

EXCESSIVE FORCE AND THE MEDIA

Miranda Dalpiaz† & Nancy Leong††

Recent allegations of police officers using excessive force against people of color have received considerable attention in the media. Yet such incidents have largely stalled in the legal system. With a few notable exceptions, neither criminal nor civil proceedings, at either the federal or state level, have provided recourse for those injured by the police or for the families of those killed by the police.

This Essay examines the media coverage of police excessive force in relation to one federal statute bridging criminal and civil rights concerns—18 U.S.C. § 242. While the statute is criminal in nature, allowing federal prosecution against government officers who willfully violate constitutional rights, it addresses civil rights concerns by offering a remedy against those who use state force to infringe civil rights.

An empirical examination reveals that—despite considerable media coverage of police excessive force—such coverage is reactive rather than proactive when it comes to federal civil rights charges. That is, it discusses charges under 18 U.S.C. § 242 only when an investigation that might result in such charges is already underway, rather than examining whether one will or should take place. An original empirical survey of ten years of coverage by thirty-six major newspapers reveals that, of 445 articles that discussed federal civil rights charges, only forty-four, or 9.89%, did so proactively rather than reactively. Such an approach is uncharacteristic for the media, which typically plays an important role in questioning whether the government should take action in rectifying alleged abuses of power directed against citizens. The Essay considers why the media has assumed a more reactive role in police excessive force cases than in other cases involving civil rights violations, discusses the consequences of this role, and finally proposes a number of ways that media coverage of police excessive force incidents should be improved.

† J.D., University of Denver Sturm College of Law.

†† Associate Professor, University of Denver Sturm College of Law. We appreciate the thoughtful comments of John Campbell, Leslae J.E. Dalpiaz, Ian Farrell, Charlotte Garden, Margaret Kwoka, Justin Pidot, and Henry Sulzbacher as well as the careful and thorough research assistance of Natalie Klee.

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INTRODUCTION

What role should the media play in reporting on civil rights violations? The question is an important one, dating back to the beginning of America and before. The Founders thought it significant enough to enshrine the freedom of the press in the First Amendment.¹ One reason for this emphasis was to help ensure that government abuse would receive scrutiny in the media.² In the ensuing centuries, the media has played a significant and active role not only in reporting on civil rights violations, but also in uncovering, investigating, publicizing, and prompting remediation of those violations.³

In this Essay, we examine the media's role in the context of allegations of excessive force by police officers. Specifically, the Essay considers the relationship between media coverage of excessive force by police officers and attempts to use the federal judicial system to punish and deter the use of excessive force. In particular, we consider the relationship, if any, between media coverage of instances of alleged excessive force by police officers and federal investigations and prosecutions for violations of constitutionally-guaranteed civil rights. The primary federal criminal statute under which such violations might be punished is 18 U.S.C. § 242, which makes it a crime to willfully deprive an individual of constitutional rights while acting under color of state law.⁴

¹ U.S. CONST. amend. I.

² For a detailed examination of this media role, see *infra* notes 12–27 and accompanying text.

³ See *infra* notes 12–27.

⁴ 18 U.S.C. § 242 (2012).

To investigate how the media covers such prosecutions, we conducted an original empirical survey of thirty-six newspapers. Our list contained the top twenty-five newspapers based on total circulation, newspapers in the twenty largest metropolitan areas,⁵ and a few additional newspapers based on our individual case studies.⁶ We then searched the online archives of these newspapers for the ten years from January 1, 2005 to December 31, 2014 using, as our search terms: (1) “federal civil rights charges;” and (2) 242 together with the phrase “civil rights.” Finally, we examined 6511 articles on the newspapers’ websites and ultimately compiled a database consisting of 445 articles that dealt with federal civil rights charges.

Our examination yielded three primary observations. First, we found that most newspapers had very little coverage discussing police excessive force in relation to federal civil rights prosecutions.⁷ Most had almost no coverage prior to Trayvon Martin’s death at the hands of George Zimmerman in 2013. True, Zimmerman was not a police officer. But as we will discuss, his self-ascribed quasi-official status appears to have drawn attention to the broader phenomenon of the abuse of power by police officers and “cop-wannabes,” as well as to the racial dynamics that often overlay such abuses of power. Yet even after Trayvon Martin’s death galvanized civil rights groups and activists across the nation, only some newspapers increased their coverage. Others continued their practice of reporting only minimally on police excessive force, or, in some cases, reporting only on the most high-profile incidents—namely, the deaths of Michael Brown and Eric Garner.

Second—and more surprisingly, given the traditional role of the media in pushing for attention to civil rights violations—we found that traditional newspapers’ coverage of police excessive force was generally reactive.⁸ That is, the media generally did not raise the possibility of civil rights violations unless the federal government had already initiated

⁵ These two sets overlapped, leading to our examination of a total of thirty-six newspapers’ online databases. A complete description of our methodology appears *infra* notes 65–78 and accompanying text.

⁶ While our goal was to achieve a reasonably representative sample of newspapers with large circulation and newspapers in major metropolitan areas, we wanted, if anything, to skew our dataset toward including *more* coverage of instances of police excessive force rather than fewer. This is the reason that we added additional newspapers that bore particular relevance to our case studies.

⁷ See *infra* notes 93–106 and accompanying text.

⁸ See *infra* notes 107–37 and accompanying text.

an official investigation or prosecution.

Third and finally, most discussion of police excessive force in the newspapers we examined took the form of news coverage, not opinion or investigatory writing.⁹ That is, reporters simply described events that had led to an existing federal civil rights investigation, rather than including a discussion of why such an investigation might or might not result in prosecution for civil rights violations, or whether such measures should be taken as a normative matter. In theory, such a discussion might occur in an objective, investigatory piece—that is, a reporter might talk with experts about possible legal developments following an instance of police excessive force. Or such a discussion might take place in the form of an op-ed or editorial. But our research revealed that, in fact, such discussions rarely took place at all.

Our three observations lead us to conclude that the American media takes an atypically reactive role in reporting and commenting on instances of police excessive force. This reactivity results in a lost opportunity for the media to assume the role that it often assumes in other contexts relating to civil rights. Moreover, the media's reactivity fails to educate the public about possible repercussions for civil rights violations and to press political actors and policymakers to engage in reforms.¹⁰

The Essay proceeds in three parts. Part I articulates the historic role of the media in probing civil rights issues, both as envisioned in judicial decisions and as described in the scholarly literature examining the relationship between the legal system and the media. It also provides a brief doctrinal overview of the mechanisms available to address police excessive force. Part II then presents original qualitative research examining the coverage of police excessive force in the media and the relationship of that coverage to legal actions—or lack thereof—to address police excessive force. Part III considers the implications of these data and offers some recommendations for improvement for both members of the media and legal actors.

I

BACKGROUND

The Founders envisioned that the media would provide a

⁹ See *infra* notes 107–37 and accompanying text.

¹⁰ See *infra* note 138 and accompanying text.

check on civil rights violations by the government. Indeed, they enshrined this premise in the First Amendment to the Constitution, which protects the freedom of the press from infringement by the government.¹¹ Our history has proven their prediction correct in many areas of the law. Indeed, the media has become known as the “Fourth Estate,” meaning that it provides an additional check on the three branches of government ensuring an educated citizenry to participate in our representative democracy.¹²

This Part considers the relationship between the media and the justice system, both in general and specifically with respect to civil rights violations. Subpart I.A explains how the media interacts with the justice system, examining both judicial decisions and the scholarly literature. Subpart I.B lays the groundwork for an examination of this interaction in the context of police excessive force by describing four recent events that we will use as case studies and surveying the federal civil rights statutes—specifically, 18 U.S.C. § 242—that would be applicable to each one.

A. The Media and the Justice System

In many instances, the media reports on civil rights abuses, leading to social, political, and legal action. One example is the water crisis in Flint, Michigan, which attracted national attention and resulted in lawsuits against various governmental officials and entities and in the declaration of an emergency by the State of Michigan and by the federal government.¹³ This response occurred only after a steady stream of articles¹⁴ and editorials¹⁵ helped to question and

¹¹ U.S. CONST. amend. I.

¹² JULIANNE SCHULTZ, *REVIVING THE FOURTH ESTATE: DEMOCRACY, ACCOUNTABILITY AND THE MEDIA* 1–2 (1998).

¹³ See, e.g., Denise Robbins, *Analysis: How Michigan and National Reporters Covered the Flint Water Crisis*, MEDIA MATTERS (Feb. 2, 2016, 3:30 PM), <http://mediamatters.org/research/2016/02/02/analysis-how-michigan-and-national-reporters-co/208290> [<https://perma.cc/VZ49-KVLA>] (providing a timeline of key events in the Flint water crisis in relation to media coverage of those events).

