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IN POLICE WE TRUST

RACHEL MORAN*

INTRODUCTION

IN the opening episode of the extraordinary 2016 documentary *O.J.: Made in America*, Joe Saltzman—a professor at the University of Southern California during the 1960s, when O.J. Simpson played football there—weighs in on the issue of Los Angeles police officers’ maltreatment of black and brown Los Angelesños during that time period.¹ “I didn’t think it was a big deal,” says Saltzman.² “I didn’t think these people were being persecuted. I didn’t think these people had any problem . . . I was as naïve as any other white person.”³

Watching Professor Saltzman’s admission of naïveté called to mind the ongoing attitude of incredulity many white people have displayed in the wake of recent shootings of black men by police officers. After Michael Brown (a black teenager) was shot and killed by Darren Wilson (a white police officer) in September of 2014, a poll of residents in the St. Louis area revealed a stark racial divide, with the majority of white residents opining that the shooting was justified, while an almost equal number of black residents concluded that it was not.⁴ Through 2015, as the names and faces of Laquan McDonald, Tamir Rice, Akai Gurley, Walter Scott, and Samuel DuBose—all black men or children gunned down by

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1. O.J.: MADE IN AMERICA (ESPN 2016). The five-episode documentary, which uses O.J. Simpson’s life and murder trial as a means for discussing the broader narrative of racial injustices in America, has been called “the best 30 for 30 documentary that the sports network has ever produced,” a “masterwork of scholarship,” and “the best thing [ESPN has] ever done.” See, e.g., John Breech, *How to Watch ESPN’s O.J. Simpson Documentary “O.J.: Made in America”*, CBSSPORTS.COM (June 9, 2016), <http://www.cbssports.com/nfl/news/how-to-watch-the-o-j-simpson-documentary-o-j-made-in-america/> [<https://perma.cc/KP7B-2CFE>]; Spencer Hall, *O.J. Simpson Documentary Is the Best Thing ESPN Has Ever Done*, SBNATION (June 6, 2016), <http://www.sbnation.com/2016/6/6/11759814/espn-oj-simpson-documentary-made-in-america> [<https://perma.cc/E9CY-GMN8>]; Mary McNamara, *Why “O.J.: Made in America” Might Be the First Television Show to Win an Oscar*, L.A. TIMES (May 20, 2016), <http://www.latimes.com/entertainment/tv/la-et-st-oj-made-in-america-tv-review-20160505-snap-htmstory.html> [<https://perma.cc/TTU2-KH5T>].

2. O.J.: MADE IN AMERICA, *supra* note 1, at Episode 1, 20:18–21; see also *id.* at 22:40 (identifying Saltzman as a USC professor).

3. *Id.* at Episode 1, 20:21–28.

4. See Jamelle Bouie, *Tale of Two Fergusons*, SLATE (Sept. 16, 2014, 05:47 PM), http://www.slate.com/articles/news_and_politics/politics/2014/09/st_louis_blacks_and_white_disagree_on_michael_brown_s_killing_hold_almost.html [<http://perma.cc/V7U3-UBNW>].

police officers⁵—became rallying cries for communities of color, many white scholars and citizens alike continued to insist that the police were being unfairly maligned.⁶ And when, after the July 2016 fatal shootings of Alton Sterling and Philando Castile—two more black men killed by white police officers⁷—Democratic presidential nominee Hillary Clinton called on white people to “listen[] to the legitimate cries coming from our African-American fellow citizens,” she was widely mocked and accused of “pandering to the African-American community.”⁸

The archetype of police officers as good-hearted heroes who do no wrong is a common one among members of the American racial majority.⁹

5. See Ashley Fantz & Holly Yan, *Dash Cam Video Shows the Moments Before South Carolina Police Shooting*, CNN (Apr. 9, 2015, 07:53 PM), <http://www.cnn.com/2015/04/09/us/south-carolina-police-shooting/> [https://perma.cc/T4ZT-3MNA]; Dana Ford & Ed Payne, *Ex-University Cop in Samuel DuBose Shooting Death Pleads Not Guilty*, CNN (July 31, 2015, 12:39 AM), <http://www.cnn.com/2015/07/30/us/ohio-sam-dubose-tensing> [https://perma.cc/9CRC-7BQD]; J. David Goodman & Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb. 11, 2015), <http://www.nytimes.com/2015/02/nyregion/akai-gurley-shooting-death-arraignment.html> [https://perma.cc/8ABB-GWAL]; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?smid=tw-ny-times&smtyp=cur&r=0> [https://perma.cc/BY4D-EJT3]; *Warning, Graphic Content: Laquan McDonald Shooting Dash-cam Video*, CHI. TRIBUNE (Jan. 22, 2016), <http://www.chicagotribune.com/news/85142730-132.html> [https://perma.cc/EV84-QQVD].

6. See, e.g., HEATHER MACDONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* (2016); Thomas Sowell, *The Race War No One Can Win*, NAT'L REV. (July 13, 2016, 12:00 AM), <http://www.nationalreview.com/article/437703/the-war-on-cops-racism-allegations-are-largely-non-factual> [https://perma.cc/CK72-TGXD].

7. See Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html?_r=0 [https://perma.cc/J7ZB-TWX9]; Rosa Flores & Catherine Shoichet, *Philando Castile Shooting: What Happened When Filming Stopped?*, CNN (July 13, 2016, 10:16 PM), <http://www.cnn.com/2016/07/13/us/police-shootings-investigations/> [https://perma.cc/8XQX-U345].

8. See, e.g., *After Dallas Shooting, Hillary Makes INSANE Statement About “White People”*, ENDING FED NEWS NETWORK (July 9, 2016), <http://endingthefed.com/hillary-blames-cops-and-white-americans-for-the-deaths-of-young-black-men.html> [https://perma.cc/8LMK-YKEX]; Thomas Lifson, *Hillary Implicitly Blames “White People” for Police Shootings*, AM. THINKER (Sept. 21, 2016), http://www.americanthinker.com/blog/2016/09/hillary_implicitly_blames_white_people_for_police_shootings.html [https://perma.cc/6GH5-H7W7].

9. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 58 (2010) (referencing popular television shows like *Law & Order* that portray charismatic police officers heroically attempting to solve terrible crimes, and act as “the fictional gloss placed on a brutal system of racialized oppression and control”); Lenese C. Herbert, *Can’t You See What I’m Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 143 (2002) (noting that Americans living in middle-class or predominantly white areas “are often personally unfamiliar with the policing done in high-crime areas,” and do not understand harsh assessments of police conduct);

A fall 2016 study by the Pew Research Center revealed that 75% of white Americans believe that the police do “an excellent or good job” in treating racial and ethnic minorities equally and holding officers accountable for misconduct, while only one-third of black Americans believe the same.¹⁰ Our nation’s laws—drafted, enacted, and interpreted primarily by white people who have rarely suffered the discomfiture of serving as an unwarranted target of police suspicion or brutality—also reflect this trust in the inherent goodness of police officers.¹¹ The American legal system, from

Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 678 (2007) (citing research finding that deference to police officers is highest in areas with low crime and effective policing); Radley Balko, *The South Carolina Police Files: Gunslinging Raids, Coverups and Magical Dog Sniffs*, WASH. POST (May 31, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/05/31/the-south-carolina-police-files-gunslinging-raids-coverups-and-magical-dog-sniffs/> [https://perma.cc/BCX5-N73S] (exposing misconduct in South Carolina police forces, and quoting white man saying, “I was sheltered, I guess. I had no idea how bad it was.”).

10. See Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RES. CTR. (Sept. 29, 2016), <http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/> [https://perma.cc/44ZD-UVST]; see also e.g., Jeffrey Fagan et al., *Street Stops and Police Legitimacy in New York*, in *COMPARING THE DEMOCRATIC GOVERNANCE OF POLICE INTELLIGENCE: NEW MODELS OF PARTICIPATION AND EXPERTISE IN THE UNITED STATES AND EUROPE* 203–05 (Thierry Delpuech & Jacqueline E. Ross eds., 2016) (noting that, despite years of unconstitutional stops and frisks by New York police officers, few people outside of heavily-policed neighborhoods of color knew about the stops and searches); Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2009 CATO SUP. CT. REV. 133, 176 (2009) (noting that “most Americans are unlikely to be stopped and frisked without good reason. The same cannot be said for others, particularly minority citizens.” (footnote omitted)); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 333–36 (1998) (describing the country’s lengthy history of heavily policing, patrolling, and controlling people of color); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 4–5 (2016), http://civilrights.baltimorecity.gov/sites/default/files/20160810_DOJ%20BPD%20Report-FINAL.pdf [https://perma.cc/PZ29-HX46] (noting that Baltimore residents living in wealthier and largely white neighborhoods described police officers as generally “respectful and responsive to their needs,” while residents of predominantly African-American communities said officers are often disrespectful and inattentive to requests for service); Nikole Hannah-Jones, *A Letter From Black America*, POLITICO (Mar./Apr. 2015), <http://www.politico.com/magazine/story/2015/03/letter-from-black-america-police-115545> [https://perma.cc/ZAN9-T46A] (quoting Khalil Gibran Muhammad, author of *The Condemnation of Blackness*, as saying, “White people, by and large, do not know what it is like to be occupied by a police force. They don’t understand it because it is not the type of policing they experience.”).

11. See, e.g., Herbert, *supra* note 9, at 149 (“Courts regularly presume that apprehending officers operate solely out of good motives and the desire to achieve fairness; however, evidence shows that in high-crime areas, this presumption is often false.”); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U.L. REV. 151, 154–55 (1994) (noting in cases involving claims of police brutality against a black man, “[t]he playing field is unevenly tilted in favor of the police officer, who is often viewed as a representative of the white male majority [T]he Supreme Court has fostered and promoted a paradigm that has privileged the often white police officer with a presumption of innocence. This

United States Supreme Court case law down to municipal ordinances, is tremendously deferential to police officers' actions and decisions.¹² White Americans are, simply put, "still overwhelmingly supportive and trustful of law enforcement."¹³

As students of history should recognize, there is a problem with giving people enormous amounts of physical and moral authority, and then deferring almost completely to their use of that authority. That problem, as Lord John Acton warned Archbishop Creighton more than 130 years ago, is that people given unchecked power are likely to abuse it, and to pick the most politically unpopular and downtrodden as their victims.¹⁴ Sadly, in the United States, people of color—and more specifically, African-Americans—have long been the subset of the population that law enforcement authority are most likely to subjugate.¹⁵ Black people have, from the time

presumption of innocence contrasts with the presumption of guilt that burdens black males and effectively undermines their ability to receive fair hearings in cases turning on proof of police brutality, misconduct, or corruption.”).

12. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1883 (2015) (concluding that courts “all too readily defer” to the judgments of police officers); Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 408–09 (2013) (citing numerous Supreme Court cases in which the Court was faced with condemning or deferring to police officers’ judgment and, in every case, chose to defer to the officers’ actions or decisions).

13. Matt Taibbi, *Why Baltimore Blew Up*, ROLLING STONE (May 26, 2015), <http://www.rollingstone.com/politics/news/why-baltimore-blew-up-20150526> [<https://perma.cc/97NS-2UMG>]. In contrast, “[u]nlike their no- or low-crime area counterparts, residents or visitors of high-crime areas consistently characterize their interactions with police as overwhelmingly adversarial; many such areas have turned into virtual war zones.” Herbert, *supra* note 9, at 143 (footnote omitted); see also L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2074 (2011) (“Many within black communities perceive the constant stopping, questioning, and searching of innocent individuals as harassment, which results in distrust, anger, and other feelings not conducive to fostering good community-police relationships or perceptions of legitimacy . . .”).

14. Lord Acton, also known by his birth name John Emerich Edward Dalberg, is the person who coined the famous phrase, “Power tends to corrupt and absolute power corrupts absolutely.” Lord Acton wrote this phrase in a letter chastising the Church of England for its refusal to hold its spiritual leaders accountable for corruption and abuse. See Letter from Lord John Acton to Archbishop Mandell Creighton (Apr. 5, 1887) (excerpted at <http://history.hanover.edu/courses/excerpts/165acton.html> [<https://perma.cc/VD26-3GSP>]). In the same letter, Lord Acton wrote—less famously, but equally applicably to today’s concerns—“I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases.” See *id.*

15. See ALEXANDER, *supra* note 9, at 20–22 (discussing historic subjugation of African-Americans by those in power in the United States); Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails As an Adequate Solution to Racist, Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757, 758–59 (2005); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 245 (2010) (arguing that one of the traditional functions of police officers has been to create “‘white only’ space”); Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH.

they were first taken by force to live in this country centuries earlier, been the subject of police antagonism, suspicion, and even violence in a way white people en masse have simply never encountered.¹⁶

This Article examines the deferential attitude toward police departments and individual officers that our laws embody, as well as the detriments of that deference. Although the American justice system affords police officers deference in many different areas, this piece looks at the issue of deference primarily through the lens of police misconduct complaints.¹⁷ Specifically, when a citizen complains that a police officer has mistreated her, that complaint is supposed to be thoroughly investigated and, if found to be true, should result in repercussions for the offending officer. In reality, most complaint review systems are so deferential to the police that officers are very rarely held accountable in any meaningful way for their misconduct. The people who suffer most from this lack of accountability are overwhelmingly people of color.

Part I of this Article discusses the history of deference to police officers in this country, and describes the trajectory our legal system has undergone from one at first deeply skeptical of law enforcement power, to one that has in recent decades seized almost every possible opportunity to defer to law enforcement “expertise.” Part II addresses deference in the specific context of police misconduct complaints, and details the many ways in which cities systematically give police officers the benefit of the doubt when reviewing civilians’ complaints about those officers. Part III analyzes the downsides of deference—particularly, evidence showing that police departments do abuse their power, and that in so doing, they regularly target communities of color as the subjects of that abuse. Lastly, Part IV proposes alternatives to the deference so ingrained in our current systems for reviewing police misconduct claims.

I. THE ORIGINS OF DEFERENCE

Deference, as Professor Daniel Solove defines it, refers to “the practice of accepting, without much questioning or skepticism, the factual and

U. J.L. & POL’Y 1, 9–13 (2015) (discussing the country’s history of racialized violence inflicted by, or with the support of, the government against racial minorities); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 659–60 (1994) (“being stopped for nothing—or almost nothing—has become an all-too-common experience” for African-Americans and Hispanics); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 313–15 (1997) (describing the “distinct[ive]ly different” and humiliating way police officers tend to treat people of color, as opposed to white people, during traffic stops).

16. Brown, *supra* note 15, at 758–59.

17. For an extended discussion regarding the flaws inherent in our current systems of reviewing police misconduct complaints, see my earlier article, see generally Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837 (2016).

empirical judgments made by the decisionmaker under review.”¹⁸ Professor Paul Horwitz provides a similar definition: “the substitution by a decisionmaker of someone else’s judgment for its own.”¹⁹

For purposes of this Article, and in the specific setting of discussing police departments and officers, when I refer to deference I mean the “presumption of rectitude that accompanies police activities and decisions.”²⁰ In this context, deference occurs when a court (or any administrative body tasked with reviewing police conduct) fails to scrutinize rigorously the decisions or actions of police officers.²¹ Often, this failure to scrutinize is accompanied by the reviewing body expressing its reluctance to “second-guess” the police officer or “‘substitute’ its judgment” for that of the police officer or department.²²

A. *History of Early Laws Expressing Distrust Toward Law Enforcement Authorities*

The United States has not always been deferential to police. To the contrary, distrust of law enforcement was a hallmark of the pre-Revolutionary War colonies, and that distrust heavily influenced the founders of this country.²³ The colonists were particularly concerned with law enforcement intrusion via the infamous “writ[s] of assistance,” which gave British law enforcement officers discretion to search and seize the colonists’ property.²⁴ Blanket authority like this inspired John Adams to draft Article 14 of the Massachusetts Declaration of Rights, which served as a precursor to the Fourth Amendment and recognized the right of all colonists to be free from unreasonable governmental intrusions.²⁵

Wariness about such unbridled law enforcement authority carried over into the planning and drafting of the Constitution.²⁶ Alexander Hamilton, in the Federalist Papers, wrote that those interpreting the Constitution were tasked with the role of guarding against “serious oppressions

18. See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 946 (1999).

19. See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1061 (2008).

20. See Magee, *supra* note 11, at 173.

21. See *id.*

22. See Solove, *supra* note 18, at 943.

23. See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 208–09 (1993); Magee, *supra* note 11, at 192; Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 397–98 (2001).

24. See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 377–402 (2009); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 224 (1988); Brian D. Walsh, Note, *Illinois v. Wardlow: High-Crime Areas, Flight, and the Fourth Amendment*, 54 ARK. L. REV. 879, 886–88 (2002).

