
ENHANCING ACCOUNTABILITY AND TRUST
WITH INDEPENDENT INVESTIGATIONS
OF POLICE LETHAL FORCE

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There are few acts committed by local government that draw more controversy than a police department's use of lethal force. Broad cross-sections of the public have lost trust in local law enforcement agencies due to their perception of biased investigations of such deadly-force incidents. This loss of trust can threaten the legitimacy of local law enforcement institutions. Systemic reforms are necessary to regain trust. Generally, the courts are not a vehicle to bring about such reforms absent the active involvement of the Department of Justice. In the current system of shooting investigations, the involved officer's own agency investigates the fatal use of force before turning the case over to the local prosecutor for review. Is there a more effective way to scrutinize the actions of officers in the United States while still protecting their due process rights? In fact, there are models in other countries which are designed to produce bias-free investigations that enhance public trust in, and the legitimacy of, the government. The various states should look to these other systems and create independent agencies to investigate and also, where necessary, to prosecute police-related deaths.

An often-told maxim is that a state is characterized by a "monopoly of the legitimate use of physical force."¹ That may or may not be true, but the "legitimacy of the use of force is central to the modern concept of governance."² The traditional point of view of the state's ability to use force is that without such a monopoly, its capacity to enforce the rule of law and protect its citizens is constrained.³ This perspective is reflected in traditional crime control policies that use deterrent threat and increasing severity of sanctions to gain compliance from potential lawbreakers.⁴

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¹ See, e.g., Layla Skinns, *The Role of the Law in Policing*, 2012 J. POLICE STUD. 225, 234.

² Melanne A. Civic & Michael Miklaucic, *Introduction, The State and the Use of Force: Monopoly and Legitimacy*, in MONOPOLY OF FORCE at xv, xvi (Melanne A. Civic & Michael Miklaucic eds., 2011) (emphasis added).

³ See Sean McFate, *There's a New Sheriff in Town: DDR-SSR and the Monopoly of Force*, in MONOPOLY OF FORCE, *supra* note 2, at 213, 213.

⁴ See Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING 203 (2010).

One result of such a traditional crime control model, not just in this country but around the world, is that immigrant communities and ethnic minorities become disproportionate targets.⁵ The New York Police Department uses an assertive policing model (which is well known as “broken windows”) that targets low-level quality of life transgressions with the goal of deterring more serious crimes.⁶ Critics of the strategy argue it unfairly singles out minorities.⁷ New York City’s Civilian Complaint Review Board (CCRB) found that while African Americans made up 23% of the city’s population, they represented 55% of reported victims of alleged misconduct from 2008 to 2013.⁸ Hispanics were 29% of the population and 26% of complainants, while whites were 34% of the population but were only 9% of alleged victims of police misconduct.⁹ In 2013, 53% of all complaints were for some form of alleged physical force misconduct.¹⁰ Periodically, the distrust that this perceived targeting engenders boils over. Public dissatisfaction with the current relationship between the police and ethnic minority communities was clearly put on display in 2014 in response to several high-profile killings by police of young African Americans in the United States: most prominently the chokehold death of Eric Garner in New York and the fatal shooting of Michael Brown in Ferguson, Missouri.

The Brown and Garner cases embodied not only general distrust between police and minority communities, but also the loss of the public’s trust in the investigations and reviews of police-involved deaths.¹¹ When grand juries declined to file criminal charges in both cases, many members of the public did not trust the outcomes, which they saw as tainted by collusion between the police and local prosecutors.¹² Opinion polls taken after the deaths of Brown and Garner demonstrate that significant cross-sections of the public do not believe that investi-

⁵ Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 388 (2010).

⁶ Charles F. Sabel & William H. Simon, *Due Process of Administration: The Problem of Police Accountability* 27–29 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-420, 2014), <http://ssrn.com/abstract=2507280> [<http://perma.cc/3Z2P-LNWP>].

⁷ *Id.* at 30.

⁸ N.Y.C. CIVILIAN COMPLAINT REVIEW BD., 2013 REPORT 8 (2014), http://www.nyc.gov/html/ccrb/downloads/pdf/CCRB%20Annual_2013.pdf [<http://perma.cc/M37N-L5BR>].

