FERGUSON’S FAULT LINES: 
THE RACE QUAKE THAT ROCKED 
THE NATION

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Welcome

Ferguson’s Fault Lines: The Race Quake That Rocked the Nation

Katherine Goldwasser, Professor, Washington University School of Law
Howard M. Wasserman, Professor, Florida International University College of Law
Brendan Roediger, Professor, St. Louis University School of Law
Thomas B. Harvey, Executive Director and Co-Founder, Arch City Defenders
Kimberly Jade Norwood, Professor, Washington University School of Law

FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION

Speakers:

Kimberly Norwood, Professor of Law, Washington University School of Law, Moderator and Presenter

Katherine Goldwasser, Professor of Law (Retired), Washington University School of Law
Thomas Harvey, Executive Director & Co-Founder, ArchCity Defenders, Inc.
Brendan Roediger, Professor of Law, Saint Louis University School of Law
Howard Wasserman, Professor of Law, FIU College of Law
Speakers/Topics/Order of Presentation

• Katherine Goldwasser will discuss: The Prosecution, the Grand Jury, and the Decision Not to Charge

• Thomas Harvey will discuss: It’s Not Just Ferguson

• Brendan Roediger will discuss: Municipal courts and the Road to Reforms

• Kimberly Norwood will discuss: From Brown (v. Bd of Education) to (Michael) Brown

• Howard Wasserman will discuss: The Uncertain Hope of Body Cameras
1. **Key Events Leading to Decision Not to Charge**
   
   *(all in 2014)*

   **Saturday, August 9**

   *noon:* Ferguson Police Officer Darren Wilson, a White man, is on patrol in his police SUV when he spots 2 African American men walking in the middle of the road. One of the men is Michael Brown. Wilson says something to the men about moving from where they are walking & words are exchanged.
August 9 (cont’d)

within the next 2 minutes:
• Brown scuffles briefly with Wilson at SUV window;
• Wilson draws his gun & fires 2 shots, one of which hits Brown’s hand;
• Brown takes off running away from the SUV; Wilson radios for assistance reporting shots fired, then gets out & chases Brown on foot;
• Brown runs about 180 feet, then turns around & runs back toward Wilson;
• Wilson fires a total of 10 shots in Brown’s direction once Brown starts running toward him;
• Brown continues moving toward Wilson for a brief time as Wilson shoots at him but soon falls to the ground dead; autopsy later determines that total of 5-7 of Wilson’s 10 shots hit Brown, & that a shot to top of his skull was instantly fatal.

August 9 (cont’d)

by 12:25 p.m.: At the request of Ferguson Police, the St. Louis County Police Department takes control of the homicide investigation.
August 20

St. Louis County Prosecuting Attorney Robert McCulloch announces that rather than decide himself whether to bring criminal charges against Wilson, he would instead put the charging decision in the hands of a grand jury.

Prosecutors from McCulloch’s office begin presenting evidence to the grand jury the same day.

August 20-September 16

Meeting with the grand jury 5 times over the next 4 weeks, prosecutors present testimony from 8 witnesses. Seven of the witnesses, all with ties to law enforcement, have no personal knowledge of any of the events surrounding the shooting, but have knowledge of, and are asked by prosecutors to recount, Wilson’s version of what happened.

September 16

Darren Wilson testifies before the grand jury as witness #9 and gives his own account of the shooting & how it came about.
September 23 - November 21

Prosecutors meet with the grand jury 19 more times over the next 2 months. Prosecuting Attorney McCulloch had announced at the outset that “Absolutely everything w[ould] be presented to the grand jury, every scrap of paper..., every photograph..., every bit of physical evidence..., every video clip, anything that we can get.” In keeping with McCulloch’s announced plan, prosecutors present testimony from 51 additional witnesses after Darren Wilson (60 altogether), play hours of video and audio recordings, and provide the grand jury hundreds of photographs, maps, diagrams, reports, and other exhibits.

November 24

Prosecuting Attorney McCulloch calls a nighttime press conference to announce that the grand jury has voted not to indict Wilson.


Differences from Grand Jury “Norm”

Cause for Concern
• McCulloch’s Cryptic Opening Message
• Prosecution-Created Confusion
• Anti-Indictment Bias
• Ignoring Race (the Elephant in the Grand Jury Room)
3. Decision to Use a Grand Jury

Discretionary Under State Law


4. Lessons Learned?

Possible Reforms to Charging Process in Police Lethal Force Cases

Take Control of the Process out of the Hands of Local Prosecutors

Limit the Use of Grand Juries

Take Steps to Promote a Greater Understanding of and Honest Conversations about the Possible Role of Race
Recipe for Disaster: 91 Municipalities, 81 courts, and 61 police departments for 900,000 people.

91 Municipalities in St. Louis County
Everyone knows about Ferguson

- Ferguson, a city of about 21,000
- Filed 11,400 traffic cases in fiscal year 2013
- In 2013, the municipal court in Ferguson issued 32,975 arrest warrants mostly for not coming to court to pay fines.
- That’s 90 arrest warrants issued per day.
- Fines and court fees were the second largest source of revenue for the city, a total of $2,635,400.

It’s Not Just Ferguson

Beverly Hills

- Population: 574
- Size of town: .09 square miles
- Police force: 14, which also provides services to neighboring Velda Village Hills
- Cases filed in 2013: 3,250 traffic tickets, 1,085 ordinance violations

Calverton Park

- Population: 1,293
- Size of town: .41 square miles
- Police force: 7
- Cases filed in 2013: 5,039 traffic tickets, 2,436 ordinance violations
On August 8, 2014, the Day Mike Brown Was Murdered

• There was a modern day debtors’ prison scheme impacting tens of thousands of people.

• Poor people and Black people were literally killing themselves because they could not get out of jail as a result of their poverty.

• 700,000 active warrants for arrest stemming from poverty and race

• Complete lack of trust between people, law enforcement, and government leaders.

Municipal Courts & the Road to Reforms

SAINT LOUIS UNIVERSITY SCHOOL OF LAW
LAW PROFESSOR
BRENDAN ROEDIGER
Michael Brown’s World:

A Case Study in Unequal Education

Michael Brown:
- Born in 1996
- Started kindergarten in 2001
- Graduated from high school in 2014
- Attended public schools in the Normandy School District all of his life

During all of his years in the Normandy schools, the school district was never accredited.
Normandy School District

• District was last accredited in 1991

• Languished as “provisionally accredited” from 1991-2013

• Finally fully labeled unaccredited in 2013 triggering the Missouri Transfer Law

Missouri Transfer Law

• 167.131. 1. The board of education of each district in this state that does not maintain an accredited school . . . shall pay the tuition of and provide transportation . . . for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.

• 2. . . . Subject to the limitations of this section, each pupil shall be free to attend the public school of his or her choice.
Michael Brown did not transfer

- He stayed in Normandy schools
- By the time of his graduation in 2014, the district had a mere 7.1 points (down from 11.1 in 2013) on a 140 point accreditation scale (50-60% needed to be “accredited”).
- The Normandy district was plagued with several “ACES”:
  - Over 90% poverty rate
  - High academic achievement gap challenges
  - The highest suspension record in the State of Missouri
  - Economic stresses; physical/mental health issues; and other “traumatic” events that affect the body and brain physically and interfere with the ability to learn
  - Aggressive and racially biased policing as detailed in several studies
- The district also had:
  - New, inexperienced and sometimes uncertified teachers (including “AP” teachers not qualified to teach “AP” classes)
  - Substitute teachers substituting the same class for months
  - Zero Honors classes
  - Substandard infrastructure issues (including moldy & mildewed facilities)
  - Lack of resources (books; proper equipment for science laboratories)
Are we living up to Brown?
NORMANDY SCHOOL DISTRICT (& OTHER DISTRICTS), i.e., NEIGHBORHOOD SCHOOLS

- Segregated housing = segregated public schools
- Public schools today:
  - Majority Black, Latino/a
  - Majority poor
  - Students experience multiple “ACES”
  - Inadequately staffed, increase in underpaid, uncertified, non-diverse teachers, under-resourced, inadequate infrastructure
  - “Zero Tolerance” = tremendous increase in school to prison pipeline
  - Biases, low (and no) expectations by teachers of their students

TRANSFER TO “BETTER” SCHOOLS NOT ALWAYS A “BETTER” OPTION

- Primarily two options:
  - Transfers under the Missouri Transfer statute discussed supra (Mo.Rev.Stat 167.131) applies to resident pupils in unaccredited districts (AND transfers historically made (and that still exist in limited form in some states) to desegregate schools under Brown) are both riddled with problems:
    - 1) For transfers of students to desegregate schools (& thus that have historically used race to desegregate): 2007 SCOTUS decision in Parents Involved v. Community Schools severely limited the ability to use a student's race to assign children to schools.
    - 2) Transfers under Brown and transfers under the Missouri Transfer law both:
      - A) Result in a one way burden: the Black, Brown and poor children get up very early, take long bus rides, get home, unable to participate in school activities to same extent as "neighborhood" children; out of neighborhood = others)
      - B) Serious racial divides and downright racism by some parents, students, & teachers alike, stoking fear, resentment, bullying, and more. Affects successful attempts to access the “better education” afforded in the suburban schools.

What now?

- Focus on quality education, including preschool education
- Focus on socioeconomic integration
- Infusion of resources to support children where they are
- Rehiring and training (cultural competency, bias training) of teachers, school administrators and SROS.
- Diverse hiring
- Law changes: Consider necessary changes to zero tolerance & other school discipline laws; take police out of schools.
The Uncertain Hope of Body Cameras

FIU COLLEGE OF LAW
LAW PROFESSOR
HOWARD WASSERMAN
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<th>Michael Brown case (Ferguson)</th>
<th>Eric Garner case (N.Y.)</th>
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<tr>
<td></td>
<td>Right decision</td>
<td>Wrong decision</td>
</tr>
<tr>
<td>Total</td>
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<tr>
<td>White</td>
<td>64%</td>
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<tr>
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<td>63%</td>
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<td>Democrat</td>
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<td>60%</td>
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Mesa, Arizona
Justin T. Ready & Jacob T.N. Young

- “Significantly” fewer stop-and-frisks
- “Significantly” fewer arrests
- More tickets/citations
- More likely to initiate contact
- Less likely to respond to dispatch calls
- 1/3 the number of complaints
Rialto, CA

• Less likely to use weapons

• Less likely to initiate physical contact unless physical threat

• “Dramatic reduction” in citizen complaints

• Reduction in use-of-force incidents

Over-deterrence

“Educated risk-taking and problem-solving that’s often needed to save lives”
“Hold up. Hold up, y’all. Hold up, everybody, hold up. We’re red right now, so if you guys are worried about cameras, just wait.”

Rep. Jason Villalba (R-TX)
Implicit bias is at the heart of our nation’s “School-to-Prison Pipeline.” First, we must recognize our own biases. We all have them. No one is exempt. The biggest challenge, however, is not to merely identify these biases. The struggle is to figure out what we do once we recognize them. For those working in the justice system, from police to prosecutors and judges, and yes, even public defenders, the consequences have broad, far-reaching, and sometimes even fatal consequences.

Ferguson’s Fault Lines will also examine other important topics of debate such as:

• The framing of the issues by the media in black versus white
• The policing of black and poor communities by law enforcement officers
• Poverty
• Looting
• Rioting and the color and face of crime as portrayed in the media
• The identity of the black male narrative, and
• The relevance of black life and whether and how it matters along with much more.

Save 25% off this book at checkout with discount code “FergusonWeb.”

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Debtor’s Prison in the 21st Century
Lourdes Rosado
New York State Office of the Attorney General
Monday, June 20, 2016
1:00 PM – 2:30 PM ET

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Chapter 3

The Prosecution, the Grand Jury, and the Decision Not to Charge*

Katherine Goldwasser**

For most of us, shooting and killing an unarmed man in broad daylight on a public street, as Darren Wilson did to Michael Brown, would result in almost certain arrest on the spot and swift prosecution. But the law treats police officers differently. In recognition of the nature and unique demands of the work they do, police are given more leeway to use deadly force, sometimes even against a person who is unarmed. The leeway is broad enough that most instances of police use of deadly force against an unarmed civilian are handled much as Wilson’s was—that is, police are called to the scene, but there is not an immediate arrest.

Of course, just because police typically do not immediately arrest a fellow officer who has shot and killed someone does not mean the shooting is not a crime. Moreover, although whether to arrest at the scene is largely up to the police, whether a formal charge will be brought and the matter pursued criminally will be determined, not by the police, but by a prosecutor. Thus, when Darren Wilson shot and killed Michael Brown, it fell to the chief prosecutor for the jurisdiction where the shooting took place,

*As many are aware, several months after the grand jury referred to in the title to this chapter voted not to indict Darren Wilson for killing Michael Brown, the U.S. Department of Justice [DOJ] issued a report on the federal criminal investigation regarding the same incident. See U.S. Dept’y of Justice, Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson (Mar. 4, 2015), http://www.justice.gov/sites/default/files/usao-mdpa/legacy/2015/03/18/DOJ%20Report%20on%20Shooting%20of%20Michael%20Brown.pdf. The report concluded, inter alia, that “Wilson’s actions [did] not constitute prosecutable violations under the federal criminal civil rights statute.” Id. at 5. Although the DOJ report shed important light on what happened between Wilson and Brown in the moments leading up to the shooting, it did not address the state criminal process in the Wilson case, which is what this chapter is about.

** I am grateful to Beverly Beindiek, Kathleen Cash, Caterina DiTraglia, Ellen Goldwasser, Peter Joy and Ann Shields for their comments and suggestions; to Brian Hall, Nick Papadimitriou and Jenny Terrell for their research assistance; and to my dear friend Kimberly Norwood for inviting me to participate in this important project.
St. Louis County Prosecuting Attorney Robert P. McCulloch, to decide what criminal charges, if any, would be brought against Wilson.

Missouri law gave McCulloch three options: (1) he could decide on his own to bring charges against Wilson; (2) he could decide on his own that no charges would be brought; or (3) he could decide not to make the determination himself and instead put the matter in the hands of a grand jury. Within days of the shooting, McCulloch announced that he was going to go the grand jury route.

The Grand Jury Proceedings

The grand jury that heard the Wilson case had already been serving and hearing routine cases presented by prosecutors from McCulloch’s office for nearly four months by the time the presentation of evidence in the Wilson case got underway. McCulloch’s opening words to the grand jurors took note of their prior experience: “I want to tell you how this is going to proceed. Obviously, it is going to be different from a lot of the other cases that you’ve heard . . . during your term.” And indeed it was very different—not just from this particular grand jury’s other cases, but from how state grand jury proceedings are ordinarily handled.

Differences from the Grand Jury “Norm”

One aspect of the Wilson proceedings that differed markedly from the usual grand jury proceeding was the scope of the prosecution’s presentation, in terms of the number of witnesses and volume of evidence presented and, as a result, the length of time it took to complete it. In a typical case, the prosecution calls one or two witnesses at most and presents few if any exhibits. Each witness gives a bare-bones account of the key facts of the case—the facts that, in the prosecution’s view, are sufficient to establish the requisite probable cause to believe that a crime was committed and that the suspect (often called the “target”) committed it. As a result, whole cases are often presented in well under an hour. In the Wilson case, by contrast, the grand jury met for about 70 hours over a three-month period, on 25 separate days, during which time the prosecution called 60 witnesses, played hours upon hours of video and audio recordings, and presented hundreds of photographs, maps, diagrams, reports, and other exhibits.

Another major difference from the usual was that the prosecution purported to take a “neutral” stance as to whether any charges should
be brought in the case. Ordinarily, a prosecutor presents a grand jury with proposed charges, in the form of an indictment; the grand jury decides if the charges are supported by probable cause; and, if so, they vote to return the indictment or bring the proposed charges (also called returning “a true bill”). If a prosecutor is not convinced that charges should be brought, then the prosecutor simply does not present the matter to a grand jury.10

Two other differences, both also significant departures from the grand jury norm, worked in tandem. First, the “target”—here, Darren Wilson—testified before the grand jury and gave his version of the relevant events; and second, through Wilson and other witnesses, the prosecution presented extensive testimony in support of Wilson’s claimed legal justifications for killing Brown. For a multitude of reasons, the target of an investigation rarely testifies before the grand jury. In Missouri, as in most jurisdictions, there is no right to do so, even if one is the grand jury’s target.11 If a target wants to testify (assuming they are even aware of the investigation), the most they can do is ask. Even if the prosecution is amenable, defense attorneys ordinarily counsel their clients against testifying, on the theory that the legal risks associated with doing so are simply too great.12

As rare as it is for a target to testify before the grand jury, it is even more unusual for the prosecution to present evidence favorable to the target, especially evidence that, if believed, would establish a complete defense to any possible charge. Although prosecutors in possession of such evidence do have a constitutionally imposed duty to disclose it to the defense for use at trial,13 in most jurisdictions, including Missouri, there is no comparable duty to present it to the grand jury.14 This is in keeping with the widely accepted view that the purpose of a grand jury is “not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.”15

Cause for Concern
Of course, just because the grand jury presentation in the Wilson case differed markedly from the usual grand jury presentation does not mean there was anything wrong with it. For other reasons, however, several aspects of the presentation were quite troubling.

McCulloch’s Cryptic Message
Prosecuting Attorney McCulloch’s opening words to the grand jury about how the case was “obviously . . . going to be different from” the
grand jury’s previous cases got the proceedings off to a questionable start. Recall that this grand jury had been hearing cases for months. Although the facts of each case were different, the prosecution’s approach in all of them was basically the same. Now here was the prosecuting attorney himself, telling the grand jurors that this next case would “obviously” be “different.” But what did he mean that it was going to be “different?” And in what sense was the difference “obvious?” More importantly, what message did it send to the grand jurors that the prosecution viewed it that way?

**Prosecution-Created Confusion**

McCulloch’s cryptic message aside, the grand jurors’ task was also complicated by certain of the prosecution’s choices as to what would and would not be presented to the grand jury—choices that made the presentation far more muddled, unfocused, and difficult to follow than it would have been had the prosecutors handled it in their usual way. McCulloch made the plan for the presentation clear at the outset: “Absolutely everything will be presented to the grand jury, every scrap of paper that we have, every photograph that was taken, every bit of physical evidence that has been gathered, every video clip, anything that we can get.” Left unsaid was an important corollary: presenting “[a]bsolutely everything” to the grand jury meant there would not be any of the sort of filtering that prosecutors usually do in order to help grand juries make sense of the cases they hear.