25. See MASS. CONST. of 1780, Decl. of Rights, art. XIV; Walsh, *supra* note 24, at 887–88.

26. See Ronner, *supra* note 23, at 397–98.

of the minor party in the community.”²⁷ Other scholars have noted that the Constitution generally showed that the fledgling United States did “not tolerate the tactics of a police state,”²⁸ and the Fourth Amendment specifically served as a response to the “intense history of political oppression and tyranny by the British Crown over the colonists.”²⁹ When the Framers drafted the Constitution and the subsequent Bill of Rights, they had in their minds an imperfect and untrustworthy government which, if not kept in check, would disregard fundamental liberties, particularly the liberties of minority groups lacking political power.³⁰

Early United States Supreme Court precedent echoed this distrust of law enforcement authority. In *Boyd v. United States*,³¹ the Supreme Court rejected the government’s attempt to seize goods and papers from a criminal suspect without a warrant.³² In affirming the significance of both the Fourth Amendment’s warrant requirement and the Fifth Amendment’s protection against self-incrimination, the Court has stated, “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”³³ The Court also cautioned against granting law enforcement officials “arbitrary power” that could impinge on the freedom of American citizens.³⁴ *Weeks v. United States*,³⁵ decided in the early twentieth century, maintained a similar tenor of skepticism toward law enforcement attempts to circumvent the Constitution.³⁶ The police officers in *Weeks* arrested the defendant without a warrant, went to his home, and searched it without a warrant or the defendant’s consent.³⁷ In holding that evidence obtained from the defendant’s home could not be used against him at trial, the Supreme Court commented on the “tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions,” and

27. See THE FEDERALIST No. 78 (Alexander Hamilton) (Issac Kramnick, ed. 1987).

28. See Maclin, *supra* note 23, at 197.

29. See Magee, *supra* note 11, at 190; see also *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) (the Fourth Amendment was the “direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown” (citations omitted)).

30. See Magee, *supra* note 11, at 192.

31. 116 U.S. 616 (1886), *rejected by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

32. See *id.* at 624–28.

33. Ronner, *supra* note 23, at 397–98 (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

34. See *Boyd*, 116 U.S. at 626–30.

35. 232 U.S. 383 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

36. See *id.* at 387–88.

37. See *id.* at 386.

reiterated that abusive police practices “should find no sanction in the judgments of the courts.”³⁸

While the Supreme Court continued to pay at least lip service to the importance of protecting citizens against intrusive law enforcement, some states—particularly those in the post-Reconstruction South—did not share those concerns. In the decades after the Civil War, many southern cities responded by dramatically increasing their police forces, and sending those forces to police black people.³⁹ These police forces in turn not only tolerated, but often participated in, violence against black communities.⁴⁰

Early to mid-twentieth century Supreme Court opinions responded to these abuses by reiterating the importance of individual protections against law enforcement abuses. Over the span of a few decades, particularly under the guidance of Chief Justice Earl Warren, the Supreme Court—frustrated by southern state courts’ and legislatures’ failure to protect the rights of minorities in the Jim Crow era, and by police departments’ increasingly authoritarian model of policing—agreed to hear numerous cases involving law enforcement abuses, and decided nearly all of them in favor of defendants.⁴¹ These decisions collectively expanded citizens’ ability to sue police departments for civil rights violations, guaranteed criminal defendants the right to counsel, provided that right to counsel during interrogations, required police officers to inform defendants of their right to counsel and right to remain silent during interrogation, and extended the Fourth Amendment exclusionary rule to misconduct by state law enforcement authorities.⁴² As Professor David Sklansky has noted, the “problem of police discretion,” and the decision to reign in that discretion through careful judicial oversight, was perhaps the defining characteristic of the Warren Court’s approach to policing cases.⁴³

38. *See id.* at 392, 398.

39. *See* Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 839 n.116 (1994) (citing EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 173 (1984)).

40. *See id.*

41. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963); *Mapp*, 367 U.S. at 660; *Monroe v. Pape*, 365 U.S. 167, 192 (1961); *see also* Friedman & Ponomarenko, *supra* note 12, at 1889–90; Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 215–16 (2012) (discussing these cases).

42. *See Miranda*, 384 U.S. at 467–68 (requiring police officers to warn criminal suspects of their rights to counsel and to remain silent before conducting custodial interrogations); *Escobedo*, 378 U.S. at 490–91 (recognizing Sixth Amendment right to counsel during police interrogations); *Gideon*, 372 U.S. at 342–44 (finding that right to counsel is fundamental to fair trial and therefore obligatory upon states under Fourteenth Amendment); *Mapp*, 367 U.S. at 660 (holding exclusionary rule applicable to states); *Monroe*, 365 U.S. at 167 (holding that illegal actions of police officers can constitute deprivation of civil rights); *see also* Friedman & Ponomarenko, *supra* note 12, at 1889–90.

43. *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1737 (2005).

Today, *Boyd* and *Weeks* are no longer good law.⁴⁴ Many of the protections afforded by the Warren Court have fallen out of favor, and the Supreme Court—and lower courts—share almost none of their earlier zeal for protecting citizens against abusive law enforcement officers.⁴⁵ More than two centuries after the Framers enacted the Bill of Rights, American police officers now enjoy broad discretion to search and seize without warrants, use force on the citizens they are intended to serve, and generally act with little fear of being held accountable for mistreatment of the people they are ostensibly intended to serve and protect.⁴⁶

B. *The Shift Toward Deference*

In the two-plus centuries since the Bill of Rights was enacted, the Supreme Court has, as Professor Carol Steiker notes, “clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order.”⁴⁷ The reason, many scholars agree, is a troubling cocktail of political aspirations, the hysteria of the “War on Drugs,” and outright racism.

Nearly all of the Warren Court’s most significant law enforcement-related decisions—providing the right to counsel during interrogation, requiring police officers to warn suspects about their rights prior to interrogation, excluding evidence obtained by police misconduct, and expanding the right to sue police officers for constitutional violations—occurred in the early-to-mid-1960s.⁴⁸ In 1968 Richard Nixon ran for president, making the nation’s rising crime rates and the Warren Court’s “pro-criminal-rights decisions” one of the chief targets of his campaign.⁴⁹ Nixon, who ran on an anti-crime platform and at times revealed himself to be outright racist,⁵⁰ made four appointments to the Supreme Court during his five

44. See *Weeks v. United States*, 232 U.S. 383 (1914), *overruled by Mapp*, 367 U.S. at 643; *Boyd v. United States*, 116 U.S. 616 (1886), *rejected by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

45. See *infra* Part I(B)–(C).

46. See, e.g., Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 893 (2002); Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 264–65 (2010); Friedman & Ponomarenko, *supra* note 12, at 1889–91; Harris, *supra* note 15, at 666.

47. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996).

48. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963); *Mapp*, 367 U.S. at 660; *Monroe v. Pape*, 365 U.S. 167, 173–75 (1961).

49. See KEVIN J. McMAHON, NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 3–4, 36 (2011); Friedman & Ponomarenko, *supra* note 12, at 1889–90.

50. See McMAHON, *supra* note 49, at 3–4, 36; Dan Baum, *Legalize It All*, HARPER’S MAG. (Apr. 2016), <http://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/WV8N-TNEX>]; Rob Stein, *New Nixon Tapes Reveal Anti-Semitic, Racist Remarks*, WASH. POST (Dec. 12, 2010), <http://www.washingtonpost.com/wp->

and one-half-year tenure.⁵¹ At the same time Richard Nixon was touting his tough-on-crime agenda,⁵² he and other lawmakers, as well as law enforcement officials, also increasingly stepped up their rhetoric in support of the now-infamous War on Drugs.⁵³ For many politicians—particularly those in the post-Jim Crow south—the drug war represented a new and culturally-acceptable method of subjugating African-Americans, both individually by charging them with crimes that carried increasingly-severe sentences, and collectively by enforcing oppressive police practices in the segregated communities where most African-Americans lived.⁵⁴ The War on Drugs, with its emphasis on subjecting mass numbers of people to police search and seizure mostly because they live in a certain neighborhood or have skin of a certain color, depended on police officers possessing the capacity and authority to “sift[] through a large volume of citizens in order to discover criminal activity.”⁵⁵ The Warren Court’s jurisprudence—demanding clear justification for exercise of police authority, and reminding individuals of their rights to be protected from oppressive police conduct—was simply not compatible with the tactics used in the War on Drugs.⁵⁶

The President’s anti-crime paranoia and War on Drugs rhetoric was, not surprisingly, heavily reflected in the precedent of the men he appointed.⁵⁷ Led by the new Chief Justice Warren Burger, the Supreme Court began to take a markedly more deferential approach to policing issues.⁵⁸ The Court—comprised, with the exception of Justice Thurgood Marshall, entirely of white men⁵⁹—began to embrace a style of policing

dyn/content/article/2010/12/11/AR2010121102890.html [<https://perma.cc/RB5M-6QAV>].

51. See McMAHON, *supra* note 49, at 3–4, 36; Friedman & Ponomarenko, *supra* note 12, at 1889–90.

52. This agenda experienced a recent rebirth in the form of Donald Trump’s presidential candidacy. Trump, who has a fondness for likening himself to Nixon, shared Nixon’s popularity primarily among white voters, and eagerness to identify himself as a “law-and-order candidate.” See, e.g., Michael Barbaro & Alexander Burns, *It’s Donald Trump’s Convention. But the Inspiration? Nixon.*, N.Y. TIMES (July 18, 2016), http://www.nytimes.com/2016/07/19/us/politics/donald-trump-portrayed-as-an-heir-to-richard-nixon.html?_r=0 [<https://perma.cc/USK8-8VDF>]; Christopher N. Lasch, *Donald Trump’s Threat to Justice Reform*, CRIME REP. (Dec. 15, 2015), <http://thecrimereport.org/2015/12/15/2015-12-donald-trumps-threat-to-justice-reform/> [<https://perma.cc/F4JL-AUTU>]; Jules Witcover, *Trump Channels 1968 Richard Nixon*, BALT. SUN (July 25, 2016), <http://www.baltimoresun.com/news/maryland/politics/bs-ed-witcover-trump-20160725-story.html> [<https://perma.cc/V6Z7-A6XD>].

53. See Cooper, *supra* note 46, at 852–53, 893.

54. See ALEXANDER, *supra* note 9, at 30–35; Baum, *supra* note 50.

55. See Miller, *supra* note 41, at 215–16.

56. See *id.*

57. See Cooper, *supra* note 46, at 852–53.

58. See Friedman & Ponomarenko, *supra* note 12, at 1889–90; Steiker, *supra* note 47, at 2469–70.

59. See *Compare Supreme Court Justices*, INSIDE GOV., <http://supreme-court-justices.insidegov.com/> (last visited Oct. 30, 2017); see also Dan M. Kahan et al., *Whose*

that was both “dragnet and racialized,” with low percentages of success but inevitably, given the huge number of people now subjected to stops and searches, an occasional victory for police to tout.⁶⁰ What eventually became a tidal wave of pro-police decisions started as a small ripple in 1968, when the Supreme Court decided *Terry v. Ohio*.⁶¹

In *Terry*, the Supreme Court was faced with deciding whether an experienced police officer behaved constitutionally when he stopped and frisked three men who were standing on a street corner and “didn’t look right” to the officer.⁶² Although the officer unquestionably did not have probable cause to stop the men, the Court sanctioned the officer’s actions by creating, for the first time, a “reasonable suspicion” test allowing an officer to stop and frisk people as long as the officer has reasonable suspicion—a standard less than probable cause—that crime has occurred, is occurring, or will soon occur.⁶³ Although the *Terry* Court acknowledged that the officer’s stop and frisk ran the risk of encouraging “wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,” the Court nonetheless approved of the officer’s conduct.⁶⁴

If the goal of *Terry* was, as it had been in the past, to ensure that individuals’ constitutional rights to freedom from intrusive police conduct remained protected, the decision was a dismal failure.⁶⁵ But that was likely not the goal. In dissecting the *Terry* decision—which is hard to understand purely as a matter of constitutional theory because the Fourth Amendment makes no reference to searches and seizures authorized by mere reasonable suspicion—Professor Anthony Thompson has noted that *Terry* is one of the first cases in which the Supreme Court chose the narrative of “police officer as expert.”⁶⁶ This narrative allowed the Court

Eyes are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 861–62 (2009) (providing statistical analysis of how factors such as race, gender, cultural orientation, and income level can affect one’s perception of whether police behaved appropriately in given situations, and criticizing Supreme Court for deferring to white majority perspective); Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1446, 1449 (2010) (criticizing the overwhelmingly white and male Supreme Court for “enhancing and privileging the dominant, majority perspective’s role” in cases that involve minority rights).

60. See Miller, *supra* note 41, at 220; see also Friedman & Ponomarenko, *supra* note 12, at 1862–63 (“[A]s crime rates continued to climb and the country took a more conservative turn after the Johnson years, proposals that legislatures place additional constraints on policing largely fell on deaf ears.” (footnote omitted)).

61. 392 U.S. 1 (1968); see also Hon. Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL’Y 91, 94 (2007).

62. See *Terry*, 392 U.S. at 5–7.

63. See *id.* at 19–21; see also Cooper, *supra* note 46, at 852–53.

64. See *Terry*, 392 U.S. at 14 (footnote omitted).

65. See Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 424 (2004).

66. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 971 (1999).

to ignore other reasons the officer may have believed the men “didn’t look right”—for example, that two of the men were black, and standing on a street corner, which was a classic stereotype of the War on Drugs⁶⁷—and instead assume that the officer, buoyed by years of experience in law enforcement, possessed an expertise in sniffing out crime that ordinary citizens simply do not understand.⁶⁸ Such an officer could be trusted to make wise decisions based on mere suspicion, rather than probable cause.

The notion of police officers as experts to whom courts should defer, rather than authorities courts should view with suspicion, became the overwhelmingly dominant narrative in the decades following *Terry*.⁶⁹ In a ten-year period spanning from 1982 to 1991—while the War on Drugs reached its climax, and the nation’s prison population increased at a rate unparalleled in the modern world⁷⁰—the Supreme Court heard thirty narcotics cases involving questions of whether law enforcement acted illegally in stopping or searching someone (or something).⁷¹ In twenty-nine of those thirty cases, the government had lost in the court below.⁷² The Supreme Court sided with the government, and concluded that law enforcement officers’ actions were constitutional in all but three of the thirty cases.⁷³ The Court itself did not bother to hide its motivation for taking

67. See *Terry*, 392 U.S. at 5; Katz, *supra* note 65, at 429.

68. See Thompson, *supra* note 66, at 971.

69. See Friedman & Ponomarenko, *supra* note 12, at 1862–63; Harris, *supra* note 15, at 666 (concluding that idea of deference to police officers “took center stage during the 1980’s”).

70. See Associated Press, *U.S. Has Highest Rate of Imprisonment in World*, N.Y. TIMES (Jan. 7, 1991), <http://www.nytimes.com/1991/01/07/us/us-has-highest-rate-of-imprisonment-in-world.html> [<https://perma.cc/7PFP-XFK7>]; Tracy L. Snell, *Correctional Populations in the United States, 1991*, U.S. DEP’T OF JUSTICE (Aug. 1993), <https://www.ncjrs.gov/pdffiles1/bjs/142729.pdf> [<https://perma.cc/48XP-JD6H>].

71. The thirty cases are: *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Florida v. Wells*, 495 U.S. 1 (1990); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Skinner v. Ry. Labor Exec.s’ Ass’n.*, 489 U.S. 602 (1989); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Florida v. Riley*, 488 U.S. 445 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *California v. Greenwood*, 486 U.S. 35 (1988); *United States v. Dunn*, 480 U.S. 294 (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Colorado v. Bertine*, 479 U.S. 367 (1987); *California v. Ciraolo*, 476 U.S. 207 (1986); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *California v. Carney*, 471 U.S. 386 (1985); *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Johns*, 469 U.S. 478 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Karo*, 468 U.S. 705 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Jacobsen*, 466 U.S. 109 (1984); *Michigan v. Long*, 463 U.S. 1032 (1983); *Illinois v. Andreas*, 463 U.S. 765 (1983); *Illinois v. Lafayette*, 462 U.S. 640 (1983); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Illinois v. Gates*, 462 U.S. 213 (1983); *Texas v. Brown*, 460 U.S. 730 (1983); *Florida v. Royer*, 460 U.S. 491 (1983); and *United States v. Knotts*, 460 U.S. 276 (1983).

72. The one exception to this is *Von Raab*, 489 U.S. at 679.

73. The only three cases in which the Court found law enforcement actions to be unconstitutional were *Wells*, 495 U.S. at 3; *Place*, 462 U.S. at 700; and *Royer*, 460 U.S. at 497.

these cases: in *United States v. Sokolow*,⁷⁴ which addressed the legality of a police officer's stop of a suspected drug courier, the Court announced in its decision that it granted certiorari "because of [the] serious implications for the enforcement of the federal narcotics laws."⁷⁵ Similarly, in *United States v. Arvizu*,⁷⁶ the Court acknowledged that it granted certiorari "because of [the case's] importance to the enforcement of federal drug and immigration laws."⁷⁷ By the year 2000, the Court had affirmed law enforcement officers' actions so consistently, in so many cases, that one federal appellate judge referred to the Fourth Amendment as "*hors de combat* of the government's so-called War on Drugs and its efforts to interdict illegal immigration, which together have produced a kind of public hysteria that has in turn impeded rational judgment and logic."⁷⁸

In many of those cases the Court went out of its way not only to affirm the legality of police officers' conduct, but also to emphasize that those officers' actions must be viewed through the lens of deference. In *United States v. Cortez*,⁷⁹ for example, the Court was asked to decide whether police officers had reasonable suspicion to stop suspected illegal immigrants crossing the border from Mexico into the United States.⁸⁰ In affirming the constitutionality of the officers' stop, the Court emphasized that the facts "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."⁸¹ Similarly, in *Illinois v. Lafayette*,⁸² the Court rejected an argument that police officers had no right to search the bag of an arrestee prior to incarceration, and reasoned that it was "hardly in a position to second-guess police departments" regarding the appropriate way to protect its employees.⁸³

In *Michigan Department of Police v. Sitz*,⁸⁴ the Supreme Court upheld the constitutionality of roadside checkpoints by police officers, despite evidence that such checkpoints are both an intrusive and ineffective means of finding and deterring criminals.⁸⁵ The Court noted that, while reason-

74. 490 U.S. 1 (1989).