⁹ *Id.*

¹⁰ *Id.* at 6.

¹¹ See Public Comment, Vincent Warren, Exec. Dir., Center for Constitutional Rights, Building Trust and Legitimacy: Listening Session Before the President’s Task Force on 21st Century Policing 3–4 (Jan. 9, 2015), http://www.ccrjustice.org/files/CCRTestimony_PolicingTaskforce_20150113Final.pdf [<http://perma.cc/4NFY-KMWK>].

¹² See, e.g., Peter Holley, *Ferguson Prosecutor Says He Knew Some Witnesses Were “Clearly Not Telling the Truth.” They Testified Anyway.*, WASH. POST (Dec. 20, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/12/20/ferguson-prosecutor-says-he-knew-some-witnesses-were-clearly-not-telling-the-truth-they-testified-anyway> [<http://perma.cc/A94U-V9GJ>].

gations of police-involved deaths are fair and impartial. In one survey, 76% of African Americans had little confidence in investigations such as the one into Brown's death.¹³ In another poll, this one by YouGov, less than half — only 42% — of whites “trust[ed] the justice system to properly investigate” police-involved deaths, while a mere 19% of African Americans had such trust in the existing system.¹⁴

Whether civilians trust the institutions of justice is central to the concept of procedural justice. That is, where the public trusts the process of the justice system, it will confer legitimacy on those institutions.¹⁵ A significant body of research demonstrates “public perceptions of the *fairness* of the justice system in the United States are more significant in shaping its legitimacy than perceptions that it is *effective*.”¹⁶ Where the public has trust, it will sanction law enforcement with legitimacy; and when it does so, it is signaling that the public's moral values of right and wrong are aligned with those of its police agencies. Conversely, legitimacy crumbles when civilians are treated unfairly and the public is left with the conclusion that police agencies are not accountable.¹⁷ The lack of trust is not universal and disagreements over law enforcement too often devolve into vituperative attacks over the character of the police as well as protestors. Such arguments, in turn, “induce disputes” over the appropriate design for accountability mechanisms.¹⁸

For the most part, the process of investigating police-caused fatalities is opaque to the public. Each lethal use of force by an officer is a homicide and investigators and prosecutors must ask whether it was also a crime. Typically police-involved deaths are subject to a two-track investigation. The first investigation is to determine whether the officer committed a crime. In most large agencies, that investigation is conducted internally by detectives from a homicide squad or by a force

¹³ *Stark Racial Divisions in Reactions to Ferguson Police Shooting*, PEW RESEARCH CTR. 2 (Aug. 18, 2014), <http://www.people-press.org/files/2014/08/18-14-Ferguson-Release.pdf> [<http://perma.cc/9KZ7-8QPN>].

¹⁴ Peter Moore, *Poll Results: Police*, YOUNGOV 2 (Aug. 14, 2014, 11:35 AM), http://cdn.yougov.com/cumulus_uploads/document/vloh3on24q/tabs_OPI_police_force_20140814.pdf [<http://perma.cc/H3AK-3HQE>].

¹⁵ See Hough et al., *supra* note 4.

¹⁶ *Id.* at 205.

¹⁷ See Jack Sullivan, *Clearing the Cops: Do District Attorneys Rubber-Stamp Police Use of Deadly Force?*, COMMONWEALTH MAG., Winter 2014, at 29, 36, http://massinc.wpengine.netdna-cdn.com/wp-content/uploads/sites/2/2014/08/CommonWealth_Winter2014.pdf [<http://perma.cc/R4AM-WK3W>].

¹⁸ Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist)?* 17 (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 181, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304645 [<http://perma.cc/KC77-P7LE>].

investigation team.¹⁹ This team is primarily responsible for gathering evidence, locating witnesses and conducting interviews — including that of the involved officer, who has the right to invoke his or her right to remain silent. Other agencies — especially smaller ones — will often have a larger neighboring department or a state police agency conduct the criminal investigation.²⁰ Once the investigation is completed, it is forwarded to the local prosecutor who, depending on the jurisdiction, either convenes a grand jury or decides whether to directly file charges against the officer.²¹ The second investigation is to determine whether the officer violated department policies or tactics. Here, the officer can be compelled to provide a statement; however, such statements cannot be used against him or her in a criminal proceeding.²² The focus of this Commentary is on the first-described criminal investigation.

