

THE MICHAEL BROWN LEGACY:
POLICE BRUTALITY AND MINORITY PROSECUTION

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I know the police cause you trouble
They cause trouble everywhere
But when you die and go to heaven
You find no policeman there.

—Woody Guthrie¹

INTRODUCTION

On August 9, 2014, Michael Brown, an 18-year-old, unarmed African-American teenager, was shot and killed in Ferguson, Missouri by Darren Wilson, a white police officer.² The shooting led to protests against racially motivated police brutality—protests that engulfed Ferguson for weeks.³ Several weeks after Michael Brown was killed, the

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¹ WOODY GUTHRIE, *HOBO'S LULLABY* (Rising Son 1972).

² Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (last updated Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

³ Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager: Police Say Mike Brown Was Killed After Struggle for Gun in St. Louis Suburb*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>; Emma G. Fitzsimmons & Michael Wines, *What Started as a Local Protest in Missouri Grows Into a Center of National Activism*, N.Y. TIMES, (Aug. 20, 2014), <http://www>

St. Louis County prosecutor announced that the Ferguson grand jury decided not to indict Officer Wilson.⁴ Queue another surge of protests.

The death of Michael Brown may have been shocking, but it was not surprising.⁵ Similar tragedies have plagued the United States in its recent past—the names of the victims and the killers may have been different, but the outcome in each case was the same.⁶ Fatality at the hands of police brutality has become so prevalent in today's society that one could argue it has become a societal norm.⁷ Today, we live in an age where police are perceived as a threat. Long gone are the days when police were viewed solely as peacekeepers.

The harmful effects of police brutality reach far beyond the physical and psychological injuries of victims—they also extend into the courtroom.⁸ The role of police testimony is critical in trials prosecuting police officers for violence and brutality against minorities.⁹ Often, a judge will instruct the jury to take the police testimony at face value—that is, to accept police testimony without weighing its evidentiary value.¹⁰ This instruction has the devastating effect of preventing juries from questioning or challenging police findings.¹¹

This paper aims to address the police brutality endemic that is plaguing the United States of America today.¹² Part I will review the

.nytimes.com/2014/08/21/us/what-started-as-a-local-protest-in-missouri-grows-into-a-center-of-national-activism.html.

⁴ Julie Bosman & Monica Davey, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

⁵ See *infra* notes 44–59 and accompanying text. Police brutality has plagued America for years—it is not a new phenomenon. *Id.*

⁶ See *infra* Part II.B and accompanying text.

⁷ See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1280 (1999) (noting that “[s]ystematic police brutality has been masked, insulated, and implicitly condoned because courts have . . . failed to make causal links between police conduct and the injuries and confessions of suspects; denied litigants or juries access to information which would enable linkages to be discovered; and in general persisted in defining encounters as separate from-and irrelevant to-any overarching systemic patterns that need to be addressed.”).

⁸ *Shielded from Justice: Police Brutality and Accountability in the United States* (1998), <https://www.hrw.org/legacy/reports98/police/uspo14.htm#TopOfPage> (noting that “[p]olice abuse remains one of the most serious and divisive human rights violations in the United States . . . [because] the administrative and criminal systems that should deter these abuses by holding officers accountable instead virtually guarantee them impunity.”).

⁹ See Legal Framework: Police Testimony and Jury Instructions, *infra* Part II.

¹⁰ See *infra* note 68 and accompanying text.

¹¹ See *infra* note 67 and accompanying text.

¹² See *infra* notes 43–59 and accompanying text.

legal and historical backgrounds preceding Michael Brown's death, the history of police brutality, and police testimony as it relates to jury instructions. Part II will review the legal framework surrounding jury instructions about police testimony. Part III will analyze the current law in this area and its effect in facilitating the current social climate regarding police brutality as it relates to minorities. Finally, Part IV will conclude by advocating a solution for this endemic by proposing changes in trial strategy, jury instructions, and police practices to counteract police testimony, while allowing for greater justice and legal protection for minorities.

Specifically, this paper proposes that all courts that sit for police brutality cases must be required to give a jury instruction directing jurors not to give any added weight to police testimony. As this paper will demonstrate, this police testimony-specific jury instruction will serve two incentives. First, it will reinforce with the jury that testimony that contradicts police testimony and pierces the Blue Wall of Silence¹³ carries as much weight as police testimony.¹⁴ Second, by strengthening the possibility of legal ramifications for police brutality, this solution aims to quell the police brutality endemic. Where legal enforcement has failed to impose discipline, the courts must step up to enforce a solution.

I. FACTUAL BACKGROUND

A. *The Michael Brown Legacy*¹⁵

To understand the allegations of police brutality implicated in the Michael Brown killing, it is helpful to first revisit the facts of that tragic day.

On August 9, 2014 at 11:54 a.m., Michael Brown was spotted leaving a convenience store with a companion.¹⁶ Surveillance cameras in

¹³ See generally Gabriel J. Chin, *The 'Blue Wall of Silence' as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 254-55 (1998). The Blue Wall is an unspoken rule amongst police forces whereby an officer will refuse to take any action to expose a fellow officer's misconduct, cutting off access to any evidence that is necessary to reach a conviction—or at least adequately try—in a police brutality case. *Id.*

¹⁴ See *supra* Part II.

¹⁵ See Raziye Akkoc, *A timeline of police attacks in the USA*, THE TELEGRAPH (Mar. 3, 2015, 4:06 PM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11446472/A-time-line-of-police-attacks-in-the-USA.html>.

¹⁶ See Buchanan, *supra* note 2.

the convenience store showed Mr. Brown stealing cigarillos before leaving the premises.¹⁷

At 12:01 p.m., Officer Darren Wilson encountered Mr. Brown and his companion walking down the middle of the street; Officer Wilson testified that, through his window, he ordered the two teens to move to the sidewalk.¹⁸ During the grand jury proceedings, Officer Wilson testified that it was at this point he recognized that Mr. Brown fit the description of the suspect in the convenience store theft.¹⁹

At 12:02 p.m., the record in the Michael Brown matter shows that Officer Wilson placed a call to the dispatcher about the two teens.²⁰ It was at this point that recollections of the altercation diverge.²¹ Several witnesses reported seeing an altercation in the police vehicle between Officer Wilson and Mr. Brown.²² Others said they saw Mr. Brown punch Officer Wilson.²³ At least one witness reported seeing no part of Mr. Brown inside the police vehicle.²⁴ Officer Wilson testified that Mr. Brown reached into the police vehicle and attempted to take his sidearm pistol.²⁵ Officer Wilson explained that because of the alleged struggle, he was forced to fire two shots from inside his vehicle at Mr. Brown, who was standing at the window of the police vehicle.²⁶ One of these two shots grazed Mr. Brown's thumb, and the other missed him completely.²⁷

At this point, Mr. Brown proceeded to flee from Officer Wilson on foot.²⁸ After running east on foot for some time, the pair stopped

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Damien Cave, *Officer Darren Wilson's Grand Jury Testimony in Ferguson, Mo. Shooting*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/interactive/2014/11/25/us/darren-wilson-testimony-ferguson-shooting.html>; see also Grand Jury Volume V at 208:18–209:7, *Misouri v. Darren Wilson*, available at: <http://int.nyt.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grand-jury-volume-05.pdf>.

²⁰ Buchanan, *supra* note 2.

²¹ *Id.*

²² *Id.*; see generally, *Documents Released in the Ferguson Case*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html> (last visited April 2, 2015).

²³ Buchanan, *supra* note 2.

²⁴ *Id.*

²⁵ See Buchanan, *supra* note 2; see Cave, *supra* note 19; see Transcript of Grand Jury vol. 5 at 222-23, *State v. Wilson* (Mo. Cir. Ct. Sept. 16, 2014), available at <http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html> [hereinafter *Transcript*].

²⁶ See Cave, *supra* note 19; Transcript, *supra* note 25 at vol. 5 p. 224-26.

