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Ferguson and Beyond

Before and After Michael Brown[†]—Toward an End to Structural and Actual Violence

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[†] See generally DEP'T OF JUSTICE, REPORT REGARDING THE ORIGINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN IN FERGUSON, MISSOURI BY POLICE OFFICER DARREN WILSON (2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

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PROLOGUE—THE KERNER COMMISSION

In 1967, Kenneth Clark, the expert witness whose research on the stigmatizing effects of racial school segregation formed a basis for the landmark Supreme Court case *Brown v. Board of Education*¹ testified before the National Advisory Commission on Civil Disorders,² convened by President Lyndon Johnson after racial unrest swept the nation’s urban centers.³

1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

2. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (THE KERNER REPORT) (1968), available at http://faculty.washington.edu/qtaylor/documents_us/Kerner%20Report.htm [hereinafter THE KERNER REPORT].

3. See generally The President’s Address to the Nation on Civil Disorders, 2 PUB. PAPERS 721 (July 22, 1967); and Remarks Upon Signing Order Establishing the National Advisory Commission on Civil Disorders, 2 PUB. PAPERS 724 (July 29, 1967).

He said there was nothing new about the causes of Black unrest:

I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of '35, the report of the investigating committee on the Harlem riot of '43, the report of the McCone Commission on the Watts riot. I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction.

The Commission report summary concluded:

We have provided an honest beginning. We have learned much. But we have uncovered no startling truths, no unique insights, no simple solutions. The destruction and the bitterness of racial disorder, the harsh polemics of black revolt and white repression have been seen and heard before in this country. It is time now to end the destruction and the violence, not only in the streets of the ghetto but in the lives of people.⁴

But there is more involved than the occasional random violence of looting captured by the headlines.⁵

I. INTRODUCTION—BEFORE AND BEYOND MICHAEL BROWN

Darren Wilson's shooting of an unarmed nineteen-year-old Black man, Michael Brown, was the tip of an iceberg of racial subordination and despair. The deep outrage over that shooting displayed in the small town of Ferguson, Missouri,⁶ the nation,⁷ and

4. THE KERNER REPORT, *supra* note 2.

5. Sheryl Gay Stolberg, *Clashes Rock Baltimore After Funeral*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/images/2015/04/28/nytfpage/scannat.pdf>.

6. #Ferguson in Pictures Taken in the Wake of the Michael Brown Shooting, ST. LOUIS POST DISPATCH, <http://www.stltoday.com/news/special-reports/michael-brown/> (last visited Sept. 11, 2015); and Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html>.

7. Holly Yan & Steve Almasy, *London Is Latest City to See Protests as Ferguson*

all over the world⁸ suggests that the shooting of Michael Brown was more than an isolated police killing of a Black teenager. The backstory involved the role of police departments and the criminal system in the lives of poor Blacks—the harassment, the violence, the hyper-criminalization, and the revolving door of mass incarceration—in combination with a racial and economic structure that systematically provides under-education, unemployment, and housing segregation.⁹ This Article posits that individual instances of police deadly force against unarmed Black men are enabled by a legal jurisprudence of structural violence which provides no accountability for the societal marginalization and stigmatization of young Black men, as well as by a jurisprudence of actual violence, which permits police officers to decide whom to target and whom to kill with virtually no threat of criminal sanction or institutional civil liability.

Initially, I explore the evidence that racially discriminatory application of deadly force is not a new phenomenon but rather one with deep roots in American history. Next, I explore how current law eschews accountability and redress by exempting police officers from prosecution even in extreme cases and by limiting civil law suits based on constitutional principles through the generous immunity doctrine. I conclude that there are formidable legal barriers to redress individual shootings, and that in any event, these measures do not address the circumstances that abet racialized deadly force. There is a tension between the notion of individual officer responsibility and

Dismay Spreads, CNN (Nov. 26, 2014, 9:23 PM), <http://www.cnn.com/2014/11/26/us/national-ferguson-demonstrations/>.

8. *Ferguson Protests Spread Across US*, ALJAZEERA (Nov. 25, 2014, 9:59 PM), <http://america.aljazeera.com/articles/2014/11/25/ferguson-protestsnationwideseccondnight.html>; see also Yan & Almasy, *supra* note 7; Nina Porzucki, *In France, Ferguson Protests Stir Memories of Suburban Riots*, PRI (Aug. 15, 2014, 10:15 PM), <http://www.pri.org/stories/2014-08-15/france-ferguson-protests-stir-memories-suburban-riots>; and Suman Varandani, *Ferguson Protests: Rally Organizers in Canada Urge Non-Black People to Stay in Background*, INT'L BUS. TIMES (Nov. 26, 2014, 6:25 AM), <http://www.ibtimes.com/ferguson-protests-rally-organizers-canada-urge-non-black-people-stay-background-1729598>.

9. RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), available at <http://www.epi.org/files/2014/making-of-ferguson-final.pdf>.

institutional control and institutional failures¹⁰ not addressed in that jurisprudence.

In Part III, I discuss the relationship between permissible deadly force and other areas of constitutional doctrine that foster a jurisprudence of violence and death in which the legitimacy of deadly force against Blacks comfortably sits. Death Penalty jurisprudence and here, a jurisprudence of violence which advocates vengeance oriented, inhumane “just deserts” principles that suggest that victims of police deadly force deserve punishment because police suspect them of crimes is consistent with a legal structure that virtually immunizes summary execution from legal sanction.¹¹ Here, too, I emphasize that deadly force against Blacks symbolically reinforces a duty of absolute submission to police authority, and, as such, is a phenomenon integral contemporary American racial subordination. In Part IV, I note the recent efforts, by the United States Department of Justice (DOJ) and courts, to address racialized deadly force. The findings from city to city are strikingly similar: longstanding policies and procedures that permit the racially discriminatory use of deadly force without correction and even with reward, the simultaneous failure to investigate or prosecute serious Black on Black crime, the double vulnerability that results, and the deep mistrust between police

10. See generally GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE (2004) (discussing the transition from nonregulation to internal control/self-regulation, and the relationship each has on abuse of force by police); see also Geoffrey P. Alpert & John M. Macdonald, *Police Use of Force: An Analysis of Organizational Characteristics*, 18 JUST. Q. 393 (2001) (explaining that there is little known about how law enforcement agencies manage and influence officers’ use of force).

