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LETTER FROM THE EDITOR-IN-CHIEF

The Howard University School of Law Class of 2016 entered into law school a little more than a month after George Zimmerman was found not guilty of second-degree murder for causing the death of Trayvon Martin. Since then, our legal study has been set against a backdrop of increasing awareness and video documentation of the violence wrought against black bodies by the apparatus of the State. Thus, it should come as no surprise that the legal scholarship that the editorial board chose to highlight in Volume 59 Issue 1 of the Howard Law Journal reflects the horrors, challenges, and hopes of the last two years. Moreover, if there is a theme to the work presented in these pages, it is that there continues to be a need for well-trained zealous advocates for the most vulnerable in our society. Since 1869, Howard University School of Law has produced such advocates, and since 1955, the Howard Law Journal has published their work. Volume 59 continues in that great tradition.

We begin with Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform, where Professor Nancy Marcus focuses on several notable deaths of black males at the hands of the police and discusses the disregard and ignorance of long standing Due Process limitations on the use of lethal force. The article connects the recent killings with a more pervasive pattern of police brutality in communities of color and analyzes recent reform efforts. Professor Marcus urges a reform to current police practices to include the constitutional understanding, and limitation, that the use of lethal force in response to the mere act of fleeing, with no other justification for the use of such force, is a deprivation of due process.

Next, Attorney John G. Browning and Howard University School of Law graduate Chief Justice Carolyn Wright, together provide us an article in which they attempt to answer the problematic question of “who was the first African American lawyer in Texas?” Extensively researched, We Stood on Their Shoulders: The First African American Attorneys in Texas reviews several of the lawyers who were potentially the first. The authors detail the challenges in gaining admission to the bar the earliest African American practitioners faced. Once admitted, these practitioners engaged in a wide variety of practices, held political office, and generally laid the path for generations of Texas lawyers.

In Teaching for Change: How the Legal Academy Can Prepare the Next Generation of Social Justice Movement Lawyers, Professor Alexi Freeman proposes multiple ways in which legal education can better pre-
pare social justice movement lawyers. Professor Freeman builds on her own personal experience and interviews with practitioners and other educators to offer innovative improvements to the existing legal education regime.

In his Book Review, *The Lieber Code, Lincoln, and Emancipation During the Civil War: Review of John Fabian Witt’s Lincoln’s Code: The Laws of War In American History*, Professor Robert Fabrikant challenges the thesis of Professor John Fabian Witt’s work, mainly that President Abraham Lincoln, the Emancipation Proclamation, and the Lieber Code are so interwoven that it is appropriate to rename the Lieber Code to Lincoln’s Code. Professor Witt was provided the opportunity to write a response to this Review, but he has not done so.

Next, it is our pleasure to print the lecture of Henry J. Richardson III, *From Birmingham’s Jail to Beyond the Riverside Church: Martin Luther King’s Global Authority*. Delivered as part of a 2014 Martin Luther King Day celebration, the speech seeks to reposition our understanding of Dr. King’s intellectual legacy by highlighting the global perspectives Dr. King employed in three of his most noted works. Professor Richardson closes by detailing how, even after death, Dr. King’s global perspectives influenced individuals and movements in the United States and abroad.

In *America’s Disposable Youth: Undocumented Delinquent Juveniles*, Professor Karla M. McKanders provides a critical exploration of the inequities undocumented youth interacting with the juvenile justice system and the immigration system must endure. Professor McKanders begins by detailing the rhetoric, policies and “othering” processes that render undocumented youth particularly vulnerable. The article then discusses the varying policies of local governments in their approach to undocumented youth that have entered the juvenile justice system. Professor McKanders concludes that the large amount of discretion exercised by state and local authorities allows for undocumented youth to be targeted in a manner inconsistent with the rehabilitative goals of the juvenile justice system.

Next is Professor Ann McGinley’s article, *Policing and the Clash of Masculinities*. The article uses gender theories to analyze the interplay between race, class, and gender in interactions between police officers and black males. Professor McGinley argues that the performance of masculinity by police officers and some black males may contribute to the violent encounters that have gripped the nation’s attention. While masculinity theories have not been traditionally applied to the analysis of the violent encounters between police and men of color in this nation, Professor McGinley argues that a deeper understanding of masculinities, as per-
formed by the police and by men of color, is an important step in police reform and reducing the number of violent clashes between the police and men of color.

We conclude with a student Comment, Death by Cop: The Lessons of Ferguson Prove the Need for Special Prosecutors, by Rukiya Mohamed, a Howard Law Journal Senior Notes & Comments Editor and member of the Class of 2016. Mohamed begins with the premise that the personal and professional conflicts of St. Louis County Prosecuting Attorney Robert McCulloch should have required his recusal from the Grand Jury proceedings to indict Officer Darren Wilson for the shooting of Michael Brown. Mohamed proposes that the states adopt legislation requiring the appointment of a special prosecutor immediately upon the use of lethal forces that result in the death of a civilian. This prosecutor would be tasked with handling any investigation and subsequent legal action against the officer. This ideally would avoid any apparent or perceived conflicts of interests that would exist should the elected or appointed prosecutor, who must collaborate closely with the police department and officers the prosecutor is now investigating and considering bringing charges against.

On behalf of the Howard Law Journal, I thank you for your support and readership. It is our hope that the scholarship within this issue will contribute to a deeper understanding of the complex issues we face today, inspire you to do your part in improving the community, and push forward the academic discourse around the topics discussed.

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* Nancy C. Marcus, LL.M., S.J.D., is an assistant professor of law, and founding constitutional law professor, at Indiana Tech Law School. This article is dedicated to the loved ones of those who have died as a result of unconstitutional violence by police, and to those within the law enforcement community seeking to make positive changes in their departments and beyond.
“I CAN’T breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe.”

—Eric Garner, July 17, 2014, Staten Island, NY, to police officer choking him.¹

“Fuck your breath.”

—County Deputy to Eric Harris, April 14, 2015, Tulsa, OK.²

INTRODUCTION (THE DEATH OF FREDDIE GRAY)

On April 12, 2015, a police officer on patrol in Baltimore, Maryland made eye contact with a young black man, Freddie Gray, on a street outside Baltimore’s Gilmor Homes housing project.³ Gray, who, like many in his community, viewed police officers suspiciously, took off running, but was soon chased down by several officers.⁴ Despite lacking any probable cause to arrest Gray, the police, upon

⁴ Mosby Transcript, supra note 3.
catching up with the fleeing man, shackled his ankles, cuffed his hands behind his back, and put him in a police wagon on his stomach, face first, without securing him with a seat belt, in violation of department protocol.\textsuperscript{5} Freddie Gray was then taken on a fatal ride in the back of the wagon, a ride so brutal that Gray’s spine was nearly snapped in two and his head was critically injured, resulting in his eventual death.\textsuperscript{6}

Videos and photographs of the incident appear to show Gray’s feet already dragging and body partially limp by the time he was put in the police wagon.\textsuperscript{7} State Attorney Marilyn Mosby’s subsequent probable cause statement recounted that even before he was put in the wagon, Gray had complained to the officers that he couldn’t breathe and requested an inhaler, which he was denied.\textsuperscript{8} That was but the first of many times he asked for medical help from the officers arresting him, and the first of two times he was documented as crying out that he could not breathe.\textsuperscript{9}

Despite Gray’s repeated pleas for medical assistance during multiple stops of the police wagon, his cries for help went ignored by the officers.\textsuperscript{10} In addition, there were numerous missed opportunities for the arresting officers to fasten Gray securely into the van to prevent the injuries that inevitably killed him. As Mosby recounted, “the medical examiner had connected the lack of a restraint to the spinal injuries that killed [Gray],” and “there had been five opportunities to put a seat belt on Gray, but they were ignored. Instead, at one stop, the officers put ankle shackles on him and put him back in the van, belly down on the floor.”\textsuperscript{11}

Although the exact causes of each of Gray’s injuries were not immediately clear following his autopsy, the medical examiner subsequently identified a deep wound that could have occurred while Gray’s shackled body was bounced around the back of the vehicle,

\begin{footnotes}
5. Id.
6. Id. (Gray subsequently “suffered a severe and critical neck injury as a result of being handcuffed, shackled by his feet and unrestrained inside the BPD wagon”).
7. See id.; see also CNN, \textit{New Video Shows Arrest of Freddie Gray in Baltimore, YouTube} (Apr. 21, 2015), https://www.youtube.com/watch?v=7YV0EtkWyno (showing video of Freddie Gray’s arrest).
9. See id.
10. Id.
\end{footnotes}
unsecured by a seat belt, after he slipped out of consciousness, and his head hit an exposed bolt.\textsuperscript{12} The other fatal injury that likely caused Gray’s death was the injury to his neck that occurred at some point during the violent ride, an injury so severe that his spine was eighty percent severed from his neck, a catastrophic injury of fatal dimensions.\textsuperscript{13}

Whatever the precise cause of Gray’s ultimate death, it is clear that, after the brutal forty-minute ride, when the officers attempted to remove Gray’s limp, mangled body from the van upon arriving at the police station

Mr. Gray was no longer breathing at all. A medic was finally called to the scene where upon arrival, the medic determined Mr. Gray was now in cardiac arrest and was critically and severely injured.

Mr. Gray was rushed to the University of Maryland Shock Trauma where he underwent surgery. On April 19, 2015, Mr. Gray succumbed to his injuries and was pronounced dead. The manner of death deemed homicide by the Maryland Medical Examiner is believed to be the result of a fatal injury that occurred while Mr. Gray was unrestrained by a seatbelt in custody of the Baltimore Police Department wagon.\textsuperscript{14}

The image of Freddie Gray’s body being thrown around the back of the police van until all life was pounded out of it is one of many that have contributed to the rage that exploded on the streets of Baltimore in the aftermath of Gray’s brutal death. As Freddie Gray took his last breath, the city of Baltimore erupted, with protests filling the streets.\textsuperscript{15} The voices of the protesters were heard and acknowledged by Prosecutor Mosby in her statement to the public announcing the subsequent arraignment of the officers who, probable cause established for indictment purposes, had caused Gray’s fatal injuries.\textsuperscript{16}

Freddie Gray’s death, and the subsequent furor that arose on the streets of Baltimore after the details of his brutal death at the hands of the Baltimore police came to light, are not isolated incidents. From the West to the East Coast, the streets of urban America have been
A Call for Constitution-Focused Police Reform

filled in recent days with blood, mourning, and outrage, as a familiar scenario replays itself all too frequently: of men and boys of color killed by police in our country’s urban communities, all too frequently for no apparent reason other than the fact the men were attempting to escape from the police at the moment they were killed. In a single, tumultuous, particularly bloody one-year period spanning from July 2014 to July 2015, a tsunami of tragedy has crashed across the country through a series of events linked by these chillingly common incidents of police killings of unarmed black men (and in one case, a twelve-year-old child). As the number and particularly disturbing nature of such incidents made national news time and time again in that fateful year, the resulting outcry sparked a new movement toward police reform as protesters and communities nationwide clamored for an end to what appears to be a growing pattern of excessive police violence, particularly against black men.

While problems with excessive police force began long before July 2014, and the recounting of police violence against unarmed civilians could fill volumes beyond the length of a law review article, at some point it becomes necessary to take a breath (a luxury Eric Garner, Eric Harris, Freddie Gray, and other recent victims of police killings were denied in their final moments, as described herein) and assess the landscape of our troubled police-civilian relations in an effort to reverse this tragic trend. To that end, this article focuses largely on the police killings of unarmed black men—and a child—between July 2014 and July 2015 that have been the subject of intense nationwide attention.17

On a more positive note, this period also marks what looks to be the beginning of a long-overdue era of police reform, with dozens of states undertaking police reform efforts across the country resulting in forty new state reform measures;18 and with the White House19 and

17. As more and more information comes to light about these events and as new events unfold, it is tempting for the author to perpetually update this article. However, such updating could be an endless process. As such, the author begs the readers’ indulgence and understanding that the events are described herein as they stood at the beginning of August, 2015. While more details and events will emerge over time, what will not change, until the rate of killings decreases, is the dire need for meaningful, constitution-focused reform, which is the primary aspiration of this article.


19. See infra Section IV.A.
Department of Justice (DOJ) intervening in Baltimore, Maryland,20 in Ferguson, Missouri,21 in Cleveland, Ohio,22 and elsewhere to direct and help implement urgently needed police reform.

Amidst these remedial efforts, however, dissent and discord abound. The national coverage of the police killings has divided the country between those who defend the police involved in the killings—by arguing, in many cases, that the victims were asking for it by running away from the police in the first place—and those horrified at the violent taking of civilian lives by those sworn to protect them.23 As described herein, some of the conflicted reactions to these incidents arise from general confusion by both police and the general

20. One of the first acts of Department of Justice Attorney General Loretta Lynch as the new attorney general was to initiate a federal civil rights investigation of the Freddie Gray incident. Edwards, supra note 15. Acknowledging the outrage of the protestors following Gray’s death, Lynch announced a broader investigation as well, into any widespread patterns of discriminatory policing and excessive force by the Baltimore police. Id. In her announcement of the investigation, she explained, “[i]t was clear to a number of people looking at this situation that the community’s rather frayed trust—to use an understatement—was even worse and has in effect been severed in terms of the relationship with the police department,” and promised that “[i]f unconstitutional policies or practices are found, we will seek a court-enforceable agreement to address those issues.” Id.


22. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1–2 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [hereinafter CLEVELAND REPORT]. The DOJ’s focus on Cleveland was due in part to an incident in 2012, which received little national coverage at the time it occurred, compared to more recent incidents, but was even more brutal than the 2014–15 incidents. Id. at 8. In the 2012 case, over 100 Cleveland police officers engaged in a high-speed chase of two unarmed black civilians, a man and a woman, in violation of Cleveland Police Department (“CPD”) protocols, after they apparently mistook their car’s backfire for gunshots. Id. The culmination of the chase was a grotesquely violent bloodbath: thirteen CPD police officers surrounded the car they had been chasing and fired a total of 137 rounds of ammunition into the car, killing both occupants, who each suffered more than twenty gunshot wounds before dying. Id. The DOJ subsequently found that the unconstitutional police force by the CPD was not confined to that incident, but that rather the “CPD engages in a pattern or practice of using unconstitutional force in violation of the Fourth Amendment . . . at a significant rate, and in a manner that is extremely dangerous to officers, victims of crimes, and innocent bystanders.” Id. at 12.

23. Compare Sharon Grigsby, Opinion, Walter Scott Killing Shows that Too Often Black Men’s Lives Still Don’t Matter, DALL. MORNING NEWS (Apr. 8, 2015, 9:56 AM), http://dallasmorningviewsblog.dallasnews.com/2015/04/walter-scott-killing-shows-that-too-often-black-mens-lives-still-dont-matter.html, with Hollis Conant, Comment to One Thing Media Pundits Won’t Say About Walter Scott’s Shooting, ALLEN B WEST (Apr. 9, 2015), http://allenbwest.com/2015/04/one-thing-media-pundits-wont-say-about-walter-scotts-shooting/ (commenting “no one has said why he was running or why he even got out of his car why not just take ticket and leave”), and YOUTHWITHOUTHOUTYOUTH, Comment to Officer Charged with Murder, Fired; Protesters Demand Justice After Shooting Is Caught on Camera, FOX 6 Now (Apr. 7, 2015, 7:24 PM), http://fox6now.com/2015/04/07/114788/ (commenting “don’t want to get shot then don’t run from the police—especially over a broken tail light”).
public about the permissible degree of police violence tolerable under our Constitution.

In particular, this article focuses on the apparent disregard, or outright ignorance, of the limitations of permissible lethal violence under longstanding Due Process precedent such as *Tennessee v. Garner*. The article also addresses the related apparent confusion of an apparently substantial number of police and civilians regarding the degree to which a person’s flight from armed officers may be viewed as, by itself, establishing probable cause for arrest, let alone lethal force. Part I of this article chronicles the series of police killings in the months both leading up and following the killing of Freddie Gray, a series of quite literally breathtaking events in which unarmed black men, and a child, were killed by police, with many of the incidents captured on film by bystanders, resulting in massive outrages and protests across the country between July 2014 and 2015. Part II connects those events to a longer history of post-civil-rights-era24 excessive police violence in this country. Part III addresses various reform measures being considered across the country as a result of the police killings at both the national and local levels.

Part IV concludes that, among the proposed reforms, one of the most important (and perhaps easiest and most affordable to implement) is a renewed commitment to a Constitution focused training of armed officers, i.e., one that emphasizes critical constitutional limitations upon permissible force by peace officers. Here, the article examines possible reasons why some members of the law enforcement community may have abandoned a Constitution-focused policing model in favor of more violence-permissive approaches such as the popular “21-foot rule” that seems to be increasingly used, in place of constitutional standards, as the governing test for when police may use lethal force. To the extent that the Constitution has been even partially abandoned as the governing standard for determining the permissibility of lethal police force, both police and the citizens they serve must be re-educated about the constitutional restraints of police violence. Of particular import are the *Tennessee v. Garner* general prohibition of deadly police force against fleeing, unarmed suspects,

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and other suspects who do not pose an imminent threat of physical harm to others, as well as due process constraints against viewing flight from police as independent and sufficient grounds for arrest. Had these basic constitutional constraints been heeded by the officers involved in the series of killings detailed herein, the victims of those killings would likely still be alive today.

While some police trainings fail to clearly enough instruct law enforcement officers about the constitutional boundaries of permissible police force, and it is even possible that some have done so intentionally, for plausible deniability purposes, such abandonment of Constitution-focused use-of-force training is inexcusable. As a matter of constitutionality and human decency, it is time for officers of the peace to protect and serve all of our urban citizens, every one of whom is entitled to life and liberty under our Constitution and the full protection of the police, free from unconstitutional and discriminatory persecution.

I. A BREATHTAKING SNAPSHOT IN TIME: FROM “I CAN’T BREATHE” TO “FUCK YOUR BREATH” AND BEYOND

Freddie Gray’s death, while shocking, is not an isolated event. The ugliness of Gray’s death is compounded when viewed in the context of a surrounding series of police killings in the months preceding and following Gray’s death, which, viewed collectively, paint a snapshot of a particularly troubling historic period of police relations in America.

A. From “I Can’t Breathe” to “Fuck Your Breath”: The Deaths of Eric Garner and Eric Harris

The additional police killings of unarmed black men that grabbed national headlines in the months preceding Freddie Gray’s death were, as with Freddie Gray’s death, literally breathtaking in their tragic dimensions.

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26. In other words, to make it more possible for officers to successfully invoke a qualified immunity defense, claiming that the constitutional parameters of permissible violence are unclear, or, invoking Heien v. North Carolina, to argue that a Fourth Amendment search and seizure based on a misunderstanding of the law may be upheld as reasonable. See 135 S. Ct. 530 (2014). But see Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (minimizing the availability of defenses based on officers’ subjective understanding of whether use of force was excessive, so long as the use of force was objectively unreasonable).
On July 17, 2014, an unarmed black father of six, Eric Garner, was choked to death by a police officer on a sidewalk in Staten Island, New York, crying out “I can't breathe” over and over before he died.\(^{27}\) His alleged crime that led to his being thrown to the sidewalk and choked to death by the police? Being a sidewalk vendor of untaxed cigarettes.\(^{28}\)

Just over seven months later, and 1,400 miles away, another unarmed black man, Eric Harris, lay dying a sidewalk in Tulsa, Oklahoma, similarly crying out to the police who pinned him down that he had been shot and couldn’t breathe.\(^{29}\) Autopsy reports, which described Harris’s death as a homicide, would later show that Harris, at the time he cried out that he could not breathe, had been suffering internal bleeding and collapsed lungs after he was shot through the right armpit by a volunteer reserve police officer.\(^{30}\)

In response Harris’s cries that he could not breathe, a second police officer, with his knee on Harris’s head, yelled at him, “fuck your breath,” as Harris laying dying and gasping for breath.\(^{31}\)

Thus, the breathtaking nature of the spate of police killings across the country in the nine months between July 2014 and April 2015, is literal, not just metaphoric: “I can't breathe” became the battle-cry chant of peace activists taking to the streets to protest excessive police violence after the strangulation of Eric Garner at the hands of a New York police officer.\(^{32}\) The “I can’t breathe” cries were echoed and magnified by civil rights protesters across the country as the news came down that the grand jury in that case decided not to indict the officer who choked Garner to death.\(^{33}\) Then, nine months later, a collective metaphoric gasp could be heard across the country as Eric Harris became the latest unarmed black man to beg futilely for

\(^{27.}\) As a Washington Post editorial depicted the event, “‘I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe. I can’t breathe.’ With increasing panic, Eric Garner left no doubt regarding his distress as he was wrestled to a Staten Island sidewalk by a phalanx of police officers. They paid no mind. Mr. Garner was choked to death.” Editorial Board, supra note 1.

\(^{28.}\) Id.

\(^{29.}\) Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In, supra note 2.


\(^{31.}\) Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In, supra note 2.

\(^{32.}\) See Editorial Board, supra note 1.

\(^{33.}\) See id.
breath, this time only to hear his pleas met with the South Carolina police officer’s chillingly “fuck your breath” response.34

The callous cruelty of such words shouted at a man pleading for his life does take one’s breath away. “Fuck your breath” was perhaps the last thing Eric Harris heard as he slipped out of consciousness to his death. This cold, merciless condemnation from a police officer to the dying man pinned beneath him is but one example of a series of unacceptable atrocities committed by “bad cops”35 that cannot be swept under the rug or condoned by either the larger policing community, or civil society generally, any longer.

Each of the following additional infamous incidents between July 2014 and July 2015, as with the cases of Eric Garner, Eric Harris, and Freddie Gray, involved the killing of unarmed black male civilians by police officers, raising troubling questions about abuse of lethal power by police in this country, and inspiring a movement toward police reform nationwide.

B. Other Police Killings of Unarmed Black Men (and a Child)
   Between July 2014 and July 2015

Although the police killings of unarmed black men (and a child), described below, are not the only incidents of such deaths, they are a representation of those cases that have received national attention due to citizen journalism. In these cases citizen journalism has cast into serious doubt any purported justification for the police killings of civilians in the tragic incidents described below.

1. The Death of John Crawford, III

On August 5, 2014, John Crawford, III, a 22-year-old black man, was shot dead by police in a suburban Dayton, Ohio, Wal-Mart store after he picked up a toy air rifle—specifically, a nonlethal Crosman MK-177 air pump rifle made for children—from a store shelf.36 Police had rushed into the store and shot Crawford in response to a 911 call in which someone had reported that Crawford was waving a gun around; a surveillance video later showed that Crawford was not wav-

34. Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In, supra note 2.
35. Of course, #notallcops.
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ing the air rifle around, however.\textsuperscript{37} The police who shot Crawford did not give the young man a chance to respond to orders, nor, apparently, did they take into account the fact that he was standing in the air rifle section of the store and was holding harmless store merchandise, not a real gun. Indeed, even if the gun had been an actual firearm, holding it would have been legal, Ohio being an open-carry state.\textsuperscript{38}

A month after Crawford was shot dead in the middle of a store for the mere act of picking merchandise off the shelf in the air rifle section of Wal-Mart, the Department of Justice initiated an investigation into the Crawford’s killing, although the officer who killed Crawford was not indicted on any charges.\textsuperscript{39} Announcing the commencement of the DOJ investigation, Ohio Senator Sherrod Brown released the statement: “Our top priority is to ensure that justice is served and that such a tragedy never happens again. The Department of Justice is right to conduct an independent investigation into this shooting, which has rightly raised alarm in the community.”\textsuperscript{40} As of the writing of this article, the investigation is still pending.\textsuperscript{41}

2. The Death of Michael Brown and the Subsequent DOJ Investigation of the Ferguson Police Department

On August 9, 2014, Michael Brown, an unarmed black eighteen-year-old, was shot and killed on a Ferguson, Missouri, street by Ferguson Police Officer Darren Wilson.\textsuperscript{42} Brown was shot after a brief altercation with Wilson, who shot at Brown after the young man ran away from him.\textsuperscript{43} Against a backdrop of impassioned and tense nationwide protests, Wilson was cleared by a grand jury after conflicting


\textsuperscript{38} Butler, supra note 36.

\textsuperscript{39} Berman, supra note 37.


\textsuperscript{43} Id. at 4–7.
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evidence about the details of the killing. In particular, as the DOJ described, there was conflicting evidence about whether (1) Wilson started shooting Brown when Brown was running away from him, or if he began shooting after Brown turned around; and (2) whether, right before the officer fired the final fatal shots, Brown had turned around in a threatening manner indicating that he was about to charge the officer.

The incident sparked intervention by the DOJ, which, while clearing Wilson of federal charges, simultaneously conducted a separate, comprehensive investigation of the Ferguson Police Department that revealed systemic problems of unconstitutional, racially discriminatory policing, including a pattern of excessive force against members of the African American community. The vast majority of excessive force by Ferguson police officers, the resulting report found, i.e., nearly 90%, is targeted at African Americans. That, among other evidence, led to the DOJ's conclusion that the Ferguson Police Department's activities “stem in part from a discriminatory purpose and thus deny African Americans equal protection of the laws in violation of the Constitution.”

3. The Death of Tamir Rice

Also in November 2014, within months after the Michael Brown killing, and three Midwestern states over, Tamir Rice, a sixth-grade boy (whom the officers later claimed looked to them like an intimidating black man), was shot to death in Ohio (an open-carry state, recall) after police pulled up in response to a call stating that the boy was

45. See REPORT ON SHOOTING OF MICHAEL BROWN, supra note 41, at 82; see also Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: Social Dominance, Implicit Bias, Criminality, and Race, 46 WASH. U. J.L. & POL’y 23 (2014) (describing protests, along with the militarized police response to those protests).
46. See FERGUSON REPORT, supra note 21, at 28.
47. Id.
48. While the Ferguson Report is replete with examples of racial disparities in the number of vehicle stops and other police investigations, arrests, and violence toward members of the African American community the evidence compiled in the report also includes a number of disturbing emails from high-ranking Ferguson officials demonstrating racism, including emails making fun of President Obama, the first lady, and black people generally, including depicting the president as a chimpanzee, and mocking people of color as lazy, illiterate, criminals, and other offensive stereotypes. Id. at 62, 64–69, 72.
49. Id. at 63.
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carrying what might have been a real gun but was “probably fake.” 50
Within seconds of pulling their police cruiser up to the boy, the police
leapt out of the cruiser and shot the boy at close range. 51 The child’s
“gun” was, it turned out, just a toy, but the shots from the police were
real and lethal. 52 As twelve-year-old Tamir lay dying on the sidewalk,
his distraught fourteen-year-old sister was tackled, restrained, and
handcuffed by the police as she tried to run to her dying brother. 53 As
she cried out begging for her brother’s life, the officers stood by, un-
moved, not even allowing the girl to go to her brother’s side in his last
moments, and not offering any medical assistance that could have
kept Tamir alive. 54

Nearly a year after Tamir Rice’s killing, the investigation remains
in the hands of local law enforcement investigators, with the Cleveland
mayor stating on record that he does not trust the state attorney
general’s office to handle the investigation. 55 In June of 2015, a de-
tailed, but redacted, investigation report from the Cuyahoga County
Sheriff’s Department was released that made no recommendation of
whether criminal charges should be filed against the officer who shot
Tamir to death. 56 The report did, however, record that the officer who
shot Tamir stated that he felt he had no choice but to use deadly
force. 57

In the meantime, the city has pressured Tamir’s family to drop
their lawsuit against the officers while the investigation is pending,
while refusing to provide a timeline for how long the investigation will

51. See Johnson, supra note 50.
52. See id.; National Digest, supra note 50.
53. See National Digest, supra note 50.
54. See Johnson, supra note 50.
57. Id.
Fed up with the lack of follow-through from the criminal justice system, a group of community leaders in Cleveland creatively availed themselves of an Ohio statute that empowers citizen activism in such circumstances, and petitioned a municipal court judge to issue a probable cause finding, rather than waiting for the prosecutor’s office to obtain a grand jury indictment. Their efforts were somewhat successful in nudging justice along. On June 11, 2015, a municipal court judge ruled that there was probable cause to charge the officer who shot Tamir Rice with several crimes, including murder, involuntary manslaughter, reckless homicide, negligent homicide and dereliction of duty, and to charge his partner with negligent homicide and dereliction of duty. The prosecutor’s office must still, however, proceed to a grand jury indictment for any conviction to happen; and as of the writing of this article, that has not yet occurred.

4. The Death of Walter Scott

On April 4, 2015, yet another unarmed black man, Walter Scott, a father of four, engaged to be married, and a former Coast Guardsman, was shot to death by a police officer who fired at him eight times in the back as he was running from the officer in North Charleston, South Carolina. North Charleston Police Officer Michael Thomas Slager reportedly laughed about the incident after the fact with his supervisor as he described how shooting Mr. Scott made his adrenaline pump. The incident (including an apparent effort by the officer to plant a stun gun on the man’s body afterward) was captured on

60. Id.
61. Id.
63. Id.
64. See Jonathan Capehart, South Carolina, Unarmed Black Men and Police, WASH. POST (Apr. 8, 2015), http://www.washingtonpost.com/blogs/post-partisan/wp/2015/04/08/south-carolina-unarmed-black-men-and-police/ (“There are three key moments in the video. At 0:56, Slager walks, then jogs, back to where once stood. At 1:06, he picks something up, presumably the Taser, from the ground. At 1:23, he appears to drop something next to Scott’s body, which he handcuffed immediately after the shooting. The Post reports that police confirmed that Scott was hit with the Taser at least once, because part of it was still attached to him when other
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video by a witness. The video consequently went viral on the Internet, often accompanied by warnings due to its graphic depiction of Scott’s killing.

Unlike previous incidents, the killing of Scott resulted in immediate action against the shooter: less than an hour after the North Charleston’s mayor and police chief received a video showing Slager shooting at the unarmed Scott while he was running away and Slager apparently dropping the stun gun by his dying body afterward, charges were filed against Slager. On June 8, 2015, a grand jury indicted Slager for murder.

5. The Death of Samuel DuBose

On July 19, 2015, a white University of Cincinnati police officer named Ray Tensing shot and killed Samuel DuBose, an unarmed black man, after pulling him over for driving without a front license plate. The officer was wearing a body camera, which captured the shooting (the video is available through the below New York Times article link; readers should be braced for the disturbing content before viewing it). The shooting, from the video, appears to come suddenly, not precipitated by any act of violence or aggression from DuBose. The video also dispels the officer’s later contention that he shot DuBose’s car because he was being dragged by the car, while confirming what the officer freely admitted: that he shot DuBose in the
head.\textsuperscript{72} As the Washington Post describes it, the video “appears to show DuBose turning the ignition after Tensing tells him to take off his seat belt. The officer reaches toward the door, yells ‘Stop!’ and draws his gun.\textsuperscript{73} Then, he thrusts the weapon through the open car window and fires a single round, striking DuBose in the head.”\textsuperscript{74} In a more detailed description of the killing (and the apparent lack of any justifiable provocation for it), the Post chronicles the fatal turn of events captured by the video as follows:

> “Hey, how’s it going, man?” Tensing begins. He explains to DuBose that he stopped him because he was not displaying a front plate. Tensing asks DuBose for his driver’s license multiple times, but DuBose hands over only what appears to be a bottle of gin. DuBose finally admits that he doesn’t have his license with him, adding: “I just don’t. I’m sorry, sir.”

With that admission, Tensing asks DuBose to take off his seat belt, presumably a prelude to asking DuBose to get out of the car. DuBose protests that he had not done anything wrong and appears to turn the car back on. At that point, Tensing yells “Stop!” and draws his gun.

After the shooting, the car lurches forward and comes to a stop some distance down the street. Tensing runs after it, yelling to a dispatcher that medical attention is needed.

One minute and 53 seconds had elapsed since Tensing first approached the car.\textsuperscript{75}

The Post documents that “[o]f 558 fatal shootings by police so far this year . . . the death of DuBose is only the fourth to result in criminal charges against the officer”; two out of the three other killings involved black men shot by white officers, and all three that resulted in criminal charges were captured on film.\textsuperscript{76}

The county prosecutor, who days after DuBose’s killing announced a murder indictment for what he called “a senseless, asinine shooting” that was “without a question a murder,” surmised that Tensing shot DuBose upon becoming enraged when DuBose would not

\textsuperscript{72.} Id.
\textsuperscript{74.} Id.
\textsuperscript{75.} Id.
\textsuperscript{76.} Id.
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exit his car. The prosecutor also acknowledged during his announcement of the indictment, made to a crowd of several hundred people braving the rain to stand together chanting “Black Lives Matter” and “I am Sam DuBose,” that Tensing’s indictment marked the first time in the history of the county that a law enforcement officer had been indicted for murder in relation to use of force while on duty.

II. THE BIGGER PICTURE OF POLICE BRUTALITY

PRE-FERGUSON

Bearing in mind the relatively recent developments of widespread police body camera use, citizen journalism advancement through smartphone video technology, and Internet dissemination of the video evidence thereby obtained, the past year’s events should not be viewed as an anomaly. More likely, such incidents are merely being brought to light to a degree not possible in the days before video evidence became so easy to obtain and disseminate via social media.

In fact, the incidents described in the previous section are but a small sampling of the police killings that occur on a frequent basis in this country. For example, one study reveals that, in the twenty-five year span between 1980 and 2005, “about 9,500 people nationally were killed by police . . . an average of nearly one fatal shooting per day.”79 In more recent years, the estimate has risen to “as high as 1,000 police killings a year.”80 This is in stark contrast with other countries’ lack of anything close to that number of police killings: “By contrast, there were no fatal police shootings in Great Britain last year. Not one. In Germany, there have been eight police killings over the past two years. In Canada—a country with its own frontier ethos and no great aversion to firearms—police shootings average about a dozen a year.”81

77. Perez-Pena, supra note 69.
78. Id.
81. Id.
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The disparity with which unarmed victims of police killings tend to disproportionately be people of color is a particularly shameful failing of American policing in a day when some wishfully have tried to proclaim that we have entered into a post-racial era. Today’s police killings of unarmed black men, sadly, illustrate that fates even worse than that of Abner Louima and Rodney King might await those unarmed citizens perceived—often wrongfully—as dangerous enough to warrant lethal force by police. The recent spate of killing men of color for little more than fleeing feels startlingly akin, at times, to the more murderous eras of police violence against unarmed black citizens from the pre-Civil Rights days.

Furthermore, while most of the attention between July 2014 and July 2015 has been on black victims of excessive police force, in many urban communities, the people of color killed by police have also been Latino, with the Latino communities also suffering disproportionately from racial profiling and excessive police force. For example, in New York City, “[p]olice reports on stop and frisk—known as UF-250 forms—show that between 2005 and 2008, 85% of stops and frisks were blacks and Latinos, and that only 8% of stops and frisks were whites. In a similar pattern, police were—and are—also more likely to use force against blacks and Latinos.”

In one of the most famous recent cases of an unarmed Latino man being killed by police, the family of Ricardo Diaz Zeferino was awarded $4.7 million after Zeferino, an innocent man helping his brother look for a stolen bike, was shot to death by police, who as-

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sumed he was a suspect in the bicycle theft.85 Three officers opened fire, shot Zeferino eight times, and killed him after the unarmed man, apparently confused as he was being shouted at, took his hat off and dropped his hands from behind his head.86 The incident was captured on camera (and can be viewed at the below link, but readers should be warned that the video is graphic and disturbing to watch).87

In other cities across the country, police killings have resulted in expensive settlements paid to the families of the victims. The killing of Eric Garner in Brooklyn eventually led to a settlement of $5.9 million, paid by New York City to Garner’s estate.88 In Baltimore, where, eventually, the city agreed to pay a settlement to the family of Freddie Gray to the tune of $6.4 million, that settlement was but the latest settlement paid to resolve police brutality claims; between the years of 2011 and 2014, the city had to pay out $5.7 million to victims of brutality, to a total of over a hundred individuals who filed civil rights and excessive force lawsuits.89 The victims included “a 15-year-old boy riding a dirt bike, a 26-year-old pregnant accountant who had witnessed a beating, a 50-year-old woman selling church raffle tickets, a 65-year-old church deacon rolling a cigarette and an 87-year-old grandmother aiding her wounded grandson,” and the victims suffered injuries ranging from broken bones to “head trauma, organ failure, and even death, coming during questionable arrests. Some residents were beaten while handcuffed; others were thrown to the pavement.”90

In Chicago, two recent shootings of unarmed black men alone have resulted in combined settlements of $3 million,91 and a separate $5 million settlement was awarded to the family of a teenaged boy

86. Id.
87. Id.
90. Friedersdorf, supra note 88; Wegner & Puente, supra note 88.
who was shot sixteen times outside a fast food restaurant.\textsuperscript{92} In yet another case, although involving “only” torture, not killings, the city of Chicago paid reparations in the amount of $5.5 million to torture victims of a former police commander, who had subjected over one hundred victims, mostly black men, to various forms of police abuse.\textsuperscript{93} As one newspaper reported, “[f]rom 1972 through 1991, the suspects were subjected to mock executions and electric shock and beaten with telephone books as their interrogators flung racial epithets at them. A Chicago Police Department review board ruled in 1993 that Burge’s officers had used torture. He was fired.”\textsuperscript{94}

While police brutality, particularly in the form of police killings of civilians on urban American streets, is not limited to victims of color, among fifty-four egregious incidents of police shootings between 2005 and 2015 that resulted in charges being brought against the officers (due to the victims being unarmed and fleeing, for instance), all but two of the victims were black.\textsuperscript{95} Three-quarters of the officers who were charged in those incidents were white.\textsuperscript{96} Among those cases, two-thirds of the officers shot and killed a black victim while, in contrast, no white people were fatally shot.\textsuperscript{97}

Half the cases involved unarmed suspects whom the officers had shot in the back. That statistic, viewed along with the specific instances that were the focus of national attention between July 2014 and 2015, indicate a continued pattern of police misconduct that involves unacceptable degrees of violence toward fleeing individuals, and particularly those who happen to be black men.

\section*{III. REMEDIAL STEPS SINCE FERGUSON}

\subsection*{A. The Dawn of a New Reform Movement}

As it is becoming increasingly apparent that lethal force by police is not an uncommon occurrence in this country, particularly against

\begin{itemize}
\item \textsuperscript{93} Aamer Madhani, \textit{Chicago City Council Approves Reparations for Police Torture Victims}, \textit{USA TODAY} (May 6, 2015, 5:45 PM), http://www.usatoday.com/story/news/2015/05/06/chicago-city-council-torture-reparations-jon-burge/70885118/.
\item \textsuperscript{94} Id.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id.
\end{itemize}
unarmed black men who are either fleeing or otherwise not posing a serious threat, communities across the country are struggling for answers. Various reforms have been considered and implemented at the state and national levels.\textsuperscript{98} At the state level, dozens of states have implemented dozens of new state reform measures, including measures requiring body cameras worn by police, the implementation of new civilian review boards and other community involvement, improved police training, increased transparency and accountability, and other reform measures.\textsuperscript{99} At the national level, reform measures under the leadership of the Obama administration have resulted in several national police reform initiatives, described in more detail below.

The reform movement is, at this point, somewhat inevitable and clearly necessary. The impetus to stop police killings of unarmed citizens grows stronger by the day as “Black Lives Matter” becomes a more and more common battle cry across the country and increased video evidence of police brutality confront all who log on to the internet. The pressure to engage in meaningful reform of use-of-force policies and other policing standards, policies and practices is coming not just from communities and government bodies across the United States, but also from the international community. For example, the United States recently had to defend its human rights record in front of United Nations Council in Geneva, Switzerland, in light of its recent history of police killings that have raised eyebrows and threats of prosecution for human rights violations.\textsuperscript{100}

A June 18, 2015, Amnesty International report contained damning findings about the state of policing in this country, including that:

- All 50 states and Washington DC fail to comply with international law and standards on the use of lethal force by law enforcement officers;

- Nine states and Washington DC currently have no laws on use of lethal force by law enforcement officers; and

\textsuperscript{98} Police Protests, supra note 18.
\textsuperscript{99} Id.
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- Thirteen states have laws that do not even comply with the lower standards set by US constitutional law on use of lethal force by law enforcement officers.101

The condemnation and moral accounting is domestic and internal as well; Department of Justice senior counsel for the Civil Rights Division James Codogan recently explained, “‘We must rededicate ourselves to ensuring that our civil rights laws live up to their promise’ . . . ‘The tragic deaths of Freddie Gray in Baltimore, Michael Brown in Missouri, Eric Garner in New York, Tamir Rice in Ohio, and Walter Scott in South Carolina have . . . challenged us to do better and to work harder for progress.’”102

In this pressure cooker of outrage, indignation, and widespread outcry for answers, a new police reform movement is growing across the country. At least two dozen states have begun implementing policing reform measures, and the federal government has been increasingly proactive, with the White House and Department of Justice working with states and localities to help implement reform measures.103

Many of the proposed reforms complement those that have been proposed over the years by legal scholars, such as calls for greater record-keeping and reporting, implementation of citizen oversight boards and other independent investigatory methods, the development of remedies that take into account race bias (both implicit and overt), and increased litigation against and prosecution of police abuse.104

The recent reform movement also is similar to past reform efforts, to an extent. DOJ involvement in police reform, for example, is

102. Pestano, supra note 100.
103. See Cleveland Report, supra note 22, at 45–46; Ferguson Report, supra note 21, at 90–102; Police Protests, supra note 18.
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not a new development. Rather, between 1997 and 2013, the DOJ investigated and assisted in the reform of over twenty-five police departments.\(^\text{105}\) During that period, the DOJ uncovered systemic patterns of improper police force, biased policing, and unlawful stops, searches and seizures in cities including Detroit, New Orleans, Cincinnati, Seattle, Pittsburgh, Washington, D.C., Los Angeles, and a number of other localities, giving rise to consent decrees that were carefully constructed to remedy these systemic abuses under the ongoing monitoring by the DOJ.\(^\text{106}\) In Cincinnati, what became known as a landmark settlement agreement, arising out of a Southern District of Ohio federal court-approved Collaborative Agreement, had a focus on community input directed toward holistic police reform.\(^\text{107}\)

The approach subsequently developed through this era of DOJ-monitored reform was based on improved use-of-force policies, training, supervision and early intervention.\(^\text{108}\) However, while the need for clear written policies on use of force was emphasized in this era of reform, a summary of the various reform measures entered into during this period did not include reference to the necessary utilization of Constitution-focused policies in use-of-force training, only mentioning Constitution-based training in the context of preventing discriminatory policing.\(^\text{109}\)

As to use-of-force training police reform, consent decrees entered into between the DOJ and the target cities generally contained the following elements that became required in use-of-force procedures, trainings and materials: (1) clearly identified categories of permissible levels of force; (2) clearly identified consequences for use for force that is unreasonable or impermissible; (3) procedures, trainings, and policies specific to different types of force; (4) requirements for certification, de-escalation; reporting, documentation and investigation, and supervision; (5) the prohibition of the use of force against


\(^\text{106.} \) Id. at 1–3.


\(^\text{108.} \) Civil Rights Investigations of Local Police: Lessons Learned, supra note 105, at 7–8.

\(^\text{109.} \) See id. at 21.
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restrained persons who resist officers solely through verbal means; (6) review, response, and auditing requirements; (7) requirements for a review board; and (8) annual training on use of force.110 While each of these elements may be critical to meaningful reform, notably absent is an emphasis on policies for use of force governed specifically by Constitution-focused rules of law.

Another historic development in the area of police reform in response to specific regional problems is the court-initiated reform in New York resulting from the Southern District of New York federal Floyd v. City of New York111 decision. In that case, after finding systemic problems with police officers targeting African Americans and Latinos for stops and frisks, the federal court ordered a comprehensive reform of policing in New York, including such measures as increased monitoring of the police, an end to racial profiling (including suggested trainings to address implicit race bias), better reporting, changes to supervision and discipline of police, use of police body-cameras, and the development of ongoing processes for supplemental reform.112

Perhaps because the Floyd reform model was judicially created, it also contained a requirement of Constitution-based police standards,113 a constitutional emphasis that was lacking in other reform measures as previously described herein.

Although Floyd is a stop and frisk case, and its policing reform mandates consequently focused on problems with stopping and frisking unarmed people of color, many of the principles underlying the court’s opinion extend to the parallel and more troubling context of lethal police force against unarmed people of color. The reforms established in that case can, therefore, continue to provide guidance in the context of police killings as well.

In the more recent era of police reform in response to the recent police killings in Ferguson and beyond, the police reform movement has become even more comprehensive, and initiated more broadly across the country rather than just in response to isolated incidents as they arise. A number of police departments and government forces at the national, state, and local levels, across different government branches, have begun to incorporate a variety of platforms for reform,

110. Id. at 13.
111. Floyd, 959 F. Supp. 2d at 686.
112. Id. at 686–90.
113. Id.
as they take affirmative steps toward instituting what will hopefully be meaningful, comprehensive, effective, and, increasingly, Constitution-focused reform. Some of the more recent reform initiatives are described below.

B. An Overview of Recent Reform Measures and Proposals

1. White House Initiatives

   On December 1, 2014, a White House press release invoking the events in Ferguson “and around the country [that] have highlighted the importance of strong, collaborative relationships between local police and the communities they protect” announced several new national programs spearheaded by the Obama administration to address systemic policing problems and to implement community-based policing models and measures nationwide.114

   First, the White House announced the commencement of a comprehensive review of programs related to the provision of federal equipment to local law enforcement agencies.115 The review will examine whether the programs—some of which have criticized as creating overly militarizing local police forces116—are appropriate to community needs.117 The review will identify methods of improving training, safeguards and standards to prevent abuse of the equipment.118 Second, the White House announced the creation of a new “Task Force on 21st Century Policing,” comprised of law enforcement and community leaders working in collaboration with the Department of Justice’s Community Oriented Policing Services.119 The Task Force is charged with developing initiative reform measures to “promote effective crime reduction while building public trust.” Finally, the Administration announced the creation of a new $263 million Community Policing Initiative, which “will increase use of body-worn cameras, expand training for law enforcement agencies (LEAs), add


115. Id.


117. CLEVELAND REPORT, supra note 22, at 6.

118. Id.

more resources for police department reform, and multiply the number of cities where DOJ facilitates community and local LEA engagement."120 This last initiative will result in matching funds for states and localities to purchase “bodycams” worn by police officers that, it is hoped, will provide a deterrent against excessive police violence, as well as provide evidence in cases where such violence occurs.121

2. The Department of Justice Settlements, Reports and Recommendations

In its Ferguson Report, the DOJ recommended a number of remedies to address unlawful police practices and to restore community trust of that town’s police force. Those recommendations included: (1) implementing a system of community policing based on community involvement and partnerships; (2) reforming police practices related to stops, seizures, arrests and issuance of summons and citations, ensuring full documentation and accountability driven by constitutional standards and the promotion of public safety rather than quota-driven police and other questionable practices; (3) improving the thoroughness of the review of stop, search, ticketing and arresting practices; (4) reorienting the police department’s use-of-force trainings and policies to “change force use, reporting, review, and response to encourage de-escalation and the use of the minimal force necessary in a situation;” (5) improving policies and training for interactions with vulnerable people such as those with physical or mental disabilities; (6) greater outreach to youth to avoid the continued “criminalizing” of youth; (7) the reduction of bias-based profiling and other discriminatory police conduct; (8) general improvement of proper police training, including in-depth training on constitutional and other legal restrictions on police action; (9) increased civilian participation in police decision-making; (10) better supervision of officers to ensure lawful and un-biased policing; (11) more diverse recruiting, hiring and promotion; (12) improved procedures and practices for responding to officer misconduct allegations; (13) transparency through more publically available information about police actions, and a number of corresponding recommendations for remedial measures targeted at the Ferguson court system.122

120. Id.
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Notably, two of the eleven above recommendations emphasize the need for Constitution-focused reform: the second recommendation—to reform police practices to ensure “full documentation and accountability driven by constitutional standards and the promotion of public safety rather than quota-driven police and other questionable practices”—and the eighth recommendation—general improvement of proper police training, including in-depth training on constitutional and other legal restrictions on police action.123 This emphasis on the importance of constitutional standards and restrictions is of particular import to those involved in educating both officers and civilians about the limitations of permissible police force. Constitutional standards, not questionable practices derived from other sources, must be at the core of any policies governing law enforcement’s physical treatment of civilians, as the Constitution at its core was adopted to protect our liberties and lives against abuse by the government and its officers.

That said, all of the above recommendations by the DOJ are critical measures that must be considered, in Ferguson and beyond. Each reform measure can play an important role in reining in excessive—and, too often, lethal—police violence, including the reining in of the inappropriate militarized treatment of urban citizens.124 And, lest “militarized” be condemned as hyperbole, the DOJ itself has criticized the militarization of police forces, for example, in the following passage from its Cleveland Report:

CDP too often polices in a way that contributes to community distrust and a lack of respect for officers—even the many officers who are doing their jobs effectively. For example, we observed a large sign hanging in the vehicle bay of a district station identifying it as a “forward operating base,” a military term for a small, secured outpost used to support tactical operations in a war zone. This characterization reinforces the view held by some—both inside and outside the Division—that CDP is an occupying force instead of a true partner and resource in the community it serves.125

After rebuking the Cleveland Police Department for emitting the vibe of a militarized war zone, the Cleveland Report recommended that the CDP “undergo a cultural shift at all levels to change an ‘us-

123. Id. at 91, 94–95.
125. CLEVELAND REPORT, supra note 22, at 6.
against-them’ mentality we too often observed and to truly integrate
and inculcate community oriented policing principles into the daily
work and management of the Division.”126

To that end, the DOJ’s Cleveland Report, as the Ferguson report
had, emphasized the need for a more conscientious Constitution-foc-
cused approach to policing that reflects greater respect for constitu-
tional rights and provides greater police accountability.127 It is this
recommendation by the DOJ, for a renewed emphasis on Constitu-
tion-focused policing, which warrants more expansion herein, and,
ideally, adoption nationwide, including in the manners proposed in
the final section of this article.

Baltimore,128 Ferguson and Cleveland are but three of many cit-
ies in which the DOJ has intervened, completed investigations, issued
reports, and entered into settlements to guarantee policing reform.129
Indeed, the reform efforts by the DOJ, while receiving more national
attention than ever in light of the police killing incidents between July
2014 and July 2015, actually began two decades ago, when the 1994
Violent Crime Control and Law Enforcement Act first authorized in-
vestigations by the DOJ of improper use of police force, unlawful
stops and searches, and discriminatory policing.130 Since then, around
two dozen such settlement agreements have been reached between
the DOJ and local law enforcement, as of May, 2015.131 Through these
agreements, and with Cleveland’s most recent settlement agreement
serving as a model for the new wave of reform, the targeted cities
have committed to undertake specific reforms, focusing, largely, on
“use of force, community policing, equipment and staffing, accounta-
bility, bias-free policing and crisis intervention,” and agreements to

126. Id.
127. Id.
128. See supra Section IV.A.
129. Tom McCarthy & Daniel McGraw, Cleveland Announces Historic Second Settlement
    over Chronic Police Abuse, GUARDIAN (May 26, 2015, 5:54 PM), http://www.theguardian.com/
    usnews/2015/may/26/cleveland-police-officers-abuse-settlement. In Cleveland’s case, two sepa-
    rate settlement agreements had to be entered into, separated by several years’ time, in order to
    rein in continued problems with excessive and discriminatory police force. Id.
130. 42 U.S.C.A. § 14141 (1994) (defining “Unlawful Conduct” and “Civil Action by Attor-
    ney General”).
131. See McCarthy & McGraw, supra note 129:
    The first major consent decree, as the deals are known, was reached in 1997 in Pitts-
    burgh, following a federal complaint prompted after an African American man died
    while being taken into custody by four police officers following a low-speed car chase,
    and after a white police officer shot dead two black men in a car that had dragged him.
    The Justice Department reached three such settlements in 2014: with New Orleans;
    Newark, New Jersey; and Albuquerque. Two current federal investigations—into polic-
    ing practices in the cities of Ferguson, Missouri, and Baltimore—are ongoing.
provide ‘‘state-of-the-art training’ to ensure that ‘any use of force is constitutional and lawful.’’ 132

3. Congressional Measures

While the Obama administration has been active and far-reaching in its programmatic efforts to accomplish meaningful police reform across the country in the past two years, Congress has been less successful. A measure, for example, that was proposed but subsequently stalled out in the 113th Congress was S. 1038, the ‘‘End Racial Profiling Act,’’ which, by its terms, would (1) prohibit law enforcement officials and agencies from engaging in racial profiling, (2) provide declaratory and injunctive relief to those injured by racial profiling, (3) require systemic policy changes to eliminate racial profiling, (4) condition certain government funding on certifications by state and local entities that they maintain adequate policies and procedures for eliminating racial profiling and have eliminated any existing practices that permit or encourage racial profiling, and on the collection of racial profiling data and the development of best practices for eliminating racial profiling data, and (5) require the Attorney General to issue regulations for the collection and compilation of data on racial profiling and for the implementation of the Act. 133

After S. 1038 failed to move, it was reintroduced in the 2015 session of Congress by Representative John Conyers, as the End Racial Profiling Act of 2015. 134 Representative Conyers, who as of the writing of this article is the longest serving Member of Congress, and who is also one of the founding Members of the Congressional Black Caucus, 135 issued a statement in support of the legislation, which explained, in part:

Recent events in the wake of Ferguson, Missouri demonstrate that racial profiling remains a divisive issue in communities across the nation that strikes at the very foundation of our democracy. The deaths of Walter L. Scott—arising from a traffic stop—Michael Brown, Eric Garner, and Antonio Zambrano-Montes—all at the hands of police officers—highlight the links between the issues of race and reasonable suspicion of criminal conduct. Ultimately, these

132. Id.
133. See generally S. 1038, 113th Cong. (1st Sess., 2013).
men are tragic examples of the risk of being victimized by a perception of criminality simply because of their race, ethnicity, religion or national origin. These individuals were denied the basic respect and equal treatment that is the right of every American. Decades ago, in the face of shocking violence, the passage of sweeping civil rights legislation made it clear that race should not affect the treatment of an individual American under the law. I believe that thousands of pedestrian and traffic stops of innocent minorities and needless killings or use of excessive force by the police call for a similar federal response. The practice of using race or other characteristics as a proxy for criminality by law enforcement seriously undermines the progress we have made toward achieving equality under the law.\footnote{Rep. Conyers Issues Statement on End Racial Profiling Act of 2015, supra note 134. The Antonio Zambrano-Montes incident referenced in Conyers’ statement is another recent police killing of a person of color, this time a Latino man, who was shot at seventeen times by police, was and hit approximately seven times, including two rounds in the back, after he was fleeing them when they approached him for throwing rocks at cars. \textit{Id.} An investigation continues as to whether he was also throwing rocks at the police, warranting their shooting at him in self-defense. \textit{See} Nicholas K. Geranios, \textit{Second Autopsy Of Man Shot By Washington State Police Differs, Lawyer Says, WASH. TIMES} (Feb. 27, 2015), http://www.washingtontimes.com/news/2015/feb/27/lawyer-2nd-autopsy-of-man-shot-by-washington-polic/?page=all; Miranda Leitsinger, \textit{Pasco Shooting: Justice Department Must Aid Local Inquiry, ACLU Says}, NBC News (Feb. 25, 2015, 5:06 AM), http://www.nbcnews.com/news/us-news/pasco-shooting-justice-department-must-aid-local-inquiry-312231.

The proposed federal legislation could be an instrumental next step toward increasing laws prohibiting discriminatory racial profiling, a number of which have been enacted at the state level, but without the type of comprehensive changes proposed by the federal Act to effectuate nondiscriminatory, constitutional, and fair policing standards.\footnote{Garrett, supra note 121, at 81–83.}

The End Racial Profiling Act is not the only policing reform measure being proposed in Congress. During the first session of the 114th Congress, other proposed measures have included tying federal grants to compliance with police reform measures, requiring better data collection pertaining to police-caused deaths, setting best practices standards, increasing body camera use by law enforcement, and reducing the militarization of police forces.\footnote{See Gabrielle Levy, \textit{Congress Left Behind in Rush for Police Reform}, U.S. NEWS & WORLD REPORT} (May 5, 2015, 4:23 PM), http://www.usnews.com/news/articles/2015/05/05/congress-left-behind-in-rush-for-police-reform.

None of these proposed policing reform bills had advanced by summer recess of the 114th Congress.\footnote{Id.}
4. Local Remedial Measures

In addition to federal reform measures, many police departments across the country have initiated re-examinations of their policies following the intense scrutiny paid to urban policing after the series of killings discussed in this article that have been at the forefront of national attention. Two dozen states implemented forty police reform measures between July 2014 and July 2015, and police departments in the remaining states have undoubtedly at least engaged in a cursory review of their policies and procedures in light of the intense spotlight being put on them and pressure to do so nationwide.

Several state and local police reform efforts that have been implemented during the July 2014-2015 period are worth highlighting.

One state recently moved forward in its consideration of legislation requiring police body camera monitoring, motivated by the tragic killing of one of its own. After the death of Walter Scott, shot in the back by a North Charleston police officer, the state of South Carolina enacted a new law requiring the implementation of state regulations that will ultimately require every police department in the state to equip its officers with body cameras. The mandate, however, was largely unfunded at the time of the bill’s enactment. It also lacked any provision enabling public access to the videos from the police body cameras, which had been a heated subject of dispute in the legislation negotiations.

Baltimore, Maryland, while having a particularly deplorable history of police violence in recent years, also stands out for the speed with which the officers involved in the death of Freddie Gray were charged, especially in comparison to the delayed announcement of charges in the cases of Michael Brown and Tamir Rice, for example. In addition, after the announcement of the indictments, the mayor of

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140. See Police Protests, supra note 18.
142. Schechter, supra note 141.
143. See, e.g., Friedersdorf, supra note 89.
Baltimore requested from the Department of Justice a full civil rights investigation to examine the Baltimore Police Department’s pattern and practices, including the department’s use of “excessive force, discriminatory harassment, false arrests, and unlawful stops, searches or arrests.”\textsuperscript{145} A day after the mayor’s request, the DOJ agreed that such an investigation was warranted, and announced that it would commence an investigation into whether the Baltimore Police Department had engaged in unconstitutional patterns and practices in its policing.\textsuperscript{146}

Another community struggling to move beyond its tainted past is Ferguson, along with the greater metropolitan St. Louis area. In Ferguson, the voter turnout for the first municipal election following the troubling events of the past year was three times that of the last city council election, and reflected a voter turnout rate double that of the city of St. Louis.\textsuperscript{147} As a result of the large turnout by Ferguson voters, a large population of whom are African American and historically underrepresented in their own municipal government, the number of black councilmembers on the Ferguson City Council tripled.\textsuperscript{148}

In St. Louis proper, the St. Louis Board of Aldermen enacted a measure creating a civilian oversight board over the St. Louis Police Department.\textsuperscript{149} The measure specifically authorizes local governments within the St. Louis region “to establish civilian oversight boards to receive, review and make independent findings and recommendations on complaints from members of the public against members of the Police Department,” in recognition of the importance of community policing and citizen involvement, and that better law enforcement “can be enhanced by an independent citizen oversight process regarding allegations of misconduct” by law enforcement.\textsuperscript{150}

\begin{thebibliography}{9}
\bibitem{} St. Louis, Mo., Ordinance 69984 (Dec. 5, 2015).
\end{thebibliography}
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While such civilian oversight boards may be traced back to the 1992 creation of New York City’s Civilian Complaint Review Board,\(^\text{151}\) they may become more prolific today in the face of greater citizen awareness of and concern about policing issues, along with other community-focused measures of reform.

Despite these steps of progress in Ferguson, tensions remain in the city. On the one-year anniversary of Ferguson, a state of emergency was declared and around 120 protesters were arrested after an incident in which the police shot and critically wounded an armed black man; in the meantime, a group of heavily armed white militia self-titled “Oath Keepers” patrolled the streets of Ferguson menacingly (to a number of the residents of Ferguson, at least) decorated with camouflage and assault rifles, but left undisturbed by the police.\(^\text{152}\)

As for New York City, another focus of police reform attention, new reform measures are once again being considered.\(^\text{153}\) The New York Police Department has announced large-scale changes to its training procedures, including revisions to its trainings related to appropriate uses of force and better communication, and new training in both firearms and “less than lethal” weapons such as pepper spray and Taser guns.\(^\text{154}\)

Local efforts to remedy past police abuses have also come to include historic settlements awards, such as those detailed in Section III of this article in the City of Chicago, resulting from a number of incidents of police killing unarmed black men.

In other cities across the countries, similar and other reform measures are likely to be considered and adopted as well, as a new wake-

\(^{151}\) Id.


\(^{154}\) Id.
IV. STOP KILLING UNARMED AND FLEEING CIVILIANS! (A PLEA FOR CONSTITUTIONAL CIVILITY)

Of all the possible reforms to reduce excessive police violence, one solution, which is among the measures proposed by the DOJ in its various reform proposals,155 is relatively inexpensive, intuitively easy, and critically needed: every police department in this country must include in its policing reform efforts a guarantee that all officers are taught the essential constitutional limitations upon permissible police force against civilians. Police training must be Constitution-driven at its core. While many law enforcement agencies and police departments undoubtedly emphasize constitutional boundaries in their training already, in some police forces, such lessons are either being neglected or are in need of re-emphasis, as a certain type of bully officers in various regions of the country156 have, however unfairly, become the ugly face of police brutality nationwide.

A. The Right to Flight, Part I: Fleeing as Insufficient Justification for Lethal Police Force

No police training on the use of force can be sufficient without emphasizing the constitutional imperative that lethal force may not be used by police against unarmed, fleeing individuals who do not pose an imminent serious danger to anyone. This use-of-force limiting principle has been a well-established rule of law for thirty years, having been clearly and adamantly set forth as a basic constitutional mandate in the Supreme Court’s 1985 Tennessee v. Garner decision, the Fourth Amendment holding of which limited the common law “fleeing felon rule” to no longer allow lethal force against non-dangerous fleeing felons (let alone non-felons).157

Tennessee v. Garner involved the police shooting of an eighth grade boy in Memphis Tennessee.158 The child was unarmed, but was suspected of breaking into a woman’s home while she was at home.159 The boy was killed by police as he was climbing a fence, attempting to

155. See supra Section IV.A.
156. See, e.g., Friedersdorf, supra note 89.
158. Id. at 3–4.
159. Id.
flee the police who were pursuing him.\textsuperscript{160} The officer who shot the
child testified that he believed the child to be unarmed but nonetheless shot him because he believed that if the boy made it over the
fence, he could outrun the officer.\textsuperscript{161}

The Supreme Court decision began with the following declaration
that immediately and unambiguously articulated the rule limiting per-
missible deadly police force:

This case requires us to determine the constitutionality of the
use of deadly force to prevent the escape of an apparently unarmed
suspected felon. We conclude that such force may not be used un-
less it is necessary to prevent the escape and the officer has proba-
bable cause to believe that the suspect poses a significant threat of
death or serious physical injury to the officer or others.\textsuperscript{162}

In its analysis, the Court emphatically declared that “[t]he use of
deadly force to prevent the escape of all felony suspects, whatever the
circumstances, is constitutionally unreasonable. . . . Where the suspect
poses no immediate threat to the officer and no threat to others, the
harm resulting from failing to apprehend him does not justify the use
of deadly force to do so . . . .”\textsuperscript{163} Although deadly force may be used
when there is probable cause that the suspect poses a threat of serious
physical harm, the Court further explained, the fact that the suspect
broke into a house in that case did not establish probable cause when
the arresting officer “had no articulable basis to think Garner was
armed.”\textsuperscript{164} While later Supreme Court cases recognized that a suspect
fleeing in a speeding car might in some cases pose such a danger
to others,\textsuperscript{165} it has never found such a danger posed by an unarmed
individual fleeing by foot.\textsuperscript{166}

\textsuperscript{160.} \textit{Id.}
\textsuperscript{161.} \textit{Id.} at 4 & n.3.
\textsuperscript{162.} \textit{Id.} at 3.
\textsuperscript{163.} \textit{Id.} at 11.
\textsuperscript{164.} \textit{Id.} at 11, 20.
\textsuperscript{165.} See \textit{Scott v. Harris}, 550 U.S. 372, 386 (2007) (holding that “[a] police officer’s attempt to
terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does
not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious
injury or death”); see also Plumhoff v. Rickard, 134 S. Ct. 2012, 2021 (2014) (same result as \textit{Scott}
in case where car chase “exceeded 100 miles per hour and lasted over five minutes,” during
which time over two dozen other cars on the road were forced to change course, and the Court
concluded that the fleeing driver’s “outrageously reckless driving posed a grave public safety
risk,” justifying a police shooting); Andrew S. Pollis, \textit{The Death of Inference}, 55 B.C. L. Rev. 435, 474 (2014) (questioning the validity of the Supreme Court’s conclusion in \textit{Scott v. Harris}
that “no reasonable jury could have believed” the plaintiff’s assertion that the police officers
involved used unnecessary deadly force,” in light of the views of laypeople to the contrary).
\textsuperscript{166.} \textit{Scott}, 550 U.S. at 382.
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The Court in Garner was sympathetic to the need of law enforcement to restrain fleeing felons, but nonetheless found that killing fleeing suspects went beyond the pale, declaring: “It is not better that all felony suspects die than that they escape.”\(^{167}\)

To the extent that Garner prohibits the use of deadly police force to stop unarmed fleeing felon suspects, it necessarily extends to at least an equal degree to protect non-felons who are running from the police, such as Eric Garner, Eric Harris, and Walter Scott.