²⁷ Buchanan, *supra* note 2.

²⁸ *Id.*

to face one another.²⁹ Recollections of what happened next vary.³⁰ What is certain is that Officer Wilson fired ten more rounds at Mr. Brown,³¹ six of which struck him.³² We also know that Michael Brown was 35 feet away from the police vehicle when shots from Officer Wilson's gun struck Mr. Brown, killing him.³³

In the aftermath of the shooting, the grand jury decided not to indict Officer Wilson.³⁴ During the investigation of Michael Brown's death, the grand jury was given more latitude in calling witnesses, than is typical in grand jury proceedings.³⁵ Witnesses who testified included people who saw the events unfold on August 9th, as well as police officers who worked on the investigation.³⁶ In addition, Officer Wilson also testified for four hours, which is particularly unusual given that grand juries typically do not hear testimony from an individual who may be charged.³⁷

²⁹ *Id.*

³⁰ See Buchanan, *supra* note 2. While some witnesses testified, "Mr. Brown never moved toward Officer Wilson," the majority of the witnesses said Officer Wilson fired shots as Mr. Brown moved towards him. *Id.* The St. Louis County prosecutor and Officer Wilson agreed that Mr. Brown "charged" towards Officer Wilson, "making 'a grunting, like aggravated sound.'" *Id.* There is also disagreement as to whether "Mr. Brown had his hands in the air" or whether "he did not raise his hands at all or that he raised them briefly, then dropped them and turned toward the officer." *Id.* There is also some testimony that Mr. Brown's arms were "out to the side, in front of him, by his shoulders or in a running position." *Id.*

³¹ Buchanan, *supra* note 2. "Officer Wilson fired 12 rounds, including two from the car and 10 more down the street, where Mr. Brown sustained at least six more wounds, including at his forehead and the top of his head, which suggested that his body was bent forward at the waist." *Id.*

³² Dr. Michael M. Baden conducted a private autopsy at the request of Mr. Brown's family. The autopsy revealed 6 gunshot wounds to Michael Brown's body, including one gunshot wound to the forehead and another at the top of his head. *Id.*

³³ Ryan Devereaux, "Down Outright Murder" *A Complete Guide to the Shooting of Michael Brown by Darren Wilson*, THE INTERCEPT, (Nov. 20, 2014, 10:25 AM), <https://theintercept.com/2014/11/20/everything-know-shooting-michael-brown-darren-wilson/>.

³⁴ See Bosman, *supra* note 4.

³⁵ See Buchanan, *supra* note 2 (noting that, by allowing Officer Wilson to testify, the Ferguson grand jury exercised its ability to call witnesses in a manner unlike that of typical grand jury proceedings).

³⁶ See *Ferguson Grand Jury Transcripts Show Widely Varying Witness Testimony*, WALL ST. J. (Nov. 25, 2014, 3:46 PM), <http://www.wsj.com/articles/ferguson-grand-jury-transcripts-show-widely-varying-witness-testimony-1416948406>; see generally *Grand Jury Transcripts, Documents Released in the Ferguson Case*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html>.

³⁷ Robert Patrick & Kim Bell, *Ferguson officer appears before grand jury on shooting of Michael Brown*, ST. LOUIS POST-DISPATCH (Sept. 17, 2014, 11:30 PM), http://www.stltoday.com/news/local/crime-and-courts/darren-wilson-testifies-in-front-of-grand-jury/article_74022ab8-756f-5e1d-81b3-3c577f1e9208.html.

Regardless of the various recollections of what happened on that fateful day, or what side of the debate one may take, we all likely agree that Michael Brown has become something of a symbol, epitomizing the tragic debate on who bears the blame for the ever-increasing number of young, unarmed black men killed by police officers. Is he a symbol of innocence? Does he leave behind the legacy of a defiant menace to society? Or does his legacy extend farther than these surface-level characterizations? More importantly, what is Michael Brown's legal legacy?

Michael Brown is now part of a tragic legacy—a member of a group that includes the likes of Emmett Till³⁸ and Tamir Rice.³⁹ These killings illustrate the historically hostile and—often times—deadly relationship between police and minorities.⁴⁰ While police are meant to protect and serve all United States citizens, for too many minority communities, police have become a source of fear, quick to resort to physical violence.⁴¹ The story of Michael Brown and others like him is a patterned one, rooted in police culture.⁴² And, while there are various proposals for reform, one area requiring immediate attention is the role the police play in the courtroom—more specifically, the role of police testimony in minority prosecution.

B. *An American History of Police Brutality*

Police brutality in the United States is not a new phenomenon—its origins are linked to America's earliest days. An early example of

³⁸ *The Death of Emmett Till*, HISTORY.COM (2010), <http://www.history.com/this-day-in-history/the-death-of-emmett-till>. Emmett Till, a 14-year-old African-American boy visiting Money, Mississippi from Chicago, was brutally murdered on August 28, 1955 for flirting with a white woman four days earlier. *Id.* Till's murderers beat him until he was nearly dead, gouged out his eyes, shot him in the head, and then threw his body into the Mississippi river. *Id.* See also Mamie Till-Mobley & Christopher Benson, *Death of Innocence: The Story of the Hate Crime That Changed America* (2003). While the case of Emmett Till does not involve police brutality, it points to a culture of violence and injustice towards minorities.

³⁹ See *infra* note 57 and accompanying text.

⁴⁰ See *infra* notes 52–58 and accompanying text.

⁴¹ John Eligon, *Running From Police Is the Norm, Some in Baltimore Say*, N.Y. TIMES (May 10, 2015), http://www.nytimes.com/2015/05/11/us/running-from-police-is-the-norm-some-in-baltimore-say.html?_r=0 (noting that some civilians run from the police out of fear, “even when they have done nothing wrong.”).

⁴² See *infra* notes 52–58 and accompanying text.

police brutality can be found in the form of lynching.⁴³ For several decades following the emancipation of slaves in the United States, police officers not only tolerated African-American lynching,⁴⁴ but also participated in it.⁴⁵

Although lynching is no longer a tool of the police trade, police brutality undoubtedly perseveres on the same behavioral spectrum. While not always motivated by racism, police brutality is undeniably associated with race.⁴⁶ Throughout the course of American history, police violence against people of color has occurred in horrifying disproportions.⁴⁷

Admittedly, however, violence is a part of policing.⁴⁸ Efficient police work often requires, and thus, justifies the use of reasonable force.⁴⁹ However, distinguishing between a reasonable and an exces-

⁴³ See, e.g., Ruth Wilson Gilmore, *Terror Austerity Race Gender Excess Theater*, in *Reading Rodney King*, in *READING URBAN UPRISING* 23, 31-32 (Robert Gooding-Williams ed., 1993) (discussing the overwhelming use of lynching in America to execute African-Americans).

⁴⁴ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* 204, 434-35 (1988) (noting that law enforcement officials were afraid to prosecute whites); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950* 8 (1980) (stating that "public officials . . . either cooperated with the mob or sought refuge in silence and inaction.").

⁴⁵ See *Foner* at 203 (describing how Confederate soldiers often became policemen after the Civil War and regularly terrorized the African American community); see also JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 24 (1993) (noting that police participated in at least half of the lynchings in the 1930s); *WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE* 10-12, 58-59, 81-82, 120, 225 (William L. Patterson ed., 1951) (describing several cases of police participation in, and instigation of, mob attacks on African-Americans up to the 1950s).

⁴⁶ See Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killings*, 9 *HARV. BLACKLETTER J.* 1, 8-13 (1992) (examining studies concerning whether racial prejudice is a factor in police shootings of African Americans and concluding that racism, even if disguised, often plays a role).