11. In *Tennessee v. Garner*, 471 U.S. 1 (1985), a police deadly force case central to the Supreme Court’s doctrine, Justice O’Connor wrote that the risk posed by home invasion burglary cases justified the use of deadly force to apprehend suspects. The “harsh potentialities for violence” inherent in the forced entry into a home preclude characterization of the crime as “innocuous, inconsequential, minor, or *nonviolent*.” *Solem v. Helm*, 463 U.S. 277 316 (1983) (Burger, C.J., dissenting). See also RESTATEMENT OF TORTS § 131, cmt. g (1934) (classifying burglary among felonies that normally cause or threaten death or serious bodily harm); and 471 U.S. 1, 27–28 (O’Connor, J., dissenting) (“Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect.”).

departments and the cities they “protect and serve.”¹² I conclude that if excessive and deadly force are to be curtailed, a reversal of current deadly force doctrine would be necessary. In the current state, unless the Justice Department investigates and alleges a pattern and practice of denial of constitutional rights, substantial damage redress is only available if citizen videotaped evidence demonstrates a wanton homicide, “and political circumstances require a substantial monetary verdict.”¹³

12. See, e.g., *Dragnet: The Shooting Board* (NBC television broadcast Sept. 21, 1967) (“You committed one of the cardinal sins in our business. You struck a man. And I’ll use your words: a man you’re hired to protect and to serve.”).

13. See, e.g. *New Audio Captures S.C. Police Officer ‘Laughing’ After Fatally Shooting Walter Scott*, CNN WIRE (Apr. 14, 2015, 6:47 AM), <http://ktla.com/2015/04/14/new-audio-captures-s-c-police-officer-laughing-after-fatally-shooting-walter-scott/> [hereinafter *Walter Scott Shooting*]; Keith Alexander, *Baltimore Reaches \$6.4 Million Settlement with Freddie Gray’s Family*, WASH. POST (Sept. 8, 2015), https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a_story.html; and J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES (July 13, 2015), <http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html>.

Events in Chicago last November also illustrate this pattern. In October, 2014 Chicago police officer Jason Vandyke shot Laquan McDonald. Prior to the release of the tapes by court order, the Police Department had said that the seventeen-year-old, who had a small knife, threatened officers, and that officer Van Dyke justifiably shot him sixteen times because Van Dyke felt threatened. Monica Davey, *Officers’ Statements Differ From Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html?_r=0. A \$5 million settlement occurred in March, 2015 after it became evident to the parties that the video conflicted with official accounts, and that counsel for McDonald’s family and others would press for its release. Jeff Coen & John Chase, *Top Emanuel Aides Aware of Key Laquan McDonald Details Months Before Mayor Says He Knew*, CHI. TRIB. (Jan. 4, 2016), <http://www.chicagotribune.com/news/local/politics/ct-rahm-emanuel-laquan-mcdonald-shooting-met-20160113-story.html>. A cascade of events occurred after release of the video which showed the seventeen-year-old walking away from police just before the officer shot him, including the dismissal of the police superintendent, murder charges against Van Dyke, and a Justice Department investigation. Davey, *supra* note 13.

II. REINTERPRETING DEADLY FORCE

A. *The Benign Dominant Narrative*

“[N]one of us want to see this [badge] turned into a hunting license.”¹⁴

Police neutrality is abetted by a legal framework in which the specific interaction of a police officer and an individual is viewed through a narrow lens that accords great deference to the judgments of officers.¹⁵ This framework was exemplified in the *Dragnet* television series, created in cooperation with the Los Angeles Police Department (LAPD). The series extolled a benevolent LAPD and featured the popular actor Jack Webb playing Sergeant Joe Friday. It aired during a particularly violent era of in the relations of the LAPD with the Black community of Los Angeles, with no major discussion of the racial dynamics of policing. These would emerge later. *Dragnet* was positively quaint, *Madmen* style, when viewed against subsequent comic¹⁶ and dramatic¹⁷ policing send-ups.

B. *The Insurgent Narrative*

The insurgent narrative—that race matters in specific ways that shape police interaction with minority communities—is not a new insight, but its bona fides have never been more powerful than in the context of the use of deadly force by police against Black males. On this front, it is difficult to know where to begin, whether with recent events such as the point blank police shooting of twelve-year-old

14. *Dragnet: The Shooting Board*, *supra* note 12.

15. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). “We analyze this question from the perspective ‘of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’” *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

16. BEVERLY HILLS COP (Paramount Pictures 1984), BEVERLY HILLS COP II (Paramount Pictures 1987), and BEVERLY HILLS COP III (Paramount Pictures 1994) are archetypes of the comic rendition of policing.

17. A more decorous form included FORT APACHE, THE BRONX (Time-Life Films, 1981), and *Hill Street Blues* (NBC television broadcast, 1981–1987). *The Wire* (HBO television broadcast, 2002–2008) would come later.

Tamir Rice,¹⁸ the vicious and heartbreaking video of Michael Slager shooting Walter Scott in the back and planting a Taser by his side,¹⁹ or with Eric Garner’s pleas “I can’t breathe,”²⁰ the riddling of unarmed Amadou Diallo’s body with forty-one gun shots,²¹ or with the shooting of twenty-two-year-old Oscar Grant in the back by Bay Area Rapid Transit police officer Johannes Mehserle, in front of a crowd of Grant’s teenage friends as he lay face down on a train platform.²²

Though the objective statistics about the use of force say that the use of deadly force is rare,²³ the recent now-publicized record of police violence against Black males reopens the obligatory question about whether “race matters”²⁴ and its contemporary claim that posits a “post racial”²⁵ society in which race is irrelevant. As with so many

18. *Tamir Rice: Police Release Video of 12-Year-Old’s Fatal Shooting—Video*, THE GUARDIAN (Nov. 26, 2014, 6:07 PM), <http://www.theguardian.com/us-news/video/2014/nov/26/cleveland-video-tamir-rice-shooting-police>; see also Cory Shaffer, *Extended Tamir Rice Shooting Video Shows Officers Restrained Sister*, CLEVELAND.COM (Jan. 7, 2015, 10:39 AM), http://www.cleveland.com/metro/index.ssf/2015/01/extended_tamir_rice_shooting_v.html; and Elisha Fieldstadt, *Fatal Shooting of Cleveland Boy Tamir Rice Was Caused by His Own Actions: City*, NBC NEWS (Feb. 28, 2015, 7:32 PM), <http://www.nbcnews.com/news/nbcblk/fatal-shooting-cleveland-boy-tamir-rice-was-caused-his-own-n314861>.