¹⁴ See, e.g., Mitch Smith, *A Water Dilemma in Michigan: Cloudy or Costly?*, N.Y. TIMES (Mar. 24, 2015), <http://www.nytimes.com/2015/03/25/us/a-water-dilemma-in-michigan-cheaper-or-clearer.html> [<https://perma.cc/XM4B-F9QB>] (discussing the negative impact of the water crisis on the health of the residents of Flint and the economy of the city).

¹⁵ See, e.g., *Flint Water Crisis: An Obscene Failure of Government*, DETROIT FREE PRESS (Oct. 8, 2015, 4:37 PM), <http://www.freep.com/story/opinion/editorials/2015/10/08/flint-water-crisis-obscene-failure-government/73578640/> [<https://perma.cc/PSG5-MUMY>] (noting the failure of the government to ensure that the drinking water in Flint is safe).

publicize the callous conduct of government officials. The effect of the media's involvement was clear, even though many believe that the national media could and should have done more to publicize the crisis.¹⁶ Likewise, after an exposé of nail salons in New York City by *The New York Times*,¹⁷ Governor Andrew Cuomo signed into effect state legislation,¹⁸ New York City developed a pilot program to measure air quality in salons,¹⁹ and other jurisdictions have followed suit.²⁰ We think, therefore, it is uncontroversial to say that the media often exposes civil rights abuses and galvanizes political reform across a wide variety of substantive areas.

Various commentators have documented the historical role of the media in exposing not only specific civil rights violations, but also systemic abuses. There is widespread agreement that the national media was instrumental in contributing to the success of the Civil Rights Movement in the 1950s and beyond.²¹ At times, reporters recall tension between national media coverage and the local reporters. For example, there was a considerable difference in the way protests in Birmingham were covered nationally and by

¹⁶ See, e.g., Robbins, *supra* note 13 (criticizing the national coverage of the Flint water crisis as inadequate).

¹⁷ See Sarah Maslin Nir, *The Price of Nice Nails*, N.Y. TIMES (May 7, 2015), <http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html> [<https://perma.cc/2G7Z-TCNR>].

¹⁸ See Laila Kearney, *New York Governor Signs Emergency Nail Salon Worker Law*, REUTERS (July 16, 2015, 2:00 PM), <http://www.reuters.com/article/us-usa-new-york-nail-salons-idUSKCN0PQ26T20150716> [<https://perma.cc/Q98Z-XPNK>].

¹⁹ See Benjamin Mueller, *Pilot Program Will Gauge Air Quality in New York Nail Salons*, N.Y. TIMES (Sept. 29, 2015), http://www.nytimes.com/2015/09/30/nyregion/pilot-program-will-gauge-air-quality-in-new-york-nail-salons.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&referer=http://t.co/67Zy7r5MSc&_r=0 [<https://perma.cc/H2DB-Y8E7>].

²⁰ See, e.g., Bryce Covert, *Connecticut Inspects 25 Nail Salons, Shuts 23 Down Over Wage Abuse*, THINKPROGRESS (Aug. 18, 2015), <http://thinkprogress.org/economy/2015/08/18/3692550/connecticut-nail-salons/> [<https://perma.cc/SP6C-GNJ6>] (noting that Connecticut shut down twenty-three nail salons for wage abuse); Rick Rojas, *New Jersey Legislators Propose Law to Protect Nail Salon Workers*, N.Y. TIMES (July 24, 2015), <http://www.nytimes.com/2015/07/25/nyregion/new-jersey-legislators-propose-law-to-protect-nail-salon-workers.html> [<https://perma.cc/6FGZ-GSKM>] (describing how lawmakers in New Jersey proposed legislation to protect nail salon workers from unhealthy working conditions and practices).

²¹ See, e.g., *The Civil Rights Movement and Television*, PALEY CENTER FOR MEDIA, <https://www.paleycenter.org/the-civil-rights-movement-and-television> [<https://perma.cc/HK73-YTES>] (discussing how television became a catalyst for change).

Birmingham papers.²² The local papers actually reported events less aggressively, perhaps because of a combination of hesitation to attract criticism from their subscriber base and concern about inflaming tensions that were already running high.²³ Still, there is no question that the media, as a whole, played an important role in the civil rights progress of the 1950s and beyond.

Media scholars concur with this descriptive account.²⁴ As two researchers report: “A comparison of front-page *New York Times* content and national public opinion from 1954 to 1976 showed strong agenda-setting effects for the civil rights issue.”²⁵ Others agree: “In choosing and displaying news, editors, newsroom staff, and broadcasters play an important part in shaping political reality. Readers learn not only about a given issue, but also how much importance to attach to that issue from the amount of information in a news story and its position.”²⁶

That is, what the media reports often shapes the explicit aims of protesters and other reform-minded activists. Other research documents the media’s ability to shape what the general public wants and demands in terms of civil rights and liberties.²⁷ And the media can frame opposition to particular civil rights issues as surely as it can garner support for

²² See, e.g., Audie Cornish, *How the Civil Rights Movement Was Covered in Birmingham*, NPR (June 18, 2013, 8:04 PM), <http://www.npr.org/sections/code-switch/2013/06/18/193128475/how-the-civil-rights-movement-was-covered-in-birmingham> [<https://perma.cc/W9RL-HRXY>] (noting the difference between how the national press covered the events in Birmingham and how the local papers covered their own local events); Ryan Vazquez, *How the Media Covered the Civil Rights Movement: The Children’s March*, APR (Apr. 25, 2013), <http://apr.org/post/how-media-covered-civil-rights-movement-childrens-march> [<https://perma.cc/4ZCT-HP6G>] (noting that while local newspapers might not have reported civil rights stories, television carried stories about the Civil Rights Movement nightly).

²³ See Cornish, *supra* note 22.

²⁴ See TAEKU LEE, MOBILIZING PUBLIC OPINION: BLACK INSURGENCY AND RACIAL ATTITUDES IN THE CIVIL RIGHTS ERA 144–46 (2002); James P. Winter & Chaim H. Eyal, *Agenda Setting for the Civil Rights Issue*, 45 PUB. OPINION Q. 376, 377 (1981); see generally G. Ray Funkhouser, *Trends in Media Coverage of the Issues of the ‘60s*, 50 JOURNALISM & MASS COMM. Q. 533, 536 (1973) (noting that media trends sought to bring improvements in race relations).

²⁵ Winter & Eyal, *supra* note 24, at 376.

²⁶ Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 176 (1972).

²⁷ See, e.g., Thomas E. Nelson et al., *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567, 574–75 (1997) (describing news framing of a KKK rally and its effect on viewers’ tolerance for the Klan).

them.²⁸ For the most part, however, the media has traditionally served as an agent for bringing to light government mistreatment and abuse of disempowered individuals and groups.²⁹

By way of comparison, how does the media respond to reports of excessive force by police officers? The next section will begin that inquiry. Before considering how the media covers the possibility of various civil rights remedies for police brutality, we must discuss what remedies are actually available. Here, we focus on federal criminal remedies. We then examine how those remedies have been applied—or not—across four case studies.

B. Legal Recourse for Police Excessive Force

Federal criminal law allows the federal government to prosecute and punish perpetrators of police excessive force that violates an individual's constitutional rights.³⁰ Under 18 U.S.C. § 242, it is a crime for a person, acting “under color of any law,” to “willfully subject[] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”³¹

The law was originally enacted as part of the Civil Rights Act of 1866 to combat injustices after the Civil War.³² The language “color of law” includes not only acts committed by public officials “within the their [sic] lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties.”³³ Additionally, “[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting ‘under

²⁸ See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 249–50 (1997).

²⁹ See, e.g., PALEY CENTER FOR MEDIA, *supra* note 21 (describing the media's impact on the success of the civil rights movement); DETROIT FREE PRESS, *supra* note 15 (noting the importance of the media in exposing the Flint water crisis).

³⁰ See 18 U.S.C. § 242 (2012).

³¹ *Id.*

³² See Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (2012)); *United States v. Price*, 383 U.S. 787, 791 (1966); see also *The Civil Rights Bill of 1866*, HISTORY.HOUSE.GOV, <http://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> [<https://perma.cc/B55N-HCZH>] (noting that Radical Republicans believed this measure would help transform the postwar South into a more multiracial society and that it was the next “logical step” after the ratification of the 13th Amendment).

³³ *Deprivation of Rights Under Color of Law*, U.S. DEP'T OF JUSTICE (Aug. 6, 2015), <http://www.justice.gov/crt/deprivation-rights-under-color-law> [<https://perma.cc/9S69-9CXP>].

color' of law for purposes of the statute."³⁴ The willfulness standard requires the government to prove "a specific intent to deprive a person of a federal right."³⁵ This heightened willfulness standard has made federal prosecution of section 242 cases "significantly more difficult."³⁶ And even when potential violations are prosecuted, the punishment for violating 18 U.S.C. § 242 can range from as little as a fine or less than one year in prison to life in prison or the death penalty.³⁷ The sentence depends on the circumstances of the crime and whether there was any resulting injury.³⁸ Still, the statute exists, and is available as one tool for addressing egregious instances of police use of excessive force.