⁴⁷ See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 *HASTINGS L.J.* 677, 693 (1996). An easily recognizable example can be found with respect to police brutality towards African-Americans and other people of color who, while not the only victims of police brutality, are disproportionately harassed, beaten and killed by police officers. *Id.*

⁴⁸ OFFICE OF JUDICIAL PROGRAMS, U.S. DEPARTMENT OF JUSTICE, *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA* iii (1999), <https://www.ncjrs.gov/pdffiles1/nij/176330-1.pdf> (last visited April 2, 2015) (noting that "[l]aw enforcement officers are authorized to use force in specified circumstances, are trained in the use of force, and typically face numerous circumstances during their careers when use of force is appropriate[.]").

⁴⁹ *Id.*

sive use of force is oftentimes difficult.⁵⁰ Even the cases that appear to be obvious examples of excessive police force may not lead to obvious legal consequences, as Officer Daniel Pantaleo's acquittal in the grand jury's investigation of Eric Garner's death demonstrates.⁵¹

Present-day America illustrates the continued practice of police brutality. Consider the following tragedies:

- Kelly Thomas, a 37-year-old, unarmed, mentally ill homeless man, was beaten and killed by police officers in Fullerton, California on July 5, 2011⁵²;
- Gil Collar, an unarmed 18-year-old student attending the University of South Alabama, was under the influence of drugs when he was shot and killed by university police on October 6, 2012⁵³;
- Andy Lopez Cruz, a 13-year-old boy, was shot and killed by a sheriff in Santa Rosa, California on October 22, 2013 while carrying a toy assault rifle that police officers believed to be real⁵⁴;

⁵⁰ *Id.* (“When the level of force exceeds the level considered justifiable under the circumstances, however, the activities of the police come under public scrutiny.”).

⁵¹ Editorial, *It Wasn't Just the Chokehold: Eric Garner, Daniel Pantaleo and Lethal Police Tactics*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/05/opinion/eric-garner-daniel-pantaleo-and-lethal-police-tactics.html> (noting that “justice for Eric Garner was blocked . . . by a Staten Island grand jury's confounding refusal to see anything potentially criminal in the police assault that killed him.”). Police officers killed Eric Garner after stopping him “on a sidewalk on Staten Island because they believed [Garner] was illegally selling loose cigarettes.” Associated Press, *Federal charges sought in Eric Garner's chokehold death*, N.Y. Post (Jul. 18, 2015), <http://nypost.com/2015/07/18/federal-charges-sought-in-eric-garners-chokehold-death/>. Officer Daniel Pantaleo proceeded to place “his arm around Garner's neck to take him down.” *Id.* Video evidence from the scene shows “Garner gasping ‘I can't breathe!’ [eleven] times before losing consciousness.” *Id.*; see also *Eric Garner*, THE HUFFINGTON POST, <http://www.huffingtonpost.com/news/eric-garner/>.

⁵² *California: Officers Acquitted in Death*, N.Y. TIMES (Jan. 13, 2014), <http://www.nytimes.com/2014/01/14/us/california-officers-acquitted-in-death.html>. In a video shown in court, Mr. Thomas was seen laying on the ground, screaming for his father and for help, while police officers repeatedly kicked and punched him. *Id.* The court held that the officers involved were not guilty of second-degree murder and involuntary manslaughter, and acquitted the officers for any liability of excessive force. *Id.*

⁵³ Melissa Gray, *Campus Officer Kills Naked Freshman at University of South Alabama*, CNN (Oct. 7, 2012, 6:05 PM), <http://www.cnn.com/2012/10/07/justice/alabama-student-killed/>. The officer was cleared of all wrongdoing after a grand jury in Mobile, Alabama decided that he had acted in self-defense. *Id.*

⁵⁴ Malia Wollan, *Boy, 13, Carrying Toy Guns Is Shot Dead by Deputies*, N.Y. TIMES (Oct. 23, 2013), <http://www.nytimes.com/2013/10/24/us/boy-13-carrying-toy-guns-is-shot-dead-by-deputies.html>. Cruz was turning around, still holding his replica assault rifle, when police fatally shot him. *Id.*

- Eric Garner, a forty-three-year-old man, was killed on July 17, 2014 by a New York police officer who used an illegal chokehold in an attempt to restrain him⁵⁵;
- Ezell Ford, a 25-year-old unarmed man, was fatally shot by two Los Angeles police officers on August 11, 2014, two days after Michael Brown was killed⁵⁶;
- Tamir Rice, a twelve-year-old boy, was fatally shot by Ohio police on November 22, 2014 in a public park where he was playing with a BB gun⁵⁷; and
- Sureshbhai Patel, a 57-year-old man, was beaten by a police officer in Alabama on February 6, 2015 while walking down the street while visiting relatives in Alabama, and as a result, is partially paralyzed.⁵⁸

Police violence offends the fundamental canon that the United States of America is a government grounded in law. Justice Douglas once wrote that “one measure of liberty is the extent to which the individual can insist that his government live under a Rule of Law.”⁵⁹ This *American History of Police Brutality* cannot hope to cease, nor can our society honestly claim to hold police to Justice Douglass’ stan-

⁵⁵ Andy Newman, *The Death of Eric Garner, and the Events That Followed*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/interactive/2014/12/04/nyregion/04garner-timeline.html>. Several police officers wrestled Eric Garner to the ground after the officers received reports that Mr. Garner was illegally selling cigarettes. *Id.* In a video taken at the scene of Mr. Garner’s death, he can be heard saying “I can’t breathe.” *Id.* Despite his plea for air, and video evidence of the banned chokehold, a grand jury chose not to charge the officer that killed Mr. Garner. *Id.*

⁵⁶ Ian Lovett, *3 Shots From Police Killed Los Angeles Man, Autopsy Finds*, N.Y. TIMES (Dec. 29, 2014), <http://www.nytimes.com/2014/12/30/us/3-shots-from-police-killed-los-angeles-man-ezell-ford-autopsy-finds.html>. Accounts of what happened vary. *Id.* Police claim that the mentally ill 25-year-old reached for an officer’s gun. *Id.* What is certain is that Mr. Ford was unarmed. *Id.* The LAPD’s investigation into the killing is still ongoing as of April 23, 2015. *Id.*

⁵⁷ Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/video-shows-cleveland-officer-shot-tamir-rice-2-seconds-after-pulling-up-next-to-him.html>. Responding to reports of someone holding a pistol that was “probably fake,” police arrived to the park where they claim Tamir Rice reached for his toy gun when ordered to raise his hands. *Id.* Video of the encounter shows that Tamir was shot within two seconds of the police arriving to the park. *Id.* Tamir Rice was pronounced dead on Sunday, November 23, 2014. *Id.*

⁵⁸ Richard Fausset, *Alabama Police Officer Indicted In Confrontation With Unarmed Indian Man*, N.Y. TIMES (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/us/alabama-police-officer-indicted-in-confrontation-with-unarmed-indian-man.html>. Video evidence shows an officer throwing Mr. Patel to the ground after he was stopped by officers while walking. *Id.* The FBI is investigating the events that led to the Indian grandfather’s current partial paralysis. *Id.*

⁵⁹ WILLIAM O. DOUGLAS, *THE ANATOMY OF LIBERTY: THE RIGHTS OF MAN WITHOUT FORCE 1* (1963).

standard, so long as we tolerate police violence that, in effect, places police officers above the law. While there are many possible reforms, the court itself can help diminish the far-reaching adverse effects of police brutality in the courtroom by introducing jury instructions specific to police testimony.

The harmful effects of police brutality reach far beyond the physical and psychological injuries of victims. They also extend into the courtroom. While oftentimes overlooked, the role that police testimony plays in trials prosecuting minorities or police brutality investigations is, in fact, a critical one. Where courts either instruct jurors to take police testimony at face value, or refuse to instruct jurors not to give added weight to police testimony, the adverse effect has resulted in very little room to question or challenge police findings. As a result, police testimony dictates the outcome of the case, wholly disregarding fault, liability, and the actualities of the respective events at issue.