This system of internalized criminal investigations has been criticized for years for its inherent bias. Merrick Bobb, the Executive Director of the Police Assessment Resource Center and one of the most well-known and highly respected advocates for effective police oversight, has argued that bias in shooting investigations appears in many forms. Some investigations are “half-hearted, wherein not all relevant witnesses are interviewed or even attempted to be located, particularly those witnesses who might give testimony unfavorable to the officer.”²³ Bobb notes that interviewers of involved officers slant investigations by using “softball, open-ended questions” that allow for narrative responses, fail to challenge factual assertions by the officer, and ask leading questions at opportune moments that likely “signal to the officer what he is supposed to say in order to get off the hook.”²⁴ In other words, in the current investigative system, the involved officer is “not investigated as someone who may have reason to fabricate evidence and lie.”²⁵ When the investigator and the subject of the investigation are connected to the same organization, there is a natural impulse to interpret evidence in a way that supports the conclusion the

¹⁹ See, e.g., 3 L.A. POLICE DEP'T, 2014 1ST QUARTER MANUAL § 794.14 (2014), http://www.lapdonline.org/lapd_manual/volume_3.htm#794 [<http://perma.cc/2Q3W-2YDC>] (describing that Los Angeles Police Department use of force and in-custody deaths are investigated by the Criminal Investigation Section of the Force Investigation Division).

²⁰ Sullivan, *supra* note 17, at 30.

²¹ *Id.*

²² See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

²³ Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 156 (2003).

²⁴ *Id.*

²⁵ Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 322 (2001).

interpreter would prefer.²⁶ This bias is not unique to law enforcement; it is also visible in other fields where a close relationship exists and strong bonds are formed, such as financial auditing.²⁷ Thus where there is a strong affinity with the subject of investigation, “it may be impossible for professionals to fulfill roles that demand objectivity while simultaneously fulfilling roles that demand partisanship.”²⁸

Nor are local prosecutors immune from bias. In his critique of the Los Angeles criminal justice system following the Rampart scandal (which included an officer-involved shooting that paralyzed an unarmed man with no prior criminal record who was then initially sentenced to prison for twenty-three years after officers planted a gun on him), Dean Erwin Chemerinsky identified a culture within the district attorney’s office that discouraged asking too many questions about potential misconduct and exhibited a pro-police bias.²⁹ This reflected an “institutional ethic of combat” where gaining convictions was prized over all other qualities.³⁰ Chemerinsky noted that even where prosecutors were suspicious of misconduct, they were reluctant to confront officers, since the police were “handing them all the evidence needed to get a guilty plea or conviction.”³¹ Since most prosecutions rely on maintaining the credibility of the police, when the on-duty actions of officers are under investigation, “prosecutors face ‘an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality.’”³² As a result, Professor John Jacobi argues, prosecutions for on-duty conduct are a rarity: “civilian distrust can be traced” to the perception of “a cycle of impunity, by which the reluctance of local government to prosecute bad cops empowers future misconduct and drives communities to regard the police as adversaries instead of protectors.”³³

The courts present one possible solution to the problem of biased investigations and rare prosecutions. Limited resources, as well as judicial precedent, however, have made courts an unreliable solution.

²⁶ See generally Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

²⁷ Don A. Moore et al., *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37, 46 (2010).

²⁸ *Id.* at 47.

²⁹ Chemerinsky, *supra* note 25, at 315.

³⁰ *Id.* at 315 n.57 (quoting H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000)) (internal quotation mark omitted).

³¹ *Id.* at 315.

³² John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 804 (quoting Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 (1996)).

³³ *Id.* at 789.