19. Manny Fernandez, *After Walter Scott Shooting, Scrutiny Turns to 2nd Officer*, N.Y. TIMES (Apr. 17, 2015), http://www.nytimes.com/2015/04/18/us/after-walter-scott-shooting-scrutiny-turns-to-2nd-officer.html?_r=0.

20. Emily Badger, *There Is a Second Eric Garner Video. It May Be More Disturbing Than the First*, WASH. POST (Dec. 5, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/12/05/there-is-a-second-eric-garner-video-it-may-be-more-disturbing-than-the-first/>.

21. Jane Fritsch, *The Diallo Verdict*, N.Y. TIMES (Feb. 26, 2000), <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>. See also BRUCE SPRINGSTEEN, *AMERICAN SKIN* (Columbia Records 2001) (memorializing Armadou Diallo).

22. *Johnson v. Bay Area Rapid Transit*, 724 F.3d 1156, 1166 (9th Cir. 2013).

23. See MICHAEL SMITH ET AL., *A MULTIMETHOD EVALUATION OF POLICE USE OF FORCE OUTCOME: FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 1–1* (2010) (stating that “previous studies have shown that 1-2 per cent of police citizen contacts involve the threat or application of physical force by the police”).

24. See generally CORNEL WEST, *RACE MATTERS* (1994) (analyzing moral authority and racial debates concerning skin color in the United States).

25. This is not a new topic and the vigorous refutation of the resilience of race is not a new endeavor. See Derrick Bell, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 197–200* (1992) (arguing that racism is endemic to American society); See also Jerome McCristal Culp, *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 164 (1994) (“[T]he

questions in this realm, a direct engagement of the “post racial” claim in the context of police uses of force requires resort to historical approaches, sociological data, criminological literature, and psychological paradigms.

C. A History of Racial Violence

The question of police use of deadly force is important to all citizens, despite the fact that there are disputes over whether police use of force statutes are accurate. But the examination of police violence against Blacks requires a wider lens in order to situate these phenomena against the background of history. A history of racial violence focuses on the role of criminal processes in the historical subordination of Blacks during and after slavery, as well as the phenomenon of historical racialized judicial and extrajudicial violence, both and examination as well as more focused inquiries into the evidence of the role of race in policing generally, and uses of deadly force more specifically.²⁶ In his comprehensive book *Justice* A. Leon Higginbotham documented the foundation of a dual criminal system which early colonial legislatures devised a differential system of offenses and punishments for slaves, masters, and other free persons to facilitate both the maintenance of slave master hegemony as well as the protection of slaves as property.²⁷ Maclin traced these practices from 1693, noting that “[i]n America, police targeting of

Supreme Court has adopted colorblindness as a legal watchword, even as it systematically limits the access of blacks to job-and jury duty, and permits racially disparate and onerous police interrogation and investigation of black Americans.”) (footnotes omitted) (citing Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2043–57 (1993) and Kimberle Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1313 (2011) (describing postracialism’s threat as “a compelling ideological frame . . . poised to exile racial justice discourse to the hinterlands of contemporary political thought.”).

26. See generally Daniel Flanighan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J. S. HIST. 537 (1974).

27. A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978). See also MARK TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2003); and THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981).

black people for excessive and disproportionate search and seizure is a practice older than the Republic itself.”²⁸ Other authors have documented the role of violence during Reconstruction and “Redemption,” the period after Republicans abandoned Reconstruction oversight in return for the presidency of Rutherford B. Hayes.²⁹ The violence continued as white and law enforcement attacked thriving Black communities around the country in the early 20th century through anti-Black programs that began with the Red Summers of 1919 throughout the Southern and Border states and continued until the 1930s.³⁰ The lynchings, disproportionate executions, police shootings, and the police violence against Blacks that led to Black protests during the 1920s through the 1940s are recounted in the Kerner Commission report.³¹

And the discussion of police shootings of Blacks is not a new topic. In 1976, John Goldkamp noted the evidence from the 1960s and 1970s demonstrating the disproportionate use of deadly force by police departments against Blacks around the United States.³² He reported incidences of Black and other minority deaths by deadly force in major cities across the country that were many multiples of those recorded for whites, despite making up far less of the population.³³

28. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 333–36 (1998).

29. See RICHARD FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 120–22, 203–05, 447 (1989) (noting violence after the end of Reconstruction). See also LEON LITWACK, BEEN IN THE STORM SO LONG 277 (1980) (noting racial violence during the Freedman Bureau era); and LITWACK, TROUBLE IN THE MIND (1998) (noting racial violence after Reconstruction).

30. CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA (2011) (noting white racial violence against Blacks in Chicago); see also JAMES S. HIRSCH, RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY 55–56 (2003) (noting white racial violence against Blacks in America from 1900–1919).

31. THE KERNER REPORT, *supra* note 2.

32. John Goldkamp, *Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality*, 2 JUST. SYS. J. 1969 (1976).

33. *Id.* at 169 n.2.

More recent data, from 2010 through 2012, are consistent with previous data:

Young black males in recent years were at a far greater risk of being shot dead by police than their white counterparts—21 times greater, according to a ProPublica analysis of federally collected data on fatal police shootings.

The 1,217 deadly police shootings from 2010 to 2012 captured in the federal data show that blacks, age 15 to 19, were killed at a rate of 31.17 per million, while just 1.47 per million white males in that age range died at the hands of police.

One way of appreciating that stark disparity, ProPublica's analysis shows, is to calculate how many more whites over those three years would have had to have been killed for them to have been at equal risk. The number is jarring—185, more than one per week.³⁴

The Justice Department data also shows stark disparities data from 2003 to 2008. From January 2003 to December 2009, 4,813 deaths were reported to the Department's Arrest Related Deaths (ARD) program, which defined an ARD as occurring "during or shortly after law enforcement personnel attempted to arrest or restrain them." Of these deaths, 32 percent were Black or African Americans and 20 percent were Hispanic or Latino.³⁵

There exists a similar pattern in regards to the disproportionate use of police deadly or excessive force in numerous cities. The DOJ has investigated twenty police departments in the last ten years. The Department's Civil Rights Division, Office of Special Litigation undertakes these investigations pursuant to the Violent Crime Control and Law enforcement Act of 1994,³⁶ and Title IV of the Civil Rights

34. Ryan Gabrielson, Ryann Grochowski Jones & Eric Sagara, *Deadly Force*, in *Black and White*, ProPublica (Oct. 10, 2014, 10:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white>.

35. ANDREA BURCH, DEP'T OF JUSTICE, ARREST RELATED DEATHS, 2003–2009, 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/ard0309st.pdf>.