75. *See id.* at 7.

76. 534 U.S. 266 (2002).

77. *See id.* at 273 (citation omitted); *see also* Cooper, *supra* note 46, at 893.

78. *See* *United States v. Zapata-Ibarra*, 223 F.3d 281, 281 (5th Cir. 2000) (Wiemer, J., dissenting).

79. 449 U.S. 411 (1981).

80. *See id.* at 412-13.

81. *See id.* at 418.

82. 462 U.S. 640 (1983).

83. *See id.* at 648; *see also* *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (holding that a police officer who shot and killed a fleeing suspect acted reasonably, and echoing the Supreme Court's deference to the judgments of officers: "we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.").

84. 496 U.S. 444 (1990).

85. *See id.* at 453-54.

able people might disagree about the best way to apprehend drunk drivers, “the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources.”⁸⁶ In *Ornelas v. United States*⁸⁷—a case addressing whether police officers had reasonable suspicion to stop and search the car of two men whom they suspected of drug trafficking—the Court reiterated that police officers “view[] the facts through the lens of [their] police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.”⁸⁸ And in *Arvizu*, the Court found that a patrol agent had reasonable suspicion to stop a man crossing the border, concluding that appellate courts must grant “due weight” to the inferences the agent drew from the man’s behavior.⁸⁹

The unifying force between the Supreme Court’s Fourth Amendment jurisprudence, as Professor Sklansky has noted, is “significant latitude to law enforcement.”⁹⁰ Professor Robin Magee refers to this theory of police expertise as “the good cop paradigm”—a “false myth of the police officer as a law-abiding citizen who is chiefly, if not totally, motivated by law enforcement interests when appropriate and who can be trusted to behave within constitutional parameters.”⁹¹ The good cop paradigm allows courts to presume that law enforcement conduct was indeed constitutional, and plausibly defer to the actions of police officers, even when no evidence exists that they are employing best or even reasonable practices.⁹² To the contrary, even if a police officer’s conduct is demonstrably *not* the least

86. *See id.*

87. 517 U.S. 690 (1996).

88. *See id.* at 699; *see also* Cooper, *supra* note 46, at 893 (noting that the *Ornelas* Court’s broad grant of discretion to police officers “occurred in the context of both media fomenting of a drug war and the reality that law enforcement relies on its ability to utilize certain techniques to conduct the drug war” (footnote omitted)).

89. *See* United States v. Arvizu, 534 U.S. 266, 277 (2002); *see also* United States v. Nelson, 284 F.3d 472, 482 (3d Cir. 2002) (rejecting a claim that an officer’s stop and arrest was unreasonable, and citing *Arvizu* for the proposition that the Supreme Court “accorded great deference to the officer’s knowledge of the nature and the nuances of the type of criminal activity that he had observed in his experience, almost to the point of permitting it to be the focal point of the analysis” (citation omitted)).

90. *See* Sklansky, *supra* note 15, at 298.

91. *See* Magee, *supra* note 11, at 160–61 (footnotes omitted); *see also* Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 687 (1995) (noting that many courts “appear to trust that police officers perform such acts out of concern for citizens rather than as a subterfuge seizure or search”).

92. *See* Magee, *supra* note 11, at 192; *see also* Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994) (concluding jury did not “automatically get to second-guess” decisions of police officers, “even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently”); Foley, *supra* note 46, at 275 (arguing that the Supreme Court’s extreme deference to police officers has “green-lighted . . . policing from the gut”).

intrusive means of accomplishing a stated goal, the Court will rubber-stamp it as long as the conduct could plausibly be considered reasonable.⁹³ The motivation behind this paradigm, and the resulting latitude toward police officers, is not evidence. Neither the Court, nor the governmental agencies advocating on behalf of the police officers in these cases, have made much, if any, effort to prove that law enforcement practices actually merit the Court's assumptions regarding their expertise.⁹⁴ Instead, the Court has at times admitted that its decisions are made with the goal of making police officers' jobs easier.⁹⁵ In *Hudson v. Michigan*,⁹⁶ the Court—declining to apply the exclusionary rule even in the face of admitted police misconduct—acknowledged that the rule's “costly toll upon . . . law enforcement objectives” was a reason to narrow its enforcement.⁹⁷

The Court's insistence on deference has also blinded it to racially-motivated behavior and outright bias. Many of the Fourth Amendment cases the Court decided in law enforcement's favor involved minority defendants whose race or national origin was explicitly a factor that police officers used in deeming them suspicious.⁹⁸ Other times, race was not mentioned but still implicit in the decision. In *Whren v. United States*,⁹⁹ the Court upheld the constitutionality of a narcotics task force stopping two black men who the officers suspected of involvement in “illegal drug-dealing activity.”¹⁰⁰ Although the officers had no probable cause or even reasonable suspicion to connect the men to narcotics, the Supreme Court held that their motivation for the stop was immaterial, because the men

93. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (explaining that the Fourth Amendment requires only that the defendant officers chose a “reasonable” method to end the threat that the plaintiff posed to the officers in a force situation, regardless of the availability of less intrusive alternatives); *United States v. Sharpe*, 470 U.S. 675, 686–87 (1985) (“A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But ‘[t]he fact that the [search could] have been accomplished by less intrusive means does not, itself, render the search unreasonable.’” (citation omitted)); see also *Tanner v. San Juan Cty. Sheriff's Office*, 864 F. Supp. 2d 1090, 1115 (D.N.M. 2012) (“To avoid a ‘Monday morning quarterback’ approach, the Fourth Amendment does not require the use of the least, or even a less, forceful or intrusive alternative to effect custody, so long as the use of force is reasonable under *Graham v Connor*.” (citation omitted)).

94. See Herbert, *supra* note 9, at 148 (“As a matter of course, courts defer to ‘officer expertise’ in defining and evaluating police encounters with civilians. Save for intermittent and perfunctory inquiry into an officer's training, experience, and assignment, courts require little proof that the officer is the proper recipient of such deference”); Miller, *supra* note 41, at 214 (noting that the Supreme Court's jurisprudence of police expertise is “pure detective fiction”).

95. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

96. 547 U.S. 586 (2006).

97. See *id.* at 591 (internal quotation omitted).

98. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990); *United States v. Montoya de Hernandez*, 473 U.S. 531, 532–33 (1985); *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975).

99. 517 U.S. 806 (1996).

100. See *id.* at 809.

had committed a traffic violation and could be pulled over for that reason.¹⁰¹ And in *Illinois v. Wardlow*,¹⁰² a black man on the west side of Chicago did nothing more than flee from officers when they approached him, but the Court held that the officers acted constitutionally in stopping and frisking him because the man was in a high-crime area, and thus, it was reasonable of the officers to believe that he also could be a criminal.¹⁰³ Although innocent people may flee from police officers, the Court decided it could not “reasonably demand scientific certainty from . . . law enforcement officers where none exists.”¹⁰⁴

C. *The Current State of Deference*

The Court’s veneration of police officers has not abated in recent years, leading some scholars to refer to the Court’s current jurisprudence in policing cases as “a posture of extreme deference . . . that is very difficult to explain as a matter of constitutional theory.”¹⁰⁵ Several decisions from the last three years alone illustrate this point. In *Plumhoff v. Rickard*,¹⁰⁶ decided in 2014, the Court held that police officers who shot and killed a fleeing suspect who had been pulled over for a damaged headlight acted reasonably, and reiterated that any review of a police officer’s decision-making must “allo[w] for the fact that police officers are often forced to make split-second judgments . . . about the amount of force that is nec-

101. See *id.* at 810–13; see also Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010) (criticizing *Whren* decision for allowing racial profiling by law enforcement to go “largely unchecked”); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1853–61 (2004) (critiquing *Whren*).

102. 528 U.S. 119 (2000).

103. See *id.* at 121–22, 125–26.

104. See *id.* at 125; see also Cooper, *supra* note 46, at 884–85 (2002) (opining that Court’s insistent deference to police officers allows officers to racially profile suspects); Mia Carpinello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 MICH. J. RACE & L. 355, 357–58 (2001) (arguing that Court in *Wardlow* articulated a reasonable standard “too deferential to police officers’ perceptions of reasonableness,” and that “[i]n our criminal justice system, reasonable behavior is defined as White behavior”).

105. See Friedman & Ponomarenko, *supra* note 12, at 1890 (footnote omitted); see also Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 STAN. L. REV. 987, 994 (2014) (calling out the Supreme Court for “uncritically tolerating [the] indignities” of granting police officers unbridled discretion to arrest for minor incidents such as traffic offenses, jumping turnstiles, stealing food to eat, and possessing minor amounts of marijuana); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U.L. REV. 1119, 1127 (2008) (labeling the Supreme Court’s jurisprudence regarding use of force by police officers as “deeply impoverished . . . unprincipled, indeterminate, and sometimes simply misleading.”).

106. 134 S. Ct. 2012 (2014).

essary in a particular situation.”¹⁰⁷ In 2015, the Court granted qualified immunity to police officers who fired numerous shots at a mentally disabled woman, concluding that although the officers may have made “some mistakes,” their conduct should not be judged with the benefit of hindsight.¹⁰⁸

Later that same year, the Court granted qualified immunity to another police officer who shot and killed a motorist during a high-speed chase.¹⁰⁹ Although the officer had never received training in shooting at vehicles to disable them, and his superior specifically ordered him to “stand by” and not shoot, the Supreme Court found that no reasonable jury could conclude that the officer used an amount of force that violated clearly established law when he ignored his supervisor’s commands and fired six shots into the driver’s car.¹¹⁰ In so doing, the Court noted that, “whatever can be said of the wisdom of” the officer’s decision, he could not be held civilly liable for his conduct.¹¹¹ Most recently, in *Utah v. Strieff*,¹¹² a majority of the Court declined to exclude evidence recovered by a detective during an unquestionably illegal stop, because the man who the detective illegally stopped had, unknown to the officer, an unrelated warrant out for his arrest.¹¹³ Although the detective had no valid reason to suspect the man of illegal activity, and stopped him only because the man had walked out of a house the detective thought might be involved in “drug activity,” the Court found that the detective’s conduct was “at most negligent,” and any mistakes in the stop were made in good faith.¹¹⁴ Jus-

107. See *id.* at 2020 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

108. See *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1775, 1778 (2015). Qualified immunity is a topic that many scholars have covered in more depth than I can devote in this Article. See, e.g., Susan Bendlin, *Qualified Immunity: Protecting “All But the Plainly Incompetent” (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023 (2012); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 919 (2015); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889 (2015); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). For purposes of this piece, I note that qualified immunity is a common means by which the judicial system defers to the decision-making of police officers and is an easy way for the court to consistently opt out of holding officers responsible for potential misconduct. See Chen, *supra*, at 910 (noting that current state of qualified immunity doctrine “rapidly approaches the status of absolute immunity” for police officers); Schwartz, *supra*, at 937 (explaining the results of an empirical study which showed that police officers are “virtually always” indemnified in lawsuits alleging their misconduct).

109. See *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015).

110. See *id.* at 307, 312; see also Kahan et al., *supra* note 59, at 841 (arguing that the Court has a wrongheaded tendency to “privilege its own view” of whether law enforcement conduct is legal, without considering—or even acknowledging—alternative viewpoints).

111. See *Mullenix*, 136 S. Ct. at 311.

112. 136 S. Ct. 2056 (2016).

113. See *id.* at 2060, 2064.

114. See *id.* at 2062–63.

tice Sonia Sotomayor issued a lonely but scathing dissent, arguing that the officer uncovered evidence of the warrant only by “exploiting his own illegal conduct.”¹¹⁵

In recent years scholars have, with increasing solidarity, condemned the Supreme Court’s knee-jerk deference to police conduct.¹¹⁶ They have excoriated the Court for “repeatedly defer[ring] to the judgments of all officers”;¹¹⁷ “strongly defer[ring] to the judgment of police officers” without seriously questioning their use of force;¹¹⁸ applying an “increasingly deferential review” of officers’ decisions;¹¹⁹ interpreting the Constitution so as to grant “extraordinary discretion to police”;¹²⁰ accepting police officers’ explanations of their conduct “blindly and without question”;¹²¹ and applying a “presumption[] of legitimate government action,” rather than closely examining the high cost of police abuse.¹²² The Court’s deference consistently comes at the greatest cost to people of color.¹²³ And it conflicts distinctly with the country’s historic mistrust of expansive police powers.¹²⁴

The Court’s decisions expose its reluctance to keep law enforcement authorities in check, in the name of fighting crime and protecting the country’s borders. But these decisions also reveal a reason white Americans are so often oblivious to policing abuses: they were never the intended targets of these abuses. From the nascent moments of the drug war, people of color have been both intentionally targeted and disproportionately prosecuted.¹²⁵ The Court’s deference allows police to target racial minorities, and thus, many white people remain either naïve or intentionally blind to those abuses.

115. See *id.* at 2064–71 (Sotomayor, J., dissenting).

116. See, e.g., Bowers, *supra* note 105, at 994; Friedman & Ponomarenko, *supra* note 12, at 1889–90; Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 790 (2013); Greene, *supra* note 15, at 36; L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1155 (2012).

117. See Richardson, *supra* note 116, at 1155.

118. See Urbonya, *supra* note 91, at 627.

119. Goldberg, *supra* note 116, at 802.

120. Butler, *supra* note 15, at 247.

121. Herbert, *supra* note 9, at 148.

122. See Greene, *supra* note 15, at 36.

123. See Butler, *supra* note 15, at 252 (observing that people in high crime areas, who are most frequently minorities, suffer the most from the Court’s deference to police); Sklansky, *supra* note 15, at 273 (noting that the Court’s decisions disregard “the distinctive grievances and concerns of minorit[ies]”).

124. See Urbonya, *supra* note 91, at 705; see also Friedman & Ponomarenko, *supra* note 12, at 1830–31 (noting that police departments are some of the “least regulated” agencies in America).

125. See ALEXANDER, *supra* note 9, at 58–59.

II. DEFERENCE IN REVIEW OF MISCONDUCT COMPLAINTS

Although a number of scholars have bemoaned the way the judiciary reviews allegations of police misconduct that arise in criminal cases or civil lawsuits,¹²⁶ very few have discussed how that same deeply-ingrained deference pervades administrative review of police misconduct claims. Administrative review occurs—or, at least, is supposed to occur—when a civilian complains about misconduct by a particular police officer or officers within a department. Depending on the city, the civilian may be able to raise that complaint in person at a police department, via a formal written complaint, over the telephone, or online.¹²⁷ The complaint is then reviewed by, depending on the review process instituted in the particular city or police department, either an internal unit within the police department itself, or an external review agency.¹²⁸

Part II of this Article addresses the manner in which the deference so prevalent in judicial review of police officers' conduct—discussed in Part I—also permeates administrative review of civilian complaints regarding police misconduct. In theory, a complaint of police misconduct that is investigated and found to be true should result in some sort of meaningful action against the police officer. In reality, the review process is so imbued from start to finish with systemic deference to police officers and departments that complaints are rarely sustained, and even less likely to result in consequences for the officers involved.

A. *Police Departments Are Frequently Entrusted with the Responsibility to Investigate Complaints of Their Own Misconduct*

Internal review is the practice of relying on police officers—typically working in a unit known as internal affairs—to handle investigations into alleged misconduct by other officers within the same department.¹²⁹ For most police departments across the United States, internal affairs units

126. See *supra* Part I(C).

127. See, e.g., *File a Complaint*, CHI. CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, <http://www.chicagocopa.org/complaints/> [https://perma.cc/LXV9-Z4HE] (last visited July 14, 2016); *File a Complaint Online*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD, <https://www1.nyc.gov/site/ccrb/complaints/file-online.page> [https://perma.cc/GY4H-KGVQ] (last visited July 14, 2016).

128. See Moran, *supra* note 17, at 853–82.

129. For readers unfamiliar with the internal affairs review process and how it may operate, I recommend two works, see OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE, <http://ric-zai-inc.com/Publications/cops-p164-pub.pdf> [https://perma.cc/Z6SG-272E] (last visited Mar. 22, 2017) (providing guidelines for what should happen when civilian files a complaint with an internal affairs unit); Ryan J. Reilly, *Here's What Happens When You Complain to Cops About Cops*, HUFFINGTON POST (Oct. 13, 2015), http://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce [https://perma.cc/3G6X-3TRW] (discussing what actually does happen when a citizen tries to file a complaint with an internal affairs unit).

review the majority of civilian complaints regarding officer misconduct.¹³⁰ This means that when a civilian complains about misconduct by an officer within a police department, another officer in that same department both receives and investigates the complaint.