Garner remains the seminal decision on the use of deadly force by police today, and is unambiguous, well-established law.\(^{168}\) Garner is the key case in analyses by the DOJ in its review of police force.\(^{169}\) For example, the Cleveland Report stated:

The most significant and “intrusive” use of force is the use of deadly force, which can result in the taking of human life, “frustrat[ing] the interest of . . . society . . . in judicial determination of guilt and punishment.” Tennessee v. Garner, 471 U.S. 1, 9 (1985). Use of deadly force (whether or not it actually causes a death) is permissible only when an officer has probable cause to believe that a suspect poses an immediate threat of serious physical harm to the officer or another person. Id. at 11. A police officer may not use deadly force against an unarmed and otherwise non-dangerous subject, see Garner, 471 U.S. at 11, and the use of deadly force is not justified in every situation involving an armed subject. Graham [v. Connor], 490 U.S. 386 [(1989)].\(^{170}\)

Applying this clearly established law, the DOJ elaborated in the report that the use of lethal force by police officers is not justified in circumstances “including against unarmed or fleeing suspects who do not pose a threat of serious harm to officers and others.”\(^{171}\)

Thus, the critical constitutional rule that must be emphasized and re-emphasized in police trainings is this: An officer may not use deadly violence against an unarmed person, a fleeing person, or a civilian (even, under Garner, a fleeing felon), absent probable cause

\(^{167}\) Id.

\(^{168}\) Search Query of Tennessee v. Garner, WESTLAW, https://a.next.westlaw.com/Document/l8beded6a19c2511d9b61beeb95be672/View/FullText.html (revealing that Garner has been cited in 3,324 cases, with only six of those cases declining to extend the case’s holding regarding the use of deadly force).


\(^{170}\) Cleveland Report, supra note 22, at 13.

\(^{171}\) Id.
that deadly force is needed to prevent an immediate threat of serious physical harm to others.\textsuperscript{172} Although this principle is well-established under Supreme Court precedent, there is a disconnect with the public, evidenced by prolific internet cries of “he shouldn’t have run!” in response to each new police shooting, as if fleeing justifies execution, even in a civil society governed by constitutional protections.\textsuperscript{173}

More alarming still is the apparent lack of awareness of this essential constitutional rule by some police officers themselves. The constitutional mandate that deadly force may not be used against fleeing, unarmed, or other civilians who do not clearly pose an immediate threat to others is not a complicated principle. But it is one that, it seems, is lost on too many trigger-happy officers whose adrenaline rush gets the better of them in the heat of the moment (and for other potential reasons discussed in Section D, below).

One case in point was caught on video, in the tragic killing of Eric Harris. As Harris lay dying on the sidewalk, crying out that he had been shot, “fuck your breath” was not the only response he got from the officers pinning him to the ground. Moments before “fuck your breath” came this exchange: “Harris screams: ‘He shot me. Oh, my God,’ and a deputy replies: ‘You fucking ran. Shut the fuck up.’”\textsuperscript{174}

The disconcerting implication of this exchange is that the officer who responded to “he shot me” with the explanation “You fucking ran” believes that those who run from police officers deserve to be shot to death.

Similarly, the officer who shot Walter Scott two days later, while laughing about the adrenaline rush he got from killing Scott, also revealed in the following dashcam video-captured exchange that he shot Scott not to prevent a threat but, instead, because Scott was fleeing:

\begin{quote}
The supervisor suggests to Slager, “When you get home, it would probably be a good idea to kind of jot down your thoughts on what happened—the adrenaline is just pumping.”
\end{quote}

“It's pumping,” Slager responds, and they both laugh.

Then there is a pause for a few seconds, and Slager speaks again, softly:

“I don’t understand why he took off like that.”

\textsuperscript{172} And, no, subjective fears based on implicit race biases do not count as probable cause. See Hutchinson, \textit{supra} note 55.

\textsuperscript{173} See generally \textit{Cleveland Report, supra} note 22.

\textsuperscript{174} \textit{Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In, supra} note 2.
Another short pause.

“I don’t understand why he’d run.” 175

Similarly, in the shooting death of Samuel DuBose by a University of Cincinnati police officer on July 19, 2015, the fact that DuBose’s attempt to put his key in the ignition of his car and drive away from the officer was immediately followed by his being shot fatally in the head indicates that, as with the others, DuBose’s attempt to flee was likely a deciding factor in the officer’s decision to shoot DuBose. 176 This seems particularly the case in light of the officer’s own statement that “He took off on me. I discharged one round. Shot the man in the head.” 177

None of the police actions in these cases, at least from the facts as they are currently known, would survive Garner’s clear-cut prohibition against the use of deadly force to stop a fleeing felon, let alone an innocent civilian.

Furthermore, these and other cases may also illustrate a related and similarly alarming pattern: the tendency of some police to use force as a punitive measure in response to police feeling disrespected or otherwise angered by the victim of their force. Such retaliatory violence has also been deemed unconstitutional. 178 It is uncommon for police to admit, however, that they are acting out of retaliation for feeling disrespected; more commonly, as in the above examples, they express without hesitation their belief that shooting was justified because a suspect was trying to flee.

There are undoubtedly many more incidents in which a police officer’s shooting of a fleeing person coincides with the officer’s mistaken belief that fleeing, in itself, justifies the use of lethal force. This misunderstanding must not be allowed to persist in our nation’s police forces a day longer. Among the civilian community, it is more understandable that people confuse CSI, James Bond, and Wild West fictional scenes with what is appropriate and constitutionally permissible in a civilized society, but among our peace officers sworn to serve and

176. Perez-Pena, supra note 69.
177. Id.
178. See, e.g., Gibson v. Cty. of Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002) (“The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment.”).
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protect us and abide by the Constitution, such excessive violence by police can no longer be tolerated.

B. The Right to Flight, Part II: Fleeing as Insufficient Probable Cause for Arrest

In a similar vein, all police trainings must also include instructions that fleeing from the police does not, by itself, give rise to probable cause for arrest. The Supreme Court, by its own description, has “consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime,” as evidence of probable cause sufficient for arrest.179 The rationale for skeptically treating the argument that flight, in and of itself, establishes probable cause of guilt? As the Court explained, as early as in an 1896 case:

[I]t is not universally true that a man who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper,' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’180

In today’s times, there is another reason to add to the list of reasons—other than guilt of a crime—that a person may run away from the police: the knowledge of the very incidents that are the subject of this article. To the extent that police killings of unarmed men—and, disproportionately, black men—has become common knowledge within urban black communities across the country, it is no wonder that some black men may flee at the sight of an officer rather than take their chances that they will be treated civilly, presumed innocent, and be spared bullying tactics to which others have been subjected. Thus, while some people (including, too often, the police who employ lethal force) may view flight by itself as establishing probable cause of wrongdoing, others recognize that fleeing at the sight of armed of-

180. Id. (quoting Alberty v. United States, 162 U.S. 499, 511 (1896)).
Officers is not evidence of guilt, because “young black men have ample reason to flee from the police.”

This point was emphasized by Baltimore City State Attorney Marilyn Mosby in a press conference explaining the finding of probable cause leading to the indictment of the officers allegedly responsible for the death of Freddie Gray. Mosby’s summation to the media of the probable cause grounds for filing homicide and other charges against Gray’s arresting officers began with a detailed narrative focusing on the lack of probable cause the officers themselves had to arrest Freddie Gray in the first place, prior to their fatally rough treatment of him:

The statement of probable cause is as follows:

On April 12, 2015 between 8:45 and 9:15 a.m., near the corner of North Avenue and Mount Street. Lt. Rice of the Baltimore Police Department while on bike patrol with Officer Garrett Miller and Edward Nero made eye contact with Freddie Carlos Gray Jr. Having made eye contact with Mr. Gray, Mr. Gray subsequently ran from Lt. Rice. Lt. Rice then dispatched over departmental radio that he was involved in a foot pursuit at which time bike patrol officers and Nero began to pursue Mr. Gray. Having come in contact with pursuing officers, Mr. Gray surrendered to Officers Miller and Nero in the vicinity in the 1700 block of Presbury Street.

Officer Miller and Nero then handcuffed Mr. Gray and moved him to a location a few feet away from his surrendering location. Mr. Gray was then placed in a prone position with his arms handcuffed behind his back. It was at this time that Mr. Gray indicated he could not breathe and requested an inhaler to no avail. Officer Miller and Nero then placed Mr. Gray in a seated position and substantially found a knife clipped to the inside of his pants pocket. The blade of the knife was folded into the handle. The knife was not a switchblade and is lawful under Maryland law. These officers then removed the knife and placed it on the sidewalk.

Mr. Gray was then placed back down on his stomach at which time Mr. Gray began to flail his legs and scream as Officer Miller placed Mr. Gray in a restraining technique known as a leg lace. While Officer Nero physically held him down against him will while a BPD wagon arrived to transport Mr. Gray. Lt. Rice, Officer Miller

and Officer Nero failed to establish probable cause for Mr. Gray’s arrest as no crime had been committed by Mr. Gray. Accordingly Lt. Rice Officer Miller and Office Nero illegally arrested Mr. Gray . . . .

[omitted: lengthy description of multiple occasions during which Gray asked for medical treatment and was denied, despite officers observing his deteriorating medical condition]

By the time Officer Zachary Novak and Sgt. White attempted to remove Mr. Gray from the wagon, Mr. Gray was no longer breathing at all. A medic was finally called to the scene where upon arrival, the medic determined Mr. Gray was now in cardiac arrest and was critically and severely injured.\textsuperscript{182}

Former Baltimore Mayor Kurt Schmoke, who currently serves as the President of the University of Baltimore, while commenting upon the above probable cause statement by Mosby, surmised that in focusing on the illegality of Freddie Gray’s initial arrest, Mosby “was just trying to send a signal to the police department that there are standards for probable cause to make an arrest, and just someone looking at you and running away does not meet a standard of probable cause.”\textsuperscript{183} Schmoke further elaborated:

[U]nfortunately, what has happened over the last few years is that there’s been kind of a blurring of the lines about when you can stop somebody and when you can actually arrest. And so all that I believe what she was doing in some of the charges was sending the signal that she wants the officers to go back to the standards that the Supreme Court has set for probable cause, and don’t try to bend those standards or blur the lines.\textsuperscript{184}

Such blurred lines are, indeed, a tremendous problem. Ideally, Mosby will be just one among many government officials and community leaders who take the lead in re-instilling basic constitutional standards in police reform, and remedying the ongoing problems in urban American with excessive police force, from the point of pursuit, to arrest, and beyond.

\textsuperscript{182} Mosby Transcript, \textit{supra} note 3.
\textsuperscript{184} \textit{Id.}
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C. Instilling Best Practices for Constitutional Policing Beyond “Reasonableness” Lip Service and the “21-Foot Rule”

With the cases highlighted in this article providing examples of officers who seem ill-trained in the constitutionally prohibited use of lethal force, what explains the lack of Constitution-focused training on this front? What could explain why a significant number of police who have killed unarmed men of color in the past year have indicated that they felt their actions were justified? It is possible, but, one would hope, doubtful, that some rogue law enforcement departments are intentionally allowing police to remain confused about the limits of permissible lethal force to enable future qualified immunity or Heien defenses.185

Assuming good faith, however, it is more likely that police are simply not being given adequate use-of-force instruction that focuses on the importance of Tennessee v. Garner restrictions on the use of lethal force, due to poor training procedures. For example, a best-practices manual issued by the Police Executive Research Forum utterly fails to mention Tennessee v. Garner at all, even in the context of teaching officers constitutional restraints on use of force.186 Rather, the manual’s discussion of constitutional restraints on use of force describes only the broad “objective reasonableness” holding of the 1989 Graham v. Connor187 case, which it describes in the following terms:

The landmark 1989 Supreme Court case Graham v. Connor provides that a Fourth Amendment standard of “objective reasonableness” (rather than the Fifth Amendment guarantee of due process) is the proper test for considering all claims of excessive force by police officers during the course of an arrest, investigatory stop, or other seizure of a citizen. An officer’s actions must be judged “from the perspective of a reasonable officer on the scene,” with consideration of the fact that “officers are often forced to make split-second decisions about the amount of force necessary in a particular situation,” the Court said.

There is no simple formula for assessing the Constitutionality of a use of force, the Court noted; rather, the assessment depends

185. See cases cited, supra note 26.
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upon “the facts and circumstances confronting [the officer at the
time].”

Such a blatant omission of the Garner restrictions on the use of lethal force is troubling, particularly when the manual does cite the more general Graham precedent, while summarizing it in such vague and subjective terms that one would never gather from the passage that the Supreme Court has clearly prohibited lethal force against fleeing unarmed and non-dangerous suspects. Repeating this inaccurate and grossly insufficient description of constitutional constraints upon use of force, the manual describes its best-practices solution for preventing excessive police force in the following terms: “Teach officers to understand the ‘objective reasonableness’ standard for use of force articulated by the Supreme Court in Graham v. Connor, and train them to be able to clearly and accurately articulate their reasons for any use of force, in writing, following an encounter.”

That’s it. No further description whatsoever of the standard for limitations of lethal force articulated in Tennessee v. Garner. A best-practices manual disseminated nationally to police forces that encourages use-of-force training based on Graham, without any corresponding discussion of the Garner limitations on lethal force, can lead to dangerous misconceptions by police that the use of force against fleeing, unarmed suspects is constitutionally permissible and acceptable. If acted upon, such dangerous misinformation will inevitably result in the types of tragic police killings that have become all too commonplace in this country.

Similarly, in a longer book produced by Police Executive Research Forum, written to guide police departments in use-of-force training, and comprised of over a dozen articles describing different methods of implementing use-of-force practices and instruction, not one word is given to the constitutional restrictions on use of lethal force under Tennessee v. Garner. This is the case despite a chapter of the book being devoted to the issue of lethal force by police.

189. Id. at 37.
191. Id.
Is it any wonder that police training in some parts of the country may fail to teach *Tennessee v. Garner* adequately, when a leading national organization for the development of best-practices manuals for police fails to mention the critically important Supreme Court case? 

In lieu of meaningful Constitution-focused training on the limits of permissible lethal force, some officers may also be encouraged to cling to what may feel like an easier and more straight-forward rule: the “21-foot rule.” The “21-foot rule,” a popular maxim that lethal force may, and should, be used when a target is within twenty-one feet of the officer, has become dogma in the law enforcement world. The rule has become a standard measure of permissible lethal force by police since 1983, when, in what has been described in police circles as a “timeless classic,” a SWAT magazine article (now available on the Police Policy Studies Council’s website) estimated that twenty-one feet is the distance at which an adversary can “enter your Danger Zone and become a lethal threat to you.” Since the article that formulated the 21-foot rule was first published, the rule “has been taught in police academies around the country, accepted by courts and cited by officers to justify countless shootings.”

It appears that, at least in the case of Michael Brown, the 21-foot rule was at the forefront of Officer Darren Wilson’s mind during his investigation statements, in which he emphasized his fear of the young man in the same breath that he emphasized the 20-feet-and-closing distance he claimed stood between him and Brown when he shot him:

Wilson explained that he chased after Brown, repeatedly yelling at him to stop and get on the ground. Brown kept running, but when he was about 20 to 30 feet from Wilson, abruptly stopped, and turned around toward Wilson, appearing “psychotic,” “hostile,” and “crazy,” as though he was “looking through” Wilson. While making a “grunting noise” and with what Wilson described as the “most intense aggressive face” that he had ever seen on a person, Brown then made a hop-like movement, similar to what a person does

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192. The training and implementation of which is also known as the “Tueller Drill,” after the man who coined the phrase and principle. See Michael D. Janich, *Beyond the Tueller Drill: There Are Ways to Bring a Gun to a Knife Fight, But You Have to be Practical and Prepared*, POLICE MAGAZINE (Nov. 1, 2008), http://www.policemag.com/channel/weapons/articles/2008/11/beyond-the-tueller-drill.aspx.


when he starts running. Brown then started running at Wilson, closing the distance between them to about 15 feet. Wilson explained that he again feared for his life, and backed up as Brown came toward him, repeatedly ordering Brown to stop and get on the ground. Brown failed to comply and kept coming at Wilson. Wilson explained that he knew if Brown reached him, he “would be done.” During Brown’s initial strides, Brown put his right hand in what appeared to be his waistband, albeit covered by his shirt. Wilson thought Brown might be reaching for a weapon. Wilson fired multiple shots.196

Following the shooting, a number of commentators appear to think that the 21-foot rule was a central factor in the shooting as well. For example, Bill Johnson of the National Association of Police Organizations, when asked for his perspective on the Michael Brown shooting, explained: “The general rule of thumb everywhere in the country is keep firing until the threat is stopped. . . . You can be up to 20 feet away and close within just a second or two close that. That’s all the time the officer has to react.”197 Similarly, criminal defense attorney Mark O’Mara, explaining his perspective of the Ferguson shooting on the Anderson Cooper show, did so in terms of the 21-foot rule:

TOOBIN: [J]ust because there was a confrontation at the car, that doesn’t give officer Wilson the right to shoot Michael Brown if he’s not a threat.

(CROSSTALK) O’MARA: It does, however, heighten officer Brown’s fear as—officer Wilson’s fear as what he might expect from Brown if he’s been aggressive to an officer, number one. And number two, don’t forget that cops are trained within 20 feet they can get to you and hurt you before you can react. So that 21-foot rule that cops have is there for a reason.198

While the 21-foot rule may have been widely accepted at a local law enforcement level, it has not been addressed even in passing by

196. REPORT ON SHOOTING OF MICHAEL BROWN, supra note 42, at 14–15.
198. ANDERSON COOPER 360 DEGREES: PRESIDENTIAL CALL FOR CALM AS PEOPLE IN FERGUSON, MISSOURI AND ACROSS THE COUNTRY WAIT FOR WORD OF A GRAND JURY; LATIN COMMUNITY REACTION TO OBAMA’S EXECUTIVE ORDER; ALLEGATIONS AGAINST BILL COSBY FIRST BROUGHT DECADES AGO; EXOSKELETONS MAKE WALKING POSSIBLE FOR PARALYZED PEOPLE (CNN television broadcast Nov. 22, 2014, 8:00 PM) (transcript available at http://www.cnn.com/TRANSCRIPTS/1411/21/acd.01.html).

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Supreme Court decisions. Among United States Court of Appeal Circuits, only the Fourth Circuit has accepted the 21-foot rule as allowing an officer to “use deadly force to stop a threatening individual armed with an edged weapon when that individual comes within 21 feet.” In contrast, the Tenth Circuit, for example, has been careful to explain that distance is just one factor to be evaluated in determining whether lethal force is permissible:

Appellant relies on two cases involving fatal police shootings. These cases illustrate why we consider the totality of the circumstances, but neither supports the proposition that any particular distance makes the use of force unreasonable.

In the first case, Zuchel v. Spinharney, we concluded summary judgment was improper where disputed facts called into question the immediacy of the threat facing the officer. One witness, for example, claimed that the distance between the officer and a knife-wielding decedent was only three and a half feet. But another witness testified the officer and the decedent were 10 to 12 feet apart at the time of the shooting. Other factual disputes involved whether the officers could reasonably think the decedent was armed when he in fact was holding fingernail clippers, whether the decedent had made a stabbing motion, and whether the officers had warned the decedent to drop his weapon.

In a second case, Walker v. City of Orem, we also found fact questions remained regarding the level of threat facing officers responding to a knife-wielding suspect. One fact supporting the absence of a threat was the distance of more than 21 feet between the officer and the decedent. But the plaintiff also presented disputed evidence that the scene was bright enough for officers to see clearly, that the decedent’s weapon was a two-inch blade, which he was holding against his own wrist, that the officers issued no warnings, that the decedent was not behaving aggressively and was not facing the officers, and that officers knew the decedent was suicidal but not homicidal. In both Zuchel and Walker, the totality of the circumstances presented a factual dispute about whether the officer reasonably perceived a threat. Eyewitnesses contested the degree of danger facing the officer at the time deadly force was exercised. Admittedly, one of the disputed facts in Zuchel and Walker involved the distance between the officer and the decedent, but while dis-

199. A search of law review and journal articles and Supreme Court cases conducted on Westlaw on May 6, 2015, reveals no articles or Supreme Court cases addressing the 21-foot rule at all.
tance is one factor in assessing the immediacy of threat, it is not the only one.\textsuperscript{201}

Only two cases among all the federal and state opinions combined that have examined the 21-foot rule have done so in light of the constitutional limitations of \textit{Tennessee v. Garner}.\textsuperscript{202} Both cases, through cursory discussions, have summarily concluded that the policy is in line with \textit{Garner}.\textsuperscript{203} However, both decisions are also unpublished lower federal court decisions.\textsuperscript{204}

There are a number of problems with the 21-foot rule in addition to the fact that the rule has never been examined in any legal scholarship or Supreme Court decision, or endorsed in any published federal court opinion,\textsuperscript{205} but is merely a construction of a single SWAT magazine article\textsuperscript{206} that has been elevated in prominence in police training to a perhaps unwarranted degree. As James O'Keefe, the former New York Police Department Deputy Commissioner for Training has explained, the 21-foot rule has been used as a guideline for decades to assist police in deciding when to use lethal force against armed attackers, with “[p]retty much every police department in the country” teaching it in their curriculum, but there are risks of improper teaching of the guideline.\textsuperscript{207} “It’s a guideline not a rule. But if that’s not taught properly, some young cop could shoot a guy and he could find himself in civil and or criminal trouble.”\textsuperscript{208} O'Keefe has predicted that the NYPD curriculum, at least, will be “more detailed” in how it teaches the 21-foot rule, without elaborating what changes will be made in particular.\textsuperscript{209}

\textsuperscript{201} Estate of Larsen v. Murr, 511 F.3d 1255, 1262 (10th Cir. 2008) (citations omitted).


\textsuperscript{203} Brown 1, 2007 WL 4730648, at *37–40; Brown 2, 253 F. App’x at 917–18; Woodward, WL 36906, at *22–23.

\textsuperscript{204} Brown 1, 2007 WL 4730648, at *1; Brown 2, 253 F. App’x at 916, Woodward, WL 36906, at *1.

\textsuperscript{205} Brown 1, 2007 WL 4730648, at *1; Brown 2, 253 F. App’x at 916; Woodward, WL 36906, at *1.

\textsuperscript{206} See Apuzzo, supra note 193.


\textsuperscript{208} Id.

\textsuperscript{209} Id.
In recent cases, including those described in this article, it increasingly appears that the 21-foot rule, rather than being a limited guideline confined to cases involving actual weapons, has been extended to cases where the only “weapon” perceived by an officer is what the officer perceives is a threatening posture by the defendant (such as the “charging” stance Wilson described Michael Brown making upon turning around, albeit while still unarmed).

Thus, perhaps the most fundamental problem with the 21-foot rule, in the end, is that it may have become a substitute in the minds of some officers for the actual constitutional limitations on use of force. If an unarmed suspect, for example, is running away from an officer but still within twenty-one feet, it may be the case that the officer will erroneously, and fatally, believe that shooting would be constitutionally permissible because the person is within twenty-one feet. The test under Tennessee v. Garner, however, is one of physical threat, not physical distance. The mere proximity of a person does not create a threat where the person is unarmed, fleeing, and otherwise non-dangerous under Garner. Thus, distance as a proxy for danger creates not only a false sense of immunity against prosecution for officers, but also a very real threat of danger for those within twenty-one feet of an officer’s raised firearm.

A growing number of law enforcement departments across the country have begun to call for internal reforms that reassess both the value of the 21-foot rule and other rules of practice that emphasize the permissibility of force rather than how to defuse potentially violent situations. The Washington Post reports that “[s]everal big-city police departments are already re-examining when officers should chase people or draw their guns and when they should back away, wait or try to defuse the situation,” and are considering, going even farther than the NYPD, abandoning the 21-foot rule.

In so doing, and in reevaluating better police practices to replace excessive-violence-enabling axioms like the 21-foot rule, such law enforcement departments would do well to ground future use-of-force trainings in Constitution-focused practices mandated by the well-established Supreme Court, not fallible rules developed by SWAT magazine contributors.

211. Apuzzo, supra note 193.
212. Id.
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CONCLUSION

Young black men confronted by the types of police who are governed by hot-headedness rather than by constitutional restraints face an impossible choice. If they stay within an officer’s grasp, or within the twenty-one feet that many police count as establishing a bright line rule authorizing lethal force, they risk being killed like Eric Garner, Tamir Rice, John Crawford, III, and Samuel DuBose, no matter how little an actual risk they pose to the officer exerting deadly force against them. If they run away and then turn around at any point while being shot at, they risk being killed like Michael Brown. Even if unarmed black men are careful not to turn around, as Brown did, lest they be accused of “charging,” they may still be shot dead, as Eric Harris and Walter Scott were. Such is the cruel reality resulting from police standards that excuse police from carefully assessing a situation before engaging in lethal violence, and from employing the constitutional constraints of *Tennessee v. Garner*. Finally, if such targets of police chases are caught alive after running away from the police, as Freddie Gray was, they risk being arrested with no probable cause of a crime, merely because they fled, and then still being inflicted with mortal injuries on their way to jail. In urban communities where certain police officers seem more trigger-happy and hot-headed than others (and oblivious to the constitutional mandates of *Tennessee v. Garner* than others), stepping outside can feel like a game of Russian roulette to young black men.

It doesn’t have to be like this.

It was not so long ago that police officers were often described as “peace officers,” for their role in keeping the peace in our communities. There is a reason that phrase is seldom heard today, and yet, we should not lose sight of the potential for resilience and a new era of police reform: one that weeds out the bad cops from the good; that has a zero-tolerance policy for unconstitutional brutality and racism-driven policing; and that works with, not against, the communities whom our peace officers are sworn to protect and serve. While much of the needed reform will take substantial time and resources, one critical fix is easily accessible and must be implemented immediately: civilians and police alike across the country must be taught in no uncertain terms that the use of deadly force by police is permissible only “where the officer has probable cause to believe that the suspect poses
a threat of serious physical harm, either to the officer or to others,” 213 and thus, “deadly force is not justified . . . against unarmed or fleeing suspects who do not pose a threat of serious harm to officers or others.” 214

To the extent that any police department fails to emphasize these constitutional limitations on permissible police force, too many lives are placed in unacceptable danger. To the extent that the 21-foot rule or similar standard has become the primary measure of permissible lethal police force, rather than the constitutional constraints of Tennessee v. Garner, police training is dangerously inadequate. Any police reform must place a greater focus on constitutional limitations on permissible violence, particularly in the context of clarifying when lethal force may not be used, including against those fleeing from the police.

This proposal may be a small piece of the police reform puzzle, but its importance is immense. Today, urban civilians of color have more reason than ever to run from police, but, sadly, have been killed far too often in the past year for doing so. As long as those who flee the police are viewed as deserving whatever they get, whether death or arrest, innocent lives are at peril, as is the constitutional integrity of our justice system.

We Stood on Their Shoulders: The First African American Attorneys in Texas

JOHN G. BROWNING* AND CHIEF JUSTICE CAROLYN WRIGHT**

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When I become an old lawyer and can no longer stand before the bar, I will tell all who will listen of those Comets, dedicated, intense, and brilliant, who illuminated the legal sky for all seeking justice and equality from a hostile and racist legal system . . . . I will speak of men who maintained their dignity and never lost their pride, whose eloquence with words and knowledge of the law could never be denied.

—The late Louis A. Bedford, Jr.¹

INTRODUCTION

In a year that marked the 60th anniversary of the U.S. Supreme Court's decision in *Brown v. Board of Education* and the 50th anniversary of the Civil Rights Act of 1964, it remained odd that even as these milestones in the struggle for equality are celebrated, a mystery remains: who was the first African American lawyer in Texas? The late L.A. Bedford, Jr. and other civil rights activists of the late 20th century in the Lone Star state may have taken their cues from figures like W.J. Durham and J.L. Turner, Sr., but who were the first African American attorneys who blazed the trail that others would follow? Answering this question has been problematic for historians, who have acknowledged that “[t]he early history of black lawyers in Texas is uncertain,” and that “a diversity of opinion” exists as to who was the first African American lawyer in the state.² Part of these problems of uncertainty and differing opinions can be explained by the lack of information available as well as by the often confusing or incomplete details that have survived.

Another explanation for this uncertainty lies in how the standards for being admitted to practice in Texas have changed over time. For most of the nineteenth century, candidates for admission to the bar usually lacked a formal legal education, having instead “read the law” under the tutelage of one or more older attorneys.³ Texas didn’t have a bar exam until 1903.⁴ The standards for earning a license to practice law changed little between Texas’ days as a republic in 1839 and the

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¹. Louis A. Bedford, Jr., *Dallas Bar Ass’n Headnotes*, November 1990.
⁴. Id.
passage of a bar licensing statute in 1891. From 1839 onward, a candidate had to be 21 years old and provide “undoubted testimonials of good reputation for moral character and honest and honorable deportment.” The candidate also had to be examined in open court by a committee of lawyers (usually three) appointed by the local district judge; two of these lawyers had to indicate that they were satisfied with the applicant's legal qualifications in order for him to obtain his law license. Upon licensure, the newly-minted attorney was permitted to practice in any trial court in the state (until 1873, a lawyer was only allowed to appear before the Supreme Court, Texas' only appellate court at the time, if he applied directly to it). Being admitted to practice in Texas during the 19th century has been described as “extraordinarily easy” in spite of attempts at rules detailing formal expectations. For example, the 1877 rules for district courts spelled out that those seeking admission to practice were required to read a variety of legal treatises, such as those by William Blackstone, James Kent, Simon Greenleaf, and others. As one historian has observed, however, it is highly unlikely that most applicants ever satisfied such reading requirements “not only because of the daunting nature of these works . . . but also because of the relative scarcity of these volumes in frontier Texas.”

The first African American lawyer in the United States, Macon Bolling Allen, was admitted to practice in Maine in 1844 (shortly thereafter, he moved to Massachusetts and became the first African American attorney in that state). African Americans continued to join the profession in small numbers before the Civil War, even as Chief Justice Taney's infamous Dred Scott opinion held that blacks could not even be citizens. After the Civil War, newfound freedom and opportunities for educational, social, and political mobility brought about by Reconstruction helped African Americans emerge from the ashes of slavery and join the ranks of clergy, educators, physicians, and (in lesser numbers) attorneys. Despite the sizable African American population, particularly in former slaveholding states like

5. See id.
6. Id.
7. Id.
8. Id.
9. Id. Indeed, even notorious outlaw and convicted murderer John Wesley Hardin was admitted to the Texas bar after one 15-year jail stay for one of his murders. Id. at 183.
10. Id. at 182–83.
11. Id. at 183.
12. Smith, supra note 2, at 93.
Texas, the lack of a significant black business class translated to a tiny pool of prospective clients.\textsuperscript{13} As a result, the few African American attorneys in the South during Reconstruction struggled for the most part. They moved “from county to county and from circuit to circuit, from the country to the city, to find places with sizable black populations and receptive political climates.”\textsuperscript{14} They survived by serving what was not even the entire black community, a sizable portion of which “often used white lawyers at higher legal fees because they thought that justice could only be obtained in this way.”\textsuperscript{15}

The elusive history of the earliest African American attorneys in Texas is, therefore, a product in part of the small number at issue. By 1890, there were only twelve black lawyers in Texas, most of whom practiced in rural areas or small towns (in contrast, the Texas bar as a whole consisted of 3,555 lawyers in 1890).\textsuperscript{16} Although there were more African American attorneys moving to cities like Dallas, Houston, and Galveston as the years passed, there were still only twenty black lawyers practicing in Texas forty years later in 1930.\textsuperscript{17}

Yet despite these small numbers and despite being largely overlooked by historians, the first African American lawyers in Texas made significant contributions nonetheless. Many were leaders and role models in their communities, serving as teachers, political organizers, and even journalists besides being attorneys. They were at the forefront of some of the earliest civil rights battles; fighting to preserve voting rights, to ensure equality in accommodations in public transportation, and to combat disparate treatment of African Americans in the criminal justice system. And they blazed these trails and made these contributions at a time when advocating unpopular positions or causes could lead to lynchings, when their fellow members of the black community were forbidden by law to serve on juries, and when even practicing in the same courts as their white counterparts came with a myriad of indignities such as being addressed by their first name instead of as “Mister” or “Counselor” or having to walk to another building to use the restroom due to a lack of “colored facilities”

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\textsuperscript{15} Smith, supra note 2, at 11.
\textsuperscript{17} Smith, supra note 2, at 350.
\end{flushright}
We Stood on Their Shoulders

in some courthouses.\footnote{In a number of states, just being a lawyer who was African American was enough to result in violence. In 1895, a mob of whites in Tuskegee, Alabama attacked Thomas A. Harris, shooting him in the leg, because they “did not want any Negro lawyer” in their community. In 1871, three white men in Arkansas murdered Wyathal G. Wynn, a graduate of Howard University School of Law. Smith, supra note 2 at 272, 304 n.20, 322–23.} From the earliest pioneers like Allen Wilder and W.A. Price to politically-savvy crusaders like John N. Johnson and Joseph Cuney, Texas’ first black lawyers served as examples and inspirations for those who followed and who would, in turn, inspire future generations of African American attorneys. Even though their exploits and very existence have been obscured by the fog of history, these early African American lawyers provided the shoulders on which countless Texas attorneys have stood since.

I. ALLEN W. WILDER—THE FIRST AFRICAN AMERICAN LAWYER IN TEXAS?

Allen W. Wilder, or “A.W. Wilder” as he is often referred to, is credited by some historians with being the first African American attorney in Texas.\footnote{J. Mason Brewer, Negro Legislators of Texas 126 (1935); J. Clay Smith, Emancipation: The Making of the Black Lawyer 345 (1993).} If this is so, his career marked a remarkable odyssey from being born into slavery to becoming a lawyer and serving in the Texas legislature. Wilder was born a slave in North Carolina around 1845.\footnote{Paul M. Lucko, Wilder, Allen W., Handbook of Tex. Online, http://www.tshaonline.org/handbook/online/articles/fwifh (last updated June 15, 2010).} Remarkably, the 1870 federal census report identifies the 25 year-old father of five as illiterate and working in a mechanical or engineering trade, yet by the 1880 census, he was identified as a lawyer.\footnote{Forever Free: Nineteenth Century African American Legislators and Constitutional Convention Delegates, A Joint Exhibit from the State Preservation Board and the Texas State Library and Archives Commission.} Nothing is known about where he received his legal education or precisely when he began practicing law. As with many African Americans in Texas and throughout the South, Reconstruction and the rise of Republican power brought opportunities to Allen Wilder that he would likely never have enjoyed otherwise. One legal historian who chronicled the rise to power of African Americans in Wilder’s community of Washington County, Texas during this period describes the changes in the following way:

[African Americans] eagerly used their rights as free men and women to assert their independence of whites and to build community institutions. They also grasped the rights of citizenship, registering
and voting in numbers that shocked and alarmed southern whites. African Americans not only formed the bone and muscle of the Republican coalition; a remarkable group of black political leaders quickly emerged as active players in the political process and shaped the direction of political change in their communities.22

Image 1: Portrait of A.W. Wilder (Courtesy of the Texas State Library and Archives Commission)

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We Stood on Their Shoulders

In Washington County, as in other so-called “Black Belt” counties with African American majority populations, black leaders became increasingly frustrated with white Republicans’ domination of state and county offices; as preacher turned state senator Matt Gaines implored one gathering of 3,000 at Brenham, “Shall we turn the mill forever and let someone else eat the meal?”23 In the 1872 election, these African American voters flexed their political muscle and elected Allen Wilder of Chappell Hill as one of Washington County’s two state representatives.24 Wilder served on the Committee on Public Lands and Land Office.25

Wilder’s legislative career was short-lived, although he would remain politically active for some time. He did not serve in the Fourteenth Legislature. After winning a close election to the Fifteenth Legislature in 1876, a House Committee determined that some of Wilder’s votes came from illegal voters and gave the election to Wilder’s opponent.26 Wilder ran for Texas Senate in 1878 but lost.27 With Reconstruction over and with Democrats reasserting political control in Texas, political terrorism and violence became increasingly common as African Americans tried to protect their voting rights.28 In 1884, Wilder was attacked and shot by white men in blackface at a ballot-counting site; the wound resulted in the amputation of his arm.29

In 1886, Wilder was a candidate for county attorney, a fact that angered local Democrats and also some white Republicans.30 Fearing interference by the Democrats, African American leaders in Washington County posted an armed guard at the ballot box location for one predominantly black precinct.31 A group of disguised white men broke into the house after midnight, resulting in one of them being shot and killed—Dewees Bolton, son of the Democratic candidate for county commissioner.32 Outraged whites lynched three African American men they associated with the incident: 40 year-old T.H.

23. Id. at 577; see Brenham Banner, Aug. 11, 1871.
25. Lucko, supra note 20.
27. Lucko, supra note 20.
32. Id.
Jones, 45 year-old Shed Felder, and 60 year-old Alfred Jones. Typical of the racist “lynch journalism” of the era, the account of the lynching in the *Dallas Morning News* describes the mob of between 20 and 60 men as “quiet, orderly, sober and well behaved.” The *Dallas Morning News* went on to blame the horrific act on the victims themselves and their white Radical Republican colleagues: “The wholesale hanging of the negroes is the culmination of the incendiary speeches made by the Radicals during the recent election and while all good citizens regret the hanging, they cannot but think that tardy justice was done.”

This lynching was just one of many incidents and politically and racially-motivated violence perpetrated against African Americans in Texas at this time, instigated in part by a fear of blacks like Allen Wilder seeking political offices like that of county attorney. Newspapers even spoke of a “Negro uprising in Brenham.” The violence and suppression of the African American vote was so widespread that in 1889, the U.S. Senate investigated and held hearings on the “Alleged Election Outrages in Texas.” One witness even testified about the link between the incidents and Wilder’s candidacy for county attorney as “a colored man.” The exchange went as follows:

Q: Why do you say that you would have considered it a misfortune if Wilder had been elected?
A: Because I did not think he was a competent man for the place.
Q: Competent in what respect?
A: I did not think he was capable in point of intelligence and legal education.
Q: To fill that office?
A: To fill that office; that was my idea about it.
Q: It is an important office in that county, is it?
A: Yes, sir; I think so, somewhat important.
Q: He was a practicing attorney, was he not?
A: Yes, sir; he had been practicing I understand seven or eight years there.

34. Id.
35. Id.
37. Id.
38. Id.
39. Id.
Unfortunately, life did not get any better for Wilder after the failed, violence-riddled bid for Washington County attorney. The Brenham lawyer encountered legal difficulties of his own, including charges of illegally signed school vouchers and perjury.\textsuperscript{40} He died in Houston on August 29, 1890.\textsuperscript{41}

\section*{II. W.A. PRICE}

William A. Price, better known as W.A. Price, has an even better claim than A.W. Wilder to being the first African American lawyer in Texas—even if both older and more recent historians’ mentions of him incorrectly identify him as “W.B. Price.”\textsuperscript{42} W.A. Price was, according to an 1872 African American newspaper’s mention of him, a well-traveled man, as well as “a fair representative of his race” and “an active and influential Republican.”\textsuperscript{43} He was born in Alabama and educated in Ohio before moving to Texas to practice law.\textsuperscript{44} In 1872, he served as a justice of the peace of Precinct Number Two; this may explain certain newspaper references to him as “Judge W.A. Price.”\textsuperscript{45} In December 1875, other newspapers in that part of the state were not only taking note of Price and the viability of his candidacy for judicial office, but also of the power wielded by African Americans at the ballot box.\textsuperscript{46} The Galveston Daily News bemoaned “the Egyptian darkness of the Eighteenth Judicial District, composed of the counties of Waller, Wharton, Fort Bend, Brazoria, Matagorda, and Jackson, where the colored race predominate.”\textsuperscript{47} Noting that it was “impossible to elect a Democrat” in this “tolerably dark district,” the newspaper speculated about who the Radical Republicans would make judge.\textsuperscript{48} The editors concluded that “Price (colored), lawyer of

\begin{itemize}
\item \textsuperscript{40} Lucko, supra note 20.
\item \textsuperscript{41} Brenham Wkly. Banner, Sept. 4, 1890, http://texashistory.unt.edu/ark:/67531/metapth115636/m1/5.
\item \textsuperscript{42} See, e.g., Rice, supra note 13, at 314 (“W.B. Price of Matagorda, admitted in 1878 to practice in the state supreme court and federal courts, was the first Negro admitted to the bar in the state.”); Dabney, Jr., supra note 2, at 43 (“W.B. Price of Matagorda . . . is reputedly the first African American admitted to the bar in this state.”) (citing Rice, supra). While there was indeed a “W.B. Price” who was a white member of the Texas bar as of 1874, he was a veteran of the 1836 Battle of San Jacinto who died in Austin on April 2, 1876.
\item \textsuperscript{43} Representative (Galveston), Jan. 24, 1872, http://texashistory.unt.edu/ark:/67531/metapth203082.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} John G. Browning & Carolyn Wright, Unsung Heroes, 77 Tex. B. J. 960, 961–62 (2014).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Galveston Daily News, Dec. 22, 1875, http://texashistory.unt.edu/ark:/67531/metapth464315.
\item \textsuperscript{48} Id.
\end{itemize}
Wharton, seems now to be the winning horse, but time brings about many changes, and before the election comes off, we expect of some others in the field.”

By 1876, Price was not only admitted to practice in Fort Bend County, he was elected as county attorney the same year. By 1878, he was admitted to practice in Matagorda County. While little information about W.A. Price survives to this day, that which is known would make him the first African American to hold a judicial office and county attorney office in Texas, and quite possibly the first black attorney in Texas as well. Price’s talents also went beyond more than legal acumen. He was also credited with being the mastermind behind a canal from Wilson Creek to the Colorado River, which “will take off enough of the water to prevent the overflow, letting in the bay at Palacios.” The white-owned Galveston Daily News predictably found it “[s]trange to say, that this scheme was gotten up by a colored man, W.A. Price, the colored lawyer of this place.” However begrudgingly the newspaper gave such credit to Price, it did go on to observe that he was well-regarded by whites and blacks alike, calling him “a man of fine talent” and saying that “the good feeling existing here between the two races is due to his influence; the white people speak very highly of him.”

49. Id.
50. Browning & Wright, supra note 45, at 962.
51. Smith, supra note 2, at 345.
53. Id.
54. Id.
W.A. Price’s Oath of Office (Courtesy of Fort Bend County Museum Association, Richmond, Texas)

OATH OF OFFICE:

I, William A. Price, do solemnly swear, (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent upon me as County Attorney of Fort Bend County, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear, (or affirm), that since the adoption of the Constitution of this State, I, being a citizen of this State, have not fought a duel with deadly weapons, within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person thus offending. And I furthermore solemnly swear, (or affirm), that I have not directly, nor indirectly paid, offered or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God.

(Sign here.) W. A. Price

Sworn to and subscribed before me this 2nd day of January 1876

W. L. S. circuit attys.
F. B. C.

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Image 3: W.A. Price Letter of Resignation (Courtesy of Fort Bend County Museum Association, Richmond, Texas)
Image 4: W.A. Price Charging Document (Courtesy of Fort Bend County Museum Association, Richmond, Texas)
While it is unclear when John N. Johnson was actually admitted to practice in Texas, or where he received his legal education, records of the Supreme Court of Texas reveal his name on the rolls on February 9, 1883—which may very well make him the first African American to have been enrolled by that court.55 And although little is known of his personal background other than the fact that he was a school teacher in Calvert, Johnson maintained a high professional profile as an ardent crusader for civil rights. In August 1884, for example, he presided over the Colored Men’s State Convention in Houston, at which topics such as civil rights, sentencing disparities for white and black criminals, and lynchings were addressed.56 In April 1883, Johnson (referred to as “the colored lawyer at Austin”) wrote to the state attorney general to protest the shooting and killing of Sam White, an African American convict sentenced to 5 years in the penitentiary by the Brazos County District Court.57 White was part of a prison detail working on the Burleson County plantation of H.K. White when he was murdered by a guard.58 Johnson called for the attorney general to launch an investigation in the wake of the county attorney’s failure to do so, saying “I have seen colored convicts beaten to death, and colored citizens who witnessed the scene were afraid to testify from the fact that the guards are generally desperate men and are feared, and white citizens, not being much interested and are not often around, do not testify.”59 The attorney general responded by ordering the Burleson county attorney to investigate the shooting.60

In August 1883, Johnson made headlines by filing three civil rights lawsuits against the Houston and Texas Central Railroad Company for denying African Americans facilities equal to white passengers.61 Newspapers condemned Johnson’s legal maneuverings as just stirring up trouble. As one newspaper stated:

The race troubles in eastern Texas have given origin to a good deal of unnecessary comment . . . . These agitations are beneficial to no-

55. Browning & Wright, supra note 45, at 962.
58. Id.
59. Id.
60. Id.
61. FORT WORTH DAILY GAZETTE, Aug. 9, 1883, http://texashistory.unt.edu/ark:/67531/metapth114503/m1/2.
body, while, since they show Texas in the light of depravity not re-
ally existing, we ought to hear the end of them . . . . J.N. Johnson,
the colored attorney at Austin . . . has done much to keep up this
feeling by bringing suits under the civil rights bill against railroads
for refusing negroes the privilege of occupying the cars reserved at
the end of the train for white people.62

By late September 1883, Johnson had met in Houston with the
railroad’s management and announced that he was dismissing the law-
suits, as well as discouraging “the bringing of similar suits on the part
of our people.”63 Johnson pointed out that the Houston and Texas
Central Railroads had promised to furnish “separate, exclusive, equal
accommodations for colored patrons” within three months, and de-
nied that his lawsuits were “brought to force social admixture,” only
brought to achieve a “just verdict of public opinion and a lawful de-
mand by lawful means.”64

Johnson continued to earn a living teaching school, practicing
law, and writing for an African American newspaper in Austin. By
1886, he had not only moved to Brazos County and the town of Bryan,
but was also the Republican nominee for district attorney for that ju-
dicial district.65 But even with a different home base he continued his
civil rights efforts. That year, in the aftermath of “the Brazoria trou-
bles”—attempted forced evictions by whites of black settlers in Brazo-
ia and Matagorda counties—Johnson wrote to the governor
requesting that he appoint a commission to investigate66. According
to contemporary newspaper accounts, while the governor questioned
the constitutionality of appointing a commission, he did take action
that indicated Johnson’s plea was favorably received.67 An October
15, 1887, article included an excerpt from the governor’s October 6
letter to the district judge for both counties, W.H. Burkhardt, di-
recting him to “form a constituent part to incite the officers and espe-
cially the grand juries” to use “every means in their powers to make

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62. See id.
63. See So-Called Race Troubles, AUSTIN WKLY. STATESMAN, Sept. 27, 1883, http://texashis-
tory.unt.edu/ark:/67531/metapth277913/.
64. Id.
metapth 463913.
67. See id.
such strenuous queries as shall lead to the arrest and conviction of all
parties concerned in the late outbreak.”68

IV. GEORGE FREMONT—FIRST AFRICAN AMERICAN
MEMBER OF THE SAN ANTONIO BAR

Apparently predating John N. Johnson in Austin, George W. Fremont became the first African American member of the San
Antonio bar in 1879.69 According to contemporary newspaper ac-
counts, Fremont had arrived in San Antonio in 1876, although he ac-
tually “began the study of law in Wisconsin in 1873.”70 One
newspaper account described Fremont in condescending terms as
someone who “manifested remarkable intelligence for one of his
race,” and who “expressed a desire to study for the legal profes-
sion.”71 According to another article heralding his admission as “a
negro attorney,” Fremont had received help while in Wisconsin from
an unexpected source.72 He had purportedly “applied to leading re-
publican lawyers for assistance, but could get none,” and then “ap-
plied to prominent democratic lawyers who gave him all the help he
desired.”73 Because of this, the newspaper said, “When he came to
San Antonio he applied to democrats because he had always found
them to be true friends.”74

Fremont received both “friendly encouragement” and the use of
their private law libraries from several local attorneys in San Antonio,
including “Col. C. Upsom [sic] now member of Congress, Col. J.H.
McLean, and other prominent Democratic attorneys,” who “rendered
him valuable aid in various ways.”75 Fremont “made rapid progress”

68. Id.
69. BRENHAM WKLY. BANNER, May 23, 1879, http://texashistory.unt.edu/ark:/67531/
metapth115378/.
70. Id.
71. A Negro Attorney, DENISON DAILY NEWS, May 9, 1879, http://texashistory.unt.edu/ark:
67531/metapth327221.
73. BRENHAM WKLY. BANNER, supra note 69.
74. Id.
75. A Negro Attorney, supra note 71. Browning & Wright, supra note 45, at 962. The “Col.
C. Upsom” mentioned is actually Christopher Columbus Upson (1829–1902), a transplanted
Yankee who was born and raised in Syracuse, New York, and educated at Williams College in
Massachusetts before moving to San Antonio to practice law in 1854. After serving in the Con-
 federate Army, he returned to his San Antonio law practice, and he briefly served in the U.S.
Congress. The “Col. J.H. McLean” referred to is James Harvey McLean, who would go on to
serve as Texas’ attorney general from Nov. 2, 1880 to Nov. 7, 1882. Also in 1882, McLean would
be named the first chairman of a statewide organization of Texas lawyers known as the Texas
Bar Association. This body laid the groundwork for what would eventually become the State
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<th>Names</th>
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<tr>
<td>Jenkins Jesse</td>
<td>Merriman May 6, 1875</td>
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<td>Austin July 9, 1880</td>
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<td>Johnson, H.B.</td>
<td>Gainesville Apr 2, 1886</td>
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<td>McKinney Oct 7, 1881</td>
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<td>Johnson, Rob. J.</td>
<td>Fort Worth Feb 10, 1887</td>
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<td>Jones, Joseph</td>
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<td>Jones, Jacob W.</td>
<td>Laredo Oct 23, 1893</td>
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<td>Johnson, Albert S.</td>
<td>Wichita Falls Apr 2, 1888</td>
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<td>Jones, Ashley S. (Judge)</td>
<td>Sherman May 16, 1891</td>
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<td>James, W.B.</td>
<td>Georgetown Jan 28, 1891</td>
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<td>Jones, W.</td>
<td>Del Rio Oct 21, 1893</td>
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in his studies, which culminated in his examination by a committee of three local lawyers.\textsuperscript{76} This committee, consisting of “two Democrats and one Republican,” “unanimously reported in favor of his admission to the bar, and supplemented their report, among their friends, by words of praise and commendation.”\textsuperscript{77} As a result of the successful examination, the newspaper noted, George W. Fremont was no longer “a stranger” but a “colored attorney” who “now has full authority to practice in the courts of that district.”\textsuperscript{78} Very little else is known about Fremont or his legal career, but the assistance he received from local white lawyers may have been what one historian had in mind when he made the sweeping (and not entirely inaccurate) generalization that while the number of African American lawyers in Texas was relatively small in the late 19th century, “they seemed to have been readily admitted to practice upon qualification.”\textsuperscript{79}

Fremont, was according to contemporary accounts, well thought of in San Antonio. One newspaper said that while the “recently admitted colored lawyer . . . is a dark limb of the law, but is no blackleg, nevertheless.”\textsuperscript{80} Fremont at one point in 1879 spoke of publishing a newspaper for San Antonio’s African American community, but soon turned his attention full time to the practice of law, and advocated for members of the black population in unpopular cases.\textsuperscript{81} One had him “traveling about the country lecturing” to raise funds to prosecute a white man named Lindheimer for the rape of an African American woman—a case that the white establishment chose not to pursue and which one newspaper dismissed as “a case of blackmail, or rather black female.”\textsuperscript{82} The next year, he defended an African American named Sam Johnson who was fined for “insulting and abusive language;” newspaper reports stated that Fremont threatened “to carry the case to the United States supreme court, alleging that justice could

Bar of Texas in 1939. In July 1940, the Texas Bar Association merged into the State Bar of Texas.

\textsuperscript{76} Browning & Wright, \textit{supra} note 45, at 962.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{See} Rice, \textit{supra} note 13, at 194.
\textsuperscript{81} Galveston Daily News, Nov. 3, 1879, http://texashistory.unt.edu/ark:/67531/metapth464807 (“The Herald reports that Geo. W. Fremont, the colored lawyer who was admitted to the San Antonio bar, is going to publish a colored paper, which he says will be bigger than the Herald, probably the size of Grant.”).
not be had on account of color."83 While the outcome of these cases remains shrouded in mystery, George W. Fremont enjoyed a long career. An August 1914 article in San Antonio’s main newspaper refers to “G.W. Fremont, the colored lawyer of this city,” addressing “a meeting of colored people at Austin” on August 9 of that year.84

V. J.H. WILLIAMS AND THE TRAILBLAZERS IN DALLAS

The first African American attorney in Dallas stayed only seven months, but made an impression nonetheless. Sam H. Scott arrived in Dallas in March 1881 and established an office and residence close to the courthouse at 301 Main Street.85 Scott came from Memphis (where African Americans had joined the bar as early as 1868), and the 1880 U.S. Census described him as a 40 year-old, divorced attorney who had been born in Massachusetts and who was biracial.86 He was obviously born a free man (unlike some early black lawyers who were former slaves), and other than a brief mention of his having lived in Oberlin, Ohio (where he was likely educated at Oberlin College), little else is known about his legal education or background.87 Scott left Dallas in October 1881 and moved to Pine Bluff, Arkansas; it is likely that with an African American population that outnumbered whites two to one, business opportunities for a pioneering black lawyer were better there.88 In fact, Sam H. Scott apparently thrived there, getting elected to the Arkansas General Assembly in 1885 and eventually relocating his law practice to Fort Smith, Arkansas by 1889.89 Clues to the mixed reception Scott received in Dallas and the impression he made during his brief stay can be found in an article

83. GALVESTON DAILY NEWS, Apr. 9, 1880, http://www.texashistory.unt.edu/ark:/67531/metapth463373.
85. PAYNE, QUEST FOR JUSTICE supra note 2, at 38.
86. Id.
88. Our Colored Lawyer, DALL. WKLY. HERALD, Oct. 6, 1881, http://texashistory.unt.edu/ark:/67531/metapth294957/m1/1/; see PAYNE, QUEST FOR JUSTICE, supra note 2; see also PAYNE, AS OLD AS DALLAS ITSELF, supra note 87.
published in the October 6, 1881, edition of the *Dallas Weekly Herald*,
bearing the headline “Our Colored Lawyer”:

He came to this city highly endorsed by the bar of Memphis, and
leaves here recommended by a number of the most prominent
members of this bar, the judges of the courts, and some of our best
citizens. He was the first and only colored lawyer who ever prac-
ticed his profession in this city, and at first there was perhaps a
slight prejudice against him on account of his race, yet it must be
said that he conducted himself with [such] propriety and discretion
that he soon won the good will of all with whom he came in contact,
and he leaves carrying with him the good wishes of those who knew
him, both white and black.90

Scott’s arrival was noted in a Dallas newspaper’s self-laudatory
editorial on March 1881, commending the city’s tolerance for African
Americans for whom “commercial avenues are open to them just as
freely as to anyone else and they are in no wise interfered with.”91 It
went on to observe that “only the other day a colored lawyer came to
Dallas from Tennessee and has opened a law office and will com-
mence at once the practice of law . . . . He brings with him, too, the
highest testimonials from bench and bar of his former home, showing
that in that state too both the courts and the professions are as free to
those of his color as they are to any applicant.”92

Roughly one year after the pioneering Samuel H. Scott, early Af-
can American member of the bars of Tennessee, Texas, and then
Arkansas, came another would-be trailblazer, J.H. Williams. There is
scant information about J.H. Williams prior to his 1882 arrival in Dal-
las for the purpose of seeking admission to the bar.93 He came from
Mineola (roughly 80 miles east of Dallas), but nothing further is
known about his legal education or personal background.94 Consis-
tent with the practice at the time, Williams sought admission from the
district judge of the Eleventh Judicial District (which would be reorga-
nized in 1883 as the Fourteenth District), George N. Aldredge.95

ark:/67531/metapth294957/m1/1/.
tory.unt.edu/ark:/67531/metapth286437/.
92. Id.
93. *PAYNE, QUEST FOR JUSTICE*, supra note 2; see also *PAYNE, AS OLD AS DALLAS ITSELF*,
supra note 87.
94. Id.
.texashistory.unt.edu/ark:/67531/metapth 2869181).
We Stood on Their Shoulders

The contemporary account of J.H. Williams’ quest for admission to the bar is entitled “A Colored Disciple of Blackstone.”96 It goes on to describe how Judge Aldredge appointed a four-man committee to examine Williams, consisting of “Messrs. Wright, Word, Leake, and Lathrop.”97 “Word” was Jeff Word, a prominent member of the Dallas Bar Association.98 “Leake” was “the polished and learned” W.W. Leake, a native of Mississippi who had studied law at both Yale and Harvard before earning his law degree from Harvard.99 After serving under Confederate cavalry leader Nathan Bedford Forrest during the Civil War, Leake married a Texan and moved to Dallas in 1874, where he soon established one of the most prestigious law firms in the state.100 He served as president of the Dallas Bar Association from 1881 to 1885,101 As the Herald reported, both Leake and Word “were of the opinion that [Williams] was duly qualified, but Messrs. Wright and Lathrop thought differently, and thus the matter remains for the court to decide.”102

The title of the Dallas Herald’s follow-up story tells the outcome of what happened after this deadlocked vote—“Not Admitted.” The very next day after his initial committee split on whether J.H. Williams was qualified to practice law, Judge Aldredge appointed an entirely new committee of three lawyers, “composed of Judge A.H. Field, Judge Hunt, and Mr. John Bookhout.”103 Abraham H. Field, who had preceded W.W. Leake as the Dallas Bar Association’s third president, was also one of the city’s leading practitioners, and for many years represented Western Union Telegraph Company as its north Texas counsel.104 This second committee examined J.H. Williams, but “reported unfavorably for him and his application was rejected.”105 According to the newspaper account, Williams purportedly told the committee “he intends prosecuting his studies until he will be able to pass examination.”106 Unfortunately, there is no subsequent record of

96. Id.
97. Id.
98. PAYNE, AS OLD AS DALLAS ITSELF, supra note 87, at 83.
100. Id.
101. Id.
102. A Colored Disciple of Blackstone, supra note 95.
103. Id.
104. PAYNE, THE FIRST 100 PRESIDENTS, supra note 99.
106. Id.

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Williams’ admission to practice anywhere in Texas, or indeed any information whatsoever regarding his later activities.

Was this a fair appraisal of J.H. Williams’ legal aptitude, or was it a racially-motivated denial? Consider two factors. First, at the time, the examination for admission to practice was, in the words of lawyers of the time, “not rigid. It was expected that the lawyer should acquire most of his legal education in actual practice.”\textsuperscript{107} In fact, as one historian of the Dallas bar noted, only two applicants to the bar were denied admission prior to 1890—one of them being J.H. Williams.\textsuperscript{108}

The procedure of the time, as this same historian noted:

\begin{quote}
[I]nvolved the filing of the petition setting forth that the applicant had resided the required length of time in Texas, that he was twenty-one years of age and of good moral character, for the proof of which a certificate was sometimes presented from the chief justice of the county court; but if the applicant had been licensed previously such petition usually set forth where and by whom he had been licensed, in which case he was usually admitted on motion of some attorney in Dallas; however, if he had not been previously licensed the court after the filing of the petition appointed an examining committee who first made their report, it seems, orally, but later in writing, in which committee report it was stated that the applicant had been examined in open court and a recommendation for the granting of his license was made, whereupon the report of the committee was adopted as the judgment of the court.\textsuperscript{109}
\end{quote}

While neither committee’s report has been located in the case of J.H. Williams, the committee report for the only other candidate to be denied admission in Dallas prior to 1890 did survive, and it is a lengthy, detailed rebuke of the unsuccessful candidate. After observing that many applicants “have and still are diligently applying themselves to master the great principles of common law,” the committee lamented that this hapless candidate belonged in the category of the “many others without the assistance of even elementary works [who] deem themselves fully competent by their own powers of mind, to grapple with and fully comprehend all the great and varied principles of our profession, when in truth they are ignorant of its simplest maxims.”\textsuperscript{110} As a result, the committee concluded, this unsuccessful applicant should only be allowed to represent himself in court while

\begin{flushright}
\textsuperscript{107} Charles Coombes, \textit{The Prairie Dog Lawyer} (1945).
\textsuperscript{108} Berry B. Cobb, \textit{A History of Dallas Lawyers: 1840 to 1890} 16 (1933).
\textsuperscript{109} \textit{Id.} at 15–16.
\textsuperscript{110} \textit{Id.} at 16.
\end{flushright}
have twelve months longer time to prepare himself.”111 Of course, another important consideration to keep in mind when considering whether J.H. Williams received a fair appraisal is the inconsistencies inherent in applicants being evaluated by different committees with varying degrees of objectivity and varying standards. This very issue was raised by the committee on Legal Education and Admission to the Bar at the fifth annual session of the fledgling Texas Bar Association on July 13, 1886. In recommending adopting more uniform standards, the committee noted “while there are some district judges who require rigid examinations and some committees whose standards were sufficiently high, these instances were exceptional and in most instances applicants were admitted without having been subjected to an examination sufficient to test their qualifications.”112

A second factor to consider is that the judge overseeing the committee deciding Williams’ professional fate could hardly be characterized as an ardent supporter of civil rights. Aldredge was a former Confederate soldier who, after the war, had “read the law” under Gilmer attorney Oran M. Roberts before being admitted to the bar in 1869.113 He served as a judge from 1878 to 1888 before returning to private practice, and was perhaps best known as an orator, particularly for the eulogy he gave for Robert E. Lee at the unveiling of the Lee monument in Dallas in 1897.114

It would take four years after S.H. Scott’s abrupt departure for another African American attorney to set up a practice in Dallas. In 1885, Joseph E. Wiley arrived from Chicago (where he graduated from Union College of Law, now known as Northwestern University Law School) and started an office at what is now Elm and Akard Streets.115 Although he handled real estate and family law matters for a predominantly African American clientele, Wiley would become best-known for two things: his work as an entrepreneur and his partnership with John L. Turner. As an entrepreneur, Wiley became an

111. Id. at 17.
112. Id. at 18.
114. DOLPH BRISSCOE CENTER FOR AM. HIST., SAWNIE R. ALDREDGE SCRAPBOOKS, 1921–1923 (Ironically, Aldredge’s son, Sawnie Aldredge, also a lawyer, would gain prominence in part for his racial tolerance. Sawnie Aldredge was mayor of Dallas from 1921 to 1923, and openly clashed with the Ku Klux Klan (KKK), calling for that organization to disband. Unfortunately, in 1922, all but one of the KKK-backed candidates for Dallas County office won election and Sawnie was swept out of office the next year.).
115. PAYNE, AS OLD AS DALLAS ITSELF, supra note 87, at 58.
owner of the New Century Cotton Mill, and was an organizer of the Colored Fair and Tri-Centennial Exposition in 1901.116 His partnership with John L. Turner began in 1898.117 Turner, the son of a farmer and educated at Kent Law School in Chicago, maintained a law practice in Dallas for 55 years and mentored African American attorneys—among them Louis A. Bedford, Jr., Dallas’ first African American judge and himself a mentor to many attorneys as well as a Dallas civil rights icon.118 In 1952, still barred from membership in the Dallas Bar Association on racial grounds, Dallas’ African American attorneys formed their own bar association and named it the J.L. Turner Legal Association in honor of the pioneering attorney.119

Wiley didn’t receive much attention in the press, but when he did it was with mixed results. White papers would get his name wrong, misidentifying him as “James E. Wiley, a colored lawyer” when he was admitted to practice in the federal courts, or as “J. Wylie, a young colored lawyer.”120 In the latter instance, however, the newspaper account was a glowing one of how he successfully defended “Alex Connard, an ebon-hued resident,” on burglary charges, handling the case “with much intelligence.”121

Following soon after in the footsteps of Wiley and Turner in Dallas was R.A. Campbell. There is little testament to Campbell’s legal career in Dallas beyond a glowing account of one of his trial victories in a story entitled “A Success at the Bar,” which appeared in Dallas’ black newspaper, The Dallas Express, in January 1900.122 Proudly referring to Campbell as “Our colored lawyer,” the article describes his victory in a civil district court case, Washington v. Johnson.123 The story recounts how Campbell “fortified his argument with abundance of decisions, at the end of which presentation, the court took the matter under advisement for several days, and decided today in favor of the client of Attorney Campbell.”124

116. Id. at 58–59.
117. Id.
118. See id.
119. Id. at 59. It is known today as the J.L. Turner Legal Society, a section of the since-integrated Dallas Bar Association.
120. DALL. DAILY HERALD, Sept. 18, 1885, http://www.texashistory.unt.edu/ark:/67531/metapth287524.
121. Id. at 2.
123. Id.
124. Id.
VI. OTHER EARLY AFRICAN AMERICAN ATTORNEYS ACROSS THE STATE

During the last quarter of the 19th century, there were other trailblazing African American attorneys scattered across Texas. For several of these individuals, what little we know about them comes from fleeting mentions in contemporary newspapers. R.S. Stout, for example, practiced in Fort Worth at least as early as 1896, when a newspaper account of the Tarrant County Republican Convention describes the speech given by “the big colored lawyer from the First Ward.”  

