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ESSAY

Restoring Community Dignity Following Police Misconduct

JOHN FELIPE ACEVEDO*

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INTRODUCTION

Ferguson, Baltimore, New York, and Charleston: the problem of police misconduct has been surfacing around the country with troubling regularity.[1] Many of the victims or their families have successfully pursued civil suits against the police departments accused of misconduct. At the same time—and as Eric Garner's family suggested at the conclusion of their legal dispute with the New York Police Department—if we are to learn anything from these events, it must be that existing remedies do not resolve the harms caused by police misconduct.[2] The outrage caused by "Ferguson encounters" is about more than the loss of time or money to individuals or families; it is, at heart, about a loss of dignity suffered by wide swaths of the American public.

This Essay argues that one way to restore good relations between communities and their police departments is by expanding existing remedies to include remedies that help restore the dignity of victimized groups. Dignity restorations make sense in an environment marked by growing suspicion of police power, and American society has arguably been such an environment since 2001. An increase in security since the September 11th attacks, during the "War on Terror,"[3] and revelation of the NSA wiretaps and metadata tracking[4]

1. *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0 (Eric Garner's death was caused by the use of a chokehold by the NYPD when he was arrested for selling lose cigarettes); Rob Crilly, *Michael Brown: What the Ferguson Riots Tell Us About Race in America Today*, TELEGRAPH (Aug. 24, 2014, 7:05 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11052845/Michael-Brown-What-the-Ferguson-riots-tell-us-about-race-in-America-today.html (the problems in Ferguson began with the shooting of an unarmed black teenager, Michael Brown, by a Ferguson PD officer); Manny Fernandez, *North Charleston Police Shooting Not Justified, Experts Say*, N.Y. TIMES (Apr. 9, 2015), http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html (Walter Scott was shot in the back by a Charleston police officer as he fled following a routine traffic stop); Kevin Rector, *Officers Plead Not Guilty in Freddie Gray Case as Judge and Trial Date Selected*, BALT. SUN (June 22, 2015, 9:27 PM), http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-trial-date-20150622-story.html#page=1 (Freddie Gray died in police custody from severe spinal trauma he suffered).

2. *See* Josh Dawsey, *New York City Agrees to Pay Family of Eric Garner $5.9 Million*, WALL ST. J. (July 13, 2015, 11:11 PM), http://www.wsj.com/articles/new-york-agrees-to-pay-family-of-eric-garner-5-9-million-1436833250 (quoting Al Sharpton saying that "we cannot have a climate where people can be killed and the answer is to just give money and not give justice."); *see also* Sarah Begley, *New York City Reaches $5.9 Million Settlement with Eric Garner's Family*, TIME (July 13, 2015), www.time.com/3956619/eric-garner-settlement/.

3. *See, e.g.*, Andrew P. Napolitano, *When the Government Demands Silence—the Ugliness of the Patriot Act*, FOX NEWS (Mar. 21, 2013), http://www.foxnews.com/opinion/2013/03/21/when-government-demands-silence-ugliness-patriot-act.html (calling the Patriot Act the American

have all contributed to a lowering of trust between citizens and the police that demands attention.[5]

Ferguson encounters also have sparked a movement by minority communities, and especially by African Americans, to reassert their dignity. The "Black Lives Matter" campaign has made dignity one of its primary focal points along with the bodies of victims of police brutality.[6] But the legal and political salience of dignity is hardly limited to minority activists.[7] Just a few weeks ago, commentators all over the United States noted Justice Kennedy's extensive use of "dignity" in the majority opinion for *Obergefell v. Hodges*.[8] Kennedy justified the

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government's "chief instrument of repression of personal freedom"); *see also* Cassady Pitt, *U.S. Patriot Act and Racial Profiling: Are There Consequences of Discrimination?*, 25 MICH. SOC. REV. 53, 54 (2011) (arguing that "[n]ew laws pertaining to terrorism and counterterrorism. . . have challenged our ideals about constitutional laws protecting against racial profiling and discrimination."); *Surveillance Under the Patriot Act*, ACLU, https://www.aclu.org/infographic/surveillance-under-patriot-act (last visited Feb. 1, 2016) (analyzing how the Patriot Act undermines the right to privacy and other rights).

4. *See, e.g.*, Lauren C. Williams, *House Members Move to Repeal the Patriot Act with Strongest Anti-Surveillance Bill to Date*, THINKPROGRESS (Mar. 24, 2015, 3:39 PM), http://thinkprogress.org/election/2015/03/24/3638234/house-members-move-repeal-patriot-act-strongest-anti-surveillance-bill-date/ (noting that revelations of the wiretaps prompted "public outrage over *civil liberties violations* and calls for immediate reform" and discussing a move to end the collection of meta-data from all phone use within the United States); *see also* Kim Taipale, *Rethinking Foreign Intelligence Surveillance*, 23 WORLD POL'Y J. 77, 77 (2006–07) (pointing out areas of concern regarding the surveillance program but not ultimately arguing against it).

5. *See generally* ANTHONY STANFORD, COPPING OUT: THE CONSEQUENCES OF POLICE CORRUPTION AND MISCONDUCT (2015).

6. *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 10–11 (1997) (describing many Americans' views of interracial marriage by stating that "the thought of a 6 foot 8 inch barrel-chested Black man skinny-dipping in their European gene pool unhinged the 'Lily-putians.'"); TA-NEHISI COATES, BETWEEN THE WORLD AND ME 5–12 (2015); Orisanmi Burton, *Black Lives Matter: A Critique of Anthropology*, CULTURAL ANTHROPOLOGY (June 29, 2015), http://culanth.org/fieldsights/691-black-lives-matter-a-critique-of-anthropology (arguing that protestors are concerned "not only for Black lives, but also for Black *bodies*" and in particular that they are expressing "indignation for the ways in which Black bodies are targeted, corralled, and annihilated by the state"); *About Us*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Aug. 7, 2015) (declaring that the movement is interested in "talking about the ways in which Black lives are deprived of our basic human rights and dignity").

7. *See* Peter Allmark, *Death with Dignity*, 28 J. MED. ETHICS 255, 257 (2002) (defining "death with dignity" as the process of dying while living as well as possible, for example in a hospice).

8. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). On "dignity" in Justice Kennedy's majority opinion, see Nan D. Hunter, *The Undetermined Legacy of* 'Obergefell v. Hodges', NATION (June 29, 2015), http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/ (arguing that Justice Kennedy is attempting to create dignity-oriented foundation for rights and had previously included similar language in *Lawrence v. Texas*, but that it is not clear where this jurisprudence is headed); *see also* Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015, 4:16 PM), http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html (observing that dignity-based arguments work by simply shifting the stigma from one group to another rather than attacking the prejudice against homosexuals directly).

expansion of marriage to include same-sex relationships by linking civil liberties to the "personal choices central to individual dignity and autonomy."[9] He also drew parallels between the way marriage restrictions harmed the dignity of same-sex couples and the way coverture had harmed women's dignity until the nineteenth century.[10] The *Obergefell* majority decisively established that "dignity" is no mere rhetorical flourish, but a core element of the Fourteenth Amendment.[11] Same-sex couples "ask for equal dignity in the eyes of the law," wrote the majority, adding that "[t]he Constitution grants them that right."[12]

Dignity has also been gaining increasing salience in legal scholarship. Property law, for instance, has embraced the idea of dignity to describe the loss of real or personal property at the hands of the state.[13] "Dignity takings" occur when governments engage in takings that are extraordinary because they go beyond the forcible dispossession of land for a public purpose.[14] Importantly, this concept has well-defined limits. States commit "dignity takings" when they destroy or confiscate property without paying just compensation *or* without serving a legitimate public purpose because they deem the owners to be "sub-persons."[15] Dignity takings can occur in situations of internal displacement, genocide, apartheid, extreme corporal punishment, and systemic discrimination.[16]

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9. *Obergefell*, 135 S. Ct. at 2597.

10. *Id.* at 2603–04.

11. *Id.* at 2597 (citing Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

12. *Obergefell*, 135 S. Ct. at 2608.

13. *See* Bernadette Atuahene, *Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa*, 45 LAW & SOC'Y REV. 955, 964–68 (2009).

14. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law* 2000 UTAH L. REV. 1, 6 (2000).

15. BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 21 (2014) [hereinafter ATUAHENE, LEARNING]. *See generally* Bernadette Atuahene, *Property Rights & The Demands of Transformation*, 31 MICH. J. INT'L L. 765 (2010) [hereinafter Atuahene, *Property Rights*].