Federal law prohibits state or local law enforcement officials from “engag[ing] in a pattern or practice of conduct” that deprives persons of rights “protected by the Constitution or laws of the United States.”³⁴ The passage of what is commonly known as the “Law Enforcement Misconduct Statute” was partly in reaction to findings by the Christopher Commission in Los Angeles that the LAPD had exercised “lax supervision” and conducted “inadequate investigation[s]” of potential misconduct.³⁵ The Department of Justice (DOJ) is empowered to seek injunctive relief to end the misconduct and force reforms of “policies and procedures that resulted in or allowed the misconduct.”³⁶ The DOJ has recently sought either injunctive relief against or a pre-litigation settlement against a number of police departments in places such as Albuquerque and New Orleans after high-profile shootings.³⁷ Yet there are approximately 18,000 local agencies in the United States³⁸ and, until the summer of 2014, no one outside of eastern Missouri had likely ever heard of Ferguson. The DOJ, however, initiates only about three pattern-and-practice investigations a year.³⁹ When a police department has not caught the attention of the DOJ, which often adopts a “worst-first” strategy that prioritizes large agencies, the remedies are sparse.⁴⁰

Litigants have not been successful in bringing claims pursuant to 42 U.S.C. § 1983 that allege police agencies are inadequately investigating shootings. Municipal liability attaches only when the municipality has an official policy or custom that causes an unconstitutional deprivation of the plaintiff’s rights.⁴¹ The linkage between inadequate investigations and a policy or custom has proven difficult to establish. In *Lee v. City of Richmond*,⁴² the U.S. District Court for the Eastern District of Virginia ruled that an inadequate investigation claim re-

³⁴ 42 U.S.C. § 14141(a) (2012).

³⁵ Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 527 (2004) (quoting H.R. REP. NO. 102-242, at 135 (1991) (internal quotation marks omitted)).

³⁶ *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/spl/documents/polmis.php> (last visited Mar. 28, 2015) [<http://perma.cc/PV34-JXSP>].

³⁷ See *Civil Rights Division Special Litigation Section Cases and Matters*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Mar. 28, 2015) [<http://perma.cc/T2W5-CGN6>].

³⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ NO. 233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/csleao8.pdf> [<http://perma.cc/6623-9QG4>].

³⁹ Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3193 (2014).

⁴⁰ Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 1 (2009).

⁴¹ See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

⁴² No. 3:12cv471, 2013 U.S. Dist. LEXIS 38085 (E.D. Va. Mar. 19, 2013).

quires the same showing as a “failure to train” allegation.⁴³ That is, the inadequacy must have been plainly obvious to city policymakers who were, nevertheless, “deliberately indifferent to the need.”⁴⁴ The U.S. Court of Appeals for the Seventh Circuit reached a similar conclusion, holding that a plaintiff could not rely on an Illinois grand jury finding that not one of the 783 excessive force complaints made against a sheriff’s department over a five-year period resulted in an indictment to support a claim that the sheriff did not in practice enforce policies against excessive use of force.⁴⁵

Private plaintiffs seeking injunctive relief are also unlikely to have success. The Supreme Court has shown great reluctance to using private party injunctive relief to change the investigative practices of police departments.⁴⁶ In *City of Los Angeles v. Lyons*,⁴⁷ the Supreme Court foreclosed the plaintiff from seeking injunctive relief against the LAPD for the use of chokeholds unless he could demonstrate it was likely that its officers would use a chokehold on him again in the future.⁴⁸ In a hypothetical suit to enjoin an agency from conducting inadequate police shooting investigations, it would be extremely difficult for a plaintiff to show that he or she would be impacted by inadequate shooting investigations again in the future. Without access to monetary or injunctive relief, impacted communities will need to wait until the Department of Justice, the “sole authority to initiate structural police reform,” launches a pattern-and-practice investigation.⁴⁹

Although the courts may not offer a solution to the problem of police and prosecutorial bias in investigating police-involved deaths, state legislatures may. To prevent further erosion of public trust, state legislatures should move the investigation and prosecution of police-involved deaths to independent agencies. A number of countries have built alternative structures to investigate police-caused deaths. These alternative models, adopted in the United Kingdom, Norway, and Canada, are completely independent from the involved agency and, in some cases, even from the local prosecutor.