Records of the Supreme Court later list him as having a license issued on June 15, 1899, and living in Austin at the time.  

In 1892, newspaper coverage of a Juneteenth celebration in Denison refers to the speech given in honor of the occasion by C.M. Ferguson, “a colored lawyer of Paris.”  

A July 19, 1887 account of the trial of African American defendant Jim Walker on charges of assault with intent to kill describes how Walker was “well-defended by W.B. Ross, a shrewd and intelligent colored lawyer” from Greenville (Walker was found guilty, but sentenced to only two years). And while we know little about the law practice of “colored lawyer” W.O. Lewis of Denison, we do know that he was a man of influence in the African American community as of 1892, when he corresponded with Governor Hogg about providing assistance for his gubernatorial campaign.

A. After Wilder, Other Brenham Lawyers

While A.W. Wilder’s trailblazing career was marred by political controversy and racial violence his most enduring legacy can be found in the fact that a surprising number of African Americans followed in his legal footsteps by setting up practices in Washington County. Within roughly fifteen years of Wilder’s legal career beginning, at least five other African American lawyers hung out shingles in the Brenham area. The first of these was Alex (occasionally mistakenly referred to as “Aleck”) Thomas, of Burton.

126. ROLLS OF THE SUPREME COURT OF TEXAS, June 15, 1899.
129. RICE, supra note 13, at 73.
130. Id.
ing at least as early as February 1878, when local newspapers described his first court case. 131 One account mentioned that “[i]n the district court on Friday rather a novel incident occurred—it being the maiden effort of Mr. Alex Thomas, colored, of Burton, a member of the Washington County Bar.” 132 Another account, which mistakenly reported his last name as “Burton,” referred to the “young colored lawyer” as having “made a good speech in his first at the bar.” 133 His exploits in the courtroom continued to be noted by newspapers in Brenham and Galveston. In August 1878, newspapers reported about “a certain case in which Mr. Alex Thomas, the colored attorney from Burton, represented the defendant and County Attorney Senutze the state.” 134 Apparently, Thomas made a successful motion to quash the indictment, but the condescending tone of the reporting makes it clear that this underdog triumph was surprising not because it was for an individual over state or the defense over prosecution. 135 Instead, this incident that “caused much amusement” was notable because it was the victory of a supposedly inferior black lawyer over a white lawyer. 136 As the newspaper account described it, “The idea of the county attorney’s indictment being quashed on motion of a colored attorney is regarded as being supremely rich, and is highly creditable to Mr. Thomas.” 137

Thomas’ career, auspiciously begun, continued to build. By 1880, he was a candidate for county attorney. 138 Unfortunately, like A.W. Wilder before him, Thomas’ legal work came to an ignominious end. In December 1884, after being convicted of stealing a yoke of oxen, Thomas was sentenced to five years in the penitentiary. 139 At least one Republican—leaning newspaper in Dallas, Norton’s Union Inte-

131. Id.
135. Id.
136. Id.
137. Id.
ligencer, found this sentence comically unfair, since “white lawyers round up whole herds with impunity.”140

George Loughridge would become the third African American lawyer in the Brenham area in 1883, joining the ranks of Wilder and Thomas. Unlike his predecessors however, little is known about Loughridge beyond the fact that he hailed from Georgia. In October 1883 news accounts noted that “Brenham has another colored lawyer,” and reported that “[i]n the District Court, on Wednesday, Mr. George Loughridge, colored, late of Georgia was admitted to the practice of law.”141

Indeed, from the Reconstruction era to shortly after the turn of the 20th century, it was comparatively small, rural Washington County that had the most impressive concentration of African American lawyers in Texas rather than larger metropolitan areas like Dallas, Houston, or San Antonio. At virtually any given time during this stretch, the Brenham area had at least 3 African American attorneys—beginning with Wilder, Thomas and Loughridge. The “second wave” would come during the early 1890s. In 1892, J.S. Moten of Brenham was admitted to practice.142 One newspaper account reported that “The committee appointed to examine J.S. Moten, the young colored man, as to his qualifications and knowledge of the law, reported favorably and the court granted him license to practice in any district, county or inferior court in the state.”143 That same year there are the earliest references to another of Brenham’s “colored lawyers,” S.J. Jenkins. By 1894, the appearance in court of this “prominent colored lawyer and politician from Calvert” was deemed newsworthy in and of itself.144 Jenkins, however, clearly had ambitions that extended far beyond a small town law practice. He was politically active, speaking at numerous Republican meetings and gatherings.145 In 1892, he made headlines for his efforts to petition Congress to appropriate funds for a study that would gather statistics “showing the progress of the race

140. Id.
142. GALVESTON DAILY NEWS, Sept. 23, 1892, http://www.texashistory.unt.edu/ark:/67531/metapth467690
143. Id.
since their emancipation. By 1893, the Brenham lawyer was back in the news for his (ultimately unsuccessful) efforts at lobbying for the post of U.S. Minister to Liberia. Jenkins ultimately succeeded in achieving a more modest degree of political patronage, however. By 1898, he had left the Brenham area and became superintendent of the Colored Deaf, Dumb and Blind Institute of Austin.

The third member of Brenham’s “second wave” of African American lawyers, and the one who practiced the longest, was John C. Cain. Cain was in practice in Brenham at least as early as 1888, and possibly earlier. However, early in his legal career, he didn’t foster a particularly positive professional reputation. One April 1888 news article gleefully recounts how “J.C. Cain, the colored lawyer, was thrown out of court on application for a divorce for his client on the grounds of abandonment.” The article goes on to describe how the witnesses Cain called not only couldn’t show which spouse had abandoned the other, but more importantly the witnesses proved more than the petition alleged: namely, that the time period of the abandonment “lacked several months of the three years required by statute.” Perhaps it was professional lapses like these that led one newspaper wag with a predilection for puns to remark “Brenham has a colored lawyer named Cain, but does not call him able.” Despite such bad press early in his career, Cain had achieved elder statesman status by the time of his death on January 16, 1909 at the age of 65. His passing was front-page news in the Brenham Evening Press, with that newspaper noting his active role in Republican politics for over forty years, including status as “Chairman of the Republican party of the county, a frequent delegate to State Conventions and once to the National Convention.” It also observed that Cain “for many years

147. For Minister to Liberia, supra note 145. For years, this post was referred to as “Minister” rather than “Ambassador.” And Jenkins might have counted himself lucky for not getting the appointment, given the unfortunate tendency for these “Ministers” to die during their tenure.
150. Id.
has been the only colored lawyer practicing at the bar here,” with “[h]is principal practice consisting of divorce cases.”153 So, while the Brenham area flourished as a hotbed of African American lawyers for years, by the turn of the century that status had apparently changed.

B. William Henry Twine

Another early African American legal pioneer began his legal career in Texas but gained prominence after moving to Oklahoma. William Henry Twine was born December 10, 1864, in Kentucky, and soon after emancipation, the family moved to Xenia, Ohio.154 Twine graduated from Blackburn’s High School and moved to Richmond, Indiana to begin a teaching career.155 While teaching school, he attended Wilberforce University in neighboring Ohio and also “read the law.”156 He moved to Mexia, Texas, to take another teaching position. According to one source, he was admitted to the Texas bar in 1888, becoming the “first colored man [who] ever took examination as [a] lawyer in Limestone County.”157 Twine practiced law in Groesbeck, Texas for 3 years before moving to the Oklahoma Territory on September 22, 1891, with his wife and growing family.158 He was admitted to the Oklahoma Territory Bar on October 31, 1891, and formed the territory’s first African American law firm with his partners George W. Sawner and E.I. Saddler.159

In 1897, Twine and his family moved to the African American community of Guthrie, Oklahoma. There, he gained prominence both as a lawyer and as a newspaper publisher. His 1897 defense of capital murder defendant George Curley made him “the first colored lawyer to carry a capital case from the U.S. Court, Northern District Indian Territory to the U.S. Supreme Court.”160 He eventually moved his practice to Muskogee, and he published two newspapers: the Pioneer Paper (1898–1904) and the Muskogee Cimeter (1904–1921).161

153. Id.
155. Id.
156. Id.
157. Id.
158. Id.
160. MATHER, supra note 154.
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Twine was active in Republican Party politics and fought both Jim Crow laws and the exclusion of African Americans from Oklahoma’s Statehood Convention. He was an organizer of a separate convention of 300 African American delegates and, along with other prominent African American leaders, met with President Theodore Roosevelt in 1907 in an unsuccessful attempt to have Oklahoma statehood overruled because of the state constitution’s rejection of civil rights.\textsuperscript{162} After Oklahoma became a state on November 16, 1907, Twine filed a lawsuit challenging one of the very first state laws passed—a measure establishing segregation on railway cars.\textsuperscript{163} Until his death in 1933, Twine continued to use both his newspaper and his legal acumen to fight on behalf of civil rights, often clashing with the KKK (which openly threatened his life).\textsuperscript{164} In addition, his three sons all became lawyers, after studying at Creighton University, Howard University, and the University of Kansas, respectively.\textsuperscript{165}

VII. HOUSTON

Houston’s history with early African American lawyers is somewhat checkered. The earliest black lawyer in Houston was apparently Charles M. Smith in 1892, who was already licensed to practice in Michigan, Kansas, and Alabama.\textsuperscript{166} A May 1892 newspaper article describes him as “the first colored lawyer who ever made application to practice in the courts of Harris county,” and whose admission was sponsored by a distinguished local white attorney, Col. Frank S. Burke.\textsuperscript{167} Smith’s stay was a short one, since by 1892 another newspaper was identifying a different attorney, Fred Mason, as “the only colored lawyer in the city.”\textsuperscript{168} Mason was touted not only as having recently received a commission authorizing him to represent claimants before the Department of the Interior, but for having the distinction of being “the only colored lawyer in the State favored with such recognition.”\textsuperscript{169}

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} A Negro Lawyer, GALVESTON DAILY NEWS, May 28, 1892, http://www.texashistory.unt.edu/ark:/67531/metapth468353.
\textsuperscript{167} Id.
\textsuperscript{168} City Brevities, HOU. DAILY POST, Aug. 4, 1899, http://www.texashistory.unt.edu/ark:/67531/metapth83104.
\textsuperscript{169} Id.
Within a few short years, however, the few African Americans practicing law in Houston only received public notoriety for their own run-ins with the law, rather than their clients’. J. Vance Lewis went from being praised as the only black lawyer in Houston admitted to practice before the Supreme Court of Texas in 1904, to being convicted of “falsely interpreting a written instrument” and being sentenced to two years in the penitentiary. Lewis, it seems, had “misrepresented the contents of a written instrument to be that of a mortgage, when it was a deed, and thereby became possessed of a valuable piece of land located in the city.” Lewis’ initial conviction was reversed, and a new trial was ordered. In 1909, M.H. Broyles—one of the only other African American lawyers in Houston—faced disbarment before Judge W.P. Hambien of Harris County’s 55th Judicial District Court. The Charge stemmed from allegations set forth in a suit filed against Broyles to cancel a deed, a claim that echoed Vance Lewis’ earlier legal woes.

VIII. JOSEPH CUNEY, GALVESTON PIONEER

While it remains unclear whether Allen Wilder or W.A. Price was the first African American lawyer to practice in Texas, Joseph Cuney of Galveston is undoubtedly the first native Texan African American lawyer. Cuney was born into slavery in 1845 at “Sunnyside,” the Austin County plantation. He was one of eight children born to the wealthy white planter Philip Minor Cuney and the slave Adeline Stuart. Cuney and his siblings were set free before the Civil War, and were well-educated; he and his brother Norris Wright Cuney both completed their early education at the Wyle Street School in Pittsburgh, Pennsylvania, run by famed African American lawyer and Professor George Vachon. During the Civil War, Cuney enlisted and

171. Id.
172. Id.
174. Id.
175. Dabney, supra note 2; see also Minority Attorneys Reference Files, the Governor Bill and Vera Daniel Center for Legal History, State Bar of Texas.
176. Bloomfield, supra note 12; see also DOUGLAS HALES, A SOUTHERN FAMILY IN BLACK AND WHITE: THE CUNEYS OF TEXAS (2003); MAUD CUNEY HARE, NORRIS WRIGHTS CUNEY: A TRIBUTE OF THE BLACK PEOPLE (1913) (Cuney’s niece).
177. George B. Vachon (1824–1878) was the valedictorian and first African American graduate of Oberlin College in Ohio. After earning a master’s degree and reading the law under the
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served with the Sixty-Third Pennsylvania Volunteers, and had the extraordinary experience of liberating his own slave grandmother during the last days of the war.178

Cuney was one of the few early African American attorneys in Texas to have a more formal legal education, having studied at Howard University Law School.179 However, he was a latecomer to the actual practice of law, having been admitted to the Texas bar in May 1897, when he was 52 years old.180 Before that, Cuney benefited from the influence of his younger brother, Norris, who has been described by some historians as one of the “greatest political leaders” of Texas and arguably the most powerful African American politician of the late 19th century.181 Norris Wright Cuney was a prominent labor organizer in Galveston; the Texas national committeeman of the Republican Party in 1886; a delegate to every national Republican convention from 1872 to 1892; and Collector of Customs for the Port of Galveston.182 As de facto head of the Republican Party in Texas, Cuney was a dispenser of political patronage jobs, and his brother Joseph shared in this as well, serving as clerk at the U.S. Customhouse in Galveston before turning to the practice of law.183

It was his status as Norris Wright Cuney’s brother, more than the novelty of being an African American lawyer, which made Joseph’s admission to the bar newsworthy. The May 29, 1897 Houston Daily Post reported that “Joseph Cuney was today admitted to the bar. He was examined in the district court and passed a creditable examination.”184 The article went on to note that he was a brother of N. Wright Cuney, “the well-known negro politician.”185

tutelage of a prominent Pennsylvania judge, Vachon applied for admission to the Allegheny County, Pennsylvania bar. His application was denied on the grounds that African Americans were not citizens. Undaunted, he passed the New York bar in January 1848, becoming the first African American lawyer in New York. Vachon would later play a role in the founding of Howard University School of Law. In 2006, efforts by a number of lawyers led to a resolution belatedly admitting him to the Pennsylvania bar.

178. PAYNE, QUEST FOR JUSTICE, supra note 2.
180. Id.
181. Rice, supra note 13, at 6.

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Cuney was one of eleven African American lawyers who practiced in Galveston between 1885 and 1920. Like his contemporaries, his was a general practice that included handling divorces, probate, real estate matters, criminal cases, and representing black-owned businesses and fraternal organizations like the Colored Knights of Pythias. Of the 118 cases argued by black lawyers before the Galveston district court between 1914 and 1917, Joseph Cuney handled 41 of them—more than any other practitioner in the city. While he could hardly be called a civil rights lawyer, Cuney did use his status and influence to address the inequities facing Galveston’s African American community during the Jim Crow era. He gave speeches at poll tax rallies and other public meetings designed to galvanize African American voters. In addition, his letter of protest against a proposed 1906 ordinance to separate the city’s municipal streetcar lines was published in Galveston’s leading white newspaper as well as by the black press (the ordinance passed nonetheless).

IX. MEDIA CONCEPTIONS OF TEXAS’ EARLY BLACK LAWYERS

Whether it was for a court appearance or trial, or even simply admission to practice, for many Texas communities the novelty of an African American lawyer showing up was a newsworthy event. For example, Henry G. Griffiths of Lamar County made the Austin newspaper in September 1888 when, “[f]or the first time in the history of Lamar county court, a negro lawyer appears to defend a client. He is the only colored lawyer ever admitted to practice law in the courts of this county.” The newspaper further noted that Griffiths “made a good impression on the jury.” On December 31, 1888, an African American lawyer from Mississippi named J.F. Dawkins relocated to Jefferson, Texas, and applied to admission to practice there. The newspaper duly reported that Dawkins “was admitted to the bar in Mississippi, and upon giving satisfactory proof of his moral standing

186. Bloomfield, supra note 16.
187. Id. at 161.
188. Id. at 165.
189. Id. at 163.
191. Id.
Image 6: Portrait of Joseph Cuney (Courtesy of UTSA Libraries Special Collections)
was given license to practice here.”193 Similarly, the relocation of a black lawyer J.T. Bailey, from Little Rock, Arkansas, to Fort Worth in 1890 was deemed newsworthy.194

On other occasions, it was an extracurricular activity or speech by a community’s “colored lawyer” that made headlines, rather than the individual’s mere status as a lawyer who happened to be African American. Thus it was reported that “colored lawyer” F.K. Chase was elected chairman of the state Republican convention in 1892 (Chase’s city or county of residence is not mentioned).195 And when the Lone Star Medical Association, billed as “the only colored medical association in the world,” held their 1892 convention in Waco, Texas, what better African American of stature in that community to address the attendees than Waco’s only “colored attorney” H.T. Walker?196 Similarly, when John F. Anderson received an appointment by the state board of education to serve as professor of mathematics at “Prairie View state normal” (later Prairie View A&M University), the congratulatory piece in the newspaper had to note his status as the “colored lawyer of Tyler.”197

As an analysis of contemporary accounts in Texas newspapers reveals, the very concept of an African American lawyer was in and of itself newsworthy. Even the prospect of a black lawyer joining a local community received attention. For example, the Denison Daily News reported in 1879 that “[a] colored lawyer from Kansas is in the city. He will probably practice law in Sherman.”198 And quoting a Laredo newspaper (The Two Laredos), a newspaper in another part of the state commented on the age-old problem of a glut of lawyers, but this time with a twist on black attorneys seeking to hang out their shingles in the west Texas border city:

A colored lawyer made his appearance in our City, prospecting for a location in which to practice his profession, but being advised by some of white brethren of the law that there were a good many

193. Id.
white lawyers here who couldn’t make a living, he concluded not to remain.199

Yet beyond merely taking note of the sheer novelty of an African American attorney, the Texas newspapers during this period betrayed a palpable undercurrent of the racism of that era. It wasn’t enough to report on the rare occasions in which African Americans sought to compete on an equal professional footing with whites at the courthouse; the Texas journalists of this age delighted in sharing the failings of those “colored lawyers” who hadn’t achieved success in the law or—even worse—had run afoul of it themselves. In 1887, the editor of one Fort Worth newspaper shared a piece from a Knoxville, Tennessee counterpart about “J.C. Young, a colored lawyer,” who “has been for some time past a waiter” at a local restaurant.200 This “disciple of Blackstone” got into a fight with the “boss waiter,” assaulted him with a piece of wood, and wound up in jail.201 As another newspaper declared, “the way of the educated colored gentleman is beset with dangers and difficulties,” before relating the cautionary tale of Styles T. Hutchins, “Georgia’s only colored lawyer.”202 Hutchins, who had been admitted in both Georgia and South Carolina, forfeited not only his license to practice law but also his freedom after misappropriating client funds.203 The article described how Hutchins had squandered his promising career “in a seacoast county, where the colored population largely preponderated,” after being convicted of the crime of “larceny after trust delegated,” and sentenced to two years in the penitentiary.204

There were also examples closer to home of black lawyers falling from the heights they’d achieved. In 1899, the Brenham paper ran a brief item proclaiming that “McKinney, a colored lawyer, has been arrested in Gonzales charged with stealing cotton from a cotton platform.”205 In 1908, the Denison Daily Herald shared the tale of a “somewhat celebrated case” of C. Dooley, “a well-educated negro

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201. Id.
203. Id.
204. Id.
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and . . . a practicing attorney” who was sent to the road gang “to work out a fine assessed against him on a conviction for local option violation.”206 Dooley had been forcibly removed from the bar of the Frisco Hotel and arrested, but had “fought the case through all the courts” before ultimately losing at the Court of Criminal Appeals and having his bond declared forfeit.207 The editor of the Denison paper gleefully shared how this “negro lawyer” would be “turned over to the tender mercies” of the road gang boss, who would “use him in making better roads for Grayson County.”208

Even within the same edition—even the same page, of a newspaper article detailing some of the important work done by early African American attorneys in Texas, the casual racism of the age appears and provides much-needed context. For example, in one 1883 editorial about John N. Johnson’s early civil rights suits against the Houston and Texas Control Railway seeking equal accommodations for black passengers, the newspaper pulled no punches in sharing how it regarding these “vexatious” lawsuits.209 Such suits weren’t about equality or rights, according to this article, but were brought on by a more threatening agenda: access to Southern white womanhood.210 The lawsuits, the editorial opines, could be blamed on the fact that “colored people have insisted in forcing themselves into coaches occupied by white ladies.”211 Given such prevailing attitudes, it is hardly surprisingly to find—in the very next column of the same paper—a news account that implicitly sanctioned the lynching of a black man accused of rape:

“A negro rapist has been arrested and jailed in Bowie county; at last accounts there was a fair prospect of his getting justice without the formality of a trial.”212

At its most extreme, then, the work done by African American attorneys was seen—through the prism of contemporary Texas newspaper accounts—as a threat to the existing social order. However, even more benign media treatment of black attorneys reflected a more subtle form of racism. If newspapers couldn’t portray black law-

207. Id.
208. Id.
210. Id.
211. Id.
212. Id.
yers stirring up trouble or getting into legal trouble themselves, then they would portray them as inept and bumbling to the point of being comical. One newspaper account hastened to point out that the legal work being credited to one black lawyer was exaggerated:

“Some time ago the Banner stated that a colored lawyer practicing in this county was counsel in five divorce cases. The item has been going the rounds until the lawyer is credited with having twelve divorce cases.”²¹³

Another article gladly shared how easily a black lawyer could be outsmarted by a white lawyer:

“An amusing incident occurred in the county court Thursday. There are three practicing colored lawyers in the county. A case was on trial in which one of our young white lawyers was defending a colored man, one of the colored lawyers was anxious to assist in the defense; the white lawyer wanted no help. Before the colored lawyer knew what was up, the white limb of the law had him sworn as a witness and put under rules. This effectually prevented the colored member of the bar from participating in the case.”²¹⁴

Even more disturbing are the racist attempts at humor that appeared in Texas newspapers directed at the misadventures and misunderstandings that naturally ensued when a black man—speaking not in an educated manner but with grossly stereotyped and exaggerated pidgin English straight out of a minstrel show—actually tried to practice law. Two different Texas newspapers both published the same racist joke in December 1884, centered around a “colored lawyer” who is trying to get his client out of jail, but who has only a limited understanding of habeas corpus relief: “Dar is a law dat’s called ‘hab

his carcass’ And I’se gwine to hab de carcass ob dat client o’ mine, dea’ o’ alive.”215

Another published anecdote purported to convey the misadventure of “‘Judge’ Crowder, colored,” attempting to appear for the defense in criminal court in Kansas City, only to be told he would have to first be admitted to that court:

“Are you duly authorized to practice before this court, sir?
Jedge, I tell ye jes how ’t is. Ise ben a jedge like yerself and I fully preciates de dignity ob de sition. Ise ben practisin in de cort of my steam’d fren, Jedge Porter, de’ corder and hab de honor ob makin’ many pints before dat spectable cort.”

“I am sorry,” replied Judge Ewing, remorsely, “but I cannot allow you to plead in this court until you have been duly admitted to the bar.”

“But, your Honor, I peels de decision ob de cort. Ise posted on de’ thorities in dis yere case, and I mands justice for de blackman as de white. I gin’ notis dat dis case is peeled.”216

To contemporary Texas newspapers, then, the notion of an African American lawyer was first and foremost a novelty. Beyond the exoticism, however, when black attorneys dared to take up the cause of important social issues like equal accommodations in public transportation, then they were characterized as troublemakers. Whenever possible, media treatment would shine a light on African American lawyers getting into legal trouble of their own, or would share real or crudely made-up examples of black attorneys being outwitted by white lawyers or unfamiliar or uncomfortable with the finer points of legal procedure. While some were more benign in their racism than others, all were intended to express the belief that African Americans were interlopers in the legal profession that they did not and never would belong.

CONCLUSION

The earliest African American attorneys in Texas may have been few in number, but their contributions clearly belied their numbers. Why, then, has this remained a largely overlooked and under-explored area of study? The story of the African American attorney in America as a whole has remained a mainly unwritten chapter in the history of the profession. As one scholar has aptly described it, “Few in number, concentrated in the South and usually operating at the margins of the profession, the earliest black lawyers have largely eluded historians of the legal profession.”217 Indeed, the small number of African American attorneys in the late nineteenth and early twentieth centuries has been one reason for the slight. As J. Clay Smith, Jr.’s work reveals, as of 1930, the 17 southern states had the following number of black male lawyers: Alabama, 4; Arkansas, 16; Delaware, 2; Florida, 10; Georgia, 14; Kentucky, 25; Louisiana, 8; Maryland, 33; Mississippi, 6; Missouri, 55; North Carolina, 27; Oklahoma, 53; South Carolina, 13; Tennessee, 26; Texas, 20; Virginia, 57; West Virginia, 20.218 Yet despite these numbers, the origins of the African American bar in other states has somehow merited more attention from legal scholars than their early Texas legal pioneers have.219 What, then, accounts for the absence of scholarship (and in some instances, inaccurate accounts) about the earliest African American lawyers in Texas?

Certainly, the dearth in numbers of practicing black attorneys in Texas during the late nineteenth and early twentieth centuries is a factor, albeit one that hasn’t daunted scholars focusing on other states.220 It is also clear that logistical challenges exist that make meaningful legal scholarship difficult, ranging from the often haphazard manner in which records of court admission were kept at the time to the loss of court records themselves due to fires, floods, or routine purges. But the fact remains that early trailblazers contributed significantly to our history, and not just in terms of the cases they handled or the

218. Smith, supra note 2, at 631–32.
219. See id. Appendix A.
causes they espoused. The mere presence of an African American lawyer in a Texas courtroom, while relatively novel, was a symbol of the opportunities and social mobility awaiting blacks in post-Civil War Texas.

Equally important, these earliest African American lawyers would go on to mentor the next generation of African American attorneys. In a day and age in which people of color are better represented than ever in the ranks of judges, law professors, lawyers, and law students (although still short of their percentage in American society), and in which we celebrate the strides made in education and civil rights, it is vital to remember that there would be no Eric Holders or Clarence Thomases without the Thurgood Marshalls or the W.J. Durhams, no Durhams or Marshalls without the J.L. Turners, and no Turners without the A.W. Wilders, the W.A. Prices, the John Johnsons, or the George Fremonts who came before them. The African American lawyer of today stands on the shoulders of giants, and it is only through an awareness of the experiences and contributions of these earliest African American attorneys that the professional roles that black men and women have achieved in the twenty-first century can be truly understood.

APPENDIX—A NOTE ON SOURCES

Researching the earliest African American attorneys in Texas posed its own unique set of difficulties. One of the first challenges was overcoming the inaccurate information that abounds online. For example, a simple Google search for “Who was the first African American lawyer?” may lead one to the correct answer of Macon B. Allen, but the search results will also lead to chacha.com’s wrong answer of “William T. Green” (who graduated from the University of Wisconsin Law School in 1892).221 Even seeking images of early lawyers from university collections and research libraries was not without its share of misinformation; in the University of Texas—San Antonio’s online general photograph collection, the photo of Joseph Cuney describes him as the first African American lawyer in Texas.

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Many official archives proved somewhat limited, such as the archives of the State Bar of Texas, which does not maintain much in the way of records predating the formation of the bar itself. Similarly, the admission practices in Texas complicated our research. The Board of Law Examiners did not come into being until 1919 (also the first year that evidence of a law diploma was required). From the days of the Republic to 1903, a license to practice law locally was determined by local district court judges. From 1903 to 1919, the regional courts of appeals had their own boards of bar examiners that issued licenses in addition to the Supreme Court. Prior to 1919, the records of the Supreme Court of Texas only reflect those attorneys who wished to practice appellate law before that court (not, as they do today, those attorneys licensed to practice generally). In spite of these limitations, we gratefully acknowledge the tremendous assistance rendered by Tiffany Shropshire, archivist of the Supreme Court of Texas, who provided not only information but also great leads on other practical resources.

Among these resources was the University of North Texas’ Portal to Texas History, a collection of digitized newspapers from all over the state. These contained many of the newspapers’ contemporary accounts that described the activities of early African American attorneys and the role they played in their communities. Whether covered in a newspaper catering to the African American community or a more mainstream newspaper, the appearance of a black attorney was often deemed a newsworthy event. We also wish to acknowledge the assistance of the Texas State Library and Archives Commission, particularly with regard to research involving African American legislators in Reconstruction-era Texas such as A.W. Wilder. The assistance of local historical societies and museums, and especially Chris Godbold of the Fort Bend County Museum and the Washington County Historical Society proved invaluable as well. Our research also benefited from the time and resources of the hard-working members of local district clerks’ offices, specifically Joyce Walshak of the Fort Bend County District Clerk’s office and Tammy Barnes of the Washington County District Clerk’s office. And while it functions as more of a pipeline for information and educational efforts on the history of African American lawyers than as a historical archive, the Chi-
We Stood on Their Shoulders

cago-based Just the Beginning Foundation\textsuperscript{222} provided great encouragement and support.

Some mysteries remain, however. Researching J.H. Williams and his efforts to become one of the first black lawyers licensed in Dallas proved especially frustrating. Searching Dallas County records for documentation of Williams’ unsuccessful quest before two different examining committees in 1882 proved fruitless. Since scant historical records referred to Williams’ decision to return to Mineola, we enlisted the aid of Ms. Ronda McAllen, an experienced genealogist whose work has been published in a number of historical journals. Ms. McAllen worked off the following assumptions in developing her search: that J.H. Williams was an African American male who was literate, possibly born before or around 1865 (but not much later if he was seeking admission to the bar in 1880), and who lived in the vicinity of Mineola, Wood County, Texas. A search of the 1880 U.S. Census of Wood County and several adjacent counties (Hopkins, Camp, Upshur, Smith, and Van Zandt) revealed a total population of 108 black men from prior to 1865. Of those 108, only 18 were literate. Of those 18, only seven had the surname “Williams” and a first name that began with either “J” or “H” (Bill, Buck, Dave, Bob, and Edd Williams were all ruled out). There was a J.H. Williams found in the 1880 Census records for Smith County, and he was identified as a 26-year-old merchant. There was no other trace of information located in either county records or subsequent census records of this individual, unfortunately.

Although this merchant who could read and write and who lived in Smith County and who went by “J.H. Williams” seemed to be the most likely match in the interest of being thorough, Ms. McAllen’s search looked at other literate, age-appropriate African American males with first names beginning with “J” or “H”. All were identified as “farmers” or “farm hands,” or “laborers” on the census records, and a couple was at the top end of the likely age spectrum (like 45 year-old Jerry Williams and 42 year-old Harvey Williams). The most likely possibility of this group was 32 year-old Henry Williams (1848–1928), a literate farmer living with his wife and six children in the 1870 and 1880 census records. Williams’ descendants eventually moved to DeKalb County, Tennessee.

\textsuperscript{222} www.jtbf.org.
Our efforts to track down the elusive J.H. Williams had a purpose. If the historical record could establish that he was unjustly denied admission to the Texas bar (and there is certainly the possibility of that), then precedent exists in several states for posthumous admission to the bar to cure a past racial injustice—as relatively recent examples from Washington state, Oregon, Pennsylvania (reversing Allegheny County’s snub of pioneering black lawyer George Vachon), and California illustrate.223 Unfortunately, the life of J.H. Williams after he was refused bar admission in Dallas remains a mystery. Nevertheless, the Dallas Bar Association president and board of directors are presently considering a resolution naming J.H. Williams an honorary member of the Dallas Bar Association—a recognition that, while belated, is something Williams could never have achieved in his day (the Dallas Bar Association was racially segregated until December 20, 1963). Perhaps justice, while delayed, will not be denied.

Teaching for Change:
How the Legal Academy Can Prepare
the Next Generation of Social
Justice Movement Lawyers

ALEXI FREEMAN*

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* J.D., Harvard Law School; Director, Public Interest and Assistant Professor of the Practice, University of Denver Sturm College of Law. This Article was inspired by my work with Advancement Project attorneys and community-based organizations across the country. Many thanks to Judith Browne Dianis, Penda Hair, Eddie Hailes, Monique Dixon, Anita Sinha, and Jim Freeman for their mentorship and guidance at Advancement Project; to Alexa Shabecoff at Harvard Law School for encouraging me to pursue both movement lawyering and work in academia; to Alexandra Moore and Elie Zwiebel for their remarkable research assistance and dedication—I have no doubt you will be amazing social justice change agents; and, most importantly, to my husband for inspiring me each and every day to fight for justice alongside communities.
The call for “practice ready” lawyers has been heard loud and clear across the country. Legal education has overwhelmingly responded to that call, finding ways to help students gain more practical experience and better understand what it actually looks like to be a lawyer. Students intending to practice “social justice movement lawyering,” however, have been largely ignored, albeit with some notable exceptions. But, working in partnership to build the power of low-income communities of color and effect long-term social change requires distinct training and distinct framing.

This article proposes ways in which the legal academy can better prepare the next generation of movement lawyers. Interviews were conducted with actual practicing movement lawyers in an effort to best understand the future movement lawyer’s needs. The article organizes recommendations for reform into four overarching categories: experiential learning, professional responsibility and ethics, interdisciplinary learning, and the law school culture. Within each of these categories, some recommendations take a limited exposure approach, whereas others provide allow for deeper exposure. If implemented, the legal academy will be one step closer to graduating more practice ready movement lawyers—lawyers poised to work in partnership with communities.

“If you go to school to be a radical lawyer in order to be a star or central figure, you’re going to be wrong or incredibly disappointed. The key is to not be central . . . to work with groups who have their own power. Your job is to enhance that power or defend it. We are bit players . . . the real players are the ones struggling in the street.”

I never aspired to be a lawyer, let alone a law professor. In fact, when my father suggested it when I was a child, I could not even fathom the idea. To me, the law appeared too impersonal, too far removed from the day-to-day realities of people, and frankly, too nasty and argumentative. Perhaps my perceptions were limited only to what I saw on television and on the big screen, but, nevertheless, I did not envision law school in my future.

1. Interview by Elie Zwiebel with Practitioner O (June 25, 2014).
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What I did envision was a career dedicated to advancing the needs and priorities of marginalized populations. As the daughter of a black, Italian, and Native American father who grew up in Brooklyn, New York and a Russian-Jewish mother who stemmed from Long Island, I have many memories of dinner conversations in which we discussed race in America and all of the injustices faced by low-income communities and communities of color. Indeed, early on, I was interested in figuring out a way to translate these dinner conversations into other aspects of my life.

Over time, I found myself being drawn to working directly with members of these communities. While I appreciated all of the efforts that I became involved in, from tutoring to mentoring and more, I found myself unsatisfied with my role as “service provider.” I wanted to do more to build the power of communities and to expose the root causes of why disparities existed.

At some point during my journey, I discovered how the law, or at least training in the law, could be helpful in changing power dynamics and directly addressing structural oppression. I met countless advocates and activists, almost all of whom had a law degree, but many of whom were not utilizing their law degree in what I had deemed the “traditional sense.” They partnered closely with impacted groups to pursue campaigns that aimed to unearth deep-rooted inequities and change the balance of power in local communities. As I witnessed these lawyers in action and learned more about their theories of change I began to understand how expertise in the law could, if used intentionally and cautiously, add value to communities. This realization prompted me to apply to law school.

During law school, I found that there appeared to be a name for using legal training to pursue racial and social justice without usurping a community’s voice. I also discovered that this was an area of law that simply did not have a clear pathway at my school—or seemingly anywhere else, for that matter. I gained an immense amount of

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2. In college, I participated in a fellowship, known as Civil Rights Summer, sponsored by The Civil Rights Project at Harvard University (now based at the University of California, Los Angeles), the Leadership Conference on Civil Rights, and the Citizens’ Commission on Civil Rights. The fellowship was designed to inspire and mobilize students, as future “agents of change,” to serve their communities and their country. In short, it offered a structured format that exposed college-age students interested in civil rights work to national activists, established a political and historical context, and created a network of peers throughout the country. See, e.g., Civil Rights Summer: A Fellowship for Emerging Social Leaders, 11 CIV. RTS. MONITOR 4 (2001), http://www.civilrights.org/monitor/vol11_no4/art10p1.html (last visited Feb. 12, 2015).
knowledge and experience during law school; but when I ultimately joined a racial justice movement lawyering organization as a full-time, permanent staff attorney upon graduation, I realized how ill-prepared I actually was for this type of lawyering. Granted, while it has made great strides especially in recent years, legal education has been critiqued for failing to graduate practice ready lawyers. However, movement lawyers require particular training. While it is often customary for new attorneys to “learn on the job,” for me, as a movement lawyer, this was really the only way I learned my craft.

In some ways, my lack of training in this type of lawyering was not surprising. Much has been documented about law schools’ failure overall to pay attention to public interest law and the students interested in public sector work. While legal education’s support for public interest law has certainly evolved over time, many public interest students continue to share a “chilling sense of isolation . . . as they progress through their law school experience.” Students who either

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4. To be clear, as a second-year law student, I interned at Advancement Project—an organization that was at the forefront of practicing community lawyering. This internship helped me understand in-depth what this type of lawyering actually was. Ultimately, this is also where I began my legal career and where I oversaw and supervised law student interns and law fellows. While I was always impressed with the quantity and quality of our student interns and junior attorneys, oftentimes, something was missing. Students generally agreed on a fundamental level that for long-term sustainable social justice change to occur, impacted communities needed to be both at the center and forefront on such work. But with the exception of a few students, their experience was similar to mine in that they had no real understanding, let alone training, in movement lawyering. In fact, they were, in some cases, dumbfounded as to how this work could be done, what challenges and questions they might encounter as a lawyer working with such communities, and what the day-to-day of movement lawyering looked like in practice.


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attend school with a predetermined interest in becoming a movement lawyer or discover during law school that they want to pursue this type of lawyering (a bit miraculous given the lack of support and guidance that exists) are likely to share these feelings even more, as they are left to navigate and learn this work completely on their own.

This article aims to change that dynamic by proposing ways in which law schools can begin to support and train future movement lawyers. Part I will set the background for this article, including an explanation of how I developed recommendations for reform by consulting currently practicing social justice movement lawyers. It will also provide a description and definition of movement lawyering in order to help explain the movement lawyer’s unique training needs. Part II will identify some potential issues that are inherent in legal education and explore challenges to better supporting and training movement lawyers. Part III will present discrete and attainable recommendations to the legal academy that will help to graduate more “practice ready” movement lawyers. Such recommendations are confined to four overarching categories: experiential learning, professional responsibility and ethics, interdisciplinary learning, and law school culture. Within those categories, I explain either limited approaches or deeper approaches in an effort to indicate and distinguish the feasibility of implementing such recommendations.

I. A PRIMER ON MOVEMENT LAWYERING

A. Interview Process

In order to gain additional knowledge and share ideas for enhancing legal education for movement lawyers, I identified and interviewed a number of lawyers engaged in the practice of social justice movement lawyering. Either these lawyers or their organizations

8. A colleague advised me that this article might be a challenge because my interviewees—practitioners—often times cannot effectively translate what they do day-to-day and how they do that into a way compatible with law school teaching. Certainly, this article had many challenging aspects, and it was sometimes difficult to translate practice skills into law school lessons. When I joined Denver Law after practicing, I learned that teaching, as trite as this sounds, is hard! Just because one understands the tenets behind one’s practice and has proven to be an effective lawyer does not mean he or she knows how to bring lessons from practice into the classroom. Teaching is an art, a skill that needs to be honed over time. Despite the unique skills required for
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self-identity as movement lawyers,9 or outsiders typically identify them as such. Because they are forced to essentially teach themselves this unique area of lawyering, these lawyers know what works and what does not when actually in partnership with communities. Engaging with those actively in practice versus other researchers or professors was intentional.

The world of people engaging in movement lawyering work, as defined below, is small.10 While this is a field that has grown tremendously in recent years, demonstrated by the creation of organizations both training lawyers for this work and engaging it in themselves,11 teaching versus practice, interviewees provided a wealth of knowledge and offered both tangible and intangible suggestions. I think, because many movement lawyers are not actually taught movement lawyering in law school, they may be more capable than the average practitioner to apply their principles and experiences to the teaching experience. Given the nature of their work and the philosophy behind movement lawyering, these lawyers, are also not necessarily confined to traditional legal education pedagogy. This is actually a good thing. Movement lawyering as a whole does not necessarily comport to the traditional legal education model; in some ways, movement lawyering challenges it directly. Creative and unique ideas for the law school classroom are welcomed and may prove to be more useful for lawyers embarking on this field. In addition, the interviews conducted with practitioners were not solely focused on teaching pedagogy (e.g., how to teach, what to teach, and why to teach). Instead, I sought out their perspectives on institutional support, culture, programming, and more. So even if some interviewees provided limited guidance on teaching pedagogy, they were able to offer helpful thoughts on these other critically important components of legal education and the law school experience.

9. In some cases, these lawyers might not use the term “movement lawyer.” As discussed in Section B of Part One, there is much overlap between the different nomenclatures that are used to describe this type of lawyering; as a result, people do identify with a variety of these terms. To be sure, nuanced differences exist between these different titles, as described in footnote 23; but for the purposes of the interviews, research, and this article, overlooking, to some extent, these differences is acceptable. Seeinfra pp. 7–8.

10. To be clear, for this article, I am referring to lawyers working in progressive, social justice focused movements. That is not to say that there are not lawyers actively engaged in multi-faceted advocacy support for more conservative movements, as there most definitely are. See, e.g., KEVIN DULK, IN LEGAL CULTURE, BUT NOT OF IT: THE ROLE OF CAUSE LAWYERS IN EVANGELICAL LEGAL MOBILIZATION 197, 197 (2006); Austin Sarat & Stuart Scheingold, CAUSE LAWYERS AND SOCIAL MOVEMENTS 197, (2006). It is possible that those engaged in movement work from this or other perspectives might offer different commentary or a different perspective on the tenets and priorities of this work.

11. On the practitioner side, in just the past few years, two new organizations have begun training lawyers and future lawyers for work in this field. The Bertha Social Justice Institute housed within the Center for Constitutional Rights and the Sargent Shriver National Center on Poverty Law have helped define this type of lawyering and begun to arm practitioners with both theoretical underpinnings and practical skills and training. Movement Support, CTR. FOR CONST. RTS., https://ccrjustice.org/movement-support (last visited Feb. 12, 2015); Community Lawyering, SARGENT SHRIVER NAT’L CTR. ON POVERTY L., http://www.povertylaw.org/training/courses/community-lawyering (last visited Feb. 12, 2015). The Center for Popular Democracy, created in 2012, describes itself as a high-impact national organization that builds organizing power to transform the local and state policy landscape through deep, long-term partnerships with leading community-based organizing groups nationwide. CTR. FOR POPULAR DEMOCRACY, http://populardemocracy.org/ (last visited Feb. 12, 2015). The organization, made up of about 35 persons, has lawyers, organizers, and other professional experts on staff. Id. The Grassroots Action Support Team, launched in 2014, in comparison, is a smaller shop that operates as a social justice
there are still only a subset of lawyers who identify this way. Many of us¹² know one another, attend the same conferences,¹³ work with some of the same groups,¹⁴ and connect our partners and our colleagues to one another. The circle gets even smaller when the lawyers and community partners become more issue-specific.¹⁵ Given this “special ops” unit providing grassroots organizations and coalitions with a unique combination of research, policy, legal, communications, and organizing support—seamlessly complementing campaigns with their greatest areas of need. The idea is to produce more dynamic, effective, and catalytic organizing and advocacy, creating significant improvements in people’s lives and increasing the power of low-income communities and communities of color across the country.

¹² While I am currently working in academia, I still identify as a movement lawyer and am hopeful that I will be able to continue to support grassroots communities while servicing my students.

¹³ For example, for a number of years, Yale Law School, specifically its students, have organized “RebLaw”, the nation’s largest student-run public interest conference which brings together practitioners, law students, and community activists from around the country to discuss innovative, progressive approaches to law and social change. Rebellious Lawyering Conference 2016, YALE UNIV., http://www.yale.edu/reblaw/index.html (last visited Feb. 12, 2015). The conference is grounded in the spirit of Gerald Lopez’s Rebellious Lawyering and aims to build a community of law students, practitioners, and activists seeking to work in the service of social change movements and to challenge hierarchies of race, wealth, gender, and expertise within legal practice and education. Id. The National Lawyer’s Guild annual Law for the People Convention is another popular conference that builds off NLG’s mission to bring together lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. See Law for the People Convention, NAT’L LAW. GUILD, http://www.nlg.org/law-people-convention (last visited Feb. 12, 2015). The group brings together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression. Id. The West Coast has also organized a rebellious lawyering conference. See Rebellious Lawyering Event, FACEBOOK, https://www.facebook.com/RebelliousLawyering/info (last visited Feb. 12, 2015). In 2013, the conference was marketed as a gathering for all people who practice rebelliously and seek to learn, share, and create solutions with a national community of rebellious practitioners. Id. Most recently, over the past two years the Bertha Institute’s People’s Law Conference has also become popular. Bertha Institute: People’s Law Conference, CTR. FOR CONST. RTS., http://ccrjustice.org/second-annual-peoples-law-conference (last visited Feb. 12, 2015). Its most recent theme was centered on occupying social justice, focusing on the idea of being lawyers for social justice and occupying legal spaces with social justice principles and practices. Id. Though only occurring once every several years, the US Social F. is another popular location for movement lawyers to convene together. U.S. SOC. F., http://ussocialforum.net (last visited Feb. 12, 2015).

¹⁴ I can recall a number of times when staff at Advancement Project, my former organization, recommended or referred a community group to another organization that could support its work.

¹⁵ My prior work focused on education, housing, and voting rights issues using a racial justice lens within the movement lawyering context. While it is important to view social justice issues within context and to understand how race intersects with other identifiers such as socio-economic status, sexual orientation, gender identity, disability, and more, my experience was intentionally focused on and prioritized based on the experience and impact of race and racial identity. Hence, many of the practitioners that I interviewed were practitioners either with a similar focus on race and/or practitioners I met through this prior work. There are countless
landscape, while there were some slight differences of opinions among interviewees, there was also significant cohesion and agreement.

Basic information about the interviewees is included below.  

<table>
<thead>
<tr>
<th>Interviewees</th>
<th>16</th>
</tr>
</thead>
<tbody>
<tr>
<td>States Represented</td>
<td>9</td>
</tr>
<tr>
<td>Male Attorneys</td>
<td>9, or 56%</td>
</tr>
<tr>
<td>Female Attorneys</td>
<td>7, or 44%</td>
</tr>
<tr>
<td>Attorneys of Color</td>
<td>7, or 44%</td>
</tr>
<tr>
<td>Attorneys 5 Years or Less out of Law School</td>
<td>3, or 19%</td>
</tr>
<tr>
<td>Attorneys 5 Years or More out of Law School</td>
<td>13, or 81%</td>
</tr>
</tbody>
</table>

B. What is Movement Lawyering?

One should first have a basic understanding of what a social movement is before attempting to understand what the movement grassroots communities and lawyers who work with them that focus less explicitly on race. There are also a myriad of other substantive social, racial, gender, and economic justice issues that are the focus of movements. With that said, much of the principles that were discussed and strategies and recommendations that were shared were not issue- or identifier-specific. In addition, my selection of interviewees was intentional: I did not randomly solicit interviewees. I specifically sought out particular individuals within the movement lawyering field, most of whom I encountered in my previous role as movement lawyer. In addition, it is worth noting that there is not necessarily always overlap in the movement lawyering community among different substantive issue foci. For example, the lawyering team at the national office of Advancement Project never engaged with the lawyers at Communities for a Better Environment—whose staff works hand-in-hand with organizers to pursue environmental justice work in California—because environmental justice was not one of our areas of expertise.

16. Generally, my prior professional experiences and referrals from other faculty, lawyers, and organizers helped me to identify potential interviewees. I also engaged in research to identify others. In order to identify lawyers to whom I had no personal or professional connection, I engaged in the following: read law review articles that profiled various clinics, lawyers, and/or organizations doing this work; reviewed law school websites to learn about certain faculty, courses, or clinics; and searched for and read news articles, other media, and popular education tools about this issue. I used my own personal experience, interviewees’ experiences, and the National Jurist’s list of top public interest schools as starting points for identifying which law schools to review. Best Schools for Public Interest Law, THE NAT’L JURIST, http://www.nationaljurist.com/content/best-schools-public-interest-law (last visited Feb. 12, 2015). Overall, I reached out to twenty-five present or former movement lawyers; our research team was able to interview 16 lawyers in total. Given the geographic locations of many of the interviewees, an overwhelming number of interviews were conducted over the phone. The number of interviewees may not constitute a large sample size. However, I did not engage in these efforts in order to produce a research study that would pass scientific muster. Instead, these interviews helped to enhance my own vision for developing the support of movement lawyering within the legal academy. Some of the interviewees did not wish to be identified by name in the article; hence none of them are identified by their names.
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lawyer purports to do. The Movement Strategy Center\(^\text{17}\) uses this definition of a social movement:

Social Movements happen when a fundamental injustice is felt deeply and widely enough that communities mobilize to challenge power holders, institutions, and society’s norms. Successful movements fundamentally shift social values and culture toward a new vision. When social movements are successful they transform the way we think, the way our society and our communities are structured, the way we live, and even who we are.\(^\text{18}\)

The aim of any social movement is to organize constituencies and reallocate power to members of the community. Groups that have been systemically excluded from decision making generally drive social movements that challenge the status quo. Bill Quigley,\(^\text{19}\) a prolific and thoughtful practitioner, teacher, and scholar in this field, explains the connection between social movements and lawyers: “Social change lawyering starts with the idea that history shows that systemic social change comes not from courts or heroic lawyers or law reform or impact litigation, but from social movements.”\(^\text{20}\)

Even though lawyers have been engaging in this type of work for years,\(^\text{21}\) this concept of lawyers working toward systemic social change

\(^{17}\) The Movement Strategy Center (MSC), founded in 2001, identifies itself as an “intermediary that works with over 300 partner grassroots organizations, alliances, and networks that operate at local, regional, and national levels.” About Us, MOVEMENT STRATEGY CTR., http://movementbuilding.movementstrategy.org/aboutus (last visited Feb. 12, 2015). MSC works across sectors, supporting local alliances that bring people in one place together across issues and constituencies and supporting national alliances that unite groups working on common issues. Id. MSC also “works within sectors, helping individuals, organizations, and alliances build their capacity to be strategic, collaborative, and sustainable.” Id.


\(^{19}\) Bill Quigley has written extensively on public interest law practice and specifically, movement and empowerment lawyering. One of his articles in which he interviewed grassroots organizers is considered a foundational and frequently cited piece for many scholars who write in this area as well as for lawyers who interact with organizers on a regular basis. See generally William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J. L. & POL’Y 101 (2006) [hereinafter Quigley 1]; William P. Quigley, *Letter to A Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7 (2007); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994) [hereinafter Quigley 3]. I was privileged to have worked tangentially with Quigley in post-Katrina New Orleans when he served as co-counsel with Advancement Project on litigation we collectively filed around preserving New Orleans’ public housing.


with marginalized groups perhaps first developed an “official name” in Gerald Lopez’s seminal piece about rebellious lawyering. Since then, a number of scholars have sought to define and re-define what this type of lawyering is. These discussions employ an array of terms and philosophies to encompass the work with substantial overlap but some distinctions in their definitions and terms. To explain move-
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ment lawyering, I identify four key points that underlie a movement lawyer’s work: long-term vision and power building, relationships with “clients,” the (limited) role of the law, and the use of multimodal advocacy strategies and skills.

Given its uniqueness in both the legal field generally (and even within the overarching field of public interest law) movement lawyering has had its share of critics. Nonetheless, it has a long history of being an effective way to advocate for change alongside communities and has gained some traction and notoriety across the country in recent years.

emphasizes that there is no consensus about the central tenets of collaborative lawyering among theorists, he identifies common themes including active collaboration: engaging clients in decision making and the implementation of strategies, encouraging clients to speak out, and facilitating work with community groups. Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 CLINICAL L. REV. 427, 440 (2000) [hereinafter Piomelli 2]. Campaign-based lawyering is founded on the idea that success is measured by contributions made to a broader campaign rather than the outcome of any individual legal action. Jennifer Gordon, The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change, 95 CAL. L. REV. 2133, 2141 (2007). Long-haul lawyering as defined by Susan Bennett values above all the dedication of the lawyer as measured by her presence in the community (both morally and geographically) and the length of she stays in the community. Susan D. Bennett, On Long-Haul Lawyering, 25 FORDHAM URB. L.J. 771, 773 (1998). Richard D. Marsico introduces facilitative lawyering as a less political alternative to collaborative lawyering, where the attorney’s role collaborative but also intentionally limited in order to safeguard client autonomy. See generally Richard D. Marsico, Working for Social Change and Preserving Client Autonomy: Is There A Role for “Facilitative” Lawyering?, 1 CLINICAL L. REV. 639 (1995). Sheila R. Foster and Brian Glick suggest integrative lawyering, built on the philosophy that lawyers must work within the community, flexibly, filling a broad range of roles, and ensuring that their own work is a piece of a larger, community-driven strategy. Sheila R. Foster & Brian Glick, Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment, 95 CAL. L. REV. 1999, 2055–57 (2007).

24. I include clients in quotation marks because, as will be discussed, I do not actually see the communities I work with as clients. Instead, they are partners. That distinction is critical for lawyers and communities to understand—and is unique to this type of lawyering.

25. For example, W. Bradley Wendel identifies several ideological critiques of movement lawyers. Lawyers, he theorizes, should be motivated by fidelity to law above all else, not moral aims; society looks to attorneys for assurance that the legal system is legitimate. Id. Therefore, it is inappropriate for attorneys to challenge or subvert the law from processes outside the legal system, which is precisely what movement lawyers do. See generally Anthony V. Alfieri, Fidelity to Community: A Defense of Community Lawyering, Lawyers and Fidelity to Law, 90 TEX. L. REV. 635 (2012) (reviewing W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010)). In his discussion of community lawyering, Angelo Ancheta expresses concern that such lawyering is at odds with the reality of practicing law, noting that progressive attorneys’ workloads are too heavy to allow time for activities beyond attending to basic client needs. Angelo Ancheta, Community Lawyering, 81 CAL. L. REV. 1363, 1397–99 (1993). Additionally, he suggests that this type of lawyering faces challenges because it requires client activism that is beyond what many clients are able to give (given the other challenges they may face). Id. Even if these two hurdles can be overcome, allowing both attorneys and clients to commit themselves to the work, Ancheta suggests that community lawyering is insufficient to address institutionalized power structures and “systemic subordination.” Id.

1. Element One: Long-Term Vision & Power-Building

Lawyers often use their legal training to determine the answers to discrete legal questions and issues. Consider, for example, two types of public interest lawyers who are faced with a client(s) encountering issues with their housing. Direct services lawyers who work with indigent clients may encounter a client who approaches them for assistance on a particular legal problem (e.g., an issue with a landlord). The lawyers may recognize that the client’s overall predicament is related to other aspects of the client’s life or that the client faces a number of hurdles given her socioeconomic status, but the lawyers often determine that their job is to address the legal problem that has specifically arisen in the landlord-tenant issue. Many times, even when the lawyers realize that this housing issue should not be viewed in isolation, the lawyers, through no fault of their own, may still only focus on the housing issue. For example, the lawyers may work at an entity that receives funding that restricts the type of work the lawyers can do, or the lawyers’ organizations may specifically focus on housing issues and therefore limit exploration of other issues or root causes. Regardless, the end result is that the lawyers address the client’s immediate urgent needs by responding to a specific legal question. The lawyers’ interactions may assist the individual clients, but these interactions are unlikely to result in law reform.

Now, consider the impact litigators. These lawyers may encounter the same housing issue, day after day. They may have more flexibility to identify a solution that could go beyond one individual client’s needs. They likely also believe that systemic social change can result from carefully targeted class action litigation. Though this approach could take substantial time and resources, it can occasionally address an underlying problem that has caused many problematic...
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housing situations. However, often, the litigation results in no change or, in some cases, the litigation can create a worse situation both legally and in terms of creating a dependency on lawyers and the law as solutions.

In both of these situations, the direct services lawyers and the impact litigators neither alter the fundamental hierarchal and capitalist structures underlying the issue nor change the amount of power the community has in the long-term. This is where the movement lawyer enters.

The movement lawyer aims not just to win particular struggles or achieve discrete legal or policy outcomes. As one interviewee argued:

You have to learn to get out of a mentality that you want to finish the thing in front of you as soon as possible. In this kind of work, that’s not the goal. It’s not to help that one kid. The goal is to stop larger social problems—for example racial profiling. It’s not that ‘one thing’; it’s the whole system that you have to change. I could spend the rest of my life fixing one problem at a time, or I can find something that will actually matter.

The movement lawyer believes that change towards a more just world happens when communities are organized, when they build enough power to shift the terms on which decisions about their future are made, and when they eventually have enough power to enforce those promises. Given this, the primary goal of movement lawyering is twofold: to challenge the injustices identified by social movements; and even more importantly, to shift power to the people of the movement so they can bring about change. Success is not measured on how the initial or discrete legal or policy question that perhaps brought the lawyer and the community together is answered; instead, success is based on how much power the community develops and how much closer this power brings the community to achieving its vision. The lawyer aims to win in ways that contribute to the commu-

32. Arkles, supra note 23, at 595–98. Arkles describes three potential problems that could result. Id. In cases dealing with possible discrimination, judicial courts often focus on intent (which is very difficult to prove) rather than impact. Id. It becomes much harder, then, to measure discrimination. Id. Arkles also discusses how the relief sought in litigation might not be best relief needed for a community, noting that lawyers may not come up with the most effective solutions, yet the lawyers and the court system are in-charge and determine whether relief should be granted and how it is granted. Id.
33. Id.
34. Interview by Elie Zwiebel with Practitioner A (May 12, 2014).
35. Gordon, supra note 23.
36. Quigley, supra note 20, at 205; see also Barry et. al., supra note 22, at 426.
nity's capacity in future struggles too. Radical change requires more than traditional reforms that try to solve problems without upsetting current power relationships. It may take time, but change is only sustainable and long-lasting if it is led and directed by the people most affected.

2. Element Two: Relationships with “Clients”

First and foremost, the movement lawyer generally does not have clients in the traditional sense. For example, lawyers might use the term partner or team member to describe the communities they work with. Movement lawyers believe change comes about by working with people, not for people. As Piomelli describes, lawyers in this field do not see themselves as saviors, protectors, or as preeminent engines or engineers of social change. While at times there may be a need to “stop a fire” using the lawyer’s power and access to traditional tools, the movement lawyer’s frame is different. The groups that movement lawyers work with are partners in all senses of the word—knowledge, power, leadership, control, and decision-making—are all shared. This is unlike other types of public interest lawyering, law reform, or impact litigation where the goal is often set by the lawyers or the institution where they work. In fact, if ultimately there is a disagreement about strategy, approach, or the like, in movement lawyering generally the community partner “gets the last word” and prevails. Of course, this does not mean that movement lawyers do not share their opinions; movement lawyers do, and when appropriate, should. But ultimately, it is the impacted communities within the movement

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38. Piomelli 1, supra note 23, at 1407.
41. Quigley 1, supra note 19, at 149.
42. Piomelli 1, supra note 23.
43. Ancheta, supra note 25, at 1370.
44. Elsesser, supra note 23, at 400.
45. Quigley, supra note 20, at 205.
46. Of course, if the partner and the lawyer are discussing something that would be a violation of the Professional Rules of Conduct, the lawyer should vocalize concerns and not engage in unethical practices.
47. It is tempting as a movement lawyer to be solely of service to the movement as a “doer” (i.e. the community or movement asks you to do something, and you simply comply). But, you are adding only limited, short-term value with that approach. The idea of building power means helping to transfer knowledge, skills, and information. You do not just do tasks. You share and collaborate so communities can gain power and voice. See, e.g., Arkles, supra note 23,
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that have to live with the outcome. That understanding is critical for lawyers to recognize in their interactions with the communities where they work.

3. Element Three: The [Limited] Role of the Law

Bill Quigley once wrote: “If the legal work is the primary part of the campaign, it is unlikely that the legal component is in relationship with a real social change movement.”49 That perspective is often hard for the lawyer to digest, but engaging in traditional litigation is just one option for change.50 When a social movement turns to litigation, it cannot be used in a silo51 or else any change that is achieved will not be sustainable.52 It is only when legal advocacy is used to support communities’ efforts on the ground that the law and lawyers will achieve an impact that reverberates beyond the courtroom.53 When this fails to happen, the use of legal tactics can actually be harmful.54

As one practitioner recounted to Lucie White as part of Professor White’s research about change-oriented lawyering:

[T]he fundamental problem [with the attempt to use law as a means of resolving conflict and promoting social justice] is that inherent in this approach is the acceptance as given of a system of law which

48. There are times when even if lawyers have a well-informed opinion, they should keep it to themselves. For example, sometimes a lawyer’s opinion can undermine the community’s power. Alongside a community organizer and a handful of youth leaders, I once attended a meeting with school officials in a particular school district. The youth made a demand of the school district, a demand that was based partially on fact and partially on hyperbole. In that case, I could have stepped in to correct the exaggeration (especially since the school leaders looked more to me than my partners for thoughts). However, the youth leader was able to get the school official to agree to his demand. In that case, going beyond the facts was actually more strategic, albeit unintentional. The facts alone would not have forced the school official to meet us even halfway. Even more importantly, had I jumped in by exposing the youth leader’s mistake, the school official, who already was patronizing to the youth, would have been less likely to take the youth leader’s issues seriously.