36. 42 U.S.C. § 14141 (2015).

Act of 1964, which forbids racial discrimination in any federal programs that receives federal assistance.³⁷ These laws permit the DOJ to initiate a civil lawsuit to remedy patterns or practices of conduct by law enforcement agencies that deprive individuals of rights, privileges, or immunities secured by the Constitution or laws. These investigations have found that departments engage in the unnecessary and excessive use of deadly force, including shootings and hit strikes with impact weapons; that they engage in unnecessary, excessive or retaliatory use of less lethal force including Tasers, chemical sprays and fists; that they use excessive force against persons who were mentally ill and in crisis, including in cases where the officers were called exclusively for a welfare check; that they use dangerous tactics that place officers in situations where avoidable force becomes inevitable; that they fail to adequately review and investigate officers' use of force; that they fail to objectively investigate all allegations of misconduct; that they fail to identify and respond to patterns of that high risk behavior; and that they fail to provide its officers with the support, training, supervision, and equipment needed to allow them to do their job safely and effectively.³⁸ The Department of Justice has obtained consent decrees across the country, from places as disparate as Los Angeles to Philadelphia,³⁹ and more recently, Ferguson.⁴⁰

37. 42 U.S.C. § 2000d (2015).

38. *See, e.g.*, DEP'T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1 (2014), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [hereinafter INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE].

39. *See, e.g.*, Civil Rights Consent Decree, LAPD, http://www.lapdonline.org/search_results/content_basic_view/928 (last accessed Dec. 12, 2015); DEP'T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 1 (2011), available at http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf; DEP'T OF JUSTICE, UNITED STATES INVESTIGATION OF THE MARICOPA SHERIFF'S OFFICE 1 (2011), available at http://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf; and GEORGE FACHNER AND STEVEN CARTER, CNA ANALYSIS & SOLUTIONS COLLABORATIVE REFORM INITIATIVE: AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 1 (2015), available at <http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf> (noting cooperative agreement with U.S. Department of Justice); *see generally* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3199 (2014).

40. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), available at <http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/>

There is much literature on the causes of these racial disparities in the use of force.⁴¹ The classical debate framed by Goldkamp involved two hypotheses, one positing internal police organization causation and the other positing Black hyper-criminality:

Belief Perspective I holds that minority overrepresentation among shooting victims is a result of differential police practices . . . [and] attributes black disproportion among shooting victims to variables *internal* to police organizations (e.g. racism by officers and by the administrators who encourage or allow them to express it by shooting blacks in situations in which they would refrain from shooting whites). Belief Perspective II views black shooting victim disproportion as a consequence of variables *external* to police organizations. From this perspective, black shooting victim disproportion is seen as a consequence of justifiable police responses to the relatively great involvement of blacks in violent crime and other activities likely to precipitate shootings.⁴²

Fyfe suggested that, though there might be confirmation of the view that the disproportion of Blacks and minorities as victims of crime and as suspects might explain racial the disparities in use of force these statistics may be “artifacts of differential police enforcement and reporting practices. In other words, it may be that disparities in police shootings of Blacks and arrests of Blacks may be the a result of arbitrariness in arrest and crime reporting practices, as well as in shooting practices.”⁴³

04/ferguson_police_department_report.pdf [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT].

41. All against a background of disparity over the accuracy of statistics. *See, e.g.*, Geoffrey Alpert and Roger Dunham, UNDERSTANDING POLICE USE OF FORCE 13–15 (2004) (or methodology)).

42. James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 708 (1982).

43. *Id.* at 709. He examined the shooting statistics of two cities, placing shooting into categories of elective and non-elective shootings, and concluded that “elective shootings rates are most greatly influenced by factors internal to police organizations. . . .” *Id.* at 711. Numerous studies show the role of racial discrimination in policing. More recently, a United States District Court judge concluded that the New York City Police Department’s long-standing stop and frisk policy amounts to racial profiling, and imposed federal monitoring of

Fyfe reasoned that gross comparisons of shootings rates are not meaningful alone in evaluating disparities in the use of force. But when Fyfe divided shootings between elective shootings (where the officer is not at risk) and non-elective shootings (where the officer must “shoot or risk death or serious injury to himself or others”) the rates were objectively comparable. He concluded that “elective shooting rates are most greatly influenced by factors internal to police organizations. . . .”⁴⁴

Since Goldkamp and Fyfe wrote, the DOJ has developed much additional information on racially discriminatory policing. It has funded research on police use of force,⁴⁵ and pursuant to 42 U.S.C. § 14141, it has investigated whether the cities and counties have engaged in “a pattern and practice” of violation of constitutional limitations on the use of force.⁴⁶ Over a period of years, DOJ investigative reports found patterns and practices of racially discriminatory law enforcement in numerous locales and settled cases before investigative reports to curtail deadly force in numerous other jurisdictions.⁴⁷

Another important dimension of the racial dimension of policing is the level of Black victims of crime and the disparity in the

the City of New York. *Floyd v. New York*, No. 13-3088-cv 1, 10 (2d Cir. argued Oct. 15, 2015), available at https://ccrjustice.org/files/2d%20Circuit%20Decision%20Affirming%20Denial%20of%20Union%20Intervention_0.pdf. Scholars have long criticized *Terry v. Ohio*, 392 U.S. 1 (1968) as a license for racially discriminatory policing. See Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1321 (1998); Tracey Maclin, *The Decline of the Right of Location: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1257, 1337 (1990).

44. Fyfe, *supra* note 42, at 711. The chief can direct his officers not to shoot the backs of unarmed fleeing property crime suspects without increasing risk to officers caused by encounters with such suspects. *Id.*

45. The National Institute of Justice has funded research on police use of force, race and policing. *Publications Related To: Law Enforcement*, NAT'L INST. JUST., <http://www.nij.gov/publications/pages/publication-list.aspx?tags=Law%20Enforcement> (last visited Dec. 31, 2015).

46. 42 U.S.C. § 14141 authorizes the Attorney General of the United States to pursue civil and equitable relief against law enforcement agencies if they engage in “a pattern and practice” of unlawful conduct. 42 U.S.C. § 14141.

47. See *supra* notes 38–40 and accompanying text.

prosecution of those crimes. In 1998, Tracey Meares called this “underpolicing.”⁴⁸ She noted:

Even after controlling for socioeconomic status researchers still found that blacks were almost twice as likely to be crime victims as whites in the same low-income group. Surveys also revealed that—like homicide—rape, aggravated assault, burglary, and auto theft were predominantly intragroup offenses. Due to residential segregation, it is likely that minority victims often were victimized by their neighbors.