As a result of the decision to present “absolutely everything,” the grand jury heard testimony that no prosecutor who was actually trying to help them do their job—that is, trying to help them determine whether there was probable cause to believe that Darren Wilson had committed a crime when he killed Michael Brown—would ever present. With the law enforcement witnesses who investigated the shooting, for example, the prosecutors elicited testimony, not just about the shooting and the surrounding circumstances, but also about the general step-by-step procedures and protocols (sometimes described in excruciating and mind-numbing detail) that they customarily followed in their jobs. Even when prosecutors did elicit testimony about the case, their presentation was unfocused. In one instance they had a witness separately show the grand jury and testify about every one of the 161 crime scene photos the witness had taken. It was almost as though the prosecutors had thought to themselves, *why select only some of the photos to show to the grand jury—for example, the clear ones, or the important ones, or*
The Prosecution, The Grand Jury, and The Decision Not To Charge

the most helpful ones—when we can just have them look at all 161 photos instead? The prosecutors went so far with their no-filtering stance that even when they knew witnesses were deliberately lying, they presented the perjured testimony to the grand jury anyway.20

Not everything that made the grand jury presentation so confusing was attributable to the prosecution’s everything-but-the-kitchen-sink approach; prosecutors also created confusion about the applicable law. One of the most glaring instances occurred shortly before Darren Wilson began testifying, when prosecutors gave the grand jurors copies of the Missouri statute that specifies when police are justified in using deadly force to make an arrest.21 A portion of the statute purports to authorize conduct that the U.S. Supreme Court ruled decades ago is unconstitutional.22 Although prosecutors eventually told the grand jurors that there was a problem with the statute, they waited for over two months to mention it.23 For that entire two-month period, the grand jurors were left to believe that the problematic statute stated the rule for when Wilson could use deadly force to arrest Brown. Even when the prosecutors finally told the grand jury about the statute issue, their explanation of the problem and how the grand jury should deal with it was confusing: they simply distributed their own statement of the law to replace the original handout and told the grand jurors, “So the statute [we] gave you [before], if you want to fold that in half just so that you know don’t necessarily rely on that because there is a portion of that that doesn’t comply with the law.”24

The prosecutors also created confusion about the law by waiting until the last day of the proceedings to give the grand jurors the Missouri homicide statute.25 The statute was essential: it specified the various charges to be considered, and set forth the legal requirements governing the probable cause determinations that the grand jury needed to make for each one in deciding whether to indict Wilson. It also could have helped the grand jurors throughout the proceedings in determining what information was relevant and thus what questions to ask the witnesses when they testified. The prosecutors clearly understood how much more difficult the grand jury’s job would be without the statute, and early on they assured the grand jurors that a copy would be provided:

[N]ormally when we’ve charged somebody with an offense, you have the charge in front of you, and you don’t have that in this case. . . . [T]hat kind of leaves you not sure how you are supposed to look at this evidence. So after this morning session, [we]

will sit down and ... come up with statutes for you on the various degrees of homicide and ... some other relevant statutes on the use of ... deadly force ... and possibly self-defense, so you will have [those] by ... next time. We'll have that for you so you can kind of at least understand the law as you are hearing this evidence.26

Although prosecutors did provide a copy of the use-of-deadly-force statute in time for the grand jurors to be able to “understand the law as [they were] hearing the evidence,”27 not so with the homicide statute. Thus, they informed the grand jury of a defense that Wilson might be able to raise before informing them of any crimes he might have committed.

**Anti-Indictment Bias**

Quite apart from the problems discussed thus far, the grand jury presentation was seriously compromised because it was driven from start to finish by a Darren-Wilson-should-not-be-indicted bias so pervasive and powerful that a “no true bill” vote was inevitable. To be clear, this is not a judgment about the actual intent of the prosecutors who made the presentation, nor is it a judgment about the correctness of the grand jury’s decision not to indict. Rather, the point is simply that whether consciously or unconsciously, the prosecutors conducted the grand jury proceedings in a way that made fair consideration of the option of returning an indictment against Darren Wilson virtually impossible.

The prosecution’s decision to grant Wilson’s request to appear before the grand jury benefited him greatly, but even after deciding that much, prosecutors still had complete control over when in the proceedings he would testify and what the grand jurors would see and hear before they heard from him. Most prosecutors who know that a grand jury target is going to testify would postpone the testimony until at or near the end of the proceedings, on the theory that hearing other (and often conflicting) accounts beforehand puts the grand jury and the prosecutor in a better position to scrutinize the testimony critically and with appropriate skepticism, and then question the target accordingly. Here, though, prosecutors took a different tack.

Wilson was allowed to testify relatively early in the proceedings—he was ninth of the 60 witnesses presented by the prosecution—and the proceedings leading up to his appearance could not have set the stage for his testimony any better had he planned them himself. Seven
of the eight witnesses who testified ahead of him, although not themselves present for any of the events surrounding the shooting, either had taken a statement from Wilson about those events or had spoken to someone else who did, and prosecutors had all seven of them recount for the grand jurors what Wilson had said. As a result, by the time Wilson testified, the grand jury had repeatedly heard all or parts of his version of the events leading up to the shooting—including, for example, Wilson’s claims: (1) that Michael Brown had “assaulted and attempted to kill him” when Wilson was just sitting in his car;28 (2) that when Brown first started running away Wilson chased him because “he knew Brown would assault another responding officer or witness” and he “did not want Brown to cause injury or death to anyone else;”29 and (3) that when Brown suddenly turned around and charged directly at Wilson, Wilson thought his life was in danger and so felt he had no choice but to kill Brown.30

The grand jurors did hear one account that differed from Wilson’s before Wilson testified—namely, that of Dorian Johnson, the young man who had been with Michael Brown in the hours leading up to the shooting—but prosecutors took various measures to blunt the impact of his testimony. Chief among these measures was the playing of and questioning Johnson about a surveillance video that was at least somewhat unfavorable to Johnson and highly unfavorable to Brown.31 The video, taken on the morning of the shooting at a local convenience store known as the Ferguson Market, showed Brown taking items without paying and pushing a store clerk in the process—an incident that came to play a prominent role in Wilson’s account of the events leading to his shooting of Brown.32

Also by the time Wilson testified, the grand jurors had heard favorable things about him and the opposite about Michael Brown. Wilson, they heard, “always ha[d] a smile on his face,” and was “very easy going” “a good officer,” and not one to “go . . . look[ing] for trouble” or start a fight with a suspect.34 Concerning Brown, by contrast, in addition to hearing repeated references to Wilson’s account of his aggressive conduct leading up to the shooting; the grand jurors were told that he came from a neighborhood that was “known for violence, guns, gangs and drugs;”35 they watched the Ferguson Market video; and they heard one of the prosecutors characterize Brown’s behavior in the video as “brash,” “threatening,” and “intimidating.”36 Then, having painted these starkly contrasting pictures of Wilson and Brown, shortly before Wilson testified, prosecutors distributed copies of the
previously discussed Missouri use-of-deadly-force statute. From Wilson’s perspective, coming as it did shortly before he began his testimony about his own use of deadly force against Brown, the timing of the distribution could not have been better. Granted, the grand jurors were told months later that there was a problem with the statute, but as far as they knew when they heard from Wilson, the statute appeared to set forth a complete defense that Wilson could rely on to defeat any criminal charge the grand jury might vote to bring in connection with Wilson’s use of deadly force against Brown.

With the stage thus set, enter Wilson. At the risk of stating the obvious, no witness had a bigger stake in the outcome of these grand jury proceedings than he did. As a practical matter, his testimony raised two questions for the grand jurors: first, was his version of events believable; and second, even assuming he was telling the truth about what happened, was his conduct reasonable? Although the prosecutors presumably had their own views on both questions, as they themselves understood, legally, the grand jurors’ views were the only ones that mattered. Thus, it was up to the prosecutors to put aside any views of their own and conduct an examination of Wilson aimed at helping the grand jurors answer the believability and reasonableness questions for themselves. Certainly, any prosecutor would appreciate that to examine Wilson effectively they would need to scrutinize his testimony carefully and actively challenge what he said; otherwise, as one of these very prosecutors put it, “you don’t get to the truth.” At almost every turn, however, the prosecutors simply failed to do their job. Two examples, each applicable to one of the questions the grand jury needed to resolve, will help make this point.

On the believability question, Wilson claimed that he knew about the earlier Ferguson Market stealing incident before he encountered Michael Brown and Dorian Johnson on the day of the shooting. This was an integral part of his version of events. Although he said it was the two men walking in the middle of the street that had initially drawn his attention, Wilson described how that initial encounter had morphed into something more serious when he noticed that Brown was carrying cigarillos (the items reportedly taken from the Ferguson Market) and that Johnson was wearing a black shirt (clothing reportedly worn by one of the suspects), and it “clicked for [him]” that “these [we]re the two from the stealing.”

But what if it did not happen that way? More specifically, what if Wilson truly did not know anything about the stealing incident when
he encountered Brown and Johnson? Certainly, there was some basis for thinking he might not have. The very first person Wilson spoke to after the shooting, a Ferguson police sergeant who was Wilson’s supervisor at the time, testified that Wilson told him then and in subsequent conversations that he (Wilson) knew nothing about the Ferguson Market incident when he spotted the two men, and that everything had unfolded from their refusal to walk on the sidewalk. The prosecutors seemed surprised by this testimony and inquired again several times, but the sergeant was emphatic: *Wilson said he did not know anything about the stealing incident.* That is a significant discrepancy: either the sergeant was mistaken and Wilson really did mention having realized the connection to the stealing incident, or Wilson’s story changed. Either way, once the sergeant testified that Wilson *did not* know about the incident, the prosecutors owed it to the grand jury to try to “get to the truth” by challenging Wilson’s subsequent testimony that he *did* know about it. But that never happened; in fact, the prosecutors never even mentioned the discrepancy to Wilson.

Regarding the reasonableness of Wilson’s conduct, Wilson’s decision that he “had to kill [Brown]” was an obvious topic for inquiry. There were many missed opportunities, but one in particular came relatively early in Wilson’s testimony, when one of the prosecutors questioned him about the various weapons he had with him on the day of the shooting and asked specifically about a Taser:

Q. Did you carry a Taser?
A. No.
Q. Why not?
A. I normally don’t carry a Taser. We only have a select amount. Usually there is one available, but I usually elect not to carry one. It is not the most comfortable thing. They are very large, I don’t have a lot of room in the front for it to be positioned.
Q. Had you been trained on how to use a Taser?
A. Yes, ma’am.
* * *
Q. You prefer not to have a Taser?
A. Correct.46

Here again, the prosecutors owed it to the grand jury to do more than they did. Instead of simply confirming Wilson’s preference (“You prefer not to have a Taser?”), for example, they might have asked questions aimed at establishing (1) that Wilson could have been carrying a
Taser that day but decided not to; (2) that a Taser enables a police officer to subdue a dangerous person without having to use deadly force like a gun; (3) that not carrying a Taser increases the risk of having to use deadly force to subdue someone; and (4) that Wilson understood all of this, yet opted not to carry a Taser anyway, mainly for reasons of personal comfort.

Likewise, consider Wilson’s subsequent testimony about Brown hitting him in the face through Wilson’s open car window when Wilson was seated in his car. Wilson said that from his perspective, that assault by Brown made Wilson’s gun a legitimate “deadly force option”; in other words, he felt that Brown’s hitting him in the face was enough to justify shooting Brown.47 The prosecutor’s response? “Okay, all right. So then you go to the [police] station?”48

Where was the scrutiny? Why not establish through Wilson the relatively minor nature of his facial injuries as a result of the hitting,49 and then challenge the reasonableness of his judgment that the hitting justified deadly force? And why not also ask Wilson whether he would have reached the same conclusion about the appropriateness of using his gun if he had been carrying a Taser at the time? Might the grand jurors have wondered, if Wilson had been carrying a Taser, maybe Michael Brown would be alive today?50

There were numerous instances of similar prosecutorial ball-dropping throughout the proceedings, and of course we all know what happened in the end: on November 24, 2014, nearly four months after Darren Wilson shot and killed Michael Brown, prosecuting Attorney McCulloch called a nighttime press conference to announce that the grand jury had voted not to indict Wilson. Later that night and over the next few weeks, McCulloch released literally thousands of pages of grand jury documents and transcripts—an almost unheard-of action, but one he had said he would take for the sake of “transparen[cy]” in the event that Wilson was not indicted.51 The release of the transcripts, in turn, brought to light what had gone on behind the closed doors of the grand jury room, including the problems previously discussed.

Ignoring Race (the Elephant in the Grand Jury Room)

In addition to the problems just noted, there was one other problem that was painfully evident from the grand jury transcripts: race mattered in this case, and yet its role was never even acknowledged in the grand jury, let alone discussed. As evidence for the proposition that race mattered here, we have, inter alia, the March 2015 Department of
Justice report on the Ferguson Police Department, the available empirical evidence (scant as it is) about police shootings of unarmed African American men and boys, a large body of social science research on the subject of implicit (unconscious) racial bias, and, most importantly, accounts from African Americans about the experience of being Black in this country and, even more to the point, accounts from African American men about their interactions with police.

The Justice Department report paints a picture of how the Ferguson police were policing Ferguson on August 9, 2014, the day Michael Brown was killed. And Darren Wilson’s grand jury testimony reveals the lens through which Wilson was viewing Michael Brown that day. Although prosecutors did not question Wilson directly about his racial attitudes, research concerning the phenomenon of implicit bias suggests that his answers probably would not have been as informative on the point as other aspects of what he said.

Implicit bias refers to the negative attitudes and stereotypes that influence our perceptions, decisions, and actions at the subconscious level, without any intent or awareness on our part. With implicit racial bias in particular, studies suggest that most of us are influenced at some level by messages we constantly receive in various ways that stereotype Black men as violent, dangerous, and inclined toward criminality. According to one study, just over 40 percent of White Americans believe that “many” or “almost all” Black men—men like Michael Brown—are violent. Studies also indicate that views about the dangerousness of Black men are often associated with views that Black people are superhuman, nonhuman, and/or less susceptible to pain—all of which, taken together, serve to increase the perceived danger, which in turn, warrants greater fear.

Before the grand jury, Wilson testified that at one point he tried to grab Brown, but “the only way I can describe it is I felt like a five-year-old holding onto Hulk Hogan.” A short time later, according to Wilson, Brown “looked up at me and had the most intense aggressive face. The only way I can describe it, it looks like a demon, that’s how angry he looked.” After Wilson fired his first round of shots, Brown “made like a grunting, like aggravated sound.” When Wilson fired another round, “it looked like he was almost bulking up to run through the shots, like it was making him mad that I’m shooting at him. And the face that he had was looking straight through me, like I wasn’t even there, I wasn’t even anything in his way.”

Wilson also testified that after Brown hit him in the face twice, “I felt that another one of those punches in my face could knock me out
or worse. I mean it was, he’s obviously bigger than I was and stronger and the, I’ve already taken two to the face and I didn’t think I would, the third one could be fatal if he hit me right.”66 Bearing in mind the stereotype of the superhuman Black man, what is significant about this testimony is how poorly it fits with the nature and extent of Wilson’s actual injuries as a result of his encounter with Brown: some scratches on his neck and a contusion on the right side of his face67—not nothing, to be sure, but arguably also not enough to reasonably fear that a third punch might kill him.

The prosecutors in some ways contributed to Wilson’s portrayal of Brown as out of control and frightening by suggesting that Brown’s prior marijuana use (as shown by a toxicology report) might have caused his extreme aggression toward Wilson (as described by Wilson). They had one witness testify that paranoia, hallucinations, and even psychosis are possible from marijuana use, and that there was no way to know from testing whether Michael Brown was experiencing any of those in the time just before Wilson shot him.68 They also questioned several witnesses about a highly concentrated and potent marijuana product known as “wax,” and about Michael Brown’s possible use of it (although their basis for asking is unclear, as there seems to have been no evidence that Brown had ever used it and actually some evidence suggesting that he had never heard of it).69

The reason all of this matters is that the reasonableness of Darren Wilson’s assessment of Brown’s dangerousness is a factor that the grand jury needed to consider in determining whether Wilson should be criminally charged for shooting Brown.70 Indeed, the reasonableness of police assessments of danger, and hence their fear, is an issue in many police use-of-force cases.71 Unless we are going to say that it is always reasonable for police officers to fear Black men because Black men are dangerous (which makes race a proxy for danger and an automatic trigger for the lawful use of deadly force), grand jurors will sometimes need to consider the role of race in an officer’s assessment of danger in determining whether the assessment was reasonable.72 Prosecutors can play a key role in all of this. Conversations about race can be difficult, especially among strangers. Prosecutors, by first informing themselves and then educating grand jurors about implicit bias, by their questioning of witnesses, and by their decisions regarding what witnesses to call are in a position to help grand jurors discuss issues of race openly and honestly.73 In the Darren Wilson case, unfortunately, that did not happen; in fact, in some instances, even if unconsciously, the prosecutors did just the opposite.
The prosecution’s marijuana theory, which lent support to Wilson’s negative portrayal of Brown, is one example of this, but some of the clearest examples occurred in connection with the questioning of various witnesses about Canfield, the overwhelmingly African American apartment complex where Michael Brown was shot and killed. The very first witness who testified, an investigator for the medical examiner’s office who was called to the scene of the shooting shortly after it occurred, was asked whether he was frightened when he was at Canfield.74 Another witness, a Ferguson police sergeant, was asked, “Didn’t people at Canfield hate police?” The witness responded that it was a “business relationship.”75 Apparently not satisfied with the witness’s answer, the prosecutor pressed further: “So there was no understanding that the residents just hated the police, it wasn’t like that?”76 (Interestingly, there was no comparable inquiry concerning how the police felt about the Canfield residents.)

When Wilson testified, the prosecutor raised the subject again:

Q. Did you guys have a volatile, well, how can I put this. Did you not really get along well with the folks that lived in [Canfield]?
A. It is an antipolice area for sure.
Q. And when you say antipolice, tell me more?
A. There’s a lot of gangs that reside or associate with that area. There’s a lot of violence in that area, there’s a lot of gun activity, drug activity, it is just not a very well-liked community. That community doesn’t like the police.77

One might ask, what were the prosecutors trying to convey to the grand jurors through this line of questioning? More importantly, what would the grand jurors have understood it to mean?

The Decision to Use a Grand Jury

With so much to criticize about the grand jury presentation in this case it is well to remember that under Missouri law, Prosecuting Attorney McCulloch did not have to use a grand jury at all; rather, he could have made the charging decision on his own. If he decided not to bring charges, he simply could have announced his decision; if he decided to go forward with charges, he could have brought them himself by filing a complaint, presenting evidence at a preliminary hearing, and, if the judge made the necessary probable cause determination, filing an information against Wilson and proceeding to trial.78 The signifi-
cance of the choice McCulloch made—presenting the case to a grand jury instead of to a judge at a preliminary hearing—would be difficult to overstate. A preliminary hearing is an adversary proceeding (both prosecution and defense are represented), held before a judge in a courtroom that is open to the public, at the conclusion of which the judge decides, based on the evidence presented, whether the probable cause standard has been met. A grand jury proceeding, by contrast, is nonadversarial (prosecutor only; no defense counsel, no judge), it is held in secret, and the decision maker is a group of lay people who, not being law-trained and having neither the authority nor the means to do their own investigating, are completely dependent on the prosecutor. When McCulloch chose to use the grand jury for Wilson, he was opting for a process that he knew would ensure secrecy, near-complete prosecutorial control, and a setting in which Wilson could safely present his version of what happened, including his claimed justifications for shooting Brown, free from cross-examination and any real-time public or media scrutiny. McCulloch also knew that the grand jury process would offer him political cover because, strictly speaking, the final decision would be the grand jury’s and not his own. And although his after-the-fact release of grand jury documents was unusual, it did nothing to alter the essential nature of the secret, prosecutor-controlled proceedings that resulted in the decision not to bring criminal charges against Wilson for killing Michael Brown.