49. Quigley, supra note 20, at 206.
50. Gordon, supra note 23.
51. Id. at 2140.
52. “[T]here were times when we bargained and argued only for marginal positional gains, and increased negotiating leverage, or some public relations advantage. Sometimes compensation or vindication was all that was possible. But we were always pursuing larger aims: a genuine changing of minds or an enduring alteration of the circumstances in which the conflict arose. Whatever else the enterprise embodied, the social goals we were seeking reached not only across large numbers of people, but from the present into some altered version of the future.” Gary Bellow, Steady Work: A Practitioner’s Reflections on Political Lawyering, 31 HARV. C.R.-C.L. L. REV. 297, 304 (1996).
53. Piomelli 1, supra note 23, at 1386; Shah & Elsesser, supra note 26.
54. Gordon, supra note 23, at 2140.

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may itself be the source of the conflict and injustice. The result may be that the lawyer ends up unintentionally promoting the use of the legal system as a means of accommodating the conflict rather than promoting social justice . . . . [T]he legal process may obscure the true nature of the dispute and even obstruct its just resolution.55

In addition, because litigation is a tool of and within the justice system, it can be considered a part of the larger discriminatory forces that low-income communities of color are trying to upend.56 As perhaps best explained by two practitioners:

[T]he reality is that most of the harms experienced by poor and working people in this country simply are not illegal. Even if represented by the best lawyer, any poor person who goes into court will be outgunned by overwhelming resources. In addition, they face the systemic biases of both the substantive law and the judicial decision makers whether judge or jury. As such, the law quite literally is designed to protect private property and capital investment and not to render justice.57

Given the potential for misuse Jennifer Gordon challenges lawyers, prior to legal tactics that may be most comfortable for them, to ask a series of questions: how can legal levers put the community in a position to achieve its goals; what power could it build; what doors could the law open; what stories could the law tell; and what time could the law buy.58 A well-trained, thoughtful lawyer could—and should—engage in dialogue with communities about using the law as a tactic,59 but the lawyer must be sure that the community partner still has control of the work—including the legal agenda.60

4. Element Four: The Use of Multi-Modal Advocacy Strategies

In view of its limitations, “the law [and litigation] is not the end all and be all of creating change in a community.”61 If the law in the traditional sense is only one, carefully used tactic to support grassroots

55. White, supra note 23, at 741–42.
56. To employ litigation, generally, you have to “believe in the underlying justness of the legal system—if you can simply have a lawyer to enforce the law, or have the right case argued to the right judge, justice will result.” Shah & Elsesser, supra note 26. While there is value in understanding the power structures that exist, some communities refuse to use tools that perpetuate society’s hierarchical structure, are rooted in our society’s racist and oppressive history, and that are, in some ways, designed to cause communities to fail.
57. Id.
59. Id. at 2141.
60. Quigley 3, supra note 19, at 474.
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efforts, what does the lawyer do? “Pretty much anything is fair game.”62 Movement lawyers do anything and everything in which they can both add value and help transfer skills to the community. They “treat litigation, lobbying, community and popular education, media campaigns, political mobilization, and organizing as a range of options to fully explore and to mix and match as each specific context warrants.”63 As one interviewee shared: “You have to be able to adopt your tactics and strategies to the conditions. The conditions are different in every community and [are] always changing.”64 Bennett describes this idea as having a sense of unboundedness.65

II. THE CASE FOR INFUSING MOVEMENT LAWYERING INTO LEGAL EDUCATION

A. Is Movement Lawyering at Odds with Legal Education As it Currently Stands?

The role of non-legal skills, important for multimodal advocacy and power-building, does not diminish the importance for movement lawyers to also be skilled attorneys in the traditional sense. As one interviewee stated: “Some people mistake the non-legal skills and your politics as being sufficient to be a movement lawyer. But you need to be a technically brilliant lawyer . . . . You do not want to overdevelop your politics and not spend enough time on your legal skills.”66

Indeed, while movement lawyers may not always engage in litigation or clear cut legal work, what they always do use is their analytical skills, their research and writing skills, their problem-solving skills, their negotiating skills, and their deductive and inductive reasoning skills—many, or all, of which have been honed in law school. The movement lawyer constantly needs to strengthen these skills and develop them even further.

There are those who believe in the idea of movement lawyering but find that the structure of legal education as it exists cannot support training movement lawyers; they argue that a major upheaval in the legal academy would be needed to be able to train students to do power-building work with communities. For example, renowned

63. Piomelli, supra note 23, at 1386.
64. Interview by Alexandra Moore with Practitioner E (May 20, 2014).
65. Bennett, supra note 23.
scholar Duncan Kennedy has argued that legal education, because of the way it is structured, trains students to function, accept, and even believe in a hierarchical system. He notes that the first-year curriculum in particular teaches issues as discrete, “with no hope . . . that from law study one might derive an integrating vision of what law is, how it works, or how it might be changed (other than in an incremental, case-by-case reformist way).” Successful social justice movements, on the other hand, rarely focus on a singular issue. Consider the Civil Rights Movement of the 1960s. The fight for civil rights encompassed a range of goals including advancement in housing, voting, education, and more. While there may have been periods focused on a particular issue area, the movement overall spoke for something broader—and both lawyers and non-lawyers involved understood. Or, consider the more recent Right to the City Alliance, a coalition of organizations fighting against gentrification. Their shared focus on addressing gentrification brought them together, but the alliance does not view that issue in isolation. In fact, the Alliance challenges the market-based approach to urban development, generally, and believe that the “fight for the city” cannot be isolated from broader social dynamics or confined to one system of oppression. This concept could be challenging for a law student to understand, especially if they are never encouraged to think about intersections in the law.

Kennedy also argues that law schools tend to prepare students for one type of legal career—a career that is limited to understanding legal rules and finding answers in the law—versus actually learning how the law functions and how to challenge it. Legal education has absolutely shifted more towards providing students with increased practical experience and gaining tangible skills—which could be more likely to result in exposure to movement lawyering than solely doctrinal based courses. But Kennedy’s point still rings true. If a law student

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68. Id. at 59.
70. Harmony Goldberg, Building Power In The City: Reflections on the Emergence of the Right to the City Alliance and the National Domestic Workers Alliance, in USES OF A WHIRLWIND: MOVEMENT, MOVEMENTS, AND CONTEMPORARY RADICAL CURRENTS IN THE UNITED STATES 99, 103 (Team Colors Collective ed., 2010)
does not or cannot envision doing something different or non-traditional with their training, simply accepts the law as it is, and/or is unable to comprehend molding or shaping the law or completely upheaving it so it can work for the community, the student is going to have a hard time being of service to a social justice movement.

Third, Kennedy asserts that the grading, curving, and ranking system that exists in law schools perpetuates the idea of hierarchy. 73 Students see a grade and learn that there is virtually nothing they can do to change that grade after it has been issued or often even their place in the rank. 74 Again, those within social justice movements operate on an opposite assumption. They demand something different and refuse to be satisfied with what society has decided is their plight, even if something appears to be “final.”

Kennedy furthermore expresses frustration on how law professors reinforce this hierarchy by modeling it themselves with students. 75 Whether it is the fight for tenure, the use of the Socratic Method in the classroom to judge and separate out students, or the preoccupation with the school’s rank, students perceive professors as justifying hierarchy. Students, who admire professors greatly, accept the hierarchical structure as the norm and then follow suit. Kennedy asserts that the professor continues to set the tone—which given the demographic makeup of teachers tends to be a white, male, middle-class tone 76—and that can become incapacitating rather than empowering. 77 Generally, students adapt to that tone rather than resist it or even fathom that they can resist it.

Dean Spade, a law school professor and trans-activist from Seattle University School of Law, agrees with much of what Kennedy wrote some years ago:

[N]o activist exits law school without having been changed and made more conservative . . . it [law school] is a place where white masculine cultural norms and behaviors are exacerbated. Curved grading ensures an environment of competition and scarcity, a hierarchy of perceived intelligence that inevitably values white, masculine norms . . . . And it feels like high school—the first year is pretty

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73. Kennedy, supra note 67, at 63.
74. Id.
75. Id. at 67.
76. Id. at 69.
77. Id.
much all day every day, you have a locker, white wealthy people frequently bully and tease people who bear markers of otherness.78

Other scholars agree that just focusing on smaller-scale content changes will not go far enough.79

If we agree with Kennedy, Spade, and others80 who understandably believe that hierarchy is deeply embedded within legal education, can anything realistically be done to expand social justice movement lawyering within the confines of today’s legal education system? Chaumtoli Huq, a scholar who also views herself as a movement lawyer, seems to think not:

There are ways law schools could do more but I don’t expect that to happen on an institutional level because it is not in the business of law schools to train movement lawyers, except for a handful of law schools whose explicit mission is to gear students towards using their legal education for social change.81

Therefore, she advocates for change on the micro and individual levels, among faculty and students.82 Huq is right. Individual faculty and students can and should do more in many ways, some of which are proposed in Part III. But, beyond individual efforts, if small adjustments can be made to legal education outside of just one individual classroom, in the short term, changes can provide future movement lawyers with better preparation for their work to come, and in the long term, can plant seeds for ultimately developing a non-hierarchical, justice-focused law school years down the road. These reforms can be successful even in light of the conclusions drawn by scholars like Kennedy and Spade.

79. For example, Rankin notes:
   One fundamental reason underlying the stasis is that reform is often narrowly understood as an effort to change content; in terms of education reform, this understanding translates into a myopic focus on changing curriculum or pedagogy. But this singular focus on content ignores the most challenging task of education reform: systemic change also requires a subversion of power.
82. Id.
B. Why Should Legal Education Make Changes to Adapt to the Movement Lawyer’s Needs?

Law schools are generally structured for future lawyers to meet the legal needs of individuals or entities. Legal education has evolved, albeit slowly, to train its future stewards to be able to better respond to needs of such clients and entities. What is clear, however, is that those needs do not always fit into discrete “legal boxes”—and they never have. Indeed, while arguably all social injustices have a legal component, no problem is purely legal. Many complex political, social, economic, and other factors always come into play, affecting the needs of not just individuals, but communities as well. But, the legal academy emphasizes training students to respond to crises using legal tools and a limited lens, which is highly problematic for anyone and certainly for the movement lawyer. As one interviewee noted:

Looking at the law devoid of context . . . of . . . how it relates to other systems of thinking . . . and other forces in society [is problematic]. In the real world, all of this matters . . . . When you make decisions and judgments, you’re looking at political context, make up of [a] court, different pressure points, media . . . . [The] emphasis on black letter law and [a] legalist frame of thinking . . . a rote sort of approach . . . [can make] you get tunnel vision.

Lawyers and advocates must have an understanding of this context and other factors and dynamics and how they work. They also need to be prepared to challenge such dynamics using a variety of strategies and tactics as appropriate. For legal education to continue to evolve and advance principles of justice, it is the legal academy’s job to help future lawyers prepare to do this work. If they fail to make lawyers useful for this work, they run the risk of becoming increasingly irrelevant.

III. REFORMING LEGAL EDUCATION TO TEACH THE MOVEMENT LAWYER

When considering the different avenues available within the legal academy through which to pursue reform, create a stronger training

83. See, e.g., infra notes 94–95 and accompanying text.
84. See generally ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES: A REPORT PREPARED FOR THE SURVEY OF THE LEGAL PROFESSION (1953).
86. Interview with Practitioner M (April 3, 2014).
ground for movement lawyers, and help emerging movement lawyers develop an understanding of movement lawyering’s four main components. Law schools can take both limited and deeper exposure approaches. Whereas a limited exposure approach may include a discrete lecture, exercise in class, or single roundtable discussion on an issue, a deeper exposure may include a course for credit or other learning opportunities that similarly occur over a semester, school year, or longer period of time—offering the opportunity to “go deeper.” In this section, I suggest both limited and deeper exposure approaches. I focus all of these recommendations within four critically important categories: experiential learning, legal profession and ethics, interdisciplinary learning, and law school culture.

A. Experiential Learning

“When a student starts to ask questions about why the world is the way it is that’s when a student starts to be transformed from a person who wants to do good to a person who wants to build power.”

Experiential learning is often touted as being critical to law students’ understanding of how to be effective lawyers. Law school clinics and externships have long been key resources for providing students with practical experience and for teaching law students how to

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87. Long-term vision and power building, relationships with “clients,” the [limited] role of the law, and the understanding and use of multimodal advocacy strategies and skills.

88. This article is limited to these subjects by choice and because interviewees shared most robust participation in these categories. However, one can imagine many other avenues for reform, including, but not limited to, for example, changes to the 1L curriculum, which has been discussed more broadly by other scholars as an important place to incorporate more public interest lawyering principles. See, e.g., Sara K. Rankin et al., We Have a Dream: Integrating Skills Courses and Public Interest Work in the First Year of Law School (And Beyond), 17 CHAP. L. REV. 89, 89–90 (2013); see also Nantiya Ruan, Student, Esquire?: The Practice of Law in the Collaborative Classroom, 20 CLINICAL L. REV. 429, 442 (2014); Nantiya Ruan, Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership, 8 LEGAL COMM. & RHETORIC: JALWD 191, 193 (2011) [hereinafter Ruan 2]; Robin Walker Sterling, On Surviving Legal De-Education: An Allegory for a Renaissance in Legal Education, 91 DENN. U. L. REV. 211, 213 (2013). Some law schools have already begun to take steps to address the 1L curriculum in this way. See, e.g., First Year Curriculum: Curriculum B, GEORGETOWN LAW, http://apps.law.georgetown.edu/curriculum/documents/DescriptionofCurriculumB.pdf (last visited Sept. 13, 2015). Interviewees wholeheartedly agree noting, “[w]e lose some people because of first year, which is unsupportive of our value.” Interview by Elie Zwiebel with Practitioner O (June 25, 2014). “If you could have a better introduction earlier on, might help you focus your energy in the right place.” Interview with Practitioner J (April 3, 2014). “Students must actively get off of the conveyer belt (out of a default setting). 1L writing assignments should be beyond firm default.” Interview by Elie Zwiebel with Practitioner G (June 29, 2014).

89. Interview with Practitioner M (April 3, 2014).

90. SULLIVAN, supra note 72, at 32-33.
pursue social justice through a legal career.\textsuperscript{91} For the movement lawyer, participation in such experiential offerings is essential. Whether through in-house clinical programs or externships in the field, students gain practical skills and an understanding of how to work with communities and partners more quickly and more thoroughly through practice than students would through only classroom learning. In turn, students' experiences in the field often benefit communities by providing legal assistance in the present while strategically training lawyers to be more capable of providing for the communities' needs in the future, when the students graduate.

A challenge is that many current clinical models focus on pursuing social justice through traditional legal means, often employing litigation and other conventional legal tactics,\textsuperscript{92} working on behalf of individuals not communities,\textsuperscript{93} and establishing the traditional lawyer-client relationship.\textsuperscript{94} Most externships are similarly narrow in focus

\begin{itemize}
\item \textsuperscript{91} Ruan 2, \textit{supra} note 88, at 197.
\item \textsuperscript{92} An additional complication with litigation that comes up in the clinical context in particular is that litigation is often too narrowly focused on one end goal: winning the case. Sameer M. Ashar, \textit{Law Clinics and Collective Mobilization}, 14 \textit{Clinical L. Rev.} 355, 385–89 (2008). This has implications not only for the client, but for the success of the clinic as well. \textit{Id.}
\item \textsuperscript{93} Through many clinics and externships, students usually learn to advocate for individuals through a case-centered model. \textit{Id.} at 368. This model generally parallels traditional direct service work by focusing on the immediate, short-term case. This model generally parallels traditional direct service work by focusing on the immediate, short-term case. By focusing on clients or projects, clinics and externships may fall short in helping students engage in the work while simultaneously keeping an eye on how to encourage and reinforce community-based power. Direct service fits the clinical and externship models neatly: Students have a limited timeframe in which to engage in the work, and the investigation and the resolution of an individual case in housing court or drug court, for example, most likely fit in the timeframe allotted for student work (e.g. one semester). This case-by-case process works well for students and universities as opposed to envisioning larger community needs and the web of priorities that may expand beyond a single issue, a single client, or a single case. Though all of the cases in a clinic or that a student sees during an externship may share similarities in school of legal thought (e.g. housing discrimination, criminal defense, etc.), the cases may or may not involve clients from the same communities. Anthony V. Alfieri, \textit{(Un)Covering Identity in Civil Rights and Poverty Law}, 121 \textit{Harv. L. Rev.} 805, 806 (2008) (“The effective delivery of scarce legal goods to disadvantaged clients requires more than the provision of equal access, case-by-case representation, and zealous advocacy. Scarcity requires that effective legal change be measured not by the outcomes of individual cases, but rather by the progress of social change: specifically, by the degree to which individual clients are able to collaborate in local and national alliances to enlarge civil rights and to alleviate poverty.”). To be clear, clinics may occasionally work with a client presenting a case that represents a community-wide struggle and subsequently engage in impact litigation. These types of clinics are becoming more common but remain the minority. Ashar, \textit{supra} note 92, at 362 (citing Susan D. Bennett, \textit{Creating a Client Consortium: Building Social Capital, Bridging Structural Holes}, 13 \textit{Clinical L. Rev.} 67 (2006); Scott L. Cummings, \textit{Clinical Legal Education and Community Development}, 14 \textit{J. Affordable Housing & Community Dev. L.} 208 (2005)).
\item \textsuperscript{94} Whether case-centered or impact litigation focused, clinics and externships often employ client-centered advocacy. Client-centered advocacy is an approach that asks lawyers to ensure clients make key decisions with respect to the legal case, to limit lawyers' role to their specific legal expertise, and to learn about and understand the client's life and who the client is
\end{itemize}
regarding skill development through work at a firm, with in-house counsel, in a government agency, or for a non-profit. This limited view is often not the best preparation for movement lawyers, especially if it goes on without additional supports, questions, or as one interviewee said, “a counter narrative.” In other words, students aspiring to be movement lawyers need clinical and externship opportunities that encourage students to engage in social justice lawyering with a wider analytical lens, to employ a range of skills, and to work in partnership with communities.

1. Deeper Exposure Approach: Establishing In-House Clinics that are Directly Connected to Movement Building Organizations

Across the country, various clinics are finding ways to support grassroots organizations in their work through multi-faceted advocacy and are providing students with the opportunity to work alongside community partners to address issues or build campaigns. Particu-

95. To be fair, a number of interviewees noted how critical clinics and externships were during their law school careers, both from helping to keep them grounded during school and for teaching useful skills for post graduation. With that said, they also noted that the models did set up a dynamic and/or focus on approaches that were limiting for the work of a movement lawyer.


97. See, e.g., Fields of Practice—Community Justice, LOY. UNIV., http://loyo.edu/lawclinic/fields-practice-community-justice (last visited Sept. 13, 2015) (The Community Justice Section of Loyola University School of Law’s Stuart H. Smith Law Clinic, which teaches students how to use litigation and traditional legal representation methods to support communities, supplements beyond the particular case. Ashar, supra note 92, at 370 (citing Katherine R. Kruse, Fortress in the Sand: The Plural Values of Client-Centered Representation, 12 CLINICAL L. REV. 369, 369–71, 377, 384–85 (2006)). Client-centered advocacy emphasizes the client’s thoughts and feelings, and considers non-legal concerns or situations the client may face. Id. When working with or on behalf of marginalized people, this approach is far better than the traditional lawyer-centered model, in which all problems are filtered through what legal resolution the attorney can help attain. Client-centered advocacy can certainly help an individual lawyer understand an individual client more authentically and more deeply, but this model is still often different than the relationship the movement lawyer seeks to create. The movement lawyering approach opens the door to contextualization of the individual client and his or her issue; clinics and externships aiming to teach movement lawyering should further contextualize the individual client and respective issue within the community and its web of concerns. While client-centered lawyering is driven by the goals of an individual, movement lawyering is driven by the needs of an entire community. Some theorists, including Asciano Piomelli, reject a hard-line distinction between community-based and client-centered lawyering, preferring to interpret movement lawyering as inherently client-centered with one of the primary goals being to empower the client to set the agenda and make decisions rather than looking to an attorney to determine what is in their interests. Piomelli 2, supra note 23. Ultimately, though, even while involved in litigation, a lawyer engaged in movement building work must look beyond the needs of an individual plaintiff and consider how their work furthers the underlying goal of building community power rather than fixing individual circumstances. If a movement lawyer is working on an individual case, the lawyer should be asking: How does this client’s situation affect and reflect the community as a whole?
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...noteworthy and worth trying to replicate, are models that are deeply connected to actual movement lawyering or grassroots organizations. For example, the University of California Hastings College of Law's Community Group Advocacy and Social Change Lawyering Clinic specifically trains law students to be partners with communities.98 The Clinic's objectives promote non-litigation:

Students will demonstrate critical understanding of the broad range of approaches to social change lawyering and the primary persuasive strategies in which lawyers and activists engage and will be able to articulate a detailed personal vision of the sort of social change practice they aspire to implement. Students will demonstrate the ability to collaborate effectively with student partners, field supervisors, and community group members on fieldwork projects implementing one or more persuasive strategies and to identify, confront, and resolve miscommunications or misunderstandings.99

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98. Community Group Advocacy and Social Change Lawyering Clinic, U.C. HASTINGS COLL. OF L., http://www.uchastings.edu/academics/clinical-programs/clinics/group-advocacy-change/index.php (last visited Feb. 13, 2015). Another example of such an in-house clinic includes the New York University's School of Law' Litigation, Organizing and Systemic Change Clinic, which partners with Make the Road New York and The Center for Popular Democracy, two well respected movement building organizations, both of whom have lawyers on staff. Through partnerships with these prominent power-building and policy-based organizations, the clinic acknowledges the need for "a flexible and deep base of knowledge and skills" beyond what litigation-focused clinics provide and trains students to approach social change lawyering with an openness to and awareness of how to use negotiation, organizing, and policy advocacy. Through this focus, students gain an understanding of how to dynamically respond to communities' legal needs without automatically resorting to litigation that may run counter to the communities' strategies or goals. One-Semester Clinics, N.Y.U., http://www.law.nyu.edu/academics/clinics/semester (last visited Feb. 14, 2015).

Instead of solely employing litigation, the clinic focuses legal training on legislative drafting, lobbying, community organizing, education, and strategic messaging. Under Professor Ascanio Piomelli’s guidance, law students learn how to work “with community activists and groups [] rather than simply navigating the legal system on their behalf.” Some examples of their work show the varied approaches taken by the students and their partners, including working with Legal Services for Children in advising high schools on how to incorporate restorative justice principles and practices into school discipline, working with prisoner advocates and activists to strategically message a campaign to end long-term solitary confinement in maximum security facilities, and working with tenant organizations “to draft and lobby for a just cause for eviction ordinance.”

In addition to expanding the notion of what is a “legal” service, the Community Group Advocacy and Social Change Lawyering Clinic frames its educational model around training students to provide long-term partnership as opposed to isolated representation. Importantly, the clinic is not divorced from deep engagement with social change lawyering theory, reflection, or academic thought; Professor Piomelli supplements fieldwork with a seminar built for engaging with theory, reflection, and academic thought.

2. Limited Exposure Approach: Expanding and Enhancing Classroom Components of In-House Clinics

Not every clinic will be structured like the aforementioned clinic, and a lack of access to mobilized grassroots communities might prove to be a barrier to creating such a structure. In these cases, law schools could consider expanding the in-class portion of a clinical program so that there is either a supplemental course that discusses the broader

101. Id.
implications of the clinic’s work, or that asks clinical professors to supplement their own seminar in this way. The struggle with this becomes time, as clinicians are always challenged with trying to fit in everything that needs to be taught. Given that, clinics can add one additional in-class credit that is taught by faculty or even community members, aimed at enhancing students’ understanding while still responding to the needs of the community and the directives of the clinic. Students may end up questioning tactics used in the clinic or notice pros and cons of a certain approach, but ultimately, this dialogue will ensure that their view of the problem at hand is not too limited. The additional graded component of the student’s skill acquisition is not contingent upon how effective the student is at establishing a partnership with the community; the students’ fieldwork is no longer a means to achieving a grade. In the supplementary seminar, students can focus on learning skills and substantive areas of the law without compromising work for or with partners in the community—the classroom work is contingent upon the student’s ability to acquire, implement, and critically think about skills and substantive law. This balance promotes students’ legal education as well as the community organization’s strategies and goals, while simultaneously expanding students’ notions of what legal work is.

3. Deeper Exposure Approach: Externships with Movement Building Organizations

The dual, but supplemental, track model for clinics mirrors the beneficial structure of certain externships that promote and train movement lawyers. For example, students at Georgetown University Law Center who externed with a movement lawyering organization, Advancement Project, synthesized their legal education with approaches to legal advocacy that are not traditionally taught in law school: developing community education materials, supporting communities advocating for legislation through policy research, and supporting strategic communications around grassroots racial justice centered campaigns. The externs worked in the field with supervising attorneys, community organizers, communications experts, and other stakeholders. Under Advancement Project lawyers’ supervision, externs supported community partners locally and around the country by providing flexible and highly responsive legal services—more often than not, services devoid of litigation. Meanwhile, Georgetown students participated in a graded seminar led by one or more of Ad-
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vancement Project's attorneys. This seminar gave the students an opportunity to not only reflect on what they are learning and dive deeper into the theory of community power building, but it also provided students with an opportunity to dialogue and ask questions about becoming a movement lawyer. Additionally, this seminar gives Advancement Project attorneys the opportunity to help train students in skills that will directly benefit the work they are doing while externing as well as skills that will benefit the partnerships between Advancement Project and community organizations.104

During spring semester 2015, students at the University of Denver Sturm College of Law had the opportunity for the first time to participate in a similarly framed externship: the Holistic Juvenile Defense and Advocacy Externship. The law school is partnering with the Colorado Juvenile Defender Center (CJDC)—a legal and policy organization with longstanding ties to the law school—and Padres y Jóvenes Unidos (PJU)—a grassroots organizing group—to place several externs in positions where students will learn both courtroom advocacy skills as well as how to apply legal education to non-litigation-based legal work. Under attorney supervision at CJDC, externs support juvenile representation in criminal proceedings and help youth and families petition for expungement of juvenile records. Under community organizer supervision at PJU, externs support community education around students’ rights, connect students and families to resources or community advocates offering disciplinary hearing representation, and may have an opportunity to support community advocates offering this representation. The lawyers at CJDC, however, are intimately aware of what the students are engaging in with PJU and help oversee their work. This structure is intentional so that students have a legal supervisor105 and are provided with an opportu-

104. As an attorney at Advancement Project, I was a member of a team that helped to develop and implement this course. Of note, Advancement Project's model of lawyering includes litigation. Students who extern with Advancement Project can also grapple with understanding how litigation fits into the community lawyer's toolbox. The University of Miami's School of Law also once had a partnership with Florida Legal Services that reflected a similar externship model wherein students would simultaneously work with community organizations to build power and participate in a seminar with a supervising attorney from Florida Legal Services to reflect, develop skills, and dialogue about community lawyering.

105. This is a requirement at least at the Univ. of Denver Sturm College of Law in order for students to receive academic credit for participation in externships, though it is not explicitly required by the American Bar Association. See, e.g., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014-2015 § 305(c) (2014).
nity to learn from how these practicing lawyers interact with community organizers.

Simultaneous with the fieldwork, students participate in a weekly seminar led by a CJDC attorney but complemented by the PJU organizers and other movement lawyers. In addition to learning relevant substantive law, during the seminar, students reflect on their experiences and dialogue about strategies and challenges in movement lawyering. This partnership supports the community while furthering law students’ education in movement lawyering methods and skills. Also, it shows law students that they can—and should—learn from non-lawyers. This hybrid externship challenges the traditional notion of externships, but still ensures high-quality supervision from a lawyer.

4. Limited Exposure Approach: Remote “Fieldwork”

Regardless of the challenges, progressive and movement-lawyer-oriented clinics and externships are slowly developing around the country. That development will go a long way towards teaching and training students. For the time being, however, clinics and externships laying foundation for movement lawyers are isolated and mostly located in major legal markets (e.g., New York, Washington, D.C., etc.). This raises the question: Can law schools use experiential learning models to remotely train students in this type of lawyering?

A remote opportunity, for example, could involve training in non-litigation methods like policy research, strategic communications, or resource development (e.g. developing materials for “know-your-rights” trainings). Such an opportunity could simultaneously benefit law students’ skill acquisition while prioritizing community power-building and servicing community needs. This could especially work for a national alliance like Right to the City, Alliance for Educational Justice, or the National Domestic Workers Alliance.

106. While these examples have promise, externship models as training grounds for movement lawyers are not without their challenges. Lawyers at such placements have even more limited time in comparison to clinical faculty members to guide students as their practice responsibilities extend far beyond their work with the students. Students also usually devote less time to externships, working only a few days each week, for example, thus making it more difficult to see movement lawyering in action and learn the nuances of the trade. Additionally, law schools monitor field placements, but externship faculty are generally less aware of the ins and outs of what occurs at a placement and have only some ability to control or shape the placement.

groups that already draw upon allies’ efforts and support from across the nation. Of course, in order for such a relationship to work, these organizations would have to be willing to participate and believe that the support provided could be useful to them.

While students would get the opportunity to create work product for such groups, remote work would suffer from a lack of in-person partnership. Law students would lose the opportunity to do the key relationship-building that is necessary to establishing trust between the community lawyer and the community—and that is often necessary to a student’s understanding of the goal and purpose of the final work product. Further to this point, the law student is not as available for rallies, actions, community meetings, or other events—activities that show the student that the lawyer and the legal strategies are just one piece of a larger campaign. The law student can only have a limited role in any of the work since the student is not necessarily available to be a “first responder” and be involved in all aspects of the work. This is particularly the case should litigation become a component of a community’s campaign. Ultimately, remote learning as a pedagogical strategy for movement lawyers is possible, though incomplete and less than ideal.\footnote{110}

B. Legal Profession and Ethics

“Ethics are of paramount importance for movement lawyers, but the answers aren’t in the professional rules of conduct.”\footnote{111}

When considering how to best incorporate a strong curriculum in legal ethics that aligns with movement lawyering principles, understanding how movement lawyers engage with the rules of professional conduct is paramount. Ultimately, some changes in framing and teaching those rules in the classroom for movement lawyers are needed. Scholars have written about this already\footnote{112} and interviewees shared many thoughts.

\footnote{110. Several interviewees mentioned that remote learning would be possible but probably unnecessary. These interviewees held the opinion that, no matter where a student’s law school is located, there will be a social justice movement or community of individuals in need of legal services. These local communities offer opportunity to learn movement lawyering for the students not based in major legal markets and not based in schools that already sponsor an experiential learning opportunity for aspiring movement lawyers. Perhaps, then, the law school has the responsibility to help find and engage with such a movement or group.}

\footnote{111. Interview with Practitioner M (Apr. 3, 2014).}

\footnote{112. See e.g., Shauna Marshall, Mission Impossible?: Ethical Community Lawyering, 7 Clinical L. Rev. 147, 153–54 (2000).}
1. Sampling of Ethical Challenges Faced by Movement Lawyers

One recurring theme that arose was that many grassroots organizers and movement lawyers face challenges with following and promoting the “rules of the system.” As one lawyer noted: “When you work in a community where the law is actively working against people, you end up asking, why am I following this system. I think the most ethical thing to do in a human sense is not necessarily the most ethical thing to do in a legal sense.” Another shared: “[The rules] reinforce status quo power arrangements; they prevent system change.” Somehow, then, the movement lawyer must accept that there may be times in which the rules of the profession do not fit so nicely with the “rules” of social movements. The lawyer may have to make a decision as to how best to balance the rules’ confines with the need to respect the relevant movement and communities.

The movement lawyer must also be aware of what role they are playing vis-à-vis their client. They must also acknowledge that this role can evolve, and with such changes, interaction with the rules of ethics changes as well. For example, one interviewee discussed this idea in terms of the different types of tools and strategies a movement lawyer employs, noting,

What does it mean to be an advocate versus a litigator? [When engaging with a community], ask yourself: Am I here as litigator—which brings on an actual lawyer client relationship—or as an advocate, perhaps working on behalf of my organization as a part of a coalition, for example.

Consider if you file a lawsuit and name certain individuals or a community organization as plaintiffs. Here, following the traditional elements of the ethical rules make sense around confidentiality, sharing of information, and the like. This is in stark contrast if you are engaging with community members on a local policy campaign instead. Not only may you be discussing topics that are not necessarily legal in nature, but you are also not necessarily forming a lawyer-client relationship as it is typically defined. Even when forming the traditional lawyer-client dynamic and engaging in litigation, the rules may still require elasticity for a movement lawyer. One interviewee commented on how the ethical rules are very singular, noting:

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113. Interview by Elie Zwiebel with Practitioner K (June 6, 2014).
115. Interview with Practitioner L (March 26, 2014).
116. Example, Power-mapping.
[The rules] assume all interaction is happening between these two people [attorney and client]. That’s not a lot of movement lawyering practice. We represent groups of folks. There is little talk of groups [in the rules]. We’ve struggled in the group representation context maintaining confidentiality. For example, what if you have a meeting of ten people who are interested in the issue but they are not the people who signed your intake forms. Now you have a confidentiality problem. There are interested parties who are not clients in the room. Kicking people out is really hard. Organizers are also in the room. How do you keep them in the room without having problems down the line?117

The aforementioned example alludes to the fact that there may be other issues or priorities of individuals or communities beyond the litigation at hand. Organizers, for example, are often present because litigation is only a singular component of the larger campaign. One interviewee related to this issue by emphasizing that the legal problem and the corresponding legal solution cannot exist in a vacuum:

[W]e are not just restricted to the legal issue. Law school pretends that this is what it teaches students to do, but when they go into practice they end up drawing artificial barriers between the various legal issues and between legal issues and non-legal issues . . . . We do what is in [clients’] best interest as they define their best interest . . . . That’s our ethical obligation . . . to think about these other systems.118

These examples, while not fully explored in this article, represent just a handful of the common ethical issues that arise for movement lawyers. A need to teach and explain legal ethics in a more nuanced fashion and to put such rules in context is critical for students interested in movement lawyering. The question is how to accomplish this?

2. Limited Exposure Approach: Incorporating Ethical Issues During 1L Year

One interviewee highlighted the first year curriculum as a good entry point into navigating the rules, stating: “Legal analysis you learn 1L year can be helpful here because what you’re learning about is how to exploit gaps, conflicts, ambiguity in the law, and bending [and] to do movement lawyering you have to bend the ethical rules.”119 In a

118. Interview by Elie Zwiebel with Practitioner I (June 20, 2014).
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traditional legal profession or ethics class, seemingly simple adjustments could go a long way towards helping students understand that the ethical rules can be interpreted in many ways depending on the lens in which you’re engaging in the work. For example, why not better connect students’ projects in the traditional first-year writing or lawyering profession class to this concept? A professor could ask students to reflect back on their written brief or oral presentations120 and consider how they created arguments that allowed them to advocate in a specific way. Through discussion and perhaps elevating certain examples, the students can begin to realize that they are already accustomed to the idea of reading beneath, between, and under the lines. And now, they are being asked to do that same thing just in a different context.

3. Limited Exposure Approach: Expanding Hypotheticals in Legal Profession Courses & Other Courses

On the other hand, another interviewee pointed out: “‘Ethics’ in reality is different than in abstract. It is much more complicated when you actually have clients or competing interests or contradictory ethical questions.”121 Legal profession classes must then incorporate different types of hypotheticals that bring issues the movement lawyer faces into question and that force students to consider whether or not the rules even apply. This could be done by providing students with a scenario on paper, or by inviting a community organizer into the classroom, virtually or live, to discuss a campaign. Then, together, students and professor could reflect on how to respond wearing a movement lawyer’s hat and the organizer can share his or her reaction on how such a response could positively or negatively affect, if at all, the campaign. Or, a professor could invite a movement lawyer, again in person or virtually, to share his or her real life experiences and troubleshoot with students. That lawyer could be asked to emphasize particular aspects of the work, such as how the legal work interacts with other aspects of the campaign or how to work with organizers who also have a vested interest in the work and who may have even brought the issue to you but who are not parties to a lawsuit. There is unlikely to be solid case law or rulings by ethical commissions that touch on these sorts of experiences so incorporating practical exam-

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120. These two examples are used since they are common activities undertaken in such classes.
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Examples is crucial to student learning. Such examples will help students actually realize that, depending on the situation, your role vis-à-vis the ethical rules varies and that, with movement lawyering, there will continue to be unexpected and new situations that arise. As an interviewee remarked: “Ethics [for movement lawyers] derive from something people are working on.”

Exercises that ask students to question ethical rules can be employed in non-legal profession classes as well. For example, in my Racial, Social, and Economic Justice Externship Seminar, where students work at an array of civil rights focused groups, from plaintiff side firms to government agencies and nonprofits, students examine some segment of the Colorado Rules of Professional Conduct and explore how they would change some of the ethical rules to better reflect the movement lawyers’ approach. Simply asking the question sparked conversation—students were initially thrown a bit, as they could not fathom a different interpretation, but, gradually, they saw how there could be ways to build power and still align with the rules or build power and enhance one’s interpretation of such rules.

4. Limited Exposure Approach: Values and Professional Identity Exercises

Another theme that arose during the conversations with movement lawyers was the idea that the ethical rules are a floor—a minimum level of care that one must provide as a lawyer, regardless of the type of lawyer. What the movement lawyer also has to consider is the “values of their practice.” One interviewee encouraged students and lawyers to literally ask themselves, “[w]hat are my values?” These might be different values in comparison to other lawyers’ values. An interviewee suggested including an exercise in either a legal profession class, a general public interest lawyering class, or a specific movement lawyering class where students actually write their values on paper and are then asked to abide by those values in externships, clinics, and the like. This exercise exemplifies how to essentially have students begin to set their own moral compasses and figure out their professional identities as a lawyer. While ethical challenges in the legal context are different than moral challenges, this sort of exer-

122. Id.
123. Id.
124. Id.
125. Id.
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cise benefits students by pushing them to articulate how they see themselves as lawyers and to realize that the rules of professional conduct are just the tip of the iceberg of what they need to consider when determining their identity.

5. Deeper Exposure Approach: Targeted Legal Profession Class

While the aforementioned examples allow for changes in an existing traditional legal profession course, some law schools offer legal profession classes specifically targeted towards students interested in the broad field of public interest law. For example, at Harvard Law School, Professor Lani Guinier has offered “Legal Profession: The Responsibilities of Public Interest Lawyers” for many years. The course description provides:

Using case studies on lobbying, public conflict resolution, class-action litigation, community-based advocacy, and lawyering for the government, this course will explore the many tensions for public lawyers who advocate on behalf of individual clients, who seek to represent causes or the “public’s” interests or who engage in legislative advocacy, community organizing or alternative forms of problem-solving and deliberation. In particular, we will focus on the philosophical, ethical, strategic and identity or role conflicts that confront lawyers as professionals and adversaries but also “public citizens.” We shall explore the distinctive challenges facing impact litigators, prosecutors, government agency lawyers, Legal Service lawyers, lawyers doing pro bono cases and/or community organizers.126

Students have the option to simultaneously work at a public interest organization, and, as part of their evaluation, they can write a paper to critically assess “the public lawyering/public policy approach they observed in light of the background reading and class discussions of the philosophical, ethical, and strategic conflicts or issues at stake.”127

While this course is not narrowly focused solely on the ethical questions and challenges that a movement lawyer specifically faces, it brings in the role of the movement lawyer as well as the role of any

lawyer engaged in multi-modal advocacy, both of which offer unique ethical scenarios. Also, the optional corresponding fieldwork allows students to see the lessons learned in action. As a student in this class years ago, I recall working closely with my classmates. In fact, each week, different teams of students “taught” the class. In turn, the class dynamic was one of collaboration, and it emphasizes learning from and with each other versus emphasizing that only one person—the professor—contains the knowledge in the classroom. This approach is particularly beneficial for aspiring movement lawyers who will often find themselves in such a group setting where they will need to remember the value and knowledge that others in the room bring.

C. Interdisciplinary Learning

“Most lawyers see themselves as a hammer and so every problem has to be a nail. We need people to develop new skillsets and perspectives.”128

Movement lawyers, along with the community organizers and community leaders they work with, simultaneously wear many hats. But, organizers often do not have the funding or resources to do all that their community asks or that the movement requires. Because of the number of demands the organizer has and/or because the organizers lack resources, sometimes the most pressing and most beneficial service that a movement lawyer can provide often requires diverse skills that law schools do not commonly teach. For example, an organizer or organization might need support with developing community informational materials, writing press releases or opinion-editorials, or analyzing quantitative data. Lawyers have not traditionally performed these tasks, and consequently, legal education often falls short in training law students in these skills. Legal education also typically falls short in training law students to consider this work as part of the movement lawyer’s skillset at all, as a perspective exists that it is not the lawyer’s job to engage in these sorts of tasks, regardless of a community’s needs.

While law schools can begin addressing this deficiency by offering more classes on the history of movement lawyering and social movements,129 law schools should also look beyond their walls to provide

129. Interview with Practitioner H (March 27, 2014); see Course Catalog – Legal Profession: Law and Social Movements, HARV. LAW SCH., http://hls.harvard.edu/academics/curriculum/cata-
greater opportunities for students to acquire more diverse skills through interdisciplinary learning. This would address two problems: the lawyer’s lack of training in skills that would greatly benefit the community, and the lawyer’s inability to comprehend the community’s needs. While there are many different skills and subjects that the movement lawyer could benefit from, stronger engagement and understanding of grassroots communities and organizing philosophies, communications skills, and policy and data analysis skills are particularly valuable non-traditional legal subjects.

1. Deeper Exposure Approach: New Places and New Faces

In order to prepare for power-building work, it is important for future movement lawyers to develop an understanding of social movements, organizing, and campaign strategy, as well as privilege and existing power structures—skills and knowledge that may be shared in some individual classes, but tend to be ignored. To this end, law schools must provide an opportunity to learn with communities and from community leaders and gain political education.

Law schools should work with communities to build programs and courses that help the students learn about the communities’ goals, history, and obstacles. Cross-teaching with and in the community better educates students about the day-to-day realities that the community faces. One interviewee described how this integrative and interdisciplinary approach could completely shift the law student’s experience of legal education:

log/index.html?o=64058 (last visited Feb. 7, 2015); Spring 2009 – Social Movements & Legal Change, The Univ. of Tex. at Austin Sch. of Law, http://www.utexas.edu/law/sao/courses/class_desc.php?cyyys=20092&unique_num=28889 (last visited Feb. 7, 2015). There may also be an opportunity for students at schools without professors or organizers who can lead such a course to take the course online through the Shriver National Center on Poverty L. See Training, Sargent Shriver Nat’l Ctr. on Poverty L., http://www.povertylaw.org/training (last visited Feb. 7, 2015).

130. To be clear, one of the challenges facing law schools in educating movement lawyers is how to provide the doctrinal foundation required for the practice of law while also preparing students to work effectively in community. As one interviewee stated, “I don’t think being a community lawyer is a pass for not having a robust legal toolbox. You should still learn procedural rules; you need it to know how to fight it.” Interview by Elie Zwiebel with Practitioner G (June 29, 2014).

131. For example, coalition building, negotiation and mediation skills, and lobbying skills are commonly used skill sets.

132. “Just because it’s called law school doesn’t mean you should only study law. You have to study systems, policy, the history of institutions you will be working in.” Interview by Elie Zwiebel with Practitioner I (June 20, 2014).
Transform [students'] politics—[] educate[] about the reality of people who are different than us . . . [we] need to know the history of the community, the economic forces putting people in poverty . . . . [We need] exposure with history and context. Then work that people do becomes different—you start to ask questions [about] why the world is the way it is. That’s the transformative piece: “Not only do I want to help, but also I’m interested in why the world is the way it is.” Then you don’t just want to do good or be humanitarian; then you become a student who wants to build power. Building power is always relevant to changing positions.133

Direct interaction and learning with the community offers the student a more diverse and robust perspective on how to be an effective movement lawyer. Through this approach, a student is more likely to be exposed to the multilateral struggles that a community faces and can, as another interviewee observed, more readily recognize that movement lawyering requires issue spotting in regard to resources in addition to issue spotting legal challenges.134 The student is more grounded in a community, sees the history of the situation, recognizes that the community organizing is intentional, and understands that the legal challenges are embedded in a broader fight that prioritizes community voice and power building. At the same time, the student sees that learning with, in, and from the community builds relationships that are necessary to a lawyer’s ability to be effective and trusted.

One initial way to get to this community engagement is to address the physical location of the school and its classes. Law school classes are often taught within the “ivory tower” and on campuses distant from community partners. This distance inherently manifests a physical and social gap between the community and the movement-lawyer-to-be, something that gets the student away from thinking about the community as partner and instead lends itself towards viewing the community as a client. Law students ultimately lose the opportunity to understand the daily happenings, struggles, and successes of the community. Why not offer certain classes in different spaces? One interviewee suggested a different solution; bringing law students into the community by facilitating skills-based classes or community history classes in recreation centers and detention centers.135 This would

133. Interview with Practitioner M (April 3, 2014) (qualifying statement that it is important for students to do this with local communities near the school so that the students are not “parachuting in”).
134. Interview by Alexandra Moore with Professor B (May 12, 2014).
135. Id. (“Get classroom outside the university walls.”).
not only foster engagement between law student and community, but would also enhance the student’s learning. In addition, law schools and law faculty should seek out greater opportunities to diversify those who are designated as “teachers” for class. Faculty should seek out community organizers and leaders and invite them into their classrooms for teaching sessions. This would allow the organizer to teach in the law-student space, something that would be important since it shows that the faculty and the law school value outside, non-traditional voices.

2. Limited Exposure Approach: Altering the Idea of Work Product

Incorporating these voices as critical to law students’ understanding of movement lawyering will inherently open students to the possibility of using their unique education to do traditionally legal work in a way that reflects legal specialization. Movement lawyers never imagine how many fact sheets, flyers, and infographics they will create. Indeed, much of what movement lawyers do includes legal and policy analysis, but the work product is not always what future lawyers envision and is often not “traditionally legal.” As one interviewee acknowledged, he “barely write[s] anything that is longer than five pages.”136 Many law school assignments are at a minimum five pages long. Because students spend extensive time learning the typical legal writing format (i.e., Issue-Rule-Application-Conclusion, or “IRAC”) and using typical legal language in documents solely for a legal purpose, the students must unlearn these skills when asked to write something explaining law to the lay person. Not only are students missing the knowledge of how to create the communication materials (e.g., fact sheets, educational resources, etc.), but also students without training in communications often do not know how to communicate without using “legalese.” In fact, when asked to explain something without legal jargon and/or to a layperson, students often become crippled, so tied to one form of writing that they have no idea where or how to start. Reiterating that “you don’t need three years only for writing legal research memos and analyzing cases . . . [and that] the problems [of concern] in movement lawyering are often not courtroom problems, making legal research memos less relevant,”137 inter-

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136. Interview by Elie Zwiebel with Practitioner A (May 12, 2014).
viewees wholeheartedly agreed that other opportunities for honing writing and communications skills are needed.

First-year lawyering courses, or other public interest minded seminar courses could diversify the types of assignments and work products students must complete. For example, after a traditional legal memo is done, students could be asked to summarize that memo in one-page, or re-write it using non-legal language. Or, students could be asked to explain their argument in a blog or opinion-editorial format. These small tasks would get students to begin to think about alternative, but effective, ways of talking about, and writing about, the law. It would have the added benefit of helping students to realize that not every work product is a memo, brief, or document for litigation.

3. Deeper Exposure Approach: Partnerships with Communications Schools or Organizations

Because law school lacks classes structured around teaching communication skills to non-lawyers, law schools should establish or strengthen partnerships with other schools and programs that do teach these skills and have expertise and training in them. Such a relationship could also allow students to better understand the idea of messaging and framing, which The Center for Media Justice defines as the “process of crafting what you will say and how you will say it so your audiences will be moved to action.”138 As one interviewee stated: “We are terrible at messaging and strategic ideas. We are all getting better but my experience has been that we don’t think that way.”139 Additionally, students could be trained in the nuances of drafting press releases that incorporate legal understanding with community-accessible language and form.140 Developing these skills inherently adds a creative tool to the lawyer’s tool belt. More importantly, it is critical for the movement lawyer to be able to connect to the community in which it is working and be able to articulate the movement’s work to multiple audiences.141 Social justice movements are rarely won in the court-
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...room;142 while what is written in a legal complaint certainly matters, what the press and public hear about an issue or campaign often matters just as much, if not more.

Several law schools offer dual degrees in journalism and law143 or programs that incorporate communications education into a curriculum about media law,144 but more schools need to make courses available that allow aspiring movement lawyers to enroll in one or more courses on strategic communications as opposed to requiring students to enroll in an entirely new program. Law schools should readily allow students—and not make it incredibly difficult to do so—to cross-register into courses with journalism and communication schools. This is imperative for movement lawyers, but would also be beneficial for any student interested in social change or public interest law.

If a law school does not have access to communications programs at their umbrella university, then the law school should find ways to expand its campus. Partnerships with nationally recognized social justice law and communications organizations like The Opportunity Agenda145 or The Center for Media Justice146 would actually allow law students to learn from lawyers, organizers, and communications experts who work together to achieve change. A law school simply has to be willing to push traditional boundaries to find the expertise needed to prepare and support students.

142. Consider, for example, the Civil Rights Movement and the role that media played in voting rights reform. When heinous actions were broadcast on television, people began to pay more attention to the underlying issues and demand. Or, for a more present day example, consider how a number of New York-based organizations persuaded law enforcement via work with the City Council to severely limit the ways in which the city would honor a detainer ICE has issued to someone in custody it believes should be deported. See, e.g., The Bronx Defenders, New Bill Passed Makes New York City a Safer, More Just Place For Immigrants and Their Families, MAKE THE ROAD N.Y. (Oct. 6, 2014), http://www.maketheroad.org/article.php?ID=3748.
4. Deeper Exposure Approach: Public Policy and Social Science Partnerships

In addition to finding ways to hone communications skills, law schools could establish or strengthen connections to social science or policy programs. One interviewee summarized the benefit of this:

I can’t imagine someone doing community based work without some of that grounding: policy analysis or even business school classes. Community lawyering groups are so under-resourced that having that skill set to draw on is almost always a huge value to add to the work. It allows you to interface and bring in people with other expertise and be conversant in non-litigation: how to look at data, crunch it, etc.147

One example of a strong partnership between a law school program and a public policy program is that of Harvard Law School and the Harvard Kennedy School of Government.148 These schools have established the “Law and Social Change” Program of Study which recognizes the importance of teaching skills and strategies that are “less obvious links to law and social change.”149 The Program of Study supplements the lawyer’s critical analysis and problem solving skills gained in the law school building with classes that teach skills like data and policy analysis.150 In addition to more traditional but important legal skills courses (e.g., “Mediation”), the Program of Study encourages students to take particular courses that will help them better understand the philosophies underlying the organizations in which they are working with, such as “Organizing: People, Power, and Change,” and “Sparking Social Change,”151 and courses that will enhance student understanding of how nonprofits function, like “Financial Management in Nonprofit and Public Organizations” and “Operations Management.”152 These latter classes could be helpful for the aspiring movement lawyer since many of the organizations they

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147. Interview with Practitioner L (March 26, 2014) (encouraging emerging community lawyers to think about how to answer the question: “How do we take information and use it strategically to change the way people think.”).
148. Law and Social Change, Harv. L. Sch., http://law.harvard.edu/academics/degrees/jd/pos/lawsocchange/index.html (last visited Feb. 7, 2015) (“At the heart of the Program of Study is an effort to build a community of students and faculty committed to understanding and using law as a means of achieving social change.”).
150. Id.
151. Id.
152. Id.
will work with may need sporadic support in maintaining nonprofit status. While this work does not have to only be the movement lawyer’s job, having some working knowledge is beneficial and allows the lawyer to show goodwill towards the organization in times of need.

Overall, the partnership between Harvard Law School and the Harvard Kennedy School of Government not only serves to diversify the perspectives on how to approach movement lawyering philosophically, but the training it offers also diversifies the law student’s practical skills. While every law school may not have access to a school like the Kennedy School to create such a robust program, law schools could offer online courses in such topics and award students credit for participation. Or, law schools could diversify their own curricula so that non-lawyers (or movement lawyers) teach such courses within the law school building and law students could enroll for law school credit.

Many of the skills that law schools could help engender in movement lawyers can be taught through interdisciplinary partnerships with the community or other schools. And while some of these skills can be further honed and reinforced through experiential learning opportunities, increasing both interdisciplinary learning and experiential learning opportunities will fuel significant shifts in law school culture—shifts that will further movement lawyer development.

D. Transforming the Law School Culture

“Who are law schools lifting up as role models? ‘Law gods.’ People who made amazing arguments, won certain cases. [But], if you’re doing your job right hardly anyone will ever know who you are; professional humility is essential.”

“Movement lawyering is about removing yourself from being at the forefront of the movement.”

Making modifications to the traditional law school curriculum would go a long way towards better supporting aspiring movement lawyers. But students learn and observe outside of the walls of a classroom as well. What a law school supports and what happens

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153. Interview by Alexandra Moore with Practitioner E (May 20, 2014) (Not having idea that public interest is some homogenous group.)
154. Interview by Elie Zwiebel with Practitioner K (June 6, 2014).
outside of the classroom affects student perspective and training.\textsuperscript{155} Thus, the legal academy should work to establish a law school environment overall that demonstrates the elements of movement lawyering.

1. Limited Exposure Approach: Opening the Law School Doors to Non-Lawyers

For example, one simple strategy would be to actively encourage the presence of more non-lawyers in the law school building for activities like panel discussions and group conversations. Law school administration and various departments could also promote activities that encourage students to get outside of the law school building and into the community. What does this look like in practice? It means not only letting local bar associations host events or email students, but also helping to connect students with other leaders in the community who may not be lawyers. It means keeping up with current resistance movements in the geographic region and being nimble enough to provide spaces to discuss, question, debate, and foster a way for students to support such activities if they so choose. A law school, of course, needs to be mindful not to tokenize such community leaders or organizers, instead crafting thoughtfully, intentionally, and in partnership with such leaders or organizers exposure for students that could be helpful for students’ learning processes and that could connect them to opportunities for future work as well.

A law school could also consider creating stronger relationships with national entities that support or teach movement lawyering. For example, a local or regional National Lawyers’ Guild chapter,\textsuperscript{156} which has long been known to support the idea of movement lawyering and has a vested interest in engaging with law students, could offer students an additional outlet for learning. Engaging with the Bertha Justice Institute, a subset of the nationally known legal advocacy group, the Center for Constitutional Rights, that actively pursues efforts to train students and future movement lawyers,\textsuperscript{157} would simi-

\textsuperscript{155}. \textit{See, e.g.}, Cummings, \textit{supra} note 93, at 210–11 (arguing that field placement models teach students how to work with community organizations as well communicate the importance of valuing social justice work); \textit{see also} Ashar, \textit{supra} note 92, 357–59 (arguing that a school’s investment in clinical education and encouraging students to dialogue and think about systems of power serves to “radicalize” students in a democratic way).


\textsuperscript{157}. For example, the Bertha Institute regularly hosts conferences and trainings for students and practitioners to engage in both theoretical and practical conversations and activities cen-
Teaching for Change

larly be useful. A law school should be proactive in reaching out to such a group and in providing a forum for such enhanced education and exposure at the law school building. But overall, considering associations that go beyond traditional legal groups and that emphasize some of the tenets of movement lawyering begins to adapt the current law school culture to be more responsive to movement lawyers’ needs.

2. Limited Exposure Approach: Supporting Student Discussions

A law school should also seek to foster discussions among students, even without collaboration with outside groups. For example, the law school could create informal spaces that help facilitate monthly student-to-student discussions on topics of interest to movement lawyers. While student organizations could take the lead on such efforts, it is important for the law school to set up an institutional structure and framework that would support and sustain such activities. This might mean designating a staff person’s time to help organize such events or facilitate interaction with the student groups, or it might mean having a rotating faculty member helping to lead such dialogues. Either way, a law school’s sustained involvement with such an endeavor would show that the school values such spaces and topics; structurally, it would help ensure that the existence of such programming would not live or die depending on the ebbs and flows of student groups. These types of opportunities would benefit all law students, and certainly first-year students, in a way that is manageable given the time constraints of being a new law student. Students should be enabled to choose to participate in such discussions and commitments outside the classroom if they have the time and desire. For example, to help train future movement lawyers, schools could consider offering such free reading groups, courses, or dialogues on topics such as story-telling, consensus-building, and inviting community participation.158

3. Deeper Exposure Approach: Re-defining What is “Legal Work”

As movement lawyering encompasses a wide range of skills that may look a little different but still add value to communities, law

158. Loyola University New Orleans offers free skills classes for several hours about once a week. February Skills Classes, LOY. UNIV. NEW ORLEANS, http://www.law.loyno.edu/february-skills-classes (last visited Feb. 7, 2015).
schools, as institutions, can expand what the law school considers to be “legal” work. This can be done in many ways, including by adapting practices in career offices, externship programs, and financial aid offices.

i. Employment and Career Advising

As an example, there have been increased conversations in the legal academy about “JD Advantage,” employment, which consists of jobs that do not necessarily require a law degree but benefit greatly from expertise in the law. In fact, for the class of 2013, the percentage of graduates employed in JD advantage jobs was almost 14%. The legal academy and the bar have been willing to uplift and embrace this concept of the JD Advantage employment and, in turn, students’ thoughts on what one can do with a law degree have expanded. When a law school demonstrates that it values such types of employment and proves it by hiring career counselors who specialize in such work or organize programming that exposes students to this work, then students begin to understand the work, place more value on it as a career path, and view it as viable options for themselves. Placing value on movement lawyering as a potential career path should be even easier to do since a law degree is still necessary to complete the work.

Staff members at career advising offices, people who often have extensive contact with students, must also be trained on this type of lawyering—just like the training needed for JD Advantage careers. They must understand, as one interviewee said, that “public interest is not some homogeneous group” and that aspiring movement lawyers might actually reject traditional public interest placements. In practice, if a student arrives for an advising session and mentions buzz words like, “building power” or supporting communities, the staff person recognizes that just directing them to traditional public interest lawyering might not be the best fit. If well informed and trained, then the staff member can provide such a student with direction on poten-

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159. According to NALP, the National Association for Law Placement, JD Advantage jobs are jobs that do not require bar passage, an active law license, or involve practicing law in the traditional sense. However, in these positions, a JD provides an advantage in obtaining or performing the job. What Is the JD Advantage, Nat’l Ass’n of Law Placement, http://www.nalp.org/jdadvantage (last visited Feb. 7, 2015).


161. Interview with Practitioner H (March 27, 2014).
tial organizations to consider engaging with locally or supply students with a list, for example, of lawyers or organizers in the region or beyond.

ii. Legal Externships

A legal externship office must be willing to understand that the work one undertakes at a movement lawyering organization is going to be diverse and will not only involve traditional legal tasks. Students should still be able to be awarded credit for participating in such a placement and they should not have to work through extra hoops to do so, provided standard requirements are met, including, if required that a lawyer is available to supervise. This requires, however, faculty and staff in such a program to have some basic knowledge of this type of work and be willing to have conversations with others to learn more. Additionally, since legal externships may be a gateway to legal employment, there must be a connection and understanding between the career office and externship office, if they are different, about JD Advantage careers and work that looks less traditionally legal is rapidly becoming more popular and acceptable.

iii. Financial Assistance and Loan Repayment

One of the most obvious ways a law school can demonstrate support is to devote financial assistance to a particular area. Law schools should expand ways for students to receive financial support for their work as movement lawyers both during and beyond law school. Financial assistance is critical for most public interest lawyers but is particularly necessary for movement lawyers, as the grassroots organizations that are typically served by such lawyers can rarely provide financial compensation; they are often struggling just to stay afoot. Because of this, law students and lawyers often are unable to work with such organizations if a legal organization or some other entity cannot offer funds. In today’s job market, however, it has become common for law schools to partner with public interest employers to share costs for legal fellows or new hires.162 Such efforts help graduates obtain jobs and help organizations get the support they need without placing too much of a burden on the group or the

school. In this case, law schools can look beyond its usual partners and work to create partnerships with local grassroots organizations.

Where such partnerships are unavailable or the groups are unable to share such a financial burden, law schools can consider establishing formal relationships with other entities that might provide support. National alliances, national training centers like the Bertha Justice Institute or the Shriver National Center on Poverty Law, and the like, are entities that might be better able to place students at organizations across the country and sponsor student work during the summer or upon graduation. Law schools might also consider developing partnerships with philanthropic groups, namely social justice focused foundations. Within the last few years, in fact, the Ford Foundation initiated a program that would place law students from four particular law schools at a variety of their grantee organizations for summer employment. The Ford Foundation provides financial support to participating students. In its first year, up to 100 paid legal fellowships were available. Such an endeavor, with some minor tweaks, could be easily adapted to provide opportunities for law students to work with movement lawyers in the field for pay without placing much, if any, burden on the law school itself.

In addition, law schools can work to expand and, in some cases, restructure, loan repayment programs to ensure that students engaged in movement lawyering can reap such financial benefits. For example, some law school repayment programs require a certain percentage of work to be legal or for recipients to be employed at a legal organization. Definitions of what is considered ‘legal’ are often restrictive so that policy work or work in support of grassroots organizations may not qualify. These constraints could deter students from pursuing this work at all, as promise of financial support for lower-paying public interest legal jobs is critical for students facing large amounts of debt.

163. Of course, such entities must be willing to partner with the law school.
CONCLUSION

This article shows how there are a number of ways, particularly within four areas—experiential learning, professional responsibility and ethics, interdisciplinary learning, and the overall law school culture—that law schools can adapt to better strengthen the support and training provided to future movement lawyers. Given life by the voices of actual movement lawyers, this article presents tangible recommendations that offer both limited and deeper exposure to movement lawyering principles and practices. If implemented, legal education can move one step closer towards graduating more “practice ready” movement lawyers.

I will never forget how when determining whether we should issue a written report on a particular topic, my former supervisor examined its strength and value, at least in part, by whether it would “have legs.” She never aimed to produce reports that might appear useful on some level, but would ultimately collect dust while sitting, unread and untouched, on a bookshelf. Instead, my supervisor hoped communities would utilize the report to mobilize their base, strengthen their campaigns, and ultimately, achieve their desired result for social change. It is my hope that this article too “has legs” and sparks others to think about how they can better prepare students for this type of lawyering. This article just brushes the surface of what can be done in legal education, specifically offering discrete and attainable recommendations for reform. I hope it generates new ideas, invokes questions, and sparks a “movement” in its own right.
BOOK REVIEW

The Lieber Code, Lincoln, and Emancipation During the Civil War: Review of John Fabian Witt’s Lincoln’s Code: The Laws of War in American History

ROBERT FABRIKANT*

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INTRODUCTION

Abraham Lincoln is perhaps the most towering figure in American history. He held the nation together during its only civil war, he freed the slaves (it is often claimed), and he was assassinated while in office. All of this contributes to making Lincoln an exceedingly sympathetic historical character of mythical proportions. However, the

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Howard Law Journal

circumstances surrounding Lincoln’s presidency have sometimes caused historians to be too generous in giving him credit for events which happened during (and sometimes after) his presidency. Indeed, the desire to lionize Lincoln sometimes causes his boosters to overlook, even suppress, important contributions of his contemporaries.