II. LEGAL FRAMEWORK: POLICE TESTIMONY AND JURY INSTRUCTIONS

Regarding the adverse effect of police testimony in minority prosecution, the fact that both the Ferguson police and Officer Darren Wilson testified at the grand jury proceeding was especially concerning considering the possible bias their testimonies may have imposed on the jury. The problem with allowing police testimony in trials or proceedings involving police brutality cases is a subjective one—without a proper jury instruction, a juror may feel inclined to either take a police officer's testimony as *per se* truth, or even give such testimony added weight due simply to the professional status of the person giving the testimony.⁶⁰ The natural solution to this issue would be an instruction to the jury to counteract these potential adverse evidentiary effects. Fortunately, there have been attempts to introduce such an instruction.⁶¹ However, these attempts are typically met with opposition.⁶²

Some states provide jury instructions to account for any biases that jurors may develop. However, a problem arises where states

⁶⁰ See *infra* notes 69–77 and accompanying text.

⁶¹ See *infra* note 63 and accompanying text.

⁶² See *infra* note 89 and accompanying text.

have conflicting standards for jury instructions regarding police testimony. For example, both New York and California provide statutes addressing jury instructions regarding testimony of a uniformed officer.⁶³

California's § 386 jury instruction provides that "[a] police officer's testimony is not to be judged by any standard other than that applicable to the testimony of any other witness. Hence, a cautionary instruction that care should be used in weighing a police officer's testimony should be refused."⁶⁴ Conversely, New York's statute mandates that courts "should instruct the jury that a police officer's testimony, in and of itself, is entitled to no greater weight than that of an ordinary citizen."⁶⁵ Here, we have two states with two separate statutes attempting to eliminate juror bias regarding police testimony in two opposite ways. Where New York calls for specific jury instructions warning juries not to give uniformed officer testimony added weight, California specifically forbids such a jury instruction for fear that the mere mention of a possible bias toward uniformed officers' testimony will create the biases the instruction attempts to avoid.

In addition to state-to-state discrepancies in statutes, courts have also struggled to find uniformity in deciding whether to require jury

⁶³ Compare 21 Cal. Jur. 3d Criminal Law: Trial § 386 ("A police officer's testimony is not to be judged by any standard other than that applicable to the testimony of any other witness. Hence a cautionary instruction that care should be used in weighing a police officer's testimony should be refused."), with Gary Muldoon, Esq., *HANDLING A CRIMINAL CASE IN NEW YORK* § 19:213 (2014) ("The court should instruct the jury that a police officer's testimony, in and of itself, is entitled to no greater weight than that of an ordinary citizen.").

⁶⁴ See 21 Cal. Jur. 3d Criminal Law: Trial § 386; see also *People v. Hanna*, 36 Cal.App.2d 333, 337 (2d Dist. 1939) (holding that jury instruction regarding police officer testimony was properly refused because "it is not the law that a police officer's testimony is to be judged by any other standard than that which applies to average witnesses."); *People v. Vuyachich*, 57 Ca.App. 233, 236 (1st Dist. 1922) (holding that "[o]ur courts have consistently held that instructions which single out the testimony of particular witnesses for comment, and instructions bearing on the weight to be attached thereto, should not be given."); *People v. Rudolph*, 28 Cal.App. 683, 686 (3d Dist. 1915) ("We know of no reason for declaring, as an abstract proposition, that because a witness may be a public or police officer and in his capacity as such has acquired the information which he is asked to impart to the jury in a criminal or other case, his testimony should be given more careful scrutiny or viewed with more circumspection than ought to be given to the testimony of any other witness.").

⁶⁵ See Muldoon, *supra* note 63, at § 19:213; see also *People v. Lopez*, 593 N.Y.S.2d 871 (App. Div. 1993) (finding that the trial court "improperly and inexplicably refused to instruct the jury that the testimony of a police officer, in and of itself, is entitled to no greater weight than that of an ordinary citizen"); *People v. Freier*, 644 N.Y.S.2d 306 (App. Div. 1996) ("[t]he court's failure to instruct the jury that the testimony of a police officer is entitled to no greater weight than the testimony of an ordinary citizen, warrants reversal.").

instructions specific to police officer testimony.⁶⁶ While some cases demonstrate successful attempts at introducing these jury instructions to eliminate jury bias,⁶⁷ there are those that refuse these same jury instructions for the same reason.⁶⁸

⁶⁶ Compare *infra* note 67 and accompanying text with *infra* note 68 and accompanying text.

⁶⁷ *People v. Hill*, 952 P.2d 673, 696–97 (Cal. 1998) (holding that “the court should have instructed the jury *sua sponte* not to give [officer] testimony any artificial weight merely because he was a [uniformed officer].”). This holding is also noteworthy because the appellate court held that the lower court had a duty to introduce such an instruction *sua sponte* in the absence of a request from either party. *Id.* This speaks to the requirement that such a jury instruction should be uniformly required across all cases that deal with police testimony (and this paper would argue, especially where the case is dealing with police brutality) whether or not either party has expressly required such an instruction. The California Supreme Court held that officer testimony-specific jury instructions “are necessary to avoid any unfairness to an accused.” *Id.* at 697. See also *Datsko v. Philadelphia*, No. CIV.A. 93–4746, 1995 WL 574364, at *2 (E.D. Pa. 1995) (“Any possible prejudice that may result from the officers’ uniforms can be corrected with the usual instruction to the jury that testimony should not be accorded enhanced credibility simply because the witness was a police officer.”); *Lloyd v. Riley*, No. CV-88-2847, 1990 WL 59592, at *2 (E.D.N.Y. 1990) *aff’d*, 930 F.2d 911 (2d Cir. 1991) (finding that “[t]he court had authority to exercise its discretion to allow the witness to testify in uniform after providing the jury with a cautionary instruction.”); *People v. Freier*, 644 N.Y.S.2d 306, 307 (App. Div. 1996) (The lower court’s “failure to instruct the jury that the testimony of a police officer is entitled to no greater weight than the testimony of an ordinary citizen, warrants reversal[.]”).

⁶⁸ In *United States v. Alston*, the Sixth Circuit denied the defendant’s proposed instruction because the “jury was [already] given lengthy instructions on considerations to make when determining witness credibility.” *United States v. Alston*, 375 F.3d 408, 412 (6th Cir. 2004). Reasoning that the instruction the district court judge gave “invites jurors to think about whether witnesses, such as the officers, may be biased because of their relationship with the government,” the court ultimately held that the district court did not abuse its discretion. *Id.* The Sixth Circuit in *United States v. Chesney* maintained that it would reverse a conviction “for failure to give a requested jury instruction only when: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is not substantially covered by other delivered instructions; and (3) the failure to give the instruction impairs the defendant’s theory of the case.” *United States v. Chesney*, 86 F.3d 564, 573 (6th Cir. 1996). See also *Mahorney v. Wallman*, 917 F.2d 469, 473 n.3 (10th Cir. 1990) (observing that “while the prosecution may not attempt to bolster the credibility of its law enforcement witnesses by emphasizing their status as government officers . . . the defendant is not entitled to specific advisory instructions[.]”); *United States v. Sotelo-Murillo*, 887 F.2d 176, 182 (9th Cir. 1989); *United States v. Wright*, 542 F.2d 975, 989 (7th Cir. 1976) (defendant unsuccessfully argued that the trial court erred in its refusal to give a specific jury instruction with respect to testimony of law enforcement witnesses). There, the Seventh Circuit affirmed the trial court’s denial of the defendant’s request for a jury instruction, reasoning that “no additional weight should be given to the testimony of law enforcement officers because of that status . . . [because] . . . the jury was otherwise adequately instructed in weighing the testimony of witnesses including law enforcement officers.” *Id.* In *Bush v. United States*, the United States Court of Appeals, District of Columbia Circuit held that if “he works openly in uniform or covertly in ‘plain clothes’ has no significance which affords any basis whatever for a rule that jurors must be warned to view him with suspicion or consider his testimony with caution.” *Bush v. United States*, 375 F.2d 602, 604–05 (D.C. Cir. 1967). See also *Austin v. State*, 784 So.2d 186, 193 (Miss. 2001) (There is no error when a court denies a jury