Lessons Learned?
The St. Louis County criminal justice system’s treatment of the Wilson case followed what has become a depressingly familiar pattern: a police officer (usually White), while acting in the course of the officer’s police duties, kills or seriously injures an unarmed Black man or boy; the local prosecutor puts responsibility for deciding whether criminal charges should be brought against the officer in the hands of a local grand jury; and, after a secret, prosecution-controlled presentation of evidence, the grand jury votes not to indict. Recently, however, the Wilson case and a string of other well-publicized police killings have put a spotlight on the virtual immunity from prosecution that police seem to have been granted in these cases. Public awareness of the pattern has prompted widespread skepticism about the fairness and impartiality of the system that has been producing it, and that in turn has sparked calls for change in how the cases are handled.
The calls for change have focused on two points in particular: (1) the people who are making all the key charging-related decisions in these cases—namely, local prosecutors—work hand-in-hand with the police officers whose use of force is ostensibly being examined for possible prosecution, and (2) the presentations to the grand jury (handled by these same local prosecutors) are made in secret, out of public view.

Some have argued that oversight of these cases should be taken out of the hands of local prosecutors and shifted to a prosecuting authority that does not have such close ties with local police. The theory is that an inherent conflict of interest exists whenever local prosecutors are called on to decide whether to bring criminal charges against the very police officers whose cooperation, help, and goodwill the prosecutors depend on in order to do their work. The prosecutors who presented the Wilson case to the grand jury were laboring under just this sort of conflict, and while we cannot know for sure, the likelihood that it played a part in the bias they showed throughout the presentation—including, above all, their kid-glove treatment of Wilson—seems inescapable.

Others, focusing on the use of grand juries and the secrecy that attends them, have urged the use of a less secretive and more open charging process, if not in all cases, then at least in police lethal force cases. Secrecy breeds suspicion, all the more when it conceals something that seems so clearly the public’s business as the determination at issue in these cases—that is, whether a public servant who has used lethal force to kill an unarmed member of the very public supposedly being served at the time should be charged with a crime. Particularly for those who have little or no confidence in the fairness of the criminal process to begin with, chief among them the Black men and boys who are so disproportionately the victims when police kill, the secrecy only serves to confirm their sense that the fix is in.

Less often mentioned in discussions of how to reform the charging process in police lethal force cases is dealing with the subject of race when the person the police have killed is a Black man. For years, it has been standard operating procedure for prosecutors to ignore race in these cases, as though race were irrelevant. The Wilson case is a perfect example. But if we did not know better before, surely we do now. Instead of ignoring race, as was done in the Wilson case, there is a need for measures designed to help the various decision makers in the charging process address the special issues of race that these
cases present. Whatever else the measures may entail, at a minimum, they should include familiarizing everyone—preliminary hearing judges, grand jurors where grand juries are used, and above all, prosecutors—with the phenomenon of implicit racial bias, and encouraging them to hold honest conversations about race.

Notes

1. Missouri permits felony charges to be brought by grand jury indictment or by complaint and information, and allows prosecutors to choose which way to proceed. See Mo. Rev. Stat. § 545.010. When a prosecutor chooses the latter, the process begins with the filing of a written complaint, Mo. R. Crim. P. 22.01, after which a hearing is held to determine if there are sufficient grounds (probable cause) to hold a trial on the charges, Mo. R. Crim. P. 22.09(a). If probable cause is found, in order to proceed with the prosecution, the prosecutor must file a formal written charge, called an “information,” Mo. R. Crim. P. 23.03. Both the initial complaint and the subsequent information are signed by, and subject to the sole control of, the prosecutor.

Not all prosecutors have the option of bringing charges on their own. In federal criminal proceedings, for example, the Fifth Amendment requires that felony charges be brought by grand jury indictment. U.S. Const. amend. V. Although that right does not apply in the states, Hurtado v. California, 110 U.S. 516, 538 (1884), nearly half the states have similar requirements under their own constitutions and/or laws. See Susan Brenner & Lori Shaw, Grand Jury Functions, Fed. Grand Jury Website, http://campus.udayton.edu/~grandjur/stategj funcsgj.htm.


3. Mo. Rev. Stat. §§ 545.010, 545.031; Mo. Const. art. I, § 17. A grand jury is a panel of citizens convened to determine whether evidence presented by a prosecutor is sufficient to bring criminal charges against the supposed perpetrator and hold a trial. Grand jury proceedings are held in secret without a judge and without defense counsel; only the prosecutor, the witnesses chosen by the prosecutor, and the grand jurors (and sometimes a stenographer) are permitted to attend. See Mo. Rev. Stat. §§ 540.130, 540.320. This is to be distinguished from a trial jury, which comes into play later in the process, only after criminal charges are brought, whether by a grand jury or by a prosecutor acting alone.

Some favored yet another option, which would have involved replacing McCulloch with a special prosecutor, whether by having him voluntarily recuse himself or by having Missouri Governor Jay Nixon remove him involuntarily. Those advocating this option questioned McCulloch’s ability to handle the case against Wilson impartially, based in part on his close family ties to local police, but even more on his record of failing to prosecute police in similar cases. See Jaeah Lee, Ferguson Cop Darren Wilson Is Just the Latest to Go Unprosecuted for a Fatal Shooting, Mother Jones (Nov. 24, 2014), http://www.motherjones.com/politics/2014/11/darren-wilson-grand-jury-decision-ferguson -police-prosecutions. Ultimately, however, efforts to get a special prosecutor appointed were unsuccessful: the situation did not fit Missouri’s requirements for replacing the regular prosecutor, see Mo. Rev. Stat. § 56.110; Governor Nixon declined to get involved, see Jo Mannies, Nixon Sticking with McCulloch, Who Has No Plans to Step Out of Ferguson Case, St. Louis Pub. Radio (Aug. 19, 2014), http://news.stlpublicradio.org/post/nixon-sticking-mcculloch-who-has-no-plans-step-out-ferguson-case; and McCulloch rejected calls for him to recuse himself voluntarily, Interview by McGraw Milhaven with Robert McCulloch, Prosecuting Attorney for St. Louis County, MO, KTRS.com (Aug. 20, 2014), http:// www.ktrs.com/mcculloch-tells-nixon-to-man-up-and-make-decision/.


6. Allegations about some of these differences and how noticeable they were to the grand jurors were central to an unusual lawsuit brought by one of the grand jurors after the proceedings in the Wilson case had concluded. See Complaint ¶¶ 19–22, Grand Juror Doe v. McCulloch, No. 4:15-cv-00006, 2015 WL 47623 (E.D. Mo. Jan. 5, 2015), dismissed on abstention grounds, 2015 WL 2092492 (E.D. Mo. May 5, 2015). Brought first in federal court, dismissed there “to allow Missouri courts to address . . . [the unsettled state law issues raised by the lawsuit],” Grand Juror Doe v. McCulloch, 2015 WL 2092492, at 1 (E.D. Mo. May 5, 2015), and then brought in state court, see Grand Juror Doe v. McCulloch, 15SL-CC01891 (Mo. Cir. Ct. 21st Cir. June 2, 2015), the suit (still pending as of this writing) seeks release from the secrecy obligations normally imposed on grand jurors under state law to allow the plaintiff to speak out about her or his experience as a grand juror and participate in public discussions about issues in the case, especially issues involving race relations, see Compl. ¶¶ 1, 3, 4, 33, Grand Juror Doe v. McCulloch, 15SL-CC01891 (Mo Cir. Ct. 21st Cir. June 2, 2015).


10. Although some commentators posited that the prosecution’s neutral stance was appropriate because the Wilson grand jury was not serving as a “regular (or indicting) grand jury,” but as an “investigative grand jury,” see, e.g., Matt Hodapp & Dan Margolies, Attorney in Missouri Debate Role of Grand Jury, KCUR.ORG (Dec. 5, 2014), http://kcour.org/post/attorneys-missouri-debate-role-grand-jury, Missouri law does not recognize this distinction or even mention anything about different types of grand juries, “investigative” or otherwise, see Mo. Rev. Stat. § 545.031; Mo. Const. art. I, § 17.


16. See supra text accompanying note 5.


19. Id. at 61–175 (2014).


22. The problematic portion is Mo Rev. Stat. § 563.046 (3)(2)(a) (1979), which says that police are justified in using deadly force to arrest a fleeing felon even if the person fleeing is unarmed and seemingly not otherwise dangerous. This contravenes the Court’s decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), which struck down as unconstitutional a similar Tennessee statute. Id. at 10.
23. Prosecutors distributed the statute on September 15, see Tr. vol. 5, 5 (2014), but did not mention the problem until November 21, see Tr. vol. 24, 134 (2014).
25. See id. at 131–33 (2014).
27. See supra text accompanying note 21. Of course, the understanding provided by the statute was itself problematic. See supra note 22 and accompanying text.
29. Id. at 33–34.
30. Id. at 164.
31. Tr. vol. 4, 13, 31–37 (2014). Other measures included impeaching Johnson with prior inconsistent statements, see id. at 5, and questioning him about past encounters with the law, see id. at 171–76.
32. See id. at 31–37.
33. See infra text accompanying notes 41 & 42.
34. Tr. vol. 5, 74 (2014).
35. Id. at 170.
37. See supra text accompanying note 21.
38. The believability question is one that would apply to any witness. The reasonableness question ties in with certain of the potential charges against Wilson (specifically, both voluntary and involuntary manslaughter, see Mo. Rev. Stat. §§ 565.023.1, 565.024.1), and with both affirmative defenses that prosecutors told the grand jurors were applicable, law enforcement use of force to arrest, see id. § 563.046, and self-defense, see id. § 563.031.1.
40. Id. at 141 (quoting in full: “We want you to understand as attorneys it is our job to challenge witnesses’ statements and that sometimes, you know, you don’t get to the truth unless you challenge a witness statement.”).
41. Tr. vol. 5, 202, 209 (2014).
42. Id. at 206–07, 209.
43. See id. at 52–53, 57–58, 31.
44. See id. at 52–53, 57–58
45. Id. at 236.
46. Id. at 205–06.
47. See id. at 236–37.
48. Id. at 237.
49. Wilson’s injuries consisted of some scratches on his neck and bruising and swelling of his right jaw, resulting in jaw pain, for which an anti-inflammatory and ice were prescribed. See Tr. vol. 22, 77, 89–90 (2014).
50. In fairness, one of the prosecutors did initiate one reasonableness-related inquiry, concerning why Wilson did not remain in his car and wait for backup instead of trying to handle Brown on his own, see id. vol. 5, 261 (2014), but after a few questions on the subject the other prosecutor intervened with a different line of questioning and the matter was dropped, see id. at 261–62.
51. Id. vol. 1, 21 (2014). Whether McCulloch’s release of the documents was legal is far from clear—it relied on a highly questionable interpretation of Missouri’s Sunshine (open government) Law, Mo. Rev. Stat. §§ 610.020 et seq. (1973)—but no one came forward to object so the issue was never litigated.
52. CIVIL RIGHTS Div., U.S. Dep’t of Justice, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding, inter alia, that “Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping[,]” . . . that this “disproportionately
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... [harms] African Americans, and [that] there is evidence that this is due in part to intentional discrimination on the basis of race,” id. at 4).

53. Data on deaths and serious injuries caused by police use of deadly force is woefully incomplete. See Carl Balk, A New Estimate of Killings by Police Is Way Higher—And Still Too Low, FiveThirtyEight.com (Mar. 6, 2015), http://fivethirtyeight.com/features/a-new-estimate-of-killings-by-police-is-way-higher-and-still-too-low/ (discussing various databases and their shortcomings). Mindful of the limitations, researchers and statisticians have nonetheless found what they believe to be reliable evidence of racial disparities. All agree, for example, that Black people are more likely than White people to be shot and killed by police, with estimates of the disparity ranging from three times more likely, see, e.g., Mapping Police Violence, http://mappingpoliceviolence.org/ [hereinafter Mapping Police Violence 2014 Study]; Kimberly Kindy (reported by Julie Tate, Jennifer Jenkins, Steven Rich, Keith L. Alexander & Wesley Lowery), Fatal Police Shootings in 2015 Approaching 400 Nationwide, Wash. Post, May 30, 2015, http://www.washingtonpost.com/national/fatal-police Shootings-in-2015-approaching-400-nationwide/2015/05/30/d322256a-058e-11e5-a428-c984eb077d4e_story.html [hereinafter Wash. Post 2015 Study] to as high as 21 times more likely, see Ryan Gabrielson, Ryan Grochowski Jones, & Eric Sagara, Deadly Force, in Black and White, ProPublica (Oct. 10, 2014; updated Dec. 23, 2014), http://www.propublica.org/article/deadly-force-in-black-and-white. Two that have looked specifically at situations where police on duty have shot and killed unarmed individuals, as in the Wilson case, have found even more pronounced disparities: just over one-half of all of these involved Black victims according to one of the studies, see Mapping Police Violence 2014 Study; two-thirds according to the other, see Wash. Post 2015 Study.


57. This is not to rule out the possibility of explicit (conscious) racial bias, but such views are sufficiently unacceptable under current social norms that a person holding them is unlikely to admit it, at least when talking to strangers.


60. See John Sides, Trayvon Martin and the Burden of Being a Black Male, Monkey Cage (July 15, 2013), http://themonkeycage.org/2013/07/15/trayvon-martin-and-the-burden-of-being-a-black-male/ (discussing study conducted with Ismail White). By comparison, only about 12 percent of Whites believe that “many” or “almost all” White men are violent. Id.


62. Tr. vol. 5, 212 (2014). (emphasis added)

63. Id. at 224–25. (emphasis added)

64. Id. at 227. (emphasis added)

65. Id. at 228. (emphasis added)

66. Id. at 216 (2014).

67. See supra note 49.


69. See, e.g., Tr. vol. 11, 100–04 (2014); Tr. vol. 12, 170–71 (2014); Tr. vol. 13, 99 (2014); Tr. vol. 19, 70–74 (2014).
70. See supra note 38.


72. See Falguni A. Sheth, Shoot First, Ask Later: Why the Concept of “Reasonable Fear” Is Anything but Reasonable, Salon (Sept. 6, 2014), http://www.salon.com/2014/09/06/shoot_first_ask_later_why_the_concept_of_reasonable_fear_is_anything_but_reasonable/.

73. See Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1181–84 (2012) (discussing possible methods of educating trial jurors about implicit bias). Prosecutors, of course, are as susceptible to implicit biases as the rest of us. See Robert J. Smith & Justin D. Levinson, The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion, 35 Seattle U. L. Rev. 795 (2012). Lest there be concern that talking about race in this context might be counterproductive, research on the subject suggests otherwise. See Kang et al., supra, at 1184 (addressing a similar concern about trial jurors, and discussing research suggesting that when jurors are encouraged to discuss race, “it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decision-making”). For a discussion of the research, see Alexander M. Czopp et al., Standing up for a Change: Reducing Bias through Interpersonal Confrontation, 90 J. Personality & Soc. Psychol. 784 (2006).

74. Tr. vol. 1, 43 (2014).

75. Tr. vol. 5, 50 (2014).

76. Id. at 51.

77. Id. at 238.

78. See supra note 1.


80. Sometimes prosecutors in police killing cases have decided on their own not to bring charges, thus skipping the grand jury step, but those cases still are similar enough to fit the pattern because (1) as with the grand jury cases, there was no public hearing into the circumstances of the killing; and (2) the cases reached the same “no prosecution” result.

81. Other highly publicized cases occurring at around the same time included the killings of Eric Garner (in New York), Tamir Rice (in Ohio), Walter Scott (in South Carolina), and Eric Harris (in Oklahoma). See Nicholas Quah & Laura E. Davis, Here’s a Timeline of Unarmed Black People Killed by Police over Past Year, Buzzfeed (May 1, 2015), http://www.buzzfeed.com/nicholasquah/heres-a-time-line-of-unarmed-black-men-killed-by-police-over#.oiV7XowlX.


85. See, e.g., Katz, supra note 83.

86. See, e.g., Gutierrez, supra note 84. This could be accomplished, even in jurisdictions where indictment by a grand jury is sometimes required, by prohibiting the use of a grand jury as the initial step in the charging process, and instead requiring that prosecutors either decide on their own not to bring charges or start the process with a complaint and a preliminary hearing in open court. See supra note 1.
Chapter 4

St. Louis County Municipal Courts, For-Profit Policing, and the Road to Reforms

Thomas Harvey and Brendan Roediger

Ferguson has been described as a microcosm of modern inequality and injustice in the United States.¹ If this is true, the St. Louis region is rich in microcosms. In St. Louis County, Ferguson is simply one of dozens of virtually identical predatory localized criminal justice systems. These municipalities routinely and disproportionately stop, charge, fine, and arrest the poor and people of color. Moreover, these municipalities often unconstitutionally close courts to the public and incarcerate people for failure to make monetary payments without providing them counsel. These destructive policies not only disrupt families, they push the poor further into poverty; prevent the homeless from accessing housing, treatment, and jobs they desperately need to regain stability in their lives; and violate the Constitution.

Other ongoing violations of the most fundamental guarantees of the U.S. Constitution in St. Louis County municipal courts include denial of counsel, denial of pretrial release, and the operation of de facto debtor prisons. This destructive system has existed for decades, prompting municipalities to structure budgets around court fines while attorneys profit and the poor suffer. The St. Louis region is just now, in the wake of the tragic killing of Michael Brown, beginning the task of examining and reforming these practices.
The Structure of St. Louis County Police Departments and Courts

A detailed and comprehensive description of the municipal structure of St. Louis County and its historical development is beyond the scope of this chapter. It is a tragic and sordid history, from the Reconstruction Era split between the county and the city to the present. To this day, St. Louis City remains a completely independent “charter city” with no legal relationship to St. Louis County and its 90 municipalities. By and large, each St. Louis County municipality, Ferguson included, was founded and incorporated as a segregated community. State law encouraged this proliferation of independent political entities with minimal state oversight by requiring virtually no prerequisites to incorporation.

As a result of this history, St. Louis County is now home to 90 distinct municipalities but only 58 independent municipal police departments. The vast majority of these police departments are not accredited nor meaningfully monitored by state government. Incredibly, in October of 2014, in the midst of a nationwide movement demanding police accountability and vigorous local debate over police training and oversight, the small St. Louis County municipality of Flordell Hills formed yet another St. Louis County police department. Just three miles from Ferguson, Flordell Hills is home to approximately 800 residents. On the first official starting day of the Flordell Hills Police Department, an officer was arrested by the St. Louis County Police Department for the theft of prescription drugs from an evidence locker.

The vast majority of St. Louis County municipalities have their own municipal court. As of 2015, there are a total of 81 independent municipal courts. These are courts of “limited jurisdiction,” hearing only cases involving violations of the municipal ordinances of the village or city in which the court sits. These municipal ordinances are largely duplicative of state law, meaning that most unlawful activity can be charged either as a state misdemeanor offense or a municipal ordinance violation. The discretion to charge unlawful activity as a state or municipal offense is left primarily to municipal police officers at the time of arrest or citation. Fines resulting from municipal ordinance violations are paid into general revenue for the municipality. Fines resulting from state offenses are paid to the state school fund. For obvious reasons, municipal police officers overwhelmingly choose to charge individuals with municipal ordinance violations.
The position of judge or prosecutor in these municipal courts is a part-time position. In most municipalities, judges and prosecutors are hired directly by the mayor, with the consent of the city council or village trustees. Although 81 of the 90 towns have their own court, there are not 81 different judges and 81 different prosecutors for each of these towns. Only 55 people work as judges in the 81 municipalities that have courts. Similarly, although there are 81 prosecuting attorney positions available in St. Louis County, only 54 different people fill those roles. Many attorneys and firms serve multiple roles, with some serving as judges, prosecutors, and defense attorneys. Some are full-time prosecutors for felony and misdemeanor cases during the day and municipal judges during the evening. These conflicts not only run contrary to best practices, they are normally prohibited by the judicial cannon. Missouri has exempted part-time judges from those portions of the cannon and has developed no specific standards for prosecutorial conflicts.