The Essay highlights four case studies to facilitate a better understanding of the media's response to incidents of police excessive force in relation to section 242. The case studies focus on four unarmed black men killed in confrontations with law enforcement: Michael Brown, Eric Garner, Dontre Hamilton, and Darrien Hunt. In each case, the U.S. Department of Justice (DOJ) investigated or is investigating the matter for possible federal civil rights violations.³⁹

Officer Darren Wilson shot Michael Brown on August 9,

³⁴ *Price*, 383 U.S. at 794.

³⁵ *Screws v. United States*, 325 U.S. 91, 103 (1945); see also Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2121 (1993) (discussing criminal liability for civil rights crimes as requiring a two-tiered *mens rea* analysis, including the "intent to violate a constitutionally protected right").

³⁶ John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 809 (2000); cf. Karen L. Black, Book Review, 5 TEMP. POL. & C.R. L. REV. 71, 72 (1995) (reviewing PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* (1995)) (suggesting that police abuse is rarely prosecuted).

³⁷ 18 U.S.C. § 242 (2012).

³⁸ *Id.*

³⁹ See, e.g., Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html> [https://perma.cc/25A4-28HT] (discussing the Michael Brown shooting); *Federal Officials to Review Milwaukee Shooting*, CBS NEWS (Dec. 23, 2014, 10:31 AM), <http://www.cbsnews.com/news/dontre-hamilton-case-federal-officials-to-review-milwaukee-shooting/> [https://perma.cc/MP3Z-F35G] (discussing the Dontre Hamilton shooting); *Utah: U.S. Reviews Killing of Man Wielding Sword*, N.Y. TIMES (Feb. 20, 2015), <http://www.nytimes.com/2015/02/21/us/utah-us-reviews-killing-of-man-wielding-sword.html> [https://perma.cc/29L2-EGZP] (discussing the Darrien Hunt shooting); Benjamin Weiser, *A Criminal Civil Rights Case May Be Difficult to Prove*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/05/nyregion/federal-investigation-into-eric-garner-death-may-be-difficult-to-prove-legal-experts-say.html> [https://perma.cc/9DA2-VGP6] (discussing the Eric Garner chokehold death).

2014 in Ferguson, Missouri.⁴⁰ Officer Wilson worked for the Ferguson Police Department.⁴¹ He confronted Brown and a friend after they disobeyed his order to walk on the sidewalk rather than the street.⁴² An altercation ensued between Officer Wilson and Brown through Officer Wilson's SUV's window, and Officer Wilson shot Brown in the hand.⁴³ Brown tried to run away, and Officer Wilson chased him.⁴⁴ Brown turned around, and Officer Wilson shot him.⁴⁵ Accounts of the conflict otherwise differed substantially. Some eyewitnesses stated that Brown put up his hands in a sign of surrender before he was shot.⁴⁶ Other witnesses stated that Brown reached for Officer Wilson's waist and charged at the officer or his car.⁴⁷

Brown's killing set off protests in Ferguson and throughout the country.⁴⁸ A St. Louis County grand jury did

⁴⁰ See Larry Buchanan et al., *What Happened in Ferguson*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [https://perma.cc/EJM9-928W].

⁴¹ See Colby Itkowitz, *Here's What Has Been Reported So Far About Ferguson Police Officer Darren Wilson*, WASH. POST (Aug. 16, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/08/16/heres-what-has-been-reported-so-far-about-officer-darren-wilson/> [https://perma.cc/7HM8-VELD].

⁴² See U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 6 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/23RV-3G2C]. The media has made much of the fact that security cameras appeared to capture Brown and his friend stealing cigarillos from a nearby convenience store shortly before Brown's confrontation with Officer Wilson. Wilson acknowledged, however, that he was not aware of the report at the time he initiated contact with Brown.

⁴³ *Id.*

⁴⁴ *Id.* at 7.

⁴⁵ *Id.*

⁴⁶ See Laura Santhanam & Vanessa Dennis, *What Do the Newly Released Witness Statements Tell Us About the Michael Brown Shooting?*, PBS (Nov. 25, 2014, 7:43 PM), <http://www.pbs.org/newshour/updates/newly-released-witness-testimony-tell-us-michael-brown-shooting/> [https://perma.cc/D2J7-CQN8].

⁴⁷ *Id.*

⁴⁸ See Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html> [https://perma.cc/DQ8Y-PLM4]; John Eligon & Manny Fernandez, *In Protests From Midwest to Both Coasts, Fury Boils Over*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/frustration-months-in-the-making-boils-over-on-the-streets-of-ferguson.html> [https://perma.cc/W57B-K768].

not bring state criminal charges against Officer Wilson.⁴⁹ Officer Wilson resigned from the Ferguson Police Department.⁵⁰ The DOJ investigated the matter for possible civil rights charges but ultimately did not file any,⁵¹ although it did produce a report harshly criticizing many of the Ferguson Police Department's practices as racially discriminatory.⁵²

Eric Garner was killed by Officer Daniel Pantaleo on July 17, 2014 in Staten Island, New York after Officer Pantaleo put him in a chokehold during an arrest.⁵³ Officers approached Garner for illegally selling "single cigarettes from packs without tax stamps."⁵⁴ The incident was recorded on video.⁵⁵ In the video, Garner is heard repeatedly telling the police officers that he could not breathe.⁵⁶ Like the shooting in

⁴⁹ See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [https://perma.cc/C9UT-LRDZ].

⁵⁰ See *Darren Wilson Resigns from Ferguson Police Department*, CBS NEWS (Nov. 29, 2014, 6:42 PM), <http://www.cbsnews.com/news/darren-wilson-resigns-from-ferguson-police-department/> [https://perma.cc/5C88-ZAHM].

⁵¹ See Wesley Lowery, *Justice Dept. Concludes That No, Michael Brown's Hands Probably Were Not Up*, WASH. POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/justice-dept-concludes-that-no-michael-browns-hands-were-probably-not-up/> [https://perma.cc/WDF8-4RG5].

⁵² See Sari Horwitz, *Justice Department Clears Ferguson Police Officer in Civil Rights Probe*, WASH. POST (Mar. 4, 2015), https://www.washingtonpost.com/world/national-security/justice-dept-review-finds-pattern-of-racial-bias-among-ferguson-police/2015/03/03/27535390-c1c7-11e4-9271-610273846239_story.html [https://perma.cc/2MNX-42EB]; see also U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62-78 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/3NE3-C2LX] (noting that Ferguson law enforcement practices disproportionately harm African American residents and are in part driven by racial bias).

⁵³ See Abby Ohlheiser et al., *No Charges for NYPD Officer in Apparent Chokehold Death; Justice Dept. to Investigate*, WASH. POST (Dec. 3, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/12/03/a-grand-jury-vote-in-new-york-police-involved-chokehold-case-could-come-soon/> [https://perma.cc/D62X-2FP5].

⁵⁴ Annie Karni et al., *2 Cops Pulled Off Streets, Staten Island DA Looking into Man's Death After NYPD Chokehold*, N.Y. DAILY NEWS (July 19, 2014, 4:30 PM), <http://www.nydailynews.com/new-york/nyc-crime/staten-island-da-man-death-nypd-chokehold-article-1.1871946> [https://perma.cc/4WDJ-Z7QZ].

⁵⁵ See Ohlheiser, *supra* note 53.

⁵⁶ See Tina Susman & Vera Haller, *Demonstrators Echo Eric Garner's 'I Can't Breathe' Cry Again, a Year After His Death*, L.A. TIMES (July 18, 2015, 10:33 PM), <http://www.latimes.com/nation/la-na-garner-justice-20150719-story.html> [https://perma.cc/AW8R-VCBU].

Ferguson, Garner's death caused protests in New York City and around the country.⁵⁷ A Staten Island grand jury declined to indict Officer Pantaleo on state charges for killing Eric Garner because they did not find probable cause that a crime had been committed.⁵⁸ At the time of this Essay, the DOJ is conducting its own federal investigation into Garner's death.⁵⁹

On April 30, 2014, Officer Christopher Manney of the Milwaukee Police Department shot and killed Dontre Hamilton at Milwaukee's Red Arrow Park.⁶⁰ Officer Manney responded to a call about a sleeping man near a coffee kiosk in the park.⁶¹ When he approached Hamilton, Officer Manney asked him to stand and he proceeded to do a "pat-down" search.⁶² During the search, an altercation began, and they struggled over Officer Manney's wooden baton. Then, according to eyewitnesses and the officer, Hamilton struck Officer Manney with the baton. Officer Manney then shot Hamilton thirteen or fourteen times.⁶³ Officer Manney was fired after the incident.⁶⁴ Investigation later revealed that Hamilton had received treatment for schizophrenia.⁶⁵ As in

⁵⁷ See Philip Bumb et al., *'I Can't Breathe': After Indictment Decision, Eric Garner's Final Words Become a Symbol of Anger, Frustration*, WASH. POST (Dec. 3, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/12/03/i-cant-breathe-after-indictment-decision-eric-garners-final-words-become-a-symbol-of-anger-frustration/> [<https://perma.cc/ZWA3-EPSJ>]; see also Susman & Haller, *supra* note 56 (reporting on the protests following Eric Garner's death).