As the Kerner Commission Report noted, police responded to these problems by doing nothing. Police failure to promote adequate protection and services in disadvantaged minority neighborhoods was a common complaint before the Commission. Of course, the arrest rates referred to above reflect only the serious crimes tracked by the FBI Crime Reports. These reports obscure the even greater number of commonly-occurring disorder offenses. White police officers patrolling urban ghettos, however, often dismissed violations of sex, drinking and gambling laws along with intraracial simple assaults as “typically Negro.”

Just as underpolicing of crime and disorder in many segregated, impoverished urban neighborhoods was a common problem, so was overpolicing in the form of harassment and brutality.⁴⁹

Jill Loevy has commented on the unsolved murders of young Black men. “I did a count in 2008 of 300-some LA homicides of the gang-related homicides, and I think something like 40 percent of the victims were this sort of victim—noncombatant, not directly party to the quarrel that instigated the homicide, but ended up dead

48. Tracey Meares and Dan Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 203–04 (1998).

49. *Id.* at 204 (citations omitted).

nonetheless.”⁵⁰ Furthermore, she notes that “[y]oung black men in their early 20s . . . had a rate of death from homicide that was higher than those of American troops in Iraq in about 2005 So people talk about a war zone—it was higher than a combat death rate.”⁵¹ They are afraid to cooperate.

Justice Department statistics show that homicide rates are down to rates observed in the 1960s, but that nonetheless Blacks are disproportionately represented as perpetrators and victims⁵² Justice Department statistics also show that homicide rates were up from “4.6 per 100,000 U.S. residents in 1962 to 9.7 per 100,000 by 1979.”⁵³ Over time, the homicides went up and down between 1980 and 1991, but by 2011 the homicide rate was “4.7 homicides per 100,000.”⁵⁴ Despite the decline overall, between 1980 and 2008 the Black victimization rate was “27.8 per 100,000—six times higher than the rate for whites.”⁵⁵

D. The Psychological Turn

The psychological turn focuses on the role of cognition and bias in racially discriminatory policing. At the general level, there is strong evidence that race affects perceptions and judgments.⁵⁶ If the discussion does not begin with the specific instances of deadly force against unarmed Blacks, then perhaps it might as productively begin with the scientific evidence that unconscious bias exists and then turn

50. *Why a Black Man's Murder Often Goes Unpunished in Los Angeles* (NPR radio broadcast Jan. 24, 2015), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=379156732>.

51. *Id.*

52. ALEXIA COOPER & ERICA L. SMITH, DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008: ANNUAL RATES FOR 2009 AND 2010 2–3 (Nov. 2011), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf> [hereinafter HOMICIDE TRENDS].

53. ERICA L. SMITH & ALEXIA COOPER, DEP'T OF JUSTICE, HOMICIDE IN THE U.S. KNOWN TO LAW ENFORCEMENT, 2011 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/htus11.pdf>.

54. *Id.* at 1–3.

55. HOMICIDE TRENDS, *supra* note 52, at 3.

56. See generally Cheryl Staats, *State of the Science: Implicit Bias Review 2014*, KIRWIN INST. 12 (2014) (reviewing important research and conferences on implicit bias, the popularity of the topic in mainstream lay media, and university initiatives on the topic).

to the body of work that requires that the lens of implicit bias be trained on racially discriminatory policing in general and the use of deadly force in particular.⁵⁷ Here, too, there is a deep body of work both within legal literature⁵⁸ and without⁵⁹ and an ever more sophisticated probing of the complex circumstances in which race wields its powerful and deadly force.⁶⁰ In particular, an important observation in the context of policing suggests that implicit bias affects officers' interpretations of events, level of aggression, and amenability of behavior to modification.⁶¹

E. Deadly and Excessive Force and Police Culture

A more recent concern about police culture is the increasing militarization of police ideology and practice. This phenomenon emerged in 1968 when Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, legislation aimed at combatting domestic crime and political movements.⁶² Among other measures, the legislation provided for assistance to state and local law

57. For legal literature on unconscious bias, see Linda Greene, *Equal Employment Opportunity Law Twenty Years After The Civil Rights Act of 1964: Prospects for the Realization of Equality in Employment*, 18 SUFFOLK U. L. REV. 593, 600 (1984) (noting that “substantial sociological and psychological research indicates that race and gender characteristics play determinative roles in the perception and judgment process.”). See also Linda Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentation of an African American Female Law Professor*, 6 BERKELEY WOMEN’S L.J. 81, 84 (1990) (discussing the unconscious bias phenomena associated with tokenism).

58. See, e.g., John Goldkamp, *Minorities as Victims of Police Shootings, Interpretations of Racial Disproportionality and Police Use of Deadly Force*, 2 JUST. SYS. J. 169, 169 n.2, 179 (1976–1977) (documenting the disproportionality of deadly force against Blacks). See also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post Racial Society*, 91 N.C. L. REV. 101, 155 (2012–2013).

59. LORIE A. FRIDELL ET AL., RACIALLY BIASED PROFILING: A PRINCIPLED RESPONSE (2001).

60. See, e.g., L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012) (“[O]fficer character is an important component to creating an institutional environment that facilitates the protection of citizen privacy against arbitrary intrusion.”) [hereinafter *Cognitive Bias*]; L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2014–2015).

61. Richardson, *Cognitive Bias*, *supra* note 60, at 271–77.

62. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 42 U.S.C.).

enforcement agencies.⁶³ Between 1988 and 1991, to further the “War on Drugs” both Congressional legislation and Department of Defense directives provided to state and local police departments U.S. Military tactical support, coordination.⁶⁴ In addition, police departments developed Special Weapons and Tactics (SWAT) teams,⁶⁵ increasing the perception⁶⁶ that local police departments had adopted military tactics⁶⁷ as a matter of course and seemed to run counter to the development of professionalism and community oriented policing approaches pioneered by Herman Goldstein of the University of Wisconsin Law School⁶⁸ and adopted in jurisdictions around the country, often out of crises resulting from excessive and deadly force incidents that provoked widespread community unrest.⁶⁹

In addition, bold militarization was enhanced as a result of a series of federal government equipment transfer programs. American Civil Liberties Union released⁷⁰ the report *War Comes Home: The Excessive Militarization of American Policing*.⁷¹ Examples of weapons include military grade weapons in Maricopa City, Arizona, where an unarmed homeless man was recently shot at night while police used night vision equipment. That same department received 32 bomb suits, 704 night vision units, 42 forced entry tools (such as

63. See generally Donald Alexander, *New Resources for Crime Control: Experience Under the Omnibus Crime Control and Safe Streets Act of 1968*, 10 AM. CRIM. L. REV. 205 (1971).

