutiny on Police Changing Dynamics of Recruiting, Retaining Officers*, STAR TRIBUNE (Oct. 17, 2015), <http://www.startribune.com/heightened-scrutiny-on-police-changing-dynamics-of-recruiting-retaining-officers/333669551/> [http://perma.cc/VFH5-XPA6]. Several smaller police departments in North County are attempting to survive the standards through consolidation of their police departments. Christine Byers, *A Cooperative Effort: Small Police Departments Band Together in North St. Louis County*, ST. LOUIS POST-DISPATCH, Oct. 26, 2015, at A1, [http://www.stltoday.com/news/local/crime-and-courts/a-cooperative-effort-small-police-departments-band-together-in-north/article\\_56e2091b-39c2-59b4-b092-c4c27f975188.html](http://www.stltoday.com/news/local/crime-and-courts/a-cooperative-effort-small-police-departments-band-together-in-north/article_56e2091b-39c2-59b4-b092-c4c27f975188.html) [http://perma.cc/HX2R-N6HD]. County Police Chief Jon Belmar warns that a consolidated department run by an unaccredited department is not the right solution, though he is supportive of consolidation if done right. Jon M. Belmar, Opinion, *Citizens Deserve Professional Policing*, ST. LOUIS POST-DISPATCH, June 12, 2015, at A15, [http://www.stltoday.com/news/opinion/citizens-deserve-professional-policing/article\\_f0d02caf-b4b5-5403-82e9-367aff5635a1.html](http://www.stltoday.com/news/opinion/citizens-deserve-professional-policing/article_f0d02caf-b4b5-5403-82e9-367aff5635a1.html) [http://perma.cc/P4PT-BMA4].

130. Bell & Moskop, *supra* note 46.

131. Jacob Kirn, *Too Small to Survive: Velda City, Beverly Hills, Pine Lawn*, ST. LOUIS BUS. J., Oct. 2–8, 2015, at 10. Since writing this, my predictions have proved all too accurate. Jennifer S. Mann, *Lawsuit Filed Against Pagedale for Ticketing High Grass and Other Code Violations*, ST. LOUIS POST-DISPATCH, Nov. 5, 2015, at A1, [http://www.stltoday.com/news/local/crime-and-courts/lawsuit-filed-against-pagedale-for-ticketing-high-grass-and-other/article\\_35fd1f5b-5a9b-5b21-97d3-dbaa927294d7.html](http://www.stltoday.com/news/local/crime-and-courts/lawsuit-filed-against-pagedale-for-ticketing-high-grass-and-other/article_35fd1f5b-5a9b-5b21-97d3-dbaa927294d7.html) [http://perma.cc/XQM4-BYRJ].

132. Steve Giegerich, *St. Louis County Council Enacts Police Standards Bill, Setting up a Court Challenge*, ST. LOUIS POST-DISPATCH, Dec. 2, 2015, at A1, [http://www.stltoday.com/news/local/crime-and-courts/st-louis-county-council-enacts-police-standards-bill-setting-up/article\\_92a41e7d-216f-576c-b000-1f5251454921.html](http://www.stltoday.com/news/local/crime-and-courts/st-louis-county-council-enacts-police-standards-bill-setting-up/article_92a41e7d-216f-576c-b000-1f5251454921.html) [http://perma.cc/FJ6E-2UJT]; St. Louis County, Mo., Minimum Standards for Police Departments in St. Louis County (Dec. 1, 2015), <http://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/4/53/4535fbd4-959a-5b39-bb83-67bd8225990a/5627e0f74f771.pdf.pdf> [http://perma.cc/ZJK4-DP42]. And the standards are *minimal*. For example, one of them requires arrests to be supported by probable cause in compliance with the Fourth Amendment. *Id.* at 2. This, no doubt, was a response to one of the findings in the Department of Justice Ferguson Report that revealed that



Whereas Missouri's approach focused on police departments as a whole, other states' post-Ferguson reform efforts focused on individual officers. Connecticut's law prohibits a police department from hiring an officer who was previously employed as a police officer by another department in the state and who "(1) was dismissed for malfeasance or other serious misconduct calling into question such person's fitness to serve as a police officer; or (2) resigned or retired from such officer's position while under investigation for such malfeasance or other serious misconduct."<sup>134</sup> The law also requires any department that is aware of the officer's dismissal or resignation to inform the hiring department of that fact.<sup>135</sup>