⁵⁸ See Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC NEW YORK (Dec. 4, 2014, 1:59 PM), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html> [<https://perma.cc/H7Z4-M87G>].

⁵⁹ See *Statement by Attorney General Holder on Federal Investigation into Death of Eric Garner*, U.S. DEPT OF JUSTICE (Dec. 3, 2014), <http://www.justice.gov/opa/speech/statement-attorney-general-holder-federal-investigation-death-eric-garner> [<https://perma.cc/96HE-S2T8>].

⁶⁰ See Monica Davey, *Former Milwaukee Police Officer Won't Be Charged in Death of Black Man in Park*, N.Y. TIMES (Dec. 22, 2014), <http://www.nytimes.com/2014/12/23/us/former-milwaukee-police-officer-wont-be-charged-in-death-of-black-man-in-park.html> [<https://perma.cc/WJM8-8FR5>].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Ashley Luthern, *Ex-Milwaukee Officer Won't Be Charged in Dontre Hamilton Shooting*, J. SENTINEL (Dec. 22, 2014), <http://www.jsonline.com/news/milwaukee/former-officer-wont-be-charged-in-fatal-shooting-of-dontre-hamilton-b99398655z1-286559211.html> [<https://perma.cc/C8KW-XGCR>].

the Michael Brown and Eric Garner cases, state prosecutors did not bring criminal charges against the officer.⁶⁶ The prosecutor claimed Officer Manney was defending himself against Hamilton.⁶⁷ The DOJ is reviewing the case for possible federal charges.⁶⁸

Finally, Saratoga Springs (Utah) Police Department Corporal Matthew Schauerhamer and Officer Nicholas Judson shot and killed Darrien Hunt on September 10, 2014.⁶⁹ The officers were responding to a call about a man walking around the streets with a samurai-like sword.⁷⁰ The officers approached Hunt.⁷¹ Then the officers stated that they fired shots at him after he swung his sword at the officers.⁷² A private autopsy demonstrated that all the bullets entered the back of his body indicating that Hunt was turned away from the officers when they shot at him.⁷³ Hunt's family has stated that, at the time he was killed, Hunt was costume-role playing as a Japanese anime character and carrying a sword with a rounded blade as a costume accessory, not as a weapon.⁷⁴ "Utah County Attorney Jeff Buhman declined to press charges against the officers, saying they were justified in using deadly force because they thought [Hunt] would harm them or others."⁷⁵ The DOJ is conducting a federal review of the circumstances surrounding Hunt's death.⁷⁶

II

QUALITATIVE RESEARCH

This Part describes original qualitative research regarding media coverage of police excessive force and possible legal

⁶⁶ See Davey, *supra* note 60.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Pamela Manson & Erin Alberty, *Darrien Hunt's Mother Says She Turned Down \$900,000 Settlement from Saratoga Springs*, SALT LAKE TRIB. (Sept. 10, 2015, 12:21 PM), <http://www.sltrib.com/news/2933436-155/darrien-hunts-family-friends-to-meet> [<https://perma.cc/C6XT-9UA4>].

⁷⁰ *Id.*

⁷¹ Alex Dobuzinskis, *Fatal Police Shooting in Utah Fuels Racial Controversy*, REUTERS (Sept. 16, 2014, 1:24 AM), <http://www.reuters.com/article/2014/09/16/us-usa-shooting-utah-idUSKBN0HBOCT20140916> [<https://perma.cc/VK9U-WWRG>].

⁷² See Manson & Alberty, *supra* note 69.

⁷³ See Dobuzinskis, *supra* note 71.

⁷⁴ See Manson & Alberty, *supra* note 69.

⁷⁵ Curtis Skinner, *FBI Probes Fatal Utah Police Shooting of Man Carrying Sword: Paper*, REUTERS (Feb. 21, 2015, 1:03 AM), <http://www.reuters.com/article/2015/02/21/us-usa-police-utah-idUSKBNOLP05J20150221> [<https://perma.cc/ES3W-TJUX>].

⁷⁶ See *id.*

actions to address that excessive force. In subpart II.A, we describe our methodology. In subpart II.B, we present our findings.

A. Methodology

To study the relationship between media coverage and the DOJ's response to alleged incidents of police excessive force, we began by gathering information about major newspapers' coverage of incidents involving allegations of police excessive force. Our research included thirty-six newspapers: those ranked by the Alliance for Audited Media in 2013 as the top twenty-five daily newspapers in the United States;⁷⁷ newspapers from the twenty largest metropolitan areas based on information from the United States Census Bureau that were not included in the list from the Alliance for Audited Media;⁷⁸ and the largest local newspaper from the towns or cities where our four case studies took place.⁷⁹ The thirty-six newspapers represented a good cross-section of newspapers across the country. Appendix A lists the newspapers we surveyed.

For the newspapers we selected, we gathered information spanning ten years: from January 1, 2005 through December 31, 2014.⁸⁰ We chose to examine a full decade in order to reduce the likelihood that our research would be influenced by anomalies relating to individual events.

Besides the time-period limitation, we also limited our

⁷⁷ Our initial list included: *The Wall Street Journal*; *The New York Times*; *USA Today*; *Los Angeles Times*; *New York Daily News*; *New York Post*; *The Washington Post*; *Chicago Sun-Times*; *The Denver Post*; *Chicago Tribune*; *The Dallas Morning News*; *Newsday*; *Houston Chronicle*; *The Orange County Register*; *The Star-Ledger*; *Tampa Bay Times*; *Cleveland Plain Dealer*; *Philadelphia Inquirer*; *Minneapolis Star Tribune*; *Arizona Republic*; *Honolulu Star-Advertiser*; *Las Vegas Review-Journal*; *The San Diego Union-Tribune*; *The Boston Globe*; and *Atlanta Journal-Constitution*. *Top 25 U.S. Newspapers for March 2013*, ALLIANCE FOR AUDITED MEDIA (Apr. 30, 2013), <http://auditedmedia.com/news/blog/top-25-us-newspapers-for-march-2013.aspx> [<https://perma.cc/UX76-HZL6>].

⁷⁸ We added: *The Baltimore Sun*; *San Francisco Chronicle*; *Miami Herald*; *Detroit Free Press*; *The Seattle Times*; *The Oregonian*; and *Orlando Sentinel*. List of Metropolitan Areas of the United States of America, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_metropolitan_areas_of_the_United_States [<https://perma.cc/4YPB-HY7Y>].

⁷⁹ We added: *St. Louis Post-Dispatch* (Michael Brown); *Daily Herald* (Provo, Utah) (Darrien Hunt); *The Salt Lake City Tribune* (Darrien Hunt); and *Milwaukee Journal Sentinel* (Dontre Hamilton).

⁸⁰ Some newspapers did not have the capacity to search back to January 1, 2005. In addition, some newspapers did not provide use information to verify that their online websites went back to January 1, 2005. Those newspapers will be noted in the findings.

research to two specific phrases. Time constraints and innumerable inconsistencies among databases prevented us from doing countless searches to find every article related to police excessive force. Instead, we focused on terms most likely to bring back relevant articles. After some trial and error, the phrases we selected were “federal civil rights charges”; and 242 along with “civil rights.”⁸¹ The searches were conducted with quotations as noted previously. Quotations were used in searching to ensure that the results match the search terms exactly.⁸² The quotations were necessary to ensure the searches produced articles related to federal civil rights charges and section 242 charges.

We then set out to learn as much as possible about newspapers’ coverage of incidents involving police excessive force during the designated time frame using our search terms. First, for each newspaper, we went to the newspaper’s website and searched the two phrases. For each term, we would go through all the results and determine which piece discussed federal civil rights charges and/or section 242 charges. Many of the search results, as demonstrated in Appendix B, did not, in fact, discuss federal civil rights charges or section 242 charges. Next, for each piece that did discuss such charges, we entered into a spreadsheet the date the piece was published, a description of the piece, the type of piece it was,⁸³ the event the piece was about, and a hyperlink to the piece. In addition, we tallied the number of pieces the paper published about a specific event that also discussed federal civil rights charges or section 242 charges. The descriptions generally discuss what the piece is about and how the search term is mentioned in the piece. In addition, due to time limitations, we did not include articles discussing Trayvon Martin and federal civil rights charges or section 242 charges. Despite the DOJ’s investigation into whether George Zimmerman violated Martin’s civil rights when he killed him, the death was not at the hands of law enforcement.