This model of internal review affords police departments a “high degree of autonomy” in deciding how to regulate their officers.¹³¹ The Supreme Court has—not surprisingly, given the level of deference it routinely affords police officers and departments¹³²—spoken out in favor of this approach. In *Hudson*, the Court concluded, as a basis for declining to apply the exclusionary rule to knock-and-announce violations, that police departments are increasingly equipped to teach their own “how to craft an effective regime for internal discipline.”¹³³ Accordingly, external pressures are, in the Court’s view, no longer necessary.¹³⁴ The Court cited little evidentiary support for its conclusion that police departments are effective at disciplining their own.¹³⁵ Instead—after admitting that its earlier precedent in *Mapp v. Ohio*¹³⁶ had suggested a far “wide[r] scope for the exclusionary rule”¹³⁷—the Court noted the “substantial social costs” of applying the exclusionary rule and chose to rely on law enforcement to police themselves instead.¹³⁸

B. *Even “Independent” Review Agencies Are Often Comprised of Current or Ex-Law Enforcement Officials*

The alternative to internal review is some form of external, independent review agency. Independent review agencies are not a new creation: they first reached a limited level of prominence during the Civil Rights movement of the 1950s and 1960s, after activists from African-American

130. See MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CITIZEN COMPLAINTS ABOUT USE OF FORCE 4 (2006), <http://www.bjs.gov/content/pub/pdf/ccpuf.pdf> [<https://perma.cc/N6VG-58XR>]; see also HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), <https://www.hrw.org/legacy/reports98/police/uspo25.htm> (“Internal affairs divisions are at the center of any examination of how police departments deal with human rights abuses committed by officers.”).

131. See Merrick Bobb, *Internal and External Police Oversight in the United States*, NAT’L PREA RES. CTR. <https://www.prearesourcecenter.org/sites/default/files/library/internalandexternalpoliceoversightintheunitedstates.pdf> [<https://perma.cc/L3MM-CXSX>] (last visited Oct. 1, 2017).

132. See *supra* Part I(B)–(C).

133. See *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

134. See *id.*; see also Miller, *supra* note 41, at 219 (“Compounding its deference to authoritarian policing, the Court currently emphasizes that self-regulation rather than external, judicial scrutiny or citizen review is sufficient to ensure police compliance with fourth amendment norms.” (footnote omitted)).

135. See *Hudson*, 547 U.S. at 599 (citing several handbooks for the proposition that police departments generally have more established internal discipline procedures than they did several decades ago).

136. 367 U.S. 643 (1961).

137. *Hudson*, 547 U.S. at 591 (citing *Mapp*, 367 U.S. at 655).

138. See *id.* at 594, 596, 599.

communities began to insist that outside agencies investigate the blatant abuses police officers were inflicting on black communities.¹³⁹ The core premise of independent review is that, because internal affairs review is subject to bias, some entity other than the police department in which the accused officer works should be responsible for reviewing complaints alleging police misconduct.¹⁴⁰

Although the primary purpose of these agencies is to provide a review system free from the bias that permeates internal affairs units, in reality, many of the agencies are staffed primarily—or even exclusively—by former police officers. The state of South Carolina relies on the South Carolina Law Enforcement Division—a supposedly independent agency comprised entirely of law enforcement officers—to investigate possible misconduct in all officer-involved shootings across the state.¹⁴¹ Although supporters of the agency claim that its independence serves as a “boon to its integrity” when investigating these shootings, substantial evidence exists to show that the agency routinely justifies officer-involved shootings, even when police officers are proven to have lied about the incident in which they were involved.¹⁴²

Chicago’s Independent Police Review Authority was also, as recently as 2014, staffed entirely by former law enforcement officials.¹⁴³ The agency recently came under fire for hiring a psychologist, best-known for his staunch defense of police officers who shoot civilians, to train its investigators.¹⁴⁴ One of the investigators was quoted as saying that the psychologist’s training gave him “a better way to articulate why the [police] shootings are almost always justified.”¹⁴⁵ “The former chief of the Independent Police Review Authority” “also fired one of the agency’s investigators,” a black man who “had determined that several Chicago police shootings were unjustified and refused agency pressure to change his find-

139. See Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 498–99 (2009). See generally Moran, *supra* note 17.

140. See, e.g., Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 593 (1997). For a more thorough discussion about the varieties of independent review agencies, see generally, e.g., SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* (2001); Samuel Walker, *Alternative Models of Citizen Oversight*, in *CITIZEN OVERSIGHT OF LAW ENFORCEMENT* 11 (Justina Cintrón Perino ed., 2006).

141. See Balko, *supra* note 9.

142. See *id.*

143. See generally POLICE ACCOUNTABILITY TASK FORCE, *RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE* (Apr. 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf [<https://perma.cc/BM4W-Q6EJ>] [hereinafter CHICAGO POLICE ACCOUNTABILITY TASK FORCE].

144. See, e.g., Chip Mitchell, *City Sends Police-Shooting Investigators to Trainer Accused of Pro-Cop Bias*, WBEZ NEWS (Sept. 28, 2015), <https://www.wbez.org/shows/wbez-news/city-sends-policeshooting-investigators-to-trainer-accused-of-procop-bias/60dabb6f-bae7-4aea-a952-e4f59ba3a156> [<https://perma.cc/5TSB-GUEC>].

145. See *id.*

ings.”¹⁴⁶ Chicago’s Police Accountability Task Force recently concluded that the Independent Police Review Authority is “badly broken” and had “lost the trust of the community” by hiring and staffing the agency almost exclusively with ex-law enforcement personnel.¹⁴⁷

C. *Police Departments Are Rarely Required to Use Early Intervention Systems That Could Protect Citizens Against Misconduct Before It Occurs*

By the time a civilian files a complaint against a police officer, that civilian has already been (or at least believes herself to have been) aggrieved. In many police departments, a small “minority of officers account for a disproportionate” percentage of misconduct.¹⁴⁸ The best way to protect civilians from police misconduct is to proactively identify those officers and correct their misconduct, or if that fails, remove them from the force. That is exactly what early intervention systems are designed to do. Early intervention systems are “a data-based management tool [intended] to identify” and intervene with potential problem officers.¹⁴⁹ The systems, which typically take the form of software allowing authorized users to track data about any given officer, can identify these officers early in their career and allow police departments—and review agencies—to pay closer attention to these officers.¹⁵⁰ Early intervention systems record a variety of information about police officers, including civilian complaints, stops, arrests, shootings, documented uses of force, and lawsuits filed against the officers.¹⁵¹ When an officer reaches a department-prescribed threshold number of triggering incidents (for example, more than two civilian complaints against him), the officer’s file should then be automatically reviewed to assess whether intervention is necessary. Possible interventions

146. Moran, *supra* note 17, at 872–73; Chip Mitchell, *City Fires Investigator Who Found Cops at Fault in Shooting*, WBEZ NEWS (July 20, 2015), <http://www.wbez.org/news/city-fires-investigator-who-found-cops-fault-shootings-112423> [<https://perma.cc/9LFA-3HZV>].

147. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 14, 42.

148. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 4 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [<https://perma.cc/WA63-PLNV>]; see also SAMUEL WALKER, U.S. DEP’T OF JUSTICE, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE 45–48 (2003), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/EarlyInterventionSystem-sLawEnforcement.pdf [<https://perma.cc/5CE9-PRZ8>].

149. See WALKER, *supra* note 148, at 3.

150. See U.S. DEP’T. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 2, 16 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [<https://perma.cc/5XJD-WLLX>].

151. See OFFICE OF CMTY. ORIENTED POLICING, U.S. DEP’T OF JUSTICE, PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING 7–8 (2008), <http://ric-zai-inc.com/Publications/cops-p146-pub.pdf> [<https://perma.cc/UA7S-UT8D>] (discussing the procedures and potential benefits of early intervention for new police officers).

include additional training, counseling, or discipline.¹⁵² At some point, if the problem behavior continues, the officer should be fired. Although early intervention systems have been in existence for more than fifteen years, and are recommended as a “best practice” for police departments, police departments are rarely held accountable for utilizing those systems effectively.¹⁵³ The Department of Justice has warned that implementation of early intervention systems is a “major issue” for police departments.¹⁵⁴ And failure to implement can have major results. Albuquerque, for example, had an early intervention system for years, but it tracked only limited types of misconduct and had impossibly high thresholds for the number of warnings an officer could incur before triggering intervention.¹⁵⁵

When Albuquerque police officer Sean Wallace shot and killed an unarmed man in 2011, the public learned only after the [killing] that this was [the third time Wallace had shot] an unarmed civilian. Wallace had killed his first victim in 2004, and wounded another in 2010, but received no discipline for either of these prior incidents.¹⁵⁶

The final report from Chicago’s Police Accountability Task Force, released in 2016, also had scathing criticism for the Chicago Police Department’s non-use of its early intervention system.¹⁵⁷ The report noted that, although Chicago’s early intervention system was a “potentially-invaluable tool” for monitoring and intervening with problem officers, the system was “not working.”¹⁵⁸ In 2013, the Chicago Police Department had zero officers enrolled in either of its two early intervention programs, and in 2015, only thirteen officers were enrolled.¹⁵⁹ One officer famously not enrolled in earlier versions of the program was Jerome Finnigan, a Chicago police veteran who, between 2000 and 2008, received 89 misconduct complaints ranging from theft to illegal searches to felony crimes.¹⁶⁰ The Chicago Police Department made no effort to enroll him in its formal intervention program, and Finnigan was eventually indicted on felony

152. See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1053 (2010).

153. See WALKER, *supra* note 148, at 54.

154. See *id.* at 55.

155. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE ALBUQUERQUE POLICE DEPARTMENT 29 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf [<https://perma.cc/MHM5-GPBD>].

156. Moran, *supra* note 17, at 895 (footnote omitted); see also INVESTIGATION OF THE ALBUQUERQUE POLICE DEPARTMENT, *supra* note 155, at 12; Astrid Galvan, *Shooting Was Police Officer’s Third*, ALBUQUERQUE J. (May 12, 2011), <http://www.abqjournal.com/news/metro/122256556202newsmetro05-12-11.htm> [<https://perma.cc/N2LF-X7PB>].

157. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 15.

158. See *id.* at 103.

159. See *id.* at 15.

160. See *id.* at 96–97.

charges of home invasion, kidnapping, and murder.¹⁶¹ The Task Force report concluded that the police department's supervisors, the Board of Internal Affairs, and the Independent Police Review Authority had collectively "not engaged in efforts to identify officers whose records suggest repeated instances of misconduct or bias."¹⁶² Refusing to identify, intervene with, or discipline officers who have been the subject of repeated complaints is a form of deference because it assumes without investigation that, despite these allegations, the officer is still fit to work.

D. *Police Officers Are Provided Deferential Protections Throughout the Complaint Investigation Process*

When an allegation of police misconduct arises, the agency charged with reviewing that allegation—whether it be an independent review agency or an internal affairs unit—should attempt to obtain as much information as possible about the incident from both the officers involved and the department itself. However, due largely to collective bargaining agreements between cities and police unions, police officers in many departments are treated with kid gloves throughout the investigation.¹⁶³ Police unions became a prominent feature of American policing during the 1960s, in direct response to a growing civil rights movement that criticized police abuses—particularly against minorities—and increasingly called for civilian review of police departments.¹⁶⁴ The unions have, in many cities, led the charge for collective bargaining agreements and law enforcement officer bills of rights that treat officers far more deferentially than civilian witnesses or suspects, allow them to refuse to participate in misconduct investigations, and even permit departments to conceal or destroy evidence of misconduct.¹⁶⁵ One of the most controversial protections that many jurisdictions provide to police officers, but not civilian witnesses, is the requirement of waiting periods before an officer can be questioned about possible misconduct.¹⁶⁶ Maryland's Law Enforcement Officer Bill

161. *See id.* at 97.

162. *See id.* at 73.

163. *See, e.g.*, Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 196 (2005); Kyle Christopher Veatch, *The Effect of Collective Bargaining on the Use of Innovative Police Policy*, OSPREY J. IDEAS & INQUIRY (2008), http://digitalcommons.unf.edu/cgi/viewcontent.cgi?article=1015&context=ojii_volumes [<https://perma.cc/KPU3-5793>]; Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), <http://inthesetimes.com/features/police-killings-union-contracts.html> [<https://perma.cc/9T84-FT7G>].

164. *See Keenan & Walker, supra* note 163, at 196.

165. *See id.* at 190; *see also* Ari Paul, *As New York City Considers Criminal Justice Reforms, Police Unions Stand in the Way*, IN THESE TIMES (Nov. 25, 2014), http://inthesetimes.com/working/entry/17399/as_de_blasio_pursues_criminal_justice_reforms_one_group_stands_in_the_way_p [<https://perma.cc/4VDT-7FRH>].

166. *See Keenan & Walker, supra* note 163, at 213; *see also, e.g.*, Uriel J. Garcia, *Experts Debate 4-day Delay to Interview Officers in Teen's Shooting*, SANTA FE NEW MEXI-

of Rights prohibits an officer suspected of misconduct from being interviewed by anyone other than another police officer, so a civilian review board cannot interview the officer at all.¹⁶⁷ But even when a police department attempts an interview, Maryland provides any officer subjected to questioning a waiting period of up to ten days, ostensibly to obtain counsel before questioning.¹⁶⁸ Other states and cities provide forty-eight hours,¹⁶⁹ and still other agreements require that all question be suspended for an unspecified or “reasonable” period of time until the officer can obtain counsel.¹⁷⁰

The so-called “48-hour rule” has achieved such notoriety that it was even featured in a 2016 British television drama, *Line of Duty*.¹⁷¹ The show, which depicts a fictional internal affairs unit assigned to investigate corrupt officers, opens with a police officer shooting and killing a man attempting to surrender, and then instructing his squad to fabricate the crime scene to cover up the murder.¹⁷² When the commander arrives on the scene in response to the shooting, he informs the officers involved in the incident that they have 48 hours of “recovery time” before being interviewed, and tells the team, “My advice is to use those 48 hours wisely.”¹⁷³ The officers then collude to cover up the crime and provide false state-

CAN (June 18, 2014), http://www.santafenewmexican.com/news/local_news/experts-debate—day-delay-to-interview-officers-in-teen/article_b160f0be-0d63-5890-b051-27a4dd735ca8.html [<https://perma.cc/5VJW-96E6>] (discussing controversy over Santa Fe police officer who was not interviewed until four days after he shot and killed sixteen-year-old Hispanic boy); Jaeah Lee, *Why Cops Are Told to Keep Quiet After a Shooting*, MOTHER JONES (Aug. 12, 2015), <http://www.motherjones.com/politics/2015/08/why-do-police-departments-delay-interviewing-officers-involved-shootings> [<https://perma.cc/7FUX-YSGF>] (discussing various rules police departments across the country have that mandate waiting period between an event involving possible officer misconduct, and interviews of the officers involved, and arguing that those rules serve primarily to protect officers and allow them time to fabricate stories); Amy Waldman, *Police Accord Would Drop “48-Hour Rule”*, N.Y. TIMES (July 15, 1998), <http://www.nytimes.com/1998/07/15/nyregion/police-accord-would-drop-48-hour-rule.html> [<https://perma.cc/T5KC-CL4L>] (reporting push by New York City mayor to drop mandated 48-hour delay before interviewing police officers involved in possible misconduct).

167. See MD. CODE § 3–104(b) (2015); Keenan & Walker, *supra* note 163, at 189.

168. See MD. CODE § 3–104(j)(1)–(2).

169. See KY. REV. STAT. § 15.520(5)(c) (2015); Emmanuel, *supra* note 163; John Sepulvado, *Police Oversight Board Wants Portland’s “48 Hour” Rule to End*, OPB (May 16, 2016), <http://www.opb.org/news/article/oregon-portland-48-hour-rule-police-oversight/> [<https://perma.cc/HL29-ZGCY>]; see also Eleanor Heard, *Are the New York Police Officers Safely Playing or Playing it Safe? Eliminating the Forty-Eight Hour Rule*, 57 N.Y.U. ANN. SURV. AM. LAW 133, 136 (2000).

170. See DEL. CODE TIT. 11, § 9200(c)(9) (2014); 50 ILL. COMP. STAT. 725/3.9 (2016); MINN. STAT. § 626.89(9) (2012); 42 R.I. GEN. LAWS § 42-28.6-2(9) (2016); Keenan & Walker, *supra* note 163, at 212.

171. *Line of Duty: Explanations* (BBC Two television broadcast Mar. 24, 2016).