16. John F. Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and Massachusetts Bay*, 92 CHI.-KENT L. REV. (forthcoming April 2017) (applying the concept of dignity takings to instances where the state over-punished the defendant's body); Craig Albert, *No Place to Call Home: The Iraqi Kurds under Arabization, Saddam Hussein, and ISIS*, 92 CHI.-KENT L. REV. (forthcoming April 2017) (applying the concept of dignity takings to the oppression of Kurds in Iraq during the Saddam Hussein regime); Wouter Veraart, *Dignity Taking and the Restitution of Property Rights in the Netherlands and in France after WW-II*, 41 LAW & SOC. INQUIRY (forthcoming Aug. 2016) (describing the need for Germany and collaborative governments to provide dignity restoration following the second world war); Hendrik Hartog, *Marriage is an Honorable Estate*, 41 LAW & SOC. INQUIRY (forthcoming Aug. 2016) (discussing the applicability of the concept of dignity takings to the institution of coverture in the Common Law);

This Essay builds on the concept of "dignity takings" by arguing that takings theory is equally applicable to police brutality against the bodies of individuals when such brutality arises from the kind of systemic discrimination evident in Ferguson encounters. Part I further explores the concept of a dignity taking and shows how it applies to racially motivated police misconduct. Part II identifies current remedies for police misconduct using case law and investigations by the Department of Justice. It also demonstrates why these remedies are insufficient in many instances. Part III suggests new remedies that can be used in conjunction with the existing remedies to effect "dignity restorations" that better address the damage caused by police misconduct.

I. POLICE MISCONDUCT AS A DIGNITY TAKING

A "dignity taking" has five features: (1) a state directly or indirectly (2) destroys or confiscates property (3) from owners or occupiers (4) whom the state deems to be sub-persons (5) without paying just compensation *or* without serving a legitimate public purpose.[17] As it stands, this definition captures some elements of recent Ferguson encounters—it does, for example, cover instances where police misconduct destroys or results in the seizure of tangible property, and it might also include instances where police misconduct results in the levying of unlawful fines. But importantly, this understanding of dignity takings does not capture instances in which the police engage in beatings or extra-judicial killings of persons. Police brutality against a targeted group creates feelings of injustice and mistreatment which cannot be remedied by existing tort law.[18] For that reason, we need to take the difficult but important step of considering an individual's body to be her property.[19]

A. The Body as Property

The idea that an individual has a property interest in her own body can be traced to John Locke's seventeenth-century political the-

Alfred L. Brophy, *When More than Property is Lost: The Dignitary Losses and Gains in the Tulsa Riot of 1921*, 41 LAW & SOC. INQUIRY (forthcoming Aug. 2016) (applying the concept of dignity takings to the losses suffered by African Americans during the Tulsa race riot of 1921).

17. ATUAHENE, LEARNING, *supra* note 15, at 21, 26–34.

18. *See* Atuahene, *Property Rights*, *supra* note 15, at 11 (arguing that providing compensation "without considering the equity enhancing factors exhibits a myopic understanding of just compensation").

19. Acevedo, *supra* note 16.

ory.[20] In the *Second Treatise of Government*, Locke asserts that every person "has a *property* in his own *person:* this no body has any right to but himself."[21] Locke uses this proposition both as the basis of his condemnation of slavery and as the foundation of his theory of property.[22] There is a group of scholars who have pushed the limits of Locke's assertion by arguing that the government should only minimally interfere or regulate a person's body and any product or profit of labor performed by that body.[23] However, such assertions are not necessary for the purposes of finding that the police commit a dignity taking when they engage in brutality against individuals. Although the state must have good cause to act against the body of a person this is often met in the criminal justice system, which primarily acts against the body of the criminal defendant.[24]

Admittedly, American experiences with slavery make it difficult to accept the idea of the body as property.[25] Not only did slavery involve the objectification of persons as objects to be owned, but it also forced those same persons to participate in the process of objectification when it required them to buy back control over their bodies.[26] Still more troublingly, even the emancipation of slaves is strongly associated with "the body as property": Nancy Rose has argued that emancipation constituted a kind of taking (from slave owners), al-

20. John Locke, Second Treatise of Government 19 (C.B. Macpherson ed., 1980); *see also* Daniel Attas, *Freedom and Self-Ownership*, 26 Soc. Theory & Practice 1, 1 (2000) (asserting that all persons legally own their own body and calling this principle "self-ownership").

21. Locke, *supra* note 20, at 19. All quotations retain the original spelling and grammar without the use of "sic."

22. *See id.* (arguing that all property ownership originally comes from mixing labor with natural resources and consequently that a man's own body and the work of his hands are his property alone).

23. *See, e.g.*, Robert Nozick, Anarchy, State, and Utopia (2013). *But see* Alan Hyde, Bodies of Law 78 (1978); Attas, *supra* note 20, at 23 (calling on libertarian thinkers to abandon the idea of self-ownership because it must be supplemented by other rights and is consequently an insufficient basis for rights theory). This has also led conservative think tanks such as the Cato Institute to begin supporting and producing scholarship that is critical of the overreach of police actions both against the individual and persons' property. In a rare instance the left and right in America agree that it is time to reign in the police.

24. *See generally* Michel Foucault, Discipline and Punish (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (discussing the state's focus, beginning in the eighteenth century, on disciplining the body).

25. *See* Barbara L. Solow, *The Transatlantic Slave Trade: A New Census*, 58 Wm. & Mary Q. 9, 12–13 (2001) (discussing the importance of the Atlantic slave trade to early colonial commerce). *See generally* Margaret R. Hunt, The Middling Sort 4–8 (1996) (describing the institution of indentured servitude in the early modern era).

26. *See, e.g.*, Olaudah Equiano, The Interesting Narrative of the Life of Olaudah Equiano 132–34 (Robert J. Allison ed., 2d ed. 1995) (describing, among other things, how Equiano bought back his freedom using the money he earned conducting side trades while enslaved to a ship's captain).

though she acknowledges that the goal of this taking was to remedy a previous expropriation, "that is, of the slaves' bodies from themselves."[27]

But despite this troubled history, the idea of the body as property is entrenched in America's founding documents.[28] The body of a citizen is at once the property of the individual and the locus of a bundle of rights that the law recognizes and protects.[29] Although the Bill of Rights does not adopt Locke's strong assertion that the body is a person's property there are several areas that recognize the importance of a person's interest in their body in multiple locations: in the Fourth Amendment's prohibition against unreasonable searches and seizures; in the Fifth Amendment's due process clause; in the Eighth Amendment's prohibition against cruel and unusual punishment; and in the Fourteenth Amendment's due process clause.[30]

Similarly, the Supreme Court has recognized an interest in bodily integrity by requiring reasonableness before invasive searches are conducted on the bodies of criminal suspects.[31] The Court has also recognized a series of rights related to an individual's control over their own body including the rights to procreate,[32] engage in consensual sexual activity,[33] marry whom one pleases,[34] and refuse medical

27. Rose, *supra* note 14 at 24–25.

28. *See generally* DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY (2014).

29. HYDE, *supra* note 23, at 50.

30. U.S. CONST. amend. XIV.

31. *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 375 (2009) (holding that school children retained 4th Amendment protections in school. Further the degree of invasiveness of the search must be justified by both the level of suspicion and the seriousness of the item searched for. In the present case a search for over the counter medication based only on suspicion was insufficient to justify the turning out of the waistband of a student's undergarment and the partial removal of her bra).

32. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down the Oklahoma Habitual Criminal Sterilization Act for infringing on the basic liberty of procreation).

33. *See* Lawrence v. Texas, 539 U.S. 558, 565 (2003) (striking down laws criminalizing sodomy between consenting adults on the basis of privacy rejecting the dubious historical argument that sodomy had always been criminalized).

34. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the right to marry as a protected liberty interest while striking down Virginia's anti-miscegination statute); *see also* Zablocki v. Redhail, 434 U.S. 374, 374 (1978) (affirming the fundamental nature of the right to marriage in striking down a Wisconsin law that required all persons with minor children not in their care to be certified by the court that their child support payments were up to date before a marriage license was issued. Although recognizing a state interest in ensuring that child support payments were made the court held this was insufficiently related to marriage to justify the intrusion); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (upholding the right to marry as applied to same sex couples).

treatment options.[35] Finally, the Court has also recognized a person's interest in controlling their procreation by approving birth control and abortions.[36]

However, the Court has been reluctant to extend a property interests in parts of the body that are removed as part of medical procedures from a fear that such a recognition would have a chilling effect on medical research.[37] The Court has also declined to recognize a right to die.[38] Current law therefore recognizes a person's property interest in the integrity and control of one's body, but like all rights it is not an absolute property right.