Not surprisingly, these courts do not reflect the communities in which they sit or the defendants brought before them. Of the 55 judges serving in St. Louis County municipal courts, only five are African American. Of the 54 prosecutors, only seven are African American.

The Municipal Court Experience for Defendants

All 81 St. Louis County municipal courts are part-time courts. Some meet only once per month while others meet weekly. The vast majority of court dates or “docket calls” are in the evening. These evening sessions are designed to process as many cases as possible, most often through guilty pleas. Often times there are more defendants scheduled for court on a given night than the space could conceivably accommodate. It is not uncommon for defendants to wait outside for significant periods of time before being allowed to enter the court, including during winter months where temperatures are commonly below freezing.

It is difficult to adequately describe the typical night court session in St. Louis County. As mentioned, many of the villages, towns, and cities have no adequate space to hold court. Court sessions are held in police stations, gymnasiums, closed elementary schools, and even a church basement. Many of these courts are within walking distance from one another. On one stretch of Natural Bridge Road (a major
east-west road in St. Louis County), you can drive through eight towns in just three miles and be subject to the jurisdiction of each of those courts. This means that if you have expired license plates, you run the risk of being cited for that infraction eight times within a span of three miles. One town, Charlack, is so small that “its police department, city hall, and jail are all contained in one modified single-family house. In fact, you can stand on the front lawn of the Charlack City Hall, look across Midland Boulevard, and see the Vinita Park City Hall across the street.”

When faced with a traffic ticket or other petty offense, a middle-class person will typically resolve it by hiring an attorney and paying fines. If a person has the means to hire an attorney, that attorney enters his or her appearance and requests a recommendation for disposition of the charge from the prosecutor. In these situations, the prosecuting attorney almost always recommends that the charge be amended from a moving violation (such as a speeding ticket) to a nonmoving violation (such as littering) upon the payment of a fine and court costs that go directly to the municipality. For a simple speeding ticket, an attorney is paid $50–$100, the municipality is paid $150–$200 in fines and court costs, and the defendant avoids points on his or her license, as well as any possible increases in insurance costs. The process works for those with wealth: the attorney is paid for easy work, the town profits from the fines, and the defendant maintains a clean driving record. Often, neither the attorney nor the defendant even attends court. However, if a person cannot afford an attorney or pay the fines, prosecutors do not make any amendments and the outcomes are markedly different.

In contrast to middle-class people, people living in poverty can neither afford an attorney nor pay a fine. When faced with a traffic ticket or other petty offense, many poor people often end up pleading guilty, taking a conviction, having points assessed, and owing money. While some courts allow payment plans, others require immediate payment of all fines and costs. If a person cannot pay the amount in full before the court date listed on a ticket, he or she must appear in court again. Furthermore, under state law, failure to pay a fine within the time dictated by the municipal judge results in an automatic license suspension. The inability to pay the full amount, transportation issues, or the inability to secure child care or a night off from work can often lead to missed payments. Missed court dates and payments lead to an arrest warrant. As a result of the automatic license suspension, the next police stop likely results in incarceration on the arrest warrant and a new charge of driving with a suspended license.
Civil Rights Violations in St. Louis County Municipal Courts

Although indigent defendants routinely inform the court that they are unable to hire a lawyer or pay fines due to their poverty, few municipalities provide lawyers for those who cannot afford counsel. As a result, unrepresented defendants commonly plead guilty without knowing that they have right to consult with a lawyer. Defendants are also sentenced to probation and to the payment of unreasonable fines without a knowing, voluntary, and intelligent waiver of their constitutional right to counsel. The lack of counsel also eliminates any meaningful adversarial testing of the cases that come before a court. Individuals routinely plead guilty to offenses such as “sagging pants” or “manner of walking” that would never pass constitutional muster. These pretextual stops that are the hallmark of racial profiling are never challenged.

Under existing Missouri law, defendants are entitled to a hearing to determine their ability to pay if they raise the issue of their poverty to the court.16 Further, prior to any finding of contempt or revocation of probation for failing to pay, defendants are again entitled to an inquiry into their ability to pay. In *Bearden v. Georgia*, the U.S. Supreme Court held that courts are required to make an affirmative finding that a person has the ability to pay a fine before it may impose incarceration for a person’s failure to pay.17 Despite the clear legal requirements, these hearings rarely occur. As a result, defendants are regularly incarcerated for their poverty. In fact, the practice of incarcerating debtors is at the core of the St. Louis County municipal court system. Individuals are threatened, abused, and left to languish in confinement at the mercy of local officials until their frightened family members can produce enough cash to buy their freedom or until officials decide, days or weeks later, to let them out for free. As previously mentioned, no municipality holds court on a daily basis, and some courts meet only once each month. A person who cannot pay the bond and is arrested on a warrant in one of these jurisdictions may spend as much as three weeks in jail waiting to see a judge.

Conditions of Incarceration

Once locked in jail, impoverished people owing debts to municipal courts endure grotesque treatment. Imprisoned persons report the following:
• Defendants are kept in overcrowded cells and denied toothbrushes, toothpaste, and soap.
• Holding cells smell of excrement and refuse and walls are smeared with mucus and blood.
• Women are not given adequate hygiene products for menstruation.
• Defendants are unable to change clothes and are without access to laundry. They are forced to wear the same underwear for weeks on end.
• Defendants endure days and weeks without being allowed to use a shower that is covered in mold and has gnats emanating from the drain.
• Defendants must step on top of other inmates, whose bodies cover nearly the entire uncleaned cell floor, in order to access a single shared toilet.
• Defendants huddle in cold temperatures with a single thin blanket even as they beg guards for warm blankets.
• The food has virtually no nutritional value and inmates lose significant amounts of weight.
• Defendants suffer from dehydration out of fear of drinking foul-smelling water that comes from an apparatus on top of the toilet.
• Defendants develop illnesses that go untreated and ignored as well as infections in open wounds that spread to other inmates.
• Defendants are routinely denied vital medical care and prescription medication, even when their families beg to be allowed to bring medication to the jail.
• Defendants must listen to the screams of other inmates languishing from unattended medical issues as they sit in their cells without access to books, legal materials, television, or natural light.
• Perhaps worst of all, defendants have no knowledge of when they will be allowed to leave or see a judge.

These physical abuses and deprivations are accompanied by other pervasive humiliations. Jail guards routinely taunt impoverished people when they are unable to pay for their release, telling them that they will be released whenever jail staff “feels” like letting them go. Jail guards also routinely and pervasively laugh at the inmates and humiliate them with discriminatory and degrading epithets.18
The “Muni Shuffle”

The “muni shuffle” is a term used locally to describe being transferred from one town’s jail to the next as a direct result of poverty and the inability to pay large fines for petty violations. It is common for the poor in the St. Louis region to have warrants for their arrest in multiple jurisdictions as a result of their inability to pay these fines. When they are arrested on one of these warrants for allegedly failing to appear to pay their fines, they are held by that town until it extracts as much money as possible from them, and then they are subsequently released, most often without ever seeing a judge. The amount needed to secure release is often negotiated and reduced over a period of days with the police, jailers, or court clerks. The form of this extraction is “cash bond” but it is important to note that this is not bond in the traditional legal sense.

This “release” is in name only because upon being told the first town is finished with them, defendants are informed that the next town has a warrant for their arrest or “hold.” This warrant, again, is not for a new offense but rather for the failure to pay fines. Instead of being freed from incarceration, they are simply moved from one jail to another until every town with the means to hold them has squeezed as much money from them as is possible. In this sense, the “release” from custody is simply the beginning of a Kafkaesque journey through the debtors’ prison network of St. Louis County.

Justice by the Numbers: Planning for Warrants and Counting on Revenue

Municipal governments, police, courts, and jails are each active components of the localized criminal justice systems that destroy the possibility of trust between citizens of St. Louis County and their government. Nationally, advocates have drawn increased attention in recent years to the dangers of an increasing profit motive in the criminal justice system. In the St. Louis area there can be no doubt that policing and fining is largely motivated by revenue. City officials encourage this practice by prospectively budgeting for increased revenue from fines. There are no police in the room when elected officials set the budget, over the course of the year the police issue the requisite number of tickets so that the courts can assess the requisite amount of fines to reach the budgeted figure. Likewise, judges increase fines and “court fees.” Implicitly or explicitly, police and courts respond to meet the numbers.
None of this is lost on the community. Local wisdom is always ahead of the game. The people who have suffered under this system for the past 50 years do not need to look at the town budget or the attorney general’s racial disparity report. They know that police work has come to mean issuing tickets, not investigating or preventing serious or violent crimes. They know they are being stopped, ticketed, and fined in order to fund their very own town. The Department of Justice Pattern and Practice Report on the Ferguson police and municipal court was not news to the hundreds of thousands of individuals who have had to navigate this system.

And it is not only the citizens who know this. Former St. Louis County Police Chief Tim Fitch has said on more than one occasion that he knows there are tiny towns requiring police to meet quotas. While he blames government leaders instead of the police, the point remains: the problem starts with the city leaders setting a budget, continues when law enforcement overpolices a region for profit, and culminates in the courts where judges and prosecutors legitimize this system.

Policing and fining for revenue, combined with the fact that cities hire poorly trained officers and fail to demand any level of accountability, leads to a toxic mix when police stop African Americans in St. Louis County. While the population of the city of Ferguson is 67 percent Black, 85 percent of all vehicle stops, 93 percent of all arrests, 88 percent of the use of force cases, and 92 percent of all warrants issued involved African Americans. Racial profiling data from the attorney general demonstrates definitively that Black drivers are targeted by police throughout St. Louis County. Ferguson is the rule and not the exception. Police interactions with the community are further exacerbated by a court system that fails to provide counsel and routinely produces guilty pleas, ensuring that the actions of officers will never be scrutinized.

All of this leads to there being over 700,000 active warrants for arrest in a region of approximately 1.2 million people. There are currently over 450,000 outstanding warrants for arrest in St. Louis County alone, which has a population of just over 900,000. By comparison, there are just over 40,000 warrants for arrest in Cook County, Illinois, a region that comprises the city of Chicago and whose population exceeds 5 million.

At the time of Mike Brown’s death, there were more warrants for arrest than people living in the city of Ferguson. In 2013, the municipal court in Ferguson issued 32,975 arrest warrants for nonviolent offenses, mostly driving violations. That is equivalent to 90 arrest warrants issued per day.
The stops, arrests, fines, and warrants all add up to a substantial revenue source for the region. Overall, it is estimated that St. Louis’s municipal courts earn over $50 million in revenue per year. In Ferguson, fines and court fees comprise the second largest source of revenue for the city, a total of $2,635,400. Budget documents show that this was an increase of more than 40 percent from 2010.

Missouri places a statutory limit of 30 percent on the amount of revenue individual municipalities can earn from their courts. In spite of that, several courts exceed that limit and do so with impunity. Eight communities exceed the limit, one collecting as much as 66 percent of its revenue from fines and fees. When asked by the press about the reliance on fines and fees to fund their government, officials routinely respond by claiming the enforcement of these ordinances is about public safety, not revenue.

Inside the Numbers in Other St. Louis County Municipalities

As noted, Ferguson is far from the exception. Here is a summary of data from other select St. Louis County municipalities:

**Pine Lawn**

The city of Pine Lawn has a population of 3,275 people and a poverty rate of 38.7 percent. 1.5 percent of the city’s population is considered white, 96.4 percent of the population is considered African American, 0.09 percent of the city’s population is considered Asian, and 2.02 percent of the city’s population is considered as “other.”

Out of the city’s 3,908 vehicle stops, 841 stops were of white drivers and 2,982 of the vehicle stops were of African Americans over one year. Many drivers are not residents. The search rate among whites was 4.88 percent and among African Americans it was 5.94 percent. The contraband hit rate was 19.51 percent among whites and 10.17 percent among African Americans. The arrest rate was 5.95 percent among whites and 10.4 percent among African Americans.

The city of Pine Lawn has revenue from fines and fees totaling $1,841,985. The cost to the city to run its municipal court was $453,125, with net revenue of $1,388,860 dollars from fines and fees.

For the 2014 fiscal year, 708 warrants were issued. Outstanding warrants total 20,525.
St. Ann
The city of St. Ann has a total population of 13,020 residents with a poverty rate of 14.6 percent. Of its population, 69.52 percent of the residents are white, 22.11 percent are African American, 2.2 percent are Asian, and 6.16 percent are classified as “other.” There were 7,331 vehicle stops among whites and 3,934 vehicle stops among African Americans over one year. The search rate among whites was 5.62 percent and among African Americans it was 14.16 percent. The contraband hit rate among whites was 16.02 percent, 10.23 percent among African Americans, 33.33 percent among Asians, and 7.14 percent among other groups. The arrest rate among whites was 6 percent and among African Americans was 17.51 percent.

The city of St. Ann has revenue from fines and fees totaling $3,415,671. The cost to the city to operate its municipal court is $332,313, leaving net revenue of $3,083,358 that the city derives from fines and fees.

The total number of warrants issued by the city for the 2014 fiscal year was 5,964.

Maplewood
The city of Maplewood has a population of 8,046 and a poverty rate of 19.9 percent. 74.14 percent of the city’s population is white, 17.2 percent African American, 3.47 percent Asian, and 5.18 percent of the population can be classified as other. There were total of 2,011 vehicle stops among white residents and 1,647 vehicle stops among African American residents over one year. The search rate among whites was 2.88 percent and among African Americans was 6.8 percent. The arrest rate among whites was 1.7 percent and among African Americans was 3.7 percent.

The city of Maplewood has revenue from fines and fees totaling $837,774. The cost of the city’s municipal court is $255,462, with net revenue from fines and fees totaling $582,312.

The city of Maplewood issued 1,251 warrants in 2014 and 3,106 warrants remain outstanding.

Municipal Court Injustice and Its Toll
As a result of collaboration with social workers, the authors have seen firsthand how charges stemming from poverty in municipal courts prevent homeless and poor clients from gaining access to housing and
jobs, cause children to drop out of school or change school districts midyear, and create or exacerbate health concerns. Individuals who are not homeless routinely lose housing and jobs as a result of contact with the police and courts. When they are stopped by municipal police and detained on a warrant, they miss work. Those who are lucky enough not to be fired as a result of the missed shifts are often fired as a result of missing additional shifts to go to court. Once people on the margins are unemployed, it is only a matter of time before they lose housing. Even if they find a job two weeks later, the loss of income is enough to push them into poverty and homelessness.

While the damage to housing and jobs is grave, the psychological damage is truly devastating, leading to anxiety, depression, and even suicide. The case of Nicole Bolden, a client of the nonprofit law firm Arch City Defenders, is illustrative. Bolden, a single mother of three and a resident of Florissant, was arrested after a traffic accident on unpaid debt owed to four different St. Louis municipalities. She had already resolved all of her cases but still owed money to the towns: Florissant, Hazelwood, Dellwood and Foristell for fines. When a police officer initially arrived on the accident scene, he determined that Bolden was not at fault but still arrested her for warrants stemming from the outstanding debt. She was first taken to Florissant, where she was told she would have to stay in jail until her debt was paid. Bolden’s mother, who lives on a fixed income, paid Florissant, but because Hazelwood claimed that Bolden owed it $150 in unpaid debt, she was held in Florissant for an additional 22 hours. Desperate to leave, she paid Hazelwood $120 from her child support card. She still wasn’t free, however, because she still owed money to both Dellwood and Foristell.

Authorities in Hazelwood transferred Bolden to the Dellwood police, who kept her at St. Louis County’s jail for 20 hours because they don’t have their own jail. Her cousin eventually gave them $150 but she still wasn’t free to go home because she owed $1,758 to Foristell.

Foristell police finally came to St. Louis County jail days later at 4:00 am Sunday morning to pick her up. Foristell doesn’t have a jail, so they held her in the St. Charles County jail. When she asked when her court date was, no one knew. When a caseworker asked how she was doing, she told them she was tired and “couldn’t take it anymore.” This earned her suicide watch. By the time Bolden finally got out of jail, she was despondent, and hadn’t slept in days.

Every year, thousands of St. Louis County residents experience the same ordeal, buying or waiting their way out of jail after jail. Some never make it out. One man, 24-year-old Charles Anthony Chatman Jr.,
hanged himself in March 2013 after being held on traffic warrants in Jennings.49 He was left unmonitored after being placed in solitary confinement. He was found dead 45 minutes later. Chatman was doing the muni shuffle. He and his family had paid $750 in bail to two municipalities but needed $850 more to be released from Jennings. Perhaps most cruelly, because Jennings rents jail space to towns too small to have their own jail, Chatman was “released” from Jennings’ official custody but not the physical space of their jail after he paid the initial bond.

Similarly, 26-year-old Dejuan Brison attempted to hang himself in the Jennings city jail in October 2014.50 Brison was arrested on a warrant for failing to appear in court in a shoplifting case and awaiting transfer to another municipal court. Bernard Scott, 44 years old, was found with a shoestring around his neck in a Pine Lawn holding cell in September 2014.51 Scott was taken to the hospital, and recovered at a rehabilitation center. Scott had been held on warrants for failure to appear to pay fines. That same month, Jenny Newman, 37, was found unconscious in the Des Peres jail an hour after arrest on warrants for failure to appear to pay fines. She died three days later.52

Efforts at Transforming the System

Arch City Defenders’ White Paper

On August 12, 2014, Arch City Defenders’ white paper on St. Louis County municipal courts was initially posted to its website.53 Providing the first comprehensive analysis of the broken municipal court system, it helped to shape a movement toward reform of the municipal courts that has come to include a comprehensive litigation strategy, policy advocacy, legislative proposals, and rule changes. This white paper was the foundation for the national exposure of this issue in a detailed report by the Washington Post.54 The persistent protests in Ferguson demanding accountability and justice for the killing of Michael Brown brought increased attention to the myriad of injustices in the St. Louis region, including those discussed in the white paper.

Requesting Municipal Court Amnesty to City of Ferguson

Saint Louis University School of Law Legal Clinics and Arch City Defenders sent a letter to the mayor of Ferguson on August 22, 2014, requesting that he commute all pending charges and remit all fines and fees in
the city of Ferguson as a “first step towards reconciliation” within his community. The letter presented the legal authority under which the city could implement the suggested policy. The mayor never responded directly to the letter, but publicly refused to consider amnesty.

Proposal to the Supreme Court of Missouri
In September of 2014, Arch City Defenders and Saint Louis University School of Law Legal Clinics articulated to the Supreme Court of Missouri one of their long-standing proposals to proportion fines to income at the outset of a case. Unlike the current practice, where no inquiry is made into a person’s ability to pay fines, this rule change would require courts to make a determination of an individual’s income at the time of assessment. This single important change could have an enormous impact on the lives of the poor in the St. Louis region and could save courts untold time from processing payments, issuing warrants, and unconstitutionally incarcerating people because of their inability to pay.

Litigation Attacking Illegal Fees
Arch City Defenders, Saint Louis University School of Law Legal Clinics, and the Campbell Law Firm filed class-action lawsuits against Ferguson as well as Beverly Hills, Fenton, Jennings, Pine Lawn, Wellston, St. Louis, Kansas City, and Velda City. The lawsuits call for a judgment that the fees violate state law, an accounting of who paid the illegal fees and how much, and reimbursement to defendants who were forced to pay the fees to avoid jail time or warrants. The suits also include a claim under the Missouri Merchandising Practices Act, the state’s consumer fraud statute, alleging that the cities attempted to deceive defendants into paying the fees.