Yale Law School Professor John Fabian Witt’s award-winning LINCOLN’S CODE: The Laws of War in American History¹ takes this phenomenon to an all-together new level. Witt retitles a famous legal code, giving it Lincoln’s name but knowing full well Lincoln neither wrote the code nor made any contribution to it, knowing full well the identity of the actual author, and knowing equally that the code at issue has, since its publication more than 150 years ago, always been known by the name of its actual author (and never by Lincoln’s name). The moniker “LINCOLN’S CODE” is a fiction contrived by Professor Witt, and is, to say the least, a rather awkward instrument by which to introduce a work of non-fiction.

Professor Witt argues that the comprehensive code of war issued by the Union army during the Civil War should no longer be called Lieber’s Code² (after its undisputed author Francis Lieber) and should be renamed Lincoln’s Code in honor of President Lincoln. Witt claims this name change is justified because Lieber’s Code was “required by” the Emancipation Proclamation (the “Proclamation”),³ and therefore is “better thought of as Lincoln’s.”⁴

However, Witt’s assertion of a salutary connection between the Proclamation and the Lieber Code is contrary to the record. Lieber was a critic, not an admirer, of Lincoln when it came to the issue of military emancipation and, in particular, the treatment of fugitive slaves. Lieber believed that Lincoln and his generals had acted contrary to natural law in not granting immediate freedom to fugitive slaves, in allowing slaveholders, including Confederate slaveholders, to retrieve fugitive slaves who had fled to Union army camps, and in barring fugitive slaves from entering Union army camps. The unfortu-

¹. JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012) [hereinafter LINCOLN’S CODE]. The book won the Bancroft Prize and was a finalist for the Pulitzer Prize.


³. Proclamation No. 17, 12 Stat. 1268, 1268–69 (Jan. 1, 1863) [hereinafter Emancipation Proclamation or Proclamation].

⁴. LINCOLN’S CODE, supra note 1, at 8.
nate truth is that Lieber was dismayed by Lincoln’s emancipation policies, and a key reason he crafted the Lieber Code was to remedy perceived defects in those policies. The Proclamation and Lieber’s Code are separate and distinct historical documents that reflect the fundamentally different positions of their respective authors on critical matters relating to the freeing of slaves and the treatment of fugitive slaves. Contrary to the title of Witt’s erudite tome, the Code rightfully belongs to Lieber, not Lincoln.

In any event, Lincoln’s undisputed authorship of the Proclamation does not justify giving him credit for Lieber’s Code. That would be like calling the Marshall Plan the “Truman Plan” simply because it happened on President Truman’s watch. Witt’s decision to insert Lincoln’s name likely reflects the recognition that Lincoln’s name will attract more buyers than Lieber’s. It certainly does not reflect a disinterested historical analysis.

I. Overview

On April 24, 1863, the Union military issued one of the most momentous documents of the Civil War era: the Lieber Code.\(^5\) This document bore the formal title “General Orders, No. 100,” and stated that it had been “prepared by Francis Lieber.” It was widely known at the time, and thereafter, as Lieber’s Code (or “the Lieber Code,” collectively referred to herein as the “Code”), in recognition of its author: Francis Lieber.\(^6\) The Code represented the first time a belligerent nation had set out in writing the rules it believed governed the conduct of war between sovereign states.\(^7\)

Francis Lieber is not widely known today, but, in 1913, on the 50th anniversary of the Code, he was praised as the “patron saint” of the American Society of International Law.\(^8\) This accolade was bestowed upon him by Elihu Root, President of the Society and one of the most highly acclaimed American statesmen and lawyers of his

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5. Lieber Code, supra note 2.
6. In a recently found post-war letter, Lieber mentions that one of the Board members, General Hitchcock “made some transpositions and changes,” and that Halleck “added to [the end of] section 43.” The words added by Halleck were: “and the former owner or State can have, by the law of post-liminy, no belligerent lien or claim of service.” Lieber Code, supra note 2, at 153. Notwithstanding these transpositions, changes and additions, Lieber states: “I wrote the [C]ode.” All of this comes from Professor Mancini’s transcription of the Lossing Letter (which is attached hereto). See infra note 70.
7. See infra text accompanying note 14.
One hundred years later, Professor Witt pronounces this “patron saint” is a “forgotten figure” who no longer deserves to have his name appended to the Code, though there is no dispute he, not Lincoln, wrote it.11

But Lieber is not “forgotten.” Witt’s pronouncements of Lieber’s demise are entirely self-serving. Lieber’s reputation is alive and well. Lieber does not need to be exhumed in order to be vindicated. Though apparently unknown to Witt, Lieber still commands an impressive academic audience.12

For more than 150 years, the Lieber Code has occupied a distinct and distinguished position in the legal firmament of the United States and the international community. It has been described as “the foundation upon which modern international humanitarian law has been constructed,”13 and “without undue exaggeration to be something of a legal masterpiece—a sort of pocket version of Blackstone’s Commentaries on the Laws of England.”14

Professor Witt acknowledges that the Lieber Code has been “tout[ed] by generations of military men and lawyers . . . as a seminal document in the history of civilization.”15 But after heaping this well-deserved praise on Lieber’s gem, Witt nonetheless insists that Lieber must be cast aside in favor of Lincoln. Witt persists in this position even though Lincoln’s only apparent connection to the Code was in his ex officio capacities as President and Commander-in-Chief.16

This transfer of attribution from Lieber to Lincoln occurs on the jacket of Witt’s 2012 award-winning legal history entitled LIN-
The Lieber Code

COLN’S CODE. But the book is entirely about Lieber’s Code. Until Witt’s self-serving epiphany, there was no such thing as Lincoln’s Code.

Witt argues that Lieber should be jettisoned in favor of Lincoln because the Code was “a way of advancing the Emancipation Proclamation.” According to Witt, “it was Lincoln’s Emancipation Proclamation that required its production and sent it out into the world.” This is not true. The Proclamation did not, expressly or otherwise, “require” the Code or “send it” anywhere.

Moreover, contrary to Witt, Lieber’s purpose in drafting the Code was not to “advance” the Proclamation. Rather, with respect to emancipation, Lieber’s purpose was to rectify policies of the Lincoln administration, which had thwarted self-emancipation efforts by fugitive slaves. Under no circumstances can it be said that the Code was the handmaiden of the Proclamation such that Lincoln’s authorship of the one entitles him to credit for the other. The metamorphosis brought by Witt rearranges the historical record in a highly misleading manner.

Though Lieber was indisputably the cause and author of the Code, he was willing to share credit with others. The person he had in mind, however, was Union General Henry Halleck, not Lincoln. Halleck had a palpable connection to the Code; Lincoln did not.

II. Francis Lieber and the Lieber Code

Francis Lieber was a Prussian émigré, who had fought in the Napoleonic Wars. At the age of 23, he obtained a Ph.D. in mathematics from the University of Jena. He came to the United States in 1827 at the age of 29, and became a distinguished academic. He served as a professor of political economy at South Carolina College, and in 1857, he was appointed a professor of history and political science at Columbia College in New York City. According to Elihu

17. Lincoln’s Code, supra note 1, at 4.
18. Lincoln’s Code, supra note 1, at 8.
21. Id.
22. Id.
23. Id. at 6.
Root, Lieber was “a publicist distinguished upon both sides of the Atlantic.”\textsuperscript{24}

In July 1862, Lincoln appointed Halleck, a well-known military thinker, to be commanding general of the Union Army.\textsuperscript{25} Lieber was aware that Halleck had faced difficulties with Confederate guerillas in Missouri, so he sent Halleck a pamphlet he had written addressing guerilla warfare.\textsuperscript{26}

In November 1862, Lieber wrote to Halleck suggesting that President Lincoln “ought to issue a set of rules and definitions providing for the most urgent issues occurring under the Law and usages of War, and on which our Articles of War are silent.”\textsuperscript{27} Lieber’s letter gave three specific examples, which he believed required immediate attention: “\textit{The Spy}—Who is a spy? How is the spy to be punished? \textit{Paroling}\textsuperscript{28}—What is it? Who paroles? What punishment for breaking the parole? Who shall be treated as prisoner of war?”\textsuperscript{29} Notably, none of the issues identified by Lieber related to slavery or emancipation.

In mid-December 1862, the War Department issued an order appointing Lieber and four generals to a board responsible for proposing changes to the Articles of War, and for creating “a code of regulations for the . . . armies in the field, as authorized by the laws and usages of war.”\textsuperscript{30} The board decided the generals would take responsibility for revising the Articles of War and that Lieber would have responsibility for codifying the laws and usages of war.\textsuperscript{31}

Two months later, in February 1863, Lieber submitted a draft, to which the other members of the board and General Halleck made slight modifications. It was then “approved” by President Lincoln and issued as “General Orders, No. 100,” with an official date of April 24, 1863.\textsuperscript{32} When it was published, the official record stated that “Gen-

\begin{itemize}
\item \textsuperscript{24} Elihu Root, \textit{Frances Lieber}, 7 Am. J. Int’l. L. 453, 454 (1913) (quoting a May 20, 1863 letter from Lieber to General Halleck).
\item \textsuperscript{25} \textit{Id.} at 453.
\item \textsuperscript{26} \textit{Id.} at 454.
\item \textsuperscript{27} Hartigan, supra note 20, at 79–80 (1983) (quoting November 13, 1862 Letter from Lieber to Halleck). The Articles of War were a military code enacted by Congress in 1806, and repealed in 1951. Articles of War, 2 Stat. 359 (1806).
\item \textsuperscript{28} Paroling was the practice of releasing prisoners of war on their written promise not to rejoin the fray.
\item \textsuperscript{29} Hartigan, supra note 20, at 79.
\item \textsuperscript{30} \textit{Id.} at 85.
\item \textsuperscript{32} \textit{Id.}; see also James G. Garner, \textit{General Order 100 Revisited}, 27 Mil. L. Rev. 1, 5 (1965).
\end{itemize}
eral Order No. 100” had been “prepared by Francis Lieber LL.D.”33 It has since been referred to as the “Lieber Code,”34 and until 2012 by no other name.

Halleck never stated why he wanted Lieber to write the Code nor is there any record of Lincoln having put forth reasons why he may have wanted Lieber to prepare the Code. Therefore, the only evidence we have about the genesis of the Code is Lieber’s own accounts.

Lieber illuminated his reasons for writing the Code in three surviving documents.35 The first was in his November 13, 1862 letter to Halleck, discussed above.36 In that letter, Lieber cited spies, parole and prisoner exchanges as problems necessitating the creation of a code.37

The second document, written soon after the Code was issued, is a May 19, 1863 letter from Lieber to Charles Sumner, a Radical Republican Senator from Massachusetts.38 In this letter, Lieber mentioned prisoner exchanges, “the abuse of truce flags,” parole, guerilla warfare, and “the arrogant pretensions of the enemy to lay down absurd rules of law.”39 Given Sumner’s strong and well-known abolitionist views, the absence of any suggestion by Lieber that he had been motivated by slavery, emancipation, or the Proclamation in creating the Code undercuts Witt’s thesis. This is especially true given that the Proclamation had issued its final form four-and-a-half months earlier.

Nevertheless, in a third document, a January 21, 1866 letter, written by Lieber shortly after the War ended, Lieber for the first time mentions slaves and emancipation in describing the genesis of the Code.40 But, as discussed below, that letter does not support Profes-

33. Lieber Code, supra note 2, at 148. Although the official record stated that Lieber had an “LL.D,” I can find no support that he had a degree other than a Ph.D from the University of Jena.
34. Carnahan, supra note 31, at 669–70.
35. Mancini, supra note 12, at 328–31. Professor Mancini points to a fourth document, but that document no longer exists, and the only known account of the contents of that document “is more of an account of the procedures that the army followed in bringing [the Code] to completion than it is a report on the conditions and problems that caused Lieber or the army to believe [the Code was] necessary in the first place.” Id. at 328–29.
37. Id.
39. Id. (quoting May 19, 1863, letter Lieber to Sumner). Mancini states that this letter was quoted in Brainerd Dyer’s article, Francis Lieber and the American Civil War. Id. at 330 n.14 (citing Brainerd Dyer, Francis Lieber and the American Civil War, 2 Huntington Library Quarterly 449, 456 n.35 (1939)).
40. Id. at 329–31; (Lieber to Lossing, January 21, 1866.).
sor Witt’s assertion that the Code came about as a result of (or as an affirming of) the Proclamation. Instead, the letter shows that Lieber thought a code was necessary to counter the harsh manner in which the Lincoln administration had thwarted self-emancipation efforts by fugitive slaves.41 Quite regrettably for Witt, this letter was not “discovered” until shortly before he finished his book.42 This post-Civil War letter demolishes Witt’s thesis, though he refuses to admit it.

III. President Lincoln and the Lieber Code

President Lincoln had no known connection to the Lieber Code, other than to “approve” it. He did not participate in drafting it, and there are no documents or accounts reflecting the extent to which he studied the Code before he “approved” it.43 Witt concedes all of this, stating “[i]ndeed, there is little reason to think that Lincoln ever saw the text [of the Code] until it was near completion and ready to come out under [Lincoln’s] name.”44 Inexplicably, Witt does not mention that the order issuing the Code specifically stated it had been “prepared by” Francis Lieber. Thus, begins the slippery slope.

Giving Lincoln credit for the Code implies that he inspired or embraced its numerous articles. But, the only known evidence makes indisputably clear that the Code resulted from a suggestion made by Lieber to Halleck. There is no evidence Lincoln played a role in Halleck’s decision to ask Lieber to prepare the Code. It is, indeed, quite unlikely Lincoln played such a role because prior to the Civil War, Lincoln had slender military experience. He would have had little reason to ruminate on the “laws and usages of war,” which was the subject matter description contained in War Department’s December 1862 order, creating the board to draft the regulations, which ultimately became the Lieber Code.45 Nor would Lincoln have had much occasion prior to the Civil War to know about the “customary” or acceptable way belligerents had dealt with spies, parole, guerilla war-

41. Lieber to Lossing, January 21, 1866, see supra note 6.
42. Mancini, supra note 12, at 331.
44. LINCOLN’S CODE, supra note 1, at 237. Witt also concedes that “Abraham Lincoln took no role in commissioning the Code, at least not that we know of.” Id.
45. HARTIGAN, supra note 20, at 85.
The Lieber Code

fare, prisoners of war or countless other situations encountered in conducting international war, which is how Lieber, Lincoln and eventually the Supreme Court⁴⁶ treated the Civil War. Lieber’s Code set out a much more nuanced and comprehensive set of rules regarding the conduct of war than had occurred to Lincoln.

Changing the name to LINCOLN’S CODE also conveys the misimpression that the Code played an important role in the battle against slavery. But it did not.⁴⁷ Confederates murderously disregarded the Lieber Code’s prohibition on discriminating against combatants based on their race. In addition, the Union military failed to follow the Code on numerous occasions, perhaps most notoriously on Sherman’s March to the Sea. In truth, the Code had virtually no effect on the conduct of the Civil War,⁴⁸ but it had an enormous impact on the manner in which many future wars were fought.

Witt claims “Lincoln approved the [C]ode because (as Halleck and [Secretary of War Edwin] Stanton well knew) it expressed a view of military necessity very close to that which Lincoln had been developing,”⁴⁹ but Witt offers no documentary support for this speculation. Curiously, Witt does not argue that Lincoln’s motivation in “approving” the Code was to “advance” the Proclamation which had been issued almost four months earlier. Yet, Witt’s argument for putting Lincoln in Lieber’s shoes, relates entirely to Witt’s imagined symbiotic relationship between the Code and the Proclamation. Ironically, though Lincoln later acted in accordance with some of the important portions of the Code,⁵⁰ he did not act in conformity with all of the emancipatory provisions of the Code.

The grounds advanced by Witt to justify the unprecedented, and quite extraordinary, step of replacing an author’s (Lieber) name with the name of someone (Lincoln) who indisputably was not the author

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⁴⁷. Mancini, supra note 12, at 328 (The Code “made little impact at the time on Union officers.”); Carnahan, supra note 11, at 690; HARTIGAN, supra note 20, at 20. The Articles of War were a military code enacted by Congress in 1806, and repealed in 1951. Articles of War, 2 Stat. 359 (1806).
⁴⁸. See infra notes 38–39 and accompanying text.
⁴⁹. LINCOLN’S CODE, supra note 1, at 237.
⁵⁰. Lincoln issued his famous Order of Retaliation on July 30, 1863, which stated: “The law of nations and the usages and customs of war as carried on by civilized powers, permit no distinction as to color in the treatment of prisoners of war as public enemies. It is therefore ordered that for every soldier of the US killed in violation of the laws of war, a rebel soldier shall be executed . . . .” Order of Retaliation (July 30, 1863), reprinted in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 357 (Roy P. Basler et al., eds., 1953–55). This implemented Articles 57 and 58 of the Code.
are insubstantial and largely inaccurate. Witt argues that the Code was “a way of advancing the Proclamation and of arming . . . 200,000 black soldiers . . . .”\textsuperscript{51} But emancipation and the arming of black soldiers came about initially through Congressional legislation all of which were enacted five-and-a-half to eight-in-a-half months before the Proclamation was promulgated:\textsuperscript{52} emancipation first occurred with the D. C. Emancipation Act, on April 16, 1862,\textsuperscript{53} and the Second Confiscation Act (“SCA”)\textsuperscript{54} and the Militia Act in mid-July 1862,\textsuperscript{55} and the authorization to arm black soldiers first occurred in the Militia Act and the SCA. So, if anything, the Code was furthering Congressional legislation, not the Proclamation. Lincoln signed those statutes, but they all came about through Congressional, not Executive, initiative.

Witt also argues that the Code is “better thought of as Lincoln’s” because “it was Lincoln’s Proclamation that required its production and sent it out into the world.”\textsuperscript{56} But, the Proclamation made no reference to a later set of rules or regulations that would be needed in order to activate or implement it. Nor did the Proclamation “require” the issuance of an additional document. The Proclamation was a self-executing order and binding on the Union military. The Code, on the other hand, was issued for “information”\textsuperscript{57} purposes only and was not binding on Union forces.\textsuperscript{58}

Witt, in effect, justifies boosting Lincoln over Lieber by portraying the Code as constituting an adjunct to the Proclamation. But, the Code and the Proclamation are entirely distinct documents. Their separate identities cannot and should not be disregarded. And, most especially, the two documents should not be conflated in order to justify giving the author of one of the documents credit for both of them. As will be seen below, though the two documents certainly overlapped regarding the issue of emancipation, the documents were cre-

\begin{itemize}
\item \textsuperscript{51} Lincoln’s Code, supra note 1, at 4.
\item \textsuperscript{52} Professor James Oakes has argued, quite incorrectly, that statutory and military emancipation commenced with the enactment of the First Confiscation Act. See infra note 87.
\item \textsuperscript{53} See generally D.C. Emancipation Act, ch. 54, § 10, 12 Stat. 376 (1862).
\item \textsuperscript{54} See generally Second Confiscation Act, ch. 190, 12 Stat. 589 (1862).
\item \textsuperscript{55} See generally Militia Act, ch. 201, § 22, 12 Stat. 597 (1862).
\item \textsuperscript{56} Lincoln’s Code, supra note 1, at 4, 8.
\item \textsuperscript{57} The preamble to the Code stated that it was “published for the information of all concerned.” Lieber Code, supra note 2, at 1.
\item \textsuperscript{58} Burrus M. Carnahan, Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 Am. J. Int’l L. 213, 215 n.14 (1988) (“The Lieber Code was . . . informational rather than directive in nature. That is, President Lincoln was not ordering all members of the army to comply with the code; rather he was issuing it as one source . . . .”).
\end{itemize}
The Lieber Code

ated in response to different sets of problems and had significantly different provisions.

The Code had the very ambitious purpose of setting out rules to guide the Union army in dealing with the myriad issues which might confront an army in time of war. The Proclamation, on the other hand, dealt with a more limited, though also momentous set of issues: emancipation and the use of black soldiers. With respect to the latter issue, the Proclamation merely repeated the authorizations earlier given to Lincoln by the Militia Act and the SCA. In contrast, the Code did not directly address the authority to arm blacks. Rather, Article 57 of the Code adopted a revolutionary rule prohibiting bel- lingerents from discriminating against enemy soldiers on the basis of race. There was no comparable provision in the Proclamation.

The Code and the Proclamation both dealt with the issue of emancipation, but in materially different ways. The Proclamation’s most significant and controversial provision purported to free most slaves behind Confederate lines. In contrast, the Code did not address the legal status of slaves behind Confederate lines. It did not state they were free. The necessary implication in the Code was that slaves behind Confederate lines remained slaves (because they were governed by the laws of the Confederate states). Under Article 43, they became free only after they crossed into Union lines and thus were no longer subject to Confederate federal or state law.

At first blush, it would appear that both the Code and the Proclamation called for Confederate slaves coming within Union lines to be treated in virtually the identical manner, viz., to be treated as “free.” Article 43 of the Code stated that slaves coming into Union lines were “immediately” free and could not be returned to bondage. The Proclamation similarly provided that the Union military would “recognize and maintain the freedom of” slaves behind Confederate lines. But, the reality was quite different.

The Code was considerably more generous in granting emancipation to Confederate runaways than the Proclamation. All such runaways coming within Union lines were freed by the Code, and all fugitive slaves in conquered territories were freed by the Code. But,

59. Lieber Code, supra note 2, at 153.
60. Emancipation Proclamation, supra note 3.
61. The Lieber Code in that respect was consistent with what Lieber had written after the Mexican War, viz., that “slavery did not exist in conquered Territories unless authorized in new affirmative legislation by the conquering state.” LINCOLN’S CODE, supra note 1, at 227. Lieber
hundreds of thousands of fugitive slaves who were set free under the Code were not granted their freedom under the Proclamation. The emancipatory provisions of the Proclamation did not apply to Tennes-
see, or to a large number of conquered and occupied areas of Louisiana and Virginia, and not to the 48 counties formerly of Virginia belonging to West Virginia. Thus, the Proclamation left in slavery more than 300,000 blacks who would have been freed under the Code.62

Lincoln was quite deliberative in deciding to exclude the con-
quered areas and Tennessee from the Proclamation. When asked by Secretary of the Treasury (and future Chief Justice of the United States) Salmon Chase in September 1863 to expand the Proclamation to include the conquered areas, Lincoln declined to do so.63 In denying Chase’s request, Lincoln was, in effect, refusing to conform the Proclamation to the Code (though there is no record of Lincoln being aware that he was acting contrary to the Code and the SCA). Thus, it was not until the end of the War, with the ratification of the 13th Amendment, that large groups of slaves in conquered areas, Tennes-
see, and West Virginia received their freedom, notwithstanding the Code provision giving them freedom “immediately.” Lincoln’s refusal to follow the key emancipatory provision in the Code alone disquali-
ifies him from being treated as the author the Code.

Witt would also have us believe that the Code was conceived by Lieber as a response to the Proclamation. But Witt’s single-minded emphasis on the emancipatory aspects of the Code overlooks the fact that only a handful, perhaps as many as five, of its 157 articles dealt with emancipation or race.64 Most of the Code dealt with the hard-
scrabble issues Lieber had identified in trying to persuade Halleck to authorize Lieber to write the Code: spies, parole, prisoner exchanges,

had also expressed this same view in a June 867 letter to Attorney General Edward Bates. See Paul Finkelman, Francis Lieber and the Modern Law of War, 80 U. Chi. L. Rev. 2071, 2083 & n.65 (2013).

62. Ironically, many, of these slaves in conquered areas, in Tennessee and in West Virginia were also entitled to their freedom under the SCA, but Lincoln’s military treated them as if they were not free. Lincoln’s refusal to expand the Proclamation to include the conquered areas of the Confederacy and all of Tennessee shows that he was unwilling to emancipate slaves to the full extent permitted by law. See Emancipation Proclamation, supra note 3; see also Second Confiscation Act, supra note 52.


64. Leiber Code, supra note 2, at 152–53, 155.
and guerilla warfare, but not emancipation or the treatment of fugitive slaves.\textsuperscript{65}

IV. Professor Witt’s Additional Justifications for Substituting Lincoln for Lieber

I have brought the above arguments to the attention of Professor Witt. He remains convinced his decision to remove Lieber in favor of Lincoln is correct.

Professor Witt argues “General Halleck (and probably [Secretary of War] Stanton) felt a need to issue a statement of what the Union believed the laws of war allowed and disallowed” because the Proclamation took “a sufficiently controversial position on a long-standing question about the law of war.”\textsuperscript{66} But, this is rank speculation. No documents or accounts show Halleck or Stanton had such a desire or concern, and no documents are mentioned by Witt. It would have been quite naïve for Halleck or Stanton to believe that retaining an academician to prepare a gratuitous, non-binding document would be an effective way of providing legal cover for the Proclamation.

Witt does not identify the “long-standing question” raised by the Proclamation, which the Code addressed. Presumably, he means to refer to “emancipation,” but that principle had already been enshrined by Congress in four pieces of legislation enacted many months before the Proclamation was issued.\textsuperscript{67}

There were two truly “controversial” issues about the Proclamation: first, whether the President had constitutional authority to promulgate it,\textsuperscript{68} and, second, whether the Proclamation’s extraterritorial application within the Confederacy constituted a proper measure under the international law of war. But, the Code dealt with neither

\textsuperscript{65} Witt also claims that Lieber also was motivated by a desire to protect black soldiers from maltreatment by the Confederates. It is true that the Code contains a very protective provision in that regard, but nowhere does Lieber state that protecting black soldiers was one of his motivations in drafting the Code; nor does Witt point to any such statements by Lieber. \textit{Lincoln’s Code, supra} note 1, at 22, 25.

\textsuperscript{66} Email from John Witt, to author (July 17, 2014, 8:56 PM) (on file with the author).

\textsuperscript{67} The four pieces of legislation were the D.C. Emancipation Act, The Territories Act, the SCA and the Militia Act, the latest of which were passed in mid-July 1862. \textit{See} Fabrikant, \textit{Of Contrabands, supra} note 63, at 321–46.

\textsuperscript{68} The leading Northern critics of the Proclamation focused on whether it violated the Constitution, not on whether it was a proper war measure within the purview of the international law of war. \textit{See} Benjamin R. Curtis, \textit{Executive Power} (1862); Joel Parker, \textit{Constitutional Law and Unconstitutional Divinity} (1863). Moreover, the Lieber Code itself did not address either the constitutionality of the Proclamation, or its extraterritorial application within the Confederacy, the latter being its truly novel feature.
of those issues. Witt’s attempt to link the Code to the Proclamation is entirely unavailing.

Professor Witt claims that there is “direct evidence” to support having Lincoln’s, not Lieber’s, name on the Code because “slavery and emancipation . . . gave rise to the Code.”69 Witt’s “direct evidence” is the recently discovered 1866 letter written by Lieber to Benson Lossing (the “Lossing Letter”), in which, Witt claims, Lieber said “it was slavery that called the [Lieber] Code into being.”70 But, the letter says no such thing.

Witt obfuscates rather than illuminates the meaning of the Lossing Letter. That letter makes plain that Lieber’s motivation in writing the Code was not “slavery and emancipation,” but to correct the Union military’s monstrously poor response to “slavery and emancipation.”71

Witt seeks to create the impression that the Lieber Code was intended to solve salutary problems created by the Proclamation (i.e., emancipation and the arming of blacks), such that if there had been no Proclamation, there would have been no need for the Code. In fact, as the Lossing Letter shows, Lieber’s original purpose was to deal with problems, which preexisted the Proclamation.72 The ugly reality is that the Lossing Letter does not applaud Lincoln or the Proclamation; rather, it condemns policies and practices of Lincoln’s military that frustrated self-emancipation by fugitive slaves.73

Most importantly, the Lossing Letter was written in January 1866, more than three years after the Proclamation was issued, yet the Lossing Letter does not mention the Proclamation.74 If Lieber indeed had the Proclamation in mind when he drafted the Code, surely he would have said so in the Lossing Letter. But, he didn’t. This staggering omission, which is ignored by Witt, is a crushing blow to his thesis that Lieber’s purpose in crafting the Code was to “advance” the Proclamation. Witt’s claim that the Lossing Letter constitutes “direct evi-

69. Email from John Witt, to author (July 18, 2014, 10:03 AM) (on file with the author).
70. Lieber to Lossing, January 21, 1866, Lieber Papers, LC. The letter cited by Witt was written by Lieber on January 21, 1866, to Benson J. Lossing, a historian. The letter lay hidden for almost 150 years. It was “discovered” only recently, by Professor Matthew Mancini, who wrote about it in an excellent article on the Lieber Code. See generally Mancini, supra note 12. I am attaching a copy of Professor Mancini’s transcription of the hand-written Lossing Letter as an Appendix.
71. Lieber to Lossing, January 21, 1866, Lieber Papers, LC.
72. Id.
73. Id.
74. Id.
The Lieber Code
dence” in support of his decision to remove Lieber’s name in favor of Lincoln’s shows a worrisome disregard of the contents of the letter.

Witt’s removal of Lieber’s name is wrong not only because of historical reasons, but also because, with respect to emancipation, Lieber acted solely in response to a moral imperative, whereas the same cannot be said for Lincoln. Rather, Lincoln justified issuing the Proclamation on the ground of “military necessity.” and then belatedly, at the suggestion of Secretary of the Treasury Chase, Lincoln added to the Proclamation itself that it as “an act of justice.” Lieber, on the other hand, believed, and so said in the Code, that fugitive slaves became free when they crossed into Union lines because “so far as the law of nature is concerned, all men are free.” (Article 42 of the Lieber Code). He offered no other reason. While perhaps politically defensible, Lincoln’s refusal to extend this moral principle enshrined in the Code (and the Second Confiscation Act) to all of the conquered areas and Tennessee renders all the more unconscionable Witt’s removal of Lieber’s name in favor of Lincoln’s.

Witt also claims that in the Lossing Letter, Lieber said “it was confusion over the status of slaves in the war that had first prompted him to call for a restatement of the laws of war.” This too is untrue. In the Lossing Letter, Lieber specifically mentioned three practices engaged in by the Union military to which he strongly objected: first, Union General Benjamin J. Butler treating the runaways as property and retaining custody of them as “contrabands,” second, General George McClellan and other Union generals permitting rebels to enter Union camps “and insolently claim their slaves;” and, third, the willingness of McClellan to use Union troops to “put[ ] down . . . slave insurrection, and then step back and fight the masters again!” Contrary to Witt, Lieber was not “confused” by the conduct of the Union military nor did he mention “confusion” by others. Rather,

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77. Lincoln’s Code, supra note 1, at 381.
78. See generally Fabrikant, Military Necessity, supra note 75.
79. Lincoln’s Code, supra note 1, at 229.
81. Mancini, supra note 12, at 333.
82. Id. at 333–34.
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Lieber had perfect clarity about what was going on, and he was outraged by it.

All of the conduct Lieber found objectionable had been tolerated, even participated in, by Lincoln, including the rough treatment by the Union military of fugitive slaves. It would be perverse to indulge the fiction that Lincoln, not Lieber, authored the Code, when the Code was intended to eliminate harsh conduct which Lincoln had allowed to stand for a considerable period.

Prior to the issuance of the Proclamation, Lincoln had knowingly tolerated and personally participated in harsh treatment of fugitive slaves by the Union army. He prevented fugitive slaves from entering Union army camps, permitted his generals to do the same, and allowed Confederates to enter the camps to reclaim their runaways. On one occasion, Lincoln himself ordered that fugitive slaves under the control of the Union military not be permitted to enter the District of Columbia. Lincoln’s failure to prohibit his commanders from returning fugitive slaves to their owners prompted Congress to pass a statute in March 1862 making it a criminal act for the Union military to do so.

While perhaps unpleasant to recall, Lincoln did not support emancipation of fugitive slaves until he signed the SCA in mid-July 1862, and then only grudgingly. Quite surprisingly, at that relatively late point in the War, Lincoln called into question the Constitutionality of the SCA by expressing doubt that Congress had the power to emancipate slaves. The SCA was the product of Congressional, not Executive, agitation, and Lincoln threatened to veto it because he thought its emancipation provisions went too far and came too soon.

83. See generally Fabrikant, Of Contrabands, supra note 63.
84. Id.
85. Id. at 333.
86. Id. at 331; see also Act to Make an Additional Article of War, ch. 40, 12 Stat. 354 (1862).
87. Professor James Oakes has argued that the Lincoln administration began emancipating slaves as early as August 8, 1861, just two days after Lincoln signed into law the First Confiscation Act, ch. 60, 12 Stat. 319 (1861). James Oakes, Freedom National: The Destruction of Slavery in the United States, 1861–1865 xiii (2013). Contrary to Oakes, the FCA did not purport to emancipate any slaves, and the Lincoln administration did not commence a policy of universal military emancipation until the Proclamation was issued by President Lincoln on January 1, 1863. See Fabrikant Great Emancipator, supra note 80, at 96, 111.
88. See generally Fabrikant Of Contrabands, supra note 63, at 339–45.
89. Thus, in a veto message sent to Congress in response to his learning of the emancipation provisions in the SCA, Lincoln said, “It is startling to say that Congress can free a slave within a state.” Id. at 342 (reproducing portions of the veto message).
90. Id. at 341–42.
It would be lamentable to give Lincoln credit for the Code under a theory that it promoted emancipation (and the Proclamation) when Lieber’s motivation was to assure the very freedom for runaways that Lincoln and his commanders had long denied them.

CONCLUSION

“General Orders No. 100” has always been known as the Lieber Code, but never LINCOLN’S CODE. So, we end here with where we started: Changing the author’s name on the Lieber Code would be like calling the Marshall Plan the “Truman Plan” simply because it happened on Truman’s watch. Lincoln would have emphatically rejected any effort to give him credit for the work of others. In this respect, imitation is the highest form of flattery for Lincoln. Let it remain the Lieber Code.
My dear Sir,

On my return to N. York I found your letter of the 12th. Pettigru was never judge. He was, as lawyers often told me, the profoundest read lawyer of the South, but he was never on the bench. You may recollect that he was the leading Union man of S. C. on the [illeg.], and van Buren I have often heard, did not appoint him on the supreme bench, when Justice Wayne was raised to that dignity, because Petigru had said something smarting in joke about v. B. as I have heard. If you see me next I will tell you much about him, especially an anecdote of great interest.

You will not call him then judge, as little as me professor. You know I donot wish it. If you cannot call me simply Francis Lieber, or Mr. (which I prefer) call me Dr. Fr. Lieber but professor, no matter now for what reasons, is not pleasant to me.

And now the genesis of “Old Hundred”—to be used by you, if you like it, but not to be transcribed. I merely give you the sketch that you may understand the whole. I take it for granted that, as historian, you like, above all, to trace the the [sic] growth, the genesis of things.

You recollect the time when Butler brought the term contraband in vogue—a term which (wrongly) took amazingly. Then came the time when McClellan actually returned runaway slaves. Rebels would come into our lines and insolently claim their slaves. At length McCld. Issued his order in which he stated that in case of servile insurrection he would, with our army, help putting down the trouble, and then step back and fight the masters again! There was such a lack of knowledge of the law of war shown in all this, that I thought it was high time to say a word about it. I wrote my article on the status of slaves in war, in the Evening Post and sent it to Gen Halleck and Stanton, telling the former that the Govert ought to issue in some form or other a code, or a set of instructions on the international rules of war in the for our officers, having already written my pamphlet on Guerrilla Warfare, which also was universally misunderstood. The government had published this. I send you a copy. And, by the way, many officers have told me, and continue to tell me, that this pamphlet has been a great
guide to them in court martials. They wrote to me from all quarters thus.

Halleck did not answer, when an occasion occurred, which made me repeat my urging of the code, always expecting that Halleck would take the lead, he being deeply versed on the law of war. The reply to this was a summons by telegraph to come to Wash. where Stanton appointed, by Gen. Order, me, General Hitchcock and 4 more generals as committee. I mention myself first because I was the first on the list.

An hour later. I have looked for the order, and cannot immediately lay my hand on it. You shall have a copy. I wrote the code. It was printed as Mr. L. Genl Hitchcock made some transpositions and changes. Genl Halleck required some additions; he added to §43 (page 9) the words at the end, beginning “and the former owner or State can have, by the law of postliminy,—I must hasten to the law school to teach on old [illeg.]

Ever yours,
F. L.
I wrote to you from Wash. [illeg.]
INTRODUCTION

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      1. The Brilliance of the Letter
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INTRODUCTION

I want to share with you this evening my perspectives and interpretations of three of Dr. King’s major speeches and epistles to all of...
us, all of which are probably in some form known to you: his Letter from Birmingham City Jail, his Nobel Peace Prize Lecture, and his Speech at the Riverside Church. I will do so in that order, which also reflects the chronology of these documents during King’s public and global ministry. I want to share these perspectives in order to demonstrate that King’s ministry and major public actions in the Civil Rights Movement, as well as our understanding of these particular messages, must be somewhat re-interpreted by giving considerably more weight to King’s global commitments and thinking as they were influential throughout most of his ministry, that is, beginning shortly after his emerging in 1955 as leader of the Montgomery Bus Boycott. This is contrary to the American-centric vision of King’s aims and actions that dominates our current narrative. Further, King’s international commitments and actions gave him a visible measure of global authority, which continued to be invoked after his assassination in 1968 in several parts of the world.

And so I will discuss the basis and emergence of King’s global consciousness and commitments, as history approaches his Letter from Birmingham City Jail, including some reflections on that great document. I will then move towards his Nobel Peace Prize Lecture, and its significance for King’s increasing global authority, before turning to the lead-up and content of his Riverside Church Speech in 1967. I will close with noting some continuing global invocations of King’s authority and their significance. It will be apparent early on that issues and historical considerations of race, law including international law, human rights, and contextual process around King’s actions are critical to this discussion.

I. KING’S EARLY INTERNATIONAL PERSPECTIVES

In March 1957, on the heels of the successful Montgomery Bus Boycott, King and his wife Coretta traveled to West Africa to attend Ghana’s independence ceremony. He was invited by Kwame Nkrumah, Ghana’s Independence Prime Minister, and Bayard Rustin, the noted civil rights organizer, coordinated the invitation with the

1. Martin Luther King, Jr., Letter from Birmingham City Jail (1963) [hereinafter The Letter].
help of Bill Sutherland, an American civil rights activist who was then working for Ghana’s finance minister. In Accra, King met Vice President Richard Nixon, and invited him down to Alabama “where we are seeking the same kind of freedom the Gold Coast is celebrating.” Also attending the ceremony were several American civil rights leaders, including A. Philip Randolph, Ralph Bunche, Mordecai Johnson, Horace Mann Bond, Congressman Charles Diggs, and Congressman Adam Clayton Powell. Not only did the inclusion of the young Martin Luther King in this group certify his recognition then as an American civil rights leader, but the presence of that group including King in Ghana as invited by Nkrumah—himself a graduate of Lincoln University in Pennsylvania—represented a tangible Pan-Africanist bond between the African independence struggle against European colonialism and the American Civil Rights movement.

King was emotionally moved by the meaning of the Ghanaian independence ceremony. There, the recently incarcerated Nkrumah and his ministers wore their prison caps, symbolizing their struggle to win Ghana’s freedom, prompting King to later write: “When I looked out and saw the prime minister there with his prison cap on that night, that reminded me of that fact, that freedom never comes easy. It comes through hard labor and it comes through toil.” At midnight, upon the lowering of the British Union Jack and the raising of the flag of an independent Ghana, King noticed the half million Ghanaians there on the polo grounds, and wrote, “Before I knew it, I started weeping. I was crying for joy. And I knew about all of the struggles, and all of the pain, and all of the agony that these people had gone through for this moment.” Interviewed on the radio while in Ghana, King said, “[T]his event, the birth of this new nation, will give impetus to oppressed peoples all over the world . . . [I]t will have worldwide implications and—not only for Asia and Africa, but also for America . . . . It renews my conviction in the ultimate triumph of justice . . . and that eventually the forces of justice triumph in the universe, and somehow the universe itself is on the side of freedom and justice. So that this gives new hope to me in the struggle for freedom.”

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5. Id. at 158–59.
6. Id. at 163.
7. Id. at 160.
8. Id. at 146.
Before departing, the Kings had a private lunch with Prime Min-
ister Nkrumah, and met with anti-apartheid activist and Anglican
priest Michael Scott and peace activist Homer Jack. On the way back
to the United States, in London, the Kings had lunch with the great
Trinidadian writer, philosopher, and activist C.L.R. James who was
very impressed by the success of the Montgomery Bus Boycott.9

The above shows that King did not become an international
leader later in his ministry. From Ghanaian independence, to which
he was invited by Nkrumah, King linked the African decolonization
movement to the U.S. Civil Rights Movement, in finding identical
goals of defeating racism, of doing it with non-violence, and with con-
sistent, demanding struggle against white and European racial domi-
nation. Moreover, his meetings in Ghana with important anti-
apartheid and peace activists presaged his commitment to soon speak
out against South African apartheid and to be committed to the cause
of global peace, and as I will soon discuss, presaged his increasingly
linking these global rights and anti-war narratives to the U.S. civil
rights narrative. Thus, King saw the international struggle in Africa as
both inspirational to the American civil rights struggle, and as part of
the same global struggle against racism and for black freedom.

Shortly after his return from Ghana, King delivered a significant
sermon on the cross relationship between Ghanaian independence
and the U.S. civil rights struggle, and he did so around the story in
Exodus of Moses leading the Israelites out of the wilderness.10 As was
his usual talent, to which I was fortunate to be exposed, King’s sermon
was perfectly clear to folks with a fourth grade education, while the
structure of his ideas and grounding of his narrative could withstand
scrutiny by learned theologians. Here, and later in his idea of the rela-
tionship between demanding protection of the rights of Ghanaians
and black South Africans, and the same for black Americans’ rights
against white American racism, King closely approached but did not
go quite as far as the seminal thinking and actions of W.E.B. DuBois.
DuBois held that blacks’ rights in America would only be protected
when they made common cause with colonized and subordinated peo-

9. Id. at 9.
10. Id. at 155.
global struggle and necessarily inspired and borrowing from it, as a first priority in realizing black American rights and dreams.

But almost from the beginning, King joined Dubois in helping to shape the Black International Tradition. This historical continuity includes confronting white hostility and opposition to any internationalizing of their rights struggles by blacks. We have seen this manifested in so many ways, including, as I will shortly discuss, the opposition of King’s closest advisers to his making his Riverside Church speech. Moreover, we are all aware of the influence of the great Indian independence leader Mohandas K. Gandhi and his philosophy and strategies of non-violence on King while he was in seminary and which he openly acknowledged. But as Professor Chandola discussed, Gandhi not only influenced King’s philosophy, but had a wider influence on the early American Civil Rights Movement a generation before King’s arrival. In the mid-1930s, influential American black leaders visited Gandhi who was then leading India’s civil disobedience campaign against British occupation colonialism. Benjamin Mays, the legendary president of Morehouse College, King’s alma mater, who would eventually give King’s eulogy, along with activist Channing Tobias visited Gandhi in India in 1937 to discuss the status of black Americans. Gandhi, who asked about his forecast for blacks in America, replied that “[w]ith right which is on their [blacks] side and the choice of non-violence as their only weapon, if they will make it such, a bright future is assured.” Mays followed by one year Howard Thurman, the noted black educator and preacher, who after talking with Gandhi stated, “[i]n his experiments with [truth] as they expressed themselves in the social and political struggle of India for freedom, Mr. Gandhi provided a crucial point of reference for the American Negro in his social political struggle for freedom.” Six years after Thurman’s visit with Gandhi, James Farmer, one of Thurman’s students and a leading civil rights activist established the Congress of Racial Equality (CORE) which used Gandhian ideas as its strategic basis for its members to battle racism, and which would launch the Freedom Rides of 1961. 

11. See King, supra note 4, at 478.
In other words, standing in the evolving black international tradition of three centuries, and early in his public ministry and prior to his Nobel Peace Prize, Martin Luther King moved to integrate the international human rights narrative into the American civil rights narrative. He consciously did so, even though huge American official energies had been and would be expended to confine King and the Civil Rights Movement to the Civil Rights narrative answerable only to official interpretations of the U.S. Constitution. These same official energies, for 300 years, had fought to ensure that the black rights struggle, in slavery and thereafter, would not be defined around the international human rights of blacks held in common with every person in the world, defined under universal norms and law, and not confined to the strictures of racially discriminatory American law.

We must therefore assess all of King’s public ministry through the lenses of King’s Pan-Africanism, his support and identification with the global decolonization movement, his urging on black Americans the necessity of giving the same support to African independence and South African anti-apartheid struggles, his early thinking and belief that the strategies and philosophy of Gandhian non-violence could be deployed to win international anti-colonial and anti-apartheid struggles, as well as the American racial struggle, as they are all part of the same global struggle for freedom.16

This assessment must include our approaches to King’s most prominent work, including Letter from Birmingham City Jail and his I Have a Dream Speech, which, with some reason, are commonly considered and advocated as major documents firmly within the civil rights narrative.17 The global commitment in King’s philosophy and outreach must be interpreted into King’s civil rights leadership, sermons, and speeches. Thus, for example, King’s epochal soaring Dream of American equality should be seen to encompass King’s requirements for realizing that Dream, that is, the successful outcome of the black non-violent struggle for equality as part of, and inspired by, the conjoined global struggle for freedom for Africans and other peoples of color. The Dream must be understood to incorporate the unity

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From Birmingham’s Jail

in love of all the world’s people and global unity of people in racial and other struggles for freedom, and not be confined to, even as it strongly so refers to, an American community redeemed from its sins of slavery and racism. And now, let us consider King’s brilliant *Letter from Birmingham City Jail*.

A. Letter from Birmingham City Jail

As prominent civil rights historian Taylor Branch tells us, in early April 1963, the integration drive and demonstrations in Birmingham were threatening to stall from a combination of lawsuits against leading Movement ministers and state-sponsored violence in a strategy of massive Alabama state resistance, plus some opposition and hesitation to further massive non-violent demonstrations by most of Birmingham’s black ministers.18 A planned demonstration on April 5 had all but fizzled, and to rescue the momentum Fred Shuttlesworth and three other black Movement ministers submitted to arrest.19 After intense crisis discussion within the leadership, King and Rev. Ralph Abernathy were arrested on April 12 in the midst of a demonstration of thousands, and King was put in a dark cell with no opportunity to make a phone call.20 Shortly thereafter a copy of the *Birmingham News* was smuggled into King’s jail cell, which contained a letter by eight white Alabama religious leaders urging the cancellation of demonstrations.21 Notwithstanding urgent pleas by his visiting legal counsel to focus on Movement strategy of the moment, King was caught up in writing his historic letter to answer those clergy, on the margins of the newspaper plus on a smuggled-in notepad, and smuggling out the draft in parts to be assembled by his associates.22 He was released from jail after eight days, and the letter was initially ignored.23

I cannot here do a detailed commentary on the entire letter, so I will discuss three categories of issues: (1) the brilliance of this letter; (2) the letter as reflecting Martin Luther King’s global commitment; (3) the letter as a missive about law defined as justice.

But first I want to speak especially to the students here about King and his letter. The letter arose, in the midst of all of the immedi-

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19. *Id.* at 46.
20. *Id.*
21. *Id.* at 47.
22. *Id.*
23. *Id.* at 49.
You can do some of your best intellectual work in response to being provoked by publicized work that is erroneous in approach and conclusions. This can happen for at least two reasons. First, by your past work, study, research, reflection and writing, you are prepared to be knowledgeably provoked about the issues at hand and your knowledge of their importance. Thus prepared, you can channel your provocation—as an informed exercise of imagination about better analysis and human consequences—into a responding new intellectual direction and truth that is both passionate and disciplined. King was superbly prepared by extensive study, disciplined reflection, and profound powers of moral perception about people, struggle, and the global human community, to write this letter from memory without references on scraps of paper smuggled in and out of a hostile jail cell. And secondly, on this basis you through your own commitment care about creating—perhaps publicly—a better approach to the basic question of truth the abuse of which defined the provocation in the first place. It was King’s mission to care and publicly move beyond the prominent abuses of moral truth and approach which had provoked him, and he was intellectually and morally prepared to do so, brilliantly under harsh and rushed conditions.

1. The Brilliance of the Letter

This was a work steeped in what Cornel West has referred to as prophetic Christianity, informed in the grace and flow of King’s writing by the historical black ministry and gospel as it lies at the center of the historical black experience, speaking to the moral necessities of the future. The historical and current scope of King’s applied knowledge of doctrine, politics, and moral struggle is persuasively focused on precise questions of race, on the most profound challenges to the Civil Rights Movement, and on groups of influential people in the community. It is, further, a persuasive demonstration of the power of theology, enhanced by references to history, to guide us through a normative assessment of power and authority in society, as compared

to the more instrumental, comparative, or statutory assessments of the same values in other disciplines such as political science, sociology, law, literature, history, business, and the sciences.

Lastly, the letter interpreted into the Civil Rights Movement some of the most basic questions defining the human condition, and did not hesitate in doing so. King’s discussion of “time” as both a philosophical construct and as it applies to politics, justice, struggle, racism, human hesitation, and Movement principles is only one example of his brilliantly digging down to first principles and working up to undermine racial opposition-inspired normative challenges to the Movement.

2. King’s Global Commitment in the Letter

Let us recall my recent discussion that King’s entire public ministry should be interpreted in light of his early commitment to global decolonization, Pan-Americanism, human rights, peace, and the unity of love of all people—allies and enemies. Our approach to this letter should also be so informed.

King’s ideas and beliefs of the intertwining of black freedom and inspirational struggle between the Civil Rights Movement, the global decolonization movement, the Pan-African freedom struggle for independence including against South African apartheid, and even cold war-related freedom movements such as the Hungarian uprising, are apparent at several points in the Letter. For example, his citation of Paul’s mission in carrying the Gospel to the far corners of the Greco-Roman world to help define his own mission; 25 his comparative reference to the nations of Asia and Africa moving “at jetlike speed towards gaining political independence, but we still creep at horse and buggy pace towards gaining a cup of coffee at a lunch counter;” 26 his citation to international examples of just and unjust law, Hitler versus the Hungarian freedom fighters; 27 his reliance at several points on the notion of human dignity which international human rights law confirms as a right of all people; 28 his defining American Negroes as being “caught up by the Zeitgeist, and with his black brothers of Africa and his brown and yellow brothers of Asia, South America and the Caribbean . . . moving with a great sense of urgency toward the promised

26. Id.
27. Id.
28. Id.
land of racial justice;”

Thus, this marvelous letter is not a missive whose aims and doctrine are confined to the American civil rights narrative, though in the first instance King through it aims to shape that narrative. Rather, this letter must be interpreted as grounded in the intersections between the global human rights narrative certifying the universal right to racial justice of black Americans in unity with that of other peoples of color in the world community, and the American civil rights narrative. The letter is demanding that the latter narrative, in its evolving confirmation of black American rights to racial justice, recognize that those rights are universal and beyond the authority of the American establishment to grant or deny.

3. The Letter as a Missive Defining Law as Justice

In many ways this is a letter about the law, but only about how to approach the law as justice and not recognizing as law simply any organized codification comprised of unjust legalisms and legal machinery. King’s discussion of the distinctions between just law and unjust law, the moral duty to follow the first and disobey the second, and the relationship in the Civil Rights Movement of the personal duty of non-violent disobedience of unjust law to the duty to respect and obey just law, as this process ultimately upholds the higher notion of just law in the national state, is simply excellent. Its excellence is enhanced in using the works, among others, of Martin Buber and Paul Tillich to demonstrate laws of racial segregation as to be morally wrong and unjust, as compared to the 1954 Supreme Court decision desegregating American schools. It is further enhanced by his discussion of just laws being applied for unjust ends, e.g., to uphold segregation. King’s unflinching, principled confirmation of the justice of civil disobedience as it confronts unjust law and power, grounded in biblical doctrine and historical examples, gives us a guidepost of high principle to meet that confrontation, which principle has now come

29. Id.
30. Id.
full circle to be incorporated in American judicial law, as I will explain in a minute: “One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. . . . [Such an individual] is in reality expressing the highest respect for law.”

Concurrently, King in his letter brings forward the doctrine of natural law as a body of principles historically based on the law of God, to put himself in the stream of western if not global jurisprudence defining and employing natural law to assess the moral and normative sufficiency of human-made law applied within states. Natural law is a major underpinning of both international human rights and American constitutional rights, and notwithstanding many current legal scholars attempting to reject its authority in favor of the primacy of codified statutes and treaties—a three centuries old debate—it never quite vanishes from legal thinking in both substance and approach. King powerfully deploys it here to determine the sufficient morality and justice of human-made law and define the personal duty to obey or disobey.

Finally, as a profound testament to its moral and cultural authority, three justice principles from King’s letter have been cited by judges in their legal opinions in a number of recent U.S. federal and state court cases. The principles are: (1) “Like a boil that can never be cured as long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must likewise be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured;” (2) “One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty;” and (3) “Injustice anywhere is a threat to justice everywhere.”

As my research assistant has perceptively observed, and I agree, the majority of these quotes are found at the very end of the opinion to support an overarching theme of the holding. The quote about exposing injustice as we would a boil is consistently used to confirm

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32. The Letter, supra note 1.
34. The Letter, supra note 1.
35. Id.
36. Id.
judges’ holdings. The quote about accepting the penalty when breaking an unjust law is used identically to a common law rule that the courts use to define the duty of a party to the case. And the quote concerning the indivisibility of injustice is used as an understanding of the nature of justice adopted in the court’s opinion.

Overall, Dr. King’s quotes are used identically to common law rules; yet, each quote is applicable to a different entity involved in a case. “Like a boil that can never be cured . . . injustice must likewise be exposed”37 is used in cases where an individual is requesting pertinent information, that a police department has deemed “confidential,” to determine police brutality.38 This quote represents a rule that is applied to a party, specifically the accused. “One who breaks an unjust law must do so . . . with a willingness to accept the penalty”39 is used in relation to civil disobedience and the quote is directed towards a party challenging a penalty.40 “Injustice anywhere is a threat to justice everywhere”41 is directed towards various officers of the court or law, such as judges and lawyers, and is cited in cases involving some wrong doing of a judge, lawyer or some entity directly related to the practice of law.42

As is now well known, Letter from Birmingham City Jail has been now widely published and anthologized, as befitting its historic importance in ways that go beyond this discussion, including perhaps signaling the need for America’s own ‘liberation theology’ to free the clergy of the status quo to uphold justice.

B. The Nobel Peace Prize and King’s Global Authority

Martin Luther King arrived in Oslo to be awarded the Nobel Peace Prize on December 8, 1964, and was soon received in private audience, along with Coretta, by King Olav V of Norway at the Royal

37. Id.
38. Doc, 202 F.R.D. at 239 (holding that court related documents about police misconduct are public domain because they concern matters of general concern of our democratic society); Wiggins, 173 F.R.D. at 230 (holding “that the allegations of police misconduct contained in the disputed files must be exposed to the light of human conscience and the air of natural opinion.”).
40. See Karpova, 402 F. Supp. 2d at 461 (stating that “[t]he hallmark of civil disobedience is the willingness of the perpetrator to pay the price for his actions.”); Voices in the Wilderness, 382 F. Supp. 2d at 63 (holding lack of credible evidence that a “civil enforcement action was anything other than lawful” will result in the enforcement of the civil penalty).
41. The Letter, supra note 1.
42. Augman, 2006 WL 3111076 at *3 (holding that no merit is given to an appeal when it is filled with distorted evidence).
Palace. In the midst of much pomp and circumstance, King would give his Acceptance Speech for the Nobel Prize, and then his formal lecture at the University of Oslo.

King’s Acceptance speech relied on his own handwritten draft. His first point was to ask why the Nobel Prize was being awarded to a movement whose struggle was yet unsuccessful in its goal of achieving peace and brotherhood. His answer was to interpret the Nobel Prize as being “a profound recognition that nonviolence is the answer to the crucial political and moral question of our time—the need for man to overcome oppression and violence without resorting to violence and oppression.”43 In doing so he credited the people of India, whom the Negroes of the United States followed, for demonstrating that “nonviolence is not sterile passivity, but a powerful moral force . . . for social transformation.”44 Grounding non-violence in love, King projected its necessity for all human conflict. King invoked the “tortuous road which has led from Montgomery, Alabama to Oslo” as laid down by this love as leading to a new sense of dignity for Negroes, and he projected increasing alliance between Blacks and white men to overcome their common problems.45 On this basis, he accepted the award “with an abiding faith in America and an audacious faith in the future of mankind.”46

King then directly projected non-violence into modern international relations as an answer greater than current power politics, even around issues of nuclear weapons. “I believe that unarmed truth and unconditional love will have the final word in reality. This is why right temporarily defeated is stronger than evil triumphant,”47 taking the latter belief from his Letter from Birmingham City Jail. “I believe that wounded justice, lying prostrate on the blood-flowing streets of our nations, can be lifted from this dust of shame to reign supreme among the children of men.”48 And then King turned to international human rights, and particularly economic, social, and cultural rights, which at that time many Western officials were rejecting on both doctrinal and cold war-based ideological grounds, but which heralded King’s oncoming basic shift of thinking and strategy regarding the Movement: that constitutional and political rights to sit at lunch counters and vote

43. Nobel Acceptance, supra note 2.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
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were not sufficient for freedom without the economic resources to eat, secure an education, and build communities. It reminds us that four years later upon his assassination King would be marching in Memphis to support the economic rights of Memphis sanitation workers. But here on the grandest of international stages, King affirmed, “I have the audacity to believe that peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality and freedom for their spirits.”

Significantly, he closed by re-iterating that he accepted the Nobel as a trustee for a Movement and all the people and sacrifice who make that Movement. But even more significantly, King here defined that Movement for which he was a trustee as the International Freedom Movement, by specifically encompassing the great early non-violent South African anti-apartheid leader Chief Albert Lutuli “whose struggles with and for his people are still met with the most brutal expression of man’s inhumanity to man.”

Let me reflect for a moment on the wider meaning of King being awarded the Nobel Peace Prize as the recognized leader of the American Civil Rights Movement. I have spoken above of the enormous energy spent by the American government and establishment since slavery and not least in the 20th century to confine the struggle for black freedom to American law, American legitimacy, American rights definitions, American permissions, and to do their best to suppress black folks away from invoking, creating a basis for prescribing, and defining the need for uniting with overseas law, struggles, allies, politics, and definitions of rights to support their great American freedom struggle. But the Nobel Prize Committee pulled the American Civil Rights Movement out into the international community by certifying its global importance and authority as a world beacon to all peoples for non-violent rights struggle. The Committee thus directly refuted American suppression of the Black International Tradition while placing the Civil Rights Movement within that Tradition. King, as we have seen, was fully aware of this shift and exercised global leadership in Oslo by enunciating that awareness from one of the highest global platforms.

49. Id.
50. Id.
Thus, in Oslo, King clarified and further led the conjoining of the American civil rights narrative to the international human rights narrative. Importantly, he did so through his affirmation of the authority of Gandhian non-violence philosophy and strategies to assess the deepest, most encrusted assumptions about international power politics and national policies of war and violence. Simultaneously by being awarded the Nobel Peace Prize, King linked through his work and recognition the International Peace Narrative into the conjoined rights narratives. Here he followed, in this linkage though in somewhat more restricted American political context, the international peace movement prominence of W.E.B. DuBois, and Paul Robeson, both of whom were officially vilified in America on anti-communist/ fellow traveler cold war grounds for doing so.

In his formal Nobel Lecture at Oslo University the following night, King amplified his beliefs on the above questions, made them more explicit, and then entered new territory. It is a soaring lecture addressed unmistakably to a global audience. Beginning with a discussion of a human “poverty of the spirit which stands in glaring contrast to our scientific and technological abundance,” and our “allow[ing] the means by which we live to outdistance the ends for which we live,” King meditated on racial injustice, poverty, and war as three major problems “which grow out of man’s ethical infantilism.”

More importantly, he asserted and explored the necessary connections among all three. From his discussion of the global yearning for freedom by all oppressed peoples, King certified the historical redemptive importance of the Civil Rights Movement for America, and then said “[b]ut on another and more important level what is happening in the United States today is a relatively small part of a world development.” He then reaffirmed his position that the American Negro has been caught up in the Zeitgeist in moving with global peoples of color with a great sense of urgency towards racial justice. Reporting some racial progress in the United States, but with still a “long, long way to go before the dream of freedom is a reality for the Negro,” he certified “we are no longer afraid of resistance and conflict.”

Then, with Gandhi as an example, King amplified and defended his belief that non-violence is achievable, applicable, necessary, and

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53. Id.
54. Id.
beginning to be manifested across the entire sweep of international relations, and that it was the only way to foster solutions to the major problems of racial injustice, poverty, and war.

King next turned to poverty as a second evil which plagues the modern world, made the more morally reprehensible by humankind’s capacity to eliminate it and render it unnecessary. He called for a maximum global effort to bridge the social and economic gulf between the haves and the have-nots of the world, for “an all-out world war against poverty,” defining the principle that “[n]o individual or nation can be great if it does not have a concern for ‘the least of these.’”55 The agony of the poor majority diminishes the rich minority, and both rich and poor are tied in a “single garment of destiny.”56

Now, King addressed the third great global evil of war. Arguing that war is now obsolete because of the destructive power of modern nuclear and other weapons, he projected the clear possibility that “modern man . . . will transform his earthly habitat into an inferno such as even the mind of Dante could not imagine.”57 Thus, he called for “the philosophy and strategy of non-violence to become immediately a subject for study and serious experimentation in every field of human conflict, by no means excluding the relations between nations.”58 The urgency of non-violence matches that of achieving racial justice and equality. Thus the necessity is to sacrifice for and love peace, by building its positive affirmation, and converting “the arms race into a ‘peace race’” as the only pathway to humankind’s “creative fulfillment.”59 King did not minimize the problems of such conversions, and achieving the political will to solve those problems depends upon us being prepared to undergo a mental and spiritual re-evaluation.

He closed by expressing his certainty that “[l]ove is the key to the solution of the problems of the world,” and the key to overcoming cycles of hate and retaliation.60 His hope and faith were equally strong that mankind would somehow rise up to the occasion, and that in the words of the great historian Arnold Toynbee, “love is going to have the last word,” even though those who struggle for peace and

55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
freedom will continue to be threatened by death and battered by persecution.  

During his trip to Oslo, King had called for the removal of foreign troops from the Congo and for the imposition of international economic sanctions on South Africa, a position not even at that time on the official and black civil rights radar in the United States. At this time also, as Taylor Branch reports, aides were briefing President Johnson to steer King away from several politically troublesome issues, including “statements (King) made abroad about an economic blockade of South Africa and a perhaps unfortunate linkage of Mississippi and South Africa.”

In sum, after Oslo, it was now even more clear that King saw the Civil Rights Movement as having its own importance but equally as part, and not the largest part, of the Pan-African and global struggle for freedom for peoples of color, and that this global struggle served as inspiration and example for the American struggle. It was clear that King embraced his leadership role in linking the civil rights, the international human rights, and the global peace narratives, and was committed to realizing these linkages where possible, including increasingly publicly challenging retrogressive U.S. foreign policy positions. It was further clear that King was committed to expanding non-violence philosophy and strategies to the deepest reaches of international relations, based on the unity of love among all peoples and classes of peoples, as the necessary route to heal the gulf between man’s technological capacities and man’s poverty of spirit. It was clear that King had undergone an expansive shift in his approach to racial injustice: to necessarily linking its cure to economic justice for peoples of color and the elimination of poverty; and towards the reality of the inescapable linkages among racial injustice, poverty, and war and the need to abolish all three of these major global problems for human redemption and survival.