B. Applying Dignity Takings to Police Misconduct

Police misconduct clearly involves state action,[39] but does it involve the destruction or confiscation of property (Factor No. 2), without just compensation or legitimate public purpose (Factor No. 5), because the state deems the targeted individuals to be sub-persons (Factor No. 4)?[40] This section argues that the answer in all three cases is "yes," and that we should consequently view racially motivated police brutality as a "dignity taking."

Regarding the destruction or confiscation of property (Factor No. 2), we might argue that the bodily damage caused by police brutality is often—but not always—temporary. However, given the heightened

35. *See* Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 281 (1990) (recognizing the right of an adult to refuse lifesaving medical treatment).

36. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down a Connecticut law that made it a crime to use or distribute contraceptives by finding the right of privacy in the penumbras and emanations of the First, Third, Fourth, and Fifth Amendments of the Constitution); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding that the right to privacy included a right to reproductive control for married couples in striking down a Massachusetts law that made it a crime for anyone other than a physician to provide contraceptives to a married couple); *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that a woman has the right to terminate a pregnancy before viability, but noting that the state has an interest in life post-viability); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (reaffirming the liberty interests in procreation and reproductive decision making, but abandoned the trimester interests articulated in Roe).

37. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 488–90 (1990). *But see* Lori B. Andrews, *My Body My Property*, 16 HASTINGS CTR. REP. 28 (1986) (arguing that "[d]onors, recipients, and society will benefit from a market in body parts so long as owners—and no one else—retain control over their bodies").

38. Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (holding that only rational basis applies as the Constitution does not imply a right to die).

39. *See, e.g.*, Elizabeth E. Joh, *The Paradox of Private Police*, 95 J. CRIM. L & CRIMINOLOGY 49, 49, 69 (2004) (observing that the law "recognizes a nearly absolute distinction between public and private" police forces and that "conventional research on the police . . . incorporate[s] Max Weber's definition of the state in terms of its monopoly over legitimate force").

40. ATUAHENE, LEARNING, *supra* note 15, at 21, 26–34.

protection that the state has given to the body even a temporary taking of the body is of serious concern.[41] In addition, the Supreme Court's takings jurisprudence has held that, in situations involving real property, the government owes compensation even for temporary takings if the taking is repeated or severe.[42] Over-fining or over-policing of specific communities clearly meets this aspect of the Court's takings jurisprudence.[43] And, of course, when police brutality results in permanent injury or death, the victim's body has been indisputably occupied by the state.

The idea that a "dignity taking" occurs when the state fails to pay just compensation *or* acts without a legitimate public purpose clearly applies to instances of racially motivated police brutality. Despite the relatively recent arrival of police forces, we now wholeheartedly accept their ability to legitimately exercise violence in the name of public safety. Racially motivated policing does not fulfill that legitimate public purpose. Of course, identifying instances of racially motivated policing is far from easy. The clearest instances are those in which the police target a particular minority group or neighborhood for misconduct.[44] More difficult are instances where the police choose to over-enforce legitimate laws against racial minorities, and thus turn a lawful enforcement into a discriminatory one.[45] This Essay uses Department of Justice (DOJ) investigations as a proxy for police misconduct and DOJ investigation reports as offering definitive accounts of the cause of such misconduct. However, as Part III explains, these are highly under-representative proxies for the overall frequency of police misconduct that cause dignity takings.

41. *See* Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009).

42. Ark. Game & Fish Comm. v. United States, 133 S. Ct. 511, 515 (2012) (holding that the temporary flooding of land was a taking under the Takings Clause); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 430 (1982) (holding that a state-authorized placement of cable television wires on the plaintiff's property constituted a taking because it was a permanent intrusion).

43. *See generally* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter FERGUSON REPORT]. It could also be argued that the over-incarceration of minorities is also a dignity taking as represents the government continuously acting against their bodies through physical restraint.

44. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 31–32 (2011) [hereinafter NEW ORLEANS REPORT] (finding that the NOPD targeted LGBT individuals for stops and failed to adequately investigate crimes committed against LGBT individuals).

45. FERGUSON REPORT, *supra* note 43, at 17 (describing an incident when the police encountered an African American man they knew was not the suspect but handcuffed him anyway and detained him in a squad car. It turned out he was the landlord of the intended arrestee and was on site to aid the police in effecting the arrest).

Finally, the idea that the state views some individuals as "sub-persons" ought to be shocking, but with respect to Americans with criminal records it is hard to dispute. The dehumanization of people with criminal records arguably started in the 1970s, when the effects of the "War on Drugs" began to be really felt and the militarization of the police (including the development of SWAT teams) took off.[46] President Nixon may have invented the criminal as cultural villain, but President Reagan certainly perfected the image with his rhetoric against "welfare queens" and criminal "predators."[47] That rhetoric paid off in 1986 with the passage of the Anti-Drug Abuse Act, which created mandatory minimum sentences for cocaine distribution and even harsher sentences for crack-cocaine.[48] And, as we now know, this was the beginning of today's mass incarceration problem: the United States has five percent of the world's population and twenty-five percent of the world's prisoners.[49]

But, over-criminalization and mass incarceration are not solely to blame for the way contemporary American society dehumanizes convicted persons. For several decades now, Americans have subsisted on an increasingly sensationalizing diet of news media that disproportionately covers crime and portrays past offenders as lacking all moral consciousness.[50] For example, Michelle Alexander has noted the *Washington Post* ran 1,565 stories on drug crimes in a one-year span—an average of more than five stories a day—between October 1988

46. RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 102–04, 126–30 (2014).

47. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 46–48 (2011); *see also* Joseph Margulies, *Abandoned Symbols: Confederate Flags and Criminal Justice*, JUSTIA.COM (June 29, 2015), https://verdict.justia.com/2015/06/29/abandoned-symbols-confederate-flags-and-criminal-justice (stating that symbols like "Willie Horton, the welfare queen, the crack whore . . . have generated an entire set of divisive law enforcement and prosecution strategies, like the war on drugs and 'zero tolerance' policing . . . have been broadly endorsed by whites but widely deployed against blacks"). *See generally* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGES AMERICAN JUSTICE (1995) (describing the effect of the Willie Horton case on the Presidential election of 1988 and on the criminal justice system).

48. ALEXANDER, *supra* note 47, at 46–48.

49. Lorna Collier, *Incarceration Nation*, AM. PSYCHOLOG. ASS'N (Oct. 2014), http://www.apa.org/monitor/2014/10/incarceration.aspx.

50. *See* Katharine A. Neill, *Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy*, 6 WORLD MED. & HEALTH POL'Y 375, 376–77 (2014) (arguing that the "drug war was part of a larger punitive shift in crime policy where the goal was to punish lawbreakers and isolate them from society" and that "drug offenders have been treated as criminals . . . are perceived negatively, undeserving of assistance, and deserving of punishment"); Yvonne Tasker, *Television Crime Drama and Homeland Security: From "Law and Order" to "Terror TV,"* 51 CINEMA J. 44, 44 (2012).

and October 1989.[51] Media and public interest in crime news coverage is obviously something of a chicken-and-egg phenomenon, but the end result is indisputably that Americans view criminals as wholly without redeeming qualities and, troublingly, view minorities as criminally inclined.[52] Criminal-catching is a sport on shows like *Cops*, and criminals are objects to be hunted.

The overall effect of media portrayal and political rhetoric has been to dehumanize criminals in American society. Criminals are "problems" to be solved, their welfare in prison is of notoriously low priority, and their failures upon re-entry into society are attributed to innate failings rather than systemic flaws.[53] Suffice it to say that when a person becomes or is treated like a criminal, she has been dehumanized by being put into a category of not being a full citizen.[54] Further, as the underlying taking was without legitimate state purpose it qualifies as a dignity taking. The unsatisfactory nature of tort settlements and awards speaks to the need for remedies beyond monetary compensation to make the victims of police misconduct whole.[55] The next section will examine the existing remedies.

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51. ALEXANDER, *supra* note 47, at 53.

52. Sarah Eschholz, *The Color of Prime-Time Justice: Racial Characteristics of Television Offenders and Victims*, *in* RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 59, 65, 71 (Marvin D. Free ed., 2003) (concluding that the major problem is that blacks and Hispanics are disproportionately portrayed as offenders, and that black Americans are frequently shown as perpetrators but rarely shown as victims of crime). *See generally* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—on the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

53. ALEXANDER, *supra* note 47, at 178–81, 248–49 (noting that the practical effect of current drug laws is to remove many black males from their families and segregating them into prisons, but this is presented as a choice that these men have made).