64. Thomas S.M. Tudor, *The Military and the War on Drugs*, 37 F. L. REV. 267, 269–73 (1994)

65. Anti Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified in scattered sections of 42 U.S.C.).

66. Popular media reinforced the reality with glamorized depictions of SWAT teams with all black uniforms and armor featuring popular movie stars in lead roles. See, e.g., *S.W.A.T* (Columbia Pictures 2003) (starring Samuel L. Jackson, Colin Farrell, and Jeremy Renner).

67. See DAVID A. KLINGER & JEFF ROJEK, *A MULTI-METHOD STUDY OF SPECIAL WEAPONS AND TACTICS TEAMS* (2008).

68. *Id.* at 1 (citing HERMAN GOLDSTEIN, *PROBLEM ORIENTED POLICING* (1990)).

69. KLINGER & ROJEK, *supra* note 67, at 1.

70. AM. CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* (2014) [hereinafter *WAR COMES HOME*].

71. *Id.* at 2 (“Carried out by ten or more officers armed with assault rifles, flashbang grenades, and battering rams, these paramilitary raids disproportionately impacted people of color, sending the clear message that the families being raided are the enemy. This unnecessary violence causes property damage, injury, and death.”).

battering rams), surveillance and reconnaissance equipment, military trucks, armored vehicles, and helicopters⁷² pursuant to the 1033 program⁷³ through which the Department of Defense transfers military equipment to local law enforcement—to the tune of \$4.3 billion dollars.⁷⁴ In addition, the Department of Justice provided funding for a variety of activities,⁷⁵ but 64 percent of police departments spent the funding on lethal and non-lethal weapons, tactical vests, and body armor.⁷⁶ Furthermore, the Department of Homeland Security has also provided funding.⁷⁷

The effects of such militarization were on prominent display in the immediate aftermath of the police shooting of Michael Brown. Protesting citizens found tanks and armored vehicles in their streets and the focal point of the demonstrations included not only the killing of an unarmed teen, but the specter of an all white police force garbed in combat uniforms with military grade equipment and their weapons pointed to an entire Black Community.⁷⁸

72. *Id.* at 13.

73. National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, 110 Stat. 2422.

74. WAR COMES HOME, *supra* note 70, at 24.

75. The DOJ plays an important role in the militarization of the police through programs such as the Edward Byrne Memorial Justice Assistance Grant (JAG) program. Established in 1988, the program was originally called the Edward Byrne Memorial State and Local Law Enforcement. “Military weapons included the Ballistic Engineered Armored Response Counter Attack Truck (BEARCAT) and the Mine Resistant Ambush Protected (MRAP) vehicles. Given away in 2013, the United States decommissioned twenty-seven thousand of those vehicles, many of which reside with local police departments.” *See also* RADEY BALKO, CATO INSTITUTE, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 10 (2006), available at <http://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america>.

76. BALKO, *supra* note 75, at 10.

77. *Id.*

78. *See* Joe Coscarelli, *Behind the Best Pictures from Ferguson, with Getty Photographer Scott Olson*, N.Y. MAG. (Aug. 20, 2014, 4:05 PM), <http://nymag.com/daily/intelligencer/2014/08/behind-the-best-pictures-from-ferguson.html#>.

III. A STRUCTURE OF VIOLENCE

A. *Structural Violence*

“Structural violence” is one way of describing social arrangements that put individuals and populations in harm’s way. . . . The arrangements are structural because they are embedded in the political and economic organization of our social world; they are violent because they cause injury to people. . . .

[N]either culture nor pure individual will is at fault; rather, historically given (and often economically driven) processes and forces conspire to constrain individual agency. Structural violence is visited upon all those whose social status denies them access to the fruits of scientific and social progress. . . .

Human rights violations are . . . symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm.⁷⁹

Farmer relied on the path breaking work of Johan Galtung, whose essay “Violence, Peace, and Peace Research”⁸⁰ provided a framework for understanding the dichotomies of violence and the manner in which various forms of violence stabilize injustice and simultaneously sustain volatility increase the potential for direct violence in society.⁸¹

Galtung’s path-breaking work explored the various dimensions of violence that are present in the state.⁸² “As a point of departure, let us say that violence is present when human beings are being influenced

79. Paul E. Farmer et al., *Structural Violence and Clinical Medicine*, 3 PLOS MED. 1686 (2006); PAUL FARMER, *INFECTIONS AND INEQUALITIES: THE MODERN PLAGUE* 79 (1999); PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 7 (2004).

80. Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167 (1969).

81. Paul Farmer, *An Anthropology of Structural Violence*, 45 CURRENT ANTHROPOLOGY 305, 307 (2004).

82. Galtung, *supra* note 80, at 168–72.

so that their actual somatic and mental realizations are below their potential realizations.”⁸³

Galtung noted the six dimensions of violence that contributed to the difference between the potential and the actual, and also explained the distinction as well as the link between indirect violence and direct violence.⁸⁴ There is a “potential [possible] level of realization which is possible with a given level of insight and resources . . . [unless] resources are monopolized by a group or class or are used for other purposes.”⁸⁵ If this occurs, “violence is present in the system. . . . [T]here is also the direct violence where the means of realization are not withheld, but directly destroyed.”⁸⁶

Galtung noted two forms of violence and made a distinction between physical and psychological violence:

Under physical violence human beings are hurt somatically, to the point of killing. It is useful to distinguish further between ‘biological violence’, which reduces somatic capability (below what is potentially possible), and ‘physical violence as such’, which increases the constraint on human movements—as when a person is imprisoned or put in chains, but also when access to transportation is very unevenly distributed, keeping large segments of a population at the same place with mobility a monopoly of the selected few. But that distinction is less important than the basic distinction between violence that works on the body, and violence that works on the soul.⁸⁷

Another important observation concerns the psychological injuries inflicted by threats of violence:

When a person, a group, a nation is displaying the means of physical violence, whether throwing stones around or testing nuclear arms, there may not be violence in the sense that anyone is hit or hurt, but there is nevertheless the threat of

83. *Id.* at 168 (italics in original omitted).

84. *Id.* at 168–72.

85. *Id.* at 169.