Writ of Prohibition
Under Missouri law, municipalities are prohibited from collecting more than 30 percent of their overall revenue from traffic-related adjudications in their municipal courts. In order for the state to determine whether a municipality has exceeded the cap, municipalities are required to file a report with the state after the end of their fiscal year. Under a recent amendment to the law, any municipality that fails to timely submit such reporting “shall suffer an immediate loss of jurisdiction of the municipal court of said city, town, village, or county on all traffic-related charges.” Many municipalities ignored the law and exceeded the 30 percent threshold or failed to report. Arch City Defenders and St. Louis University Legal
Clinics brought a writ of prohibition alleging that cases heard by the Village of Bel-Ridge Municipal Court after it failed to file a timely report were without jurisdiction. This matter is still pending as is a constitutional challenge to the law brought by the Missouri Municipal League.

Arch City Defenders and Saint Louis University School of Law Legal Clinics have also partnered to bring a class-action lawsuit against the city of Bel-Ridge, alleging it has been operating a court without jurisdiction since June of 2014 as a result of failing to timely file the required reports. Shortly after these cases were filed, the Missouri Attorney General brought a number of suits against other municipalities that were not in compliance and the Missouri State Auditor announced increased audits of municipal courts.

Debtors’ Prisons Lawsuits
Equal Justice Under Law, Arch City Defenders, and Saint Louis University School of Law Legal Clinics joined together to bring class-action lawsuits against Ferguson and Jennings alleging violations of the First, Sixth, Eighth, and 14th amendments. The suits allege that indigent people were jailed solely for not being able to make a monetary payment and were held in deplorable conditions in the Cities of Ferguson and Jennings until they or their family scraped together enough cash to buy their freedom. These cases are ongoing.

The Ferguson Commission
The Ferguson Commission was established by the governor of Missouri, Jeremiah (“Jay”) Nixon, in response to community demand to study and address the socioeconomic issues underlying community unrest following the killing of Michael Brown Jr. by Ferguson police officer Darren Wilson. The governor specifically charged the commission with investigating the municipal court system. The Municipal Courts Working Group, which included the authors of this chapter, was tasked with making recommendations for the broader commission with regard to the courts. Ultimately, the Commission adopted municipal court reform and consolidation as a primary call to action in its final report.

Missouri Legislature
The Missouri Legislature has thus far largely ignored the crises brought to light by the killing of Michael Brown and the evolving nationwide Movement for Black Lives. Even the most conservative reforms, such as updating the law on “use of force” to comply with the Constitution,
were rejected. Municipal court reform was the exception. Legislation was passed eliminating the separate offense of “failure to appear” and automatic license suspension for minor traffic violations. The legislation further limits the percentage of revenue a municipality may retain from traffic fines. Although heralded as comprehensive reform, the legislation does nothing to stop municipalities from engaging in predatory policing practices and incarcerating defendants as a consequence of their poverty.

Missouri Supreme Court
The Missouri Supreme Court amended Rule 37, the Supreme Court rule governing municipal courts, to clarify that no person can be incarcerated for failing to pay in municipal court without a judicial determination that nonpayment was willful. Further, the court exercised its authority over the municipal courts and transferred Appellate Court Judge Roy Richter to preside over the municipal court of Ferguson. In March and April of 2015, the Missouri Supreme Court requested public comment on the municipal courts. In May of 2015, the court announced the formation of a Blue Ribbon Committee to make recommendations on municipal court reform.

Reforms in Individual Municipalities
There are some early signs of meaningful reforms by individual municipalities. The city of St. Louis recalled over 200,000 outstanding warrants and proportioned fines to income for the poor. St. Louis County Presiding Judge Maura McShane ordered municipal courts to no longer exclude the public, a practice that is in clear violation of the U.S. and Missouri Constitutions. Ferguson has eliminated two ordinances charging fees not authorized by state law, eliminated the warrant recall fee, and created a new docket to address people who are struggling to make their payments.

Department of Justice Investigation and Report
At this time, the Department of Justice remains in active negotiations with the city of Ferguson regarding the resolution of the Department’s pattern and practice investigation.

Conclusion
From Reconstruction Era Black Codes through the Drug War and “broken windows” policing, the systematic overenforcement of petty
Offenses in Black communities has been an integral part of maintaining white supremacy in the United States. This practice is not limited to the present and it is not limited to the St. Louis region. The Department of Justice investigation, whatever its deficiencies, was historically significant in its recognition that police and local courts worked in concert to criminalize Black residents. While profit motive is certainly not a necessary component of this phenomenon, in Ferguson and elsewhere, it is apparent that there is money to be made from excessive fines, cash bail schemes, and exorbitant court costs. Progressive catchphrases such as “restorative justice” and “community policing” miss the point. In the St. Louis region the task will be to put an end to the policing of day-to-day life and to abolish profit-driven part-time courts.

Notes

7. Id.
10. Id. at 10–12.
11. See generally MODEL CODE OF JUDICIAL CONDUCT.
12. PUBLIC SAFETY—MUNICIPAL COURTS JUDGES AND PROSECUTORS ADDENDUM, supra note 9.
13. Id.
14. Both authors routinely represent defendants in municipal court and have personally witnessed this.
18. The conditions of confinement as described by plaintiffs in Fant v. Ferguson, No. 4:15-CV-00253-AGF (E.D. Mo. filed May 26, 2015).
19. PUBLIC SAFETY—MUNICIPAL COURTS, supra note 8, at 3.
24. Id.
27. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, supra note 21, at 9.
30. Racial Profiling Data/2013, supra note 22, at 877.
31. Id.
32. Id.
33. Id.
37. Racial Profiling Data/2013, supra note 22, at 1021.
38. Id.
39. Id.
40. Id.; MISSOURI JUDICIAL REPORT SUPPLEMENT: FISCAL YEAR 2013, supra note 26, at 309.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. One of the authors, Thomas B. Harvey, is the co-founder and executive director of this firm.
FERGUSON’S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION

51. Id.
52. Id.
54. Balko, supra note 15.
56. Id.
Chapter 6

From Brown to Brown:
Sixty-Plus Years of Separately Unequal Public Education

Kimberly Jade Norwood

“Do you know how hard it was for me to get him to stay in school and graduate? You know how many Black men graduate?” —Lesley McSpadden, Michael Brown’s mother

On August 9, 2014, Michael Brown, an 18-year-old Black teenager, was killed by police officer Darren Wilson. Brown had just graduated from a public high school in the Normandy School District (Normandy Schools) located in Normandy, Missouri. He was scheduled to attend a for-profit college in Missouri a few days after his death. For all of his life, Normandy Schools were predominately Black, poor, and in academic distress. Take away the year 2014 and leave the words Brown, education, and segregation, and one would immediately think of a different time: the 1950s. One of the most famous decisions in U.S. Supreme Court history, Brown v. Board of Education, decided in 1954, outlawed segregated and unequal education. Over 60 years later, the battle for integrated, quality education continues. This chapter examines the school district Michael Brown graduated from and situates its place in the Brown legacy.

A Segregated and Unequal Past

Unequal access to education for Black Americans began long before Brown. Almost from the beginning of African enslavement in this country through the end of the Civil War, laws existed in most of the colonies, and later the states, making it a crime to
teach Blacks (in some cases whether enslaved or free) how to read or write. With the Civil War’s end and the beginning of Reconstruction in 1865, strong demands to overturn those laws and a positive movement toward obtaining a quality education became one of the first priorities for Blacks in America. Freedom from bondage, citizenship, and the right to vote were eventually secured by the ratification of the 13th, 14th, and 15th Amendments. These gains were believed (and hoped) to be the beginning of the end of a 200-plus-year nightmare. The post-Reconstruction era, however, saw the legalization of racial segregation as evidenced by the Supreme Court’s holding in *Plessy v. Ferguson* that a standard of separate but equal was constitutional. The decision in *Plessy*, combined with other laws in the nation at the time (e.g., peonage and convict lease laws) and the continued and escalating violence waged by the Ku Klux Klan, all worked to ensure that separate would not be equal.

The collective Black community overwhelmingly believed, however, that education was the key to real freedom. Formerly enslaved Blacks were often mutilated and even killed if caught trying to learn how to read and write. Both during Reconstruction, with the help of the Freedmen’s Bureau—and thereafter once the Bureau was disbanded—these formerly enslaved people spent virtually all of their money to build schools and to obtain an education. Although the right to an education was secured in many states, the quality of the education varied depending on the color of one’s skin. Charles Hamilton Houston, born one year before *Plessy*, dedicated his life to changing that outcome. Using public education as his foundation, Houston proved, in cases spanning a 20-year period, that separate was not equal in the field of public education.

Though Houston did not live to see the culmination of his work in *Brown*, his protégé, Thurgood Marshall Jr., secured a unanimous Supreme Court vote completely accepting Houston’s philosophy that segregation based on race was not, and could never be, equal.

Following *Brown*’s announcement, and its second opinion a year later famously directing the nation to desegregate its schools with “all deliberate speed,” there was tremendous pushback against the ruling, particularly in the South. For two decades though, Supreme Court decisions suggested that integration was here to stay. But White backlash was steadfast. Encouraged by racially discriminatory policies enacted by private banks, realtors, and even the federal and state governments, Whites fled urban areas as Blacks moved in.
Urban school districts soon found very few Whites left in the cities with which to desegregate. One district court in Michigan found its answer by allowing children to cross school district boundaries lines in order to desegregate schools. After finding that it was not enough that the State violated the constitution, the Supreme Court found that individual school districts, too, must be in violation of the constitution in order to be included in any remedy; in the case at hand, then, the crossing of school boundary lines was rejected. This was the Court’s first retreat from Brown. Over the next 20 years, the Court issued multiple opinions that virtually halted judicial efforts to undo hundreds of years of unequal and segregated education. This occurred despite evidence that schools were not, in fact, being desegregated, much less integrated. Indeed, the Court held in 1991 that desegregation was no longer the goal. Rather, if a school could prove that it had acted in good faith to do what it could, “to the extent practicable,” to desegregate, that was all that was required. In 2007, the Court again revisited desegregation in public schools. In that year, the Court decided Parents Involved in Community Schools v. Seattle School District No. 1. There the Court applied the most demanding constitutional standard, that is, the strict scrutiny test, to the question of whether race could be used by school districts to voluntarily desegregate schools. Answering no, the Court found that the use of race failed the second prong of the strict scrutiny test in the cases before it: the use of race was not narrowly tailored to achieve a compelling governmental interest.

Racial Inequality in Public Schools

Segregated and unequal schools thrive throughout the United States. Brown’s vision of both integrated and quality education for all students has been lost and indeed may be impossible to fulfill in the 21st century. Under racially segregated systems pre-Brown, most Black students were not receiving quality education; most White students were. Brown envisioned that if the students were desegregated and assigned to schools without regard to the color of one’s skin, not only would the goal of integration be met—which many believe in and of itself is a form of education—but also that all students would receive a quality education. Quality education in an integrated setting was possible in the decades following Brown, but this dual goal is no longer possible.
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Source: Missouri Department of Elementary and Secondary Education (DESE)

*Percentage with a numerator less than 20. Data does not include students enrolled in the Special School District, private schools, or charter schools. ELA—English Language Arts; ACT—American College Testing; Below basic—Percent of students with an Achievement Level of Below Basic; Basic—Percent of students with an Achievement Level of Basic; Proficient—Percent of reportable students who scored Proficient; Advanced—Percent of reportable students who scored Advanced.
It is not simply that public schools today are more racially segregated than 40 years ago, although this is true. And it is not simply that Black, Asian, and non-White people of Latin American descent make up a majority of the students in public schools today (thus the term “majority minority”), although this is also true. But, we must consider two other key factors: (1) White student enrollment in public schools has decreased over the years and (2) White births have declined significantly over the years. All of these realities challenge any goal to integrate schools as that term was defined in *Brown*.

Notwithstanding the challenges facing racial integration of schools today, we must not abandon the other goal of *Brown*: that all children, no matter their skin color, receive access to quality education. This is really what *Brown* stood for. *Brown* viewed education as the mechanism to enable full citizenship in American society. Indeed, *Brown* specifically acknowledged that without an education, it is virtually impossible to execute the rights of citizenship. And yet, today, for millions, this goal has also been largely abandoned.

Public schools in the United States have been falling and failing for many years. They have also become more unequal in terms of the quality of education and this can be racially tracked. Black, non-White Hispanic students, and American Indian/Alaska Native or Native American students are at the greatest academic disadvantage as compared to non-Hispanic White/Caucasian students and Asian/Pacific Islander students. Blacks, and Black males in particular, are at the bottom of the academic ladder. Consider the following:

**Graduation**

The national public school graduation rate for Black males in 2012–2013 was 59 percent. The percentage was 80 percent for White males. Worse still, the graduation rates for Black males in large urban school districts during that same period were far lower. Missouri’s graduation rate for Black males in 2012–2013, for example, was 66 percent. Yet, for its largest urban school district, St. Louis Public School District (SLPSD), the graduation rate for this subgroup was 33 percent. These results were not unique to St. Louis. Atlanta graduated 38 percent of Black males; Cleveland, 28 percent; Detroit, 20 percent; Miami, 38 percent; New York, 28 percent; Philadelphia, 24 percent; and Milwaukee, 43 percent. The announcement in 2015 by the Department of Education that U.S. students are graduating from high school at rates higher than ever before rings hollow for some.
Literacy

Graduation is undoubtedly important but literacy is even more so. Indeed, one can graduate from high school but be unable to read. Large achievement gaps exist between Black and Latino student performance and that of White and Asian students. Of all subgroups, Black males are at the bottom of all performance levels.

The National Assessment of Education Progress (NAEP) has three academic achievement levels: Basic, Proficient, and Advanced. NAEP’s performance data reveals huge racial disparities. For example, in the 2012–2013 school year, the national percentage of Black males who scored at proficient or above in 8th-grade reading was 12 percent. The same figure for White males was 38 percent. For 8th-grade mathematics, the national figure for Black males in 2012–2013 was 13 percent at or above proficiency, compared to 45 percent for White males.

Although NAEP tracks three achievement levels, many states add a fourth level: below basic (or level 1). This level is below grade level. In New York State, for example, 2014 English Language Arts assessments for grades 3–8 showed that 46 percent of Black students scored below basic, compared to 25 percent of White students; in mathematics, the figures were 47 percent and 21 percent respectively. In the nation’s capital, 15 percent of Black students in 8th grade performed below basic in both reading and math categories as compared to 1 percent of White students. In some of these Washington, D.C., school districts, the below basic percentage of Black students was as high as 61 percent for 8th-grade reading and 59 percent for 8th-grade math.

Resources

If you compare schools where the student body is predominately Black and Latino to schools where the student body is overwhelmingly White and Asian, it is immediately apparent that a different type of education is taking place in each space. In October of 2014, the Department of Education, Office of Civil Rights Division (OCR), issued a report demonstrating the different educational experiences of children depending on the racial makeup of their school. A sample of some of the findings contained therein revealed that schools attended by predominately Black and/or non-White Hispanic students

- were less likely to offer advanced and/or gifted courses and
  where offered, the students were less likely to be recommended to or enrolled in those classes.
were less likely, at least in the case of predominately Black schools, to offer Advanced Placement (AP) courses.
• had newer, more inexperienced teachers.
• had teachers who made less money than similarly credentialed teachers in predominantly White school districts.
• were older and poorly maintained, with inadequate heating, ventilation, air conditioning, and lighting.
• were more likely to be overcrowded and lack essential educational facilities like science laboratories, auditoriums, and athletic fields.
• had fewer computers and other mobile devices and computers were of lower quality and capability; indeed, even the speed of Internet access varied.

These disparities were not limited to a simple comparison of inner-city and poor schools with wealthier suburban schools. Rather, even for schools in the same school district, schools with primarily White populations were shown to have more and better resources. Michael Brown attended what are sometimes referred to as 'apartheid schools,' schools whose students are almost all Black and/or non-White Hispanic, and often usually poor. These schools struggle in every way and at every level imaginable. As demonstrated below, Michael Brown attended one of these schools.

**Normandy Schools**

Michael Brown attended schools located in Normandy, Missouri. Incorporated in 1945, Normandy was originally a White suburb of St. Louis City. As Blacks started moving into Normandy and other similar suburbs near St. Louis city, Whites fled. By 1978, Normandy Schools had the second-highest percentage of Black students in the St. Louis metropolitan area. SLPSD had—and still has—the highest percentage in the area.

Born in 1996, Michael Brown started kindergarten in a district that had not been “accredited” since 1991. The Missouri Department of Elementary and Secondary Education (DESE) is required by law to annually review school performance to evaluate which schools (and students) need improvement. DESE follows an accountability system for reviewing schools. The system “outlines the expectations for student achievement with the ultimate goal of each student graduating ready for success in college and careers.” DESE considers various
standards in attempts to determine if a school is on target to achieve its goal. Based on evaluation of these standards, a district can be unaccredited, provisionally accredited, accredited, or accredited with distinction. A 14-point scale was used (this system has since been replaced) to evaluate the effectiveness of school districts. A minimum of 6 points were required for accreditation. During Michael Brown’s tenure in the district, Normandy Schools never received more than 5 points. Normandy Schools were not labeled as unaccredited during this time, as they should have been, but were allowed to operate as a provisionally accredited district. Though the district was finally, officially labeled as unaccredited in 2013, the lengthy stay as provisionally accredited prevented the type of attention and focus on the district and on the children in that district that it surely needed.

To add insult to this injury, in 2009 DESE took another all-Black, poor, and unaccredited district, the Wellston School District (Wellston)—which was then the worst performing district in the state—dissolved it, and placed all of its students in technically-unaccredited-but-nonetheless-labeled-provisionally-accredited Normandy Schools. Serious questions remain as to why DESE placed students from Wellston into the struggling Normandy Schools. Granted, Normandy Schools were in close proximity to Wellston, but nothing required Wellston students to be placed in the district closest to them. More importantly, given that Normandy Schools were, for all intents and purposes, technically unaccredited, it was a horrible choice. Indeed, there were two accredited districts near Wellston where those children could have been assigned. Those two districts, the Clayton School District (Clayton) and the Ladue School District (Ladue), were 3.2 miles and 7.6 miles away respectively, from Normandy Schools. (See Figure 1.) Not only were these two districts close to Normandy Schools and accredited but they were actually very high-performing districts. As the data in the Appendix reveals, both Clayton and Ladue outperformed Normandy Schools academically in all categories. The Wellston children could have easily been reassigned to schools in Clayton and Ladue, thus avoiding the unneeded pressure on the already frail Normandy Schools.

But DESE did not assign the Wellston children into these higher-performing districts. Many believe race and class were the underlying reasons. Clayton and Ladue are both affluent and virtually all-White school districts. Wellston and Normandy Schools both were then predominately Black, poor, and academically struggling. Missouri Board of Education
Vice President Michael Jones said it best: “The [Wellston] students were not going to be absorbed into any of the high-performing, mostly White districts nearby. You’d have had a civil war.” There likely was a power dynamic going on as well. Two struggling and poor districts—Wellston and Normandy Schools—simply did not have the political clout of the wealthier Clayton and Ladue districts. Thus, by placing the Wellston children into already faltering Normandy Schools, political peace was maintained but it came at the cost of the demise of Normandy Schools.