54. *See* Milica Vasiljevic & G. Tendayi Viki, Dehumanization, *Moral Disengagement, and Public Attitudes to Crime and Punishment*, *in* HUMANNESS AND DEHUMANIZATION 129 (Paul G. Baine, Jeroen Vaes, & Jacques Philippe Leyens eds., 2013) (describing the description of some criminals as savages or sub-humans by the general population); *see also* James M. Binnall, *Convicts in Court: Felonious Lawyers Makes A Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1379–80 (2010) (noting that twenty-nine states and the federal courts prohibit felons from serving on juries, but allow felons to serve as attorneys); Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1881 (2005) (noting only two states, Maine and Vermont, do not restrict the voting rights of felons in any way, while twenty-nine to paroles, thirty-two states extend the prohibition to those on parole or probation, and fourteen ban all felons from voting); Amy Shlosberg et al., *Expungement and Post-exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 382–83 (2014) (noting that felons lose a variety of benefits including access to government student loans, the right to vote, the right to hold public office, and other government benefits).

55. Begley, *supra* note 2 (discussing how, despite the settlement, Eric Garner's family still is rallying support to push for a federal criminal investigation of his death).

II. EXAMPLES AND EXISTING REMEDIES

That there are clear instances when police cross the line into unlawful behavior is evidenced by the paying out of tort damages to the victims of police misconduct.[56] Police misconduct usually results in more than the loss of time and money (although these are considerable losses to bear)—it also results in a loss of dignity. However, most existing remedies are forms of tort compensation authorized under 42 U.S.C. § 1983, which does nothing to address this loss. In addition, criminal prosecutions are authorized under 42 U.S.C. § 14141 although they are rarely conducted.[57] This provision is also the basis of the DOJ investigations into department wide police misconduct. This section uses a sample of recent DOJ investigations to discuss what qualifies as police misconduct. It also surveys existing remedies to such misconduct, which largely derive from 42 U.S.C. § 1983 and § 14141.

A. Department of Justice Investigations

In the past decade, the DOJ has conducted almost thirty investigations into police departments throughout the United States and its protectorates.[58] The DOJ either investigates after a complaint has

56. Radley Balko, *U.S. Cities Pay out Millions to Settle Police Lawsuits*, WASH. POST (Oct. 1, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/10/01/u-s-cities-pay-out-millions-to-settle-police-lawsuits/ (describing payouts made by cities, although not all of these were made in response to police misconduct); Andy Shaw, *City Pays Heavy Price for Police Brutality*, CHI. SUN-TIMES (Apr. 4, 2014, 2:23 AM), http://chicago.suntimes.com/chicago-politics/7/71/167182/city-pays-heavy-price-for-police-brutality (noting that Chicago has paid out $521 million over the past decade and $84.6 million in 2013 alone).

57. *See* Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 151–53 (1998) (attributing the lack of prosecutions to institutional pressures on prosecutors and the lack of credibility of victims of police brutality); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1355 (2015) (observing that limited resources have prevented prosecutors from pursuing cases).

58. The DOJ has investigated: Maricopa County (Arizona) Sheriff's Office; Town of Colorado City (Arizona) Police; Inglewood (California) Police Department; Los Angeles County Sheriff's Department; East Haven (Connecticut) Police Department; Escambia County (Florida) Sheriff's Office; City of Miami Police Department; Orange County (Florida) Sheriff's Office; Harvey (Illinois) Police Department; New Orleans Police Department; Detroit Police Department; Ferguson (Missouri) Police Department; Missoula (Montana) County Attorney's Office; Missoula (Montana) Police Department; University of Montana Office of Public Safety; Newark (New Jersey) Police Department; Albuquerque Police Department; Beacon (New York) Police Department; Schenectady (New York) Police Department; Suffolk County (New York) Police Department; Yonkers (New York) Police Department; Alamance (North Carolina) County Sheriff's Office; Cleveland (Ohio) Division of Police; Warren (Ohio) Police Department; Portland Police Bureau; Puerto Rico Police Department; Virgin Islands Police Department; and Seattle Police Department. The DOJ also issued statements of interest in five cases: Melendres v. Arpaio, 784 F.3d 1254 (2015); Garcia v. Montgomery County, ?Civil No. 8:12-cv-03592-JFM (2013)?; Sharp v. Baltimore City Police Department, Civil No. 1:11-cv-02888-BEL (2012); Floyd

been filed or issues a Statement of Interest if there is a private case against a department or official.[59] Consequently, DOJ investigations are a severely under-representative proxy for police misconduct.[60] The under-investigation of police misconduct is certainly a national problem, but beyond the scope of this Essay. The rest of this section examines three prominent DOJ investigations: in Ferguson (2015), New Orleans (2012), and Maricopa (2013). These investigations represent cities in different parts of the country, different lengths of investigation, and two different types of law enforcement agencies (police and sheriffs' departments).[61]

1. Ferguson Police Department

The shortcomings of the Ferguson Police Department came to public attention following the killing of eighteen year old Michael Brown by police officer Darren Wilson.[62] After a grand jury decided not to bring charges against Officer Wilson, the city erupted in riots.[63] Angry residents protested the grand jury decision with a peaceful candlelight vigil, but following this, some residents broke car windows and looted several local stores, while the Ferguson Police exacerbated the situation by using heavy-handed tactics.[64] The DOJ's investigation found that Ferguson's police department acted more like a revenue collecting agency for the town than a police force designed to protect

v. City of New York, 1:08-cv-01034-SAS-HBP (2013); and Padilla v. City of New York, 13-CV-0076-MKB-RER (2013). *Special Litigation Section Cases and Matters*, U.S. DEP'T JUSTICE, http://www.justice.gov/crt/about/spl/findsettle.php#police (last visited Aug. 7, 2015). It should be noted that this list does not include older investigations against the Chicago Police Department and the Los Angeles Police Department even though monitoring is ongoing.

59. *Id.*

60. Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Unaccounted in Federal Stats*, WALL STREET J. (Dec. 3, 2014, 11:26 AM), http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504 (noting that there is no set procedure or requirement for the reporting of police killings to the FBI for tracking).

61. The Ferguson investigation was launched in 2014; New Orleans was launched in 2009; and Maricopa was launched in 2012.

62. Stanford, *supra* note 5, at 166.

63. Moni Basu, Holly Yan & Dana Ford, *Fires, Chaos Erupt in Ferguson After Grand Jury Doesn't Indict in Michael Brown Case*, CNN (Nov. 25, 2014, 8:53 AM), http://www.cnn.com/2014/11/24/justice/ferguson-grand-jury/.

64. Christine Byers, *Justice Department Faults Ferguson Protest Response*, SAINT LOUIS POST-DISPATCH (June 30, 2015), http://www.stltoday.com/news/local/crime-and-courts/justice-department-faults-ferguson-protest-response/article_32d55f9f-0bf4-51e4-93d6-71b873cb8038.html; *Ferguson Riots: Ruling Sparks Night of Violence*, BBC (Nov. 25, 2014) http://www.bbc.com/news/world-us-canaa-30190224; *Timeline of Events After Fatal Police Shooting in Ferguson*, YAHOO SPORTS (Aug. 7, 2015, 3:59 PM), http://news.yahoo.com/timeline-events-fatal-police-shooting-ferguson-054258196.html.

its citizens.[65] The report also detailed breakdowns in the processes used to review uses of force against citizens: paperwork was often not completed by officers and when it was completed the reports were not investigated by the responsible officers; "supervisors seem to believe that any level of resistance justifies any level of force."[66] The Ferguson Police Department engaged in excessive force incidents against citizens of all ages, and in one instance even used a taser on a middle school student when the student refused to leave a classroom following a minor dispute with another student.[67]

As if this were not enough, Ferguson's municipal court was under the supervision of its police chief, meaning that any complaints about the underlying citation or court process went back to the police chief for decision. Unsurprisingly, due process violations abounded. Judges frequently would not listen to testimony presented by defendants or provide other basic due process procedures, such as written orders.[68] As part of a larger effort to raise revenue for the city the municipal court's judge would issue arrest warrants for non-paying individual. This in turn encouraged police to engage in unconstitutional stops, targeting the town's African American community, in an attempt to search for outstanding failure to pay warrants.[69] Of the 460 individuals arrested between October 2012 and October 2014 for only outstanding warrants 96% were African Americans.[70]

The DOJ found many reasons to think that the Ferguson Police Department engaged in discriminatory misconduct. African Americans were more likely to be searched when stopped, but were less likely to have contraband. African Americans represented eighty-eight percent of all "use of force" cases.[71] They were more likely to receive multiple citations: seventy-three incidents of African Americans receiving multiple citations, which was twice as much as all other groups.[72] They were also more likely to be charged for frivolous crimes, and in most of these cases constituted over ninety percent of

65. FERGUSON REPORT, *supra* note 43, at 9–15.

66. *Id.* at 40.