In 1983 the Supreme Court reviewed a case involving police brutality in *Briscoe v. LaHue*.⁶⁹ There, the Supreme Court agreed that the policeman “carries special credibility with jurors.”⁷⁰ Although this case did not deal directly with instances of police brutality, it aptly demonstrated how police testimony carries such weight that it is able to manipulate the outcome of a case. Specifically, the case addressed whether 42 U.S.C. § 1983 allowed a convicted person to bring a claim under the Civil Rights Act against a police officer who had offered perjured testimony in trial.⁷¹ Petitioners alleged that by falsely claiming that petitioners had an opportunity to “harmonize their stories,” the testifying officer prejudiced the jury and diminished the petitioners’ own testimony.⁷² The Court agreed.⁷³

As *Briscoe* demonstrates, and as the Court held, “perjured testimony by police officers is likely to be more damaging to constitutional rights than such testimony by ordinary citizens, because the policeman . . . carries special credibility in the eyes of jurors.”⁷⁴ Furthermore, the threat of perjury for police officers who “cooperate regularly with prosecutors in the enforcement of criminal law” is such

instruction on the weight to give to the testimony of law enforcement officers but instead instructs the jury on its role as fact-finder in which it is to determine for itself what weight and credibility to give to the testimony of each witness.); *State v. Smith*, 19 P.3d 254, 263 (N.M. 2001); *Hicks v. United States*, 658 A.2d 200, 202 (D.C. 1995) (“In the absence of some unusual circumstance necessitating a special instruction, a general credibility instruction is ordinarily sufficient.”); *See also* *People v. Roche*, 157 P.2d 440, 440-41 (Cal. App. 1945) (finding that where the only two witnesses who testified were police officers and neither gave any testimony that was improbable, impossible, or in conflict with any physical facts, and court in general charge instructed on presumption of innocence, criminal intent, reasonable doubt, and power of jurors to properly weigh evidence, refusal to give requested instruction that testimony of police officers is to be judged by same standards as that of any other witness and that jury was not compelled to decide in favor of prosecution because case was presented through police officers was not prejudicial); *People v. Hanna*, 36 Cal. App. 2d 333, 337 (2d Dist. 1939) (holding that the court properly refused an instruction that jurors must use care in weighing police officers’ testimony because of officers’ tendency to procure and state evidence against the accused to justify the arrest because jurors are to judge police officer testimony by the same standards that apply to other witnesses); *People v. Vuyacich*, 57 Cal. App. 233, 236 (1st Dist. 1922) (affirming the trial court’s decision not to give a jury instruction regarding the weight of peace officer testimony); *People v. Rudolph*, 28 Cal.App. 683, 686 (3d Dist. 1915) (rejecting an instruction regarding risk of juror biases developed as a result of police testimony).

⁶⁹ *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983).

⁷⁰ *Id.*

⁷¹ *Id.* at 326.

⁷² *Id.* at 327.

⁷³ *Id.* at 342.

⁷⁴ *Id.*

an unlikely consequence “that it is not an effective substitute for civil damages.”⁷⁵ The Court was clear: since a testifying policeman serves the same function as any other witness in court, the jury must be made aware that police testimony cannot carry any extra weight.⁷⁶ To do so would violate a defendant’s civil rights.⁷⁷

Several courts across the country have since applied this standard and provided a jury instruction to prevent an evidentiary bias.⁷⁸ Most recently, an appellate court in Connecticut “provided a thorough charge to the jury, including an instruction that the testimony of a police officer should not be viewed differently from that of a layperson.”⁷⁹ This decision is especially noteworthy because the court also noted that “in the context of the entire trial, including the closing arguments and the jury instructions,” the added instruction to bar the jury from granting extra weight to police testimony did not introduce prejudice.⁸⁰

Case dockets from across the country are replete with examples of other cases that found that the jury instruction does not pose the threat of prejudice, but rather alleviates the potential for biases.⁸¹ As

⁷⁵ *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *supra* note 67 and accompanying text.

⁷⁹ *State v. Edward M.*, 41 A.3d 1165, 1182 (Conn. App. Ct. 2012).

⁸⁰ *Id.*

⁸¹ *United States v. Alston*, 375 F.3d 408, 412 (6th Cir. 2004) (treating as legitimate the concern that jurors might accord greater weight to law enforcement officers’ testimony because of their status, but holding that under the circumstances the concern was adequately addressed by the jury instructions); *United States v. Victoria-Peguero*, 920 F.2d 77, 85 (1st Cir. 1990) (holding that instructions at beginning and end of trial that “government agents are entitled to no more credibility than any other witness” was “sufficient to counter any harm caused by the judge’s omission of the requested voir dire inquiries.”); *Lloyd v. Riley*, No. CV-88-2847, 1990 WL 59592, at *2 (E.D.N.Y. May 3, 1990) *aff’d*, 930 F.2d 911 (2d Cir. 1991) (finding that “[t]he court had authority to exercise its discretion to allow the witness to testify in uniform after providing the jury with a cautionary instruction.”); *People v. Hill*, 952 P.2d 673, 696–697 (Cal. 1998). In *Datsko v. City of Philadelphia*, the court held that “[a]ny possible prejudice that may result from the officers’ uniforms can be corrected with the usual instruction to the jury that testimony should not be accorded enhanced credibility simply because the witness was a police officer.” *Datsko v. City of Philadelphia*, No. CIV.A. 93–4746, 1995 WL 574364, at *2 (E.D. Pa. 1995). In *People v. Freier*, the court held that “the [lower] court’s failure to instruct the jury that the testimony of a police officer is entitled to no greater weight than the testimony of an ordinary citizen, warrants reversal.” *People v. Freier*, 644 N.Y.S.2d 306, 307 (App. Div. 1996); see also *People v. Lopez*, 593 N.Y.S.2d 871, 872 (App. Div. 1993) (“The court improperly and inexplicably refused to instruct the jury that the testimony of a police officer, in and of itself, is entitled to no greater weight than that of an ordinary citizen.”).

these cases demonstrate, the threat is not in introducing a new jury instruction to affirm, and in some cases reaffirm, that police testimony cannot and does not carry extra evidentiary weight. Indeed, as the history of rising police brutality in this country continues to make clear, the real threat is in *not* immediately introducing a new jury instruction.

Admittedly, there have also been cases in the United States that do not agree; these cases hold that an additional jury instruction directing the jury not to give any additional weight to police testimony is reversible error. For example, in 2006 the Michigan Court of Appeals held that the trial court did not err in refusing to give such an instruction.⁸² In *People v. Davis*, the court explained that the jury had been instructed “numerous times during jury selection to decide the case on the merits and not to give ‘greater weight or lesser weight to the testimony of a witness because he’s a police officer or a lay witness.’”⁸³ And, before jury deliberations began, “the court instructed the jury that it must ‘decide the credibility of the witnesses’ and that the prosecution and defense witnesses should be viewed the same.”⁸⁴ The court held that “taken as a whole,” this combination of instructions was sufficient to protect the defendant’s rights.⁸⁵

The *Davis* court had given a general instruction to the jury (both during *voir dire* and prior to deliberation) that the jury should not give any piece of evidence—or witness testimony—greater weight than another.⁸⁶ Several other cases reach this decision based on a finding that the court had given a similar general instruction.⁸⁷ However, other courts have reached the same conclusion without any such finding.⁸⁸ Specifically, there are courts that deny a specific instruction regarding the weight of police testimony, *in the absence of* a general instruction on the weight of all the evidence.⁸⁹ The degree of harm

⁸² *People v. Davis*, No. 261987, 2006 WL 1751848, at *5 (Mich. Ct. App. June 27, 2006).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *Mahorney v. Wallman*, 917 F.2d 469, 473 n. 3 (10th Cir. 1990); *United States v. Sotelo-Murillo*, 887 F.2d 176, 182 (9th Cir. 1989); *United States v. Wright*, 542 F.2d 975 (7th Cir. 1976); *Austin v. State*, 784 So. 2d 186, 192-93 (Miss. 2001); *State v. Smith*, 19 P.3d 254, 263-64 (N.M. 2001); *Hicks v. United States*, 658 A.2d 200, 202 (D.C. 1995).