And just like that, three years after Wellston was merged into Normandy Schools, Normandy collapsed. In September of 2012, DESE announced that, effective January of 2013, Normandy Schools would be unaccredited. This announcement triggered a Missouri law, known as the transfer law. This law provides that if a Missouri school was rendered unaccredited, the pupil residents in that district could opt to attend another accredited school in the same district, or could attend an accredited school in another district of the same or an adjoining county. The statute further mandated that the unaccredited district pay tuition for the transferring pupil to the accredited school and mandated that the unaccredited district choose a district for which it would also provide transportation.
The Missouri transfer law dates back to 1931 but it was not until a 1993 amendment that the right of children in unaccredited schools to transfer to accredited schools was provided. Interestingly, the sponsor of the transfer law never imagined it would actually be triggered. The statutory terms were to be used as a stick to force struggling districts to improve. “It was meant to be harsh. It was a wake-up call to clean up your situation and get it fixed.” In 1993, then, had Normandy Schools—with its 5 out of 14 points—been labeled unaccredited, parents might have taken advantage of the benefits of the transfer law. But DESE did not label Normandy Schools as unaccredited in 1993 or at any time during the 1993–2012 school years. This failure to label the district unaccredited for almost 20 years prevented parents from transferring their children to better schools. Twenty years. An entire generation of children were trapped in a failing district and deprived of their right to fully perform their citizenship.

Even when it was prepared to acknowledge Normandy Schools’ unaccredited status in 2012, DESE still got it wrong. It announced in September of 2012 that Normandy Schools would become unaccredited in January of 2013. This delayed effective date of the change to unaccredited status again prevented parents from transferring their children into accredited schools at the start of the 2012 school year. Because the statute is not triggered until a school and/or district is officially labeled unaccredited, parents could not take their children out of the failed schools until the middle of the school year. Anyone knows that transferring a child in the middle of a school year is rarely in the child’s best interest.

Because of DESE’s manipulation of the timing of Normandy Schools’ unaccreditation, Normandy Schools did not experience the full impact of the transfer rule until the start of the 2013–2014 school year. In preparing for parents to exercise their children’s right to transfer under the law, Normandy Schools chose to provide transportation to the nearly all-White Francis Howell School District (Francis Howell), approximately 23 miles (and a very long bus ride) away. (See Figure 1.) Recall that there were two highly performing districts less than eight miles away from Normandy Schools. Not only were Clayton and Ladue substantially closer than Francis Howell to Normandy Schools, but Clayton and Ladue were also stronger academic districts. In virtually every category, Clayton and Ladue outperformed Francis Howell. (See Appendix.) Yet Normandy Schools chose the further, lower-performing district for its students.
Transfers were effective for the 2013–2014 school year. Of the approximately 4,100 students in Normandy Schools, 1,100 elected to transfer to various school districts. Approximately 430 selected Francis Howell because that was the district to which Normandy Schools would provide transportation.58

In the weeks and months after Normandy Schools announced its decision to provide transportation to Francis Howell, anyone who picked up a St. Louis newspaper would have thought they were reading stories from the 1950s. They told of interviews with parents in Francis Howell, social media comments, and town hall meetings where parents in Francis Howell worried about Normandy Schools children being a bad influence on the Francis Howell children. They worried about compromising their test scores and accreditation; despite the higher drug use in the district, they worried about increased drug use and the need for drug sniffing dogs. Some comments referred to the Normandy School’s children as trash, thugs, slum kids, and rapists.59 One comment summed it up this way: “Too bad this country places such an emphasis on publically subsidizing the least qualified citizens to reproduce. I wonder how much things would improve if instead of WIC and other such nonsense, the govt gave out vouchers for free abortions.”60 Additional similar comments posted on the Francis Howell website and Facebook page were so troubling that the district had to disable the comment feature. Of course many of these comments also denied that race and class had anything to do with their conclusions. Safety was touted as the number one concern. The local newspaper in St. Louis did a story highlighting Normandy as the “most dangerous school in the area.”61 The comments, though, clearly went beyond concerns for safety. Race was often front and center. And indeed, for those who believe otherwise, one need only read the comments that did explicitly cover race and unabashedly admitted that they did not want their children to attend schools with black children.62

Nonetheless, the transfers proceeded, and pursuant to statute, despite some parents’ concern that Normandy would not pay and would just suck their district dry, Normandy Schools wrote tuition checks to the tune of $1.5 million per month to the various transferee school districts, including Francis Howell.63 Three interesting things happened as a result of those transfers:

1) Not one of the perceived fears of the Francis Howell parents manifested.64
2) Although the transfer law contained no such limitation, DESE advised all districts to set class size limitations that were in the range of already acceptable limitations, and districts followed this advice. Schools did not have to deal, then, with hiring more teachers or finding additional classroom space. Some additional expenditures were necessary for extra books, art supplies, and such, but larger expenses like teacher salaries often were not. Thus, only a portion of the money paid by Normandy Schools to the transferee districts was used to cover additional expenses and in some cases, none of the tuition money was spent on the Normandy children.

3) The payments virtually bankrupted Normandy Schools. The situation became so dire that on May 20, 2014, the State Board of the Department of Education used its statutory power to dissolve Normandy Schools. It then proceeded to create what it said was a new district, appointed a new school board for the district, and announced that the new district would be operated under direct state oversight. This, the State Board said, would provide the district with a new beginning. It did not accredit the “new” Normandy Schools but labeled it as a “State Oversight District” without an accreditation status for up to three years. This new district, then, would be not-unaccredited. And, this meant that the transfer statute would no longer apply. The new district, now called the Normandy Schools Collaborative (NSC), went into effect on July 1, 2014. Days later Francis Howell announced that it would not accept children from NSC. This decision was odd. After all, Francis Howell still had over a million dollars in tuition from NSC that it had not spent. There also were no concerns about drugs, violence, or crime. Nonetheless, the district stated that because NSC was no longer unaccredited, the statute no longer applied. Several parents who wanted their children to continue to attend Francis Howell filed a lawsuit for injunctive relief to force that district to accept the students. A hearing was held on August 6, 2014, the first day of school in Francis Howell.

In the meantime, schools in NSC were scheduled to begin classes on August 11, 2014. Many children who lived near the Canfield Green Apartments, where Michael Brown was killed just 48 hours earlier, attended school in NSC. Emotions and tensions were high. Readers will recall the protests and civil unrest, tear-gas-filled air, military-style tanks, and police with assault rifles pointed and ready to shoot that marked Ferguson streets for the days and weeks after the Brown
killing. In the midst of that turmoil and a week and a half after school had already begun in Francis Howell, a judge in St. Louis County enjoined Francis Howell from preventing the plaintiff children from coming back. Finding NSC “abysmally unaccredited,” the judge stated that irreparable harm would occur if the students, who wished to transfer and had done everything necessary to effectuate their right to transfer under the law, were not permitted to return to the district.71

To put the judge’s statement that NSC was “abysmally unaccredited” into perspective, consider the following: In 2013, DESE adopted a new measure of performance based on a 140-point scale. A district needs 50–60 percent of those points to be accredited.72 In 2013 NSC earned a total of 11.1 percent. By the time Michael Brown graduated one year later, it had earned just 7.1 percent.73 This was the worst academic record in the state.74 The court noted that under these circumstances, any attempt to recognize NSC as anything other than unaccredited would “completely def[y] logic.”75

Even after the judge’s order, however, Francis Howell required each student who wanted to return to have his or her own uniquely signed court order in hand. Thus another fight ensued for parents who thought the August 15 court order was enough. The court’s preliminary injunction became final in February of 2015. Although it took some time (critical time, in fact, for a parent wanting to return to Francis Howell), Francis Howell finally, albeit begrudgingly, accepted the students. All of this uncertainty and instability, two things no child ever needs, were happening in the midst of the turmoil and unrest of Ferguson in the aftermath of the Michael Brown killing. Michael Brown’s youngest sister attended school in this very district. This gives you a sense of how close the students in the school were to the issues simultaneously going on outside of the schoolhouse doors. The stress load on many parents and children alike was often too great to bear.

Thus, only about 110 of the 430 students who transferred to Francis Howell the prior year took advantage of the court victory. There were many students who, once the district stated that they could not return, did not fill out the proper “intent to return” documents. When Francis Howell tried to enforce the deadline, another fight was had, and the parents again won. Many parents, though, were simply tired of their children being batted about like balls in a ping pong game. The stress load in the community was already on overload. And a lingering question remained: Would the children be able to stay in Francis Howell once and for all, or would they be going through similar battles in...
the foreseeable future? In other words, if Normandy regained accreditation the next year or the year after, would Francis Howell push those children out and force them to return to their home school district or allow them to stay and graduate from their new school? Most parents decided to keep their children in Normandy Schools. Tanks and tear gas on the streets, fights with the Francis Howell school district, angry White parents in Francis Howell, two-hour-long one-way bus commutes, and the uncertainty of being able to stay in and graduate from high school in Francis Howell forced many parents to choose the devil they knew.

At the time of this writing, NSC continues to send tuition payments out to school districts including Francis Howell. It continues to have a student body that is over 97 percent Black, over 90 percent on free or reduced lunch, and struggling with tremendous academic issues. There are also behavioral challenges with the Normandy Schools children. And, as discussed infra, NSC continues to have challenges with curriculum offerings, resources, and teacher expectations. The district is segregated by race, unequal on almost every measurable level, and there is no relief in sight.

What Is Left of Brown?

Nine months after Michael Brown’s killing, the St. Louis Post-Dispatch ran a story on his former high school. The story was written from the vantage point of Cameron Hensley, then a senior honors student. Hensley, unlike a number of his high-achieving classmates, had opted not to exercise his rights under the transfer statute, choosing instead to remain at NSC. The story revealed no new beginning, as promised by state education officials; no expectations, few books, no homework, and no attempt to educate. Specifically, readers learned that at Normandy High School, there were: zero honors courses; seniors reading on a third-grade level; a physics teacher who had not planned a lesson in months; substitute teachers who had been substituting the same class since the beginning of the school year; unsupervised and unattended students sleeping in class, taking pictures, practicing dance routines, all in front of teachers who were in the classroom but not teaching; an AP English class taught by an instructor not certified to teach it; rooms that smelled like mildew and lacked adequate air conditioning; no school books to take home; and virtually nonexistent
homework. For students like Michael Brown and Cameron Hensley, who opted to stay in their home schools, no tangible benefits of the victory in Brown over 60 years earlier could be seen in their schools. They attended racially segregated schools, overwhelmingly poor schools, and extremely underperforming (and thus unequal) schools. Supreme Court precedents kept them in segregated schools, compulsory attendance laws required their attendance in segregated and underperforming schools, and despite that compulsory attendance, they were virtually ignored once inside the building.

Normandy Schools are reflective of many public schools throughout the nation. Dysfunction, racial segregation, and unequal education plague Black, Brown, and poor children in public schools. Normandy Schools are not an anomaly. What is happening there, what has happened there, is reflective of a national story. Indeed, public schools remain “so separate and vastly unequal that Plessy v. Ferguson, not Brown v. Board of Education, might as well be the law of the land.” Historical segregation and discrimination have laid the foundation for what we continue to see today. But it is the current trappings of poverty and unequal access to opportunity and resources, that is, the legacies of Plessy, that continue to smother the academic achievement of poor students, of Black students, of Brown students, and even of Native American students.

What Now?

For 60-plus years, we have defined integration in terms of White and Black. We can no longer do this given declining White births, increasing births among non-White Hispanic populations, and continued White flight from public schools. It is becoming harder to integrate, if integration is defined in Black and White. Of course, the benefits of diversity have been well established, so although increasingly difficult to implement, we should continue to work to integrate schools in spaces where that is still possible. But integration based on the Black/White model can no longer be the goal.

There remain real structural barriers to quality education. Racial isolation, class and housing segregation, unemployment and underemployment, concentrated poverty, inadequate access to nutritional food, inadequate health care and access to health care, and criminalization are just a part of the vicious cycle keeping people and their children trapped in dysfunction, inequity, and inequality. Many children also come from communities afflicted with drugs, violence, and
gangs. Family support structures are not always present. Many come from single-parent homes and homes where the students may have to care for younger siblings or work themselves to help the family survive. Many parents are uneducated themselves, coming from the same dysfunctional school systems their children attend. Consider too practices that prey on the working poor, like the failure to pay living wages, higher rents and food prices, predatory loans and interest rates, and municipal court abuses as reflected earlier in chapter 3. All of these certainly have negative repercussions on the lives of the children who live in these communities and on their cognitive development, learning capability, and attentiveness in school. Imagine trying to attend school and learn and thrive with this weight on your shoulders. Michael Brown’s mother is often quoted for asking a reporter shortly after her son’s death: “Do you know how hard it was for me to get him to stay in school and graduate?” Maybe we can see a little of what she meant now.

Systemic educational deficiencies are part of the problem as well. Many children do not receive the critical early childhood education that they need to set their foundation for future learning. Despite the evidence of the importance of early childhood education, many districts in poor communities do not have early childhood education programs. Children without this access begin kindergarten behind the starting line. We must find the funding for these proven means of providing the educational foundation children need. Early childhood interventions can and should also include work with parents and other care providers. Schools should receive adequate funding to provide wrap-around services to meet the needs of the students, the parents, and the community. Consider the work of Superintendent Tiffany Anderson in the Jennings School District, in close proximity to Normandy Schools. Superintendent Anderson was recognized by Education Week in 2015 as one of “the nation’s 16 most innovative district leaders” in its 2015 Leaders to Learn From report. Despite a predominately Black, poor, and academically struggling district, Superintendent Anderson has implemented a variety of social services that reach into her district’s community and therefore reaches her students. And her academic numbers have consistently improved over the past few years.

Schools also need basic resources: textbooks, desks, chairs, science laboratory equipment, chalk. Schools need certified, qualified, degreed, well-paid, diverse, and empathetic teachers who care about their students and who have expectations of them. Recall from the
OCR report cited earlier that the best teachers do not gravitate to poor districts and it is not uncommon that many of the teachers in these districts are less experienced and hold fewer degrees than teachers in more affluent districts, and some have little or no expectations of their students. Diverse teachers also are lacking despite the overwhelmingly Black and Brown student populations. Explicit and implicit racial biases negatively inform and often taint teacher assumptions and conclusions about students and exacerbate the school to prison pipeline. All of this can be addressed and remedied.

We must also rethink how schools are funded. Most public schools are funded by property taxes under the guise of local control. Such limited funding not only hurts the educational prospects for children who live in property-poor districts, but also works to keep schools segregated. Indeed, affluent communities often fight efforts to bring affordable housing to their communities. And, as long as housing is segregated and schools are assigned by neighborhoods, schools will continue to be segregated based on class and/or race. But there is an answer to this. We could change the way students are assigned to schools. Legislatures can remedy this deficiency by reassigning schools based on factors other than zip codes. For example, socioeconomic status is an acceptable way of assigning students to schools and its benefits are well known. This has been suggested as a factor that should be considered when assigning schools. Similarly, the Obama administration has recommended that schools consider multiple factors like household income, educational attainment of the adults in the household, and racial and economic demographics of a neighborhood when assigning children to schools.

What Now for Normandy?

For Normandy Schools, the question of “what now?” is still uncertain. The governor of Missouri announced a plan for the state and surrounding school districts to support Normandy Schools and fellow struggling district Riverview Gardens. The state will provide $500,000 in reading and literacy funding, while neighboring districts will lend varying support: curricula design assistance, teacher training, cost reductions from pooled purchasing power, reading and math specialists, and in some districts reductions in tuition for transfer students. Is this a step in the right direction or another Band-Aid? I think the latter. For
decades now, Normandy children have been trapped in a failing and dying district. And they are not alone in the greater St. Louis area.99

The efforts previously mentioned at reforming unaccredited schools are not evidence of anything more than piecemeal and partial feel-good attempts at change. $500,000 and a little support by other districts is just feel good salve for the doers. It will not change the educational trajectory of the thousands of students in Normandy Schools or other failing districts. Sure, temporary relief might be had. But what is needed is more than temporary relief. We need systemic change. It is time to completely restructure how children are being educated in Missouri (and indeed, in public schools throughout America). But first, neighborhoods, like people, must be nourished. Communities need adequate housing, health care, and employment, for example. Districts must also meet children where they are. Recall the work of Superintendent Anderson in the Jennings School District, a district with near identical demographics to Normandy. There teachers are provided with dismantling racism training, poverty simulations, cultural and ethnic competency classes. Washers and dryers are made available for students. They have a health clinic in the school, parenting classes, and a food pantry. The district has a shelter for its homeless children. As the Superintendent says, it is impossible to teach if the child is cold, hungry, unhealthy, and has no place to live. Educating the child means treating the whole child and that requires meeting the child where the child is.100 States, including Missouri, need to reconsider the way it assigns children to schools. Clearly children are receiving a different quality of education depending on where they live. (See Appendix.) This can and must be changed. Of course in order to do this in Missouri, we would need to consider consolidation of school districts. Currently the metropolitan area comprises 24 school districts. The districts would have to be consolidated into several larger groups or one large district, and children would need to be assigned along socioeconomic lines or a combination of other factors along the lines discussed earlier.

The solution of one unified school district in the St. Louis metropolitan area, at least, has been suggested before.101 And, while it has been rejected time and time again, it seems to be the only way to assure that every child in Normandy Schools and the other failing school districts can be assured of the opportunity of a quality education without regard to their zip code.102 It is the only way to ensure that every taxpayer, every teacher, every politician, and every parent is invested in the education of all. It is the only path on the road to full citizenship. It is the thing we have not tried.
Michael Brown attended school. He graduated. Given what you now know of the school district he graduated from, you might agree the road ahead of him would have been difficult had he lived. Indeed, underperforming schools, “a dearth of successful models, lack of networks that lead to jobs, unsafe streets, recurrent multi-generational family dysfunction, or the general miasma of depression that can pervade high poverty contexts may inhibit the success of even the most motivated.”

St. Louis NAACP City Chapter President Adolphus Pruitt once noted that “if the districts cannot find a way to properly educate their children, they might as well put a gun to their head and kill them. . . . The outcome of failing to get a good education is ruining their lives. I make that statement because it is that serious of an issue. It impacts everything.” While the statement regarding guns to the head is merely hyperbole, we know that the rest of the statement is certainly true.

At the time of this writing, it is one year after Michael Brown’s death. A new school year has just begun. Welcome Back signs greet students in Normandy everywhere. The question now is, Welcome back to what?

Notes


11. This story is documented in The Road to Brown (Cal. News Reel 2004). Some of the cases leading up to the Brown decision included Pearson v. Murray, 169 A.2d 478 (1936) (University of Maryland...
School of Law ordered to admit Black male student); \textit{Mo. ex rel. Gaines v. Canada}, 305 U.S. 337 (1938) (University of Missouri School of Law ordered to admit Black male student); \textit{Sweatt v. Painter}, 339 U.S. 629 (1950) (University of Texas ordered to admit Black male student); \textit{Sipuel v. Board of Regents of the University of Oklahoma}, 332 U.S. 631 (1948) (University of Oklahoma School of Law obligated under the equal protection clause to provide Black female plaintiff same educational opportunity as provided to White students); and \textit{McLaurin v. Oklahoma State Regents for Higher Education}, 339 U.S. 637 (1950) (segregation of Black male student in University of Oklahoma’s doctoral program violated equal protection clause).