172. See *id.* at 0:00–7:00.

173. See *id.* at 7:18–33; see also *id.* at 25:15–33 (showing investigators noting that the officers involved had “48 hours to get their stories straight”).

ments to investigators. In Chicago, reality mirrors this fiction: after police officer Jason Van Dyke shot and killed seventeen-year-old Laquan McDonald, numerous officers who witnessed the shooting provided false statements claiming that McDonald was aggressively moving toward the officers when Van Dyke shot him—assertions that video of the incident refutes.¹⁷⁴ The Police Accountability Task Force concluded the City’s collective bargaining agreements with the police department, notably including the waiting period before speaking with investigators, had “essentially turned the code of silence into official policy.”¹⁷⁵ Even after an officer is interviewed, some collective bargaining agreements allow officers to revise their statements if confronted with evidence that their initial statements were false. Chicago’s collective bargaining agreement provides that, when the investigating agency possesses video or audio evidence of a misconduct incident, an officer cannot be charged with making a false statement unless the officer is first given the opportunity to review the evidence, and subsequently given an opportunity to clarify or amend his statement if desired.¹⁷⁶ Collective bargaining agreements also hamper investigations by requiring destruction of past civilian complaint records. A recent review of sixty police department contracts revealed that more than one-third contained provisions allowing or even requiring police departments and review agencies to destroy civilian complaint records after a period of years.¹⁷⁷ Other provisions prohibit investigators from investigating complaints older than five years.¹⁷⁸ These kinds of agreements protect officers

174. See Monica Davey, *Officers’ Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html?mcubz=3> [<https://perma.cc/Q5HE-AXQF>]; Warning, *Graphic Content: Laquan McDonald Shooting Dash-Cam Video*, *supra* note 5; see also Eddie Randle, *Officer Comments After Muskogee Pepper Spray Incident Spark Controversy*, FOX23.COM (Sept. 7, 2016), <http://www.fox23.com/news/officer-comments-after-muskogee-pepper-spray-incident-spark-controversy/438186969> [<https://perma.cc/68GL-4H5V>] (video showing Muskogee, Oklahoma, police officers discussing among themselves how to “spin” incident in which they pepper-sprayed eighty four-year-old woman); ACLUvideos, *Police Record Themselves Conspiring to Retaliate Against Protester*, YOUTUBE (Sep. 19, 2016), <https://www.youtube.com/watch?v=wvyehgt9CuA> [<https://perma.cc/W8HX-6EF8>] (recording of Connecticut police officers apparently conspiring to falsify charges against a protester); Sarah Larimer, *Video of Paul O’Neal Shooting Shows Officers Firing at a Fleeing Car*, WASH. POST (Aug. 5, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/05/video-of-paul-oneal-shooting-shows-officers-firing-at-a-fleeing-car/?utm_term=.996cbad15f33 [<https://perma.cc/4CCA-VDXU>] (showing video of Chicago police shooting of eighteen-year-old Paul O’Neal, including police officers after the fact complaining that they would be placed on desk duty, and suggesting that they say “he shot at us, right?”).

175. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 14, 71.

176. See *id.* at 71.

177. See Emmanuel, *supra* note 163.

178. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 72.

who are serial offenders from being exposed by shrouding their past in secrecy.¹⁷⁹

E. *Reviewing Bodies Are Reluctant to Sustain Misconduct Complaints*

The rate at which reviewing bodies sustain misconduct complaints, and the standards they employ to measure those complaints, is evidence of the “presumption of rectitude”—a telltale sign of deference¹⁸⁰—accompanying police officers’ actions and decisions. The Cleveland Internal Affairs Unit will sustain a complaint against an officer only if the allegations are proven beyond a reasonable doubt—the highest standard in American law, and one almost entirely absent from administrative review.¹⁸¹ When the Department of Justice interviewed officers within Cleveland’s Internal Affairs Unit, several admitted that their primary goal in investigations was to absolve the accused officers wherever possible.¹⁸² In San Jose, California, the police department requires complainants who allege that an officer is racially biased to prove that the officer’s actions were in fact motivated by racial bias, and if the complainants are unable to do so, the department will defer to the officers’ version of events.¹⁸³ As of 2014, the San Jose Police Department had never once sustained a complaint of racially-biased policing.¹⁸⁴ Baltimore police officers, meanwhile, “discourage complaints from being filed, misclassify complaints to minimize their apparent severity, and conduct little or no investigation” into civilian complaints.¹⁸⁵ Although Baltimore’s Internal Affairs unit has received more than sixty complaints of illegal strip-searches in the past six years, it has sustained only one, and closed many investigations without even interviewing the complainant.¹⁸⁶ Statistically, the percentage of civilian complaints sustained by either internal affairs units or independent review agencies is consistently and perniciously low. The Newark, New Jersey Police Department’s Internal Affairs Unit “sustained between four to seven percent of civilian complaints in the years spanning 2010 through 2012.”¹⁸⁷ “Al-

179. See Emmanuel, *supra* note 163; see also CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 14.

180. See Magee, *supra* note 11, at 173.

181. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 5, 35 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/WY2F-844D>].

182. See *id.* at 5.

183. See OFFICE OF THE INDEP. POLICE AUDITOR, CITY OF SAN JOSE, 2014 IPA YEAR END REPORT (2014), <http://www.sanjoseca.gov/DocumentCenter/View/42029> [<https://perma.cc/2SRG-G3KD>].

184. See *id.* at 49.

185. See INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 10, at 10.

186. See *id.* at 33–34.

187. See Moran, *supra* note 17, at 860; INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, *supra* note 150, at 35.

though the unit was aware” of a “serious theft problem” within the police department, having received numerous complaints from arrestees about the same officers stealing their property during the arrest or booking process, it did not “sustain a single theft complaint against these officers.”¹⁸⁸ Use of force complaints fared similarly: “over a five-year span, the Newark, New Jersey, Police Department did not discipline a single officer for using excessive force.”¹⁸⁹ In a lawsuit filed against the City of Newark, an expert concluded that the department had a pattern of favoring the officers and “almost invariably reject[ing]” civilian complaints.¹⁹⁰ Similarly, after the Connecticut Attorney General’s office reviewed the Connecticut State Police internal affairs system, it reported that the review process was “so ineffective,” and the agency’s predilection to justify officer misconduct was “so strong,” that officers were almost certain to avoid consequences for even criminal behavior.¹⁹¹ Between 2001 and 2007, the Camden, New Jersey Police Department received 485 complaints regarding excessive force, and the Internal Affairs Unit sustained only two.¹⁹² A report on the Portland, Oregon Police Department found that the Internal Affairs Division sustained “very few” civilian complaints of any sort, and filing complaints was essentially futile because the department would simply not discipline them.¹⁹³ The nation’s largest police departments appear to be just as inclined to favor police officers over civilians. In Chicago, over a four-year period stretching from 2011 to 2015, review agencies sustained only 7% of civilian complaints.¹⁹⁴ Of 400 shootings by police officers between 2007 and 2014, the Independent Police Review Authority found less than 1% to be unjustified.¹⁹⁵ Forty percent of complaints lodged against police officers were never even investigated during that four-year period, and another 37% were closed as “not sustained,” which means the investigators reached no conclusion as to whether the complaint was valid.¹⁹⁶ The same was true in New York: in 2014, New York City’s Citizen Complaint Review Board closed out nearly half of its cases with a finding of “unsubstantiated,” which means that the Board did not determine whether the

188. See Moran, *supra* note 17, at 860; INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, *supra* note 150, at 31.

189. See Moran, *supra* note 17, at 863; INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, *supra* note 150, at 42.

190. See *Garcia v. City of Newark*, No. 08-1725 (SRC), 2011 WL 689616, at *4 (D.N.J. Feb. 16, 2011).

191. See N.Y STATE POLICE & CONN. OFFICE OF THE ATTORNEY GEN., REPORT ON THE EVALUATION OF THE CONNECTICUT DEPARTMENT OF PUBLIC SAFETY INTERNAL AFFAIRS PROGRAM ii, 132 (2006), www.ct.gov/ag/lib/ag/other/conn_report_12-04-06.pdf [<https://perma.cc/XV9N-2L8Z>].

192. See *Noble v. City of Camden*, 112 F. Supp. 3d 208, 217–18 (D.N.J. 2015).

193. See EILEEN LUNA-FIREBAUGH, PERFORMANCE REVIEW OF THE INDEPENDENT POLICE REVIEW DIVISION 63 (2008), <https://www.portlandoregon.gov/ipr/article/245276> [<https://perma.cc/2ZRT-QPZN>].

194. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 10.

195. See *id.*

196. See *id.*

complaint had merit or not.¹⁹⁷ In Baltimore, the police department recorded 2,818 uses of force by police officers over a six-year period, investigated only ten of those incidents, and identified only one as involving excessive force.¹⁹⁸

F. *Reviewing Bodies Are Even More Reluctant to Impose Meaningful Discipline*

In keeping with a fundamental concept of deference—reluctance to substitute one’s own judgment for that of the police officer¹⁹⁹—many internal affairs units and review boards are reluctant, even when an officer has committed obvious misconduct, to impose any significant consequences. When the Department of Justice investigated the Ferguson Police Department in light of Michael Brown’s shooting death at the hands of officer Darren Wilson, it discovered that Ferguson police officers routinely sent racially discriminatory emails to each other, stereotyping minorities as lazy, unemployed, living off welfare, and prone to committing crimes.²⁰⁰ Not one of the officers receiving these emails ever reported them as inappropriate, and none were disciplined for sending them.²⁰¹ The Seattle Police Department has also had a number of incidents in which police officers used racial slurs against minorities, including one in which an officer was recorded threatening to “beat the f’ing Mexican piss out of a suspect.”²⁰² Although multiple officers at the scene witnessed this incident, none reported it, and the police department did not discipline the officer until a civilian bystander publicized a video of the incident.²⁰³ On other occasions, Seattle police officers called a Native American man a “f’ing Indian,” and commented that a black man who worked at a hospital must be “the janitor.”²⁰⁴ Despite complaints by civilians who overheard the incidents, the police department declined to discipline these officers.²⁰⁵ When Chicago’s Independent Review Authority found that multiple police officers had used “racially biased language” with civilians, the Review Authority recommended minor suspensions of no more than a few

197. See N.Y.C. CIVILIAN COMPLAINT REVIEW Bd., ANNUAL REPORT 27 (2014), <http://www.nyc.gov/html/ccrb/downloads/pdf/2014-annual-report-rev2layout.pdf> [<https://perma.cc/5CDX-PLM2>].

198. See INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 10, at 9.

199. See Horwitz, *supra* note 19, at 1061; Solove, *supra* note 18, at 946.

200. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 71–72 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/6ZNT-L63X>].

201. See *id.*

202. See INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT, *supra* note 148, at 27.

203. See *id.*

204. See *id.* at 28.

205. See *id.*

days for each officer.²⁰⁶ Chicago's Independent Police Review Authority also has a long practice of allowing officers to accept minor discipline on a lesser charge in order to forestall thorough investigation of a complaint.²⁰⁷ In 2015, for example, officers agreed to accept the Police Review Authority's findings in cases where officers slapped and punched their victims; struck a woman in the head while she was handcuffed and on her knees; struck a victim's head against concrete and then failed to provide medical assistance; strip-searched a minor without justification; and fractured a girlfriend's nose.²⁰⁸ In exchange, these cases were closed without complete investigation, despite the fact that some or all of these cases may have involved criminal behavior by the officers.²⁰⁹ Even when the Police Review Authority recommends discipline, it is rarely imposed: in 2015, 73% of the time that discipline was recommended, it was reduced after arbitration.²¹⁰ In the very rare cases when termination is recommended, the Police Board more frequently than not reverses that decision.²¹¹ Between 2011 and 2015, the Police Board upheld discharge recommendations in only 41% of the cases it reviewed.²¹²

G. *Police Departments and Reviewing Agencies Are Allowed to Withhold Data from the Public About Misconduct Complaints*

Police officers and departments are afforded deference even after complaints against them are resolved. Many states, as well as some cities, prevent disclosure of disciplinary records or complaints filed against police officers except in rare circumstances.²¹³ A 2013 investigation by News-

206. See CITY OF CHI. INDEP. POLICE REVIEW AUTH. QUARTERLY REPORT (July 15, 2015), <http://www.iprachicago.org/wp-content/uploads/2016/07/2015-07-15QuarterlyReport.pdf> [<https://perma.cc/28SS-BPX8>]. The report does not provide any specific descriptions of the racially offensive language that the officers used. See *id.*

207. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 77–78.

208. See *id.* at 78.

209. See *id.*

210. See *id.* at 85.

211. See *id.*

212. See *id.* at 86.

213. See, e.g., N.Y. CIV. RIGHTS ART. 5 § 50-a (2014) (preventing disclosure of police records except by court order); AURORA, COLO., MUN. CODE § 50-41 (2005) (placing strict limitations on disclosure of police records even when deemed relevant to criminal proceedings); *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 295 (Cal. 2006) (holding police personnel records are confidential under state law); *Md. Dep't of State Police v. Dashiell*, 117 A.3d 1, 17–18 (Md. 2015) (holding internal affairs investigatory records are exempt from disclosure); see also Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 762 (2015) (discussing how various state and city laws hamper disclosure of police personnel records in criminal cases); David Packman, *Police Misconduct Disclosure Laws*, CATO INST. (Feb. 7, 2010), <http://www.policemisconduct.net/police-misconduct-disclosure-laws/> [<https://perma.cc/W4G9-2CGH>] (summarizing police misconduct disclosure laws in all fifty states).

day magazine revealed hundreds of Long Island police officers who had been investigated for serious disciplinary issues and crimes, including having “shot innocent people, falsified official reports, manipulated DWI arrests to increase overtime pay and lied to district attorneys and investigators.”²¹⁴ The vast majority of these officers were allowed to stay on the police force, and information about their misconduct was not disclosed to the public, in part because of a New York law that prevents disclosure of police records except by court order.²¹⁵ In Baltimore—a city that has endured more than its share of public dissatisfaction with the police in recent years—a former county attorney called on the city to forego its “destructive obsession with maintaining the secrecy of police disciplinary records and proceedings,” which had contributed to eroding the public’s trust in the police department.²¹⁶ Review agencies have also been historically reluctant to release information about their review processes or resolutions. In New York, the Civilian Complaint Review Board has been sued for refusing to release information about misconduct complaints sustained against Daniel Pantaleo, the New York police officer who choked Eric Garner to death.²¹⁷ Chicago’s Independent Police Review Authority was also recently criticized for its lack of transparency in providing data about its complaint resolution process.²¹⁸ The Review Authority has not published an annual report since 2012, and provides only brief summaries, without any identifying details, of sustained complaints against officers.²¹⁹ It also provides no means by which a member of the public can track a complaint through to its resolution.²²⁰ The legal system’s shift, from one originally suspicious of law enforcement abuses to one all too ready to assume that law enforcement officials are acting appropriately, is apparent from start to finish in the review of police misconduct claims. The legal system’s embrace of deference to police officers has, as discussed in Part III below, had devastating effects in many communities, particularly those comprised primarily of people of color.

214. See Sandra Peddie & Adam Playford, *For Their Eyes Only*, NEWSDAY (Dec. 18, 2013), <http://data.newsday.com/crime/police-misconduct/> [https://perma.cc/J83Q-ZA5X].

215. See N.Y. CIV. RIGHTS Art. 5 § 50-a; Peddie & Playford, *supra* note 216.

216. David A. Plymyer, *Shining a Light on Police Misconduct*, BALT. SUN (Jan. 19, 2016, 01:39 PM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-police-transparency-20160119-story.html> [https://perma.cc/BKS5-HTJJ].

217. See The Editorial Board, *Stop Hiding Police Misconduct in New York*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/29/opinion/stop-hiding-police-misconduct-in-new-york.html?_r=0 [https://perma.cc/R38M-X2XN].

218. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 80.

219. See *id.*; see also CITY OF CHI. INDEP. POLICE REVIEW AUTH., *supra* note 206.

220. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 80.

III. THE DARK SIDE OF DEFERENCE

Blind deference to police officers, Professor L. Song Richardson has noted, “does little to protect against arbitrary policing.”²²¹ The United States today is reaping the repercussions of decades of blind deference. After years of allowing police departments and officers to operate with virtual impunity, a slew of recent incidents in which police officers have killed unarmed or non-violent African-Americans has garnered increased public outrage.²²² Still, many people—far more likely to be white than people of color—choose to view these tragedies as isolated incidents, rather than the natural manifestations of systemic deference to those in power.²²³ Police misconduct is, unfortunately, not isolated at all.

A. *Police Departments and Officers Regularly Abuse Their Power with Few Repercussions*

In 1981—thirteen years after the *Terry* decision, and well into the Supreme Court’s move toward extreme deference to police officers—a study revealed that police officers in the United States are “more heavily armed and they shoot more often than police in any other Western democracy.”²²⁴ That reality remains. In the first six months of 2016, United States police officers killed 566 people—well over three per day, and the

221. See Richardson, *supra* note 116, at 1157; see also Herbert, *supra* note 9, at 152 (stating court system’s “blind adherence to the good cop paradigm” has allowed it to “continue to ignore the very real problems of improper conduct by law enforcement officials”).

222. See, e.g., Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?mcubz=1> [<https://perma.cc/ZQE6-N4KS>]; Mercy Benzaquen et al., *The Videos That are Putting Race and Policing Into Sharp Relief*, N.Y. TIMES (Aug. 19, 2017), http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?smid=tw-nytimes&smtyp=cur&_r=1 [<https://perma.cc/YM3N-Y4TA>]; Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html> [<https://perma.cc/33DD-3TBP>]; Ford & Payne, *supra* note 5; Matt Furber & Richard Pérez Peña, *After Philando Castile’s Killing, Obama Calls Police Shootings “an American Issue”*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/us/philando-castile-falco-heights-shooting.html?_r=0 [<https://perma.cc/QQN7-MJDJ>]; Goodman & Yee, *supra* note 5; Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html> [<https://perma.cc/N8PZ-5TYL>] (discussing public reaction to shooting death of Michael Brown); Michael Martinez, *Report: Autopsy Shows Freddie Gray Suffered “High-Energy Injury”*, CNN (June 24, 2015), <http://www.cnn.com/2015/06/23/baltimore-freddie-gray-death-officers-indicted-pleas> [<https://perma.cc/3BSH-DEY2>].

223. See, e.g., David A. Graham, *Systemic Racism or Isolated Abuses? Americans Disagree*, ATLANTIC (May 7, 2015), <http://www.theatlantic.com/politics/archive/2015/05/systemic-racism-or-isolated-abuse-americans-disagree/392570/> [<https://perma.cc/TA53-W8PC>].