In other words, the Nobel Peace Prize not only brought the American Civil Rights Movement onto the world community stage, but it brought King and his evolving recognition of his global ministry onto the same stage. Finally, it was clear that King took his being awarded the Nobel Peace Prize quite seriously regarding his sense of his own global ministry, including his commitment as the American

61. Id.
62. Branch, supra note 18, at 547.
civil rights leader to expanding the narrative of international peace and the illegitimacy of war. Thus, we can say, from our privileged vantage point in retrospect, Martin Luther King was on his way to his magnificent speech at the Riverside Church.

C. To the Riverside Church

In March and April 1967, the Civil Rights Movement faced challenges on several fronts. As Taylor Branch relates, these included continuing deaths and racist brutalities in Mississippi, the exclusion of Adam Clayton Powell from Congress, and the Vietnam War and its threat to the rough alliance among President Lyndon Johnson and King and his Movement allies.63 White progressives allied with the Civil Rights Movement increasingly became involved in the Vietnam anti-war movement.

Martin Luther King, three years after his Nobel Peace Prize, was strongly wrestling with his conscience and commitment to non-violence as to whether he should give more public support to the anti-war movement, including whether to participate in a major anti-war demonstration at the United Nations Plaza. His expressing his commitment to that demonstration alarmed the majority of his close advisors, black and white, who began to work to dissuade him. They argued that King’s doing so would hurt the Movement by identifying him with “a squabbling fascist, socialist hippie collection,” and that it would destroy his relations with President Johnson.64 King responded that it would be cowardly to shun a just cause for fear of isolation. On March 13, he cancelled a meeting with the President that he had secured for that day, which the President later said he did not understand.

His advisers continued to insist that King must find another venue for his anti-war commitment, even as King insisted that he was going to march. Andrew Young and other advisers then accepted that King “feels conscience-bound to participate,” and set out to limit the damage, including arranging for a controlled presentation of King’s Vietnam message.65 This led to a process where the immense Riverside Church in New York was secured for a King speech, but on the

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64. Id. at 584.
65. Id. at 586.
unusual condition that a speech text be ready five days in advance to be distributed to the press.

King and his assistants basically accepted this difficult condition, while buying as much time as possible for King and others to get the speech written, in and around King’s departing for Chicago for several rallies there. This included his leading with Dr. Benjamin Spock a 5,000 member Chicago Area Peace Parade in downtown Chicago, plus a speech against the Vietnam War. Some of his advisers kept phoning him in Chicago to try to change his course, but to no avail. King reported that at least a thousand Negroes had joined the Chicago peace march, thus as Taylor Branch noted, easing fears that King would become a token leader for white ideologues.

Upon his return King faced opposition to his anti-war stance from the Southern Christian Leadership Conference Board (SCLC), including accusations that he was “acting like a bishop” to impose his position on the organization. SCLC passed a weak resolution of implied support for the war, aiming not to embarrass King as its president.\footnote{Id. at 587–89.} At this time, King revealed to the \textit{New York Times} his plan to give “a major policy paper on Vietnam” soon at the Riverside Church, which made the front page.\footnote{Id. at 590.}

It was past the speech text deadline on April 2, and revisions to the speech were being cobbled together by King and his advisers. That morning the speech was given to the press, even as King discarded the written preface and substituted his own oratorical words. At 8:00 PM that evening, the Church was packed with 4,000 people and an overflow line stretched towards 120th Street. As King stepped to the pulpit, in Taylor Branch’s words, “[a] standing ovation died down to cavernous tension before King imposed deeper quiet with a meditation on hesitant voices. ‘I come to this magnificent house of worship tonight because my conscience leaves me no other choice,’” King began.\footnote{Id. at 591.}

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I have shared with you some of the process leading up to King’s epochal speech to underline aspects of King’s greatness.

\footnote{Id. at 587–89.}
\footnote{Id. at 590.}
\footnote{Id. at 591.}
From the time of slavery, any movement or group for black rights with black leadership has had to confront severe challenges in racial America. These have arisen around the historically-framed question of whether black groups meeting and leading themselves are too dangerous to public order, or to their racist opponents, or to their white allies and providers of resources, and thus are too dangerous to their own cause, without the mediation and the behind-the-scenes control of white allies, sympathizers, moderates purveying status quo wisdom, friendly and hostile government officials, more conservative and hesitant or more radical blacks around the group’s leadership. All of the foregoing frames the issue of the total effects of these challenges on the original black group or movement and its vision for success. And much of these aggressive challenges focus on who will control both the public and internal narratives of these black groups and their leadership, particularly as they shape definitions around race of right and wrong, public legitimacy and the relationship of justice and morality to law.

The Civil Rights Movement around King was subjected to all of these challenges, which focused on King personally, whose ideas, actions, and speech had an enormous but not absolute impact on shaping public legitimacy in connection with the Movement’s aims. As I noted previously, these challenges intensified around King’s vision, actions and words, in the face of historical American racial fears affecting both blacks and whites at all levels of domination and subordination, as King demanded that the national civil rights narrative be married to the global human rights and Pan-African narratives, that these conjoined narratives should incorporate the international peace narrative, and that the linkages among war, poverty, and racism should be made by the American Civil Rights Movement a focus of its national action program.

In moving towards Riverside Church against so much opposition generated by both alliance and hostility to changing his public narrative defining his conscience-driven and realist-informed vision for American redemption, and in, notwithstanding, preserving his vision and its narrative, in the midst of both these challenges and his other pressing Movement responsibilities, King’s strength, perseverance and public coherence revealed profound aspects of his historical greatness, as once again he gave America an irreplaceable resource.
1. What the Speech Did

King accomplished four objectives in this speech:

1. He demanded the consistency of rights and justice between U.S. foreign policy and its domestic policy. The U.S. cannot support overseas oppression while supporting equal justice at home.

2. He defined the necessity of enforcing both international political and civil rights, and economic, social and cultural rights as a matter of law for poor people and people of color. Here he supported land reform for peasants in Latin America, notwithstanding contrary U.S. policies.

3. He defined and upheld the general right of black people to take international positions on major issues, here following W.E.B. DuBois and his own recent examples.

4. He further internationalized the Civil Rights Movement, including in joining to it the global focus on the Vietnam War as a Nobel Peace Laureate, and implicitly defining his ministry as serving the total U.S. justice struggle.

To meet these aims, King adjudged the United States fighting the Vietnam War as immoral, on the wrong side of history, and illegal under international law. And as we have seen above in King’s building these ideas, he now made these judgments based on projecting a new, radical (in being academically disreputable), approach to international relations. It is based on Gandhian non-violence, human dignity, empathy for third world peoples against colonialism and neocolonialism, the international rule of law through the United Nations binding powerful states, the unity of love including for opponents and enemies, and a worldwide fellowship as a supreme unifying principle of life which unlocks the door to ultimate reality and is necessary for the survival of mankind. He insisted this approach can operate against balance of power politics, and indicated for Vietnam how it might, for example, “By treating the Vietnamese more as subject ‘natives’ than citizens, the American example has long since undermined a democratic road to independence.”

Democracy may be supported for Vietnam, but it cannot be imposed.

70. See generally Riverside Church Speech, supra note 3.
He brought forward natural law based on God’s law and love to define justice and its authority to assess the dictates of the State, and to help define the duty of sovereign rulers to act to protect all humankind. State behavior must be judged, and its wars must be distinguished between those just and those unjust. On this basis, U.S. foreign policy must stand on moral principles of justice for the world’s vulnerable and powerless peoples.

The U.S. must fulfill its moral destiny in the international community by placing itself on the right side of history. Specifically, it must have the courage to implement policies that do not depend for their success on people—American or non-American—suffering and dying.

Civil rights law and international human rights law are indivisible and they are joined through the United Nations Charter as it binds the United States. A demand for a just international peace is integral to the civil rights struggle. Minorities must use international law to relieve local and international oppression against them, including through the United Nations. All of us are obligated to judge the legality of the use of U.S. military force. Just law can indeed govern the international community. All must protest with all available creative means of doing so: “[t]he witness to belief [is] more important than immediate results.” President Johnson’s national diversion of money and resources away from poor people was a command to speak out and mobilize against war.

U.S. power brings with it moral responsibility in the world, not simply the American right to freely exercise its power. That responsibility includes the duty of the US to speak for the overseas poor of the world.

Racism, militarism, and materialism—designated the Triplets—are a unity of national and international evils. They cannot be discussed in segmented categories. Eliminating the Triplets must depend upon shifting from a “thing-oriented” society to a “person-oriented” society.

Nations cannot procrastinate in adopting international policies based on love, because time waits on no one in moving towards the choice between a non-violent co-existence and violent co-annihilation.

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72. Riverside Church Speech, supra note 3.
America, the richest and most powerful nation in the world, can well lead the way in this revolution of values. There is nothing except a tragic death wish to prevent us from reordering our priorities so that the pursuit of peace will take precedence over the pursuit of war. There is nothing to keep us from molding a recalcitrant status quo with bruised hands until we have fashioned it into brotherhood.\textsuperscript{73}

2. The Significance of the Aftermath of the Speech

Thus, King carried these norms of justice into the heart of the American cold war narrative on Vietnam. He did so through the history of French colonialism there failing to suppress Vietnamese nationalism, and the unfolding similar failure of the American war. King was demanding the basic rights of African Americans and other peoples of color to be free of the official imposition on their communities and on their beliefs of the divisive fixed-sum dichotomy that national security must prevail over civil rights and human dignity, and that only the unredeemed American State can shape and control those narratives. And because at Riverside Church King carried the demand that these norms assess the heart of American cold war thinking, and did so on the wings of the international rule of law, the American cold war narratives were flung against him, as once again official America regarding the Black International Tradition, unsuccessfully tried to prohibit black people from entering, sitting down, and partaking in the restaurant of grand national and international policy making.

The Riverside Church speech and King were widely and ferociously condemned across the country, by liberal whites, conservative blacks including the NAACP, and those protecting their access to President Johnson, who himself publicly castigated King for not sticking to civil rights and meddling in foreign policy, and by the \textit{New York Times, The Washington Post}, and other newspapers.\textsuperscript{74} Rarely, if ever, did critics engage the substance of his speech. There was a widespread commentary on how this speech had harmed the Civil Rights Movement, including by “focusing on Vietnamese peasants rather than average American voters,” by not focusing on the integrated combat ranks of the US Army, for painting himself into a corner with a bunch of losers, and that millions of black people would suffer for King’s insults against the greatest civil rights President in American history.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{See generally At Canaan’s Edge, supra} note 63, at 581–604.
“[He] should leave Vietnam alone for his own sake.”75 “Many who have listened to him with respect will never again accord him the same confidence. He has diminished his usefulness to his cause, his people, and his country.”76 Race relations are difficult enough “without his ‘wasteful and self-defeating’ diversions into foreign affairs.”77 He has “fus[ed] two public problems that are distinct and separate.”78 As Taylor Branch further reports, privately King said, “[t]he war in Vietnam is a much graver injustice to Negroes than anything I could say against that war.”79 King was stung by the avalanche of criticism, but shortly recalled that this kind of opposition was similar to that against every movement in which he had participated, before they finally came around. King felt cut off even from disagreement, in ways worse than his accustomed fare of veneration or raw personal hostility, and he was periodically quite saddened and upset.

But King did join the leadership of the April 15 anti-war mobilization in New York’s Central Park, which marched to United Nations Plaza, following his advisers’ strategies and negotiations to prevent King from being shown to be overtly supporting Stokely Carmichael as one of the other leaders of the march. The march of 125,000–400,000 was four hours long, and King remarked privately that the magnitude of the rally exceeded the March on Washington. King, on the march platform, gave a similar speech to the Riverside Church speech, but with a toned-down refrain of “[s]top the bombing!”80 Branch tells us that FBI Director J. Edgar Hoover, with approval from President Johnson, approved leaks to friendly news sources designed for “extreme embarrassment” to King, and later falsely wrote the President that King “is an instrument in the hands of subversive forces seeking to undermine our Nation.”81 King continued to oppose the war in various other protest venues, led strategies to create jobs in Chicago, participated in other demonstrations, and was teased by his neighbor in Atlanta, Professor Vincent Harding of Spelman College, who drafted much of the Riverside Speech, for “causing a month of ceaseless trouble.”82 And on April 30, at his home church,
Ebenezer Baptist, with Stokely Carmichael in the congregation, King reflected with passion on the aftermath to Riverside Church: “There’s something strangely inconsistent about a nation and a press that will praise you when you say be nonviolent toward Jim Clark [in Birmingham], but will curse you and damn you when you say be nonviolent toward little brown Vietnamese children!” The congregation broke into applause.

II. CLOSING REFLECTIONS ON KING’S GLOBAL AUTHORITY

Almost exactly a year after Riverside Church, America would tragically lose King to an assassin’s bullet. By that time, King, as indicated previously, had evolved in believing that the Movement had to shift its focus, in light of the legal victories and strategies of the sit-ins, the freedom rides, two major pieces of federal legislation on public accommodations and voting rights, towards defining and protecting economic rights for blacks and poor peoples, for jobs and eliminating poverty, without which the recently-confirmed political rights for blacks would be of little value.

He and his associates were intensely planning a Poor People’s March on Washington for Jobs and Against Poverty, when, honoring a promise, he went to Memphis to march with the sanitation workers for their wage and job security rights. He was assassinated while there. Increasingly, King was linking the shortcomings of capitalism and materialism to the scope and continuation of poverty and poor people in America as the richest of the world’s countries. In his demand that the civil rights narrative be fused with the international human rights narrative regarding black and poor people’s rights in America, King, following international human rights law, was demanding the equal authority at home and abroad of political and civil rights, and economic, social, and cultural rights. But whereas much of the international community had at least engaged in law and doctrinal issues of governments’ duties regarding economic, social, and cultural rights, that rights narrative had not only not begun in the United States, but it was then, as it largely is now, actively rejected by judicial and official America, President Johnson’s “War on Poverty” notwithstanding.

83. Id. at 604.
84. Id.
I have already discussed elements of King’s prominence as an international human rights leader from within the American Civil Rights Movement, and how seriously he took the interpretation of his global ministry through the Nobel Peace Prize as a leader for international peace. The authority of King’s global ministry and ideas continued after his death, not only in their global influence but also in their influence on thinking and doctrine in American law and academia. I have already noted the adoption in U.S. court cases of justice propositions from his Letter from Birmingham City Jail. At least one legal scholar has found in King’s “Reconstructive Theology” a basis for the emergence in current jurisprudence of the Critical Race Theory movement. As we know, King acquired much of his philosophy of civil disobedience from Gandhi’s work towards Indian independence from British colonialism, which was only part of Gandhi’s influence on U.S. civil rights foundational thinking. Recently at least one Indian scholar has credited King with the most effective global application of Gandhi’s philosophy, and thus influential in the continuing synthesis of dialog and legal concepts between Indian and American thinkers about civil rights and affirmative action in these two intensely pluralistic societies. And President Obama would seem to be the first American President who has read and schooled himself in King’s philosophy and strategy.

In the dedication of the International Slavery Museum in Liverpool, England in 2008, there were repeated references to King and his work. Nonviolent movements throughout the world, including in Poland, the Philippines, China and South Africa have acknowledged King’s leadership as an influential force in their freedom struggles. The solidarity movement in Poland, in its leadership of movements bringing down the Iron Curtain, used the documentary *Montgomery to Memphis* as a training film for its organizing work. In the struggle for South Africa’s liberation from apartheid, Nelson Mandela, Bishop Desmond Tutu, and other leaders have noted their inspiration and feeling of kinship towards King and his work. I have already dis-

85. See generally Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985, 987 (1990) (“As the towering organic intellectual of twentieth-century American life, King integrated theory, experience, and transformative struggle to create a rich and effective form of critical activity.”).

cussed King’s international and American leadership against apartheid since the late 1950’s, his calling for a national American anti-apartheid movement twenty years before the actual event, and Nelson Mandela’s dedicated trip in 1990 to King’s gravesite in Atlanta.

In this connection, King’s leadership produced the emergence of three prominent African American leaders carrying the core of King’s non-violence philosophy into key issues of international relations: Reverend Leon Sullivan and his Sullivan Principles against American commercial cooperation with South African apartheid, and as a foundation for current doctrines of multinational corporate duties to uphold international human rights; Reverend Jesse Jackson whose global work in publicly integrating American and international human rights narratives includes negotiating the peaceful release of innocent hostages in tense situations; and Reverend Andrew Young who was fired from his United States United Nations ambassadorship for proposing equitable non-violent negotiating strategies for the Palestinian/Israeli Middle East conflict and has long been an international leader on economic rights empowerment including American obligations towards African economic development.87

And King’s authority as a global leader for international peace, and for demanding that American foreign policy carries obligations of justice to vulnerable peoples, also significantly continued beyond his death. In 2003, as the American invasion of Iraq was unfolding, the global Iraq anti-war movement was centered around King’s birthday, and King’s words were invoked against an American war in Iraq. Coordinated through the Internet and linked by C-Span, in more than 600 towns and cities, in demonstrations of a magnitude unequaled since the Vietnam War, at least 30 million people worldwide marched against the War in Iraq. The demonstrations covered a wide range of

the political spectrum in all countries, the notion of unjust war preached by King was prominent, and Martin Luther King III marched and spoke in New York. Thus, I suggest that King’s birthday must also be celebrated for King’s opposition to the militarism of the U.S. government. It can now no longer be claimed that King’s birthday is confined to celebrating the importance of the Civil Rights Movement in the United States.88

CONCLUSION

I have tried to show that one seriously undervalued lens through which King’s major work must be interpreted is that of his global ministry, and his demanding from early in his public work that the rights of minorities and poor people in the United States must borrow inspiration, definition, and authority from integrating the civil rights narrative with the international human rights narrative and in turn with the international peace narrative. The neglect, refusal, or ignorance of this vital global dynamic in King’s thinking and ministry comprises one of the undesirable trends produced by the national ritualization of King’s birthday.

And if we thought that King in his martyrdom could safely be confined and commodified within the familiar precincts of liberal political American democracy, defined by slightly more racially just interpretations of the American Constitution; we are mistaken. The Letter from Birmingham City Jail and his I Have a Dream speeches were not in King’s thinking and work the sole realization of better liberal democracy, minus the wages and badges of slavery and racism. They were part of King’s evolving global “Beloved Community” that he knew overtook the limits of capitalist democracy to attain, because capitalism could not answer with justice, the questions, “Why are there 40 million poor people in America and hundreds of millions more in the world”? “Why do racially vulnerable peoples globally continue to be oppressed”? “Why can we not see that non-violence and love must be the salvation of humankind against the destructive blind alleys of war”?

Thank you.

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America’s Disposable Youth: 
Undocumented Delinquent Juveniles

Karla M. McKanders*

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The future of people “who have been living legally in the United 
States for so long that their native lands are a distant memory and the 
language of their youth feels like a foreign tongue to them” are very 
vulnerable to deportation for childhood mistakes that would normally 
be excused for youth of U.S. citizenry. ¹

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1. Dana Leigh Marks, Immigration Judge: Death Penalty Cases in Traffic Court Setting, 
ken-system/.
Howard Law Journal

INTRODUCTION

José spent the majority of his life in a small town in Southern United States.2 He entered the United States through the desert when he was six months old with his mother without lawful status. He attended school and engaged in the activities of a “normal” teenager. Since his time in the United States, his primary language was English and he only spoke a little bit of Spanish. At the age of sixteen, he was involved in an altercation in which he was accused of shoplifting with an alleged local Latino gang. The local police department arrested José and sent him to the local juvenile detention facility. The local juvenile prosecutor attempted to indefinitely detain José and his Latino counterparts who were also arrested as undocumented. José’s friends, however, were immediately released when their parents produced their U.S. birth certificates to the juvenile detention facility.3

Immigration and Customs Enforcement was immediately called to handle the “illegal” immigrant child.4 During the child’s first appearance in juvenile court, the Immigration and Customs Enforcement Officer yelled at the child, inaccurately telling him that he was going to be immediately deported from the United States.5

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2. The case study on José is fictional based on working with immigrant children and litigating their cases.

3. Id.

4. The discourse surrounding the use of the terminology “illegal” has pervaded conversations on immigration for the last few years. It is a term used to refer to immigrants who do not have lawful status to remain in the country. “The veneer of precision and neutrality embedded in the term ‘illegal’ is an apt guise for assumption and stereotype.” CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND THE LAW (2008). The term is typically used as a means to stigmatize a group of people and creates a community of immigrants to be seen as “others” or “outsiders.” This term is used in a pejorative sense in conversations and in the media. Further, the term focuses in on criminalizing immigrant conduct as part of this stigmatization. Accordingly, in this article the terminology “illegal immigrant” will not be used. Instead the term “undocumented immigrant” will be utilized. See generally THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOUMRA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1, 329 (6th ed. 2008) (explaining “the terms 'illegal aliens,' 'undocumented aliens,' and explaining that an immigrant is ‘a noncitizen authorized to take up permanent residence in the United States. This is a subset of the group that common or journalistic usage often labels immigrants, meaning noncitizens who have been present for a while and wish to stay indefinitely, legally or illegally”). See also STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1350 (4th ed. 2005) (stating “[t]he stereotypes used against undocumented Latino immigrants likewise extend to those with lawful status who are often assumed to be “illegal.” The general public often conflates the different categories of immigration status and assumes that Latino is synonymous with “illegal”).

5. See generally 8 C.F.R. §1263.3(b)(1) (stating “children should be released to parents, legal guardians, or adult relatives, in that order. If such persons cannot be found or do not exist, the child will not be released except in ‘unusual and compelling circumstances’, even to adults willing to execute an agreement to care for the child’s well-being.”).

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as how to proceed, the juvenile delinquency attorney had the child plead to the offense as charged. The magistrate judge refused to provide any services to rehabilitate the child under the assumption that the child would be immediately removed from the United States, never to return back to his jurisdiction.

The child was immediately placed into the custody of U.S. Marshalls with Immigration and Customs Enforcement who moved him to an out-of-state detention center for immigrant children to await deportation proceedings. The Office of Refugee Resettlement with the Department of Health and Human Services has a policy of reunifying immigrant children with their family members until removal proceedings are concluded. Under this practice, within a week, José was back home in the same jurisdiction with his mother pending deportation proceedings.

José is like many young people who come to the United States but do not have and cannot obtain lawful immigration status. José’s story demonstrates that undocumented immigrant children who have resided in the United States from a young age are vulnerable in their interactions with juvenile justice and immigration systems. While many undocumented youth have spent many years being educated and socialized in the United States, when they transgress societal norms, unlike U.S. citizen youth, the consequences, depending on the jurisdiction, are severe. Undocumented immigrant children may be placed in immigration detention, separated from their families, relocated to an unfamiliar country, and not given access to the rehabilitation services that U.S. citizen children are afforded to rehabilitate “delinquent” behavior. It is important to consider the implications of the interface between state juvenile systems, the immi-

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6. Supra note 2.
7. Id.
8. Id.
9. 8 C.F.R. §1236.3(b)(1).
10. Supra note 2.
12. Id. at 72–80.
13. Id. at 93.
14. See id. at 66 (discussing an immigrant youth who was sent back to a country that he had not lived in since age 5 to live with distant family members he had never met).
15. Id. at 84–87 (discussing how the aims of the juvenile justice system are at odds with the immigration system in part because the latter does not further rehabilitative goals).
Howard Law Journal

igration system and the treatment of undocumented immigrant youth, specifically young Latino males, interacting with these systems. Approximately 23.2 percent of children in the United States are either immigrants or the children of immigrants. Further, approximately two-thirds of undocumented immigrants in the United States have lived in the United States for at least a decade.

To compound the national migration trends, there has been a significant increase in immigrants migrating to U.S. cities who have not typically interacted with immigrant populations. While states like California, New York, Texas and Florida, have traditionally had the highest foreign-born populations in the United States, between 2000 and 2009 the foreign born populations in Georgia, Washington, Virginia, Maryland, Pennsylvania, North Carolina, Nevada, Colorado, and Tennessee increased by over 100,000 people. In Georgia, North Carolina, Nevada and Tennessee, the foreign born population increased by more than 50%. These statistics demonstrate that it is inevitable that more juvenile justice systems across the country will create policies regarding the treatment of undocumented youth. The types of policies and practices in each jurisdiction have varied widely. “Beginning in 2008 there have also been reports by the federal government of an increasing number of noncitizen youth being referred to immigration authorities by juvenile probation officers and other juvenile justice officials.”

This Article takes a look at various state and local policies towards undocumented immigrant youth in their interactions with the juvenile justice and immigration systems. Central to this conversation is a discussion of how undocumented immigrant youth are defined

19. Id.
20. Id.
21. Id.
22. See id. at 25 (citing Sturgeon v. Bratton, 174 Cal. App. 4th 1407 (2009)) (“The Los Angeles Police Department adopted a policy that prohibited its officers from initiating any police action for the sole purpose of investigating an individual’s immigration status. The policy was upheld by the California Court of Appeals. The court found that the policy was not preempted by, nor did it violate, federal immigration law.”); WILBER, supra note 16, at 26 (“Oregon state law prohibits law enforcement agencies from utilizing any public resources ‘for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.’” (citing OR. REV. STAT. § 181.850)).
and perceived within these systems. In particular, this Article examines how local rhetoric surrounding undocumented immigrants can adversely affect the policies that are implemented in addressing how to manage undocumented children who are placed in the juvenile delinquency and immigration systems after residing in the United States for many years. The first section of the Article addresses how the undocumented delinquent youth, mainly Latino males, are constructed through the various narratives of immigrant children that are perpetuated in the media and policymakers, which in turn impacts their treatment as immigrant children with the juvenile justice and immigration systems. This section addresses the multiple identities of race, class, gender and socio-economic status that impact the Latino delinquent immigrant child’s interactions with both the immigration and juvenile justice system. The second section of the Article examines state and local policies for the referral of delinquent immigrant youth to the Department of Homeland Security, Immigration and Customs Enforcement which begins removal proceedings. This section considers the inherit bias and the targeting of particular groups that may develop from varied state and local policies that are not uniform and based on the discretion of political actors.

Overall, this Article takes a critical look at the contrasting ways in which vulnerable undocumented immigrant youth are defined within these legal systems and how the “othering” of Latino male youth facilitates the denial of legal guarantees of equality and reinforces existing hierarchies and stereotypes. In conclusion, the Article finds that advocating for undocumented youth who are interfacing with these two systems, where the goal has become exclusion—not rehabilitation of youthful behavior and a preference for family unity—presents attorneys and advocates with a substantial task that must be addressed at a federal legislative level to promote uniformity and justice in the treatment of delinquent immigrant children who interface with actors within the juvenile justice and immigration systems.

I. CONSTRUCTING THE LEGAL SUBJECT: UNDOCUMENTED DELINQUENT YOUTH AND MULTIPLE LAYERS OF ILLEGALITY

In order to address how to establish policies and advocacy strategies for undocumented immigrant youth who interface with both the immigration and juvenile delinquency systems it is imperative to ex-
amine the varied narratives of immigrant children. These varying narratives shape the legal rights that are afforded to different categories of immigrant children and can help us understand how the undocumented delinquent juvenile is treated within the juvenile delinquency and immigration systems. Scholars Galicia and Rios describe how the legal system interfaces with the perception of undocumented children to create “layers of illegality.” The delinquent undocumented child is faced with varied legal constructions involving the interaction between the immigration and delinquency system. These constructions are coupled with stereotypes attributed to undocumented Latino immigrant children, which impacts the remedies and differential treatment they receive when they transgress societal norms as juveniles in contrast to U.S. citizen juveniles whose conduct in other contexts may be easily overlooked and rehabilitated. This section examines how each system impacts how undocumented children are treated when they interface with the juvenile delinquency system.

A. Layer One: The Undocumented Child and the Immigration System

The immigration system is a system of exclusion and inclusion. During different periods in the history of the United States, immigration laws and policies have been constructed in a manner that reflects societal bias and stereotypes about immigrant populations. The no-

25. Id. at 55.
26. Id. (stating “[t]he xenophobia follows: Multiple marginality can help us explain how the boys in this study became constructed as criminal threats in the multiple contexts and institutions in which these boys navigated”).
tion of exclusion involves the intentional act of “denying someone access to something [or] shutting someone out from a place.” Inherent to a sovereign state is the prerogative to include and exclude persons from its territory. This process involves the complex intersection of policies developed by the legislative, executive and judicial branches within a government. Access to inclusion within a nation-state typically involves access to “goods, lifestyle, practiced language, opportunity, environmental conditions, etc.” In the ideal context, nation-states provide rational justifications for excluding persons from the nation-state’s territories. Immigration scholar, Bas Schotel, explains:

First, the reasons for the exclusion must be backed up by sufficient relevant facts derived from stakeholders and scientific research. Generic and abstract reasons for exclusion do not constitute proper justification. Second, the authorities must show that in light of these relevant facts they have conducted the difficult exercise of balancing the migrants (legitimate) interest in immigration against the interests of the receiving country.32

Theoretically, in developing sound immigration policies that account for exclusion of particular migrants the state will have well-reasoned non-discriminatory justifications that align with research that are balanced with the nation-state’s interest.

At different times in our nation’s history, discriminatory policies have been used as justification to exclude various immigrant populations from the United States. For example, the seminal United States Supreme Court case Fong Yue Ting v. United States directly illustrates

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29. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute excised by the Government’s political departments . . . ’”); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (recognizing the inherent power of a sovereign nation to control its borders)). See generally Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (pointing out that the Constitution vests the national government with absolute control over international relations); Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (stating that the government’s power to exclude aliens from the United States is not open to controversy).
31. Id. at 14.
32. Id. at 17.
this point. This case addresses whether a federal immigration law permitted the federal government to exercise exclusive power over immigration and exclude Chinese immigrants in a highly discriminatory manner.

Accordingly, in the immigration debate, we must be highly conscious of the fine line between reasoned factual assertions to justify the right to exclude as a sovereign nation in contrast to rhetoric that promulgates the exclusion of certain populations.

1. Rhetoric and the “Othering” of Immigrants

This section will explore how the perceptions of immigrant populations are developed in the United States. As explained below, there is a complex interplay between the terminology used to describe immigrant populations in the media and by elected state and local officials and how daily rhetoric can transform into policing policies that are implemented against immigrant communities. This section uses the examples from national media descriptions of immigrant communities, mainly Latino communities. It explains how discourses on Latino immigrant communities impact local policing policies.

The discourse surrounding the use of the terminology “illegal” has pervaded conversations surrounding immigrants and immigration reform for the last few years. This term used to refer to immigrants who do not have lawful status to remain in the country. The term “illegal” is often viewed as being legally precise and accurately describing immigrants’ legal status; however, the stigmatization that is imbedded in the use of the term typically associated with criminal activities stereotypes the civil immigration violations and ignores the complexities of immigration law to accurately depict a person’s immigration status. Use of the term stigmatizes a group of people; helps to define a group “others” and “outsiders,” which makes it easier to develop exclusionary policies towards a certain group of individuals—especially young Latino males.

Over the years, the media and other advocates have started a campaign to remove the use of the word “illegals” from the American

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34. Fong Yue Ting, 149 U.S. at 711.
35. See generally Daum, supra note 4 (explaining the assumptions and stereotypes that are associated with the term “illegal”).
36. Id. at 11 (“The veneer of precision and neutrality embedded in the term ‘illegal’ is an apt guise for assumption and stereotype.”).
The campaign to not use the term “illegal” started in an effort to divert from using racially charged rhetoric to divisively polarize the immigration debate. The movement away from this terminology is to facilitate a more inclusive and humane discourse on immigration issues. The dehumanization of immigrants by leaders and the media colors our perceptions and the types of policies that are developed locally and nationally for immigrant children who come in contact with both the juvenile delinquency and immigration systems. For example, in response to the federal government’s decision to reject the Knox County’s application to jointly enforce immigration laws with the 287(g) program, in August 2013, Knox County Sheriff Jones stated, “I will continue to enforce these federal immigration violations with or without the help of U.S. Immigration and Customs Enforcement. If need be, I will stack these violators like cordwood in the Knox County Jail until the appropriate federal agency responds.” This comment exemplifies the stereotyping and dehumanization of immigrant populations in which local authorities engage. Comparing immigrants, who are people, to cordwood is dehumanizing. The Sheriff’s comments also mock the criminal justice system in a manner which likens the system to one that is in the business of blankly processing immigrants without any regard or consideration to their individual circumstances or constitutional due process rights. The Sheriff’s reference to immigrants as cordwood symbolizes the mass processing and detention of immigrants without regard to their individual circumstances or humanity. Imbedded in his public statement is the sweeping generalization that a person’s status as an immigrant is deeply connected with illegality. This type of thinking leads to racial profiling in policing and unequal treatment within the criminal and immigration systems.

The Knox County Sheriff’s comments and use of the “I” word exemplifies a common phenomenon when it comes to the debate on

38. Id.
39. Id.
40. McKandrs, supra note 27, at 173.
immigration reform: the objectification of immigrants. This comment is reminiscent of Arizona Sheriff Arpaio’s remarks deriding Mexican border crossers as swine-flu carriers and his own reference to the “tent city” extension of the Maricopa County Jail as a “concentration camp.” In addition, Arpaio’s comments led the Arizona federal district court to find that his police department disproportionately singled out Latinos and advanced racial profiling of immigrants within Maricopa County. Specifically the federal district court found in favor of the Plaintiffs and granted them injunctive relief. The Court found that:

1. detaining, holding or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons are in the country without authorization.
2. Following or enforcing its LEAR policy against any Latino occupant of a vehicle in Maricopa County.
3. Using race or Latino ancestry as a factor in determining to stop any vehicle in Maricopa County with a Latino occupant.
4. Using race or Latino ancestry as a factor in making law enforcement decisions with respect to whether any Latino occupant of a vehicle in Maricopa County may be in the country without authorization.
5. Detaining Latino occupants of vehicles stopped for traffic violations for a period longer than reasonably necessary to resolve the traffic violation in the absence of reasonable suspicion that any of them have committed or are committing a violation of federal or state criminal law.
6. Detaining, holding or arresting Latino occupants of a vehicle in Maricopa County for violations of the Arizona Human Smuggling Act without a reasonable basis for believing that, under all the circumstances, the necessary elements of the crime are present.
7. Detaining, arresting or holding persons based on a reasonable suspicion that they are conspiring with their employer to violate the Arizona Employer Sanctions Act.

This decision is important as it reinforces the notion that developing policing policies based on assumptions and stereotyping of a particular group is unconstitutional. This decision is a step towards

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44. Melendres, 989 F. Supp. 2d at 912.
45. Id.
breaking the predictable pattern that has developed across the nation where local officials rail against the federal government’s purported inaction and, while doing so, make inflammatory comments against Latinos, “illegals,” and immigrants. Such comments and related anti-immigrant rhetoric by state and local officials now play a large role in framing local policies that are implemented in addressing immigrant juveniles who interface with the juvenile delinquency courts. The rhetoric that is set forth in the media and policy debates actively contribute to the “othering” of undocumented immigrant youth, which influences state and local policies towards Latino immigrants.

2. Immigrant Children and Vulnerability

The stereotyping language and policing policies as described above in Knox County, Tennessee and Maricopa County, Arizona as explained below impacts the ways in which immigrant children, mainly Latino, are treated within the immigration and juvenile justice systems. Before examining the specific relationship of immigrant children’s vulnerability in the juvenile justice system, it is important to understand the ways in which immigrant children relate to the legal system in the United States, which often gives them reduced agency.

For example, immigrant children are often afforded legal rights and status through their relationships with parents. Rarely, until recently in the history of U.S. immigration laws, have immigrant children been able to change their immigration status without the support of an adult. Further compounding the immigrant child’s reduced agency is the fact that immigrant children are also mainly afforded immigration benefits through immigration laws aimed at protecting immigrant children from harm. For example, immigrant children are offered protections under immigration law when they express a fear of returning to their country of origin through being granted asylum.


49. Shah, supra note 47, at 236.

when they are abused abandoned or neglected, or when they are victims of violence or trafficking. The immigrant child’s relationship to the immigration system has traditionally been one of dependence and victimhood. The immigrant child narrative has been one of a child seeking protection from harm.

Only recently through the Obama Administration’s exercise of prosecutorial discretion, not legislative action, were undocumented children who migrated to the United States and have resided here for several years afforded temporary relief and the ability to remain in the United States through their dependency on their parents or victim status. Deferred Action for Childhood Arrivals (“DACA”) is different from past immigration laws in which children’s immigration has been derived. Until DACA, immigrant children have related to the immigration system as victims or dependents. They have not been granted any agency over their status in relation to immigration laws.

In support of immigrant children’s reduced agency, many scholars have identified undocumented immigrant children in many ways. There is often a dichotomy between the deserving and undeserving immigrant that plays out in the narratives created surrounding immigrant children. Who is perceived as vulnerable within society often determines the choice of charity afforded to individuals within the legal system and the immigration system. The deserving immigrant is a victim of his circumstances, whereas, the undeserving immigrant is one who actively transgresses societal norms and is not worthy of integration into the American populace. Media, politicians and policies towards different immigrant populations create perceptions of deserving and undeserving immigrants.

We see this playing out with undocumented immigrant delinquent children in that they are in a category where they “fail to live up to idealized notions of autonomy, [and] . . . are blamed, and either

52. 8 U.S.C. § 1101(a)(15)(U); § 1641(c)(1)(B)(i).
54. Shah, supra note 47, at 233–34.
55. Barack Obama, President, U.S., Remarks by the President on Immigration (June 12, 2012); see also Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot. (June 15, 2012) (transcript available at whitehouse.gov).
56. Lauren Heidbrink, Migrant Youth, Transnational Families and the State: Care and Contested Interests 173 (2014).
57. Id.
58. Id.
59. Id.
deprived of support or... severely punished.”
Undocumented youth are “caught between two identities—one that they have for themselves and another that the federal government places upon them.”
Delinquent immigrant children are straddling two worlds. The first world places upon them a dependency on adults in order to obtain their immigrant status and identity. Whereas when Latino immigrant children transgress societal norms, the severe punishment that ensues divorces them from their dependency and fails to see them as minors, placing them outside the norms wherein children are seen as being worthy of rehabilitation and treatment under circumstances that are applied to U.S. citizen children within the juvenile justice system.
Correspondingly, the recent surge in unaccompanied immigrant youth entering the country has focused attention on the Southern border entry of unaccompanied minors and the “humanitarian crisis.” The discussion has centered on a humanitarian crisis with children fleeing their countries in response to violence and poverty. The increased attention given to immigrant juveniles at the border can be contrasted with undocumented immigrant youth, brought to the country as children, who have been residing in the U.S. since early childhood and end up interfacing with the state juvenile delinquency system. The latter child, in some circles, may be categorized as a victim and may be perceived as the “safe” or “vulnerable” immigrant to afford more protection under the law, whereas the former is perceived as violating social norms.
As anthropologist Lauren Hiedbrink observed:
  As a Border Patrol officer surveilling the Texas-Mexican border remarked to me, “But these are not our children.”; in fact, migrant children are not seen as possessing the vulnerability or rights of children at all. The detention, containment, and removal of the Other

61. Shah, supra note 47, at 231.
62. Id. at 232–33.
63. Hiedbrink, supra note 56, at 46.
65. Id. (“Experts say violence and poverty in sending countries and a desire to reunite with family members already in the United States, as well as a growing number of human smuggling networks, are the primary drivers of the migration.”).
are palatable. The illegality and perceived innate criminality of mi-
grant youth have become the preeminent factor in the ways that they are apprehended, detained and cared for by law enforcement and child welfare authorities.68

The border patrol agent’s statement illustrates the invisible status of immigrant children who are viewed as not worthy of protection under U.S. laws. The border agent’s perspective can be contrasted with advocates’ narratives which place undocumented youth in a victim category where the children “are not responsible for their presence in this country, they live with the burdensome threat of deportation that drives them and their families into the shadows, marginalized by the need to remain invisible.”69 The contrast to this narrative that has been advanced more recently is that “[immigrant children] whose parents are identifiable are seen as reproductions of their parents’ illegal or criminal behavior, destined to reproduce the same pathological behaviors embodied in the illicit presence in the United States.”70

Designating the unaccompanied child as a category of vulnerable victim frames mobility as a symptom of their vulnerability as children and a condemnation of the conditions spurring their migration. Advocates have come to frame this movement as representative of a rupture. The discourses of “lost childhoods” and social anxieties around the “lost generation” gain traction as advocates publicize the victimization of child migrants, abandoned children, and trafficking victims.71

As advocates may perpetuate the victim narrative in litigating cases for immigrant children, they must be cognizant of the repercussions of this narrative. For example, judges or immigration officers may be more receptive to narratives that play to stereotypes and depict children as victims with no agency in need of being saved by the immigration system. The dichotomy that the victim and vulnerable immigrant child creates versus the delinquent, undeserving immigrant child has repercussions on the ways in which immigrant children are dehumanized within the juvenile justice system and not afforded equal protection which inhibits their access to forms of immigration relief.

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68. Heidbrink, supra note 56, at 49.
70. Heidbrink, supra note 67, at 154.
71. Id. at 171.
The way that the migrant child is perceived also is also impacted by race, gender, and socio-economic status.\textsuperscript{72} The juvenile delinquent undocumented immigrant is uniquely situated within this framework based on the fact that the majority of undocumented youth that interface with the juvenile system are young Latino males.\textsuperscript{73} This particular population is viewed outside of the victim/dependent narrative, which makes this population susceptible to “othering” and more severe punishment when they transgress societal norms.

B. Layer Two: State and Local Juvenile Delinquency Systems

Unaccompanied migrant youths become yet another group of unencumbered, untrustworthy, brown men requiring law-enforcement intervention to control the threat to the nation.\textsuperscript{74}

An examination of the interface between the immigration system and juvenile justice system and its impact on Latino male juveniles reveals how race, lower socio-economic class and poverty intersect to create disparate treatment within these systems. Alarming statistics demonstrate how Latino boys are increasingly interfacing with the juvenile justice system. Across the country, there are approximately 600 juveniles arrested daily.\textsuperscript{75} Every Latino boy born in 2001 has a one in six chance of going to prison.\textsuperscript{76} Further, through the juvenile justice system school officials identify many Latino boys as gang threats.\textsuperscript{77} The result is hyper-surveillance and hyper-criminalization of Latino boys for common adolescent behavior.\textsuperscript{78}

These statistics show how a juvenile justice system initially set up to rehabilitate children reinforces stereotypes and acts as a means to exclude vulnerable children. The juvenile justice system was set up in 1899 to recognize “the special status of youth as amenable to and worthy of rehabilitation.”\textsuperscript{79} Some communities are utilizing the juvenile justice system to effectuate deportation of children instead of rehabili-
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tating undocumented juvenile children, which results in separating families and implements a very adult punishment for very juvenile conduct.\textsuperscript{80} In practice, the juvenile system has become an institution that increasingly criminalizes juvenile behavior and overlooks the ability to act as a mechanism to address the underlying issues that contribute to a child’s delinquent acts.\textsuperscript{81}

II. LOCAL, STATE AND FEDERAL POLICIES TOWARDS UNDOCUMENTED DELINQUENT IMMIGRANT YOUTH

Race, socio-economic status, and gender all contribute to the immigrant juvenile child’s increased vulnerability within the immigration and criminal justice systems. The interactions between the juvenile justice and immigration systems work in tandem to criminalize undocumented immigrant youth behavior. For undocumented youth, criminalization occurs where individuals are dehumanized to the point where society feels justified in punishing the individual.\textsuperscript{82} When dehumanization occurs children may not have adequate access to due process with the justice system to defend against delinquency charges or assert a form of immigration relief.\textsuperscript{83} Individuals who fall within this category are often poor, immigrant and minority populations.\textsuperscript{84}

It is in this light that interactions between the immigration and criminal justice systems must be examined as both of these systems have had adverse effects on minority, poor and immigrant populations.\textsuperscript{85} Both systems interconnect wherein perceptions of immigrant children are influenced by the stereotypes that come with the use of the term “illegal aliens.” In this context, “[‘illegal alien[s]’] [are viewed as individuals] who must be apprehended, controlled and removed from the state. This social sensibility taps into social anxieties about an invasion or flood of ‘illegal aliens’, requiring repression and containment unaccompanied children in the same ways that their adult counterparts do.”\textsuperscript{86} “For unaccompanied migrant youth, the state’s

\textsuperscript{80} Frankel, supra note 11, at 84–87.
\textsuperscript{81} See id.
\textsuperscript{82} See, e.g., Rios & Galicia, supra note 24, at 55.
\textsuperscript{83} Id. at 55.
\textsuperscript{84} Id.
\textsuperscript{85} See generally Kristin Henning, Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform, 98 CORNELL L. REV. 383, 404 (2013) (“From its inception, the juvenile court has operated as an institution for ‘other,’ nonmainstream youth living outside of the middle-class ideal.”).
\textsuperscript{86} HEIDBRINK, supra note 56, at 41.
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presumption is that they are an inherent risk to public safety and as a result, forfeit any opportunity for rehabilitation. Instead, by governing through crime, the state easily can remove them from the “homeland,” while those who are citizens remain incarcerated with little potential for rehabilitation.”87 “The out-of-place migrant youth transforms from at risk to the risk.”88

Several states and localities, which regularly interface with undocumented immigrant children, have developed policies, regulations and laws surrounding the detention and referral of undocumented immigrant children to Immigration and Customs Enforcement to initiate removal proceedings.89 More prominently since September 2001, there has been a shift from border enforcement for the removal of immigrants to interior enforcement.90 Interior enforcement is the removal of immigrants through referral to the Department of Homeland Security.91 With the passage of 1996 legislation, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), there was an increase of interior enforcement through the monitoring and verification of authorized immigrants within the United States.92 There also was an increase in the cooperation between federal, state and local governments with the creation of 287(g) agreements under

87. Id. at 46.
88. Id. at 48.
90. See generally Lisa M. Seghetti et al., Enforcing Immigration Law: The Role of State and Local Law Enforcement, 2–3 (2006) (focusing on the shift to interior enforcement of immigration laws after September 11, 2001 with the creation of the Department of Homeland Security) (stating “currently, there are express provisions in federal law that provide state and local law enforcement the authority to assist federal officers with the enforcement of immigration law under certain circumstances. Such authorities were enacted into law in 1996 in §439 of the Antiterrorism and Effective Death Penalty Act (AEDPA; P.L. 104-132) and §133 and §372 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; P.L. 104-206). In addition to the provisions enacted in AEDPA and IIRIRA, the DHS has several initiatives with state and local law enforcement agencies to facilitate the investigation, arrest and apprehension of foreign nationals who have violated the law, as discussed below.”).
91. Id.

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IIRAIRA. The 287(g) agreements permit state and local law enforcement officials to partner with the Department of Homeland Security, Immigration and Customs Enforcement Division under Memorandums of Agreement to apprehend and remove unauthorized immigrants from the country. With the implementation of IIRAIRA and 287(g) programs, interior enforcement increased. Between 2006 and 2008, interior enforcement removals accounted for forty-three percent of removals. Between 2011 and 2013, criminal removals accounted for eight percent of interior removals. The implementation of these laws resulted in a shift to integrate state and local officials into the interior enforcement of immigration laws.

Under the state and local policies, once an undocumented immigrant child enters the juvenile justice system, prosecutors, probation officers, and juvenile justices may refer the child to Immigration and Customs Enforcement through placing an immigration detainer warrant on the child. An immigration detainer warrant permits a state entity to place a hold on an immigrant for forty-eight hours after the conclusion of the state criminal proceedings. During the forty-eight

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93. Immigration and Nationality Act, § 287, (codified as 8 U.S.C.A. § 1357(g)) (“(1) Notwithstanding section 1342 of Title 31, United States Code, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.”).

94. Id.

95. Id.

96. Id.

97. See generally Anderson et al., supra note 89, at 4 (illustrating the point that individual local jurisdictions may develop their own policies regarding the referral of immigrant children to Immigration and Customs Enforcement); Seghetti et al., supra note 90, at 3 (discussing Congress’ first authorization of Quick Response Teams (QRTs) in 1999 to apprehend illegal aliens and deport them back to their country by working directly with state and local law enforcement officers. As of September 30, 2002, there were 45 QRTs in 11 different states, comprised of federal, state and local law enforcement officials, and established in areas that experienced an increase in illegal immigration. QRTs respond to requests from state and local law enforcement authorities who believe they have an illegal immigrant in custody. The federal law enforcement officials on a QRT usually include special agents, immigration officers and detention and removal officers. Congress appropriated funding for QRTs in FY1999 and FY2001.).

98. See generally 8 C.F.R. § 287.7 (2011) (providing that the Department of Homeland Security may advise a state prison, or another law enforcement agency, to detain an unlawful immigrant who is within their custody). Typically, the detainer process is commenced through a state or local entity contacting Immigration and Customs Enforcement Officers. Then, the Department of Homeland Security places a detainer advising a state prison, or another law enforcement agency, that ICE seeks custody of an alien presently in their custody. The law enforcement agency (state or local) must hold the immigrant for up to 48 hours, excluding Saturdays, Sundays, and holidays, to allow ICE to assume custody. The regulations empower the Department
hours, Immigration and Customs Enforcement must come and take the immigrant into custody.\textsuperscript{99} If this time period elapses without Immigration and Customs Enforcement intervention, then the state and local officials must release the immigrant.\textsuperscript{100} This policy is applicable to both adult and youth immigrants.\textsuperscript{101}

Part of the increase in state and local enforcement has included the referral of undocumented juveniles who interface with the juvenile delinquency system to Immigration and Customs Enforcement.\textsuperscript{102} Different states and localities have developed varied policies towards whether to refer children to Immigration and Customs Enforcement on an ad hoc basis, strict referral policies, or to remain silent.\textsuperscript{103} Some jurisdictions have developed policies where Immigration and Customs Enforcement officers are always contacted when an immigrant, undocumented and/or documented, is in their custody—strict referral policies—whereas, other jurisdictions, have developed policies based on varied local justifications and exercising prosecutorial discretion for referral of immigrants to Immigration and Customs Enforcement—ad hoc policies.\textsuperscript{104} The discussion below outlines the varied and inconsistent policies in Arizona, Los Angeles, San Francisco and Oregon.

For example, Arizona’s law (SB 1070) is an example strict referral policy. SB 1070 requires all police officers to investigate the immigration status of all individuals they stop if the officers suspect that the individuals are in the country unlawfully.\textsuperscript{105} Under Arizona’s policy, immigrant children are often referred to Immigration and Customs Enforcement.\textsuperscript{106} Different counties in Arizona have, however, developed varying implementation of SB 1070 towards undocumented delinquent children. “In the city of Chandler, [Arizona] . . . if police
suspect the immigration status of a juvenile, they will likely conduct an investigation of the parents.” The city of Nogales will refer children directly to juvenile authorities based on perception of undocumented status.

In contrast to the varied policies in Arizona, the Los Angeles Police Department adopted a policy that prohibited its officers from initiating any police action for the sole purpose of investigating an individual’s immigration status. The policy was upheld by the California Court of Appeal. The court found that the policy was not preempted by, nor did it violate, federal immigration law.

Another jurisdiction, Oregon, has a state law that prohibits law enforcement agencies from utilizing any public resources “for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.”

Similarly, “in San Francisco, immigrant rights advocates have pushed for a revision of a 2008 ordinance that mimics the federal Secure Communities program, a controversial initiative that compels local cops to report to ICE the immigration status of all people they detain.” Under the old policy, which was instituted by Lee’s predecessor Gavin Newsome, all undocumented youth who were arrested by city police were reported to Immigration and Customs Enforcement, even if their arrests never resulted in a conviction. Under this policy, an estimated hundreds of undocumented youth have been reported to immigration officials for deportation.

In its 2013 policy, Orange County started detaining and referring youth to Immigration and Customs Enforcement based on their “questionable” immigration status. Under this policy, in 2011, 170 youth were referred to immigration. “Between October 1, 2009 and February 10, 2013, ICE issued immigration detainer requests for nu-
meric youth detained in Orange County Juvenile Hall. Based on advocacy efforts by the University of Irvine’s Immigrant Rights Clinic, in June 2014, Orange County stopped referring youth to Immigration and Customs Enforcement and stopped all immigration holds after the conclusion of criminal proceedings. It is evident that there are varying state and local policies towards referring undocumented juveniles to Immigration and Customs Enforcement.

Currently, children in the immigration system are not viewed as rights holders capable of social and political agency. The U.S. government has not modified the immigration detainer system for children. Thus children and adults are treated the same.

The juvenile justice system is a system that is intended to be one of rehabilitation and treatment for children. Even though this is the goal, the juvenile justice system across the United States has become a system wherein children enter into a system rife with high recidivism rates and that is an entry into the criminal justice system.

The failure of the immigration laws to require state and local uniformity in regards to the referral of immigrant youth to Immigration and Customs Enforcement facilitates arbitrary and unequal enforcement of immigration detainers on delinquent immigrant youth. Often, young Latino males bear the brunt of the ad hoc policies as they are the majority of youth offenders referred to Immigration and Customs Enforcement for removal from the United States. Even though the

115. Id.
117. See, e.g., Heidbrink, supra note 56, at 159, 163.
118. Under 8 CFR § 287.7, there is no separate policy in instituting an immigration hold on a child—the same I-247 form is filled out by Immigration and Customs Enforcement for immigrant children. Once the child is in immigration custody, unlike adults, they are placed in the custody of the Department of Health and Human Services, Office of Refugee Resettlement, Division of Unaccompanied Children for detention under the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. See generally William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008).
119. Child Trends Data Bank, Juvenile Detention: Indicators on Children and Youth 2 (2013), http://www.childtrends.org/wp-content/uploads/2012/05/88_Juvenile_Detention .pdf (“One estimate suggests that between 50 and 75 percent of adolescents who have spent time in juvenile detention centers are incarcerated later in life.”)
Federal Juvenile Justice and Delinquency Prevention Act expressly prohibits detaining a juvenile solely because he is undocumented, in practice, some jurisdictions have unlawfully detained children based upon their immigration status.^{121} Undocumented youth are deportable for not having the correct immigration status and the juvenile justice system is just an avenue for Immigration and Customs Enforcement to identify such youth for deportation.

The juvenile court referral of undocumented immigrant juveniles to Immigration and Customs Enforcement is a part of a model in which “[t]he juvenile court has shifted from a model based on the tutelary complex as a means of distributing social services to a more punitive mechanism of social control that ignores mediating conditions of structural poverty and racism, yet the conditions under which the court must operate also have changed.”^{122} As evidenced by the varied and ad hoc basis, strict referral policies, or to remain silent policies, states and localities can exercise a wide amount of discretion for referring immigrant juveniles to Immigration and Customs Enforcement to institute immigration proceedings for removal from the United States. The lack of uniformity and the amount of discretion local authorities can exercise over these decisions leaves room for a disproportionate number of Latino delinquent males to be targeted and referred to Immigration and Customs Enforcement for removal from the United States without regard for or consideration of the goals of rehabilitation that underlie the juvenile justice system or a complex legal analysis regarding the forms of immigration relief for which a delinquent immigrant child may be eligible.

**CONCLUSION**

The question becomes how to advocate for undocumented youth, like José, who are interfacing with these two systems where the goal has become exclusion—not rehabilitation of youthful behavior and a preference for family unity. The varied counter-narratives in which the immigrant youth are viewed present attorneys for undocumented youth in a precarious quandary. Attorneys are faced with constructing

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^{121} See 42 U.S.C. § 5633(a)(11) (2006) (“[J]uveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult . . . [and are aliens who have not charged with any offence] shall not be placed in secure detention facilities or secure correctional facilities.”).

^{122} Heidbrink, supra note 56, at 45.
narratives of their clients that conform to the constricting, stereotypi-
cal narratives that frame their clients as victims who are dependent in
relation to the failed state and parental apparatus under which they
may be able to successfully advocate and find relief for their clients or
construct narratives of their clients that empower their client’s stories
and give them voice and agency in the direction of their lives and in-
teractions with legal systems. The treatment of Latino delinquent
males presents attorneys and advocates with an insurmountable task
that must be addressed at a federal legislative level to promote uni-
formity, fairness and justice in the treatment of delinquent immigrant
children who interface with actors within the juvenile justice and im-
migration systems.
Policing and the Clash of Masculinities

ANN C. McGINLEY*

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INTRODUCTION: POLICING, RACE, AND GENDER

In 2014 and 2015, the news media inundated U.S. society with reports of brutal killings by police of black men in major American cities.1 These stories shocked average white Americans. Until recently, the media has only sporadically covered police abuse of black citizens. It appeared, therefore, that the killings represented a recent escalation in police brutality. Media reports may reflect a significant increase of killings by the police, or increased attention to a decades-old problem, or both, but police departments do not typically keep data on police killings of civilians.2 What the data that exist do show, however, is that at least for a five-month period in 2015, there was a disproportionate rate of police killings of unarmed black men. In response to the shootings of the past year, The Guardian conducted a study that found that in the first five months of 2015, there were 464 people killed by police in the United States.3 Of those 464, 102 were unarmed.4 Twenty-nine percent of those killed by police were black; 14 percent were Hispanic/Latino, and 50 percent were white.5 Blacks represent only 13 percent of the country’s population, but were killed at a disproportionate rate of 29 percent.6 Even more revealing, unarmed blacks were killed at slightly more than twice the rate of unarmed whites (32 percent vs. 15 percent).7 Twenty-five percent of

1. See infra notes 40–49; 71–80; 271–84; 290–300; 313–26 & accompanying text.
4. Id.
5. Id.
6. Id.
7. Id.
Latinos killed were unarmed. Moreover, nearly all of the persons killed—95 percent—were men.

Many members of the black community believe that the disproportionate police presence in the black community, mass incarceration of black citizens, and the killings of unarmed black men by police are related. Black communities claim that police departments have besieged them for decades. Due to the now infamous “War on Drugs” instituted by the Reagan administration, and the “broken windows” strategy of policing, law enforcement focuses its efforts on poor and predominantly minority urban communities. As a result, black male youths are incarcerated at a much higher rate than their white counterparts. Michelle Alexander has labeled the ever-increasing imprisonment of black men, “The New Jim Crow,” comparing the mass incarceration of black men and the consequences of a criminal record

8. Id.
9. Id.
12. This theory comes from an article published in The Atlantic that argued that disorder that is not addressed leads to more serious criminal activity in the area. See George L. Kelling & James Q. Wilson, Broken Windows: The Police and Neighborhood Safety, Atlantic, Mar. 1982. As a result of broken windows theory, a number of police departments initiated police practices that focus on misdemeanors and small crimes such as graffiti and loitering. See Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing 2 (2001). There has been significant criticism of the broken windows theory and policing strategies resulting from it. See, e.g., id. at 6–8 (concluding that broken windows theory and order maintenance policing are failures that have led to increased unnecessary incarceration); see also Bernard E. Harcourt & Jens Ludwig, Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000, 6 Criminology & Pub. Pol’y 165, 171 (concluding that the increase of misdemeanor marijuana arrests in New York City actually increased serious crime rather than decreasing it).
13. Loïc Wacquant, Racial Stigma in the Making of America’s Punitive State, in Race, Incarceration, and American Values, 57, 59, 63 (Glenn C. Loury, ed., 2008) (arguing for use of term “hyper-incarceration” rather than “mass incarceration” and noting that geography is important to hyper-incarceration); Frank Rudy Cooper, Hyper-incarceration as a Multidimensional Attack: Replying to Angela Harris Through The Wire, 37 Wash. U. J.L. & Pol’y 67, 70–71 (2011) (noting that “hyper-incarceration is actually targeted by gender and locale as well as race”)
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to the laws in the U.S. South that mandated segregation of black and white citizens after the Civil War.16

American neighborhoods are still highly segregated, and the police presence in black and other minority communities far outweighs that in white communities.17 While police officers attempt to justify their focus on black communities by the high arrest rate compared to the low arrest rate in predominantly white neighborhoods, this reasoning seems circular. A similar focus on college campuses where white students predominate, for example, would likely yield arrest rates for illegal drugs that are similar to or higher than those occurring in black neighborhoods.18

There is no question that race and class play a key role in the nature of policing that occurs in poor black urban neighborhoods, but the relationship between police and their victims is not only about race, class, and communities. It is also about gender. Black men, especially those living in poor neighborhoods, are the common victims of police scrutiny, stop and frisks,19 arrests, incarcerations, and killings. White men are almost invariably the police personnel who kill unarmed black males in the streets. Performances of masculinity by the police and their victims contribute to this pattern.20

This article uses multidimensional masculinities theory to analyze the intersection of race, gender, and class at which this problem occurs. It evaluates the crucial role gender plays in the formation, edu-


18. I am indebted to Frank Rudy Cooper for this insight, which he articulated in a joint talk we gave at Seattle University Law School. The research shows that blacks do not disproportionately use drugs illegally. See id. at 99.

19. “Stop and frisk” is the term for the police strategy of stopping persons on the street. “Stop and frisk” occurs when the police lack probable cause to arrest, but can articulate a reasonable suspicion that the person stopped is engaged in criminal activity. If the officers can meet this standard, it is legal to stop and frisk the suspect under the Fourth Amendment to the United States Constitution, which forbids unreasonable search and seizures. In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court sanctioned “stop and frisk” based on lesser evidence than probable cause. Many believe that this decision opened the door to wholesale searches of black youths.

20. By describing the unarmed men who are killed by the police as “victims,” I do not take the position that police engaged in the killings do not necessarily have a defense. It may be that at least in some cases the police officer’s fears are “reasonable,” when viewed from the police perspective. Nonetheless, unarmed minority men killed by the police are victims because they lose their lives where the police responsible for the killings may or may not be prosecuted.
Clash of Masculinities

cation, training, and work behavior of police officers.\textsuperscript{21} It also explains that the way some black men perform their masculinity may lead to stereotypical thinking by police that most black men are dangerous criminals. These stereotypes, once adopted by the police, either consciously or not, may lead to police officers’ violence, especially when working in poor black communities. In the worst of situations, the encounters between police and black male citizens turn deadly.\textsuperscript{22} The article concludes that an understanding of masculinities studies should lead to important policy changes in the gathering of evidence, research, education, and training of police. These understandings, combined with policy changes, may help prevent further police violence perpetrated on innocent victims.\textsuperscript{23}

For purposes of this article, masculinities is: 1) a social structure that empowers masculinity over femininity and men over women; 2) a series of behaviors deemed “masculine” by society or groups of society; and 3) the actual performance or “doing” of “masculine” behaviors. This article employs multidimensional masculinities, which considers race, sex, class, and other identity characteristics along with gender, and pays careful consideration to the context of the particular situation.\textsuperscript{24} It identifies masculine police practices and the masculine gender of the job of policing itself and analyzes how police departments and individual police officers respond to societal concepts of masculinity as they intersect with race and class.

The article also discusses how men in minority populations perform masculinity in public and explores how those performances interact with the police’s “doing” of their masculinity, sometimes with deadly results. In essence, there is a clash of masculinities between

\textsuperscript{21} This article deals with masculinities performed by male police officers in the use of excessive force against suspects in the community. Of course, female police officers can also engage in excessive use of force. But women represent a small percentage of the police forces, especially in smaller communities, in the United States. The specific killings in the examples throughout this article were caused either exclusively by male officers, or by a group with a predominance of male officers.

\textsuperscript{22} I do not blame the victim, but I demonstrate how the complex mix of police and neighborhood masculinities may lead to tragedy. It is important to understand that hypermasculinity performed by some black men in poor neighborhoods is a response to their subordination in our society and to the way that our society undermines the masculinity of poor black men.

\textsuperscript{23} Some police who kill unarmed men of color may be intentionally racist and classist, but absent the subtle and not-so-subtle messages of what it means to be a man, and the importance of masculinity to the job of policing, many male police officers would seek ways to resolve conflicts that do not lead to the killings of unarmed minority men.