The Police Ombudsman of Northern Ireland (PONI) was established by the Police (Northern Ireland) Act 1998⁵⁰ and opened its doors

⁴³ *Id.* at *23–24.

⁴⁴ *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)) (internal quotation mark omitted).

⁴⁵ *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008).

⁴⁶ *See, e.g., Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976).

⁴⁷ 461 U.S. 95 (1983).

⁴⁸ *See id.* at 105–06; *see also* *Armacost*, *supra* note 35, at 492.

⁴⁹ *See* *Rushin*, *supra* note 39, at 3193.

⁵⁰ *Police (Northern Ireland) Act*, 1998, c. 32 (U.K.).

in 2000.⁵¹ Complaints against the Police Service of Northern Ireland, including allegations of criminal misconduct, are investigated by PONI.⁵² By law, PONI “must [also] investigate all cases of death or serious injury.”⁵³ After concluding its investigation, PONI then makes recommendations to the Director of Public Prosecutions who has the discretion whether to file charges.⁵⁴

The Norwegian Parliament created the Norwegian Bureau for the Investigation of Police Affairs in 2004.⁵⁵ The Norwegian government is explicit that, “[w]ithout adequate control of the [police’s] use of [its] power, the right to use force could become a threat to legal protection and democracy.”⁵⁶ The Norwegian Bureau is independent of the national police force and is administratively attached to the Ministry of Justice.⁵⁷ It investigates all allegations of criminal misconduct by officers and all instances where someone dies as a result of the police or prosecuting agency’s exercise of their authority and has its own cadre of prosecutors.⁵⁸ The Norwegian Bureau exists to safeguard three objectives: “the right for involved persons to be heard,” the maintenance of “public confidence in procedures,” and the protection of “fundamental rights for citizens and police officers involved.”⁵⁹

Surveys conducted in Europe suggest that residents of countries with independent investigation structures have a higher opinion of their criminal justice systems than similar American surveys have shown. While a direct correlation between the public’s view of the criminal justice system and independent investigations of police use of force is difficult to measure, researchers surveyed attitudes about justice systems through the European Social Survey in 2010. The survey asked forty-five questions in twenty-eight countries to measure trust in

⁵¹ David MacAlister, Final Report, *Police-Involved Deaths: The Failure of Self-Investigation*, B.C. CIVIL LIBERTIES ASS’N 40 (2010), <http://bccla.org/wp-content/uploads/2012/05/20101123-McAllister-Report-Police-Involved-Deaths-The-Failure-of-Self-Investigation.pdf> [<http://perma.cc/UQ79-586P>].

⁵² *Id.*

⁵³ *Id.*; see Police (Northern Ireland) Act, 1998, c. 32, §§ 50, 54 (U.K.).

⁵⁴ Police (Northern Ireland) Act, 1998, c. 32, §§ 58–59 (U.K.).

⁵⁵ 5 Mar. 2004 nr. 13 (Nor.); see also NORWEGIAN BUREAU FOR THE INVESTIGATION OF POLICE AFFAIRS, ANNUAL REPORT ‘09, at 30 (2009), http://www.spesialenheten.no/Portals/01/C3%85rsrapporter/Spesialenheten_%C3%85rsrapport%2009%20LOW%20-%20engelsk.pdf [<http://perma.cc/Z8FD-NWFD>].

⁵⁶ The Norwegian Police — Use of Force (Physically), Norwegian State Response to Christof Heyns, U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, <http://www.icla.up.ac.za/images/un/use-of-force/western-europe-others/Norway/State%20Response.pdf> (last visited Mar. 23, 2015) [<http://perma.cc/M5XG-769P>].