We acknowledge a few limitations to our data collection

⁸¹ The search term “242 ‘civil rights’” refers 18 U.S.C. § 242, the federal civil rights statute under which civil rights prosecutions are typically prosecuted.

⁸² See KEVIN E. BROOKS, *DATABASE SEARCHING BASICS* 1 (2005), http://cms.bsu.edu/-/media/WWW/DepartmentalContent/Library/ScienceHealth/SHSL_LibDbaseSearchBasics_rev.pdf [<https://perma.cc/AGT7-9KF4>].

⁸³ For type of article, we listed if the article was from a wire service such as the Associated Press, and/or if the article was an article, an editorial, or something else. If only the article is listed, then the article was written by a staff reporter for the newspaper.

process. A few of the newspapers' websites had technical difficulties during our research period; therefore, we were unable to compile a database for these papers.⁸⁴ In addition, a few newspapers' websites did not have the capacity to narrow their results based on our search to a manageable number that we were able to properly examine; therefore, we were also unable to compile databases from those papers for the search term "242 'civil rights.'"⁸⁵

To complement the data that we gathered, we contacted all the newspapers surveyed to get information about their online content. We asked the newspapers: (1) whether all the newspaper's content that appears in print is also online; (2) if all the newspaper's print content is not online, how the newspaper determines what appears online; and (3) how far into the newspaper's archives searches on their website go and how complete their online archives are. In addition, we were able to locate some information about the archives on the newspapers' websites.

Our research indicates that newspapers generally display most of their content online.⁸⁶ It is even more likely for newspapers to put content on their websites that "will garner the highest number of hits,"⁸⁷ a category that would likely include articles discussing instances of police excessive force given the ongoing national conversation about these issues. The online archives for newspapers varied in how far back the archive went and how complete the archive was. For many newspapers, the online archives had the capacity to search articles that were over ten years old.⁸⁸ However, a few newspapers' online archives only had the capacity to search for articles within the last four or five years.⁸⁹ Most of the

⁸⁴ These newspapers included: *The Seattle Times*; *Chicago Sun-Times*; and *Milwaukee Journal Sentinel*.

⁸⁵ These papers included: *The Orange County Register*; *Minneapolis Star Tribune*; and *Las Vegas Review-Journal*. For example, for the 242 "civil rights" search, *The Orange County Register* produced around 2,120 hits, *Minneapolis Star Tribune* produced 1,900 hits, and *Las Vegas Review-Journal* produced 1,158. For other papers, the search typically produced numbers that were in the 10s.

⁸⁶ The newspapers included: *Las Vegas Review-Journal*; *Cleveland Plain Dealer*; *The Denver Post*; *Miami Herald*; *The Wall Street Journal*; *Los Angeles Times*; and *Chicago Tribune*.

⁸⁷ Email from the *Houston Chronicle* to author (Oct. 5, 2015) (on file with author).

⁸⁸ The newspapers included: the *Houston Chronicle*; *New York Daily News*; *The Denver Post*; and *The San Diego Union-Tribune*.

⁸⁹ The newspapers included: *Miami Herald*; *The Wall Street Journal*; *Cleveland Plain Dealer*; and *The Star-Ledger*.

online archives were somewhat incomplete for a variety of reasons. For example, one newspaper stated: “When we switched platforms some of the content that had expired in sections didn’t migrate over.”⁹⁰ Based on our searches, the larger publications seemed to have more robust archives which garnered the high search results demonstrated in Appendix B.

The most important takeaway from the information gathered from the newspapers is that, despite the incompleteness of some newspapers’ archives, most of the newspapers’ websites had all of the print content for at least the last five years. In addition, the extensiveness of our search counteracts the incompleteness of some archives. If an article was missed, it was likely either because of database flaws with the newspapers’ websites or because the article’s mention of federal invention into instances of police excessive force was minor. As a result, our database is, if anything skewed to include a greater percentage of relevant articles than the universe of newspaper coverage as a whole.

B. Findings

In this section, we present qualitative data suggesting that the media’s coverage of incidents of police excessive force is typically limited. While the media does cover many such incidents—and has done so with more regularity since Trayvon Martin’s death—the data suggest that the media is generally engaging in a reactive role when covering these incidents. With the exception of a very few high profile incidents,⁹¹ newspapers merely report on federal civil rights proceedings or investigations once they have begun rather than discussing the possibility of such investigations before they begin. In short, the media has stopped playing the role of “Fourth Estate”⁹² when it comes to holding law enforcement accountable for incidents of police excessive force. After examining our data set from a primarily quantitative perspective, we then examine the articles related to our case studies to develop a qualitative account of our

⁹⁰ Email from Pierre Taylor, Miami Herald, to author (Sept. 22, 2015) (on file with author).

⁹¹ The few cases are incidents of police excessive force that garnered protests and other public attention. These cases include Eric Garner and Michael Brown.

⁹² The Fourth Estate is the news media and it refers to the media’s role to “act on behalf of the people” and, within a system of checks and balances, the media works to “ensure that the powerful are held accountable.” SCHULTZ, *supra* note 12.

findings.

1. *Trends in News Coverage*

In total, we examined 6,511 articles on thirty-six newspapers' websites and compiled a database of 445 articles. The articles were selected for the database if the article contained at least one sentence addressing "federal civil rights charges." The articles that were not selected did not contain anything about federal civil rights charges. The articles instead, for example, would refer to civil rights in a broader discussion that did not relate to police use of force. Roughly two-thirds of the newspapers had fewer than ten articles discussing federal civil rights violations or section 242 charges, and roughly half of the newspapers had fewer than five articles discussing federal civil rights violations or section 242 charges.⁹³ Only ten newspapers (roughly one-third) had more than ten articles discussing federal civil rights violations or section 242 charges.⁹⁴ These ten papers were: *The Wall Street Journal*; *The New York Times*; the *Los Angeles Times*; the *New York Daily News*; the *New York Post*; the *Chicago Tribune*; the *Tampa Bay Times*; *The San Diego Union-Tribune*; *The Baltimore Sun*; and the *Orlando Sentinel*.⁹⁵ Seven of those papers were from major metropolitan areas with populations of more than 1.3 million people.⁹⁶

After Trayvon Martin's death on February 26, 2012, and Michael Brown's death on August 9, 2014, newspapers' coverage of instances of police excessive force increased by 48.9%.⁹⁷ Even though there was increased coverage of instances of police excessive force, the coverage was extremely concentrated. Articles discussing the Michael Brown and Eric Garner cases accounted for 41.9% of all the

⁹³ For calculation of these numbers, we did not count the three newspapers that were not completely databased due to technical difficulties. To reiterate, those newspapers included: *The Seattle Times*; *Milwaukee Journal-Sentinel*; and *Chicago Sun-Times*.

⁹⁴ See Appendix C.

⁹⁵ See Appendix C.

⁹⁶ See Appendix C.

⁹⁷ See Appendix B.3; see also Kevin Johnson & Yamiche Alcindor, *No Federal Charges for Zimmerman in Trayvon Martin Death*, USA TODAY (Feb. 24, 2015, 8:35 PM), <http://www.usatoday.com/story/news/2015/02/24/no-federals-charges-against-george-zimmerman/23942297/> [<https://perma.cc/2RVD-TA3F>] (discussing the investigation of the Trayvon Martin shooting); *Tracking the Events in the Wake of Michael Brown's Shooting*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html/#time354_10512 [<http://nyti.ms/1sumynr>] (detailing the extended public coverage of the events following Michael Brown's death).

articles found discussing federal civil rights charges.⁹⁸ This number includes the search results from the newspapers in the cities where the deaths took place (*The Wall Street Journal*; *The New York Times*; the *New York Daily News*; the *New York Post*; and the *St. Louis Post-Dispatch*).

In addition to the dominant coverage of Eric Garner and Michael Brown, the papers based in New York City had significant coverage of the Sean Bell case.⁹⁹ In total, our database included forty-two articles about Sean Bell (roughly 9.5% of the total number of articles).¹⁰⁰ On November 25, 2006, New York Police Department officers killed Bell during a confrontation in which they fired fifty bullets at his vehicle as he was leaving his bachelor party the night before his wedding.¹⁰¹

In contrast to the extensive coverage of the Eric Garner and Michael Brown cases, the papers provided almost no coverage of the instances of police excessive force involving Darrien Hunt and Dontre Hamilton.¹⁰² In total, the newspapers did not have any articles about Darrien Hunt's death and had six articles about Dontre Hamilton's death (roughly 1.4% of the total number of articles).¹⁰³ These numbers include the search results from the newspapers in the towns or cities where the deaths took place (the *Daily Herald* (Provo, Utah); *The Salt Lake City Tribune*; and the *Milwaukee Journal Sentinel*).