224. See James Lindgren, *Organization and Other Constraints on Controlling the Use of Deadly Force by Police*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 111 (1981).

vast majority by gunshot.²²⁵ During those same six months, officers in Texas alone killed fifty people—a mere five less than police officers in England and Wales killed in the last twenty-four years combined.²²⁶ Police officers across the United States killed 2,318 people between January 1, 2014 and December 31, 2015.²²⁷ Official responses to such shootings have been extremely deferential.²²⁸ Over a five-year period from 2010 to 2014, the Albuquerque Police Department killed twenty-eight people, and until 2014—despite a Department of Justice report finding that the “majority” of those killings were unjustified—not one of the officers involved in the twenty-eight killings had been charged with any crime.²²⁹ Similarly, though the DOJ’s review of officer-involved shootings within the New Orleans Police Department revealed “many” instances of “clear policy violations” over just a two-year period, the police department itself had not found an officer-involved shooting to violate policy in the last six years.²³⁰ The lack of accountability illustrated by these disturbing statistics has created a system where police departments can almost automatically reject or ignore civilian complaints about police misconduct, with little fear of consequence. When the Department of Justice investigated the Ferguson Po-

225. See *The Counted: People Killed by Police in the US*, GUARDIAN, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killing-us-database> [<https://perma.cc/9GG9-AGGR>] (last visited July 7, 2016); *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/?tid=a_inl [<https://perma.cc/C4Z8-8V93>] (last visited July 7, 2016).

226. See Jamiles Lartey, *By the Numbers: US Police Kill More in Days Than Other Countries Do in Years*, GUARDIAN (June 9, 2015, 06:00 PM), <http://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killing-us-vs-other-countries> [<https://perma.cc/85AS-95AN>]; *The Counted: People Killed by Police in the US*, *supra* note 225.

227. See KILLED BY POLICE, <http://killedbypolice.net/> [<https://perma.cc/759M-ZAW4>] (last visited May 30, 2016). Because police departments are generally not required to report how many people they have killed, and are often resistant to doing so, no precise governmental statistics are available regarding these numbers. A group of Harvard Medical Scientists recently called on United States public health agencies to make police killings a “notifiable condition,” which would require police departments to report each killing to their corresponding Public Health Department. See Dylan Sevett, *Harvard Medical Scientists Say Police Killings Should Be Recorded as Public Epidemic*, U.S. UNCUT (Dec. 27, 2015), <https://web.archive.org/web/20170210013119/http://usuncut.com/black-lives-matter/harvard-medical-police-killing-public-epidemic/> [<https://perma.cc/XTT2-5FHS>].

228. See Robert M. Myers, *Code of Silence: Police Shootings and the Right to Remain Silent*, 26 GOLDEN GATE U. L. REV. 497, 505 (1996).

229. See Nick Pinto, *When Cops Break Bad: Inside a Police Force Gone Wild*, ROLLING STONE (Jan. 29, 2015), <http://www.rollingstone.com/culture/features/when-cops-break-bad-albuquerque-police-force-gone-wild-20150129?page=2> [<https://perma.cc/EL56-3SVP>]; see also INVESTIGATION OF ALBUQUERQUE POLICE DEPARTMENT, *supra* note 155, at 2–3.

230. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT vi, 18 (2011), <https://s3.amazonaws.com/s3.documentcloud.org/documents/74332/justice-department-report-on-the-new-orleans.pdf> [<https://perma.cc/3XVL-8QXE>].

lice Department in the wake of Michael Brown's death, it found that Ferguson police officers "rarely respond meaningfully to civilian complaints of officer misconduct," and such complaints had a "significant likelihood" of going uninvestigated.²³¹ Out of 151 incidents in which officers used force on civilians, supervisors and command staff approved all but one.²³² The Ferguson police chief himself admitted that he had never once overturned a supervisor's conclusion that use of force was reasonable.²³³ In Chicago, the Police Accountability Task Force found a department that systemically "sanctioned practices that led to the deaths of fellow citizens and the deprivation of the rights of so many others."²³⁴ Between 2007 and 2015, more than 1,500 Chicago police officers acquired ten or more complaints against them, sixty-five accumulated at least thirty, and two accumulated more than fifty.²³⁵ The Task Force noted a "general absence of a culture of accountability" with the police department, concluding that although problem officers were well known within the department, the police department's leadership and outside review agencies took few steps to address the problems or remove the officers.²³⁶ The message the police department and independent review agency sent to Chicagoans was that "the police can act with impunity."²³⁷

B. *Abuses of Police Power Inordinately Target People of Color*

As long as police misconduct has existed in this country, its victims have been primarily people of color. Policing in America has a sordid racial history, beginning with the existence of slave patrols in the South—white men authorized by the community to patrol for black slaves out at night against their masters' will.²³⁸ After emancipation, many southern states responded by enacting vagrancy laws, which criminalized people for being unemployed, and were almost universally enforced against poor black people—subjecting them to the punishment of forced labor, and in effect ensuring a new, legal form of slavery.²³⁹ Policing was, as Professor Ahmed White notes, an "institution of class control" primarily aimed at subjugating poor people of color.²⁴⁰ Policing as an institution of racial oppression continued on through the Jim Crow era, where many Ku Klux

231. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 200, at 2, 83–86.

232. See *id.* at 39.

233. See *id.* at 41.

234. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 1.

235. See *id.* at 12.

236. See *id.* at 96.

237. See *id.* at 63, 81.

238. See, e.g., Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 124 (2007); Brown, *supra* note 15, at 760–61.

239. See Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667, 670, 679–80 (2004).

240. See *id.* at 671.

Klan members served as police officers, and police departments routinely sanctioned violence against black people.²⁴¹ During the Civil Rights Movement, police officers brutalized black protesters, enforced school segregation, and actively fought to keep black people from challenging white privilege.²⁴²

Today, one need only scroll through a social media feed, and read hashtags like #AltonSterling, #PhilandoCastile, or #SayHerName—memorializing just a few of the black men and women recently killed at the hands of police officers²⁴³—to realize that racial injustices “continue[] to play a significant role in police-citizen interactions.”²⁴⁴ Some police officers—many of whom manage to rise to prominent positions within police departments—are overtly racist. In Ferguson, Missouri, several high-ranking supervisors in the police department were in the group of people who routinely forwarded racist emails.²⁴⁵ The chief of staff to the Los Angeles County Sheriff was forced to resign in April of 2016, after the Los Angeles Times discovered and made public a series of emails he had sent invoking derogatory stereotypes of African-Americans, Latinos, and Muslims.²⁴⁶ In San Francisco, nine police officers under investigation for unrelated criminal activities were found to have sent numerous racist text messages to each other, including messages urging each other to shoot a black man, stating that mixed-race children are an “abomination,” calling a black man a “monkey,” and praising white power.²⁴⁷ The police depart-

241. See, e.g., Alschuler, *supra* note 238, at 124; Brown, *supra* note 15, at 760–61.

242. See, e.g., Alschuler, *supra* note 238, at 124; Brown, *supra* note 15, at 760–61.

243. See #AltonSterling, TWITTER, <https://twitter.com/hashtag/altonsterling> [<https://perma.cc/QXM4-TMFG>]; #PhilandoCastile, TWITTER, <https://twitter.com/hashtag/philandocastile> [<https://perma.cc/MPW4-ZKKA>]; #SayHerName, TWITTER, <https://twitter.com/hashtag/sayhername> [<https://perma.cc/9KRQ-76TG>].

244. See Richardson, *supra* note 116, at 1148.

245. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 200, at 71–72.

246. See *Emails Sent by Tom Angel with Derogatory Stereotypes of Muslims, Latinos, Blacks and Others*, L.A. TIMES (Apr. 27, 2016), <http://documents.latimes.com/emails-sent-tom-angel-derogatory-stereotypes-muslims-latinos-blacks-and-others/> [<https://perma.cc/KGR7-KFMZ>]; Liam Stack, *Los Angeles Police Official Resigns over Racist Emails*, N.Y. TIMES (May 1, 2016), http://www.nytimes.com/2016/05/02/us/los-angeles-police-official-resigns-over-racist-emails.html?hp&action=click&pg_type=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news&_r=2 [<https://perma.cc/N75W-EBN7>]; Alene Tchekmedyan & Cindy Chang, *Top L.A. County Sheriff's Officials Resign over Emails Mocking Muslims and Others*, L.A. TIMES (May 1, 2016, 06:09 PM), <http://www.latimes.com/local/lanow/la-me-ln-sheriff-aid-tom-angel-resigns-emails-20160501-story.html> [<https://perma.cc/J3QZ-ER5W>].

247. See Beenish Ahmed, *These Cops Are Probably Going to Get Away with Praising White Power and Saying Black People Should Be Spayed*, THINK PROGRESS (Dec. 19, 2015), <http://thinkprogress.org/justice/2015/12/19/n3734044/sfpd-miscoduct/> [<https://perma.cc/J3QZ-ER5W>].

ment waited nearly two and one-half years after learning of the racist text messages to fire any of the officers involved.²⁴⁸ A court later reinstated the officers, finding that the police department had violated the one-year statute of limitations for investigating police misconduct.²⁴⁹ In June of 2016, a federal judge found extensive evidence of intentional racial bias against African-Americans by the San Francisco Police Department.²⁵⁰ And in Baltimore, the Department of Justice investigation revealed that the Baltimore Police Department regularly fails to hold officers accountable for racial bias or use of racial slurs.²⁵¹ Apart from recorded instances of overt racism, empirical evidence also supports the claim that people of color are the most likely targets of police violence.²⁵² African-Americans represent just 13% of the United States population, but account for more than 30% of people killed by police.²⁵³ Between 2010 and 2014, unarmed black people were 3.49 times more likely to be shot by police than unarmed white people.²⁵⁴ In Miami-Dade County, unarmed black people were 22 times more likely to be shot by police than unarmed white people, and in the counties that encompass Los Angeles and New Orleans, unarmed black people were 10 times more likely to be shot by police than their white counterparts.²⁵⁵ In Cook County, Chicago, unarmed black

248. See Vivian Ho, *S.F. Cops Who Wrote Racist Text Messages Win Court Ruling*, SF GATE (Dec. 21, 2015, 04:45 PM), <http://www.sfgate.com/crime/article/Judge-rules-in-favor-of-S-F-cops-who-wrote-6713191.php> [https://perma.cc/J3QZ-ER5W].

249. See *id.*

250. See Vivian Ho & Bob Egelko, *Federal Judge Finds Evidence of Racial Bias by S.F. Police*, SF GATE (June 30, 2016), <http://m.sfgate.com/news/article/Federal-judge-finds-evidence-of-racial-bias-by-8335739.php> [https://perma.cc/J3QZ-ER5W].

251. See INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 10, at 8.

252. See Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 13 (2001).

253. See Sendhil Mullainathan, *Police Killings of Blacks: Here Is What the Data Says*, N.Y. TIMES (Oct. 16, 2015), <https://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html> [https://perma.cc/4FPQ-C5PP]. The disproportionate representation of minorities as targets of police suspicions plays out across the spectrum of the justice system. See generally, e.g., Loic Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DOEDALUS, 74, 74 (2010) (discussing how police, courts, and corrections system have systematically targeted the “black underclass” for decades); ROBYNN J.A. COX, ECON. POL’Y INST., WHERE DO WE GO FROM HERE? MASS INCARCERATION AND THE STRUGGLE FOR CIVIL RIGHTS 6 (Jan. 16, 2015), <http://www.epi.org/files/2014/MassIncarcerationReport.pdf> [https://perma.cc/Q4J7-QMUS].

254. See Cody T. Ross, *Introducing the United States Police-Shooting Database: A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011–2014* 5 (PLOS Research Paper) (Dec. 8, 2014), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2534673 [https://perma.cc/P92F-E4EZ]. These records included both police shootings that killed their victims, and shootings where the victims survived. See *id.*

255. See *id.*; see also *Officer Involved: A KPCC Investigation into Police Shootings in Los Angeles County*, KPCC, <http://projects.scpr.org/officer-involved/#12> [https://perma.cc/T9KQ-TZHU] (last visited May 26, 2016) (discussing how law enforce-

people were 5 times more likely to be shot by police than armed white people.²⁵⁶ In almost every county in the country, unarmed victims of police shootings were more likely to be black or Latino than white.²⁵⁷ Young black men fare even worse: from 2010 through 2012, black teenagers between the ages of fifteen and nineteen were twenty-one times more likely to be killed by police than their white counterparts.²⁵⁸ Professor Linda Sheryl Greene has described police use of deadly force against unarmed black men as

enabled by a legal jurisprudence of structural violence which provides no accountability for the societal marginalization and stigmatization of young Black men, as well as by a jurisprudence of actual violence, which permits police officers to decide whom to target and whom to kill with virtually no threat of criminal sanction or institutional civil liability.²⁵⁹

The reluctance—or outright refusal—to hold officers accountable for violence represents deference in its worst form: unwillingness to second-guess an officer’s judgment even when it results in the death of an unarmed citizen.²⁶⁰ Mundane, daily interactions are also plagued with racial bias. Police departments routinely discriminate against people of color in stops and seizures.²⁶¹ Professor Tracey Maclin describes “police targeting of black people for excessive and disproportionate search and seizure” as “a practice older than the Republic itself.”²⁶² Between January 2004 and June 2012, the New York Police Department made more than 4.4 million stops.²⁶³ Although the city’s population is 23% black, 29% Hispanic, and 33% white, only 10% of the people stopped were white, while 80% were black or Hispanic.²⁶⁴ Chicago police officers are roughly 4 times more likely to search a black person’s car than a white person’s, despite evidence that white people are roughly twice as likely to have contraband in their car.²⁶⁵ Chicago’s Police Accountability Task Force found that African-Americans in Chicago had “disproportionately negative experiences

ment officers in Los Angeles County fatally shot black people at triple the rate of white people).

256. See Ross, *supra* note 254, at 5.

257. See *id.* at 7.

258. See Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white> [<https://perma.cc/DQ28-9V52>]. This statistic is drawn from FBI data for the years 2010–2012. See *id.*

259. See Greene, *supra* note 15, at 4.

260. See Solove, *supra* note 18, at 943.

261. See, e.g., Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181 (forthcoming 2017), <http://ssrn.com/abstract=2787101> [<https://perma.cc/K8B2-T8Y4>].

262. See Maclin, *supra* note 10, at 333.

263. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

264. See *id.* at 556, 574.

265. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 39.

with the police,” which included disproportionate use of force, traffic stops, and pedestrian stops of African-Americans.²⁶⁶ Black residents of Baltimore also report being regularly humiliated and abused by police officers, and the Department of Justice’s recent investigation into the Baltimore Police Department revealed that police officers routinely and systematically conduct unconstitutional stops and searches of African-American residents.²⁶⁷ One of the factors that likely contributes to this discrimination is the discretion police officers are routinely afforded when deciding who to stop and who to arrest.²⁶⁸ Because the Supreme Court has shown extreme deference to police officers in deciding the meaning of terms like probable cause and reasonable suspicion,²⁶⁹ police officers’ personal beliefs, biases, and prejudices are essentially absorbed into the law.²⁷⁰ This is particularly dangerous in poor and urban areas, where research has shown that police officers working in these environments—many of which are predominantly populated by people of color—tend to have higher degrees of implicit racial bias than officers who work in majority-white areas.²⁷¹ It is, as Justice Sotomayor recently noted in her dissent in *Strieff*, “no secret that people of color are disproportionate victims of” unconstitutional conduct by police officers.²⁷² Even when a person of color complains about police misconduct, racial bias may taint the review of that complaint. Between 2011 to 2015, Chicago’s complaint review agencies—the Bureau of Internal Affairs and the Independent Police Review Authority—received 17,500 complaints of police misconducts, 61% of which were filed by African-Americans, while 21% were filed by white people.²⁷³ Of the complaints sustained, however, only 25% were filed by African-Americans, while 58% were filed by white people.²⁷⁴ In other words, police misconduct complaints by white people

266. *See id.* at 13.

267. *See* INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 10, at 7; Taibbi, *supra* note 13.

268. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 27 (1998).

269. *See supra* Part I(B)–(C).

270. *See* Davis, *supra* note 268, at 27; *see also* Luna, *supra* note 10, at 133, 178 (noting that “[t]he Supreme Court’s authorization to frisk in the absence of crime may be surprising to some . . . but it would be no news for those who live in minority neighborhoods”); Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination* (2016), <http://ssrn.com/abstract=2811449> [<https://perma.cc/PK2X-63GK>] (surveying data from more than 100 police departments and concluding that police officers are far more prone to search black or Hispanic drivers than white or Asian drivers).

271. *See* Richardson, *supra* note 116, at 1160.

272. *See* *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citation omitted).

273. *See* CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 32.