Illinois's approach was to establish a database on officers with a questionable record and house it in the state POST, the Illinois Law Enforcement Training and Standards Board. Effective January 1, 2016, the law requires all law enforcement agencies to notify the Board where there has been a

[F]inal determination of willful violation of department or agency policy, official misconduct, or violation of law when: (1) the officer is discharged or dismissed as a result of the violation; or (2) the officer resigns during the course of an investigation and after the officer has been served notice that he or she is under investigation that is based on the commission of a Class 2 or greater felony.<sup>136</sup>

The database contains the officer's name, the nature of the violation, the reason for the termination, and any statement from the officer. It is available to the chief administrative officer or designee of a law enforcement agency but not to the public.

#### IV. A ROLE FOR THE FEDERAL GOVERNMENT IN POLICE ACCOUNTABILITY

Given the opposition to state licensing by police unions, the states with either no or weak licensing laws are not likely going to be able to enact comprehensive legislation.<sup>137</sup> Commentators have noted the success that unions have had in getting Law Enforcement Officers' Bills of Rights laws

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some officers thought there were circumstances where an arrest without probable cause was lawful. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 26, at 15–23.

133. Steve Giegerich, *Cities Launch First Challenge to St. Louis County Police Standards Bill*, ST. LOUIS POST-DISPATCH, Dec. 4, 2015, at A1, [http://www.stltoday.com/news/local/crime-and-courts/cities-launch-first-challenge-to-st-louis-county-police-standards/article\\_9eefaafb-e32c-549f-9823-087bd583aa02.html](http://www.stltoday.com/news/local/crime-and-courts/cities-launch-first-challenge-to-st-louis-county-police-standards/article_9eefaafb-e32c-549f-9823-087bd583aa02.html) [<http://perma.cc/FK5P-STC5>].

134. House Bill No. 7103, § 6(a), Pub. Act No. 15-4 (Conn. 2015) (Effective Oct. 1, 2015).

135. *Id.* at § 6(b).

136. Illinois Police Training Act, 50 ILL. COMP. STAT. 705/6.2(a) (2016).

137. Goldman & Puro, *supra* note 7, at 564, 566 (Police unions in California were responsible for the repeal of that state's (very limited) law that had permitted a cancellation of certificates (the equivalent of decertification)).

enacted as well as similar protections in collective bargaining agreements. These give police officers facing discipline for misconduct special protections not available to other public sector employees.<sup>138</sup> Noting that these provisions prevent accountability and transparency, Jonathan Smith, former chief of the DOJ's Special Litigation Section in the Civil Rights Division, stated in a recent *New York Times* op-ed, "Reform is good for union members—in fact, the overreach of law enforcement bills of rights and some union contracts have harmed the very officers the contract rules are intended to protect."<sup>139</sup>

The federal government can pressure the states to enact and enforce reforms through the power of the purse: the DOJ's COPS office should give preference for grants to local police departments in states (a) that have an effective POST program in place; (b) that have a POST program that reports to the NDI the names of decertified officers; and (c) that have both mandatory basic and continuing education in such areas as dealing with mentally ill suspects, addressing racial profiling, and handling domestic violence situations.

Furthermore, the DOJ can take on a broader role in investigating and stopping patterns or practices of municipalities in relying on law enforcement for revenue.<sup>140</sup>

The United States should also follow the practice that is standard where healthcare professionals are convicted or plead guilty in federal court to Medicare or Medicaid fraud.<sup>141</sup> When a peace officer is convicted of or pleads guilty to a civil rights violation in a prosecution by the Criminal Section of the

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138. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bill of Rights*, 14 B.U. PUB. INT. L.J. 185, 185 (2005). For a recent example of special treatment in the area of collective bargaining, Governor Scott Walker of Wisconsin exempted local police, firefighters, and the state patrol from the collective bargaining restrictions applicable to other public sector unions in 2011 Wisconsin Act 10. Steven J. Allen, *Scott Walker vs. the Unions (Part 1 of 2)*, UNION WATCH (July 10, 2015), <http://unionwatch.org/scott-walker-vs-the-unions-part-1-of-2/> [<http://perma.cc/4XJ5-T6UR>]. Kate Levine argues that Law Enforcement Officers' Bill of Rights (LEOBRs) give suspect police officers an insider's advantage in thwarting investigations, which "threatens the legitimacy of the criminal justice system." Kate Levine, *Police Suspects*, 115 COLUM. L. REV. (forthcoming 2016).