Despite the coverage disparity, the deaths of Hunt and Hamilton had many similarities to the deaths of Brown and Garner. First, they were all African-American men killed by white police officers.¹⁰⁴ Second, in all of the cases, the state authorities did not prosecute the officers responsible for the deaths. Additionally, in all of the cases, the DOJ investigated or is investigating the matters for possible federal civil rights violations.¹⁰⁵

⁹⁸ See Appendix B.

⁹⁹ See Appendix B. The database has forty-two articles about Sean Bell.

¹⁰⁰ See Appendix B.

¹⁰¹ See Cara Buckley & William K. Rashbaum, *A Day After a Fatal Shooting, Questions, Mourning and Protest*, N.Y. TIMES (Nov. 27, 2006), <http://www.nytimes.com/2006/11/27/nyregion/27shot.html> [<https://perma.cc/4KX3-98LU>].

¹⁰² See Appendix B.

¹⁰³ See Appendix B.

¹⁰⁴ See *supra* Part I.

¹⁰⁵ See *supra* Part I.

2. *The Reactive Role of the Media*

The media's role in reporting on excessive force is largely reactive. Based on our database, of the 444 articles that discussed federal civil rights charges, 401, or 90%, were merely reporting on what was happening.¹⁰⁶ There were only twenty-six articles that actually advocated or even gave an investigatory discussion about federal civil rights charges.¹⁰⁷

The reactive articles typically have a few lines mentioning a pending federal civil rights investigation or covering the legal proceedings of federal civil rights prosecution. The *New York Daily News* published an article about Michael Brown on November 26, 2014, that exemplifies the category of reactive articles.¹⁰⁸ The article is about the state grand jury's decision not to indict Officer Darren Wilson.¹⁰⁹ The article's only mention of federal civil rights charges is to state that "[t]he Justice Department is still conducting an investigation into possible civil rights violations that could result in federal charges."¹¹⁰ Another example is an article published in *The San Diego Union-Tribune* on March 31, 2011.¹¹¹

A former New Orleans police officer convicted of fatally shooting a man after Hurricane Katrina and a retired officer who burned his body were scheduled to be sentenced Thursday on *federal civil rights charges*. In December, a jury convicted David Warren of shooting Henry Glover, 31, without justification outside a strip mall less than a week after the storm, which struck Aug. 29, 2005. Warren faces a maximum sentence of life in prison. Gregory McRae, who burned Glover's body in a car near a police station, faces up to 50 years in prison for his convictions.¹¹²

A third example is from *The Washington Post*. The article is simply covering the DOJ's decision to not file federal civil rights charges in a case involving Metro Transit Police.¹¹³ It

¹⁰⁶ See Appendix B.

¹⁰⁷ See Appendix B.

¹⁰⁸ See Laura Bult & Corky Siemaszko, *Ferguson Police Officer Darren Wilson Not Indicted*, N.Y. DAILY NEWS (Nov. 26, 2014, 1:28 PM), <http://www.nydailynews.com/news/national/ferguson-police-officer-darren-wilson-not-indicted-article-1.2022549> [<https://perma.cc/KT95-T8K9>].

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

¹¹¹ See Michael Kunzelman, *Ex-Cops Face Sentencing in Post-Katrina Shooting*, SAN DIEGO UNION-TRIBUNE (Mar. 31, 2011, 1:56 AM), <http://www.sandiegouniontribune.com/news/2011/mar/31/ex-cops-face-sentencing-in-post-katrina-shooting/> [<https://perma.cc/7G8G-8BLN>].

¹¹² *Id.* (emphasis added).

¹¹³ See Victor Zapana, *Metro Transit Police Will Not Face Federal Civil Rights*

states: “The Justice Department said Saturday that it will not file *civil rights charges* against two Metro transit police officers for actions they took during a May arrest of a man in a wheelchair that was widely disseminated on YouTube.”¹¹⁴ These examples are only a few illustrations of the 401 articles we found that only report on federal civil rights charges or proceedings. The articles do not advocate or push for federal civil right charges.

Despite the extreme prevalence of reactive articles related to federal civil rights charges, there were forty-four proactive articles about federal civil rights charges.¹¹⁵ Around 59% of the proactive articles were investigative pieces typically about the legal difficulties the DOJ faces when it prosecutes law enforcement under section 242. One example of an investigatory article is an Associated Press article that appeared in *The San Diego Union-Tribune* on August 26, 2014.¹¹⁶ The article is about how “[a]s the Justice Department probes the police shooting of an unarmed 18-year-old in Missouri, history suggests there’s no guarantee of a criminal prosecution, let alone a conviction.”¹¹⁷ The article goes on to discuss how the DOJ will have to demonstrate that Officer Wilson “not only acted with excessive force but also willfully violated Brown’s constitutional rights,” which is a very difficult standard to meet.¹¹⁸ Additionally, the article discusses cases where the DOJ decided to and where the DOJ decided not to charge law enforcement officers with federal civil rights violations.¹¹⁹

Forty-one percent of the proactive articles were opinion pieces discussing federal civil rights charges. On May 1, 2013, the *New York Post* published an opinion about an individual with Down syndrome who was killed by sheriff’s deputies in a movie theater.¹²⁰ The piece questions why there

Charges Involving May Wheelchair Arrest, WASHINGTON POST (Oct. 22, 2011), https://www.washingtonpost.com/blogs/post_now/post/metro-transit-police-will-not-face-federal-civil-rights-charges-involving-may-wheelchair-arrest/2011/10/22/gIQA8qdM7L_blog.html [<https://perma.cc/LCG7-MQUV>].

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *See* Appendix B.

¹¹⁶ *See* Eric Tucker, *Federal Prosecutions Not Easy in Police Shootings*, SAN DIEGO UNION-TRIBUNE (Aug. 26, 2014, 10:23 AM), <http://www.sandiegouniontribune.com/news/2014/aug/26/federal-prosecutions-not-easy-in-police-shootings/> [<https://perma.cc/H7ZA-WGLX>].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *See Killed by the Law, and No One Protests*, N.Y. POST (May 1, 2013, 4:00 AM), <http://nypost.com/2013/05/01/killed-by-the-law-and-no-one-protests/>

were no protests, no state charges filed, and how the sheriff's deputies involved were allowed to return to full duty following Robert Ethan Saylor's tragic death.¹²¹ Additionally, the piece discusses how the National Down Syndrome Congress and Saylor's mother "met with Justice Department officials . . . to request a federal civil-rights investigation into the incident" but that so far "Justice hasn't signaled that it will get involved" ¹²² Finally, it calls for action: "Someone needs to investigate what happened and hold those responsible to account. Justice demands it."¹²³

On December 5, 2014, the *New York Daily News* published an opinion piece about federal civil rights charges in relation to the Eric Garner case.¹²⁴ Rachel Harmon, a law professor at the University of Virginia School of Law and former prosecutor for the DOJ, wrote the opinion.¹²⁵ The piece discusses how difficult it is for the DOJ to demonstrate that a police officer willfully deprived someone of his or her constitutional rights.¹²⁶ Typically, the DOJ brings federal civil rights charges in cases where there is "obvious intentional misconduct, like the Uplands Park, Mo., officer who arrested prostitutes and then sexually assaulted and robbed them, or the federal Border Patrol officer who pressed his service pistol against a man's head during an interrogation and threatened to shoot him if he did not answer questions."¹²⁷ She also discusses how "federal prosecutors bring criminal charges only if they believe they can prove guilt to an unbiased jury beyond a reasonable doubt."¹²⁸ In the end, she concludes that:

Given federal law's limited reach, no one should be surprised if no officer is tried for Garner's death in federal court. But avoidable deaths suggest the need for new policies and better training, and department policy violations justify discipline. Citizens should always demand as much. A decision not to charge anyone does

[<https://perma.cc/HJP4-BN95>].

¹²¹ *See id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See* Rachel Harmon, *Harmon: Difficult to Prove Cop Was 'Willful' in Garner Case*, N.Y. DAILY NEWS (Dec. 5, 2014, 12:12 AM), <http://www.nydailynews.com/news/politics/harmon-difficult-prove-willful-garner-case-article-1.2034195> [<https://perma.cc/TS9U-TDJP>].

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

not mean nothing went wrong.¹²⁹

On January 14, 2014, the *Los Angeles Times* editorial board published an editorial about whether the DOJ should bring federal civil rights charges against law enforcement for Kelly Thomas' death.¹³⁰ Kelly Thomas, an unarmed, homeless, schizophrenic man, was beaten to death by police officers for being uncooperative.¹³¹ During the beating, evidence showed Thomas crying for help.¹³² Two of the officers were acquitted of state charges for the death.¹³³ The editorial form was unlike any other editorial we found. The editorial was composed of excerpts from an email conversation amongst the editorial board about whether the DOJ should bring federal civil rights charges in the case.¹³⁴

The conversation began with one viewpoint — against federal charges — then veered into the possibility that they were called for in this case, and then swung back, in a more nuanced way, to the idea that federal charges, though they have been crucial at times to resolving cases in which civil rights were blatantly ignored, were not called for when the verdict seems to have been reached legitimately, even if we or others think it might have been wrong.¹³⁵

These proactive articles demonstrate the ways the media could contribute to a more robust discussion about whether federal civil rights charges should be filed in cases of excessive force by police. However, the proactive articles are largely drowned out by the reactive reporting because for every proactive article there are nine articles that add almost nothing to the dialogue about possible federal remedies for excessive force by police officers.¹³⁶

¹²⁹ *Id.*

¹³⁰ See Karin Klein, *Should Police Face Federal Charges in Kelly Thomas' Death? An Editorial Board Discussion*, L.A. TIMES (Jan. 14, 2014, 1:58 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-kelly-thomas-federal-case-20140114-story.html> [<https://perma.cc/ZJE5-YMJ8>].