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

⁵⁹ *Id.*

the police and the courts.⁶⁰ The survey designers recognized that “[i]f securing normative compliance with the law is to be a key aim of criminal justice policy, then public trust in the system is required. It is equally important that citizens accept the legal institutions as having a legitimate right to exercise authority.”⁶¹

Unfortunately, there is no similar data from prior to the formation of investigation bodies either in the United Kingdom or in Norway against which to compare the 2010 survey, and the ESS asked no questions directly about lethal force investigations. Nevertheless, the results show that even respondents who identified as belonging to groups that experience discrimination in their respective countries had greater confidence in the police than the amount of confidence that ethnic minorities in the United States have in their police. When surveyors asked those in the United Kingdom who were in groups that had experienced discrimination “how often the police make fair, impartial decisions,” 69.9% responded “often” or “very often,” versus 83.4% of those who had not suffered discrimination.⁶² Surveyors also asked whether “[p]olice have the same sense of right or wrong as [the respondent].” United Kingdom residents who were in groups that experienced discrimination were less likely to have a positive response, with just over half (53.3%) agreeing or strongly agreeing with the sentiment versus 70.7% of non-discrimination suffering groups.⁶³ In Norway there were similar gaps between members of the relatively small group that suffered discrimination and those who were not in such groups;⁶⁴ though Norwegians overall expressed greater trust in the police and courts than residents of the United Kingdom.⁶⁵

Several Canadian provinces have developed independent agencies to investigate potential criminal conduct by police officers. Ontario’s

⁶⁰ EUROPEAN SOCIAL SURVEY, TRUST IN JUSTICE: TOPLINE RESULTS FROM ROUND 5 OF THE EUROPEAN SOCIAL SURVEY, ESS TOPLINE RESULTS SERIES ISSUE 1, at 3 (2011), http://www.europeansocialsurvey.org/docs/findings/ESS5_toplines_issue_1_trust_in_justice.pdf [<http://perma.cc/QR23-WRXY>].

⁶¹ *Id.*

⁶² Detailed cross-tabulation data may be accessed via the ESS’ online analysis function. See *Justice (ESS5 2010)*, EUROPEAN SOCIAL SURVEY, <http://www.europeansocialsurvey.org/data/themes.html?t=justice> (last visited Mar. 28, 2015) [<http://perma.cc/A6VQ-WQ65>].

⁶³ *Id.*

⁶⁴ Of the subset of groups in Norway that had experienced discrimination, 75.6% believed the police often made fair and impartial decisions. In contrast, 84.0% of those who did not identify as belonging to a discriminated-against group agreed with the sentiment that police made fair and impartial decisions. *Id.* When asked if police have the same sense of right or wrong, 59.3% of members of groups that had suffered discrimination agreed or strongly agreed with the statement, compared to 73.5% of the rest of those surveyed. *Id.*

⁶⁵ See *id.* (finding that 81.8% of U.K. respondents and 83.6% of Norwegian respondents believed that “police make fair, impartial decisions” “often” or “very often” and that 66.6% of U.K. respondents and 78.5% of Norwegian respondents believed that “courts make fair, impartial decisions based on the evidence available to them” more often than not).

Special Investigations Unit (SIU) was formed in 1990 and was the first such agency in Canada.⁶⁶ It is a civilian law enforcement agency with jurisdiction to investigate criminal allegations against police officers and incidents resulting in death or serious bodily injury involving the province's fifty-seven police services.⁶⁷ It has a staff of eighty-five and its own forensic investigators, vehicles, and laboratory.⁶⁸ The impetus for the formation of SIU was the conclusion reached by the province's general public that "internal investigations lacked the necessary objectivity required of policing."⁶⁹ Recommendations to charge officers are made to the Crown Prosecution Service. In 1999, following repeated challenges by police services and officers reluctant to cooperate with SIU, the Police Services Act⁷⁰ was updated with regulations that require the cooperation of officers.⁷¹ The Act also requires that police chiefs secure officer-involved crime scenes and immediately notify SIU of incidents that fall within the SIU's mandate as lead investigator.⁷² As a result of SIU investigations, charges were laid against fourteen officers in Ontario in 2014 for alleged criminal conduct; four of the incidents were for assaults causing bodily harm or assault with a weapon.⁷³