139. Jonathan M. Smith, *Police Unions Must Not Block Reform*, N.Y. TIMES, May 30, 2015, at A19, <http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html> [<http://perma.cc/REM6-ABNN>].

140. Ryan J. Reilly, *As DOJ Zeros in on Profit-Driven Policing, Advocates Urge Crackdown*, HUFFINGTON POST (Dec. 2, 2015), [http://www.huffingtonpost.com/entry/as-doj-zeros-in-on-profit-driven-policing-advocates-urge-crackdown\\_us\\_565dd88ee4b072e9d1c36495](http://www.huffingtonpost.com/entry/as-doj-zeros-in-on-profit-driven-policing-advocates-urge-crackdown_us_565dd88ee4b072e9d1c36495) [<http://perma.cc/2NVG-WGW6>].

141. Such convictions entail mandatory reporting to the National Practitioner Data Bank (NPDB), and the information is available to state licensing boards. *NPDB Reporting Requirements and Query Access*, NPDB, <http://www.npdb.hrsa.gov/resources/tables/reportingQueryAccess.jsp> [<http://perma.cc/RMR3-UETY>] (last visited Feb. 6, 2016).

DOJ's Civil Rights Division, there should be a requirement that the officer notify the state licensing agency (if there is one in a particular state) and have his license revoked, either as part of his plea or as part of the sentence. The same should occur for peace officers; merely an agreement by the officer not to serve in law enforcement is insufficient to make sure he can no longer abuse his position in the same or another state.<sup>142</sup> Finally, Congress should consider adopting the equivalent of the National Practitioner Data Bank (NPDB) for law enforcement officers. There should first be a study conducted by the Government Accountability Office (GAO) of whether officers decertified in one state are currently working in law enforcement in other states. The GAO did such a study prior to the enactment of the NPDB when it discovered that one-third of doctors licensed in two states who lost their license in one state kept their license in the other.<sup>143</sup> And the information kept on the federal database should mirror what is kept on the NPDB, which includes the following: any malpractice judgment or settlement; loss of staff privileges at a hospital for more than thirty days; and any adverse action taken by the medical board. In addition, the law should permit the officer to file a statement, as is permitted for health practitioners under the NPDB,<sup>144</sup> and also in Illinois's new database on officers who were terminated or resigned during the course of an investigation.

Decertification information wouldn't have disclosed the prior misconduct of the officers involved in the West Palm Beach case since neither officer was decertified. The President's Task Force on 21st Century Policing has taken the first step in Recommendation 2-15 that DOJ's COPS officer "should partner with the International Association of Directors of Law Enforcement Standards and Training (IADLEST) to expand its National Decertification Index to serve as the National Register of Decertified Officers with the goal of covering all agencies within the United States and its territories."<sup>145</sup>

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142. For a discussion of other ways the DOJ could coordinate efforts with state POSTs, see Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 121 (2003).

143. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE SECRETARY OF HEALTH AND HUMAN SERVICES, EXPANDED FEDERAL AUTHORITY NEEDED TO PROTECT MEDICARE AND MEDICAID PATIENTS FROM HEALTH PRACTITIONERS WHO LOSE THEIR LICENSES 6 (1984).

144. BUREAU OF HEALTH WORKFORCE, U.S. DEP'T OF HEALTH & HUMAN SERV., NPDB GUIDEBOOK F-2 (Apr. 2015), <http://www.npdb.hrsa.gov/resources/npdbguidebook.pdf> [<http://perma.cc/M3QA-XDLG>].

145. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 29 (2015), [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf) [<http://perma.cc/E6P5-QN4B>].