67. *Id.* at 36–38 (describing incidents at the local schools including one where an officer used a Taser on a student in class when they did not comply fast enough with the officer's orders, and noting that officers assigned to the school "viewed increased arrests in the schools as a positive result of their work").

68. *Id.* at 14–15, 42, 44.

69. *Id.* at 18, 42.

70. *Id.* at 42, 57.

71. *Id.* at 62.

72. *Id.*

arrests made.[73] African Americans were also more likely to fare poorly once they made it into municipal court, since they were sixty-eight percent less likely to have their cases dismissed.[74]

Importantly, the DOJ also found that this was not simply a case of bad policing—it was a case of explicitly racist policing. Ferguson's law enforcement officials engaged in racist communication such as circulating an email depicting President Obama as a chimpanzee to one another.[75] Unsurprisingly given this attitude, they also "failed to take any meaningful steps to evaluate or address the race-based impact of its law enforcement practices."[76]

The investigators spoke to a woman who was issued an initial fine of $151 for parking violations but because of her inability to pay the fine she "was arrested twice, spent six days in jail, and paid $550 to the court for the events stemming from this single instance."[77] Despite being interviewed for the report, the DOJ notes that she still owes the city of Ferguson $541 from this instance as of the issuing of the report; clearly the DOJ did nothing for this unfortunate woman.[78]

The lack of responsibility by Ferguson police officers for the department's problems is illustrated by the necessity of the DOJ to reprimanded Ferguson police officers for wearing bracelets while in uniform in support of Wilson.[79] Strikingly, the DOJ also found it necessary to instruct Ferguson officials to enforce its own policy of having officers wear name badges while on duty; a practice that officers were refusing to do.[80] In addition, structural changes were suggested including hiring more minority police officers; providing more training for officers on how to deal with vulnerable populations; instructing officers not to arrest students for trivial in school infractions; investigat-

73. *Id.* (noting that African Americans were primarily stopped for frivolous crimes—accounting for 96% of outstanding municipal warrants; 95% of manner of walking; 94% of failure to comply; 92% of resisting arrest; 92% of peace disturbance charges; and 89% of failure to obey charges).

74. *Id.*

75. *Id.* at 72. The Report also described a May, 2011 email which said; "An African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for $5,000. She phoned the hospital to ask who it was from. The hospital said 'Crimestoppers.'"

76. *Id.* at 70–71.

77. *Id.* at 4.

78. *Id.*

79. Letter from Christey E. Lopez, Deputy Chief, Special Litigation Section, Civil Rights Division, U.S. Dep't of Justice, to Thomas Jackson, Police Chief, Ferguson Police Department (Sept. 26, 2014), U.S. DEP'T JUSTICE (Sept. 26, 2014). The bracelets said "I am Darren Wilson," and were causing additional agitation among the town's citizens.

80. *Id.*

ing use of force allegations; provide accurate information to individuals regarding what they are charged with; and closing cases on the docket which are only there for failure to appear.[81] While these changes will improve future interaction with the public they are not designed to remedy past discrimination.

The Ferguson case is important as it shows that the technical enforcement of the law can create discriminatory impact; of course it is well settled that discriminatory enforcement of a neutral law is cognizable in court.[82] However, the fact that individuals are technically criminals makes relief for them difficult to obtain as the DOJ's own report illustrates.[83]

2. New Orleans Police Department

The DOJ initiated an investigation of the New Orleans Police Department (NOPD) in May 2010.[84] This investigation of civil rights violations by the NOPD was completely separate from the criminal cases pending against several New Orleans police officers for their actions during the events surrounding hurricane Katrina.[85] Even without including the malfeasance of the police in the wake of Katrina the DOJ concluded that the NOPD had engaged in a pattern of "unreasonable less lethal force" as well as several instances when "NOPD officers used deadly force contrary to NOPD policy or law."[86] In addition, the report found that the NOPD engaged in a pattern of stopping, searching, and arresting persons without reasonable suspicion or probable cause.[87]

Unlike Ferguson, where the DOJ found institutional racism and a drive to create revenue, the DOJ attributed the NOPD's failings to poor training and a misguided approach to policing.[88] The NOPD engaged in statistics-driven policing that focused on increasing the number of arrests rather than on reducing violent crime.[89] However, this is not to say that the NOPD's misconduct was well-intentioned. To the

81. FERGUSON REPORT, *supra* note 43, at 90–102.

82. *See generally* Whren v. United States, 517 U.S. 806 (1996); Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

83. FERGUSON REPORT, *supra* note 43, at 4.

84. United States v. City of New Orleans, 32 F. Supp. 3d 740 (E.D. La. 2014).

85. NEW ORLEANS REPORT, *supra* note 44, at vi.

86. *Id.* Shockingly, the DOJ found that in the past six years the NOPD had found officer involved shooting had violated a policy.

87. *Id.* at 26.

88. *Id.* at 27

89. *Id.* at viii.

contrary, the NOPD seems to have particularly targeted African Americans, ethnic minorities, and LGBT community members for excessive stops and arrests.[90] And as in the case of Maricopa County (discussed in Section III(a)(iii) below) Latinos were often subjected to pre-textual stops for minor offenses as way to harass them about their immigration status.[91]

In January 2013, the United States District Court for the Eastern District of Louisiana approved a consent decree between DOJ and the City of New Orleans.[92] The Consent Agreement covered numerous areas of police conduct, but focused primarily on improved training on the use of force, crisis intervention, stops, searches, arrests, and custodial interrogations[93] The agreement also required the NOPD to implement bias-free policing training, some language translation, and training on dealing with victims of sexual assaults and domestic violence.[94]

As in Ferguson the consent agreement focused on improving transparency, improved training, and oversight requiring the police to track all incidents of police misconduct. The DOJ also required the posting of an updated police "policy, procedure, and manual, including those created pursuant to this agreement. . ." online for public view.[95] Unlike Ferguson the DOJ did not focus primarily on race but on gender and sexual orientation as well as poor officer training, which is noteworthy since the victims of police misconduct are often viewed as solely African American.[96] The remedies reached between the DOJ and NOPD highlights the DOJ's approach to police misconduct, which emphasizes structural defects rather than actual restitution for victims.

90. *Id.* at 35.

91. *Id.* at 36.

92. Order and Reasons, 32 F. Supp. 3d 740. United States v. City of New Orleans, No. 12-1924 (E.D. La. Jan. 11, 2013).

93. Consent Decree Regarding the New Orleans Police Department, 32 F. Supp. 3d 740 [hereinafter NOPD Consent Decree] (these areas covered approximately 35 of 124 pages of the report or ¼ including all of the front matter and background).

94. *Id.* at 49–59 (the report called not only for training of police officers but mandatory tracking of all sexual assaults and domestic violence cases to address complaints that the police department had failed to properly investigate these crimes and had coded them as miscellaneous).

95. *Id.* at 105.

96. Order and Reasons, 32 F. Supp. 3d 740. United States v. City of New Orleans, No. 12-1924 (E.D. La. Jan. 11, 2013).

3. Maricopa County Sheriff's Office

Like in Ferguson and New Orleans, events in Maricopa encompassed racial discrimination and general misconduct, but they occurred in the context of a Sheriff's Office.[97] The DOJ investigation, launched in June 2008, found that the Office's excessive use of force against Latino citizens and its attempts to enforce immigration laws (which were beyond its purview) created significant mistrust between the Sheriff's Office and the wider community.[98]

Latino drivers were four times more likely than non-Latino drivers to be stopped for moving violations while driving in the southwest portion of the county.[99] The Sheriff's Human Smuggling Unit used particularly egregious stereotypes in selecting vehicles to be stopped, and often stopped vehicles driven by Latinos when no moving violation had occurred.[100] In one incident an officer pulled over a man for allegedly failing to signal then arrested him for not having proper identification despite his producing several forms of valid identification; he was released after thirteen days in detention without any charges being filed.[101] Likewise, the Sheriff's crime suppression operations primarily targeted Latino neighborhoods.[102] In a particularly egregious incident the deputies detained and restrained a man and his twelve year old son for over an hour after removing them from their home simply because they were raiding the neighboring house.[103] Moreover, in addition to the violations by on-duty officers, the Sheriff's Office discriminated against inmates and jail visitors who did not speak English, with special emphasis placed on those who spoke Span-

97. *See, e.g.*, Adam Serwer, *Sheriff Joe Arpaio: Calling Me Names Violates My Civil Rights*, MOTHER JONES (Dec. 18, 2011, 9:35AM), http://www.motherjones.com/mojo/2011/12/joe-arpaio-calling-me-names-violates-my-civil-rights (citing allegations that Arpaio used the Sheriff's Office to target political enemies and critics and noting his general lack of understanding of what constitutes a civil right).

98. Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, to Bill Montgomery, County Attorney, Maricopa County (Dec. 15, 2011), [hereinafter Maricopa Findings Letter]; *see also* Complaint, United States v. Maricopa Cty., (D. Ariz. May 10, 2012), at 8–10 [hereinafter Maricopa Complaint].

99. *Id.* at 6.

100. *Id.* at 7–9 (noting that in one incident the officers detained the persons for appearing disheveled and wearing stained clothing but photos taken by them show that the individuals were neatly dressed; in a separate incident four men were removed from their car zip-tied and sat on the curb for an hour after they were stopped for having a car that was "a little low," which is not a traffic violation).

101. *Id.* at 7.

102. *Id.* at 11–13 (describing the unlawful detention, searches and questioning of immigration status of Latinos by the Maricopa Sheriff's Department in their homes, automobiles, and places of work).

103. *Id.* at 12.

ish.[104] And much like the NOPD, the Maricopa Sheriff effectively hindered any investigation of its activities by failing to consistently collect data on the racial identities of the persons it stopped.[105]

As in Ferguson and New Orleans, the DOJ recommendations focused on improving training and disciplinary procedures, clarifying policies, and enhancing data collection and data management.[106] Similarly, the DOJ recommended that the department create a "comprehensive complaint, investigation, and disciplinary system to enable it to hold officers accountable when they violate policy and/or the law."[107] The Maricopa consent agreement also required that all forms be provided to inmates and visitors in both English and Spanish.[108] However, and also like the other cases, the DOJ investigation was wholly forward-looking: it only aimed to help prevent future violations, and not remedy past ones.[109] Stephen Rushin has described this litigation as "structural reform litigation" since it aims to change the systemic causes of police misconduct.[110] As can be seen by the discussion of the above cases the primary goal of Department of Justice's remedies is to improve policing not right wrongs so there is a need for a third type of remedy and we can look to dignity restoration to provide it.

B. Existing Remedies

DOJ action with respect to police misconduct is mandated by 42 U.S.C. § 14141, which was passed after the Rodney King riots of 1992. Section 14141 authorizes the Attorney General of the United States to initiate litigation in cases of systemic police misconduct.[111] There are several problems with viewing DOJ investigations as a remedy for the

104. Settlement Agreement, Attachment A 9–12, United States v. Maricopa County, No. 2:12-cv-00981-ROS (D. Ariz. July 7, 2015) [hereinafter Maricopa Settlement Agreement], 3, 67, 71; *see also* Maricopa Findings Letter, *supra* note 98, at 2.

105. Maricopa Findings Letter, *supra* note 98, at 20–21(several of the consent decree requirements were that the department collect data for traffic stops).

106. *Id.*

107. *Id.* at 21.

108. Maricopa Settlement Agreement, *supra* note 104, at 9–10.

109. *See* Maricopa Settlement Agreement, *supra* note 104, at 2, 15; *see also* Maricopa Findings Letter, *supra* note 98, at 21.

110. *See generally*, Rushin, *supra* note 57.

111. 42 U.S.C. § 14141(a) provides, "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." *See also* Rushin, *supra* note 57, at 1347.

harms suffered by victims of police misconduct. For one, the DOJ and the local agencies it cooperates with are strongly encouraged to settle because doing so helps "minimize costly litigation and adverse publicity and avoid the collateral effects of adjudicated guilt."[112] But this very desire to avoid "adjudicated guilt" is precisely what denies victims a sense of closure or an affirmation of their dignity.[113]

Second, there are inherent limitations to the kind of "structural reform litigation" that the DOJ engages in. Stephen Rushin has noted that this type of litigation has high costs to municipalities; the reforms' longevity is often minimal; and the investigations themselves can lead to decreased effectiveness in policing.[114]

Third, even to the extent that DOJ investigations produce valuable reforms, the DOJ's extremely low rate of involvement means that misconduct far outpaces reform. As Rushin has observed, if "even I 0.1% of [law enforcement agencies] have an issue, that's more than [the DOJ has] ever done in the entire history of the statute."[115] Indeed the DOJ has only investigated approximately three agencies per year under § 14141, and when it *does* investigate it focuses on larger departments to the exclusion of smaller ones.[116] Besides the basic problem of a low rate of change, this clearly communicates to victims that police misconduct is not an issue that the federal government is willing to pour money into.[117]

Fourth, even when the DOJ launches an investigation and suggests reforms, the process is concluded via a consent decree.[118] Consent decrees are only enforceable by the negotiating parties, meaning the offending municipal department and the DOJ. Neither the victims nor the community at large have standing to seek enforcement of the consent decree. Any complaints regarding implementation failures or subsequent abuses within the scope of the consent decree are completely at the mercy of the DOJ. The fact that the public is in this way

112. United States v. Jackson, Miss., 519 F.2d 1147, 1152 n.9 (5th Cir. 1975).
113. *Id.*
114. *Id.* at 1408.
115. Rushin, *supra* note 57, at 1416 (quoting an anonymous interviewee).
116. *Id.* at 1415.
117. President Barack Obama, Remarks at the NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference (acknowledging in his remarks that the racial inequality in policing, but focused on the cost to the tax payers for keeping roughly 1.5 million persons incarcerated. He did note some changes including the reduction of prison sentences for non-violent drug uses. However, the emphasis on increased spending was at the community level for programs not directly related to police misconduct, but encouraging youth development).
118. United States v. City of New Orleans, 32 F. Supp. 3d 740 (E.D. La. 2014).

removed from the corrective process can hardly be said to console or empower those who have been wronged by police misconduct.

Most significantly, even if DOJ investigations are effective at addressing deficiencies in police training and procedures (although this is questionable for the reasons given above), they are not effective at providing remedies to the victims of police misconduct. As Ferguson, New Orleans, and Maricopa illustrate, the DOJ's primary goal is to improve future police practices, which at best carries secondary benefits to community residents who have already suffered from police misconduct. To date, the only way in which DOJ investigations have provided relief to victims has been where the DOJ advocates closing all municipal cases where over-fining and compound fines have saddled individuals with obligations far in excess of the original fines issued.[119] Even this, however, does not in any way remedy the initial discrimination that caused the over-policing and over-fining of a specific community.[120]

C. Tort System

Tort compensation offers another potential means of remedying police misconduct because any individual may bring suit against a person who, under the color of law, deprives them of "any rights, privileges, or immunities secured by the Constitution and laws."[121] Several cities have already paid out large sums of money to the victims of police abuse.[122] For example, New York recently paid Eric Garner's family $5.9 million[123] and the City of Los Angeles paid Rodney King $3.8 million for the beating he received at the hands of LAPD officers.[124]

Nevertheless, there are four drawbacks to relying on the tort system in instances of police misconduct. First, the focus of tort compen-

119. FERGUSON REPORT, *supra* note 43, at 102.

120. *Id.* at 66 (providing details on the over citation of African Americans by the Ferguson police).

121. 42 U.S.C. § 1983 (1996).

122. Dawsey, *supra* note 2.

123. New York Observer Editorial Board, *Sending the Wrong Message with the Eric Garner Settlement*, N.Y. OBSERVER (July 24, 2015, 10: 35 AM), http://observer.com/2015/07/sending-the-wrong-message-with-the-eric-garner-settlement.