¹³¹ See Max Ehrenfreund, *Officers Acquitted in Death of Kelly Thomas*, WASH. POST (Jan. 14, 2014), https://www.washingtonpost.com/national/officers-acquitted-in-death-of-kelly-thomas/2014/01/14/3e660b24-7d24-11e3-95c6-0a7aa80874bc_story.html [<https://perma.cc/NGZ2-PVM5>].

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See* Klein, *supra* note 130.

¹³⁵ *Id.*

¹³⁶ *See* Appendix B.3.

III

IMPLICATIONS AND RECOMMENDATIONS

In this Part, we discuss the implications of the data we have discussed. First, we consider why it is that the media does not report more consistently on the possibility of federal civil rights prosecutions under section 242. We then turn to the consequences of this ignorance. The media's largely reactive role with respect to federal criminal prosecutions for civil rights violations may play a role in why such prosecutions are so rarely used. Equally important, the media's failure even to discuss section 242 explains why the general public is largely uninformed on the way such prosecutions might work. The fact that the public does not know such prosecutions are a possibility, in other words, prevents the type of grassroots mobilization that might prompt a federal investigation in more instances of police excessive force rather than only in exceptional cases. In light of these implications, we offer suggestions for the media in covering instances of police excessive force, for educators who wish to incorporate the study of police excessive force into their curricula, and for the public in reading such accounts.

A. Implications

In our view, the media's failure to assume a proactive role in reporting on the possibility of section 242 investigations has several likely causes. The most straightforward is that many reporters, particularly those who have no legal training, may not be aware that section 242 can be used as a remedy in situations involving excessive force by police. They are likely unaware because it is used so rarely; ironically, their failure to report on section 242 creates a vicious cycle by reinforcing the likelihood that it will be used rarely. Another possibility is that reporters are hesitant to raise the possibility of federal criminal charges when such charges are not yet pending, perhaps thinking that it would be inappropriate to do so. Our view is that it would not be—after all, in many other situations the media often reports on the possibility of criminal charges before any are filed. But that does not mean that members of the media have fully synthesized their views on the topic. Alternatively, reporters may worry about jeopardizing their relationships with police departments and officers who give them valuable information related to other matters on which they report. That is, the same reporters who cover criminal activity within a particular jurisdiction and who rely on police officers for comment may

be the ones who would report on section 242 and are, therefore, not entirely oblivious to the external consequences of their decisions.

A number of consequences flow from the media's failure to report on the possibility of federal prosecutions under section 242. The most obvious is that the public is then not informed about such prosecutions. If the public lacks such information, it is unable to hold decision makers accountable for failures to investigate, sloppy investigations, or questionable decisions regarding the decision to prosecute or not.

The public's lack of information may, in turn, lead to less grassroots activism, discourse, and advocacy for the federal government to undertake such investigations into whether a prosecution is appropriate. While the federal government is of course not bound to respond to public mobilization, the DOJ falls within one of the elected political branches, and anecdotal evidence suggests that DOJ response may be sensitive to public outcry.¹³⁷

Moreover, even if such prosecutions ultimately do not occur, the discussion of such prosecutions in the discourse creates an incentive for institutional change. Police departments who believe they may have escaped a close call may investigate their practices and initiate reforms. Even if departments themselves are reluctant to change, the attorneys who represent them may insist on modifications to current policies. And current police officers, perhaps uneasy about the prospect of being prosecuted, may make an effort to proactively seek out the constitutional parameters that apply to their jobs and strive to apply them in day-to-day policing.

The lack of discussion of section 242 prosecutions may also lead to a loss of legitimacy for both the justice system and the media. Without knowing about section 242, seeing serious media discussion of section 242, and seeing the DOJ consider prosecution under section 242, disempowered communities may come to believe that there are simply no legal remedies when one of their own is killed by a police officer. Moreover, if the media fails to report on even the possibility of a section 242 action, the community may

¹³⁷ For example, it was not until after extensive protests and other activism by the Black Lives Matter movement and other advocates that the DOJ began investigating the shooting death of Michael Brown. *See supra* notes 40–52 and accompanying text (discussing the response to Michael Brown's death and subsequent federal investigation).

believe that to the extent there are legal remedies they exist only on paper and are not even a possibility when the person is, for example, poor and black.

By contrast, if the media reports on section 242, the community will have its concerns partially validated, particularly if the DOJ ultimately undertakes an investigation. Even if no prosecution ensues, the community will at least have felt heard to some degree. As the community response in some other cases has made clear, a lack of prosecution is often a blow.¹³⁸ But even the announcement of a decision to prosecute offers an outlet for pent-up anger and frustration. Without such an outlet, a community loses hope entirely.

B. Recommendations

As readers can likely discern, our view is that the media should take a proactive approach to reporting on potential prosecutions under section 242. Just as the media reports on whether a private citizen who kills another private citizen should stand trial for murder, manslaughter, or another charge, it should also report on whether a police officer who uses excessive force against a citizen should be held accountable via state criminal charges, federal civil rights actions under 42 U.S.C. § 1983, or federal criminal prosecution under section 242. If the media actively reports on the availability of prosecutions under section 242, the public will be more educated and able to hold their elected officials accountable.

In addition, the DOJ should make the media's job easier by creating easy access to information about section 242, statistics about how many investigations the DOJ initiates, and the result and reasoning for each investigative outcome. Such statistics are currently unavailable except through Freedom of Information Act requests, which are time-consuming and too easily ignored.¹³⁹

¹³⁸ See, e.g., Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0 [<https://perma.cc/MQ7B-QMMT>] (noting the "outrage" of communities in Cleveland given what it considered to be inadequate prosecution following the police shooting of Tamir Rice).

¹³⁹ At the time of this Essay, the authors are still waiting for a response from the Civil Rights Division of the Department of Justice regarding a Freedom of Information Act request they filed on August 31, 2015.

CONCLUSION

Police excessive force remains a persistent and troubling social phenomenon that has and continues to captivate the media's attention. As our research demonstrates, addressing that phenomenon requires the participation of both members of the media and legal actors. Our research indicates that the media is not holding up its end of the bargain. With improved coverage of section 242 prosecutions, or at least coverage of the possibility that a section 242 prosecution might take place, the media can help encourage and complement federal efforts to achieve justice for all parties to an incident of police excessive force.

APPENDIX A: NEWSPAPERS

<u>Newspaper</u>	<u>Location of Newspaper</u>
THE WALL STREET JOURNAL	New York City, NY
THE NEW YORK TIMES	New York City, NY
USA TODAY	Washington, DC
LOS ANGELES TIMES	Los Angeles, CA
NEW YORK DAILY NEWS	New York City, NY
NEW YORK POST	New York City, NY
THE WASHINGTON POST	Washington, DC
CHICAGO SUN-TIMES	Chicago, IL
THE DENVER POST	Denver, CO
CHICAGO TRIBUNE	Chicago, IL
THE DALLAS MORNING NEWS	Dallas, TX
NEWSDAY	Melville, NY
HOUSTON CHRONICLE	Houston, TX
THE ORANGE COUNTY REGISTER	Santa Ana, CA
THE STAR-LEDGER	Newark, NJ
TAMPA BAY TIMES	Tampa Bay, FL
CLEVELAND PLAIN DEALER	Cleveland, OH
PHILADELPHIA INQUIRER	Philadelphia, PA
MINNEAPOLIS STAR TRIBUNE	Minneapolis, MN
ARIZONA REPUBLIC	Phoenix, AZ
HONOLULU STAR-ADVERTISER	Honolulu, HI
LAS VEGAS REVIEW-JOURNAL	Las Vegas, NV
THE SAN DIEGO UNION-TRIBUNE	San Diego, CA
THE BOSTON GLOBE	Boston, MA
ATLANTA JOURNAL-CONSTITUTION	Atlanta, GA
THE BALTIMORE SUN	Baltimore, MD
SAN FRANCISCO CHRONICLE	San Francisco, CA
MIAMI HERALD	Miami, FL
DETROIT FREE PRESS	Detroit, MI
THE SEATTLE TIMES	Seattle, WA
THE OREGONIAN	Portland, OR
ORLANDO SENTINEL	Orlando, FL
ST. LOUIS POST-DISPATCH	St. Louis, MO
THE SALT LAKE CITY TRIBUNE	Salt Lake City, UT
DAILY HERALD	Provo, UT
MILWAUKEE JOURNAL SENTINEL	Milwaukee, WI