14. See, e.g., PBS, The Supreme Court: Expanding Civil Rights, Primary Sources, Southern Manifesto on Integration (Mar. 12, 1956), http://www.pbs.org/wnet/supremecourt/rights/sources_documnt2.html (19 senators and 77 members of the House of Representatives signed the “Southern Manifesto,” promising to use all lawful means to bring about a reversal of \textit{Brown}). In 1957, Elizabeth Eckford, one of the Little Rock Nine, famously walked through a mob of angry White protestors in order to desegregate Central Rock High School. \textit{JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY} (2001). Prince Edward County closed all public schools from 1959 to 1964 in lieu of desegregating them. \textit{Id}. In 1960, federal marshals escorted six-year-old Ruby Bridges into her new all-White school. \textit{Id}. In 1963 then Alabama Governor George Wallace famously blocked the entrance to the University of Alabama, refusing to allow two Black students—Vivian Malone and James Hood—to enter the school. B.I. HOLLS, \textsc{Opening the Doors: The Desegregation of the University of Alabama and the Fight for Civil Rights in Tuscaloosa} (2013).


16. \textsc{Colin Gordon, Mapping Decline: St. Louis and the Fate of the American City} (2009).


18. \textit{Milliken}, 418 U.S. at 752.


22. \textit{Id.} at 726. The Court left undisturbed prior rulings that race could be considered to remedy the effects of past discrimination and to diversify the student body in higher education. \textit{Id.} at 720–22.


37. BLACKLIVESMATTER REPORT, supra note 32, at 39.

38. The New York State Department of Education defines level 1 as follows: NYS Level 1: Students performing at this level are well below proficient in standards for their grade. They demonstrate limited knowledge, skills, and practices embodied by the New York State P–12 Common Core Learning Standards for Mathematics that are considered insufficient for the expectations at this grade. N.Y. Dep’t of Educ., Definitions of Performance Levels (2014), http://www.p12.nysed.gov/irs/ela-math/2014/2014-MathDefinitionsofPerformanceLevels.pdf.


41. Id.

42. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). In 2006, Oprah Winfrey aired a special report titled “Schools in Crisis.” Although the report focused on many inferior public school buildings in inner cities throughout America, one particular experiment revealed in the report is worth noting. A group of students from a poor inner-city school in Chicago with a graduation rate of 40 percent traded places for a day with a group of students from an affluent suburban school 35 miles west of the city and with a graduation rate of 99 percent. The students from the inner-city school were overwhelmingly Black while the students from the affluent suburban school
were predominately White. The physical structure of the two facilities were vastly different, with the inner-city school barely structurally sound and the suburban school a multimillion-dollar facility. Inside, the buildings continued to reflect the vast differences in resources. Working computers with keyboards (with all keys intact), instruments for music classes, award winning music programs, fully functional science laboratories, state of the art—and thus actually working—exercise equipment, cardio rooms, and water-filled pools, to name a few amenities, were all available in the suburban school, but completely absent in the inner-city school. Even the level of expectation from teachers and rigor in classrooms were vastly different between the schools. An “A” student in math from the inner-city school sat in on a comparable class in the suburban school and later remarked: “I was looking at the math problems that they’re doing and I was like what language is that? Soon as I get to college, I’mma be lost.” *The Oprah Winfrey Show: Oprah’s Special Report: American Schools in Crisis* (Harpo Prods. Inc. television broadcast Apr. 12, 2006).


44. “Apartheid schools” is a term used to describe schools that are 90% or more Black and/or brown. See, e.g., Lilly Workneh, March 26, 2014, Study: NY schools most segregated in US labeling some “apartheid schools,” http://thegrio.com/2014/03/26/study-ny-schools-most-segregated-in-the-us-labeling-some-apartheid-schools/; see also Jonathan Kozol, *Shame of the Nation* (2005). This frequently also means that the school is likely a high poverty one. See, e.g., supra note 25.

45. For studies in the history of the White communal beginnings of the suburbs immediately surrounding St Louis city, see *Gordon*, supra note 16.

46. See, e.g., Hannah-Jones, supra note 2. From 1972 through 1999, SLPSD was at the center of the largest voluntary desegregation lawsuit (and settlement) in the country. Minnie Liddell, a Black parent who resided in the City of St. Louis, filed a lawsuit in 1972 against SLPSD and the state of Missouri to force those entities to comply with the mandate of *Brown*. The lawsuit eventually ballooned to include over 20 suburban school district defendants. Settlement included transportation of some Black students from the city schools into largely White suburban schools and the transfer of some White suburban children into city magnet schools. This arrangement did not allow transfers between county schools. Normandy Schools, a county school district, was not a defendant in the case. Not being a party to the lawsuit, it could not benefit from the settlement. More importantly, even had it been a defendant, as a county district, it would not have been eligible to transfer students from its primarily Black school district to any of the largely White county school districts. See, e.g., Gerald W. Heaney & Susan Uchitelle, *Unequal Struggle: The Long Road to an Equal Education in St. Louis* (2004). I explored areas that unfolded after this book’s publication. See Kimberly Jade Norwood, *Minnie Liddell’s Forty-Year Quest for Quality Public Education Remains a Dream Deferred*, 40 Wash. U. J.L. & Pol’y 1 (2012).

47. E-mail from Carol D. McCauley, Custodian of Records for the Normandy Schools Collaboration (June 8, 2015, 17:48 CST) (on file with author).


53. Children have a right to free education in Missouri. Mo. Const. art. IX, § 1(a). State statutes require that school aged children from a lapsed district be reassigned to another school district or

54. Hannah-Jones, supra note 2.


56. Norwood, supra note 46, at 40–42.


61. All comments are on file with the author.


64. Elisa Crouch, Missouri Offers Some Relief on Impending School Transfers, St. Louis Post-Dispatch, June 20, 2013, http://www.stltoday.com/news/local/education/missouri-offers-some-relief-on-impending-school-transfers/article_bca34ac8-c8ad-51d3-8a90-e60a3aaccab.html. In the Guidance for Student Transfer from Unaccredited Districts to Accredited Districts, DESE also imposed arbitrary time limits on when students could sign up to transfer, see Mo. Dep’t of Elementary & Secondary Educ., Guidance for Student Transfer from Unaccredited Districts to Accredited Districts, STLTODAY.COM, http://www.stltoday.com/guidelines-for-student-transfers/pdf_7760177a-6fbf-5e35-b072-b05bc557d53f.html.


66. Id.

67. Id.

68. Massey, supra note 58.

69. Bock, supra note 64.

70. Massey, supra note 58.

71. Massey, supra note 58.

72. Today districts are “accredited with distinction” if they obtain at least 90 percent of all possible points (126–140 points); “accredited” if they have 70–89.9 percent of the possible points (98–125 points); “ provisionally accredited” if they have between 50 and 69 percent of the relevant points (70–97 points). If the district has less than 50 percent of the points (0–69 points), the district is unaccredited. Mo. Dep’t of Elementary & Secondary Educ., MSIP 5 Questions and Answers, http://dese.mo.gov/sites/default/files/msip5-faq.pdf.


75. Massey, supra note 58.


78. As detailed elsewhere in this book, living in the Normandy School District during the time of Michael’s Brown’s death was incredibly stressful. Canfield Green Apartments was just five miles away. Not only were there psychic traumas as a result of the killing of Michael Brown, the leaving of his body in the street for four hours, the protests, the militarized police response, and the violence, but there were tremendous uncertainties among Normandy residents about whether accredited school districts would follow the court’s August 15 order. The Francis Howell School District fought the transfers as long as it could and even once it relented, parents in Francis Howell were not happy with the transfers and Normandy Schools parents did not know when/if Normandy Schools would declare bankruptcy and if so, what would happen to their children. Moreover, transfers only applied to unaccredited districts. What would happen a year or two or three down the road for a Normandy Schools child attending school in Francis Howell if Normandy Schools regained accreditation? Would the child be able to finish school in Francis Howell or be uprooted once again? Given these uncertainties, many parents opted to have their children stay in Normandy Schools. Staying meant that the children would be surrounded by a known and familiar environment and would be close to home. This also meant receiving an education in the worst district in the state. A year after Michael Brown’s death, these issues remain. Elisa Crouch, Normandy Transfer Students Left in the Lurch, Aug. 4, 2015, http://www.stltoday.com/news/local/education/normandy-transfer-students-left-in-the-lurch/article_3f127024-1997-55d5-8219-7a057b7ee259.html.

79. Crouch, supra note 77.

80. Analysis of Census Bureau data shows that while the percentage of children living in poverty declined for Hispanics, Whites, and Asians, the number remained steady for Black children, with poverty among Black children registering at almost 40 percent. This is the first time the number of Black children living in poverty surpassed the number of White children living in poverty. This is significant because there are three times as many White children as Black children in the United States. See Eileen Patten and Jens Manuel Krogstad, Black Child Poverty Rate Holds Steady, Even As Other Groups See Declines, Pew Res., July 14, 2015, http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines/.

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84. Bosman & Fitzsimmons, supra note 1.


103. Cashin, supra note 95, at 940.

104. Crouch & Bock, supra note 57 (emphasis added).
### Appendix

**Public School District Characteristics**

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Ferguson’s Fault Lines: The Race Quake That Rocked a Nation
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Source: Missouri Department of Elementary and Secondary Education (DESE)

*Percentage with a numerator less than 20. Data does not include students enrolled in the Special School District, private schools, or charter schools. ELA—English Language Arts; ACT—American College Testing; Below basic—Percent of students with an Achievement Level of Below Basic; Basic—Percent of students with an Achievement Level of Basic; Proficient—Percent of reportable students who scored Proficient; Advanced—Percent of reportable students who scored Advanced.
Chapter 12

The Uncertain Hope of Body Cameras

Howard M. Wasserman

There is little agreement about Ferguson.

A Pew Research Center poll in early December 2014 showed sharp racial, demographic, and political divisions about the Michael Brown shooting and everything surrounding it. While 80 percent of Black and 62 percent of Hispanic responders disagreed with the grand jury’s decision not to indict Officer Darren Wilson in Brown’s death, 64 percent of White respondents agreed with the decision. Fifty percent of people aged 18–29 disagreed, while all other age groups agreed, the number increasing with age. Sixty percent of Democrats disagreed, while 76 percent of Republicans agreed.¹

The only point of cross-group agreement has been the appropriate policy response—equip police officers with body cameras. And that agreement is widespread. A whitehouse.gov petition in August 2014 calling for a federal law requiring all state, county, and local police to wear cameras garnered more than 150,000 signatures.² The White House responded by touting the benefits of police cameras, including their inclusion in a consent decree the Department of Justice (DOJ) reached with the City of New Orleans.³ A proposed consent decree between the United States and Ferguson gave the City 180 days to equip all appropriate officers and all marked police vehicles with cameras and microphones and to establish comprehensive policies for their use.⁴ Police rank and file previously had embraced cameras, although that support has cooled as the idea has gained wider popular currency.⁵ Law enforcement executives and the American Civil
Liberties Union are behind cameras. Members of Congress have called for federal legislation on the subject. Democratic presidential candidate Hillary Clinton stated her support for cameras in the wake of riots and protests in Baltimore following the death of an African American man in police custody. One week after the nonindictment of Wilson, President Obama announced a community-policing initiative that included $75 million in matching funds to help local police departments establish programs and purchase 50,000 cameras; DOJ announced the first phase, a $20 million pilot partnership aiming to provide cameras to 50 agencies, in May 2015. And that same December 2014 study showed overwhelming bipartisan and cross-racial public support for body cameras.

Body camera proponents reflexively cite three broad benefits, although those benefits may be contradictory. First, everyone—police and members of the public—will behave better in police encounters, knowing they are being recorded and that the recording may be used as evidence or information in subsequent investigations, litigation, disciplinary proceedings, public conversations, and other processes. Second, if anyone does misbehave, cameras offer unambiguous, neutral, objective, and certain evidence in all future police-citizen encounters. Third, there will be fewer citizen complaints about police abuse, less constitutional litigation, and the results of any proceedings that do occur will be more accurate thanks to this new evidence. The result is both transparency in policing and accountability of both police and members of the public for their misconduct. Indeed, police body cameras represent the next piece of an ever-expanding network of recording devices ready to capture every police-citizen encounter gone wrong, from smartphones to tablets to dashboard cameras to miniscule video or audio recorders.

Cameras may well produce some or all of these expected benefits. Perhaps if Wilson had been wearing a camera, we could have seen the encounter and might agree on whether the Brown shooting was justified. Perhaps if Ferguson police had body cameras in August 2014, we would know whether officers overreacted to peaceful, constitutionally protected demonstrations or whether members of the public engaged in violent and unlawful rioting that warranted forceful police response. The problem instead is one of rhetoric. Body cameras are perceived, and discussed, as a panacea—as a single, comprehensive, unambiguous, and infallible solution to police misconduct and police-public conflict. As always, the issue is more complicated and the solution less certain than public discussion and debate recognizes or
acknowledges. Even if everyone agrees that widespread adoption of body cameras is a good idea, the surrounding rhetoric and expectations must remain realistic about the technology, its true benefits, and its very real limitations.

The Brown shooting kicked-off more than a year of incidents that demonstrate the competing perspectives on what video might contribute.

Less than two weeks after the Wilson grand jury decision, a grand jury in New York declined to indict New York City Police Officer Daniel Pantaleo in the choking death of Eric Garner. Unlike in Ferguson, that encounter had been captured on a bystander’s cell-phone video, in which Garner can be heard saying he could not breathe. That this grand jury nevertheless reached the same conclusion as the one in Missouri demonstrates that video and cameras do not simply, automatically, or necessarily ensure accountability or prevent “the next Ferguson.”

At the opposite end of the spectrum are multiple cases in which police officers were charged with crimes, including homicide, at least partly on the strength of video evidence. In each case, prosecutors defended the charging decision by pointing to body-cam, dashcam, and other video that appeared to show wrongdoing and, more importantly, appeared to contradict officers’ written reports and statements about the incidents.

This chapter considers the benefits and limitations of body cameras and video evidence and how the policy debate should account for them going forward. Body cameras and video are a good idea, they may achieve the hoped-for benefits, and their use should be encouraged and enabled. But expectations and demands must remain grounded in the realities of litigation and public policy, the limitations of video technology, and the function of video evidence. And so must the public conversation.

Unknown Effects and Unintended Consequences

We can only speculate whether recording deters bad behavior and incentivizes good behavior by police and the public in these encounters. The technology and its use by real police in real-world situations is too new to fully understand its true effect and effectiveness.

Two studies offer some preliminary answers. The first examined a pilot program in Mesa, Arizona, which equipped 50 officers with
body cameras and left 50 without cameras. The study made three key findings: (1) Camera-equipped officers conducted “significantly” fewer stop-and-frisks and made significantly fewer arrests than their non-camera-equipped colleagues; (2) camera-equipped officers wrote more tickets and citations; and (3) camera-equipped officers were more likely to initiate contact with citizens they encountered on the street but less likely than non-camera-equipped colleagues to respond to dispatch calls. In fact, the percentage difference in stop-and-frisks performed by each group was larger than the actual percentage of stop-and-frisks performed by camera-equipped officers; Mesa also saw fewer total complaints against officers with cameras and nearly three times as many complaints against officers without cameras.

A second study examined camera use in the police department in Rialto, California. When wearing cameras, officers were less likely to use weapons and less likely to initiate physical contact with suspects, doing so only when physically threatened; when not wearing cameras, officers were more likely to initiate physical contact and more likely to use force even when not physically threatened. The study similarly found a dramatic reduction in citizen complaints and use-of-force incidents compared with the previous 12 months.

The question is what to conclude from such studies. Perhaps they confirm what supporters hope: when wearing body cameras, officers are more proactive, more risk-averse, and more willing to avoid invasive or forceful policing strategies except when necessary. Officers think more carefully about whether they have sufficient cause to stop and frisk or to arrest before confronting people. They are more cautious about using force, although less cautious about noninvasive actions, such as issuing citations. Meanwhile, these effects carry to citizens, who are less likely to proceed with questionable or nonmeritorious complaints, knowing that video evidence undermines their version of events.

On the other hand, it is risky to generalize from these studies. Rialto and Mesa are not New York City or Chicago or even St. Louis; the number of officers to be equipped, the raw number of encounters to be recorded, and the amount of video to be stored and processed in those two communities are not comparable to what we see in larger urban centers. Nor can we overlook the relative absence in these communities of demographic trends and characteristics that trigger controversial police practices with potentially racially disparate impact—such as stop-and-frisk in New York City or arrests on outstanding warrants...
for high-fee nonviolent offenses, the pervasive practice in Ferguson that created some of the distrust between the public and police.

We also might question how much cameras genuinely deter. The presence of cameras (from media members and from phone- and camera-toting observers) during the Ferguson demonstrations in August and December 2014 seem to not have deterred demonstrators from destroying property or police from overreacting to peaceful protests. The deterrence argument is thrown into further doubt by the seemingly regular flow of new videos showing apparent police misconduct—typically excessive force or attempts to skirt constitutional limitations on their authority to stop, search, and seize members of the public—in incidents from Texas to South Carolina to California, to New York, to Minnesota, to Indiana. And this includes situations in which members of the public attempted to record law-enforcement officers performing those very functions. The immediate public reaction to videos depicting police violence against unarmed individuals is often that the police overstepped, thereby directing the public discussion in a particular direction. Whether the video justifies that reaction—whether it shows genuine misconduct or constitutionally appropriate force—often gets lost in the conversational noise.

Moreover, an unintended consequence of deterrence is overdeterrence. As organizational-behavior scholar Ethan Bernstein explains, knowing that they are being recorded and evaluated based on the recording, “workers are likely to do only what is expected of them, slavishly adhering to even the most picayune protocols.” Bernstein found that assembly-line workers avoided creative timesaving devices or training methods, instead adhering rigidly to precise written policies, fearing having to explain themselves to anyone watching the video.

Carried to the policing context, overdeterrence might mean “sacrificing the kind of educated risk-taking and problem solving that’s often needed to save lives.” Police officers may steer well clear of the constitutional line out of fear of having to explain or justify behavior that, while not necessarily unconstitutional, looks questionable on video, especially to members of the public untrained in the nuances of police practices and the Fourth Amendment. As a practical matter, the prospect of being recorded, and fear of the public reaction to that recording, might cause an officer in a potentially dangerous situation to hesitate in using force, perhaps endangering his life or safety or the life and safety of the public.
As a legal matter, overdeterrence underpins the defense of qualified immunity in constitutional litigation, which protects executive officials from suit so long as their conduct does not violate clearly established constitutional rights of which a reasonable officer would have been aware. Immunity provides officers with breathing space; it ensures that they are not unnecessarily risk-averse, that they do not perform their official functions less vigorously or with “unwarranted timidity,” and that they do not forgo potentially beneficial policing strategies out of fear of personal liability.31 Given the expansion of qualified immunity in recent years, it would be ironic if police departments were to widely adopt a practice that creates the very overdeterrence that qualified immunity is designed to avoid.

On the other hand, whatever timesaving creativity might be lost from overdeterrence will hopefully be outweighed by officers not violating individuals’ constitutional rights. We might welcome video if the effect is that officers hew more closely to formal, written department policies, procedures, and training, rather than going “off-script” in a way that might produce constitutional deprivations. The doctrine of municipal liability is premised on the idea that departments create policies and procedures for their officers, train them in those policies, and hold them to account for failing to follow them.33 To the extent pervasive video recording enforces that idea, it benefits the overall constitutional system. In fact, in firing a South Carolina deputy sheriff for throwing a female high-school student to the ground—a seizure captured on multiple student cellphones—the Sheriff emphasized that the deputy failed to follow proper training and procedures.34

Limits of Video Evidence

More problematic is the insistence that body cameras will provide video evidence that is always an objective, neutral, certain, unambiguous, and accurate representation of what happened in an encounter, leaving no doubts and no he-said/he-said disputes. The assumption, in the Supreme Court’s words, is that video can “speak for itself.”35 In fact, this bromide is false.