Independent investigative bodies must exhibit a number of common characteristics to be effective. First and foremost is the ability to investigate potential criminal wrongdoing by officers and to make recommendations for prosecutions that are then evaluated by special prosecutors.⁷⁴ The independent investigative agency should be open and transparent, independent of any other law enforcement agency, but with unrestricted access to officers and agency records.⁷⁵ It must be given a sufficient budget, the power to issue subpoenas, search warrants and a well-defined jurisdiction and mandate.⁷⁶ Investigators should be granted all the powers of peace officers.⁷⁷

⁶⁶ See MacAlister, *supra* note 51, at 44. Other Canadian provinces that have since adopted independent investigative bodies include Alberta, Manitoba, Nova Scotia, and Saskatchewan. *Id.* at 46.

⁶⁷ *What We Do*, ONT. SPECIAL INVESTIGATIONS UNIT, http://www.siu.on.ca/en/what_we_do.php (last visited Mar. 23, 2015) [<http://perma.cc/C4SH-Y2W7>].

⁶⁸ *Organizational Chart*, ONT. SPECIAL INVESTIGATIONS UNIT, http://www.siu.on.ca/en/org_chart.php (last visited Mar. 23, 2015) [<http://perma.cc/VBN2-W3SA>].

⁶⁹ ONT. SPECIAL INVESTIGATIONS UNIT, *supra* note 67; see also Police Services Act, R.S.O. 1990, c. P.15, § 113 (Can.).

⁷⁰ Police Services Act, R.S.O. 1990, c. P.15, § 113 (Can.).

⁷¹ See Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10, § 11(3) (Can.).

⁷² See *id.* §§ 3-4.

⁷³ See *2014 News Releases*, ONT. SPECIAL INVESTIGATIONS UNIT, <http://www.siu.on.ca/en/news.php?yr=2014> [<http://perma.cc/E6AE-L5J5>].

⁷⁴ MacAlister, *supra* note 51, at 72.

⁷⁵ *Id.* at 72-73, 76.

⁷⁶ *Id.* at 74-76.

⁷⁷ *Id.* at 75.

These characteristics should represent the baseline requirements for independent investigative and prosecuting agencies. Remaining details should be left to state legislatures, especially in light of size differences among states and relative capacity of states' attorneys general to administer such offices. The examples of Northern Ireland, Norway, and Canada should serve as guides for state legislatures in constructing such agencies even though the United States Constitution, unlike the European Convention on Human Rights — of which both the United Kingdom and Norway are signatories — does not impose a duty on states to adequately investigate police-related deaths. Both the United Kingdom and Norway are subject to Article 2 of the Convention, which limits the state's taking of life through "the use of force which is no more than absolutely necessary."⁷⁸ In fulfilling the requirements of Article 2, signatory states are inferred to have a duty to ensure "adequate effective investigation of deaths."⁷⁹ Even without such a mandate, states should pursue new ways to independently investigate and prosecute deadly uses of force.⁸⁰ States' adoption of independent agencies that investigate and prosecute police misconduct would clearly improve upon our current system. First, having independent agencies investigate incidents of possible police misconduct would enhance the truth-seeking process. Independent agency investigators would more likely be free of the institutional allegiances and biases that currently color investigations because they would not feel an impulse to protect fellow members of their own organization. Second, these independent agencies would serve an important expressive function that would likely bolster public trust in our institutions of justice. If the public knows that police-involved deaths are investigated and prosecuted by agencies without close ties to police departments, it will likely have more confidence in the results of those proceedings.

Police departments and local prosecutors will likely strongly object to losing control of these sensitive investigations. It should be apparent to legislatures and other stakeholders, though, that the benefits of thorough and unbiased investigations easily outweigh such notions of territorialism. The result will be greater trust in the process and increased legitimacy of the criminal justice system in the eyes of the public.

⁷⁸ Convention for the Protection of Human Rights and Fundamental Freedoms art. 2.2, Nov. 4, 1950, 213 U.N.T.S. 221.

⁷⁹ Juliet Chevalier-Watts, *Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, 21 EUR. J. INT'L L. 701, 702 (2010).

⁸⁰ See Simmons, *supra* note 5, at 404–08.