\textsuperscript{24} See Ann C. McGinley & Frank Rudy Cooper, Masculinities, Multidimensionality, and the Law: Why They Need One Another, in Masculinities and the Law: A Multidimensional Approach 6–7 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).
the police and the minority male population that creates a dance that often leads to tragedy. *Yet all too often the victims who police kill do not display a hypermasculine performance, but because of stereotypes of black men as threatening and dangerous, police are more likely to use deadly force when faced with black male subjects, whether they are hypermasculine or not.*

Unfortunately, the importance of masculinity performances has received little or no attention in the public discussion about the killings in our streets. Even the President’s Task Force and the U.S. Department of Justice (“DOJ”) investigations of the Cleveland, Ohio and the Ferguson, Missouri police departments, which resulted from a series of shootings in Cleveland and the shooting of Michael Brown in Ferguson, Missouri, paid little or no attention to the importance of masculinity performances to the outcomes.25 This article fills the gap.

Part I describes the empirical findings of police killings of civilians and the DOJ investigations of the Cleveland and Ferguson police departments. The data from empirical studies and investigative reports clearly show that police use excessive force in poor minority urban neighborhoods. Some of the data also support the presence of racial bias, both conscious and implicit, in the police behaviors, but the reports ignore the importance of gender.

Part II explains masculinities, multidimensionality, and critical race theories and the connections among them. It then uses this theoretical perspective to analyze how multidimensional masculinities theory can explain the conflict between police and the black community, and, in particular, the pursuit of black men by (mostly white male) police officers. Part III offers a proposal for more accountability of police departments; it posits that understandings of masculinities and how they interact with racism must inform education and trainings in the police academy. I conclude that new understandings about masculinity, combined with increased research into new models of community policing that emphasize the importance of eliminating

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hypermasculine behaviors should lead the way. With effort, these types of programs will encourage a safer environment for men of color in the United States and will lead to improved community policing for all.

I. EMPIRICAL UNDERSTANDINGS OF POLICE BEHAVIOR

A. Use of Force Studies

Police use of force is not randomly distributed throughout the community, but is concentrated in neighborhoods with a higher percentage of blacks and Latinos.\(^{26}\) Police use of deadly force “is greatest in the most populated cities and in cities with the highest murder rates.”\(^{27}\) Police are more likely to kill blacks in large cities with higher black murder rates and with more families headed by single women\(^{28}\). In cities with black mayors, however, the percentage of blacks killed by the police declines.\(^{29}\)

While the race of those living in the neighborhood actually does predict prevalence of police killings of civilians, studies that have tried to demonstrate that race of the officer and victim affect individual police officers’ decisions to shoot or not to shoot yield mixed findings.\(^{30}\) These studies use computer simulations in which the study subjects play the role of police, and are told to shoot using the computer keyboard or joystick if the suspect has a weapon, and not to shoot if the suspect does not have a weapon.\(^{31}\) Studies measure both reaction times and error rates. Some of these studies identify a clear link between race of the suspect and the officer’s speed and/or willingness to shoot, whereas others do not.\(^{32}\)

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\(^{26}\) Kim M. Lersch, et al., *Police Use of Force and Neighbourhood Characteristics: An Examination of Structural Disadvantage, Crime, and Resistance*, 18 P OLICING & S OC. 282, 295 (2008). This study does not have the race of the individuals against whom force was used. It merely has the neighborhood and the percentages of minorities vs. non-minorities in the neighborhood. *Id.*


\(^{28}\) *Id.* at 854.

\(^{29}\) *Id.*


\(^{31}\) *Id.* at 358-59.

\(^{32}\) See, e.g., Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & S OC. PSYCHOL. 1314, 1317 (2002) (demonstrating link between race of suspects and shooting); Lois James et al., *Results from Experimental Trials Testing Participants’ Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 J. EXPERIMENTAL
Unfortunately, these individual studies suffer from various methodological problems because they fail, in many ways, to reflect real-life situations. One of the best individual experiments methodologically corrects many of the problems in earlier studies, but its results, too, are confusing. In Toward a Comprehensive Understanding of Officers’ Shooting Decisions: No Simple Answers to This Complex Problem, William T.L. Cox, Patricia G. Devine, E. Ashby Plant, and Lauri L. Schwartz explored the influence of suspect race, officer race, and neighborhood characteristics on the officers’ shooting patterns, by using real police officers instead of students as their subjects. The results were mixed. When measuring reaction times in response to still photographs, officers were more likely to shoot armed black suspects more rapidly than armed white suspects. In contrast, when responding to video simulations, the opposite occurred. When measuring error rates, the only race bias found was that subjects, responding to video simulations correctly failed to shoot unarmed black suspects more than unarmed white suspects. There was no pattern of a tendency to shoot unarmed blacks over unarmed whites.

The most important finding of the Cox study seems to be that changing environmental factors and using more complex, active video simulations yielded different results in police shooting experiments. This study demonstrates the complexity of using these types of experiments, even with real police officers as the subjects, to predict how officers will and do react in on-the-ground situations. It clarifies that science is far from determining whether race of officer and/or race of suspect are significant in police killings of civilians, and that there is much difficulty in attempting to measure and predict the racial effects
from these types of experiments. Fortunately, while these studies are not conclusive, we do have important theory, combined with actual investigations of real police departments that can shed further light on the problem.

B. Investigations of Real Police Departments

Given the weakness of the lab studies discussed in Subsection A above, it makes sense to take a careful look at uninterested investigations of real police departments. These investigations, completed by the Department of Justice, Civil Rights Division (“DOJ”) either in response to lawsuits brought alleging a pattern or practice of unlawful police behavior or to one or more police killings of unarmed civilians, contain valuable information about masculinity and race in police use of force. Because of limited resources, the DOJ cannot study every location where killings of unarmed men take place or even where there are serious allegations of racist police forces. But within the past two years there are two completed reports of police departments whose members have erroneously killed black unarmed civilians: Cleveland, Ohio and Ferguson, Missouri.

These two case studies represent many hours of work by DOJ investigators and attorneys who examined many witnesses and documents relating to the behavior of two Midwestern police departments, one in a large city, and the other in a smaller one. These reports provide important information about police behaviors as they occur on the ground. Although the reports do not necessarily reflect what occurs in other cities in the United States, neither should they be ignored. They provide a valuable piece of empirical evidence that tends to verify the thesis that a clash of masculinities—black and white—leads to deadly results in the streets of the United States.

1. Cleveland, Ohio, Division of Police

Cleveland, Ohio had a number of troubling incidents that led to a DOJ investigation.

*Malissa Williams and Timothy Russell*

In November 2012, a black couple, Malissa Williams and Timothy Russell, drove past a police station and the car backfired. The police believed that the couple had shot at the police and began a high-speed pursuit with sixty police cars and about one hundred police. Police eventually cornered the couple in a parking lot. Cleveland police
fired 137 shots into the car, killing both Williams and Russell. When police searched the car, there was no gun in the car. One officer, a white male, Michael Brelo, fired forty-nine shots into the car; fifteen of the shots occurred as Brelo stood on the hood of the car and fired down at the couple through the windshield. He was charged and acquitted of two counts of voluntary manslaughter.40

Tamir Rice

In November 2014, two Cleveland police officers arrived at a park where it was reported that a young man appeared to waive a gun.41 Within two seconds of arriving at the park, one of the policemen, Tim Loehmann, shot Tamir Rice in the abdomen.42 Rice, a twelve year-old African American boy, who was playing with a toy gun, died the next day of gunshot wounds.43 When Tamir’s fourteen year-old sister heard the shots, she ran toward Tamir to help him.44 Loehmann’s partner, Frank Garmback, wrestled her to the ground, handcuffed, and threw her in the police car, as Tamir lay bleeding on the snow-covered ground.45 Neither Loehmann nor Garmback made an attempt to help Tamir.46 An FBI agent arrived four minutes later and tried unsuccessfully to resuscitate Tamir.47 Loehmann, the rookie policeman who shot Tamir, had resigned under pressure from his previous police job in Independence, Ohio, because of his poor performance.48 Both Loehmann and Garmback are white.49

42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
49. The Cleveland Sherriff’s Department finished its investigation into the Tamir Rice case, and sent the case to the prosecutor’s office, which will determine whether or not to charge Officers Loehmann and Garmback in the shooting. Mitch Smith, Prosecutor Receives Findings in Fatal Shooting of Tamir Rice by Cleveland Police, N.Y. TIMES (June 3, 2015), http://www.nytimes.com/2015/06/04/us/investigators-hand-over-findings-in-fatal-shooting-of-tamir-rice-by-
These are only two of a series of troubling incidents that led to a DOJ investigation of the Cleveland Division of Police (“CDP”) for potential use of excessive force. The DOJ conducted the investigation jointly with the United States Attorney’s Office for the Northern District of Ohio. Overall, the Investigation found that the CDP engaged in a pattern or practice of both deadly and less lethal force, as well as tactical errors by CDP officers that endangered themselves and the public.\(^{50}\) In sum, the Report mentions four general findings:

- The unnecessary and excessive use of deadly force, including shootings and head strikes with impact weapons;
- The unnecessary, excessive or retaliatory use of less lethal force including tasers,\(^ {51}\) chemical spray and fists;
- [The use of] [e]xcessive force against persons who are mentally ill or in crisis, including cases where the officers were called exclusively for a welfare check; and
- The [use] of poor and dangerous tactics that place officers in situations where avoidable force becomes inevitable and places officers and civilians at unnecessary risk.\(^ {52}\)

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\(^{50}\) Investigative Report of the Cleveland Division of Police, supra note 25, at 3–7.

\(^{51}\) TASER is the registered trademark of a weapon that fires electric current that stuns the object, often causing neuromuscular incapacitation.

\(^{52}\) Investigative Report of the Cleveland Division of Police, supra note 25, at 3.
The Investigation found systemic deficiencies responsible for the pattern or practice. In particular, it found a failure to establish “effective and rigorous accountability systems.”\(^{53}\) Individual officers also bear responsibility, according to the Report, for their own actions.\(^{54}\)

Investigators were particularly troubled by the failure of police officers to report, and properly document force incidents, as well as their supervisors’ endorsement of questionable and unlawful conduct by the officers.\(^{55}\) Some investigators, for example, admitted that they conduct investigations with the purpose of casting the police officer’s behavior in the most favorable light possible.\(^{56}\) Many stated that they find an officer guilty of misconduct only if the evidence against the officer proves a violation beyond a reasonable doubt.\(^{57}\) The Report concluded that this is an unreasonably high standard that departments use to judge police misconduct.\(^{58}\) In fact, the Cleveland Report states that this standard has led to discipline extremely rarely, and when there is discipline it is often for minor procedural offenses.\(^{59}\)

The authors of the Report expressed special concern because a previous investigation in 2004 had identified a pattern or practice of constitutional violations and the same structural deficiencies and had made recommendations for change, but there was little or no effect.\(^{60}\) The Report emphasized that the CDP’s failure to police itself had led to an inability to work with community groups and members.\(^{61}\) It noted that the CDP operated in a militarized fashion, which reinforces the views of community members that the CDP is an “occupying force” rather than a partner in the community.\(^{62}\)

The Report also mentioned that although investigators did not focus on CDP’s search, seizure, and arrest practices, the force investigation revealed arrests, stops, and seizures that appear to be unconstitutional, and supervisors wrongfully reviewed search and seizure reports without seeking additional information justifying the officers’ behavior.\(^{63}\)

\(^{53}\) Id. at 4.
\(^{54}\) Id.
\(^{55}\) Id. at 5.
\(^{56}\) Id.
\(^{57}\) Id.
\(^{58}\) Id.
\(^{59}\) Id.
\(^{60}\) Id. at 5–6.
\(^{61}\) Id. at 6.
\(^{62}\) Id. at 6.
\(^{63}\) Id.
The Report found a number of deadly force violations as well, including officer shootings at suspects who posed no immediate threat to officers or others,\(^64\) and hitting people in the head with officers’ guns where use of deadly force is not justified.\(^65\) It also found excessive use of less lethal force, including use of TASER guns, chemical sprays, and strikes to bodies of suspects who pose little or no threat to the officer or the public.\(^66\)

Finally, the DOJ found that the policies were unclear, training of police was inadequate, police did not write proper force reports, and supervisors did not adequately investigate force reports.\(^67\)

The Report took no position on racial profiling, but it emphasized that there were serious issues between minority populations and the police. Interviews of African Americans revealed that the community believes that CDP officers are verbally and physically aggressive toward them because of their race.\(^68\) Moreover, officers resisted community members’ attempts to file complaints.\(^69\) Given this, the Report recommended a “comprehensive community policing strategy” that would enable law enforcement agencies and the people they serve to create an atmosphere of trust and develop solutions to the community problems.\(^70\)

2. Ferguson, Missouri Police Department

The DOJ investigated both the death of Michael Brown at the hands of a police officer in Ferguson, Missouri and the entire Ferguson Police Department.

*Michael Brown*

In August 2014, a white police officer, Darren Wilson, shot and killed Michael Brown, an unarmed black teenager in Ferguson, Missouri. Wilson had noticed Brown and his friend walking in the middle of the street, and told them to move to the sidewalk.\(^71\) When Wilson realized that Brown and his friend met the description of two suspects

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64. *Id.* at 14–17.
65. *Id.* at 18.
66. *Id.* at 19.
67. *Id.* at 1.
68. *Id.* at 49.
69. *Id.* at 49.
70. *Id.*
alleged to have stolen cigarillos, he parked his car at an angle, blocking traffic.\textsuperscript{72} Brown approached Wilson’s police car, and there was a scuffle over Wilson’s gun.\textsuperscript{73} DOJ investigators credited Wilson’s report that Brown grabbed Wilson’s gun, and Wilson shot at Brown from his car.\textsuperscript{74} Wilson got out of his car and chased after Brown who ran away; Brown turned around and began to move toward Wilson.\textsuperscript{75} Wilson shot at Brown.\textsuperscript{76} Brown was hit with six bullets in his head and torso, and died of multiple bullet wounds.\textsuperscript{77} He was unarmed.\textsuperscript{78} There was conflicting testimony whether Brown’s hands were up in a position of surrender as he approached Wilson.\textsuperscript{79} Wilson told investigators that Brown charged him in a threatening manner.\textsuperscript{80}

The DOJ performed two investigations: one of the incident surrounding Michael Brown’s death and another into the Ferguson Police Department’s [hereinafter “FPD”] use of force. It produced two reports.\textsuperscript{81} The DOJ investigation of the individual shooting of Michael Brown concluded that the evidence was insufficient to prove beyond a reasonable doubt that Officer Wilson’s shooting of Michael Brown was objectively unreasonable, and that he willfully shot Brown in violation of Brown’s constitutional right to be free from unreasonable force.\textsuperscript{82}

\textsuperscript{72} Id.  
\textsuperscript{73} Id.  
\textsuperscript{74} Id.  
\textsuperscript{75} Id. at 6–7.  
\textsuperscript{76} Id. at 7.  
\textsuperscript{77} Id. at 8.  
\textsuperscript{78} Wax-Thibodeaux, supra note 77.  
\textsuperscript{79} See DOJ MICHAEL BROWN REPORT, supra note 71, at 7.  
\textsuperscript{80} Id. at 7.  
\textsuperscript{81} INVESTIGATION OF THE FERGUSON POLICE DEP’T REPORT, supra note 25; DOJ MICHAEL BROWN REPORT, supra note 71.  
\textsuperscript{82} See DOJ MICHAEL BROWN REPORT, supra note 71, at 9–12.
Nonetheless, the broader investigation of the FPD found that the City and Municipal Court used arrests and court dates to raise revenue rather than to protect citizens’ safety. The Report, which excoriated the FPD, found numerous constitutional violations in searches, seizures, arrests, and use of force; it also highlighted a lack of training and a failure of supervisors to investigate use of force allegations.\(^83\) Officers routinely made arrests without probable cause.\(^84\)

Offense reports created by the officers themselves demonstrate that the officers see criticism and insolence as grounds for arrest, and even supervisors have condoned unconstitutional practices as retaliation for lawful opposition to the police’s exercise of its authority.\(^85\)

The Report also found that many of the procedures at Ferguson had a disparate impact on black citizens and that there was significant evidence of intentional discrimination. With reference to racial bias, the Report states, “Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of the Ferguson’s police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race.”\(^86\)

In particular with reference to the use of force, the Report found that the FPD engages in a pattern of excessive use of force that disproportionately harms African Americans. The overwhelming majority of the force used against community members—nearly 90 percent—is against blacks, even though blacks represent only 67 percent of the population.\(^87\) Moreover, “85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers” are directed at black members of the community.\(^88\) Officers use TASERS, where less force or none at all would be advised; they also release dogs on unarmed suspects.\(^89\) The Report lists telling statistics:

Police are 2.07 times more likely to subject African Americans to a search during vehicular stops (after controlling for non-race based variables) even though African Americans are 26 percent less likely to have contraband found on them during a search. African Americans

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\(^83\) *Investigation of the Ferguson Police Dep’t Report*, supra note 25, at 3.
\(^84\) *See Investigation of the Ferguson Police Dep’t*, supra note 25, at 18.
\(^85\) *Id.* at 26.
\(^86\) *Id.* at 4.
\(^87\) *Id.* at 4–5, 28.
\(^88\) *Id.* at 4.
\(^89\) *Id.* at 28.
are 2.00 times more likely to receive a citation and 2.37 times more likely to be arrested following a vehicular stop.\

Police officers use force against African Americans “at disproportionately high rates, accounting for 88% of all cases from 2010 to August 2014 in which an FPD officer reported using force. In all 14 uses of force involving a canine bite for which there is information about the race of the person bitten, the person was African American.”

Police officers are more likely to give multiple citations during a single incident to African Americans; blacks received “four or more citations on 73 occasions between October 2012 and July 2014, whereas non-African Americans received four or more citations only twice during that period.”

“African Americans account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges.”

“African Americans are 68% less likely than others to have their cases dismissed by the Municipal Judge.”

“In 2013, African Americans accounted for 92% of cases in which an arrest warrant was issued.”

“African Americans account for 96% of known arrests made exclusively because of an outstanding municipal warrant.”

Investigators found evidence of intentional discrimination and racial animus based on: 1) “consistency and magnitude” of racial disparities in treatment by police and courts; 2) direct communications among police and court personnel that exhibited prejudice against blacks; 3) other communications that demonstrated courts and police harbored racial stereotypes; 4) “background and context surrounding the FDP’s disparate enforcement;” and 5) the city’s consistent use of practices known to have a disparate impact on blacks and failure to correct the situation.

90. Id. at 62.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id. at 63.
97. Id. at 70–71.
The Report also found that the use-of-force review system is “particularly ineffectual.” Officers often do not report use of force at all. Supervisors almost never investigate force incidents. When they do, they do not interview witnesses or seek to review footage of a jail incident or examine videotapes from TASERS. They merely summarize the officer’s version of events.

**Summary**

In sum, the DOJ Report on the FPD is a devastating account of constitutional violations by the police directed in particular at African American community members. It blames a failure of leadership and effort to put into practice training programs for the officers, failure of supervisors to use their authority to teach officers constitutional means of conducting themselves, and failure to punish officers for acting unconstitutionally. Furthermore, the Report reveals many instances of direct evidence of persons in authority making derogatory comments about black members of the community, as well as engaging in racial stereotyping. Finally, the investigation finds many members of the black community who stated that FPD officers had used racial epithets in dealing with members of the public.

These reports comprise important data points about what occurred in Cleveland and Ferguson, and may potentially indicate behaviors that are responsible for shootings in other urban settings. But they do not discuss the importance of gender—masculinity, in particular—to the results in these cities. One likely reason is that masculinity is considered so natural that it is often invisible to onlookers. Race and class are extremely important to the behaviors described in the DOJ reports, but without an understanding of masculinities, the analysis is missing the third leg of a three-legged stool. Masculinities are a hidden explanation in these reports. Part III explains masculinities theory, and how it relates to race and class.
II. MASCULINITIES STUDIES AND CRITICAL RACE THEORY: HEGEMONY, PRIVILEGE, AND SUBORDINATION

A. An Introduction to Masculinities Theory

Masculinities experts are feminists who believe that a study of men and masculinities appropriately supplements feminist understandings. Both feminists and masculinities theorists believe that gender is a social construction. Although male and female bodies are different, in particular when it comes to reproductive function, femininity and masculinity do not result wholly from female and male biology. Rather, these traits, in large part, are socially constructed through invisible structures that reinforce gender roles and societal messages to boys and girls, men, and women.

Masculinities theorists posit that men accomplish masculinity by working to conform to societal expectations in different contexts. Masculinities theorists conclude that feminism neglects the hierarchical relationships among men and how those relationships affect both men and women. While feminism may see men as an undifferentiated powerful mass that imposes its power to harm women, masculinities theory sees a gender structure that requires men to “act like real men.”

Even though the definition of “real men” is contested and changing, the term “hegemonic masculinity” describes the ideal masculinity that has the most power at any given time and place. In Western culture, the hegemonic masculinity focuses on competition, aggression, independence, control, and capacity for violence. It ordinarily describes the upper middle class white male professional who represents the ideal version of masculinity because of the important relationship between masculinity and breadwinning.

105. Nancy E. Dowd, The Man Question: Male Subordination and Privilege 60–61 (2010) (noting that masculinity is a social construction, not a biological given, is a conclusion “widely held by masculinities scholars”). Feminists have similar views about femininity. That is, women’s “weakness” usually derives from unequal power structures rather than from biology. Id. at 2.


107. McGinley & Cooper, supra note 24.

108. See Dowd, supra note 105, at 16; Messerschmidt, supra note 106, at 45.


Masculinities theorists argue that there is constant pressure on men as individuals to aspire to the hegemonic form of masculinity.\(^{111}\) While many men attempt to conform to the societal ideal of the hegemonic male, most men find reaching the ideal an impossible goal, and “develop varied forms of accommodation, reinterpretation, and resistance to ideologically hegemonic patterns.”\(^{112}\)

In fact, many men feel significant pressure to conform to norms of masculinity that are more respected in their local social cultures. These forms of masculinity are “subordinated” or “oppositional” masculinities. Men who accomplish subordinated or oppositional masculinities are less wealthy and powerful than men engaging in hegemonic masculinity; they perform masculine behaviors in opposition to (and at times threatening to) hegemonic masculinity.\(^{113}\) Often these men perform their masculinity in a more physical or powerful, hypermasculine way. Examples of men who establish their worth through hypermasculine performances are blue-collar workers in factories, policemen, and firemen,\(^{114}\) or young black men from poor urban neighborhoods who adopt the “cool pose,” a version of hypermasculinity that emphasizes toughness and invincibility.\(^{115}\)

Despite their lower status, subordinated masculinities are extremely powerful in setting norms of masculine behavior in urban poor and working class communities.\(^{116}\) The victims of police violence and the police themselves predominantly hail from these communities.\(^{117}\) The victims often come from poor or working class minority urban communities; the white police predominantly come from white working class communities.\(^{118}\)

But masculinities are not merely individualized competitive behaviors. Rather, masculinities, as used here, comprise a social structure based in gender and around which many institutions revolve. Men are taught from boyhood not to appear like a woman (“don’t

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111. CONNELL, supra note 109, at 122.
113. MESSERSCHMIDT, supra note 110, at 11–12.
115. See infra note 270 for a description of “cool pose.”
116. McGINLEY & COOPER, supra note 24, at 5.
118. Id.
throw like a girl”) and not to be gay.119 While views of homosexuality continually change, many parents and teachers insist that boys act like boys, which means that they should not display any feminine or “effeminate” characteristics. Some of these “effeminate” characteristics include demonstrations of caring and emotions, which are associated with being a woman. (“Boys don’t cry.”).120 Men as a group reap the “patriarchal dividend,” the privilege in power and resources of being male, but because of the pressures placed on individual men to be appropriately masculine, they often feel powerless.121

Furthermore, the intersection of masculinity with different classes and races affects the relative privilege or disadvantage that a particular man might have. Viewing subjects through the lens of masculinity combined with lenses of race and class helps explain what happens, for example, when citizens challenge the police.

Before delving more deeply into masculinities theory in the specific context of police and their victims, the next subsection discusses some primary concepts of critical race and multidimensionality theories, and how these concepts support an understanding of masculinities and race in the policing context.

B. A Primer on Critical Race Theory

Critical race theory is an interdisciplinary theory in law that draws on a number of fields in the social sciences such as history, sociology, and ethnic studies. Critical race theory posits a number of concepts, two of which are important to this article. First, race is socially constructed yet materially relevant. Second, while certain groups in society continue to express racism overtly and consciously, eliminating overt racism is not sufficient because implicit or unconscious forms of racism still remain as a result of our history that are intractable and often invisible to white people.122 As Michael Omi and Howard Winant conclude, race is neither merely an ideological construct, nor an objective condition.123

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119. See Dowd, supra note 105, at 62.
120. Id.
121. Connell, supra note 109, at 79.
122. See McGinley & Cooper, supra note 24.
123. See Michael Omi & Howard Winant, The Theoretical Status of the Concept of Race, in THE THEORETICAL STATUS OF THE CONCEPT OF RACE, IN RACE, IDENTITY, AND REPRESENTATION IN EDUCATION 3–6 (Cameron McCarthy et al., 2005).
1. Socially Constructed but Materially Relevant

Critical race theory explains that race is socially constructed but at the same time materially relevant. Persons of different races have distinguishing physical characteristics. These physical characteristics such as phenotype are, however, not biologically determinative of personality, traits, intelligence, or other important personal characteristics. In fact, the biological difference is unimportant, but society has constructed important differences. History and its social effects have created race. That is, in the United States, because of the history of slavery, Jim Crow, and discrimination, black race has a social meaning. Because U.S. society has inscribed onto black bodies a meaning that is inferior to that of white bodies, blackness is material in society even though the differences between black people and white people would not be material absent our culture. Because of our history, the creation and the continuation of social categories of race, blackness is relevant in that it is associated with strong stereotypes and prejudices that affect the way that society and institutions are structured and the way individuals act within these institutions.

Blackness is socially constructed as inferior to whiteness. But even though there is no important biological difference, many blacks have identifying physical characteristics, such as phenotype, that, combined with the social construction of race, make blackness a material disadvantage in the United States. This is what critical race scholars mean when they say that race is socially constructed, but material at the same time.

2. Structural Bias Expressed Implicitly

The second important concept of critical race theory is that although society disapproves of overt racism, racism still exists. Anthony Greenwald and Marzarin Banaji, along with a number of other social scientists, conclude, based on significant empirical support, that implicit racism is prevalent in our society; a large percent of those who believe that they are not racist actually harbor unconscious...
This implicit bias is harmful to blacks because it affects policies and practices built into the very structure of the law and society. It may also be responsible for individual reactions based on stereotypes society teaches its members from birth.

3. Critical Race and Multidimensional Masculinities Theories

Critical race and masculinities theories overlap in important ways. First, like critical race scholars who believe that race is socially constructed, masculinities scholars conclude that gender is socially constructed. While there are real physical differences between men and women, the meaning and importance of the differences exist primarily because of social messages and structures. Moreover, gender itself is social: it has no meaning outside of the social context in which it exists. Multidimensional masculinities theory, which incorporates intersectionality theory’s insight that unique identities form at the intersection of two or more identities, considers a person’s identities as they play out in the context of a particular situation. For example, a black male employee in a blue-collar workplace such as the police force would likely have more power than a black female police officer. On the street, however, because of the nature of policing and stereotypes about black men, a black man would likely draw more negative attention from the police than a black woman. In essence, the power of the black man vis a vis a black woman differs depending on the setting.

C. Using Multidimensional Masculinities to Analyze the Conflict Between Police and Black Men

1. Gender, Race, Class, Police Officers, and Black Suspects
a. Gendered Policing

Police work is gendered male. Law professor Angela Harris notes that the importance of hypermasculinity to police work “emerges in the very qualifications for the job” which emphasize a

133. McGinley & Cooper, supra note 24, at 6–7.
134. See Messerschmidt, supra note 106, at 175.
military metaphor in organization and rhetoric. The increased militarization of the police is not accidental. It has occurred as a result of a combination of the War on Drugs by the Reagan administration, and a response to fear of terrorism as a result of the bombing of the World Trade Center in New York City in 2001.

Harris explains that masculine culture is deeply embedded in street policing. The police form a brotherhood that relies on a division between the police and the criminals—a mentality of “us vs. them.” She likens police to what “street gangs aspire to be: sovereign protectors of turf, defenders of the innocent, and possessors of a monopoly on violence and moral authority.” Even when individual policemen engage in obvious criminal behavior while on the job, there is a “blue wall of silence” and the officers close ranks to protect their member from outside investigations. The code of silence makes it difficult to detect use of excessive force and to investigate it when it happens. Fellow officers shun and ostracize those who break the code.

Because police officers see themselves as guardians of “nice” (predominantly white) neighborhoods, and enforcers of the law against a “community of savages,” the racialized “other” becomes the symbol of criminality. Police officers enhance their own masculinity by aligning themselves with what they see as “the just” and protecting them from intrusion by racialized criminals.

137. Harris, supra note 135, at 794.
138. Id.
139. Id. at 795, 796.
141. Id. at 491. A recent example of the “blue code of silence” and the importance of police officers’ honor is the reaction New York City police demonstrated to Mayor Bill De Blasio when he ordered that after the Eric Garner case, that New York City police attend a three-day “retraining” program. See Conclusion infra for a description of the Eric Garner case. De Blasio noted that he had warned his biracial teenage son about the dangers of the police. Soon after, in an unrelated incident, two New York police officers were gunned down. Alex Altman, Why New York Cops Turned Their Backs on Mayor de Blasio, Time (Dec. 22, 2014), http://time.com/3644168/new-york-police-de-blasio-wenjian-liu-rafael-ramos/. When the mayor spoke at the downed police officers’ funerals, many members of the police department turned their backs on him. Id.
142. See Harris, supra note 135, at 797.
Harris explains that black officers, too, engage in the most violent behavior directed at black suspects because police work gives black officers an opportunity to gain the privileges of hegemonic masculinity. And, because the suspects are labeled criminals, not blacks, African American police officers can do the police work without betraying their race.

Harris speaks of police officers’ gender violence in the specific context of a brutal sexual assault by New York police officers on a male suspect. Officer Volpe forced a broomstick up Haitian immigrant, Abner Louima’s anus and stuck the broomstick in Louima’s mouth as another officer held Louima down. Volpe’s colleagues who witnessed the attack remained silent at least until the investigation got underway. The assault simultaneously enhanced the masculinity of the officers involved by demonstrating that their manhood was superior to that of the suspect, and also demeaned the masculinity of Mr. Louima. The other officers who witnessed the event and the police department also benefitted from the assault and the resulting silence of the officers who witnessed it. Louima, as Harris explains, represented a racialized, criminal threat to the officers’ masculinity and to the masculinity of the New York City Police Department. Volpe’s assault on Louima demonstrated that he and his colleagues and the entire department were more “manly” than Louima.

The police killings of black male citizens that I describe in this article are less intimate than the violation of Abner Louima, but they equally represent gender violence. Police officers need to demonstrate their superior masculine power over those whom they patrol. The reason for many of these killings may be race- and gender-based in that white police officers refer to racialized and gendered stereotypes of black men to judge the dangerousness of the situation; the officers are too quick to resort to deadly force. Moreover, the excessive use of force enhances the masculinity of both the individual officer and his department and serves as a message to the black male “savages” that the police department is superior to them.

143. Id. at 798.
144. Id.
145. Id. at 778.
146. Id.
147. Id. at 798.
148. Id.
As law professor Leigh Goodmark notes, “[p]olicing shares a number of attributes with all-male institutions like sports teams or single sex schools: a need for dominance, an emphasis on masculine solidarity, and the insistence that others within the group be protected . . . , a focus on physical courage, and the glamorization of violence.” Masculine traits that researchers identify in male police officers include: “combative personalities, resistance to management, a propensity toward violence and use of weapons,” stoicism, hardness, decisiveness, lack of emotion, strength, domineering and controlling personalities. Moreover, in their work, male police officers denigrate female officers as well as women in the community as a means of enhancing their own masculinity, and that of the department.

It was not until the 1970s that women entered the police force, and once they did, women were often relegated to work that was coded feminine, such as dealing with juveniles or victims of domestic abuse; women did not rise to the level of upper management. Even today, female police officers represent a small minority of the forces across the country. The Bureau of Justice Statistics calculates that among the largest thirteen cities, in 2007, female police officers ranged from nine to twenty-seven percent of the force with a median of seventeen percent. The smaller the force, the smaller the percentages of women on the force. In local police forces and sheriffs’ offices, female officers ranged in 2007 from a low of four percent in the smallest departments and offices to a high of fourteen percent in the departments and offices of over one hundred officers. Men doing police work have greater authority than their female colleagues. Moreover, police work enables men to construct their masculinity.

Female and male police officers perform femininity and masculinity as they work: when men and women are partners, the men often dominate the partnerships, control the shift, and conduct interviews of witnesses and victims while the women author the reports and do the

150. Id. (citations omitted).
151. Id.
152. Messerschmidt, supra note 106, at 175.
154. Id. at 2.
155. Messerschmidt, supra note 106, at 175.
156. Id.
Male officers take domestic violence less seriously than female officers, and are often themselves responsible for domestic violence. Female police officers experience stress caused by sex- and gender-based harassment and discrimination in these predominantly male, hypermasculine jobs. Special paramilitary forces such as SWAT teams are particularly hypermasculine. Extreme masculinity may prevent women from assuming equal roles on SWAT teams. Moreover, a recent study demonstrated that men generally do not believe that women are qualified for SWAT teams, but women disagree. Women have left SWAT teams because of the bad treatment received by male SWAT team members.

Law professor Frank Rudy Cooper explains that male police officers demonstrate two important characteristics that derive from their need to prove their masculinity. The first, “command presence,” is the ability to demonstrate control over a situation. “Command presence” describes an aggressive means of policing, a masculine method of control that is antithetical to negotiation and problem solving. Masculinity serves as a structure within policing and police forces and also governs how individual police officers perform their gender. Although an authoritative presence is sometimes necessary, especially when linked to masculinity, it is also subject to abuse. Second, police officers expect respect and male police officers construe challenges to their authority as challenges to their masculinity that deserve punishment. Police officers often use excessive force against persons who resist arrest or show a lack of respect.

This need to punish disrespect comes from a culture of honor that requires men to act in a way that preserves and promotes their masculinity in the face of challenges coming from other men. In fact, Cooper argues, male police officers engage in “masculinity contests”
with members of the neighborhood they are policing.\textsuperscript{168} These contests cannot result in both sides’ retaining their masculinity.\textsuperscript{169} One of the participants will cede to the other’s greater power, and will emerge as less masculine.\textsuperscript{170} The police officer begins with the premise that he has greater masculine power, a premise that a civilian might challenge. But when civilians do challenge the police officers’ authority (and, therefore, masculinity), the police officers will reassert their authority by engaging in behavior that “emasculate[s] suspects and elevate[s] their own masculine esteem.”\textsuperscript{171}

b. \textit{Policing in Poor Black Neighborhoods}

Besides masculine police culture there is a male pattern of policing: a “war” carried out through military type dominance and presence that translates into a high number of arrests in poor neighborhoods, and mass incarceration. The “enemy” of this war is implicitly men of color. There remains significant racial segregation in housing in U.S. cities. Particularly, the poor neighborhoods in U.S. cities are predominantly black, and in many cities, Latino.\textsuperscript{172} In 1982, the Reagan administration announced its War on Drugs.\textsuperscript{173} A few years later, the Reagan administration “hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the war.”\textsuperscript{174} As Michelle Alexander, author of \textit{The New Jim Crow} explains, the media campaign was immediately successful, with images of black crack “dealers” and “whores,” all of which “seemed to confirm the worst negative racial stereotypes” about black citizens living in poor black neighborhoods.\textsuperscript{175} The Anti-Drug Abuse Act, passed by Congress in 1986, established longer sentences for persons convicted of using or distributing crack cocaine than its counterpart—powder cocaine—and

\begin{itemize}
\item \textsuperscript{168} Id. at 701.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Gregory D. Squires, and Charis E. Kubrin, \textit{Privileged Places: Race, Opportunity, and Uneven Development in Urban America}, 147 NHI (Fall 2006), http://nhi.org/online/issues/147/privilegedplaces.html.
\item \textsuperscript{174} \textit{Alexander, supra} note 15, at 5.
\item \textsuperscript{175} Id.
\end{itemize}
imposed these sentences on the possession, use, or distribution of far less potent crack than for powder cocaine. This law disparately affected black communities because crack cocaine was more common in black communities, whereas powder cocaine was more common in white communities. It was not until 2010 that Congress amended the law in an attempt to equalize the punishment for crack and powder cocaine.

The War on Drugs also led to increased vigilance by police of poor minority communities in major cities that has lasted over thirty-five years. Bernard Harcourt and Jens Ludwig found that by the year 2000, in New York City, for example, there was a huge increase in misdemeanor charges of smoking marijuana in public view. The pattern of these arrests disproportionately affected African Americans and Latinos.

In large part because of the War on Drugs, including the long sentences imposed by law, the combined U.S. penal population in state and federal prisons rose dramatically from about 300,000 to more than 1.5 million from 1980 to 2013. Drug convictions account for most of the increase, and most of the drug convictions are of blacks and Latinos from poor urban neighborhoods. Today, the United States has the highest incarceration rate in the world. Although there is a perception among U.S. citizens that poor blacks are very violent, violent crime is not responsible for the spike in imprisonment. A recent study by Jason Carmichael and Stephanie Kent concludes that increases in size in city police forces result from income inequality, and racial threat caused by an increase in blacks living in

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177. Id.; ALEXANDER, supra note 15, at 112.
178. Id. To be clear, as of 2006, a much larger percentage of crack cocaine users were non-Hispanic whites (67 percent) than non-Hispanic blacks (17 percent), but crack cocaine was more prevalent in poor black communities than powder cocaine was. Kamesha Spates, More than Meets the Eye: The Use of Counter-Narratives to Expand Students’ Perceptions of Black Male Crack Dealers, in HYPER SEXUAL, HYPER MASCULINE? 133, 133 (Brittany C. Slatton & Kamesha Spates eds., 2014). More illegal drugs were making their way to poor inner city neighborhoods and the War on Drugs led to arrests and convictions for drug offenses to rise dramatically. ALEXANDER, supra note 15, at 5–6.
179. See Harcourt & Ludwig, supra note 12, at 165.
180. Id.
182. ALEXANDER, supra note 15, at 6.
183. Id.
184. Id. at 101.
Thus, it appears that income inequality in the United States that surged during the Reagan administration and still increases today may have caused the increased surveillance of black neighborhoods in major cities in the United States. Such increased surveillance, in turn, likely caused the dramatic rise in arrests, convictions, and incarcerations of black citizens.

According to Alexander, the United States imprisons today a larger percentage of its black population than South Africa did at the height of the apartheid era. The rates of drug crimes committed by blacks do not explain the disproportionate number of blacks imprisoned for drug-related offenses. Importantly, people of all races use and sell drugs at “remarkably similar rates,” but the police have concentrated on poor black communities. Moreover, it appears that the hyper vigilance of poor black communities has not reduced serious crime in those neighborhoods. A study by Bernard Harcourt and Jens Ludwig reveals, in fact, that in New York City, increases in arrests for misdemeanor marijuana charges actually led to an increase in the severity of crime in the neighborhood, rather than a decrease that broken windows policing theorists would suggest.

The Supreme Court’s increasingly narrow interpretation of the Fourth Amendment to the United States Constitution, which guarantees the right not to submit to unreasonable governmental search and seizures, has made it easier for the police to make drug arrests. A series of decisions by the Court has unleashed the power of the police in drug and other arrests. Primary among these decisions are Terry v.

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185. Carmichael & Kent, supra note 173, at 276.
187. Id. at 7.
188. See Harcourt & Ludwig, supra note 12, at 171. Because many states remove the right to vote permanently from convicted felons, a very large percentage of the U.S. urban black male population no longer has the right to vote, even in national elections. Moreover, imprisonment not only affects the franchise to vote, but also makes it extremely difficult for these men to gain employment once they are released from prison. Alexander, supra note 15, at 149–51. Moreover, felons are not eligible for food stamps and may be evicted from public housing. If felons are homeless, their children are placed in foster care. See id. at 57, 145.
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Ohio,190 Schneckloth v. Bustamonte,191 Whren v. United States,192 and Ohio v. Robinette.193

These cases give broad discretion to the police to stop nearly anyone based on limited, and often, pretextual reasons. Police power to stop and frisk combines with the discretion that the police department has to determine which neighborhoods to target and which persons to stop, either on the street or in cars, to create an unreasonably intrusive presence of the police in poor black neighborhoods. The discretion results in a disproportionate number of blacks stopped and frisked.

But discretion is not the only story. There is a major increase in the amount of funding and other resources available to state and local governments to fight the War on Drugs.194 The federal Drug Enforcement Agency (“DEA”) funds state and local police for training, intelligence, and technical support.195 These grants have led to a significant focus on minority members of the community and to countless arrests.196

Policing transformed from “community policing” to “military policing” with the passage of the Military Cooperation with Law Enforcement Act, which encourages the military to give local police forces access to military intelligence, research, and weaponry for drug enforcement.197 The availability of funds and equipment has led to increased militarization of police forces in poor black neighborhoods. Funds became available beginning in the late 1990s to add a military

190. Terry v. Ohio, 392 U.S. 1, 22 (1968) (permitting officers to stop and frisk persons upon an “articulable suspicion” but absent probable cause).
191. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (holding that police do not have to prove that a person who was not in custody and gave consent to a car search after a stop for a traffic violation knew he had a right not to consent).
192. Whren v. United States, 517 U.S. 806, 813 (1996) (permitting officers to stop a person for a traffic violation even if it was a pretext for a drug search).
193. Ohio v. Robinette, 519 U.S. 33, 35 (1996) (holding that police do not have to tell suspects about their right to refuse to consent when they are subject to a pretext stop).
194. Alexander, supra note 15, at 73.
195. Id.
196. Id. at 73-74.
197. Id. at 75-76. The Reagan Administration supported the Act, and subsequently, Presidents Bush and Clinton increased the provision of military equipment, technology, and training to local police officers with the understanding that the police would make drug interdiction a top priority. Id. at 76. President Obama increased the money available for drug enforcement through the Byrne grant program. Id. at 82–83.
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component to support drug enforcement.\textsuperscript{198} SWAT (Special Weapons and Tactics) teams formed in many localities to fight drugs.\textsuperscript{199}

Perhaps most influential to local police departments are the financial incentives the civil forfeiture law creates to engage in paramilitary operations.\textsuperscript{200} A law amended in 1984 permits local police forces to keep the majority of cash and assets seized as a result of a drug raid, granting to local police a huge stake in the illicit drug market.\textsuperscript{201} The law gave local police departments up to 80 percent of the cash, cars, homes, and other property they collected during drug raids, even where no one was ultimately arrested.\textsuperscript{202} Congress amended the civil forfeiture rules in 2000, but there is a serious question whether the reforms go far enough.\textsuperscript{203}

c. Performing Masculinities Through Work and Crime: The Importance of Class

International statistics on the gender of perpetrators of violence uniformly demonstrate a severely unbalanced sex ratio; men perpetrate ninety to one hundred percent of the violence globally, and women are responsible for less than ten percent of violence worldwide.\textsuperscript{204} Criminologist James Messerschmidt explains that the most salient predictors of crime are gender and age of the “criminal.” Young men engage in crime at a much higher rate than older men or women of any age do. But there is a significant difference based on class and opportunity concerning when a man “ages out” of crime.\textsuperscript{205} In poor urban neighborhoods men engage in crime at higher rates, not

\textsuperscript{198}. Id. at 73.
\textsuperscript{199}. In fact, many police forces use SWAT teams to conduct raids and arrests that used to be ordinary police work. Police use new equipment and tactics learned through trainings regularly in poor neighborhoods to serve no-knock warrants on citizens in the middle of the night. Id. at 74–75.
\textsuperscript{200}. Id. at 78–80.
\textsuperscript{201}. Id. at 77.
\textsuperscript{202}. Id. at 77–78.
\textsuperscript{203}. Id. at 80. Michelle Alexander notes that for the first time in 2000, there was an “innocent owner” defense, but the government’s burden of proof is low – it must demonstrate only by a preponderance of the evidence that the property was involved in a drug crime, and there is no attorney’s fees provision for a person who successfully challenges the forfeiture. Id. at 80-82. Without attorney’s fees, most poor blacks suffering from forfeiture do not have the funds to challenge it. Id.
\textsuperscript{204}. Lee H. Bowker, \textit{Introduction, in Masculinities and Violence} xi, xiv (Lee H. Bowker ed., 1998).
\textsuperscript{205}. \textit{Messerschmidt, supra} note 106, at 109-10.
only to survive, but also to perform masculinity, and, therefore, they “age out” later than men in working class neighborhoods do.206

Messerschmidt posits that crime itself is a means of performing or accomplishing masculinity.207 Men and boys of different classes have different relationships to crime and accomplish their masculinity by engaging in different types of crimes. While upper middle class (predominantly) white boys construct their masculinity through academic achievement because academic success is tied to breadwinner status,208 working class white boys often define their masculinity in contraposition to academics because they see physical labor as providing the only truly masculine jobs.209 Working class white boys use fighting as a means of demonstrating their masculine superiority over teachers and upper middle class white male students and female students.210 Fighting is a means of “constructing an opposition masculinity as collective practice.”211 Outside of the school, working class white boys disproportionately commit hate crimes. Hate crimes are public forms of masculinity that permit working class white boys to demonstrate their masculine superiority over gays and members of other races.212 Police predominantly come from this social class.213

Messerschmidt explains that poor and working class boys who are members of racial minorities have little or no access to paid labor.214 They resort to disorder and violence in school to construct their masculinity in a way that differentiates themselves from the working class white children.215 Outside of school, street gangs and street violence become means of accomplishing “opposition masculinity.”216 "Within

206. Id.
207. See id. at 79-80 (Messerschmidt explains that gender is more than a social sign but involves activity and behavior often associated with the specific gender. He alludes to the idea that crime is a behavior that often falls into the masculine category.).
208. Id. at 92-93. I do not mean to “essentialize” the experiences of the groups I discuss in this subsection. Clearly, not all white middle class men or black men, etc. are the same, but these observations are generalizations based on Messerschmidt’s study of these groups.
209. Id. at 97.
210. Id. at 98 (describing a study that observed working-class British boys).
211. Id. at 99.
212. Id.
213. Id. at 178.
214. Id. at 104.
215. Id. at 104-05.
216. Id. at 105. Many boys drop out of school and engage in robberies. “Robbery provides a public ceremony of domination and humiliation of others.” Id. at 107. Group robberies entail greater violence and provide the opportunity to prove to friends that a boy has no fear. As Messerschmidt notes, “The robbery setting provides the ideal opportunity to construct an ‘essential’ toughness and ‘maleness’; it provides a means with which to construct that certain type of masculinity—hardman. Id.
the social context that ghetto and barrio boys find themselves, then, robbery is a rational practice for ‘doing gender’ and for getting money.”

Because minority youths have few economic opportunities, they take longer to age-out of crime than do white working class boys. Some of these minority youths join gangs as an expression of masculinity. Opposing gangs struggle for domination in a way that allows them to accomplish their masculinity. In the United States, these youths live in the neighborhoods that are often targeted by the police.

2. Stereotypes: The Bad Black Man vs. the Good Black Man

The overwhelming majority of crime is committed by men. In fact, violence is considered a defining characteristic of masculinity. Police associate black men and other men of color in particular with criminality. Seeing all black men as presumptive criminals is reinforced by widespread stereotypes about black men and black masculinity. Stereotypical tropes define African American men in the United States. Sociologist Catherine Harnois states, “[T]he controlling images . . . work to justify continued racial segregation and inequality. They emphasize a kind of deviant black masculinity that is defined against a normative, middle-class, heterosexual white masculinity.” Law professor Frank Rudy Cooper explains that our society represents black men in bipolar fashion. Cultural images of black men include the Bad Black Man and the Good Black Man. The Bad Black Man is animalistic, criminal and hypersexual. Blacks were treated as chattel during slavery, and the image of black men as beasts persists even today. Moreover, black men have suffered from identification with criminality and unrestrained sexuality for centuries in Europe and the United States. Toward the end of slavery, there was a fear that freed black men would prey upon white women,
and an expressed need for white men to “control and repress” black men in order to protect white women.\textsuperscript{226} This fear increased after emancipation of the black slaves because black men had political and property rights similar to those of white males.\textsuperscript{227}

But more important, white supremacist masculinities were threatened by the freedom of black male slaves, and the perceived threat to the white male’s income and exclusive right to “pure” white women.\textsuperscript{228} Assuring that black men and masculinity did not challenge white masculinity, white male supremacists regularly lynched and castrated black men wrongfully accused of attempting sexual relationships with white women.\textsuperscript{229} Ida B. Wells demonstrated that lynching was usually related to black business success.\textsuperscript{230} Nonetheless, lynchings and castration assured the superiority of white men over black men, and white women.\textsuperscript{231}

The image of black man as hypersexual, violent, and bestial continues today, and appears in media portrayals of the news.\textsuperscript{232} While there are some good depictions of blacks in society, these are not predominant or strong images in popular culture. Furthermore, when positive images do prevail in popular culture, they are dismissed as the exception, thereby reinforcing the “truth” of the negative images, and justifying the continued unequal treatment of black men.\textsuperscript{233}

\textsuperscript{226} Id.
\textsuperscript{227} Id. at 877.
\textsuperscript{228} See James W. Messerschmidt, Men Victimizing Men: The Case of Lynching, 1865-1900, in MASCULINITIES AND VIOLENCE 125, 137 (Lee H. Bowker ed., 1998).
\textsuperscript{229} Id. at 140, 143–46.
\textsuperscript{231} See Messerschmidt, supra note 228, at 147–48.
\textsuperscript{232} During the writing of this article, a 21-year-old white young man entered a historical black church in Charleston, South Carolina and gunned down nine black victims. Reportedly, before he began shooting, he blamed blacks for “rap[ing] our women.” Ralph Ellis, et al., Shooting Suspect in Custody After Charleston Church Massacre, CNN (June 18, 2015, 11:50 PM), http://www.cnn.com/2015/06/18/us/charleston-south-carolina-shooting/. A webpage created by the perpetrator before the shooting contains a racist manifesto that blames blacks for crime on whites in the U.S. See Brendan O’Connor, Here Is What Appears to Be Dylann Roof’s Racist Manifesto, GAWKER (June 20, 2015, 10:55 AM), http://gawker.com/here-is-what-appears-to-be-dylann-roofs-racist-manifest-1712767241. While this perpetrator’s views cannot be attributed to other Americans, the trope of the black or Latino criminal still pervades our culture. For example, Donald Trump, as he announced his run for the presidency of the United States, identified Mexican immigrants as “rapists.” Donald Trump, President Announcement Speech (June, 6 2015) (transcript available at http://time.com/3923128/donald-trump-announcement-speech/).
\textsuperscript{233} See Harnois, supra note 220, at 96.
Many African American men, not only those who belong to the stereotyped lower classes but also those who are middle and upper middle class, suffer intense scrutiny by the police. Consider the arrest of Dr. Henry Louis Gates, Jr., a distinguished African American Harvard Law professor, when he attempted to open his front door after arriving home from vacation. Police, responding to a complainant who believed that Gates was an intruder, went to Gates’ home.\textsuperscript{234} By this time, Gates has gotten into the home, and a police officer asked Gates for his identification, which Gates provided.\textsuperscript{235} Gates’ driver’s license had his home address, and thereby verified he was not an intruder.\textsuperscript{236} Nonetheless, the officer asked Gates to step out onto the porch, and Gates refused.\textsuperscript{237} When Gates finally stepped out onto the porch, the officer arrested Gates for disorderly conduct.\textsuperscript{238} A report conducted on the incident blamed both men and stated that race, class, and a lack of respect for police authority were responsible for the conflict.\textsuperscript{239} The Committee investigating the incident did not even see that gender, combined with race and class, was a primary motivating factor of the incident.\textsuperscript{240}

African American parents of all classes describe “the talk” that they feel compelled to have with their teenage sons about how to react if the police stop or try to arrest them:

If you are stopped by a cop, do what he says, even if he’s harassing you, even if you didn’t do anything wrong. Let him arrest you, memorize his badge number, and call me as soon as you get to the precinct. Keep your hands where he can see them. Do not reach for your wallet. Do not grab your phone. Do not raise your voice. Do not talk back. Do you understand me?\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} See Frank Rudy Cooper, \textit{Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian}, 11 NEV. L. J. 1, 3 (2010) (arguing that the Gates controversy occurred at the intersection of race, class, and masculinity and in the context of a police arrest); Thompson, supra note 234.
This is a painful reality in contemporary U.S. The Good Black Man image is also an enduring trope. Like Uncle Tom, from *Uncle Tom’s Cabin*, the antebellum novel, the Good Black Man today is assimilationist; he performs his race and gender in a way that makes white people comfortable. He avoids complaining about racism and is ingratiating and compliant. But, as Cooper explains, the default position for black men is that they are Bad Black Men, angry and threatening.

Even if police do not consciously adopt the stereotypes of black men, the press constantly bombards society with messages about black men as dangerous, angry, and threatening. These images create attitudes about black men that may lead to differential treatment of black and white men in police encounters.

3. Performance of Masculinity by Some Black Men

There are multiple black masculinities, but the intersection of race and gender makes it clear that because of racial stereotypes, masculinity is a challenging goal for black men to attain. Some black youths perform their masculinity as hypermasculinity, which as expressed may bring more police attention. Harris notes that the history of slavery has contributed to black men’s view of who they are. African American men have always felt “emasculated” by the culture of white masculinity because of their inability to compete for hegemonic masculinity, which includes control over their own women. Culturally, black men have been stereotyped as weak and childlike and also as dangerous and threatening but unintelligent. As a response, some African American youths have adopted the “cool pose,”

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247. See Harris, *supra* note 135, at 783.
248. *Id.* at 783–84.
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a “rebellious” form of masculinity that opposes hegemonic masculinity and presents black masculinity as superior to white masculinity. 249

Americans view black male youths as crack dealers, even though the vast majority of crack users—67 percent—are white and blacks are no more likely than whites to sell cocaine. 250 Moreover, the perception of who sells drugs and arrest rates are both shaped by race. 251 This view comes from the widespread presumption of black male criminality in our society. 252 Even many of those black men who do deal illegal drugs, a distinct minority, are misunderstood. Black men do not decide to deal drugs out of whim, but rather, their decision often results from economic necessity. 253 Many sell drugs to provide for their families who live in poverty, and have no other means to make sufficient income. 254 A number of black men who were once drug dealers have made fame and fortune by creating and performing rap music, which describes the reasons for their former lives as drug dealers. These lyrics, although fully admitting of illegal drug use and dealing, also discuss the background in which this behavior occurs—a dysfunctional family, no help from society, a lack of education, and little or no economic opportunity. 255 According to sociologist Kamesha Spates:

[S]elling drugs is more about survival and less about being labeled as deviant. Contrary to popular belief, many of these men entered the drug game to counter notions that black men are unable to provide for themselves or their families. Though many of them were still kids themselves, their attempts to ‘man-up’ resulted in their willingness to take desperate measures. 256

249. Id. at 784.
250. Spates, supra note 178, at 133.
251. See, e.g., Katherine Beckett, et al., Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests, 44 CRIMINOLOGY 105, 105–06 (2006) (finding that blacks are significantly overrepresented in arrests in Seattle for selling drugs, disproportional to the racial and ethnic composition of those who sell drugs, and that race shapes perceptions of who and what constitutes the drug problems in Seattle and the institutional response to drugs).
252. Spates, supra note 178, at 133.
253. Id. at 142.
254. Id. at 143.
255. Id. at 144–46. bell hooks argues that men who produce rap and hip-hop music as a means of criticizing American society, however, are making money from the capitalist system and supporting white male patriarchy. See bell hooks, We Real Cool: Black Men and Masculinity 55 (2004).
256. See Spates, supra note 178, at 148.
An ethnographic study by researchers Michael Pass, Ellen Be- 
noit, and Eloise Dunlap supports Spates’ conclusion.257 Their inter-
views of ninety-four low-income black men demonstrate that when 
asked about manhood and masculinity, the subjects’ most prevalent 
response was that real men are responsible to provide for themselves 
and their families.258 In essence, low-income black men share the 
same views about the markers of manhood as their white middle-class 
counterparts. Yet, only thirty-six percent of the sample reported that 
they had legal jobs as their primary source of income.259 The authors 
concluded that poor black men provided for their households in ac-
cordance with the resources that were available to them.260 In other 
words, if necessary, black men resorted to illegal means to support 
their families. The authors noted, “It is clear that [the men] want to 
be seen as providers and protectors, responsible for people they care 
about, despite not having success in employment that is considered 
essential to the hegemonic image of masculinity.”261

Michelle Alexander argues that some black young men in poor 
neighborhoods embrace gangsta culture as a political act of resistance 
and defiance.262 The black youths who embrace the stigma of crimi-
nality see their behavior as a way of lessening the demeaning stigma. 
As Alexander states:

For those black youth who are constantly followed by the po-
lie and shamed by teachers, relatives, and strangers, embracing the 
stigma of criminality is an act of rebellion—an attempt to carve out 
a positive identity in a society that offers them little more than 
scorn, contempt, and constant surveillance.263

These performances are attempts to define one’s manhood, to ex-
press masculinity in a way that gives the young men power over those 
who pursue them, and an identity they can embrace. Unfortunately, 
this identity performance is often harmful to the individual, and can 
also increase the strength of society’s stereotypes about black men liv-
ing in poor minority neighborhoods. Alexander likens the gangsta 
culture on Black Entertainment TV to a “minstrel show” for an audi-

257. Michael Pass et al., ‘I just be myself’: Contradicting Hyper Masculine and Hyper Sexual 
Stereotypes Among Low-Income Black Men in New York City, in HYPER SEXUAL, HYPER MAS-
258. Id. at 173.
259. Id.
260. Id. at 179.
261. Id.
263. Id. at 171.
ence of white, suburban teenagers.\textsuperscript{264} Law professor Athena Mutua recognizes the important anti-racist message of Kanye West and other rap musicians, but she also recommends that black men instead engage in progressive black masculinities.\textsuperscript{265} That is, black men, according to Mutua, need to reject patriarchal control over black women and embrace feminism.\textsuperscript{266} She argues that black men’s embrace of concepts of ideal masculinity hurts black women, black men, and black communities.\textsuperscript{267} In other words, black men are harmed by “gendered racism.”\textsuperscript{268}

Even those black youths who do not engage in the black gangsta culture are often misunderstood if they engage in the “cool pose” by wearing the symbols of gangsta culture such as the hoodie, the sagging pants, the hat turned backwards. These symbols say “criminal” to white America, and likely to the police who work on the streets in the poor neighborhoods, and to other young blacks in the neighborhood.\textsuperscript{269} But these symbols of masculinity should not be misunderstood.\textsuperscript{270} Most young men, whether black or white, in poor or wealthy neighborhoods, represent themselves as masculine through clothing and other symbols that are powerful in their own local cultures. In fact, these symbols may represent masculinity in poor neighborhoods because they do represent criminality, but many boys and young men who are not involved in criminal behavior have also adopted these symbols.

\textit{Freddie Gray}

Freddie Gray could have been one of these men. Gray and his sisters were raised by a disabled mother who was addicted to heroin

\begin{itemize}
\item \textsuperscript{264} Id. at 168.
\item \textsuperscript{265} Athena D. Mutua, \textit{Theorizing Progressive Black Masculinities, in Progressive Black Masculinities} 3, 4-5 (Athena D. Mutua, ed., 2006).
\item \textsuperscript{266} Id. at 5.
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id. at 6.
\item \textsuperscript{270} Daniel Goleman, \textit{Black Scientists Study the ‘Pose’ of the Inner City}, \textit{N.Y. Times} (Apr. 21, 1992), http://www.nytimes.com/1992/04/21/science/black-scientists-study-the-pose-of-the-inner-city.html (concluding that although “the ‘cool pose’ is often misread by teachers, principals, and police officers as an attitude of defiance,” it is actually a way to maintain “integrity and suppress rage”); see also Richard Majors & Janet Mancini Billson, \textit{Cool Pose: The Dilemma of Black Manhood in America} xi (1992) (arguing that “cool pose” is a strategy that can be used to demonstrate pride and masculinity, but can also, when used as a mask, have negative effects).
\end{itemize}
and illiterate.\textsuperscript{271} He and his sisters suffered lead poisoning from high lead levels in the paint on the walls in their rented home in an impoverished neighborhood in Baltimore, Maryland.\textsuperscript{272} By the time of his death at age twenty-five, Gray had been arrested more than a dozen times, and convicted a few times for heroin and marijuana possession.\textsuperscript{273} He had spent two years in jail.\textsuperscript{274} On a fateful day in April 2015, Freddie Grey walked outside in Baltimore and made eye contact with a police officer.\textsuperscript{275} The rest is history. Freddie began to run away and the police apprehended him and pinned him to the ground.\textsuperscript{276} The police dragged Grey to the back of a police van.\textsuperscript{277} By the time Gray arrived at the police station, he was not breathing.\textsuperscript{278} He was hospitalized for a week and died.\textsuperscript{279} His autopsy showed that Gray died from a “high energy impact.”\textsuperscript{280} Officers had placed Gray into the van with handcuffs and ankle cuffs.\textsuperscript{281} Contrary to policy, the officers did not belt Gray in.\textsuperscript{282} This permitted Gray to hit his head due to sudden deceleration of the van. The state medical examiner’s office ruled the death a homicide.\textsuperscript{283} Many believe that Freddie Gray had a “rough ride,” a term commonly used by Baltimore police for the intentional placement of a suspect in a police van with handcuffs and no seat belt and making sudden stops that can cause serious injury.\textsuperscript{284}

\begin{thebibliography}{99}
\bibitem{272} Id.
\bibitem{273} Id.
\bibitem{274} Id.
\bibitem{276} Brown, \textit{supra} note 275.
\bibitem{277} Hermann & Woodrow, \textit{supra} note 271.
\bibitem{278} Id.
\bibitem{279} Id.
\bibitem{281} Id.
\bibitem{282} Id.
\bibitem{283} Id.
\bibitem{284} ‘Rough rides’ or \lq\lq nickel rides\rq\rq are common in other police departments, and have led to serious injuries and law suits against police departments. Manny Fernandez, \textit{Freddie Gray’s Injury and the Police ‘Rough Ride’},’ N.Y. TIMES (Apr. 30, 2015), http://www.nytimes.com/2015/05/01/us/freddie-grays-injury-and-the-police-rough-ride.html?_r=0. There are two pending investigations by the DOJ regarding the Freddie Gray incident; one will study the specific incident surrounding Gray’s death, and the other will study the police department. See Mike Levine,
Prosecutors charged six officers with crimes ranging from second-degree murder to false imprisonment.\textsuperscript{285} A grand jury later indicted the officers for similar charges.\textsuperscript{286} The police officers were five men and one woman.\textsuperscript{287} Freddie Gray was black. Two of the male officers were black, as was the woman.\textsuperscript{288} Three male officers were white.

4. “Heroes” versus “Thugs”\textsuperscript{289}

In sum, male police officers accomplish masculinity by acting tough in arresting poor black male suspects. This is not only an individual accomplishment, but the result of a number of structures including the normative masculine definition of militarized policing, the society’s fear of the “other,” the War on Drugs, and the increased arrests and incarceration of black men.

Individual officers, who are predominately male, usually hail from white working class neighborhoods. They reject the hegemonic white upper middle class masculinity that they cannot achieve, considering it a weak, wimpy persona. But that upper middle class white masculinity still holds significant power, and working class white men need to accomplish their own version of masculinity. In place of upper middle class masculinity, working class white male police officers create their own brand of masculinity, a tough hypermasculinity. This persona comes into contact with the black males in the poor neighbor-
hoods that the police officers work. In part due to inaccurate stereotypes of the bad black man, and in part due to hypermasculine performances put on by some black youths in poor minority communities, the police officers see the black youths as the “other,” “savages” that the police need to control. It is “us versus them.”