274. *See id.*

were 9 times more likely to be sustained than similar complaints by black people.²⁷⁵

C. *Deference Has a Demoralizing Effect on Communities of Color*

A sad but common bond among people in many communities of color is the experience of having been stopped or harassed by a police officer without having committed any crime.²⁷⁶ In *[E]racing the Fourth Amendment*, Professor Devon Carbado—a black man originally from England—tells of a time after he moved to the United States when police officers, allegedly acting on a tip about black men with guns, removed him and three relatives from their Los Angeles County home at gunpoint and demanded to search their home.²⁷⁷ When they told their sister, still living in England, what had happened, she filed a complaint with the police department, called the newspaper, and contacted the NAACP.²⁷⁸ Nothing came of her complaints: the police, after all, were simply investigating a crime, and it was insignificant that three black men had been terrified and humiliated in the process.²⁷⁹ One devastating effect of this discriminatory reality is fear. The decades of biased policing people of color have endured—particularly when set against a more recent backdrop of highly-publicized shootings of black people by police officers—has created a current epoch in which many people of color are terrified of interacting with the police.²⁸⁰ Black people at all income levels are more likely to fear encounters with police officers than their white counterparts.²⁸¹ But the fear is not new: Gallup polls conducted biannually since 1985 show that, over the past thirty years, consistently less than half of surveyed minorities nationwide express confidence that the police will either serve or protect them, and many believe that the police would be willing to use excessive

275. *See id.* at 40.

276. *See* Brown, *supra* note 15, at 763; Harris, *supra* note 15, at 679–80 (“Many African-American males can recount an instance in which police stopped and questioned them or someone they knew for no reason, even physically abusing or degrading them in the process.”); Ronner, *supra* note 23, at 394 (“One basic truth underlies the African American experience within the criminal justice system: racism.”).

277. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 947–64 (2002).

278. *See id.* at 964.

279. *See id.*

280. As just one example, see Taryn Finley, *#IfIDieInPoliceCustody: Twitter Responds to Sandra Bland’s Death with Heartbreaking Hashtag*, HUFFINGTON POST (July 17, 2015, 12:37 PM), http://www.huffingtonpost.com/entry/twitter-responds-to-the-suspiciousness-of-sandra-blands-death-with-ifidieinpolicecustody_55a8feeee4b04740a3dfa386 [<https://perma.cc/J4D9-SA7C>]; *see also* Rachel A. Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. REV. 870, 910–11 (2015) (noting that even common police coercions such as stops and arrests have substantial consequences, including increased fear and distrust of law enforcement).

281. *See* Sklansky, *supra* note 15, at 314.

force on them.²⁸² For generations, non-white parents have sat their children down and talked with them about how to behave to police officers, in a way few white families feel the need to: don't run, don't make any sudden movements, keep your hands where the officers can see them, don't look the officer in the eye.²⁸³ People of color are also significantly less likely to believe in the legitimacy of police officers and policing tactics. The Department of Justice's report on the Ferguson Police Department revealed that Ferguson's pattern of "unconstitutional policing," which the Ferguson police have operated freely for years, has "undermin[ed] law enforcement legitimacy among African Americans in particular."²⁸⁴ A recent Chicago survey revealed that only 6% of African-Americans in the city believed that Chicago police officers treated everyone fairly.²⁸⁵ When communities of color fear the police, believe they will receive unfair treatment, and question their legitimacy, the natural result is that they also attempt to avoid contact with the police.²⁸⁶ In many minority communities, these efforts go so far as to avoid even reporting crimes, from a fear that police officers will treat them as suspects rather than witnesses or victims—a concept foreign to most white people.²⁸⁷ This is not how the world should work: ordinary civilians should not be afraid to report crime, and should not live with the worry that the person entrusted by the government to protect them will actually be the one to harm them. Yet for many people of color, that is the reality in which they live.

282. See Justin McCarthy, *Nonwhites Less Likely to Feel Police Protect and Serve Them*, GALLUP (Nov. 17, 2014), <http://www.gallup.com/poll/179468/nonwhites-less-likely-feel-police-protect-serve.aspx> [https://perma.cc/6BM6-G38A]. While the percentage of white people who expressed confidence in the police has risen as high as 72% during this same time period, the percentage of minorities expressing the same confidence has never been over 52%, and has fallen as low as 33%. See *id.*; see also Jens Manuel Krogstad, *Latino Confidence in Local Police Lower Than Among Whites*, PEW RESEARCH CTR. (Aug. 28, 2014), <http://www.pewresearch.org/fact-tank/2014/08/28/latino-confidence-in-local-police-lower-than-among-whites/> [https://perma.cc/7DB2-FT53] (concluding that Hispanics are significantly less likely than white people to express confidence in the ability of the police to treat races equally, avoid excessive force, or do "a good job enforcing the law").

283. See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903)).

284. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 200, at 2, 15.

285. See Editorial Board, *When Chicagoans Don't Trust Police, the City Suffers*, CHI. TRIB. (Feb. 3, 2016, 05:40 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-cops-tribune-poll-police-chicato-edit-0204-jm-20160203-story.html> [https://perma.cc/5HWD-N9PF].

286. See Carbado, *supra* note 277, at 966; Harris, *supra* note 15, at 679–80.

287. See, e.g., Hannah-Jones, *supra* note 9; see also Wayne Drash, *Poll: 1 in 5 Blacks Report "Unfair" Dealings with Police in Last Month*, CNN (Nov. 30, 2015, 08:29 AM), <http://www.cnn.com/2015/11/29/us/criminal-justice-racism-cnn-kff-poll/> [https://perma.cc/WGL8-RECC].

IV. DOING AWAY WITH DEFERENCE

As much as the law serves to reflect social norms, it also, by the same token, solidifies social prejudices. The law is, as Professor Ian Haney Lopez has noted, “a prime instrument in the construction and reinforcement of racial subordination.”²⁸⁸ Whether wittingly or not, the legal system’s deeply-ingrained deference to police officers has, for decades, effectively rubberstamped the widespread mistreatment of minorities, and allowed police departments to turn a blind eye to abuses by their own officers. It is long past time to hold police departments accountable for misconduct. That is what this part aims to do: provide concrete suggestions for dismantling the system of deference that has long plagued review of police misconduct complaints, and replacing it with a system that effectively responds to civilian complaints and holds officers accountable for their abuses.

A. *Stop Letting Police Departments Police Themselves*

Entrusting police departments with the responsibility of policing themselves is the ultimate form of deference. But, as detailed in Part II, police departments have squandered the trust afforded them by protecting their officers from investigation, refusing to sustain complaints, and imposing few consequences for officers who commit even blatant misconduct.²⁸⁹ Police officers’ ability to mistreat civilians—sometimes violently—with near impunity “is due in no small part to internal review systems that routinely turn their backs to police misconduct.”²⁹⁰ Adopting an external oversight model is the first step toward building community trust, by giving outside reviewers a meaningful voice into how the police department operates and what measures can be taken to improve it. The past several decades have seen a small but significant shift away from relying on internal affairs units to review misconduct complaints, and the number of cities with civilian review boards has proliferated.²⁹¹ The National Association for Civilian Oversight of Law Enforcement provides a resource list, which does not purport to be exhaustive, of 121 cities and counties with civilian oversight agencies.²⁹² Many, however, lack the authority either to review certain types of misconduct complaints or to impose discipline when they determine it is merited.²⁹³ For example, although New York Police De-

288. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3 (1994).

289. See *supra* Part II.

290. See Moran, *supra* note 17, at 853.

291. See WALKER, *supra* note 140, at 40–44.

292. See *Police Oversight by Jurisdiction (USA)*, NAT’L ASS’N FOR CIVILIAN OVERSIGHT OF LAW ENF’T, http://www.nacole.org/police_oversight_by_jurisdiction_usa [<https://perma.cc/HE3M-MFL4>] (last visited June 21, 2016).

293. See, e.g., CHI., ILL., MUN. CODE § 2-57-040(c) (2007); CINCINNATI, OHIO, MUN. CODE art. 28, § 1 (2002); BLAKE NORTON ET AL., DEP’T OF JUSTICE, COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF THE ST. LOUIS COUNTY POLICE DE-

partment officers have a long history of making false statements in police reports or to investigative bodies, the Citizen Complaint Review Board is not authorized to investigate false statement cases; complaints about false statements are automatically referred to the Internal Affairs Unit.²⁹⁴ Albuquerque's new Civilian Police Oversight Agency (CPOA), which was created by the Albuquerque City Council in 2014 after the Department of Justice found the previous oversight model grossly ineffective, authorizes the CPOA only to recommend discipline, which the police chief is then free to decline.²⁹⁵ Restricting review agencies in this way hinders their efforts to achieve meaningful reform. Where police departments have proven consistently ineffective in addressing misconduct, it is well past time to stop deferring to their judgment, and instead authorize independent review agencies to review all complaints.²⁹⁶

B. *Create Independent Review Agencies That Are Staffed Primarily by Civilians, Rather Than Law Enforcement Officers*

Independent review agencies are not truly independent when they are staffed primarily by former (or even current) law enforcement officers.²⁹⁷ The best leaders listen to their constituents, and police departments should be no exception to that rule. A better model of governance is one that incorporates input from members of the public who have no ties to the police department, including those who have been specifically critical of the police. Adding civilian voices to the review process allows outsiders to identify deficiencies in current police practices and forces authorities to confront the perspectives of the people most affected by police misconduct. It also adds legitimacy to the reform effort—when the public participates, it is more likely to support that effort and invest in its success—and promotes transparency in resolving complaints.²⁹⁸ Several cities in recent years have made concerted efforts to diversify and legitimize the agencies responsible for reviewing police misconduct complaints. In 2002, Cincinnati formed the Citizen Complaint Authority in response to a class-action lawsuit by Cincinnati citizens against the City of Cincinnati and the Cincinnati Police Department, alleging widespread misconduct and racially-biased policing.²⁹⁹ The city decided to staff the Citizen Complaint

PARTMENT 98 (2015), <http://ric-zai-inc.com/Publications/cops-p316-pub.pdf> [<https://perma.cc/5MFF-MNKD>]; INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE, *supra* note 181, at 41.

294. See N.Y.C. CIVILIAN COMPLAINT REVIEW Bd., *supra* note 197, at x–xi.

295. ALBUQUERQUE, N.M., POLICE OVERSIGHT ORDINANCE, § 9-4-1-4(C)(3)(C) (2014).

296. See Moran, *supra* note 17, at 882.

297. See *supra* Part II(C).

298. See Moran, *supra* note 17, at 884–85.

299. See Collaborative Agreement at 2, *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002) (No. C-1-99-317), <http://www.cincinnati-oh.gov/police/link-servid/27A205F1-69E9-4446-BC18BD146CB73DF2/showMeta/0/> [<https://perma.cc/SK5C-7QRG>].

Authority with three categories of employees: (1) a board of seven citizens appointed by the mayor; (2) an executive director and support staff, appointed by the city manager in consultation with the review board; and (3) a team of professional investigators.³⁰⁰ The settlement agreement required the board to be comprised of a “diverse array of seven individuals, from a cross-section of the Cincinnati community, who have the requisite education and experience to impartially review evidence and render judgments on alleged officer misconduct.”³⁰¹ To staff the board, the mayor was required to accept nominations from fifty-two different community councils within the city, as well as businesses, civic and social service agencies, and other organizations.³⁰² To alleviate any concern that civilians might not have the requisite training or expertise to resolve police misconduct complaints, each member of the board is required, before taking office, to complete a basic training course that includes classes at the Cincinnati Police Academy, instruction in constitutional and criminal protections, and ride-alongs with Cincinnati police officers.³⁰³ Newark’s recently-formed Civilian Complaint Review Board also stresses the importance of diverse civilian viewpoints. The Review Board is composed of nine members, one of whom the city’s inspector general selects, three of whom are the municipal council appoints, and five of whom local and civil rights organizations, including the National Association for the Advancement of Colored People and the American Civil Liberties Union, vote in.³⁰⁴ No more than one member may be a former employee of the Newark Police Department.³⁰⁵ In Chicago, the Police Accountability Task Force report echoed sentiments similar to those behind the reforms in Cincinnati and Newark, concluding that “real and lasting change is possible only when the people most affected by policing have a voice.”³⁰⁶ Recognizing that most Chicagoans have “long been shut out of Chicago’s police oversight system,” the task force called for a revamped oversight system that includes members of the community, who are “critical to ensuring that officers are held accountable for misconduct.”³⁰⁷ The Task Force also recommended that previous Chicago Police Department em-

300. *See id.* at 18, 20.

301. *See id.* at 18.

302. *See id.*

303. *See id.* at 19.

304. *See* RAS BARAKA, MAYOR OF THE CITY OF NEWARK, NEW JERSEY, EXECUTIVE ORDER (2014), http://www.ci.newark.nj.us/wp-content/uploads/2015/02/ExecutiveOrder-CivilianComplaintReviewBoardwithRules_FINAL.pdf [<https://perma.cc/6U5W-V42Y>] (establishing Civilian Complaint Review Board through executive order by Mayor in Newark, New Jersey); *see also* Daniel Ross, *Newark’s New Disciplinary Board Could Flex Rare Muscle over Police*, YES! MAG. (Sept. 11, 2015), <http://www.yesmagazine.org/peace-justice/newarks-new-civilian-board-could-wield-rare-disciplinary-muscle-over-police-20150911> [<https://perma.cc/U3SF-4G63>].

305. *See* BARAKA, *supra* note 304.

306. *See* CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 5, 7–10.

307. *See id.* at 14.

ployees, as well as employees of the State's Attorney's Office, be prohibited from serving as investigators or the Chief Administrator of the review agency.³⁰⁸

C. *Mandate Use of Early Intervention Systems*

Although early intervention systems have been around for several decades, as of 2010 more than two-thirds of police departments with at least 100 officers still did not use them.³⁰⁹ Evidence suggests that early intervention systems can indeed reduce police misconduct.³¹⁰ Chicago's Police Accountability Task Force recently called for the police department to implement a functional early intervention system to identify problem officers,³¹¹ and the White House has also invested money and effort into reforming early warning systems by making the information obtained more accessible to the public. The White-House-sponsored Police Data Initiative, which began in 2015, recruits police departments to submit their data archives on police-citizen encounters for analysis and suggestions on how the data can be used to reform police departments and remove problem officers.³¹² Unfortunately, even the limited number of police departments that do have early intervention systems often do not use them properly.³¹³ Accordingly, I recommend that early intervention systems be managed by independent review agencies, rather than the police departments themselves.³¹⁴ Early intervention systems would allow review agencies to recommend (or require) additional training for officers who are the subject of complaints, or identify them within the department to discourage the identified officers and their colleagues from future misconduct. It would also help review agencies identify which officers deserve serious discipline or termination for their misconduct: an officer who has had multiple complaints and continued his behavior should be removed

308. *See id.* at 81.

309. *See* Schwartz, *supra* note 152, at 1066.

310. *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 858 n.97 (2012) (citing SAMUEL WALKER ET AL., *EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER 27* (2001) (finding police officers were named in one-half or one-third as many civilian complaints after intervention, but none of the departments studied track legal claims in their early intervention systems)).

311. *See* CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 18.

312. *See* Andrew Tarantola, *White House Launches the Police Data Initiative*, *ENGADGET* (May 18, 2015), <http://www.engadget.com/2015/05/18/white-house-launches-the-police-data-initiative/> [<https://perma.cc/89KU-D2TW>]; *see also* Megan Smith & Roy L. Austin, Jr., *Launching the Police Data Initiative*, *WHITE HOUSE* (May 18, 2015, 06:00 AM), <https://www.whitehouse.gov/blog/2015/05/18/launching-police-data-initiative> [<https://perma.cc/XTN6-S6M7>].

313. *See supra* Part II(A).

314. *See* Moran, *supra* note 17, at 882; *see also* Schwartz, *supra* note 153, at 1063 (“[E]ven with functional early intervention systems, supervisors may analyze information from the system in a biased manner.”).

from the force, whereas an officer's first complaint may, depending on the type of misconduct, deserve less serious discipline.³¹⁵

D. *Eliminate Special Treatment for Police Officers
During Misconduct Investigations*

The extreme deference afforded to police officers who are the subject of misconduct investigations does much to permit, and even facilitate, that misconduct. A 2008 study showed that police departments with collective bargaining agreements were significantly less likely to utilize civilian review of misconduct claims or adopt policing reforms.³¹⁶ More recently, a 2016 study reviewing seventeen consent decrees reached between local governments, police departments, and the Justice Department revealed that in at least seven cases, the cities' collective bargaining agreements presented a roadblock to important reforms required by the settlements.³¹⁷ Although I certainly do not call for the abolition of police unions, I do suggest reforms to many collective bargaining agreements. The "48-hour rule" (or others like it), allowing officers to wait 48 hours or more before being questioned about an incident of suspected misconduct, should be abolished.³¹⁸ Among other things, the rule has been criticized for giving the impression—correctly—that police officers "have more rights than anyone else in a criminal investigation."³¹⁹ That is a fair criticism: although defenders of the rule say it allows police officers to collect themselves emotionally and fully recollect the events of the incident, police departments certainly do not afford that same right to civilian witnesses when police officers want to question them.³²⁰ My point is not that officers should not be allowed to consult with lawyers—particularly in a criminal investigation, they do and should have that right—but that they are provided far more protections than an ordinary citizen would be under the same circumstances, which detracts from the legitimacy of the investigation and pro-

315. See Moran, *supra* note 17, at 894–95.

316. See Veatch, *supra* note 163.

317. See Emmanuel, *supra* note 163; see also Adeshina Emmanuel, *Why Black Lives Matter Is Taking on Police Unions*, IN THESE TIMES (July 22, 2016, 07:58 PM), http://inthesetimes.com/working/entry/19318/why_black_lives_matter_is_taking_on_police_unions [<https://perma.cc/Z9KK-EVBA>].