⁸⁸ See *infra* note 89 and accompanying text.

⁸⁹ See *United States v. Chesney*, 86 F.3d 564, 573 (6th Cir. 1996) (The court maintained that a conviction would only be reversed “for failure to give a requested jury instruction only when:

caused by the decisions of these latter courts is especially concerning. While in the instance of a general instruction the jury hears, at least once, that all evidence must be weighed equally,⁹⁰ in the absence of even a general instruction, a jury may be moved by police authority to weigh such testimony more heavily than lay person testimony.

These cases, regardless of their respective success or failures in attempting to enter police officer testimony-specific jury instructions, lend further support to the legitimate concern that jurors may, in some instances, be inclined to give testimony from a police officer particular weight because of the respect and credibility customarily associated with law enforcement. The adverse effect of this phenomenon is that jurors' considerations of factual issues may be tainted by an unreliable, yet seemingly credible source.

The absence of a nationwide standard is evident. The discrepancy in implementing police testimony-specific jury instructions is part of the problem. Courts, in an attempt to adhere to their respective state statutes and required jury instructions, have often impeded justice by disallowing jury instructions specific to uniformed officer testimony. In these circumstances, courts typically refuse to give special jury instructions explaining that the jury is not to give additional weight to law enforcement testimony because of the officer's status; the courts believe existing instructions adequately instruct the jury in weighing law enforcement testimony.⁹¹ In following this line of thought, courts have essentially refused to implement a more specific and effective jury instruction, simply because a barely-sufficient jury instruction is already in existence. The problem with this, however, is that these courts' decisions adversely effect a legitimate concern—that is, the need for a more specific jury instruction entirely. Given the apparent relationship between police brutality investigations and police testimony, it is imperative that there be a standard to address the possible

(1) the requested instruction is a correct statement of the law; (2) the requested instruction is not substantially covered by other delivered instructions; and (3) the failure to give the instruction impairs the defendant's theory of the case." See also *Bush v. United States*, 375 F.2d 602, 604-05 (D.C. Cir. 1967); *People v. Roche*, 157 P.2d 2d 440, 440-41 (Cal. App. 1945); *People v. Hanna*, 36 Cal.App.2d 333, 337 (2d Dist. 1939); *People v. Vuyacich*, 57 Cal.App. 233, 236 (1st Dist. 1922); *People v. Rudolph*, 28 Cal.App. 683, 686-87 (3d Dist. 1915) (rejecting an instruction regarding risk of juror biases developed as a result of police testimony).

⁹⁰ See e.g., *People v. Davis*, No. 261987, 2006 WL 1751848, at *5 (Mich. Ct. App. 2006).

⁹¹ See e.g., *People v. Rudolph*, 28 Cal.App. 683, 686-87 (3d. 1915) (rejecting an instruction regarding risk of juror biases developed as a result of police testimony).

bias that police testimony may cause in police brutality investigations and minority prosecution.

III. ANALYSIS: HOW THE COURTS CAN ACT TO CURE THE POLICE BRUTALITY ENDEMIC

When you have police officers who abuse citizens,
you erode public confidence in law enforcement.

—Mary Frances Berry⁹²

The climate surrounding police brutality cases is becoming increasingly hostile. If the aftermath of the Michael Brown case has left behind any legacy, it is that this behavior cannot continue without serious, dire consequences.⁹³ And, these consequences will not come in the form of evenhanded justice. Instead, communities of people who feel they are harmed by the police, who feel threatened by ongoing police violence, and who feel the government will not step in to protect their lives and liberties will take steps to ensure their own justice.⁹⁴ In these circumstances, neither the state nor well-meaning officers can hope to regain control.⁹⁵ The mistrust will breed for generations to come, compromising legal enforcement efforts and community safety.

Meanwhile, the Blue Wall of Silence further cushions police officers from liability, protecting their unlawful conduct without any real repercussions.⁹⁶ These circumstances, coupled with ongoing police violence, the current social climate, and the lack of wholly sufficient jury instructions to protect against prejudicial police testimony in court are breeding bad news for safety and legal validity for years to come.⁹⁷ Accordingly, courts are in a unique position to combat all these ailments. Namely, by providing an avenue where wronged par-

⁹² Maria Hinojosa, *Civil Rights Panel Probes NYC Police*, CNN.COM (May 26, 1999, 11:18 AM), <http://www.cnn.com/US/9905/26/nypd.probe/index.html>.

⁹³ *The Damage in Ferguson*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/interactive/2014/11/25/us/ferguson-photos.html> (discussing the damage the rioting has caused in Ferguson, Missouri).

⁹⁴ See The Editorial Board, *The Meaning of the Ferguson Riots*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/2014/11/26/opinion/the-meaning-of-the-ferguson-riots.html?_r=0 (discussing the aftermath of the destructive riots following the Ferguson grand jury decision).

⁹⁵ *Id.*

⁹⁶ See *supra* note 13 and accompanying text.

⁹⁷ See Legal Framework: Police Testimony and Jury Instructions, *supra* Part II.

ties can come to seek actual retribution, or even to analyze whether they have suffered a harm, courts can take steps to diminish police brutality in the future while providing retribution to those already harmed.

A. *Jury Instruction Requirement*

The first solution to the problem of police brutality must come in the form of a mandatory, uniform jury instruction that is specific to uniformed officers, which instructs the jury not to give added weight to police testimony. There are courts across the country that have already implemented this solution and their trials provide an opportunity to distinguish instructions that work from those that fail.

An example of a successful jury instruction is one that is direct, specific, and appropriately narrow such that it leaves no room for misinterpretation. Indeed, jurors are faced with absorbing so much information that jury instructions must be clear to help in the jury's evidentiary analysis. An appropriate instruction would take the following proposed form:

In reviewing the evidence presented before you today, and in reaching your decision, you must not assess the testimony of a uniformed police officer differently from that of a layperson. Additionally, you must not grant any additional weight to the testimony of uniformed police officers in comparison to layperson testimony.

Any juror that acts on a bias towards police testimony following this instruction does so in direct violation of this jury instruction.

The First Circuit adopted one such successful instruction that reads as follows: "Remember, as I told you before, that government agents are entitled to no more credibility than any other witness."⁹⁸ Likewise, the Second Circuit has affirmed a lower court's decision to read the following jury instruction: "You must not give this witness's testimony greater or lesser weight because he testified while in uniform. You must weigh his testimony and his credibility the same way that you will weight [*sic*] the testimony and credibility of another witness."⁹⁹

⁹⁸ U.S. v. Victoria-Peguro, 920 F.2d 77, 85 (1st Cir. 1990).

⁹⁹ Lloyd v. Riley, No. CV-88-2847, 1990 WL 59592, at *2 (E.D.N.Y. 1990), *aff'd*. 930 F.2d 911 (2d Cir. 1991).

Both of these instructions were successful because they were succinct, but also effective in conveying the purpose. Jurors are often entirely unskilled in legal education and procedure. Therefore, trial proceedings are confusing and difficult to digest in their entirety. To add convoluted jury instructions to the mix would breed unclear and unsupported verdicts that are vulnerable to remand. Instead, a carefully crafted instruction that speaks to the concerns for prejudice inherent in police testimony can take an extra step to ensure just, valid, and sound verdicts.