Playing the role of the hypermasculine cop whose job is to save the community from the “badasses,” some police officers absorb the message that black men are criminals, even when those black men before them do not adopt the role of hypermasculine “badass.” This stereotyping of black men may be conscious or unconscious, but in either event, it leads to the use of excessive force on black male suspects, which escalates to severe abuse and, even killings. This hypermasculine behavior by the cops actually accomplishes their own brand of masculinity because they now have vanquished evil, as they see it, in the name of society. In their minds, they are “heroes,” and their victims are “thugs.” While the majority of the cops are white and male, some women and men of color, given a sense of hegemonic power, also combine with white male police officers to constrain the “thugs.”

III. MASCULINITY AND POLICE SHOOTINGS: AGENDA FOR CHANGE

The theory of masculinities suggests that there are at least two different types of subordinated or oppositional masculinities engaged in competition for primacy on the streets in the United States. The police, whose (white) working class masculinity is subordinated to the upper middle class hegemonic masculinity, perform their masculinity in a hypermasculine, tough way, emphasizing physical strength and control, demanding respect and honor for themselves and their compatriots. When challenged, the police reinforce their masculine identities by engaging in abusive tactics toward other men who also do not meet the definition of hegemonic masculinity of the upper middle class.

These other men are often black, and because of stereotypes about black men, police view them as dangerous and threatening. These stereotypes encourage the predominantly white police officers to use excessive force to protect themselves and society; the stereotypes also justify use of excessive force against the dangerous “other.”
The use of force, in turn, enhances the masculinity of the police officers who engage in it, and of the department in which they work. While the stereotypes of black men are rooted in history, some black men in the community themselves also engage in hypermasculine performances of black masculinity—oppositional masculinities—to counter the stigma of being poor black men. These performances by some young black men, which represent them as drug users and criminals, create forms of masculinity that oppose both the hegemonic masculinity and the hypermasculinity of the police. Ironically, these hypermasculine performances by young black men, many of which do not include illegal behavior, enhance the stereotype of most black men as criminal and dangerous, thereby reinforcing a cycle of violence between the police and black men.

What is particularly odd, however, is that the police do not merely assert their masculinity by focusing on those men who practice hypermasculinized black criminal masculinities; rather, it appears that the police do not always distinguish between the black youths who engage in hypermasculine performances and other black men in the community who do not. Thus, it appears that many black men who become victims of excessive force by police departments do not necessarily challenge the police through use of their own forms of hypermasculinity. In essence, the police seem to assume a type of criminal hypermasculinity of black men living in poor urban neighborhoods.

Walter Scott

The case of Walter Scott, a fifty-year old black man, who was gunned down by a white police officer in North Charleston, South Carolina, is a good example of this phenomenon. In April 2015, Officer Michael T. Slager, pulled over Walter L. Scott because his car had a broken taillight. Scott ran, his family believes, because he feared Slager would arrest him for failure to pay child support. Slager followed Scott, and a scuffle ensued. Scott broke away again, and Slager pumped bullets into Scott's back as he fled. After the eighth shot, Scott collapsed. Slager called the police and re-

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291. Id.
292. Id.
293. Id.
294. Id.
Howard Law Journal

reported that he had shot Scott, but he told the dispatcher that Scott had grabbed the policeman’s TASER gun. Unbeknownst to Slager, however, an uninterested witness recorded the incident on his cellphone. The recording demonstrates that Scott was about fifteen feet away with his back turned to Slager when Slager shot him repeatedly. After Scott dropped to the ground, Slager approached and handcuffed the lifeless Scott. Slager returned to where he stood earlier, picked up an object that appears to be his TASER, and dropped it next to Scott’s body, in an effort, many believe, to back up Slager’s false story that Scott had grabbed his TASER. Scott, who was unarmed, died of multiple gunshot wounds.

There is no indication that Scott challenged Slager’s authority or that he engaged in a hypermasculine performance of his masculinity. There was no allegation that he showed disrespect. Like Tamir Rice, a twelve-year old boy who was playing in a Cleveland park, Walter Scott clearly did not perform his masculinity in a way that was threatening or oppositional to the police. While Freddie Gray, the Baltimore man who was fatally injured on his way to the police station, had a number of arrests on his record, there was no evidence at the time of his death that he had done anything to challenge the police other than making eye contact and running away. Michael Brown comes the closest to challenging the police’s masculinity. His fatal mistake may have been approaching the officer’s car and engaging in a scuffle over the officer’s gun. By the same token, the facts are disputed in the Michael Brown case, and it is unclear whether the college-bound young man demonstrated anything close to dangerous or criminal masculine behaviors. In essence, the clash of masculinities, whether real or imaginary, led to unnecessary killings of black men.

In conflicts between police and black men, masculine structures and performances occur on both sides. That is, society often views

295. Id.
296. Id.
297. Id.
298. Id.
299. Id.
300. Officer Slager was charged with murder as a result of the shooting. Id. There is a FBI and DOJ investigation into the death of Walter Scott, but reports had not yet been released at the time this article was published. See Timothy M. Phelps & Christi Parsons, Justice Department to Assist in Investigation of South Carolina Cop, L.A TIMES (Apr. 8, 2015, 12:51 PM), http://www.latimes.com/nation/nationnow/la-na-police-shooting-feds-20150408-story.html; FBI Launches Investigation Into Shooting by White Police Officer, JERUSALEM POST (Apr. 8, 2015, 2:38PM) http://www.jpost.com/Breaking-News/FBI-launches-investigation-into-shooting-by-white-police-officer-396494.
black men as having a failed or hyper form of masculinity. This view persists as a result of hundreds of years of treatment and attitudes toward black men. In turn, as a result of their subordination, some black men have responded with oppositional masculinities, reinforcing stereotypes about black male hypermasculinity. Some black men adopt “cool poses” that involve criminality and/or hypersexuality. The state, in turn, has reacted by employing an unprecedented militarized police presence in poor black neighborhoods. Most recently, this is the result of Ronald Reagan’s War on Drugs. While it is nearly impossible to prove cause and effect, it is undeniable that U.S. society has created the conditions under which a militarized police force kills black men at an alarming rate.

A. Recommendations for Change

As noted above, there are at least two completed investigations by the DOJ as well as a Task Force created by the President of the United States. The Task Force makes important recommendations concerning how to improve policing in U.S. cities. The Task Force recommends, for example, the following general concepts:

• Building Trust & Legitimacy;
• Policy & Oversight;
• Technology & Social Media;
• Community Policing & Crime Reduction;
• Training & Education; and
• Officer Wellness & Safety

All of the Task Force’s recommendations should be implemented quickly.

I fear, however, that police killings of black men will still continue without an understanding of the gendered, cultural nature of the killings. It may be more difficult to change our culture than to establish new rules about training, policing, and reviewing police behaviors. These rules are vital to assure the proper results, but education of police should include understandings about how gender—especially concepts of masculinity—lead to killings by police. Police academies should take seriously the damage that excessive hypermasculine behaviors and attitudes can create, and train their students in how mas-

culine performances are often invisible because of how normal they seem to society. Moreover, police departments should renew these understandings about masculinity so that police officers understand the difference between acting professionally and acting masculine.

An ethnographic study of a police academy by two sociologists demonstrates that much of the behavior in the police academy training reinforces hidden beliefs in the superiority of masculinity and the inferiority of female police officers. These trainings not only harm women, but also harm the male police officers and the departments because they teach police officers that masculinity is a vital criterion for professional police work. In fact, the messages of masculinity are invisible to many who engage in the training, but the training is effective. A hidden curriculum of masculinity, “taught obliquely by teachers and students, instructs students about the particular form of masculinity that is lauded in police culture, the relationship between extreme masculinity and police work, and the nature of the groups that fall ‘inside’ and ‘outside’ of the culture of policing.”

Making masculinity visible to police trainees and police, and requiring their supervisors to address excessive masculine practices are necessary changes that should underlie the new rules and regulations concerning police behavior. Building the work around concepts of competence, community policing, and safety and rewarding officers who engage in safe, community practices should eliminate unnecessary hypermasculine practices and assure better relationships with the community. This proposal is consistent with the Task Force’s recommendation that police departments decrease their military models and engage in community policing.

The following steps should help rid police departments of ineffective masculine policies themselves and excessive masculine behaviors that lead to unnecessary killings:

302. See Anastasia Prokos & Irene Padavic, ‘There Oughtta Be a Law Against Bitches’: Masculinity Lessons in Police Academy Training, 9 GENDER, WORK, AND ORG. 349, 440 (2002) (concluding that the police academy training had a hidden curriculum that lauded masculinity and conveyed that male officers were superior to female officers).
303. See id. at 440.
304. Id.
• A national database on police killings that includes the characteristics of the police personnel and the victims, such as race and gender, and the neighborhood where the killing occurred;

• Empirical research into the importance of masculinity to police officers’ use of excessive force;

• Empirical research on new models for police trainings that focus on de-gendering the police force, the reduction of masculine behaviors and reactions;

• Empirical research on alternative methods of supervising and investigating police use of force that would have a more productive result;

• Creation of models for police trainings and continuing education that not only encourages community policing, but that also work to reduce efforts of police to prove masculinity through the use of excessive force;

• Accountability of supervisors for a reduction of racism and masculine behaviors in the police department; and

• Affirmative hiring and promotions of black and other minority men and women in police departments.

B. Demographic Shifts and Hope for the Future

It is important to understand that there is hope for change. The demographics of police departments are changing. Where in the 1970s blacks made up about 6 percent of sworn officers in the approximately three hundred largest police departments in the United States, by 2006, in cities of over 250,000 people, 20 percent of officers were black, and 14 percent were Latino. This number rose from 18 and 9 percent, respectively in 1990. For most of the cities in the sample, the rise in ratios of minority police officers did not merely reflect a rise in the cities’ minority populations. In fact, the ratio of police of-

306. As Valoria Vojdik explains, it is not sufficient merely to allow women into an all-male environment. See Valorie K. Vojdik, Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions, 17 BERKELEY WOMEN’S L.J. 68, 74-75 (2002). It is necessary to change the culture so women can thrive. Masculine culture is based on the concept that men are superior to women. The culture needs to be dismantled. A positive side-effect of destroying the hypermasculine culture is that there may be less use of excessive force when it is no longer considered positive to prove oneself through the use of force.


308. Id.
Officers who are of color has risen well above the ratio of blacks and Latinos in the cities’ populations.\textsuperscript{309}

Law professor David Alan Sklansky explains that these changes mean that the police force is no longer a monolithic group of persons with the same voice and same ideas. Today, what used to be an insular subculture of sameness “is itself now being transformed, segmented, and rendered more porous by the growing diversity of the police force.”\textsuperscript{310} This increased diversity has not radically changed police departments, and for operational purposes, blue (the usual color of police uniforms) is still blue (police officers’ shared identity). Between service calls, however, police officers are a less cohesive group.\textsuperscript{311} This may be a good thing; there is hope that changing demographics will open police departments to important reforms.\textsuperscript{312}

\textbf{CONCLUSION: REFRAMING MASCULINITIES: REDUCING KILLINGS}

\textit{Eric Garner}

In July 2014, Eric Garner, a 43 year-old, 395-pound black father of six stood on a street corner in Staten Island, New York.\textsuperscript{313} Residents had complained about drug dealers who frequented the location.\textsuperscript{314} Two plain-clothes police officers, responding to their superior’s call to go to the site, approached Garner and accused him of illegally selling cigarettes.\textsuperscript{315} They attempted to handcuff Garner, who told them to leave him alone and pulled his arms away.\textsuperscript{316} One of the officers, Daniel Pantaleo, a white male, placed Eric Garner in an illegal chokehold and wrestled him to the ground.\textsuperscript{317} When Garner was prone, the other white male officer applied pressure to his back.\textsuperscript{318} Garner, cried repeatedly, “I can’t breathe,” as he lay on the ground under the officers’ pressure.\textsuperscript{319} Backup to the police arrived,
including a couple of sergeants. 320 One of the sergeants, a woman, reportedly told the officers to “ease up,” but they failed to do so. 321

The officers called for medical assistance, but the emergency medical technicians, who arrived in a few minutes, did not give Garner oxygen, even though his breathing was labored. 322 When the medical team put Garner into the ambulance, he was in cardiac arrest, and they finally gave him oxygen. 323 But it was too late. Garner was pronounced dead approximately 45 minutes later at the hospital. 324 The New York City medical examiner’s report stated that Garner died because of the chokehold and chest compression. 325 Garner was unarmed. 326

Garner’s treatment raises serious questions about the “broken windows” theory of policing, and the police officers’ motivations for holding him down, but it is clear that the officers acted in a hypermasculine way in their attempt to subdue the suspect. Not only did they

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320. Id.
321. Id.
322. Id.
323. Id.
324. Id.
325. Id.

subdue him; they also killed him, even though he posed no threat to the officers or to others.

Case studies suggest that training that provides individual officers with appropriate skills, combined with an organizational framework of internal and external accountability can reduce police use of force. Case studies suggest that training that provides individual officers with appropriate skills, combined with an organizational framework of internal and external accountability can reduce police use of force.327 Moreover, a study demonstrates that hypermasculine workplaces such as oil-rigs can become much more productive and less dangerous places when the focus is on safety and training that seeks to eliminate hypermasculine behaviors.328 More research is needed to set up programs for training of police that would focus on the positive aspects of policing and community relations.

Leadership is a key component of successful programs. These training programs, if they are to work to prevent needless police killings of black male citizens, should include education on masculinities, and how masculinity is not only built into the structure of society, but also how individuals perform to accomplish their masculinity. This self-awareness of individual police officers and their supervisors, along with new efforts to reduce the militarization of our police forces, should help reduce excessive force by police officers.

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INTRODUCTION

A white police officer’s killing of an unarmed, black teenager sparked a national movement.1 On August 9, 2014, in the middle of a Ferguson, Missouri street, Officer Darren Wilson fired nine shots into Michael Brown.2 There were conflicting accounts of the events that led up to the shooting.3 Wilson asserted that he struggled with the teenager, and felt like a five-year-old who was holding onto Hulk Hogan.4 Wilson also described Brown as a “demon” who came after his gun.5 Wilson admitted volleying several shots into Brown as Brown

4. Wilson Transcript 5, supra note 3, at 212.
5. Id. at 214–15.
Death by Cop

approached Wilson with his hands in the air. Dorian Johnson, who was with Brown at the time of the shooting, provides a different perspective. Johnson said Wilson grabbed Brown into his police car, and described Brown as the one in fear of Wilson. Johnson said that Brown only used the force necessary to pull himself away from Wilson. He also stated that when Brown turned towards Wilson—with his hands up—that Wilson continued to shoot several times, even as Brown’s body fell to the ground.

The grand jury “gave up their lives” while deliberating. St. Louis County Prosecuting Attorney Robert McCulloch inappropriately uttered these words in front of the entire nation when he delivered the grand jury’s decision not to indict Wilson. McCulloch convened the grand jury for twenty-five days, over a three-month period, in order to determine whether “probable cause exist[ed] to believe that a crime was committed, and that Darren Wilson [was] the person who committed that crime.” The grand jury heard testimony from Johnson, Wilson, and several other witnesses. It ultimately returned a “no true bill” on November 24, 2014. The tragic encounter between Wilson and Brown has simply become known as “Ferguson.” This shooting has sparked a national debate on police brutality, race, and prosecutorial discretion. The return of a no bill raises questions as to whether it was appropriate for McCulloch to prosecute Wilson; this Comment focuses on this aspect of the Ferguson debate.

This Comment recognizes that the grand jury’s decision may have been different had McCulloch recused himself from Wilson’s case. McCulloch’s conduct when he prosecuted Wilson was fraught with ir-

6. Id. at 227–29.
8. Id.
9. Id.
10. Id. at 121, 125.
11. Ferguson, Missouri Grand Jury Decision Announcement (CNN television broadcast Nov. 24, 2014) [hereinafter Live Broadcast]. Many critics were angered when McCulloch used the words “gave up their lives” when he referred to the grand jury’s laborious efforts in rendering its decision. See Alana Horowitz, Ferguson Prosecutor Robert McCulloch Gives Bizarre Press Conference, HUFFINGTON POST (Nov. 24, 2014, 10:04 PM), http://www.huffingtonpost.com/2014/11/24/bob-mcculloch-ferguson_n_6215986.html. Indeed, many found McCulloch’s press conference “baffling, unwieldy and inflammatory.” Id.
12. See id.
13. Id.
14. Live Broadcast, supra note 11.
15. Ferguson was number four of trending global news in 2014. See GOOGLE TRENDS - TOP CHARTS, GOOGLE http://www.google.com/trends/topcharts?hl=en#vm=cat&geo&date=2014&cid. [hereinafter GOOGLE TRENDS].
16. See id.
regularity, including McCulloch’s refusal to recommend a specific charge to the grand jury and instructing the grand jury on self-defense several times.\textsuperscript{17} McCulloch’s conduct confirmed that his close relationship with law enforcement led to the biased prosecution of Wilson. Like many state prosecutors, McCulloch has both a personal and professional relationship with his local police department, and for this reason, he should not have prosecuted Wilson.\textsuperscript{18} In fact, all state prosecutors should be automatically removed from cases where a police officer from their local police departments is accused of killing a civilian. This should be the case because there is a significant risk of prosecutorial bias that may form through the professional and personal relationships between the two agencies.

This Comment proposes that states adopt legislation that would require the appointment of a special prosecutor whenever a local police officer is accused of excessive force in the death of a civilian. The state rule would provide that a special prosecutor replace an elected state prosecutor at the very beginning of such cases. Specifically, a special prosecutor would be appointed during the investigative stage, well before the grand jury proceedings were underway. The state legislation would create a bright line rule, whereby a special prosecutor would be appointed as soon as an officer’s use of force results in a civilian fatality, this will usually be whenever the incident has been reported to the local authorities. Certain procedures on how best to carry out this rule should be left for local state implementation, so long as special prosecutors are appointed at the very beginning of cases where an officer has killed a civilian.

Part I demonstrates how current ethical rules and special prosecutor replacement procedures kept McCulloch on Wilson’s case irrespective of the inherent conflict of interest created by his relationship with law enforcement. Part II explores likely objections to the proposed measure. Despite these objections, Part III explores the limits of democracy, that make the Comment’s proposed legislation the only plausible option for ensuring that justice is properly served in fatal police brutality cases.


I. MECHANISMS FOR STATE SPECIAL PROSECUTOR APPOINTMENTS

A great deal of ink is poured over the role of the prosecutor because there is a broad understanding that a prosecutor’s power can be subject to abuse.19 The power and discretion wielded by an elected state prosecutor is certainly immense, yet it is not absolute. The American Bar Association (ABA) Model Rules of Professional Responsibility, ABA Standards on the Prosecution Functions, and of course, each prosecutor’s local rules, govern this potentially dangerous power.20 These rules are supplemented by the states’ procedures for appointing special prosecutors. Without such limits, prosecutorial discretion would go unchecked. However, as it stands today prosecutors practically have plenary discretion on deciding which cases to bring; an abuse of this discretion is the potential to result in selective prosecutions.21

Ethical rules governing prosecutors seem to allow for special prosecutors in situations like Ferguson. In other words, a prosecutor who has a personal relationship with local law enforcement would appear to “permit his or her professional judgment or obligations to be affected”22 by his personal interests. This is a violation of the governing ethical rules. Therefore, because McCulloch’s relationship with law enforcement affected his professional judgment, arguably, a fair reading of the ethical rules should have required McCulloch’s removal. However, such a reading, which would automatically remove prosecutors from prosecutions of police officers, has not prevailed.23 This demonstrates that the ethical rules are under-enforced, to the detriment of justice, when prosecutors bring charges against police officers. These rules are not and cannot be the solution for removing

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20. See MODEL RULES OF PROF'L CONDUCT r.3.8 (AM. BAR ASS’N, DISCUSSION DRAFT 1983) [hereinafter MODEL RULES]; see also STANDARDS ON THE PROSECUTION FUNCTIONS, §§ 3-1.1–1.3 (AM. BAR ASS’N, 1992) [hereinafter STANDARDS].
21. See Leslie C. Griffin, The Prudent Prosecutor, 14 GEO. J. LEGAL ETHICS 259, 276 (2001); see also Davis, American Prosecutor, supra note 19, at 407.
22. STANDARDS, supra note 20, at § 3-1.3(f).
23. See Danny Cevallos, Why Keep Prosecutor on Brown Case?, CNN (Sept. 8, 2014, 2:20 PM), http://www.cnn.com/2014/08/22/opinion.cevallos-michael-brown-cop-prosecutor/. As the law stands today, McCulloch was presumed competent to handle this case, despite the adamant protests against his representation and the implicit appearance of impropriety underlying his prosecution of this case. See id.
prosecutors from cases where they must bring charges against officers from their local police departments.

A state prosecutor’s relationship with his law enforcement department coupled with his vast discretionary power creates an untenable situation, where the purposes of prosecutorial ethics and the criminal justice system are overlooked for the benefit of preserving relationships formed between a prosecutor and his police department. This is especially significant and most troubling since the “prosecutor has been fairly described as the single most powerful figure in the administration of criminal justice.” As such, the states’ current procedures for appointing special prosecutors must be reevaluated so that justice may be served in all cases, even those involving police officers.

A. What is a Special Prosecutor?

What most people know about special prosecutors begins and ends with Archibald Cox, who was the independent special prosecutor who prosecuted the infamous Watergate case. President Nixon fired Cox in what was known as the Saturday Night Massacre. A special prosecutor is a “lawyer appointed to investigate and, if justified seek indictments in a particular case.” A “special prosecutor may be an attorney who does not already hold a public prosecutorial office, or he may hold an ordinary prosecutorial office” and may “come from any

26. Id. at 602-03. The Saturday Night Massacre began when a U.S. Court of Appeals ordered President Richard Nixon to turn over tape recordings pursuant to Special Prosecutor Archibald Cox’s subpoena. Id. “[T]hese tape recordings might [have] prove[d] or disprove[d] White House involvement in the Watergate cover-up.” Id. at 602. President Nixon, along with Senator John Stennis, offered Cox the verified transcripts, but nothing else, and the following day, Cox held a press conference, where he discussed his reasons for not agreeing with the Stennis proposal. Id. at 602–03. President Nixon then asked Attorney General Elliot Richardson to fire Cox. Richardson refused, and resigned. Id. at 603. Next, “Deputy Attorney General William Ruckelshaus attempted to resign and was ‘fired’ by the President. Finally, Solicitor General Robert Bork carried out the President’s order, terminating Cox.” Id. Soon after the Saturday Night Massacre “[a] firestorm of public protest erupted that led to the appointment of a new special prosecutor—Leon Jaworski—and the slow unraveling of the Nixon presidency.” Id. In response to these events, Congress enacted the Independent Counsel Act, which was enacted by the Ethics in Government Act of 1978. See Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867. Independent counsel provisions are codified as amended at 28 U.S.C. 49, 591–99 (1994)(expired 1999)(giving the United States Attorney General the power to appoint a special prosecutor, without any undue interference from the president); Gormley, supra note 25, at 602–04, 609.
source other than the local prosecutor’s own office.” Thus, the office of the special prosecutor is a very powerful position. When a special prosecutor is appointed, he wields as much prosecutorial power and discretion as the attorney he replaces.29

B. Ferguson is an Example of How the States’ Current Mechanisms Fail to Appoint a Special Prosecutor When He is Most Needed

Ferguson illustrates the fault among current state special prosecutor appointment procedures. These procedures, as in Ferguson, do not require the replacement of a prosecutor whenever state prosecutors prosecute their law enforcement departments. Yet, Ferguson demonstrates the dangerous deviations state prosecutors may take in order to shield their local law enforcement departments from prosecution.

Ferguson residents were skeptical of McCulloch because they believed his sympathies for police officers were too exceptional.30 McCulloch’s relationship with law enforcement reinforces the notion that there is both an individual and systematic issue that gives rise to a risk of bias among elected prosecutors in favor of law enforcement, albeit McCulloch’s relationship with law enforcement appears to be more exceptional than usual.31 Indeed, a black man killed McCulloch’s father—a St. Louis police officer—while he was in the line of duty.32 Moreover, McCulloch’s mother, brother, nephew, and cousin also

29. Id.
31. See Levy, supra note 18.
32. Id.
served with the St. Louis police. McCulloch has said that he would have joined the police had he not lost his leg due to cancer, and has also said that he became a county prosecutor because it was ‘‘the next best thing’’ to being an officer. McCulloch’s relationship with law enforcement is certainly exceptional.

The Ferguson community, as well as the Mound City Bar Association of St. Louis, believed that a special prosecutor should have stepped in due to McCulloch’s personal relationship with law enforcement. However, prosecutors are supposed to stow away any personal feelings they may hold when fulfilling their prosecutorial duties. Indeed, it would not fare well for judicial economy if a prosecutor is removed from every prosecution that mirrors an aspect of his personal relationships with others. Instead, McCulloch’s personal relationships with his local law enforcement department gave the appearance of impropriety when he prosecuted Wilson because many feared McCulloch would mishandle Wilson’s prosecution, and treat it differently than his other cases. Thus, McCulloch’s role in Wilson’s prosecution speaks to a broader issue facing the criminal justice system in local police brutality cases throughout the country. McCulloch is an example, albeit an extreme example, of the appearance of impropriety present in state police brutality cases. McCulloch’s relationship with local law enforcement was what ultimately drove perceptions that he would mishandle Wilson’s prosecution, and these perceptions have since been exacerbated by the grand jury’s decision not to indict Wilson.

1. The Different Approach McCulloch Took in Wilson’s Prosecution

Ferguson demonstrators doubted McCulloch’s abilities to handle Wilson’s prosecution impartially. It was argued that McCulloch’s ac-

33. Id.
34. Id.
36. See Griffin, supra note 21, at 276; see also STANDARDS, supra note 20, at §3-1.3(f).
37. See Cevallos, supra note 23.
38. See MODEL CODE OF PROF’L RESPONSIBILITY CANON 9 (AM. BAR. ASS’N 1980) [hereinafter CANON].
39. See id.
40. See Altman, TIME Article, supra note 17; see also Gannam, supra note 30; Caldwell, supra note 30; Davey, supra note 1.
tions, and the subsequent leaks to the public during the grand jury proceedings, would ultimately result in the grand jury returning a "no true bill."\footnote{Altman, \textit{TIME} Article, \textit{supra} note 17.} Indeed, many of the leaks seemed to exculpate Wilson.\footnote{Id.} The leaks seemed to warn Ferguson that a no bill was soon to follow. The community viewed McCulloch’s actions as an unnecessary way of extending the proceedings so that McCulloch could deliver a no bill to Ferguson in the midst of winter weather, in the hopes of deterring protesters.\footnote{Id.} Furthermore, according to legal experts, the manner in which McCulloch handled the grand jury proceedings was uncommon in several respects.\footnote{Susan McGraugh, a veteran Missouri criminal-defense attorney and law professor at St. Louis University, said that McCulloch’s prosecution of this case was “not your regular St. Louis grand jury case.” \textit{Id.; see also} Cohn, \textit{supra} note 30.} Therefore, arguably, the need to replace McCulloch with a special prosecutor first arose during his handling of the grand jury.\footnote{See Altman, \textit{TIME} Article, \textit{supra} note 18; Cohn, \textit{supra} note 30; Davis, \textit{Justice} \textit{supra} note 30.}

First, instead of recommending a specific charge for Wilson, McCulloch decided to present “evidence as it bec[ame] available, . . . leaving it up to the grand jury to decide what the evidence warrant[ed].”\footnote{Id.} In fact, McCulloch’s team admitted that they were treating this case differently, and even told the grand jury: “I know this is different than other cases because normally when we’ve charged somebody with an offense, you have the charge in front of you, you can read maybe what the elements are and you don’t have that in this case.”\footnote{Wilson Transcript, \textit{supra} note 2, at 14–15.} Some legal experts and disgruntled members of the Ferguson community believed that refusing to recommend a charge to the grand jury was a tactical ploy to avoid an indictment.\footnote{Altman, \textit{TIME} Article, \textit{supra} note 17.} Adolphus Pruitt of the St. Louis NAACP said that “[t]o present a case to a grand jury, without any direction or instructions with regard to what you want them to achieve . . . gives the best odds that an indictment will not occur.”\footnote{Id.} When McCulloch failed to recommend a charge to the grand jury he deviated from normal prosecutorial procedures, and demonstrated that he may not have pursued an indictment in his prosecution of Wilson as zealously as he had in his other cases.\footnote{Id.; see also Cohn, \textit{supra} note 17; Davis, \textit{Justice} \textit{supra} note 30.}
Second, McCulloch ordered that all testimony be transcribed, and that the transcripts and audio recordings from the grand jury proceedings be immediately released. This action is extremely uncommon as grand jury proceedings are usually secretive in nature, not even the judge is present when the prosecutor presents a case to the grand jury. The secretive nature of grand jury proceedings is significant because releasing evidence from the proceedings would be prejudicial to the charged defendant as there is a chance he might not be indicted. Accordingly, when McCulloch released information from the grand jury proceedings he deviated from a customary prosecutorial practice of keeping grand jury proceedings secret.

Third, the grand jury transcript shows that McCulloch’s team instructed the grand jury on self-defense several times, and during one instruction stated:

[Y]ou must find probable cause to believe that Darren Wilson did not act in lawful self-defense . . . and only if you find [that], which is kind of like finding a negative, you cannot return an indictment on anything or true bill unless you find [that]. Because both are complete defenses to any offense and they both have been raised in his, in the evidence.

It seems McCulloch’s assistant made a Freudian slip by referring to the evidence presented to the grand jury as Wilson’s evidence since the prosecutors were truly putting on exculpatory evidence. It is very uncommon for prosecutors to introduce a full defense to a grand jury, and even instruct the grand jury on that defense. After all, prosecutors seek an indictment from its grand jury, not a “no true bill.”

McCulloch and his assistants’ departures from customary prosecutorial procedures for handling grand jury proceedings demonstrate the unfair results that may result under the states’ present removal systems for state prosecutors. As they stand, the ethical rules

51. Altman, TIME Article, supra note 17.
52. Andrew E. Taslitz et al., Constitutional Criminal Procedure 51 (5th ed. 2014).
53. Id.
54. See Altman, TIME Article, supra note 17.
56. See Cohn, supra note 30.
57. See id.
58. See id.
merely state that McCulloch had the option to recuse himself.\(^{59}\) Thus, under the current regimes, prosecutors will continue to manipulate their duties in fatal police brutality cases.

2. Why McCulloch was not Removed

From the beginning, it was unlikely that a special prosecutor would be brought into Wilson’s case, as it was doubtful that any of the branches of the Ferguson government would have appointed a special prosecutor. “Missouri law permits a judge to appoint a special prosecutor, but judges rarely make such appointments unless the conflict is clear . . . .”\(^{60}\) There is even less of a chance that the Missouri legislative body could have acted in time to remove McCulloch, which left the executive: Governor Jay Nixon. Yet, Missouri Governor Nixon adamantly refused to ask McCulloch to recuse himself from the prosecution, and instead left the decision to McCulloch.\(^{61}\) Moreover, St. Louis County Executive Charlie Dooley and Missouri Attorney General Chris Koster also had the power—but refused—to remove McCulloch from the case.\(^{62}\) Two major considerations made it highly unlikely that Koster or Dooley would have removed McCulloch: (1) McCulloch had no apparent relationship with Wilson, and (2) there was, and still is, “no automatic rule that local prosecutors [be] precluded from prosecuting police officers, simply because of the traditional relationship between the two.”\(^{63}\) Thus, although a “prosecutor has an ethical obligation to consider his own recusal,”\(^{64}\) McCulloch adamantly refused to recuse himself irrespective of his relationship with his local police department.

Ultimately, McCulloch could only have been removed through legal recusal or disqualification,\(^{65}\) and neither were plausible options under current regimes. Thus, as the law stands today, state prosecutors who prosecute their local law enforcement departments will continue in such prosecutions, largely unchecked.

\(^{59}\) See Standards, supra note 20; see also Cevallos, supra note 23.

\(^{60}\) Davis, Justice, supra note 30; see also Cevallos, supra note 23.

\(^{61}\) Caldwell, supra note 30.

\(^{62}\) Davis, Justice, supra note 30.

\(^{63}\) Cevallos, supra note 23.

\(^{64}\) Id.

\(^{65}\) Id.
C. Current State Special Prosecutor Procedures

Although procedures for special prosecutor appointments vary from state to state, currently the state attorney general or the governor usually appoints a special prosecutor.66 “[T]he judicial, the executive, or the legislative [branches]; or the legislature” all have the power to “create an office of independent special prosecutor.”67 The decision to appoint a special prosecutor is not usually made unless the conflict is clear, such as “where the prosecutor is related to one of the parties.”68

The decision to remove a state prosecutor and replace him with a special prosecutor is often driven by the “political or controversial nature” of the case.69 Such cases may be “too hot to handle’ for a local prosecutor who must continue to work and live within a local community.”70 The state attorney general usually intervenes where “action is necessary and a regular prosecutor is not taking such action.”71 A special prosecutor will usually be given limited authority in a given jurisdiction to supersede the local prosecuting attorney, and many jurisdictions have statutes that identify the source from which an intervening prosecutor may be drawn.72 However, because local prosecutors are stripped of their immense power when such appointments are made, they rarely occur.73 This further demonstrates the inability of any branches of government to step in and appoint a special prosecutor, even where it may be absolutely necessary.

D. Problems with Current Prosecutorial Ethical Guidelines

A state prosecutor’s discretion is most questionable when a police officer is accused of using excessive force.74 Certainly, a prosecutor’s broad discretion creates opportunities for prosecutorial misconduct and abuse. This broad discretion has also led some state prosecutors

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67. Id.
68. Davis, Justice, supra note 30.
69. Fairchild, supra note 28.
70. Id.
71. Id.
72. Id.; see also Cevallos, supra note 23.
73. See Davis, Justice, supra note 30.
Death by Cop

to under-prosecute abusive police officers.\textsuperscript{75} For instance, a study conducted by the Human Rights Watch has shown that prosecutors in big cities, such as Chicago, Detroit, Indianapolis, New Orleans, Philadelphia, Portland, and San Francisco have often failed to prosecute officers for police brutality.\textsuperscript{76} The report further found that “[i]n some jurisdictions, the special procedures used in indicting or prosecuting an officer may help him or her avoid indictment or conviction.”\textsuperscript{77} Furthermore, “[l]ocal prosecutors may justify dismissing complaints of police brutality because such cases draw the media’s attention to police officers who lie and violate the law—a significant problem given that local prosecutors routinely rely upon officers as witnesses.”\textsuperscript{78} Prosecutors may allow police perjury “in order to establish a good working relationship with the police, [and] are likely to overlook the use of excessive force for the same reason . . . If local prosecutors are pressured into turning a blind eye to police perjury, an atmosphere is created in which officers may feel that they have carte blanche to use excessive force,”\textsuperscript{79} Prosecutors need their police departments to build their cases.

It is no secret that all prosecutors work closely with their police departments.\textsuperscript{80} Prosecutors rely on their police departments to bring them evidence.\textsuperscript{81} Thus, a prosecutor who has a bad relationship with his or her police department “has a hard time making his or her cases stick.”\textsuperscript{82} As a result, when prosecutors bring cases against police officers they work with everyday, they “face enormous pressure from both police and fellow prosecutors not to go forward with such cases.”\textsuperscript{83} Accordingly, evidence on this issue certainly suggests that there may be a slippery slope of leniency prosecutors start down in

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\begin{itemize}
\item \textsuperscript{75} Id. (discussing the Los Angeles District Attorney’s office prosecution of “only one deputy from the Los Angeles Sheriff Department (“LASD”) out of the 382 referrals they had received in the preceding ten years”).
\item \textsuperscript{76} Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States 1 (1998), http://www.hrw.org/legacy/reports98/police/index.htm [hereinafter \textit{WATCH}].
\item \textsuperscript{77} Id. at 179.
\item \textsuperscript{78} Panwala, supra note 74, at 653. However, this notion is somewhat flawed as, in an ironic turn, prosecutors lose their credibility by not enforcing the law against police officers who commit police brutality.
\item \textsuperscript{79} Id. at 652.
\item \textsuperscript{80} Levy, supra note 18.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} David A. Harris, The Interaction and Relationship between Prosecutors and Police Officers in the U.S., and How this Affects Police Reform Efforts, in The Prosecutor in Transnational Perspective 7–8 (Erik Luna & Marianne Wade eds., 2011).  
\end{itemize}
order to maintain their relationships with their law enforcement departments.\footnote{84}

The ethical guidelines in place for prosecutors seem to suggest that a prosecutor’s ties with its law enforcement departments would create a conflict of interest. Various ethical codes and case law provide mandatory norms for prosecutors.\footnote{85} The ABA first set standards for lawyers in 1908 when it adopted the Canons of Professional Ethics.\footnote{86} These Canons were of little help to the criminal prosecutor as there was only a single direct reference to a prosecutor among the ABA’s forty-seven Canons.\footnote{87} The 1969 ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct also added little, substantively, to the role of the criminal prosecutor.\footnote{88} Eventually the ABA adopted the Standards Relating to the Administration of Criminal Justice, the Prosecution Function, which gave substantive direction on prosecutorial ethics.\footnote{89} Specifically, Standards §§3-1.3 and 3-2.10 provide guidance to prosecutors on their conflict of interests and special prosecutors appointments, respectively.\footnote{90} Of particular importance to this discussion is Standard §3-1.3(f), which explicitly states that a prosecutor’s personal and political ties should never affect his or her abilities to prosecute a case.\footnote{91} Yet, a prosecutor’s ties with its law enforcement departments may affect a prosecu-

\footnote{84. See Watch, supra note 76, at 175. Certainly, many believed McCulloch mishandled Officer Wilson’s prosecution because of his relationship with the local police department.}

\footnote{85. Griffin, supra note 21, at 263.}

\footnote{86. See Canon, supra note 38.}


\footnote{88. See id. at 437; see also Model Rules, supra note 20.}

\footnote{89. See Standards, supra note 20.}

\footnote{90. See id. at §§ 3-1.3, 3.210. These Standards provide, in pertinent part, that: Standard 3-1.3 Conflicts of Interest (a) A prosecutor should avoid a conflict of interest with respect to his or her official duties. *** (f) A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests. *** Standard 3-2.10 Supercession and Substitution of Prosecutor (a) Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that the prosecutor is incapable of fulfilling the duties of office. (b) The governor or other elected official should be empowered by law to substitute special counsel in the place of the local prosecutor in a particular case, or category of cases, upon making a public finding that this is required for the protection of the public interest.}

\footnote{91. See id. at § 3-1.3(f).}
tor’s ability to prosecute police officers belonging to those departments. Moreover, Standard §3-2.10(a) states that a prosecutor should be removed when he is unable to fulfill the duties and obligations of his office.92 However, state prosecutors remain on cases where, as in Ferguson, there is certainly a conflict of interest and an inability of that prosecutor to fulfill his duties and obligations impartially. Therefore, based on a fair reading of these Standards, elected state prosecutors who prosecute local state police officers have a conflict of interest within the meaning of the Standards. Accordingly, elected state prosecutors should be replaced with special prosecutors, especially in fatal police brutality cases where the stakes are exceptionally high.

This reading of the ABA Standards finds some support in the legal field. For instance, according to legal scholar, Laurie L. Levenson, the “wiggle” words contained in the Standards “reflect that at the heart of conflict of interest rules, as with other ethical standards, lies the need to rely on prosecutors’ good judgment. The rules are guideposts, but it takes a conscientious prosecutor to be guided.”93 Thus, a “conscientious prosecutor”94 would not remain on a case where his personal or political interests are in conflict with his representation. A prosecutor’s handling of a police brutality case is certainly one such case. This is illustrated by Professor Schwartz of the University of Pennsylvania, who “analyzed the outcomes of approximately twenty-five police violence complaints filed by civilians with the Philadelphia District Attorney’s office . . . Schwartz cited a number of factors common to all local district attorneys’ offices” in concluding that “the local prosecutors’ offices face ‘a hopeless conflict-of-interest’ in handling police violence complaints.”95 Thus, there is ample support for the construction of the ABA Standards that an inherent conflict-of-interest exists when state prosecutors prosecute their local law enforcement officials.

92. See id. at § 3-2.10(a).
94. Id. at 899.
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The appearance of justice is as important as justice itself. Although the Appearance of Impropriety Standard is not “included in the Model Rules of Professional Conduct, courts continue[ ] to require attorneys to avoid the appearance of impropriety.” In fact, “several studies demonstrate that perceived procedural fairness has a substantial effect on a participant’s assessment of the system.” Ultimately, the legal process “depend[s] upon public satisfaction with, confidence in, and trust of legal authorities.” Without the appearance of justice “both the ability of courts to influence the structure of law and the ability of the police and other government officials to enforce the law” would be negatively effected. The risk of bias associated with the underlying “cozy” relationship enjoyed by elected state prosecutors and their law enforcement departments are problematic since these potential biases sometimes hinder state prosecutions of police brutality. The appearance of justice, and justice in itself mandates that prosecutors not be limited in this manner. Accordingly, though the ABA Standards fail to recognize a sweeping conflict-of-interest among prosecutors and their law enforcement departments, there is a broad understanding that such a relationship sufficiently conflicts the state prosecutor within the meaning of Standard §3-1.3(f).

II. APPOINTING SPECIAL PROSECUTORS IN FATAL POLICE BRUTALITY CASES IS NECESSARY

Two different groups have emerged in the national debate surrounding the events in Ferguson. One group viewed McCulloch, an elected official, as the right person to prosecute Wilson. And, the other group vehemently called for McCulloch’s removal because they

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97. Id. at 717.
98. Id. at 719.
99. Id. at 700.
100. Id. (quoting Tom R. Tyler, The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience, 18 L. & Soc’y Rev. 51, 51 (1984)).
101. Id.
102. Levy, supra note 18.
103. See Cevallos, supra note 23.
104. See Standards, supra note 20, at § 3-1.3(f) (1992). The Ferguson community certainly seems to agree with this reading of the standard as well. See also Caldwell, supra note 30; Cohn, supra note 30; Davey & Bosman, supra note 1; Gannam, supra note 30; Levy, supra note 30.
105. See Cevallos, supra note 23.
believed he was unable to fairly prosecute Wilson.106 These notions have shed light on the possible implications of appointing special prosecutors in state cases where a police officer’s use of force kills a civilian.

No one suggests that the appointment of a special prosecutor alone will stop police brutality. Instead advocates for special prosecutors have modest goals. It is thought that special prosecutors would bring a meaningful change to how police brutality cases are handled because they would actually charge officers when there is probable cause to do so.107 These charges will serve as deterrence against future acts of police brutality by sending the message to would-be police offenders that their abuses will no longer continue unpunished, overlooked, or under-prosecuted.

A. State Special Prosecutor Appointments May be Undemocratic and Strip Elected Prosecutors of Their Power and Legitimacy

If a special prosecutor replaced McCulloch in Wilson’s prosecution then it would undoubtedly have affected the St. Louis County prosecutor’s office. One of the arguments for keeping prosecutors, and what may have kept McCulloch on Wilson’s prosecution, is that democratic principles require elected state prosecutors to handle local issues, even those involving alleged local, fatal police brutality.108 Issues of encroaching federal enforcement of local matters, and the prospect that state prosecutors may lose legitimacy are two important arguments that may foreseeably be raised against the proposed legislation.109

Some critics of special prosecutor appointments have argued that keeping McCulloch on this case was ultimately a pro-democratic move.110 These critics have also commented that: “[i]f there has been a long-simmering distrust of McCulloch’s impartiality, then the time for the people to address this was at the polls when he was running for

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106. See Alex Altman, TIME Article, supra note 17; see also Caldwell, supra note 30; Cohn, supra note 30; Gannam, supra note 30; Levy, supra note 18.
108. See Cevallos, supra note 23.
110. See Cevallos, supra note 23.
McCulloch recently survived a Democratic primary in September 2014 and faced “no Republican opposition in his re-election bid.” One critic acknowledged that: “Divesting [McCulloch] of his elected office because of protests would subvert the democratic process that elected him.” Indeed, “McCulloch has been prosecuting attorney since 1991, and has been reelected to four-year terms ever since.” Missouri Governor Nixon has also offered his concerns on McCulloch’s prosecution of Wilson, and stated that “[t]here is a well-established process by which a prosecutor can recuse themselves from a pending investigation, and a special prosecutor be appointed . . . Departing from this established process could unnecessarily inject legal uncertainty into this matter and potentially jeopardize the prosecution.” The fact that local officials and others were reluctant to remove McCulloch from Wilson’s prosecution, a single prosecutor handling a single case, for fear of disturbing the status quo and their constituents is troubling. This single instance of protest against McCulloch’s removal from Wilson’s prosecution is indicative of the mass protest that may be waged against the proposed legislation. This is certainly the case since the proposed legislation would require all local prosecutors, not just a single prosecutor, to step down in all fatal police brutality cases. Arguably, such legislation may start down a slippery slope of letting the power of local government slip from the hands of its elected officials.

It is fundamental that local attorneys are “beholden to the people of [their] county.” This principle follows the rationale that local prosecutors be held accountable in order to ensure that they “uphold the law in all cases.” There is a concern that such accountability must also include prosecutions of the local police force. Hence, removing elected state prosecutors from fatal police brutality cases may remove their accountability in such cases, and may arguably call into question their legitimacy. If a state prosecutor were to concede that an outsider is better equipped to handle a particular case, it would suggest “that her office is incapable of fulfilling its mission;” no

111. Id.
112. Gannam, supra note 30.
113. See Cevallos, supra note 23.
114. Caldwell, supra note 30.
115. Id.
116. Panwala, supra note 74, at 656.
117. Id.
118. Id.
119. Id.
state prosecutor’s office desires to acquiesce in such an idea by giving up its power unnecessarily. Accordingly, asking a state prosecutor’s office to step down and appoint a special prosecutor in all fatal police brutality cases would create an impression of illegitimacy with the state prosecutor’s constituents since its office would be unable to fulfill its mission in all of those cases.

Traditionally, crime control has been left to the states. Certainly, “the traditional view that crime control in the United States is and should be primarily a local matter” is a hallmark of criminal law. This elemental principle is illustrated by the ongoing debate over federal enforcement of local crimes. Critics have fervently argued against an encroaching federal government into a realm traditionally reserved for the states. This argument parallels one that would be raised against appointing special prosecutors in fatal police brutality cases since elected state prosecutors would be relinquishing their power to outsiders: appointed special prosecutors. Certainly, there are concerns among legal scholars that too many state and local crimes have been federalized with the advent of federal substantive criminal law; giving up even more power by appointing special prosecutors may exacerbate this problem. For instance, it is argued that “[s]elective federal intrusion also interferes with a state’s ability to establish state-wide criminal law policy to the extent it desires.” Selective appointments would arguably have similar results since prosecutors would be excluded from all homicide cases in which a police officer is charged. Elected state prosecutors would be unable to enforce any of their policy concerns in that realm since state prosecutors would be stripped of their powers to prosecute such cases.

However, opponents of this measure need not fret because the proposed measure is narrowly drawn. The proposal only triggers the requirement for the appointment of a special prosecutor when a number of factors are met. For instance, the measure does not remove power from state prosecutors in every police encounter; instead the measure targets only fatal encounters, where a civilian is killed. State prosecutors will prosecute all other cases involving local law enforcement. For example, if a civilian kills a police officer, the elected state

120. Id.
121. See Baker, supra note 109, at 690.
122. Id.
123. Id.
124. See id. at 678.
125. Id. at 686.
prosecutor will remain on the case. Additionally, if a police officer shoots at a civilian, and that civilian survives, the prosecutor will remain on the case. This is not to say that there is a hierarchy of harms that should be given more weight and prosecuted more zealously. Instead, when a civilian is injured, depending on the injury, he will be available to tell his side of the story, something a dead civilian obviously would be unable to do.

Moreover, appearance drives the proposed rule; thus, these mandatory appointments would be less insulting to the elected state prosecutor. Accordingly, a state prosecutor would not be stripped of its accountability in the eyes of its constituents because they would understand that the proposed legislation simply weighs the countervailing principles and recognizes that the need for unbiased prosecutors substantially outweighs the need for elected prosecutors to wield their power, and sustain their legitimacy and accountability, once a police officer kills a civilian.

B. Who Will Bear The Cost?

The feasibility of any new proposed program or legislation is in large part based on its economic viability. The federal government is a model that may be looked at to glean the particular costs associated with special prosecutor appointments. Under this regime, the Department of Justice (DOJ) is responsible for all costs associated with federal appointments of special prosecutors.126 Although, the ultimate cost is borne by the taxpayers.127 “Independent counsel investigations are expensive and, because of the initial start-up costs, probably more expensive than the average DOJ investigation.”128 This is so because “the independent counsel starts from ground zero and concludes by winding down through a reporting and attorneys’ fees process unknown in a typical investigation or prosecution.”129 Other associated costs are “proportional to the length of” a special prosecutor’s “investigations, prosecutions, appeals, final reporting process, and other close-out procedures.”130 Surprisingly, within thirty years “twenty independent counsel investigations” accounted for roughly $136 million

126. Gormley, supra note 25, at 674.
127. Id.
129. Id. at 2364.
130. Id.
in costs.\footnote{131} Federal prosecutions are usually more complex and more costly than state prosecutions, however, this data demonstrates the significant costs associated with special prosecutor appointments, which are inevitably borne by the taxpayers. However, these costs could be capped, and there is always the option of federal funding. Indeed, President Obama has even thrown his support behind appointing special prosecutors, and has said that “local law enforcement agencies should consider requiring independent criminal investigations and independent prosecutors in cases where the use of force by police officers results in injury or death.”\footnote{132}

On the other side is the cost borne by St. Louis taxpayers as a result of McCulloch’s irregular conduct before the grand jury. Demonstrators came from all over the country to voice their opinions on McCulloch’s improper conduct.\footnote{133} Many demonstrations continued throughout the country.\footnote{134} Although there were several peaceful demonstrations, some angry demonstrators damaged local Ferguson businesses and state property.\footnote{135} Protests remained ongoing for several months, and have required police officers to be present, often in riot gear.\footnote{136} On the evening that McCulloch announced the grand jury’s decision not to indict Wilson, Ferguson officials called in the National Guard, and did not permit flights into one St. Louis airport.\footnote{137} Governor Nixon even went so far as to issue a state of emergency in Ferguson.\footnote{138} Additionally, at least one school district canceled its after-school and evening activities, and at least four other schools announced they would not hold classes the day after the grand jury decision was reached.\footnote{139} Businesses also closed at the prospect of trouble, and at least two area malls closed early on the evening the grand jury decision was announced.\footnote{140}

\footnote{131} Gormley, supra note 25, at 674.
\footnote{134} See Davey & Bosman, supra note 1.
\footnote{135} Id.
\footnote{136} Id.
\footnote{137} Id.
\footnote{138} Id.
\footnote{139} Id.
\footnote{140} Id.
There are many nonmonetary costs borne by the citizenry in such cases as Ferguson. Indeed, as a result of Brown’s death there has been a loss of trust in the system.\textsuperscript{141} Black citizens now have a multitude of cases to pick from to evidence the notion that police officers can get away with killing them; to name a few: Tamir Rice, Oscar Grant, Aiyana Jones, John Crawford III, Kimani Gray, and Eric Garner.\textsuperscript{142} In these cases there were significant issues associated with the prosecutions of the police officers.\textsuperscript{143}

In Eric Garner’s case the New York City Police Department (NYPD) choked Eric Garner to death, and the grand jury also returned a “no true bill” against the police officer.\textsuperscript{144} More demonstrations throughout the nation ensued after this announcement.\textsuperscript{145} A tangential and unfortunate event that occurred after the New York decision was that an estranged man killed two NYPD officers before killing himself.\textsuperscript{146} Whether indirect or direct this tragic shooting took place after a grand jury, convened by a local prosecutor, failed to indict a police officer in a fatal police brutality case. In April 2015, Freddie Gray—another African-American man—died while in police custody in Baltimore, Maryland.\textsuperscript{147} After Gray’s death there were many demonstrations in Baltimore, and the city paid 12.9 Million on insurance claims for the damage.\textsuperscript{148}

The demonstrations following the Brown, Garner, and Gray killings demonstrate that demonstrators will not stop if police officers continue to escape the grip of the criminal justice system. Of course, this is not to say that the purpose of special prosecutor appointments is to ensure that a grand jury returns an indictment against every accused police officer. The true purpose of the proposed measure is to simply remove the appearance of impropriety and any conflicts of in-

\textsuperscript{141.} Id.
\textsuperscript{143.} Id.
\textsuperscript{144.} CNN Tonight (CNN television broadcast Dec. 3, 2014).
\textsuperscript{148.} Id.
interests that cause state prosecutors to mishandle state prosecutions of their local police departments in fatal police brutality cases. Demonstrations have their own costs, hence the cost of appointing a special prosecutor should not be the only cost considered in determining the feasibility of the proposed measure.

III. THE LIMITS OF DEMOCRACY

A. The Status Quo Does not Address Racial Inequality

A large part of the frustrations concerning Wilson’s prosecution center on Brown’s race.149 Notably, “[a]n analysis of federally collected data show that young black males in recent years were at a far greater risk of being shot dead by police than their white counterparts—21 times greater.”150 Even more striking, “[t]he 1,217 deadly police shootings from 2010 to 2012 captured in the federal data show that blacks, age 15 to 19, were killed at a rate of 31.17 per million, while just 1.47 per million white males in that age range died at the hands of police.”151 Unfortunately, these numbers signify that Brown’s killing is not an isolated incident. The underlying race issue emphasizes the sensitive nature of police brutality cases, which demonstrates the need for unbiased prosecutors to lead the charge.

The events surrounding Freddie Gray’s death in Baltimore are also worth noting. In May 2015, Baltimore State’s Attorney Marilyn Mosby—an African-American woman—announced that the six police officers that allegedly contributed to Gray’s death were indicted by a grand jury.152 Three of the officers who killed Gray, an African-American, are also African-Americans themselves.153 Mosby’s announcement drew cheers from the black community, even including Maryland Congressman Elijah Cummings—also an African-American.154 Nonetheless the Fraternal Order of Police requested that Mosby appoint a special independent prosecutor in the case against

150. Id.
151. Id.
154. Id.
the six charged officers. Gene Ryan, president of Fraternal Order of Police Lodge 3, argued that Mosby’s connection to the Gray family’s attorney and her marriage to a city councilman, who is now running for mayor of Baltimore, presented a conflict of interest. The Chapter “called the speed of [the prosecution] politically motivated.” Mosby denied any conflict of interest, and remains on the case. Judge Barry Williams has since rejected the defense’s “motion asking for the Office of the State’s Attorney to be removed from the Freddie Gray case.” Despite the fact that Gray, some of the charged police officers, and Mosby are all African-American, the conclusion stands that prosecutors, regardless of race, may be too related to local politics to provide an impartial evaluation of police misconduct. While the African-American community in Baltimore celebrates Mosby’s prosecution, others still question its legitimacy.

B. The Ferguson Movement as a Plea for Change by the Politically Powerless

Ferguson demonstrations have been compared to the Civil Rights Movement. During the Civil Rights Movement, African-Americans, similar to Ferguson demonstrators, fought for rights they believed they would not receive through any other means. Indeed, there are several racially polarized Supreme Court decisions that were only enforced and legitimized through executive orders of force. Suffice it to say that racially discriminatory practices have historically largely been dismantled through legislative acts and government intervention, and not through blacks casting their votes in local elections.


158. Donovan, supra note 155.


162. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (finding that “prejudice against discrete and insular minorities may be a special condition, which tends ser-
The proposed measure is akin to legislative acts that have successfully dismantled patterns of racial discrimination since it has the effect of targeting police officers that unjustifiably kill minorities.

Most citizens know very little about the practices and policies of their local prosecutor. “Even if the prosecutor is chosen through the electoral process, the election rarely focuses on these issues.”163 Minorities with less education and less income are even more likely to be uninformed when it comes time for them to cast their vote in local elections.164 This situation creates a huge dilemma where an increasingly disproportionate number of minority victims are slain by police officers with no equitable legal redress since state attorneys do not represent their interests.165

African-Americans are disempowered in Ferguson. Ferguson’s minority citizens have participated minimally in the democratic process.166 For instance, “Ferguson is 67 percent black,” yet “five of the six council members and the mayor are all white.”167 In fact, “[i]n the—April 2013 municipal election . . . whites were three times more likely to vote than African Americans.”168 Two important factors account for this discrepancy. First, Ferguson, like other municipalities, holds municipal elections in April of odd-numbered years, a time when voter turnout is at its lowest.169 Second, Ferguson “holds non-partisan elections (where party labels do not appear on the ballot),” a reform “that has been shown to reduce both what citizens know about candidates as well as their likelihood of voting.”170 Accordingly, although McCulloch was recently reelected,171 Ferguson’s minority community still wants to change how state prosecutors handle police brutality cases.172 Indeed, one of the “Black Lives Matter” Move-

163. Davis, American Prosecutor, supra note 19, at 397.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. See Cevallos, supra note 23.
172. See Zauzmer & Williams, supra note 1.
ment’s major slogans is “indict the system.” Ferguson, like a lot of other predominately black neighborhoods, did not speak through McCulloch’s re-election. Instead, Ferguson, and many other communities throughout the nation, voiced their distrust of the criminal justice system through their demonstrations. Carrying signs that read, “Indict the system,” “Black lives matter,” and “No justice, no peace. No racist police,” does not seem to suggest that Ferguson is happy with the status quo. The proposed measure would respond to these frustrations by injecting the criminal justice system with neutral prosecutors when state prosecutors face the tough position of prosecuting police officers they work with everyday. This measure would help to rebuild minorities’ trust in the criminal justice system.

Former United States Solicitor General, United States Attorney General, and Associate Justice of the United States Supreme Court Robert H. Jackson stated that one of the greatest dangers that may lead to prosecutorial abuse is that a prosecutor may pick someone from a group of unpopular persons and then look for an offense to charge them under. Jackson says: “It is here that law enforcement becomes personal.” Jackson cautions that personal prosecutions demonstrate a prosecutor’s fear of “being unpopular with the predominant or governing group, [and] being attached to the wrong political views.” Jackson describes an intrinsic problem associated with elected prosecutors: that they may follow the wishes of certain politically connected constituents, instead of zealously protecting the interests of all of its citizens. Indeed, a major problem in Ferguson was that McCulloch represented everything the Ferguson residents distrusted about the legal process: that the criminal justice system treats young black boys and men differently.

173. Id.
174. See Schaffner et al., supra note 161.
175. See id.
177. See id.
178. See id.
179. See id. Jackson’s fear was also discussed in United States v. Carolene Prods. Co., where the Supreme Court found that prejudices waged against discrete and insular minorities may seriously “curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

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C. The Inability of Minorities to Shape Policy Through Elections

*United States v. Carolene Prods. Co.*’s\textsuperscript{180} famous footnote four provides additional support for the proposition that reforms to racial discrimination must come from a source other than local elections. This footnote outlined a stricter standard of review for legislation that discriminates against minorities, particularly those who lack the requisite political power to seek redress from the political process.\textsuperscript{181} It has been said that this footnote “‘defined the federal courts’ agenda for a generation:’ . . . [that] federal courts can intervene when the political process marginalizes or shuts out some groups.”\textsuperscript{182} “[T]he footnote strikingly provided: a coherent justification for unelected justices to overturn legal decisions of elected officials when the fairness of the Constitution, and of democracy, is at stake.”\textsuperscript{183} *Carolene Products* provides particularly persuasive support for the notion that principles of democracy and fairness necessitate intervention where minorities have faced discrimination.

Statistics on the disproportionate number of black males who die at the hands of the police certainly seem to suggest that there is a pattern and practice among police departments that has resulted in police officers disproportionately killing young black men.\textsuperscript{184} In the spirit of *Carolene Products*, the proposed measure provides a suitable remedy that calls for unbiased prosecutors to prosecute such cases. This measure is consistent with principles of democracy and fairness because it seeks to allow minorities legal redress by ensuring that the

\textsuperscript{180} This famous footnote reads:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, as to prohibition of peaceable assembly. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

\textit{Id.}

\textsuperscript{181} See id.


\textsuperscript{183} Id.

\textsuperscript{184} See Staples, supra note 149.
crimes committed against them be adjudicated in a fair and just manner.

Historically, minorities—usually the victims of police brutalities—had no meaningful way to augment law enforcement practices and abuses through the Democratic process. One such example was New York’s controversial stop-and-frisk policy. In ruling the policy unconstitutional, Judge Shira A. Scheindlin recognized that black men in America constantly fight against certain inequalities. Similarly, black men throughout the nation are being targeted and killed by local police. Undoubtedly, this practice also violates bedrock principles of equality. The fate of stop-and-frisk begs the question of whether more young black bodies must litter the streets until the “right” set of facts make its way before a judge. The proposed measure is meant to deter would be police offenders and to also rid the streets of bad police officers by having neutral prosecutors lead prosecutions where a police officer has killed a civilian. This remedy is more efficient than waiting for the issue of police officers’ disproportionate targeting and killing of black men to reach the courts.

D. The Probable Success of the Proposed Measure

Ferguson is a strong example of the substantial impact the proposed legislation will have on dismantling the racially discriminatory patterns and practices of some local police departments. The proposed measure is a step in the right direction towards combating racial discrimination because it will send the message that “black lives matter” since it mandates that state prosecutors be replaced with prosecutors who have no relationship with the police departments in which the putative defendants work.

Additionally, since the non-indictment of Wilson, the Justice Department investigated the Ferguson Police Department (FPD), and

185. See id.
186. See Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). This practice was only put to an end once United States District Court Judge Shira A. Scheindlin ruled the practice unconstitutional. See id.
187. Id. at 667.
188. See Staples, supra note 149.
189. See Floyd, 959 F. Supp. at 562. Indeed, Judge Scheindlin’s decision was made twelve years after stop-and-frisk was first implemented. Id.
found that FPD has a pattern of civil rights violations. Moreover, following the non-indictments in Ferguson and New York, Congress reauthorized legislation that requires “states to report the number of people killed during an arrest or while in police custody.” It is clear that the federal government has recognized that police killings of civilians are a problem that requires serious investigation and attention. Accordingly, the time is ripe for the removal of state prosecutors from cases involving a local police officer that has killed a civilian.

CONCLUSION

Criminal prosecutors play an important role in the pursuit of justice, and law enforcement officials undoubtedly play a crucial role in ensuring public safety. Prosecutors and police officers are certainly not the bad guys—until they are. Police officers must be brought to justice when they unjustifiably kill civilians. Prosecutors are charged with the difficult task of bringing these officers to justice when they have committed such crimes. As it stands today, there is a slim chance that police officers will be brought to justice for the unjustified killings of civilians. The proposed measure is a game changer. It would ensure that elected state prosecutors be replaced where they cannot effectively fulfill their pursuits of justice: where they are tasked with the difficult duty of prosecuting police officers belonging to the local police departments with which they collaborate with daily to build their cases.

McCulloch’s prosecution of Wilson is one of the clearest examples of how cases may be handled differently by prosecutors who prosecute their local police departments. McCulloch took several deviations from normal criminal prosecution procedures when he prosecuted Wilson. This is unacceptable, and is inconsistent with the purposes underlying the ABA’s Standards Relating to the Adminis-

195. See Levy, supra note 18.
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tration of Criminal Justice, the Prosecution Function\textsuperscript{196} as well as the criminal justice system.

A civilian, who happens to be killed by a police officer, deserves justice just as much as any other civilian who was killed by any other type of defendant. The proposed measure is a way of normalizing the way prosecutors handle fatal police brutality cases by bringing in prosecutors who will have the ability to view a defendant police officer for who he is, and not anything more than a criminal defendant.

\textsuperscript{196} See Model Rules, supra note 20, at r. 3.8; see also Standards, supra note 20, at § 3-1.3.