318. See *supra* Part II(D).

319. See Waldman, *supra* note 166.

320. E.g., Laurie P. Cohen, *New York Rules Mean It's Tough to Convict Police in Diallo Case*, WALL ST. J. (Apr. 7, 1999, 09:01 AM), <http://www.wsj.com/articles/SB923369461908946544> [<https://perma.cc/Q2JV-KN9N>] (noting that, in aftermath of the Amadou Diallo shooting, officers could not be interviewed until more than 48 hours later, and quoting former officer saying, "The cops in New York enjoy a degree of protection that doesn't exist in other places and is unwarranted"); see, e.g., Heard, *supra* note 169, at 138 (concluding that 48-hour rule is "entirely unnecessary and should be eliminated"); Lee, *supra* note 166; see also Keenan & Walker, *supra* note 163, at 212 (noting that "[n]o law enforcement officer would countenance a time bar on proceeding with the investigation of a crime by civilians").

vides officers time to falsify their stories. Even if not eliminated completely, the rule should at a minimum be amended to require that officers involved in the misconduct not consult with each other during that time period. Chicago's Police Accountability Task Force has recommended that the collective bargaining provisions requiring investigators to delay officer interviews for at least 24 hours "should be revised to ensure that officers are separated and remain separated from other officers until all officers have given statements."³²¹ When the Department of Justice entered into a consent decree with the Los Angeles Police Department, the decree contained a similar provision, requiring that all officers in an officer-involved shooting be separated immediately after the incident, and kept separate until after interviews were finished.³²² Police officers should also not be allowed to attend each other's interviews. In multiple officer-involved shooting investigations in the Albuquerque Police Department, other officers who were involved in the incident were allowed to participate in the shooting officer's interview, a practice which law enforcement officers would not countenance with civilian witnesses, for the obvious reason that it encourages collaboration in recounting how the incident occurred.³²³ Union rules like those in Chicago, requiring investigators to give police officers notice of questions ahead of time, and then amend their statements if found to be inconsistent with video or audio evidence, should also be eliminated.³²⁴ These rules are essentially a free pass for officers to provide false statements: if evidence is found to refute the statements, the officers can simply change them.

E. *Provide Mediation Opportunities Between Complaining Citizens and the Officers Accused*

Mediation, in which a police officer accused of misconduct meets with the complaining civilian, carries the potential for several benefits. It draws police officers out from under the shroud in which they normally operate, and forces each party to at least hear, if not understand, each other's position. It also requires police officers to be accountable to someone other than their colleagues.³²⁵ And it provides a hope of restorative justice, in which the community member and accused officer have an opportunity to reconcile after airing grievances.³²⁶ Mediation can also re-

321. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 74.

322. See Los Angeles Police Department Consent Decree at 24, United States v. City of L.A., (C.D. Cal. Jun 15, 2001), http://assets.lapdonline.org/assets/pdf/final_consent_decree.pdf [<https://perma.cc/ZL4J-VGH5>].

323. See INVESTIGATION OF ALBUQUERQUE POLICE DEPARTMENT, *supra* note 155, at 28.

324. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 18; Emmanuel, *supra* note 163.

325. See Samuel Walker & Carol Archbold, *Mediating Citizen Complaints Against the Police: An Exploratory Study*, 2000 J. DISP. RESOL. 1, 10-11 (2000).

326. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 78.

duce the threat of implicit racial bias and stereotyping, which is a major problem in policing today.³²⁷ Studies have shown that police officers are more likely to pay close attention to people of color, interpret their behavior as suspicious, and behave aggressively toward them.³²⁸ These biases can, however, be reduced through increased awareness and commitment to reducing stereotypes, which face-to-face meetings facilitate.³²⁹ Police-citizen mediation programs are relatively rare. As of 2000, only fourteen active police-citizen mediation programs existed nationwide, in a country with more than 17,000 state and federal law enforcement agencies.³³⁰ But some have taken flight in recent years, with promising results. A three-year study of Denver's citizen-police mediation program, which requires officers and civilians to participate in face-to-face mediation in a neutral setting, revealed that both officers and complainants who participated in mediation had significantly higher satisfaction rates with the complaint process than those who went through the standard, formal investigation process.³³¹ A study of the Denver mediation program found that nearly 60% of complainants were satisfied with the outcome, and a full 75% were satisfied with the process.³³² In contrast, civilians who participated in the traditional complaint review process during the same time period, without mediation, reported only seven percent satisfaction with the outcome and 12% satisfaction with the process.³³³ Officers' rates of satisfaction after mediation were noticeably higher as well—approximately 68% were satisfied with the outcome, and nearly 80% with the process, while only about half of officers reported satisfaction with the traditional complaint outcomes, and 20% with the process.³³⁴ Additionally, officers who participated in mediation received fewer citizen complaints after mediation than officers who did not, with an especially significant decrease for minor complaints such as discourtesy and improper police procedures.³³⁵ The Pasadena Police Department has also experimented with a police-citizen mediation program that was entirely

327. See Richardson, *supra* note 13, at 2042–52.

328. See *id.* at 2053 n.98 (citing Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 677 (2004); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006); and Robert W. Livingston & Marilyn B. Brewer, *What Are We Really Priming? Cue-Based Versus Category-Based Processing of Facial Stimuli*, 82 J. PERSONALITY & SOC. PSYCHOL. 5, 17 (2002)).

329. See Richardson, *supra* note 13, at 2054.

330. See Walker & Archbold, *supra* note 325, at 235–36.

331. See JON L. PROCTOR ET AL., DENVER'S CITIZEN/POLICE COMPLAINT MEDIATION PROGRAM: A COMPREHENSIVE EVALUATION Abstract (Feb. 24, 2009), https://www.denvergov.org/content/dam/denvergov/Portals/374/documents/Mediation_Journal_Article_2-24-09.pdf [<https://perma.cc/255J-Q5PL>].

332. See *id.* at 18.

333. See *id.* at 17.

334. See *id.* at 18.

335. See *id.* at Abstract.

voluntary for both the police officer and complainant.³³⁶ The department offered mediation for complaints alleging “police tactics, police procedure, quality of service, and rudeness or discourtesy.”³³⁷ Although the sample was quite small, both police officers and citizens in the Pasadena program reported a high rate of satisfaction with the mediation.³³⁸ Other cities are beginning to follow suit. After the Albuquerque Police Department was investigated by the Department of Justice and found to have a pattern and practice of civil rights violations, Albuquerque’s City Council created a new Civilian Police Oversight Agency in 2014.³³⁹ The ordinance creating the agency has a “Mediation First” clause, which requires that mediation, “[w]henver possible,” be the first option for resolution of civilian complaints.³⁴⁰ Eugene, Oregon has a mediation program where, if the police officer and complaining party both agree to participate in mediation facilitated by a third-party, mediation can occur in lieu of investigation and discipline.³⁴¹ San Francisco’s Office of Citizen Complaints also offers mediation as an option for resolution of civilian complaints.³⁴² The goal of the mediation is to improve relationships between civilians and police officers, and provide each side an opportunity to explain why certain actions occurred.³⁴³

F. *Where Necessary, Impose Meaningful Discipline*

Truly serious misconduct must truly be taken seriously. An officer who is, for example, overtly racist has no place on a police force. When Chicago’s Independent Police Review Authority found in 2015 that numerous police officers had racially discriminated against civilians—by using words the agency described as “racially biased language,” “racial comments,” “racially offensive comments,” and “ethnically biased language”—the agency recommended only minor suspensions of no more

336. See OFFICE OF CMTY. ORIENTED POLICING, U.S. DEP’T OF JUSTICE, EVALUATION OF A PILOT COMMUNITY POLICING PROGRAM: THE PASADENA POLICE-COMMUNITY MEDIATION AND DIALOG PROGRAM 26 (2008), <http://static1.squarespace.com/static/5498b74ce4b01fe317ef2575/t/54ba6a68e4b0c2baff90886c/1421503080651/e070825154.pdf> [<https://perma.cc/T9AJ-37RR>].

337. See *id.* at 23.

338. See *id.* at 29–31.

339. See ALBUQUERQUE, N.M., POLICE OVERSIGHT ORDINANCE, §§ 9-4-1-1–14 (2014).

340. See *id.* §§ 9-4-1-4(C)(3)(e), 9-4-1-6(C)(3).

341. See EUGENE, OR., EUGENE POLICE OPERATIONS MANUAL, Policy 1020, § 1020.7.2 (2015), http://coeapps.eugene-or.gov/EPD_POM_EXT/DocView.aspx?id=1393648&searchid=24203099-627a-4047-a79e-809f3e672827&dbid=0 [<https://perma.cc/STP8-6CEA>].

342. See S.F. OFFICE OF CITIZEN COMPLAINTS, CITIZEN-POLICE MEDIATION PROGRAM BROCHURE, https://sfgov.org/occ/ftp/uploadedfiles/occ/mediation_english.pdf [<https://perma.cc/67PN-TWJD>] (last visited Oct. 3, 2017).

343. See *id.*

than a few days for each officer.³⁴⁴ This does nothing more than reinforce the belief—already widely-held in Chicago’s African-American communities—that police officers can treat people of color poorly without repercussions.³⁴⁵ Officers who lie during misconduct investigations, or retaliate against civilians who have complained of police misconduct, should also be subject to termination.³⁴⁶ A recent report assessing Chicago’s Independent Police Review Authority suggested that, when the agency finds that a police officer “deliberately concealed or failed to disclose information” about a fellow officer’s misconduct, the agency should recommend dismissal from the force.³⁴⁷ The Department of Justice came to the same conclusion in Ferguson, recommending that officers found untruthful in the performance of their duties, including responding to misconduct investigations, be fired.³⁴⁸ Corrupt police officers not only harm the communities they are hired to protect, but also do immense damage to the integrity and reputation of the police department itself.

G. *Require Review Agencies to Make Information Regarding Misconduct Complaints and Their Resolutions Publicly Available*

“Sunlight,” Supreme Court Justice Louis Brandeis famously penned, “is said to be the best of disinfectants.”³⁴⁹ Proponents of keeping misconduct complaints and their resolutions unavailable to the public generally invoke the police departments’ interest in protecting the reputation and morale of police officers who have been accused or found to have committed misconduct.³⁵⁰ But ignored in that argument is the public’s interest in assessing whether police departments and review agencies are actually and fairly investigating misconduct and, where appropriate, imposing appropriate discipline.³⁵¹ Providing public access to information about misconduct complaints and resolutions would allow civilians the opportunity

344. See CITY OF CHI. INDEP. POLICE REVIEW AUTH., *supra* note 206. The report does not provide any specific descriptions of the racially offensive language that the officers used. See *id.*

345. See Editorial Board, *supra* note 285.

346. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 87.

347. See RON SAFER ET AL., PREVENTING AND DISCIPLINING POLICE MISCONDUCT: AN INDEPENDENT REVIEW AND RECOMMENDATIONS CONCERNING CHICAGO’S POLICE DISCIPLINARY SYSTEM 4–5, 23 (2014), https://www.cityofchicago.org/content/dam/city/progs/safety/Preventing_Disciplining_Police_Misconduct_Dec_2014.pdf [<https://perma.cc/4HW6-YMY3>].

348. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 209, at 96.

349. See LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT 62 (1914).

350. See Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 COMM. LAW. 34, 37 (2004); Richard Winton, *Privacy Often Trumps Transparency with Police Shooting Videos*, L.A. TIMES (May 19, 2015, 7:27 PM), <http://www.latimes.com/local/crime/la-me-police-cameras-20150520-story.html> [<https://perma.cc/PNR2-J955>].

351. See Zansberg & Campos, *supra* note 350, at 34, 37.

to assess whether their police department takes these complaints seriously, and would take a step toward removing police departments and officers from the veil of secrecy under which many of them currently operate.³⁵² Even the International Association of Chiefs of Police has stated that releasing data about police misconduct and civilian complaints is “sound public policy.”³⁵³ Several months after the Laquan McDonald shooting video rocked Chicago, setting off a firestorm of protests and ultimately leading to the removal of the police superintendent, chief of police detectives, Cook County State’s Attorney, and head of the Independent Police Review Authority,³⁵⁴ the new head of the Review Authority—in an effort to address the criticism it had received for lack of transparency in reviewing police misconduct—released hundreds of videos of incidents in the past several years in which police officers killed or injured civilians.³⁵⁵ The agency’s new chief also released a statement saying,

These past few months, as the city has struggled with so many questions about policing and about police accountability, it has been clear that we all agree that there is a lack of trust, and that increased transparency is essential to rebuilding that trust Today represents an important first step toward that.³⁵⁶

While the release of videos is indeed an important (and seemingly obvious) first step, much more can be done to provide the public access to information on potential police misconduct. Los Angeles’s Office of Inspector General has recommended that the Los Angeles County Sheriff’s

352. See Friedman & Ponomarenko, *supra* note 12, at 1833, 1848; see also Ken Armstrong, *How to Fix American Policing*, MARSHALL PROJECT (July 13, 2016), https://www.themarshallproject.org/2016/07/13/how-to-fix-american-policing?utm_medium=email&utm_campaign=newsletter&utm_source=openingstatement&utm_term=newsletter-20160713-540#.H7t6eWs0L [https://perma.cc/P54B-TCHF] (“[T]he criminal justice system, including policing, suffers from a stunning data gap.”).

353. See INT’L ASS’N OF CHIEFS OF POLICE, *PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT* 104 (2006), http://www.iacp.org/portals/0/pdfs/PCR_LdrshpGde_Part2.pdf [https://perma.cc/56EH-ERPG].

354. See Monica Davey & Mitch Smith, *Mayor Rahm Emanuel Fires Chicago Police Superintendent*, N.Y. TIMES (Dec. 1, 2015), <http://www.nytimes.com/2015/12/02/us/chicago-police-rahm-emanuel-laquan-mcdonald.html> [https://perma.cc/5SES-PCAJ]; Jeremy Gorner, *Chief of Detectives Retires from Chicago Police Amid Fallout from Video*, CHI. TRIB. (Dec. 8, 2015, 07:00 AM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-chief-of-detectives-retires-met-20151207-story.html> [https://perma.cc/GLF9-PR29]; Claire Landsbaum, *Prosecutor Anita Alvarez Loses Chicago Reelection in Wake of Laquan McDonald Controversy*, N.Y. MAG. (Mar. 16, 2016, 03:23 AM), <http://nymag.com/daily/intelligencer/2016/03/chicago-prosecutor-anita-alvarez-ousted.html> [https://perma.cc/B8HH-ZC45].

355. See Richard A. Oppel, Jr. & Richard Pérez-Peña, *Chicago Releases Videos of Police Shootings*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/04/us/chicago-police-misconduct.html?smid=tw-nytimes&smtyp=cur&referrer=https://t.co/719B9htynX> [https://perma.cc/8WLM-565F].

356. *Id.*

Department regularly disclose data about civilian complaints and discipline imposed, as well as recorded uses of force or deputy-involved shootings.³⁵⁷ Data about arrests and investigatory stops, as well as the race of the parties stopped and arrested, is also important to track whether police departments are demonstrating racial animus or predilection in their encounters with citizens.³⁵⁸ Disciplinary information, allowing the public to track how many complaints an officer has received and how many have been sustained, should also be available online.³⁵⁹ Review agencies should issue annual reports indicating the number of complaints individual officers receive each year, what types of complaints each officer received, and a short summary of the factual allegations, as well as how many complaints against each officer were sustained, and why.³⁶⁰

V. CONCLUSION

In his book *David and Goliath*, Malcolm Gladwell writes, “Our definition of what is right is, as often as not, simply the way that people in positions of privilege close the door on those on the outside.”³⁶¹ For decades, the legal system has accepted—quite deliberately in many cases, and simply unquestioningly in others—the premise that deference to police officers is “what is right.” It is time to rethink our definition of what is right. Our legal system has all too frequently closed the door on people of color, and police departments and officers have all too frequently enabled, or led the way in, these exclusions. Our nation’s police departments desperately need to be reformed. Although these reforms must occur in many areas, one aspect of this reform is changing the way we review misconduct complaints. And it is the people in positions of privilege—often white—who must stop burying their heads in the proverbial sand and acknowledge the damage that decades of deference has done.

357. See CITY OF L.A. OFFICE OF INSPECTOR GENERAL, RECOMMENDATION TO THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT FOR PUBLIC DATA DISCLOSURE 1 (2014), <https://oig.lacounty.gov/Portals/OIG/Reports/Data%20Disclosure%20Recommendation.pdf?ver=2015-01-14-170415-567> [<https://perma.cc/X6ZB-4SFX>].

358. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 18; see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 659–67 (S.D.N.Y. 2013).

359. See CHICAGO POLICE ACCOUNTABILITY TASK FORCE, *supra* note 143, at 18; see also CHICAGO COUNCIL OF LAWYERS, CHICAGO NEEDS TO REPORT MORE COMPREHENSIVE DATA ABOUT HOW IT PROCESSES MISCONDUCT COMPLAINTS AGAINST POLICE 4–5 (2015), <http://files.ctctcdn.com/48087546001/8e90e9e6-e26c-42fd-adb0-768de52ce936.pdf> [<https://perma.cc/M984-XADS>].

360. See Moran, *supra* note 17, at 896.

361. See MALCOLM GLADWELL, *DAVID AND GOLIATH* 190 (2013).