APPENDIX B: NEWSPAPER SURVEY DATA

Part 1:

Newspaper	Number of Search Results for "Federal Civil Rights Charges" ¹	Number of Articles Actually about Federal Civil Rights Charges	Number of Search Results for 242 "Civil Rights"	Number of Articles Actually about 18 U.S.C. § 242
The Wall Street Journal	1248 ²	33	5	0
The New York Times	239	20	310	1
USA Today	11	1	0	0
Los Angeles Times	600	66	9	0
New York Daily News	1799	85	26	0
New York Post	578	40	11	0
The Washington Post	47	9	30	0
Chicago Sun-Times	0	0	0	0
The Denver Post	10	1	1	0
Chicago Tribune	494	39	8	0
The Dallas Morning News	7	3	33	0
Newsday	11	2	2	0
Houston Chronicle	60	6	28	0
The Orange County Register	4	0	2120	Did not go through all the results
The Star-Ledger	7	1	188	0
Tampa Bay Times	504	21	2	0

¹ These were the results before we added the date limitations.

² This search was conducted without use of the quotation marks because *The Wall Street Journal's* website did not produce sufficient results with the quotation marks.

Newspaper	Number of Search Results for "Federal Civil Rights Charges" ¹	Number of Articles Actually about Federal Civil Rights Charges	Number of Search Results for 242 "Civil Rights"	Number of Articles Actually about 18 U.S.C. § 242
Cleveland Plain Dealer	10	1	26	0
Philadelphia Inquirer	5	2	1	0
Minneapolis Star Tribune	7	0	1900	Did not go through all the results
ArizonaRepublic	0	0	0	0
Honolulu Star-Advertiser	7	1	3	0
Las Vegas Review-Journal	3	2	1158	Did not go through all the results
The San Diego Union-Tribune	99	13	83	0
The Boston Globe	16	1	4	0
Atlanta Journal-Constitution	54	2	12	0
The Baltimore Sun	484	37	7	0
San Francisco Chronicle	56	7	24	0
Miami Herald	4	0	3	0
Detroit Free Press	4	2	0	0
The Seattle Times	0	0	0	0
The Oregonian	14	4	32	0
Orlando Sentinel	461	38	12	0
St. Louis Post-Dispatch	11	3	13	0
The Salt Lake City Tribune	10	3	5	0
Daily Herald	8	1	9	0
Milwaukee Journal Sentinel	0	0	0	0

Part 2:

Newspaper	Number of Articles About Eric Garner Within Our Search	Number of Articles About Michael Brown Within Our Search	Number of Articles About Dontre Hamilton Within Our Search	Number of Articles About Darrin Hunt Within Our Search	Number of Articles About Sean Bell Within Our Search
The Wall Street Journal	6	23	0	0	0
The New York Times	1	7	0	0	2
USA Today	0	0	0	0	0
Los Angeles Times	7	31	1	0	0
New York Daily News	15	8	1	0	27
New York Post	3	3	0	0	11
The Washington Post	2	4	0	0	0
Chicago Sun-Times	0	0	0	0	0
The Denver Post	0	1	0	0	0
Chicago Tribune	3	11	2	0	0
The Dallas Morning News	0	1	0	0	0
Newsday	2	0	0	0	0
Houston Chronicle	0	0	0	0	0
The Orange County Register	0	0	0	0	0
The Star-Ledger	0	1	0	0	0
Tampa Bay Times	1	6	0	0	2
Cleveland Plain Dealer	0	0	0	0	0
Philadelphia Inquirer	0	1	0	0	0
Minneapolis Star Tribune	0	0	0	0	0
ArizonaRepublic	0	0	0	0	0
Honolulu Star-Advertiser	0	0	0	0	0
Las Vegas Review-Journal	0	2	0	0	0

Newspaper	Number of Articles About Eric Garner Within Our Search	Number of Articles About Michael Brown Within Our Search	Number of Articles About Dontre Hamilton Within Our Search	Number of Articles About Darrin Hunt Within Our Search	Number of Articles About Sean Bell Within Our Search
The San Diego Union-Tribune	0	2	0	0	0
The Boston Globe	0	1	0	0	0
Atlanta Journal-Constitution	0	0	0	0	0
The Baltimore Sun	3	12	1	0	0
San Francisco Chronicle	0	0	0	0	0
Miami Herald	0	0	0	0	0
Detroit Free-Press	0	2	0	0	0
The Seattle Times	0	0	0	0	0
The Oregonian	0	2	0	0	0
Orlando Sentinel	4	16	1	0	0
St. Louis Post-Dispatch	0	2	0	0	0
The Salt Lake City Tribune	0	3	0	0	0
Daily Herald	0	0	0	0	0
Milwaukee Journal-Sentinel	0	0	0	0	0

Part 3:

Newspaper	Reactive Articles	Proactive Articles	Investigatory Pieces	Opinion Pieces	Number of Articles Before Trayvon Martin's Death (2/26/2012)	Number of Articles Post Trayvon Martin's Death (2/26/2012)	Number of Articles Post Michael Brown's Death (8/9/2014)
The Wall Street Journal	27	6	5	1	1	3	29
The New York Times	19	2	2	0	12	2	6
USA Today	1	0	0	0	0	0	1
Los Angeles Times	64	2	0	2	9	19	38
New York Daily News	76	9	5	4	46	17	22
New York Post	38	2	0	2	27	7	6
The Washington Post	7	2	1	1	2	1	6
Chicago Sun-Times	0	0	0	0	0	0	0
The Denver Post	1	0	0	0	0	0	1
Chicago Tribune	33	6	4	2	15	3	21
The Dallas Morning News	2	1	1	0	1	1	1
Newsday	1	1	0	1	0	0	2
Houston Chronicle	6	0	0	0	6	0	0
The Orange County Register	0	0	0	0	0	0	0
The Star-Ledger	0	1	1	0	0	0	1
Tampa Bay Times	20	1	0	1	10	4	7
Cleveland Plain Dealer	1	0	0	0	1	0	0
Philadelphia Inquirer	2	0	0	0	0	1	1
Minneapolis Star Tribune	0	0	0	0	0	0	0
Arizona Republic	0	0	0	0	0	0	0
Honolulu Star-Advertiser	1	0	0	0	0	1	0

Newspaper	Reactive Articles	Proactive Articles	Investigatory Pieces	Opinion Pieces	Number of Articles Before Trayvon Martin's Death (2/26/2012)	Number of Articles Post Trayvon Martin's Death (2/26/2012)	Number of Articles Post Michael Brown's Death (8/9/2014)
Las Vegas Review-Journal	2	0	0	0	0	0	2
The San Diego Union-Tribune	10	3	3	0	9	2	2
The Boston Globe	1	0	0	0	0	0	1
Atlanta Journal-Constitution	2	0	0	0	0	1	1
The Baltimore Sun	35	2	2	0	15	6	16
San Francisco Chronicle	7	0	0	1	6	1	0
Miami Herald	0	0	0	0	0	0	0
Detroit Free Press	1	1	1	0	0	0	2
The Seattle Times	0	0	0	0	0	0	0
The Oregonian	3	1	0	1	1	0	2
Orlando Sentinel	36	2	1	1	16	3	19
St. Louis Post-Dispatch	2	1	0	1	0	1	2
The Salt Lake City Tribune	2	1	0	1	0	0	3
Daily Herald	1	0	0	0	1	0	0
Milwaukee Journal-Sentinel	0	0	0	0	0	0	0

APPENDIX C: TOP TEN NEWSPAPER DATA

Newspaper	Number of Search Results for "Federal Civil Rights Charges" or 242 "civil rights" ³	Number of Articles Databased	Population ⁴
The Wall Street Journal	1253 ⁵	33	8,491,079
The New York Times	549	23	8,491,079
Los Angeles Times	609	66	3,928,864
New York Daily News	1824	85	8,491,079
New York Post	589	40	8,491,079
Chicago Tribune	502	39	2,722,389
Tampa Bay Times	506	21	358,699
The San Diego Union-Tribune	182	13	1,381,069
The Baltimore Sun	491	39	622,793
Orlando Sentinel	473	39	262,372

³ These were the results prior to adding the date limitations.

⁴ Our population figures are drawn from census data. U.S. Census Bureau, *Community Facts*, AM. FACT FINDER, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> [<https://perma.cc/3F8B-GN5C>] (data via searches using the available U.S. Census search engine).

⁵ This search was conducted without use of the quotation marks because *The Wall Street Journal's* website did not produce sufficient results with the quotation marks.