124. Leezel Tanglao, *Rodney King Dead: Victim in 1991 LAPD Police Brutality Case, Has Died,* ABC NEWS (June 17, 2012), http://abcnews.go.com/US/rodney-king-dead-victim-1991-lapd-police-brutality/story?id=16589384.

sation is making the individual who has suffered harm whole again.[125] While this is certainly an advantage of the tort system as compared to DOJ investigations, it ignores the fact that police misconduct causes significant harm to the dignity of entire (almost always minority) communities.[126] The "Black Lives Matter" campaign sought to not only address the incidents of police brutality against particular persons but address "the ways in which Black lives are deprived of our basic human rights and dignity.[127]

Second, there is a kind of "representation reinforcement" problem in asking victims of systemic discrimination to use the very system that discriminates against them in their pursuit of justice.[128] Moreover, state actors who engage in the kind of discriminatory policing that characterizes virtually all cases of police misconduct essentially create their own escape hatch because over-fining and mass incarceration are extremely effective ways to render potential plaintiffs—who are socioeconomically disadvantaged in the first place—even less capable of mounting costly legal battles. To such targeted individuals tort remedies are no remedies at all, and those who would argue otherwise are uniquely adept at self-delusion.

Third, tort law may not be available to individuals who actually did commit a crime. That is, those persons who were targeted because of their race, but were nevertheless actually committing a technical offence, such as a failure to signal. It is technically permissible to bring a lawsuit against the government for discriminatory application of a neutral criminal law, but it is unlikely that a jury would be sympathetic to a convicted individual or that the case would be worth it to any lawyer to bring.[129]

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125. *See* John P, Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DePaul L. Rev. 435, 435 (2006).

126. George L. Priest, *Satisfying the Multiple Goals of Tort Law*, 22 Val. U. L. Rev. 643, 649 (1988) (asserting that the goal of the tort system is not only to pay compensation to wronged individuals, but also to create incentives to reduce accidents).

127. *About Us*, BlackLivesMatter.com, http://blacklivesmatter.com/about/ (last visited Aug. 7, 2015).

128. Evan Barret Smith, *Representation Reinforcement Revisited: Citizens United and Political Process Theory*, 38 Vt L. Rev. 445, 448 (2013); *see also* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

129. *See* Stanford, *supra* note 5, at 48 (describing how the State of Illinois has sought to prevent currently incarcerated victims of Jon Burge from pursuing a class action lawsuit against the CPD and instead appointed David Yellen, Dean of Loyola University Law School, to ascertain the veracity of the claims); *see also* Maricopa Findings Letter, *supra* note 98, at 5 (describing the over targeting of Latino drivers for traffic citations).

It should also be noted that offending actors are often heavily disincentivized against settling tort claims arising from police misconduct because such settlements are often criticized by the public as the government giving money to criminals.[130] This is evidenced by the City of Chicago which spent more money ($63 million) on outside legal counsel to fight claims, while paying out only $54.2 million in claims to victims and their attorney fees indicating a willingness to spend more on defending claims then settling them.[131]

Fourth, cities—like all powerful litigants—are very skilled at prolonging cases. A prime example is Chicago's handling of the John Burge case.[132] From the 1970s until the early 1990s, Jon Burge ran the "Midnight Crew" of the Chicago Police Department (CPD).[133] The Crew tortured suspects and planted evidence primarily targeting Chicago's African American residents.[134] Although Chicago has been settling claims related to Burge and other CPD officers since the mid-1990s there remains around fifty cases that have not reached settlements.[135] The $5.5 million settlement fund created by the city will be

130. *See* New York Observer Editorial Board, *Sending the Wrong Message with the Eric Garner Settlement*, N.Y. OBSERVER (July 24, 2015, 10:35 AM), http://observer.com/2015/07/sending-the-wrong-message-with-the-eric-garner-settlement; *see also* Connor D. Wolf, *Union Leader Blasts Multimillion Dollar Eric Garner Settlement*, DAILY CALLER (July 14, 2015, 5:00 PM), http://dailycaller.com/2015/07/14/union-leader-blasts-multimillion-dollar-eric-garner-settlement/ (noting that Ed Mullins, president of the Sergeants Benevolent Association, criticized the settlement calling it shameful).

131. Jonah Newman, *Chicago Police Misconduct Payouts Topped $50 million in 2014*, CHI. REP. (Feb. 25, 2015), http://chicagoreporter.com/chicago-police-misconduct-payouts-topped-50-million-in-2014/.

132. STANFORD, *supra* note 5, at 48.

133. Christina Sterbenz, *A Group of Rogue Cops Known as the 'Midnight Crew' Tortured Dozens of People for Decades—and Now Chicago is Paying Millions For It*, BUS. INSIDER (May 6, 2015, 3:13 PM), http://www.businessinsider.com/r-chicago-council-approves-reparations-for-police-torture-victims-2015-5 (describing the torture, electrocutions, and faux Russian Roulette used by the officers on their victims).

134. STANFORD, *supra* note 5, at 49–50 (describing some of the accusations including police electrocuting suspects, beating them, and suffocating several more); *see also* Matthew Walberg, *Prosecution Rests in Burge Torture Trial*, CHI. TRIB. (June 15, 2015, 8:05 PM), http://www.chicagotribune.com/news/ct-met-burge-0616-20100615-story.html (describing the testimony of Shadeed Mu'min of having a gun with one bullet placed to his head by Burge when he refused to confess and then being forced to play Russian roulette. When this did not work Burge had Mu'min suffocated until he passed out and then repeated until he spoke).

135. Hald Dardick, John Byrne, & Steve Mills, *Mayor Backs $5.5 Million Reparations Deal for Burge Police Torture Victims*, CHI. TRIB. (Apr. 14, 2015, 7:54 PM), http://www.chicagotribune.com/news/ct-burge-reparations-emanuel-met-20150414-story.html (providing a description of the settlement offered to the approximate 50 remaining victims of the Midnight Crew by the City of Chicago, which has been endorsed by mayor Rahm Emanuel).

used to pay each of the remaining victims $100,000.[136] Although these victims of police misconduct finally received some form of compensation, they had to wait at least fifteen years or more.[137] The CPD cases also reveal that despite the horrendous actions of CPD officers, which included electrocuting suspects and chocking them until they passed out before repeating in order to obtain confessions, the average payout was a meager $35,550.[138]

Fifth, even if we view tort compensation purely as an incentive system rather than a means of healing, it simply does not work. Police departments do not feel the pinch of the lawsuits since the cities they serve foot the bill.[139] Similarly, the tort system creates no incentive for the perpetrating officers to modify their behavior as they are mostly indemnified by their departments (and thus again by their cities) for actions undertaken while on duty.[140] In other words, paying tort damages neither provides adequate restitution to the victims nor works as a mechanism to reform police departments.[141]

Lastly, monetary damages are plainly not enough to remedy the harms caused by police misconduct.[142] While it is true that the American legal system operates on the assumption that all harms can be monetized and quantified, it is becoming increasingly apparent that the harms of police misconduct are of a type and a scale that evade tort compensation. Most victims or their families have continued pushing for law enforcement reform after receiving settlements.[143] Most importantly the simple payment of money will not serve to restore the dignity lost by the victims of police misconduct. As Atuahene demonstrated in her work, once a dignity taking has oc-

136. David Schaper, *Chicago Creates Reparations Fund For Victims of Police Torture*, NPR (May 6, 2015, 1:43PM), http://www.npr.org/sections/thetwo-way/2015/05/06/404545064/chicago-set-to-create-reparation-fund-for-victims-of-police-torture.

137. Sterbenz, *supra* note 136.

138. *Id.*

139. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U.C.R L.J. 479, 495 (2009).

140. Rushin, *supra* note 57, at 1355.

141. *Id.*, at 1353–56 (providing a thorough discussion of historic attempts by the federal government to regulate police misconduct).

142. *See* ATUAHENE, LEARNING, *supra* note 15, at 21.

143. For instance, Eric Garner's family encouraged more rallies in favor of criminally charging the officers who were involved. Chris Burek, *NYC Reaches Settlement with Family of Eric Garner: Deal is one of the Largest in NYPD History*, LEGIS. GAZETTE (July 20, 2015), http://www.legislativegazette.com/Articles-Top-Stories-c-2015-07-20-92479.113122-NYC-reaches-settlement-with-family-of-Eric-Garner.html.

curred, something more than mere restitution is needed to make the injured persons whole again.[144]

The final section of this paper will provide two possible restorations to the victims of police misconduct that would serve as dignity restorations. It is important to note that these additional remedies would not supplant, but supplement the existing DOJ orders and tort remedies currently in use.