There are also “hybrid” instructions that have admirable qualities, but ultimately fall short of an adequate and effective instruction. Facially, these instructions give a jury instruction that appears satisfactory, but have the arguable effect of encouraging jurors to consider witnesses’ backgrounds in assessing their credibility, thus inviting jurors to give more weight to police officers’ testimony. An instruction offered by a Michigan court is a perfect example of a “hybrid” instruction. In *Holman v. Renico* the court offered the following instruction:

We had some witnesses here who were police officers. You need to know that a police officer isn’t entitled to any extra credibility by virtue of the uniform, the badge and the title. But neither is a police officer’s credibility to be automatically diminished in your eyes because he or she is a police officer.

I’m not telling you to ignore the fact that a witness is a police officer. I’m not telling you to ignore [sic] witness’ background. Background can often help you understand where the person is coming from, what they mean, why they said what they did, why they saw what they did, whatever.

So, background is important, but you don’t by virtue of a person’s background, be it a police officer or something else, treat the person as automatically more credible or automatically less credible. Background is a consideration, but all witnesses are to be treated the same. And if you give a person’s background due weight, you’re treating everyone the same.¹⁰⁰

Initially, the instruction is off to a good start. It begins by laying a foundation to introduce the instruction: “[w]e had some witnesses

¹⁰⁰ *Holman v. Renico*, No. 05-CV-70359, 2006 WL 3105839, at *6 (E.D. Mich. 2006).

here who were police officers.”¹⁰¹ Such an introduction is helpful because it draws the minds of the jury members to the portions of the evidentiary record that this instruction will implicate. This focus further strengthens the effect of the instruction. The next bit is also well put: “[y]ou need to know that a police officer isn’t entitled to any extra credibility by virtue of the uniform, the badge and the title.”¹⁰² Having drawn the jury’s attention to the relevant evidence, the instruction has gone on to explain that police testimony must carry the same weight as other testimony, irrespective of the police officer’s aesthetic attributes—the uniform and the badge.

Had the instruction ended at this point, it would have been a more than adequate police officer testimony-specific jury instruction. Unfortunately, from then on the instruction quickly diminishes into an imprecise ramble. The instruction goes on to say: “[b]ut neither is a police officer’s credibility to be automatically diminished in your eyes because he or she is a police officer.”¹⁰³ Now, the jury bears the burden of drawing the fine line between not granting any extra credibility to the police testimony and not diminishing that same testimony by virtue of those qualifications.

The instruction proceeds to make divergent statements that are likely to confuse any jury. In any case, the instruction is not clear about what weight a jury can give to police testimony and how the jury can evaluate testimony in light of the witnesses’ varying backgrounds. The instruction has convoluted the earlier, clear message, when in reality, the instruction would have been ideal had it stopped at “the badge and the title”. Towards the end, the instruction reads that “background is important” but it is not grounds to hold a witness as “automatically more credible or automatically less credible.”¹⁰⁴ Having earlier said that a police officer’s testimony cannot be given more weight in light of background (the officer’s title), the instruction now suggests that “[b]ackground can often help you understand where the person is coming from, what they mean, why they said what they did, why they saw what they did, whatever.”¹⁰⁵ And so, the juror is

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

charged with giving each testifying witness's background "due weight."¹⁰⁶

Here, the latter portion of the argument contradicts the earlier portion so the jury is left wondering whether it may consider a witness's background, whether it must ignore background entirely, or whether it must give "due weight" to background. The instruction to give each witness's background "due weight" is a highly problematic instruction because it circles back to the same threat that police testimony will carry more weight to the detriment of the defendant's evidence. The jury will presume that the police officer's background is worthy of more weight in light of the uniform, badge, and title, perpetuating the officer testimony prejudice. And so, in adding more detail, the jury instruction has served only to thwart its own efforts.

Legislatures must also take care not to settle for inadequate jury instructions. The example of *Holman v. Renico* points to the importance of constructing an effective and understandable jury instruction. Case law is replete with examples of failed and successful instructions.¹⁰⁷ It is certainly plausible that in light of these cases, a legislature can put together a uniform instruction that aims to counteract the inherent bias that police testimony carries.

B. *Recording Requirement*

In addition to the jury instruction, police officers should also be required to record all interactions with civilians. Specifically, these interactions should be tracked, recorded, and immediately streamed to local headquarters where they will be stored in the case of a future trial. Recording police officer interactions would serve a number of purposes. First, by recording police interactions, officers are more likely to be wary of their actions; they are more likely to think twice before violating individuals' civil rights. Second, by having the record, police officers will be less credible if they lie, misstate, or exaggerate the circumstances of their interaction. Prosecutors and defendants will not need to hunt down witnesses to paint a picture of what happened during a police interaction. Instead, assuming evidence rules are satisfied, the exact circumstances of the interaction at issue will be available for a jury to review, analyze, and judge in coming to its deci-

¹⁰⁶ *Holman v. Renico*, No. 05-CV-70359, 2006 WL 3105839, at *6 (E.D. Mich. 2006).

¹⁰⁷ See Legal Framework: Police Testimony and Jury Instructions, *supra* Part II.

sion. Finally, these recordings would serve as incomparable training tools—both instructive in how to act and how not to act. Indeed, for the well-meaning and innocent officer who is carrying out duties and following instructions, these videos will also serve to negate liability.

It is important to note that these proposed changes are not meant to take power, control, or decision-making ability away from police officers. Officers risk their lives as a regular part of their jobs to protect and serve their communities. As such, these proposed changes only aim to protect those officers who stay true to their duties and to weed out those “bad seeds” who are responsible for this endemic.

C. *Training Requirement*

Furthermore, police forces must be required to undergo better training programs to equip them to handle dangerous situations (without resorting to unnecessary force and violence) while protecting themselves and their communities. For example, officers should be required to take implicit bias tests¹⁰⁸ that review an individual’s implicit (and often times unknown) biases.¹⁰⁹ It is understandable, for example, that an officer reacts more defensively towards an individual from a specific group of people without previously knowing of a bias towards that group. However, these tests will serve to prevent such surprises. These tests will give officers the opportunity to learn about their biases, review the impact of their biases, and hold themselves accountable for their future reactions.

It is unfortunate that police forces across the country are likely suffering from economic hardships like all sectors of society. And so, it is understandable that not all forces will be able to implement those changes necessary to combat all biases or overcome all prejudices.

¹⁰⁸ Project Implicit, *Harvard University*, available at <https://implicit.harvard.edu/implicit/>. This is a site, operated by Harvard University that provides a multitude of tests to test for various biases. After taking the test, the subject can review the results. This site and these tests are entirely free. The compute generates the review afterwards so there is no opportunity to review the results with a professional, but at the very least it provides an introduction to individual biases. A police force could review these same results and refer officers to speak to a professional as necessary. For example, if an officer has a strong bias against one minority group, and that officer works in a community primarily occupied by that minority group, it would be well-advised that the officer should seek counseling to overcome the bias or learn not to act upon the bias. At the very least, knowledge of such a bias beforehand eliminates any potential argument in the future that an officer acted unaware of his implicit biases.

¹⁰⁹ See Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON CIV. RIGHTS L.J. 1 (2015).

However, this excuse is unacceptable. There are a variety of resources available without cost, or at a lowered cost—such as online psychological evaluations¹¹⁰ and reduced cost counseling opportunities.¹¹¹ In any case, the cost of sufficient training cannot serve as a deterrent. There can no longer be any doubt that the lack of training has become a threat to human life and liberty. This cannot continue unnoticed in the United States of America.

D. *Slivers of Hope*

As a tribute to this country’s ability to adapt, improve, and move forward, there are several instances that show a solution to America’s police brutality disease exists.¹¹² For example, on April 1, 2015, a New York police detective was relegated to desk duty after he was found to have confronted a driver in “an angry, profanity-laced tirade.”¹¹³ The New York Police Chief has commented that this decision comes at a time of “historically low crime” when the police force is attempting to retrain officers to interact with the community to improve relations.¹¹⁴

It is also noteworthy that this decision came after the driver posted a video on YouTube documenting the interaction.¹¹⁵ The video has since gone viral.¹¹⁶ The presence of the YouTube video and the resultant decision to demote the police detective to desk duty speaks to the proposition above, that requiring police officers to record all interactions with civilians will streamline the process and compel the police force, the officers, and civilians to obey the pillars of justice in resolving the ensuing conflict.¹¹⁷

In another instance, Governor Doug Ducey of Arizona vetoed a bill on March 30, 2015 that would prohibit “law enforcement agencies

¹¹⁰ See Jan Hoffman, *When Your Therapist Is Only a Click Away*, N.Y. TIMES (Sep. 23, 2011), <http://www.nytimes.com/2011/09/25/fashion/therapists-are-seeing-patients-online.html>.