## CONCLUSION

A common refrain from those opposed to major reform of policing is that the system is fine, we just need to get rid of the bad—sometimes rotten—apples. In fact, as discussed above, current policies make it inevitable that the bad apples will continue to work in law enforcement. Furthermore, rotten apples can spoil the entire barrel.<sup>146</sup> But the events in Ferguson and elsewhere present an opportunity to bring about major changes, just as the events surrounding the acquittal of the officers involved in the beating of Rodney King led to Congress's enactment of § 14141. As Rachel Harmon points out, the kind of “systemic” policing failures we are seeing requires “proactive and systematic”—as opposed to “reactive and haphazard”—reforms.<sup>147</sup> The passage of Senate Bill 5 in Missouri is an example of what can be accomplished by bringing together groups who are normally on opposite sides: most law enforcement members want to be professionals and most people interested in the protection of citizens' civil rights and civil liberties understand the need for good policing. Increasing selection standards, improving training, and holding police accountable for their misconduct will help gain the respect of the community, and thereby will make the police more effective. Another lesson from Ferguson is that serious thought should be given to close down police departments that cannot meet minimum standards of performance. Many of those departments were small and financially strapped. Across the United States, almost fifty percent of law enforcement agencies have fewer than ten sworn officers.<sup>148</sup> It may be that the United States should learn from

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146. Seth Stoughton, Geoffrey Alpert & Jeff Noble, *Why Police Need Constructive Criticism*, ATLANTIC (Dec. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/12/officer-porter-mistrial-police-culture/421656/> [<http://perma.cc/63RL-6V7K>] (“The failure to engage in behavior reviews and the refusal to have these conversations sends the wrong message: that poor behavior or outright misconduct is tolerated or encouraged. Police agencies may sometimes blame a ‘rogue cop’ or a ‘bad apple’ for misconduct, but as Barbara Armacost has observed, sometimes apples go bad because the barrel—the culture of the police agency itself—is defective. Many reports on policing—the Wickersham Commission that investigated policing failures during Prohibition, the Knapp and Mollen Commissions that investigated corruption at the NYPD, the Christopher Commission that investigated excessive force in the LAPD, and so on—have recognized that misconduct flourishes in environments that fail to address it. Ignoring or individualizing problematic attitudes and actions is an all-too-common feature of a culture that resists second-guessing and peer correction, but doing so is the functional equivalent of tacit approval.”).

147. Harmon, *supra* note 16, at 2, 5.

148. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 2 (July 2011), <http://www.bjs.gov/content/pub/pdf/cs1lea08.pdf> [<http://perma.cc/BD4Q-ZJB2>] (In 2008, there were 17,985 state and local law enforcement agencies employing at least one full-time officer or the equivalent in part-time officers. The total included 12,501 local police departments, 3063 sheriffs' offices, 50 primary state law enforcement agencies, 1733 special jurisdiction agencies, and 638 other agencies, primarily county constable offices in Texas). In that same year, there were seventy-

other countries where the norm is to have larger departments rather than thousands of departments of fewer than ten officers.<sup>149</sup>

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three federal law enforcement agencies with approximately 120,000 full-time officers. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2008 1 (June 2012), <http://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<http://perma.cc/R75P-T7TU>].

149. Daniel Lazare, *Why US Police Are Out of Control*, CONSORTIUMNEWS.COM (Aug. 20, 2015), <http://consortiumnews.com/2015/08/20/why-us-police-are-out-of-control/> [<http://perma.cc/969R-W2SE>] (“So what is the real reason that America is off the charts when it comes to police shootings? The most important explanation is one that almost no one notices: fragmentation. Britain, for example, has some 50-odd separate police forces, the Metropolitan Police Service covering greater London, a slew of regional police forces covering the rest of the country, plus a Serious Organized Crime Agency to deal with higher-level offenses. Germany has a federal police force plus one police department for each of the sixteen länder, or states, while France, thanks to the Jacobin tradition of centralization, somehow makes do with just three police forces in all: the National Police, the National Gendarmerie, and the Municipal Police, only half of whom are armed. Australia meanwhile has eight police forces, New Zealand has just one, while Canada, somewhat unusually, has more than 200, including two dozen or more among Native American tribes.”).