III. DIGNITY RESTORATION

A dignity restoration involves not only restitution, but additional compensation that is aimed at making the dehumanized community part of society again.[145] As police misconduct results in a dignity taking as it dehumanizes the individual and works a taking either of their body (brutality or extrajudicial murder) or of their property via discriminatory levying of fine it requires a dignity restoration. In her work examining South Africa's Land Restitution Program, Atuahene argues that the goal of the program was not simply the payment of money to those persons who had lost property during the apartheid regime, but their restoration within society.[146] This form of restitution "is a one-time event that occurs within a specified timeframe. It is an attempt to correct past wrongs by returning to a prior status quo perceived to be more just, or creating a new status quo predicated upon correcting specific past wrongs."[147] All of the programs proposed below are restorative not redistributive; that is the goal is still to set the person or community whole and not to transfer or redistribute wealth in society.[148]

A. Truth and Reconciliation Commissions

There are some uses of Truth and Reconciliation Commissions (TRC) in the United States. The City of Greensboro, South Carolina instituted a TRC in 1999 to address the town's history of racial vio-

144. ATUAHENE, LEARNING, *supra* note 15, at 57; *see also* Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1444–46 (2007) [hereinafter Atuahene, *Reparation*].

145. ATUAHENE, LEARNING, *supra* note 15, at 57.

146. Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 850–51 (2009) [hereinafter Atuahene, *Illegitmacy*].

147. Atuahene, *supra* note 147, at 1446.

148. *Id.* at 1446–47.

lence and the 1979 Ku Klux Klan murder of labor activists.[149] The Greensboro TRC completed its final report in 2006, recommending an increase in racial sensitivity training for city officials; the resolution of misdemeanor citations by addressing the underlying problems rather than through the criminal justice system; and instituting an educational program to ensure past events are not forgotten.[150] In South Africa a TRC was established to address harms that occurred during the apartheid era.[151] The goal of the commission was to "establish as complete a picture as possible of the causes nature and extent of the gross violations of human rights which were committed."[152] In addition, the commission would have the authority to grant amnesty to perpetrators who gave full disclosure of relevant facts and helped create a comprehensive report of the incidents for publication to help prevent future abuses.[153] Although this sounds like a foreign concept it is related to the current DOJ investigations of police officers does include the of community meetings to solicit information from the public regarding police abuses.[154]

The benefit of this commission is that it would enable victims' voices to be heard, thus making them feel part of the fabric of society again.[155] As police officers are already rarely prosecuted and almost universally indemnified for their actions, it would not be much of a stretch to give the majority of them amnesty from past actions.[156] Indeed this would serve the additional purpose of encouraging both victims and officers to come forward to speed along any tort claims

149. Joshua Inwood, *Righting Unrightable Wrongs: Legacies of Racial Violence and the Greensboro Reconciliation Commission*, *in* ANNALS ASSOC. AM. GEOGRAPHERS 1450 (2011).

150. *Greensboro Truth and Reconciliation Commission*, FINAL REPORT (2006), http://www.greensborotrc.org/.

151. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) at Preamble to the act ("AND SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future; AND SINCE the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society; AND SINCE the Constitution states that there is a need for understanding but not for vengeance, a need for reparations but not for retaliation, a need for ubuntu but not for victimization . . . ; BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa . . . .").

152. *Id.* at § 3(1)(a).

153. *Id.* § 3(1)(a)–(d).

154. FERGUSON REPORT, *supra* note 43, at 4.

155. Atuahene, *Reparation*, *supra* note 147, at 1444; *see also* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg, eds., 1988) (noting the need of marginalized groups to have a voice in society).

156. Joanna C. Schwatz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

against government agencies. Such a commission would also serve to capture the numerous victims of police misconduct who did suffer a harm (such as those in Ferguson who were targeted for municipal fines), but where the harm is not great enough to bring a tort claim.[157]

A final benefit of TRCs is their relatively low cost. In South Africa the nationwide commission's annual budget was only $18 million per year; a commission focused on one department could last for a fairly short duration and not be burdened with nationwide logistical costs.[158] Most importantly, a commission would bring the victimized community back into conversation with the government and the offending agency, thus, removing the stigmatization and promoting police-community relationships.[159]

B. Community Reparations

Although not widely used in the United States reparations have been used in response to police brutality in Chicago and on a smaller scale in response to systemic racism in Greensboro. Reparations is the idea that the government would create some form of restitution, which might go beyond monetary compensation to include things such as free education, job training or other benefit to the victims of past abuse.[160] It should be noted that such a program would not be an affirmative action program as it would be directed to redress a specific harm not general inequalities.[161] There has been some tentative discussion of similar programs, such as an indication by President Obama of a national level increase in education funding in order to close the overall crime rate disparity, but that is different from what is being proposed here as Obama's plan would be a general redistribution rather than restitution for a specific harm.[162]

A clearer example of reparations is the settlement reached between the City of Chicago and the victims of the CPD and Jon Burge. In that settlement, not only will a fund be set up to pay the victims monetary claims, but the city will offer "free city college tuition for

157. Ferguson Report, *supra* note 43 (discussing the story of the woman who was fined $151 but it turned into more than $1000 from administrative fees and other related fines).

158. Truth Commission: South Africa, United States Institute of Peace, http://www.usip.org/publications/truth-commission-south-africa (last visited Aug. 7, 2015) (addressing that the South African commission operated from 1995–2002 although there has been discussion of reopening the related land reform commission to help process additional claims).

159. Atuahene, *Illegitimacy*, *supra* note 149, at 849–51.

160. Atuahene, *Reparation*, *supra* note 144, at 1444–46.

161. *Id.* at 1446.

162. Remarks of President Barack Obama, *supra* note 117.

victims and their families, free counseling for psychological issues or substance abuse as well as other assistance."[163] In addition, the city will offer a formal apology, erect a memorial to the victims of police misconduct, and require that the incident be taught in Chicago Public School's civics classes.[164] The Chicago reparations offer a nice combination of specific benefits to be granted to the victims and their families as well as some longer lasting compensation. The programs schooling and counselling are discrete in terms of who can benefit from them and will expire with the lives of the victims. At the same time the memorial and education of future generations about the abuse will help ensure that it is not forgotten. Again these are not affirmative action programs, but a form of restitution to the victims of Burge and his "Midnight Crew".

The ability of this type of restitution program to be regularly adopted is tantalizing as it would capture all the victims of police abuse. However, the history of attempts to remedy school segregation by bussing students across neighborhoods shows that there is a limit to this type of restoration.[165] In addition, any settlement or ensuing program that was based on racial classification would be subjected to strict scrutiny.[166] It could be argued that the scrutiny is met as it is a compelling governmental interest to remedy the past wrongs of state agents.[167] However, any quota or other direct preference would still likely be struck down.

If a reparations program could be paired with a truth and reconciliation commission, then it would be possible to identify the individuals who suffered at the hands of the police. By doing so the reparations could be limited to actual victims of police misconduct

163. Hal Dardick et al., *Mayor backs $5.5 Million Reparations Deal for Burge Police Torture Victims*, CHI. TRIB. (Apr. 14, 2015, 7:54 PM), http://www.chicagotribune.com/news/local/breaking/ct-burge-reparations-emanuel-met-20150414-story.html#page=1.

164. *Id.*

165. *See* Milliken v. Bradley, 418 U.S. 717 (1974) (prohibiting inter-district remedies for segregation unless the plaintiffs can show that an unconstitutional racial policy in one district caused the segregation in another district); *see also* Charles U. Smith, *Public School Desegregation and the Law*, 54 SOC. FORCES 317, 322–23 (1975) (discussing the opposition to bussing by public officials).

166. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (using strict scrutiny the court struck down a California admission policy providing boost to minority candidates). *But see* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding an admission policy designed to promote diversity among the student body holding that diversity was a compelling state interest).

167. The Court has held that remedies, which directly remedy past racial discrimination can survive strict scrutiny. For example, in *United States v. Paradise*, the Court upheld a hiring quota implemented by the Alabama Department of Public Safety. 480 U.S. 149 (1987).

thus making the reparation a non-race classification, and thereby, dodging strict scrutiny all together. This would also have the added benefit of making any reparations discrete in terms of those eligible as well as of limited time duration.

CONCLUSION

The hostility and degradation of criminals in the United States over the past quarter century has created the situation that whenever someone is treated like or called a criminal they are essentially being called subhuman. When this is coupled with police misconduct—especially when that misconduct targets a discrete minority and involves physical abuse, extrajudicial killing, or unjust enforcement of the law—that misconduct works as a dignity taking against the victims. Existing remedies are insufficient to put these victims whole, as they have suffered more than the loss of their money or injury to their body. In order to put them whole, remedies that restore their dignity are needed. Two such remedies are the establishment of truth and reconciliation commissions and the granting of reparations, such as those given in Chicago following the Burge case. By creating greater remedies the government will bring the victims back into society as equal members.