First, as any undergraduate film student knows, what video actually “says” depends on various qualities of the video—who and what is depicted, who created the images, and details of the images themselves (length, clarity, lighting, distance, angle, scope, speed,
steadiness, manner of shooting, and others). Second, as Dan Kahan and his co-authors showed, what any viewer “sees” in a video—and the inferences and conclusions she draws from what she sees—is influenced by the viewer’s cultural, demographic, social, political, and ideological characteristics. Video speaks “only against the background of preexisting understandings of social reality that invest those facts with meaning.” All of this affects the inferences drawn from video, as viewers identify many different possible meanings, interpretations, and conclusions about an event, depending on the particular video and the particular viewer.

Two of Kahan’s studies are especially pertinent in understanding the efficacy of body cameras and video in the context of Ferguson. One study tested whether viewers saw a particular use of force (an officer intentionally ramming his car into a fleeing car to end a high-speed chase, resulting in the fleeing car rolling into a ravine) as constitutionally excessive, finding division along political and ideological attitudes. A second study found that viewers’ opinions about reproductive freedom tracked whether they saw events outside a reproductive health clinic as peaceful assembly and protest or as unlawful and violent attempts to blockade the clinic.

Both questions—whether some force was excessive and whether a gathering was peaceful protest or lawless riot—are precisely at issue in deciding what happened in Ferguson, with respect to both the Brown shooting and the protests and demonstrations that followed. And there is no reason to believe that Kahan’s findings would not be replicated there. Had Officer Wilson been wearing a body camera when he encountered and shot Michael Brown, opinions about what the video “showed” almost certainly would have split along political divisions about race, racial justice, police practices, and concepts of law and order. For comparison, while a majority of viewers believed the video of Eric Garner’s death showed constitutionally excessive force, that belief was far stronger among Blacks and Hispanics, younger people, and Democrats. Similarly, viewer opinions about whether Ferguson demonstrators were peacefully assembling or unlawfully rioting likely would track opinions about the First Amendment, public protest, and the permissible use of the streets for expressive activity, not to mention opinions about the underlying events being protested—the Brown shooting and the grand jury decision not to indict.

Of course, the Supreme Court shows no sign of moving from its view that video can be (and often is) so conclusive and unambiguous that
a court in a civil rights action can determine its meaning without the need for jury consideration. Paradoxically, then, body cameras may prove worse for civil rights plaintiffs—more constitutional cases will feature video, offering courts more opportunities to misuse video evidence on summary judgment and more opportunities to keep cases and videos away from civil juries.

The limits of body cameras and video arguably became clear from the nonindictment of Officer Pantaleo in Garner’s death less than two weeks after the nonindictment of Wilson. One might conclude from that contemporaneous decision that body cameras would not have made a difference in Ferguson, in turn casting doubt on their efficacy as a response to police misconduct and police-public conflict. Video or not, the outcome was the same in both cases—no criminal punishment, no police accountability, and no justice for a seemingly unarmed African American man killed at the hands of police. If the Garner video was not sufficient to secure an indictment (much less a conviction) in what most viewers saw as a clear case of unreasonable force against an unarmed, nonresisting suspect with whom police initiated physical contact in response to a “broken windows” violation, accountability is unattainable. And body cameras and video do not change or improve anything.

At worst, the Garner case confirms Kahan’s point that video never speaks for itself, but depends on who is watching and what is being watched. No matter the broad public and popular perception of the story told in the Garner video, most or all of the grand jurors—likely reflecting a different political, social, and demographic makeup than the broader national public watching the video—saw a different story and decided accordingly. The case also highlights the need to view video in conjunction with witness testimony, not as a substitute or as a singular video narrative that justifies ignoring testimony. Finally, video’s indeterminacy remains a constant—in criminal and civil proceedings and even when a fact-finder is given an opportunity to see the video and resolve the case. Any judge, grand jury, or petit jury may view any video differently than does the public, prompting the same disagreements, the same popular outrage, and the same concerns about police nonaccountability when an officer goes unsanctioned.

But just as we should not be overly optimistic about the potential of body cameras, neither should video’s acknowledged limitations warrant entirely rejecting them as a useful tool. First, the conversation about body cameras must focus not only on how video affects judicial proceedings, but also how it influences the public and political
conversation. And the Garner case highlights video’s significant extra-judicial effects and benefits. While opinion about the Brown nonindictment split sharply along racial and political lines, a cross-racial majority—no doubt under the video’s influence—believed the Garner grand jury got it wrong. Public preferences and perceptions of that video, and thus perceptions of the case, might prompt some responses to Garner’s death that we did not see in response to Brown’s death. The DOJ declined, following an investigation, to pursue federal civil rights charges against Officer Wilson. But as of November 2015, it continued to investigate charges against Officer Pantaleo, a strategy that may have appeared more promising given the potential for a different grand or petit jury (drawn from a broader pool of an entire federal district) to view and interpret that video differently. The New York City Police Department’s internal affairs division also was investigating Pantaleo’s actions, whereas Wilson simply (although not quietly) resigned from the Ferguson Police Department. And New York City settled a threatened civil action with Garner’s family for almost $6 million.

Moreover, sometimes video will prompt prosecutors to pursue charges against law-enforcement officers, with video validating that decision both internally and publically. This is especially likely when the video appears to contradict officers’ written reports, initial statements, or testimony about incidents, thereby overcoming fact-finders’ tendency to credit officer testimony. Consider examples from 2015 alone. University of Cincinnati police officer Ray Tensing was indicted for murder in the shooting death of Sam DuBose during a traffic stop on the strength of videos from multiple body cameras. Chicago police officer Jason Van Dyke was indicted for first-degree murder in the shooting death of Laquan McDonald. Van Dyke shot McDonald sixteen times and defended his actions by reporting that McDonald had charged towards him with a knife; dashcam video (released only after an open-records lawsuit) showed McDonald walking away from the officers. In North Charleston, South Carolina, an officer was indicted on murder charges in the shooting death of Walter Scott, an African American man; a bystander recorded the officer firing eight rounds, shooting Scott in the back as Scott ran at slow speed from a routine traffic stop, and handcuffing the prone body immediately afterwards. And in November, Louisiana indicted two state police officers for second-degree murder and attempted second-degree murder arising from a recorded post-chase shooting that left a father hospitalized and his six-year-old son dead.
Video may even affect cases of non-lethal police misconduct. In December, New York City Police Officer Jonathan Munoz was indicted for official misconduct and lying on a criminal complaint. In March 2014, Munoz had arrested Jason Disisto for obstructing government administration, disorderly conduct, and resisting arrest; Disisto had attempted to record Munoz frisking and arresting a friend of Disisto’s, and Munoz stated in the incident report that Disisto had lunged at him and tried to punch him. But footage from a security camera was later found, seeming to show that Munoz had initiated the physical confrontation, apparently to stop Disisto from recording the underlying incident.59

Again, however, charges or an indictment do not mean a conviction; a jury may ultimately acquit in each of those cases if it sees a different story or finds different meaning in that same video than the one carried by prosecutors, grand jurors, or the public. And the same public outrage and public frustration may follow.

**Implementation: The Devil in the Details**

Ultimately, the effectiveness of body cameras depends not on the effectiveness of cameras and video in the abstract, but on the hard details of implementation. Law enforcement agencies must enact policies addressing everything about how cameras should be deployed and used. It is not enough to call for body cameras; public discussion must consider the difficult endeavor of making them work.

In 2014, the Police Executive Research Forum (PERF) and the DOJ’s Community Oriented Police Services Program published the results of a yearlong study that included a survey of police departments, interviews with executives in departments that have implemented body camera programs, and a one-day conference of law enforcement officials and other policy experts. The report offered more than 30 recommendations of protocols for equipping officers with cameras, recording events, and storing, reviewing, using, and releasing recordings. At its heart was recognition that agency policies and training materials must provide clear, specific, and detailed guidelines.60 And the first round of federal funding for local body camera programs explicitly targeted law enforcement agencies that already had considered and established camera policies, requiring that any funding applicant “must establish a strong plan for implementation of body-worn cameras and a robust training policy before purchasing cameras.”61
Consider, for example, the debate over when officers must turn cameras on and record a particular public encounter. ACLU representatives argued that officers should record all encounters with the public, because continuous recording eliminates “any possibility that an officer could evade the recording of abuses committed on duty”; law enforcement officials wanted a more limited approach vesting officers with discretion to keep cameras off during certain encounters and events, particularly where privacy concerns are implicated or when recording would be “unsafe” or “impossible.” The PERF report ultimately recommended that officers record “all calls for service and during all law enforcement-related encounters and activities that occur while the officer is on duty,” subject to officers obtaining consent to record from crime victims and retaining discretion to keep cameras off when entering people’s homes and when talking with victims, witnesses, or other people reporting crimes, particularly in sexual assault and child abuse cases. While siding with the discretionary approach, the report also recommended that officers explain and justify any decision not to record a particular encounter.

Of course, vesting officers with discretion may create a different unintended consequence—more opportunities for dispute, complaint, and litigation. As police cameras become more pervasive, it becomes impossible to avoid expectations and demands—from courts, litigants, juries, citizens, the media, and civilian police-review boards—that cameras always will be used, that video always will be available, and that the absence of video evidence will itself be evidence of misconduct. There also will be inevitable disappointment among those same groups when the video does not offer a single, unambiguous, commonly agreed-upon, and satisfying story about what happened in an encounter. The absence or ambiguity of video will itself become a subject of dispute and controversy in the media, in police departments and local governments, in the public discourse, and in the courts. The proposed consent decree with the City of Ferguson provided that “in order to continue to promote transparency, foster accountability, and enhance public trust in FPD, the City agrees to make body-worn and in-car camera recordings publicly available to the maximum extent allowable under Missouri law.”

Unfortunately, the maximum extent may not be that great, as Missouri officials at least initially appeared unwilling to strike the balance recommended by PERF and suggested in the consent decree. Indeed, the ACLU, perhaps the strongest voice in favor of broad disclosure,
acknowledged the significance of those countervailing privacy concerns.67 While most state open records and Freedom of Information laws contain exemptions for evidence, ongoing investigations, and privacy, the PERF report urged departments to use “these exceptions judiciously to avoid any suspicion by community members that police are withholding video footage to hide officer misconduct or mistakes.”68 PERF insisted that a “broad public disclosure policy” demonstrates commitment to transparency and accountability; it called on departments to make clear the processes for responding to disclosure requests, for determining what videos will be disclosed to the public, and for explaining to the public why some video was or was not released.69

Unfortunately, Missouri officials at least initially appeared unwilling to strike a similar balance. In February 2015, a panel convened by Missouri Attorney General Chris Koster recommended that the General Assembly amend the state’s Sunshine Law to define data from any “mobile video recorder” (including police vehicle and body cameras) as “closed records,” not subject to public request and accessible only to those involved in the incident for purposes of civil litigation or by court order. Koster warned of technology “lead[ing] to a new era of voyeurism and entertainment television at the expense of Missourians’ privacy.”70

Missouri legislators initially appeared ready to follow that recommendation. A February 2015 proposal in the state senate would have categorically exempted all official video from any public disclosure or open records request. Proponents of the measure cited privacy concerns; the problem, it was argued, was that video could end up on YouTube, where an officer’s single “mistake” would remain forever.71 Interestingly, state legislators seemed more concerned with the privacy of their police officers than the privacy of victims, witnesses, and others in the video, to say nothing of the public and its interest in identifying and checking abuse of government power. This one-sided sympathy stood in marked contrast to the PERF study’s balanced approach recognizing the countervailing weight of transparency and accountability.

The Missouri proposal would functionally eliminate police-created video from meaningful public discussion and debate over incidents of police conduct. The public would only see video that law enforcement chooses to release, which likely would be only video supporting and exonerating the officers involved in a confrontation—it rarely will be in the government’s interest to voluntarily disclose video depicting
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Officer misconduct. The Laquan McDonald case illustrates the point. It took more than a year and an order from a state trial court before the City of Chicago released dashcam video of a fatal shooting for which the officer was charged with first degree murder. This places significant weight on citizen video—from smartphones, small recorders, and other devices—to capture and publicize police-public encounters and misconduct. In other words, we end up exactly where we have been before police donned body cameras, relying on the public to record events.

Unfortunately, the public records police subject to an ongoing threat of officers actively interfering with those recording efforts and to conflicting judicial signals about the public’s First Amendment right to record police activity in public. During the August 2014 Ferguson demonstrations, the ACLU filed a lawsuit specifically challenging police interference with citizen recordings, resulting in a settlement in which St. Louis County officials publicly and formally acknowledged the public’s right to record. The proposed consent decree with the United States required Ferguson to continue acting in accordance with that agreement, including training and supervising officers to not interfere with non-disruptive public recording of police activities and providing that recording may not in and of itself constitute a threat to officer safety. And one of the plaintiffs in a § 1983 damages action arising from the August protests specifically alleged that officers had seized and destroyed the memory card from his camera.

But federal courts are divided on the First Amendment question. And one Texas legislator proposed prohibiting all non-media personnel from coming within twenty-five feet of police officers while filming them performing their functions in public, although his bill was met with sharp criticism, was likely unconstitutional, and was quickly withdrawn. The point is that if body camera videos are not released as a matter of state policy and citizen video becomes difficult to obtain, video ceases to form any meaningful part of the public conversation about law enforcement behavior.

One unexpected obstacle to implementing body cameras is the new opposition, or at least hesitancy, of police unions and rank-and-file officers. As recently as 2012, a study of 785 law enforcement professionals found overwhelming support for cameras, with 85 percent saying they would be effective in reducing litigation and false claims of officer misconduct. But as more people in and out of government have seized on body cameras and video as the solution and as agencies have begun...
establishing programs, the rank and file has resisted. Unions and officers in several cities have cited everything from officer privacy to citizen privacy to lack of evidence that cameras work to the breaking of trust between police and the communities they serve.\textsuperscript{80} The last of these points seems especially ironic, given that the loss of trust between police and their communities has produced the very police-citizen conflicts that body cameras are designed to record, reveal, and deter.

In any event, this new opposition implicitly acknowledges two things: interpretations of video will vary and some portion of the public will—for demographic, political, sociological, or attitudinal reasons—virtually always see police misconduct in any video depicting police using force, especially against unarmed individuals. The way to avoid making the police look bad, the officers seem to suggest, is to eliminate video evidence from debates and discussions about their behavior.

One case, appropriately enough from St. Louis, illustrates the consequences of officer uncertainty about implementation. An April 2014 traffic stop over an illegal turn escalated to the driver being pulled from the car, kicked, and tased. Part of the encounter was captured by the dash cam of one squad car, until a later-arriving officer can be heard saying, “We’re red right now, so if you guys are worried about cameras, just wait,” at which point the audio and then the video were shut off. Charges against the driver were dropped, either because the truncated video contradicted the officers’ written reports (the driver’s version) or because the “the action of turning off the dash cam video diminished the evidentiary merits of the case” (the government version). The officer who called for the video to be shut off was suspended for violating department regulations requiring that dashboard cameras remain on until an incident is over. While defending that suspension, the chief of the St. Louis Police also insisted that the video did not depict any wrongdoing by the officers involved, making it all the more inexplicable to him why the officer turned off the video.\textsuperscript{81}

While the driver’s civil rights action remains pending as of this writing, the case captures many of the problems of implementation and incentives that come with body cameras. The simplistic presumption is that the officer turned the camera off because she saw her colleagues engaging in misconduct, which might explain why the chief felt the need to simultaneously defend the officers shown using force and suspend the officer who shut off the camera. On the other hand, the officer who shut off the camera likely did so assuming that any force against a seemingly unarmed man during a routine traffic stop would
be viewed by the public as unconstitutionally excessive, even if the force was legally justified. In turning off the video, however, she created the very public-perception problem she was trying to avoid. Body cameras make this calculus ever more common.

The perverse incentives on display here disappear if Missouri succeeds in exempting all police-created video from public disclosure. That officer no longer worries about how the public will perceive the video, and thus no longer feels the need to turn the camera off, because the public never sees (or gets to consider and discuss) the video unless and until litigation.

Unfortunately, this creates further perverse incentives for officers to impede citizen-created video of public encounters—to confiscate iPhones or to order citizens to stop recording, thereby eliminating the only source of video that might still make it onto YouTube for public consumption or that might affect public attitudes toward the officers’ conduct. And this brings us back to the new wariness over body cameras among police rank and file. Officers could reasonably conclude that the best course is to not even engage with the web of confusion, uncertainty, competing incentives, and criticism that cameras create.

**Conclusion**

Police body cameras offer numerous benefits and are likely a net positive, especially with members of the public increasingly concerned about police misconduct and excessive force and increasingly armed with their own recording technology. But the public debate about body cameras must reflect the nuance and complexity of camera policy, grounded in the limitations of video evidence and the hard questions of implementation. The current discussion—in which cameras are erroneously touted as magic solutions that resolve all problems—highlights the failure to recognize that complexity. And it should prompt government officials and all other stakeholders in the public debate to take a more cautious, realistic, and, hopefully, more effective approach to body cameras and to video evidence. If there is a common lesson from Ferguson, that should be it.
Notes


10. Sharp Racial Divisions, supra note 1.


13. Id.

14. See discussion infra notes 54-58.


25. Ethan Bernstein, supra note 27.


38. Kahan et al., supra note 37, at 883.
41. Kahan et al., supra note 37, at 841.
43. Sharp Racial Divisions, supra note 1.
45. Compare Wasserman, supra note 11, at 633, with Scott, 550 U.S. at 380–81.
46. One can debate whether the Garner or Brown grand juries were used in ordinary or appropriate ways, in which the grand jury follows the prosecutor’s lead based on the state’s strongest evidence, or whether they were used in an atypical manner as fact-finders outside an open and adversarial trial process. See Dahlia Lithwick & Sonja West, Shadow Trial, Slate (Nov. 26, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/ferguson_grand_jury_investigation_a_shadow_trial_violates_the_public_s_right.html.
47. Wasserman, supra note 11, at 643–44.
48. Id. at 644–48.
49. Sharp Racial Divisions, supra note 1.
52. Hilary Hanson, NYPD Investigators Question Chokehold Officer for More than 2 Hours, Huffington Post (Dec. 10, 2014), http://www.huffingtonpost.com/2014/12/10/nypd-investigation-eric-garner-daniel-pantaleo_n_6304874.html.
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57. Berman, supra note 21; Peralta, supra note 21.


60. Police Exec. Res. Forum, supra note 17, at 38; Stanley, supra note 6, at 1–2.


64. Id. at 13.

65. Id. at 28–29.

66. Consent Decree ¶ 249, supra note 4.

67. Id. at 15; Stanley, supra note 6, at 1.


69. Id. at 64 (recommendation 25).


73. See sources cited supra note 56.


77. Compare Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012), and Glik v. Cunniffe, 665 F.3d 78 (1st Cir. 2011), with Kelly v. Borough of Carlisle, 662 F.3d 248 (3d Cir. 2010), and ACLU of Ill., 679 F.3d at 611–12, 614 (Posner, J., dissenting); see also Collins, supra note 26.


79. Wylie, supra note 5.

80. See sources cited supra note 5.