¹¹¹ See Lesley Alderman, *How to Find Mental Health Care When Money Is Tight*, N.Y. TIMES (Nov. 20, 2009), <http://www.nytimes.com/2009/11/21/health/21patient.html>.

¹¹² The events discussed herein are recent as of April 23, 2015.

¹¹³ Al Baker, *New York Detective Put on Desk Duty After Tirade With Uber Driver*, N.Y. TIMES (Apr. 1, 2015), http://www.nytimes.com/2015/04/02/nyregion/new-york-detective-put-on-desk-duty-after-tirade-with-uber-driver.html?ref=topics&_r=0.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ John Callegari and AMNY Staff, *NYPD Cop in Viral Video Apologizes for Rant Against Uber Driver*, NEWSDAY (Apr. 4, 2015), <http://www.newsday.com/news/new-york/patrick-cherry-nypd-detective-in-viral-video-apologizes-to-uber-driver-for-angry-rant-1.10197332>.

¹¹⁷ See *supra* Part III.B.

from releasing the names of officers involved in serious or fatal shootings for 60 days.”¹¹⁸ While the Governor noted that proponents of the bill have been arguing that the 60 day period is necessary to protect the officers, the Governor explained that he vetoed the bill because it would “add distrust or adversarial relationships” between civilians and law enforcement personnel.¹¹⁹ Acknowledging the importance of rebuilding trust between the community and police officers, Governor Ducey explained that the community had a right to know the identities of police officers involved in serious or fatal shootings because the police officer is ultimately accountable to his community.¹²⁰

Finally, coming full circle to Michael Brown’s hometown of Ferguson, Missouri, the new acting police chief has begun to take steps to rehabilitate the police force and its relations with the community.¹²¹ These changes come in response to “the Justice Department’s primary recommendations for the Police Department” in Ferguson.¹²² Specifically, police Chief Alan Eickhoff is “working to better integrate his officers with the community by putting them on more bike patrols and encouraging them to walk the beat and speak with residents.”¹²³ Chief Eickhoff “conceded that many of his officers were still worried about their safety as anger continues after” the Michael Brown tragedy.¹²⁴ Nonetheless, Chief Eickhoff has chosen to take the initiative to move away from Michael Brown’s murder, toward improved relations between the police and Ferguson. If Ferguson can rise from its ashes and begin to implement changes in response to the Michael Brown legacy, then the rest of the country must also rise to meet its obligation to prevent a civilian from falling to the hands of police brutality ever again.¹²⁵

¹¹⁸ Rick Rojas, *Arizona Governor Vetoes Bill to Shield Police Names*, N.Y. TIMES (Mar. 30, 2015), <http://www.nytimes.com/2015/03/31/us/politics/arizona-governor-doug-ducey-vetoes-holding-back-the-names-of-officers-in-shootings.html?ref=topics>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See John Eligon, *Ferguson Chief Takes Steps Urged in Report*, N.Y. TIMES (Mar. 26, 2015), <http://www.nytimes.com/2015/03/27/us/ferguson-chief-takes-steps-urged-in-report.html?ref=topics>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ As of April 13, 2015, there have been recent instances of police brutality resulting in the killings of unarmed African-American males. On April 4, 2015, Walter Scott, an unarmed, 50-year-old, African-American male, was shot and killed by former Officer Michael Slager, a white South Carolina police officer. Alan Blinder & Timothy Williams, *Ex-South Carolina Officer is*

IV. CONCLUSION

In Ferguson and other towns across America, the key to change lies not only in community policing and local political reform, but also in legal reform. Although courts are unable to control the everyday interactions police have with minorities, they do have the ability to impact the role police testimony plays in police brutality prosecution cases.

This paper has reviewed the history of police brutality in this country and courts' varying approaches in presiding over these cases. While some courts have allowed¹²⁶ a specific instruction¹²⁷ that the jury cannot give more weight to police testimony over lay person testimony,¹²⁸ others have denied the instruction, arguing that such an instruction would pose an undue prejudice.¹²⁹ This paper argues that in the climate of police brutality that has infected this country for decades, all courts must be uniformly required¹³⁰ to give the jury a specific instruction not to grant any additional weight to police testi-

Indicted in Shooting Death of Black Man, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html>; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>. Former Officer Michael Slager has been charged with Murder. *Id.* Additionally, on April 13, 2015, Robert Charles Bates, a white, 73-year-old volunteer sheriff's deputy, shot and killed Eric Courtney Harris, a 44-year-old, African-American male. John Bacon & William M. Welch, *Tulsa Reserve Deputy Charged With Manslaughter*, USA TODAY (Apr. 13, 2015), <http://www.usatoday.com/story/news/nation/2015/04/13/oklahoma-shooting-video/25702233/>; Richard Pérez-Peña & Michael Wines, *Volunteer Sheriff Is Charged in Killing After Mistaking Handgun for Taser*, N.Y. TIMES (Apr. 13, 2015), <http://www.nytimes.com/2015/04/14/us/volunteer-deputy-charged-with-manslaughter-after-mistaking-handgun-for-taser.html>. Mr. Bates said that he meant to pull his Taser, but instead drew his gun. John Bacon & William M. Welch, *Tulsa Reserve Deputy Charged With Manslaughter*, USA TODAY (Apr. 13, 2015), <http://www.usatoday.com/story/news/nation/2015/04/13/oklahoma-shooting-video/25702233/>. Mr. Bates has been charged with second-degree manslaughter. *Id.*

¹²⁶ At least one court has held that even where neither party asks for a specific instruction, the court has an obligation to instruct the jury *sua sponte* to weigh police testimony the same as lay person testimony. *See* *People v. Hill*, 952 P.2d 673, 696 (Cal. 1998).

¹²⁷ There are cases that allow for a specific instruction *in addition* to a general instruction regarding the equal weight of all testimony and cases that allow for the specific instruction, but do not speak to whether a general requirement is also required, or given. *See* *Burdine v. State*, 646 N.E. 2d 696, 699 (Ind. Ct. App. 1995); *State v. Lawwill*, No. 88251, 2007 WL 1559563, at *8-*9 (Ohio Ct. App. 2007).

¹²⁸ *See supra* note 67 and accompanying text.

¹²⁹ *See supra* note 68 and accompanying text.

¹³⁰ This shall include federal and state level courts dealing with both criminal and civil cases of police brutality.

mony.¹³¹ Courts must be required to give a police officer testimony-specific jury instruction regardless of whether a court also gave a general instruction—either during jury selection or prior to deliberation—that the jury must give equal weight to all evidence. The purpose of such an instruction is to ensure that the jury understands the purpose of the instruction. To the extent there is an overlap between the general and specific instruction, the overlap will only serve to reinforce the principle. Additionally, police officers should be required to record all interactions with civilians to establish an evidentiary record. Finally, police officers must be required to undergo testing to determine and resolve biases and psychological impediments that may result in undue brutality and violence.

While the duty to protect and serve the public falls on the police, the court system is in the unique position to help our “boys in blue” as a whole move back towards that standard and away from the deadly legacy the “bad seeds” have built. Only when courts and police departments implement changes to combat the police brutality endemic can we hope to overcome the rising hostility between police officers and their communities, while limiting the biases that jurors may unjustly form in minority prosecution cases.

¹³¹ See *supra* notes 93–99 and accompanying text.