86. *Id.*

87. *Id.*

physical violence and indirect threat of mental violence that may even be characterized as some type of psychological violence since it constrains human action. Indeed, this is also the intention. . . .⁸⁸

Galtung next connected structural and actual violence. Actual violence is a type of violence “where there is an actor that commits the violence as personal or direct, and to violence where there is no such actor as structural or indirect. In both cases individuals may be killed or mutilated, hit or hurt in both senses of the word and manipulated”⁸⁹

[I]n the first case these consequences can be traced back to concrete persons as actors, in the second case this is no longer meaningful. There may not be any person who directly harms another person in the structure. The violence is built into the structure and shows up as unequal power and consequently as unequal life chances . . . as when income distributions are heavily skewed, literacy/education unevenly distributed, medical services [access differs for groups] . . . if the persons low on income are also low in education, low on health, and low on power

The important point here is that if people are starving when this is objectively avoidable, then violence is committed . . . where life expectancy is twice as high in the upper as in the lower classes, violence is exercised even if there are no concrete actors [to which] one can point . . . [this] condition of structural violence [is also called] *social injustice*.⁹⁰

Galtung made a fifth distinction between violence that is intended or unintended, one important to rendering structural violence irremediable. He noted that Roman jurisprudence and Judeo-

88. *Id.* at 170.

89. *Id.*

90. *Id.* at 170-71.

Christian ethics focus on intention. That focus installs “a bias that renders acceptable social injustice.”⁹¹

Finally Galtung distinguished between two levels of violence—manifest violence and latent violence.⁹² Latent violence exists when “the situation is so unstable that the actual realization level ‘easily’ decreases.” Here, Galtung hoped to capture the human instability and the low value on human life that is a consequence of structural violence. “[A] little challenge [will] trigger considerable killing and atrocity.”⁹³ Latent violence “indicates a situation of unstable equilibrium, where the level of actual realization is not sufficiently protected against deterioration by upholding mechanisms.”⁹⁴ This violence is also called symbolic violence.

The search for solutions to the historical, enduring, and widespread vulnerability of Black males to police violence requires a more probing assessment of the conditions that create the potential for this species of racial violence and for its repetitive nature. The circumstances in which the phenomenon occurs repeatedly involve deeply rooted inequalities that limit both political and material opportunity, and stigmatize entire communities. The phenomena that contribute to vulnerability are also collectively called symbolic violence.⁹⁵

The work of Richard Rothstein, a powerful critic of structures that condemn the racial underclass to permanent marginalization,⁹⁶ has commented on the policies that created the *structural violence* of

91. *Id.* at 171–72.

92. *Id.* at 172.

93. *Id.*

94. *Id.*

95. Claudio Colaguori, *Symbolic Violence and the Violation of Human Rights: Continuing Sociological Critique of Domination*, 3 INT’L J. CRIMINOLOGY & SOCIOLOGICAL THEORY 388, 389 (2010) (examining Pierre Bourdieu’s concept of “symbolic violence” and its critique of domination, describing it as “the subdued expression of a power that is normally and regularly operating in a mode of violence”).

96. See RICHARD ROTHSTEIN, ECON. POLICY INST., FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH 2 (2013), available at <http://www.epi.org/publication/unfinished-march-public-school-segregation/>; see also Richard Rothstein, *Racial Segregation and Black Student Achievement*, in EDUCATION, JUSTICE, AND DEMOCRACY 173 (Danielle Allen & Rob Reich eds., 2013) (discussing the achievement gap in general).

places like Ferguson.⁹⁷ His analysis revealed that both private and public forces created the “segregated metropolises” that is St. Louis.⁹⁸ These include:

- Racially explicit zoning decisions that designated specific ghetto boundaries within the city of St. Louis, turning black neighborhoods into slums;
- Segregated public housing projects that separated blacks and whites who had previously lived in more integrated urban areas;
- Restrictive covenants, excluding African Americans from white areas, that began as private agreements but then were adopted as explicit public policy;
- Government subsidies for white suburban developments that excluded blacks, depriving African Americans of the 20th century home-equity driven wealth gains reaped by whites;
- Denial of adequate municipal services in ghettos, leading to slum conditions in black neighborhoods that reinforced

97. Richard Rothstein, *The Making of Ferguson*, THE AM. PROSPECT (Oct. 5, 2014), <http://prospect.org/article/making-ferguson-how-decades-hostile-policy-created-powder-keg/>.

A more powerful cause is the explicit intents of federal, state, and local governments to create racially segregated metropolises. The policies were mutually reinforcing In 1974, a federal appeals court concluded, “Segregated housing in the St. Louis metropolitan area was . . . in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments.” The Department of Justice stipulated to this truth but took no action in response. In 1980, a federal court ordered the state, county, and city governments to devise plans to integrate schools by integrating housing. Public officials ignored the order, devising only a voluntary busing plan to integrate schools, but not housing Although policies to impose segregation are no longer explicit, their effect endures. When we blame private prejudice and snobbishness for contemporary segregation, we not only whitewash history but avoid considering whether new policies might instead promote an integrated community.

Id.

98. *Id.*

whites' conviction that "blacks" and "slums" were synonymous;

- Boundary, annexation, spot zoning, and municipal incorporation policies designed to remove African Americans from residence near white neighborhoods, or to prevent them from establishing residence near white neighborhoods;
- Urban renewal and redevelopment programs to shift ghetto locations, under the guise of cleaning up those slums;
- Government regulators' tacit (and sometimes open) support for real estate and financial sector policies and practices that explicitly promoted residential segregation;
- A government-sponsored dual labor market that made suburban housing less affordable for African Americans by preventing them from accumulating wealth needed to participate in homeownership.⁹⁹

In our current jurisprudence, we have rejected a broad constitutional obligation of racial and economic equality and rendered targeted racial measures presumptively unconstitutional. After *Brown*, the Supreme Court rejected the proposition that policies with disproportionate negative effects on minorities should be strictly scrutinized for their validity and necessity.¹⁰⁰ The Court extended *Washington v. Davis* to racialized enforcement of the criminal law in *McCleskey v. Kemp*.¹⁰¹ The consequences are dire:

99. *Id.*

100. *Washington v. Davis*, 426 U.S. 229 (1976). The Court should not strictly scrutinize procedures and/or criteria that disproportionately disqualified minorities from jobs. In that case, the Court decided that no such scrutiny was required unless minorities could prove that the procedures or criteria were adopted with the intent of excluding blacks ("We [the Court] have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and 'denies any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups."). *Id.* at 245.

101. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

In the absence of a vigorous constitutional principle that casts doubt on practices that perpetuate past segregation and discrimination, rules and practices that produce these outcomes, even if not squarely endorsed, acquire a gloss of constitutional legitimacy.

This constitutional doctrine immunizes from judicial inquiry the cumulative effects of private and public decision-making, as well as the influence of wealth and poverty. As a result, the opportunity and inclusion aspirations of minorities are delegitimized. On the contrary, if constitutional doctrine condemned, or at a minimum rendered suspicious, facially-neutral rules with disproportionate disadvantageous effects, the gloss of meritocracy that shores up these disparities would be undermined.¹⁰²

Washington and *McCleskey* lent “legitimacy to policies that disproportionately and cumulatively disadvantage minority groups, especially the poor.”¹⁰³ It can further be noted that “[t]he immunization of race-neutral policies from constitutional challenges lends credence to the assumption that the racial and economic stratification of society should be attributed to the failures of the disadvantaged rather than the unfairness of societal institutions and rules.”¹⁰⁴

Anti-affirmative action doctrine has also contributed to the legal infrastructure shoring up structural violence. The twenty-five year ambiguity of *Regents of the Univ. of Cal. V. Bakke*,¹⁰⁵ as well as the presumption of unconstitutionality affirmed by majorities in *Adarand Constructors, Inc. v. Pena*,¹⁰⁶ *Grutter v. Bollinger*,¹⁰⁷ *Parents Involved in Cmty. Sch. v. Seattle Dist.*,¹⁰⁸ and *Fisher v. Univ. of Tex.*

102. Linda S. Greene, *From Brown to Grutter*, 36 LOY. U. CHI. L.J. 101, 114 (2004).

103. *Id.*

104. *Id.*

105. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

106. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

107. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

108. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).]

at *Austin*,¹⁰⁹ add weight to the constitutional legitimacy of policies that routinely relegate minorities to the margins.¹¹⁰ The rhetoric of “special treatment” is a new stigma—though not a new charge for those who may have benefitted from targeted programs.¹¹¹ Coupled with the charge that those who have historically enjoyed exclusive entitlement and privilege are now “innocent individuals,”¹¹² new legal rhetoric reflects the historic charge of minority inferiority, traceable to *Dred Scott v. Sandford*.¹¹³ This legal framework forces efforts to eliminate structural violence—structural to political efforts unaided by constitutional command.

B. Actual Violence

Actual violence is reflected across a broad range of jurisprudence. From the court system’s approach to the death penalty and prison conditions to the use of deadly force by police in the streets, a structure of actual violence is firmly entrenched in American law.

1. The Death Penalty

The history of the death penalty and the courts in this country has a troubled history, and it is apparent from the early decisions of recent jurisprudence. In *Furman v. Georgia*, the Court addressed the matter of life and death in a slight and stiff formal paragraph.¹¹⁴ Though the Court agreed that the imposition of the death penalty in the cases before it would violate the Eighth Amendment’s ban on cruel and unusual punishment, the fractured decision said that the death penalty was not dead. On the merits, the per curiam opinion—a paragraph long—garnered the support of five Justices: Douglass,

109. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

110. In these opinions a majority of the Court adopted activism—rather than deference—to voluntary measures of racial inclusion, increasing associated legal risks.

111. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883).

112. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O’Connor, J., concurring).

113. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

114. *Furman v. Georgia*, 408 U.S. 238 (1972).

Brennan, Stewart, White, and Marshall. All wrote separate concurring opinions.¹¹⁵

Douglass wrote to emphasize that the discretionary systems before the court permitted discrimination against minorities, the poor, the illiterate, and mentally disabled that was “was incompatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”¹¹⁶

Stewart wrote to emphasize that Court had not rejected the death penalty, nor eliminated the possibility that it might be imposed on retributive grounds.¹¹⁷ For Stewart, the defect was the wanton and freakish imposition of the death penalty, not the per se unconstitutionality of the penalty, even if inflicted for retribution.¹¹⁸

White did not reject the death penalty per se but concluded that the Eight Amendment was violated by legislative schemes that provided so much discretion that the death penalty as a whole no longer served its legitimate legislative goals.¹¹⁹

Only two justices—Brennan and Marshall—concluded that the death penalty violated the Eight amendment because of its severity and degradation, its arbitrary use, its virtual rejection by contemporary society, and the availability of an alternative punishment of imprisonment.¹²⁰

Marshall’s opinion, which concluded that the death penalty was per se unconstitutional under the Eight Amendment, was the most lengthy and comprehensive.¹²¹ It was framed with a frank acknowledgment that the particular crimes for which Furman had been convicted were “reprehensible,” but that the task before the court was not to condone the crime but to decide the constitutionality of the punishment of death.¹²² He noted that more than six hundred

115. *Id.* at 256–57 (Douglas, J., concurring); *Id.* at 306 (Stewart, J., concurring); *Id.* at 307–09 (Stewart, J., concurring); *Id.* at 312–13 (White, J., concurring); *Id.* at 305–06 (Brennan, J., concurring); *Id.* at 371 (Marshall, J., concurring).

116. *Id.* at 256–57 (Douglass, J., concurring).

117. *Id.* at 306 (Stewart, J., concurring).

118. *Id.* at 307–09 (Stewart, J., concurring).

119. *Id.* at 312–13 (White, J., concurring).

120. *Id.* at 305–06 (Brennan, J., concurring).

121. The opinion was 56 pages long, exclusive of appendices.

122. 408 U.S. at 315 (Marshall, J., concurring).

lives were at stake in the case before the Court.¹²³ Marshall reviewed the history of the death penalty and the history of decisions parsing the meaning of the Eighth Amendment¹²⁴—a history that demonstrated that “evolving standards of decency that mark the progress of a maturing society”¹²⁵ were the measure of the constitutionality of the penalty.¹²⁶ Justice Marshall disagreed with the Court’s view of the death penalty’s purpose of deterrence and retribution.¹²⁷ Marshall’s view was that the purpose of retribution was not justified as an avenue to visit society’s moral outrage. Instead the judiciary must serve as a buffer against the imposition of unconstitutional—though popular—punishments.¹²⁸ In addition, he insisted that the government could not just carry out such an affair in a consistent and non-discriminatory manner.¹²⁹

Justice Brennan also rejected the death penalty:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.¹³⁰

The dissenters included Chief Justice Burger, who wrote for Blackmun, Powell, and Rehnquist, to emphasize that the legislature must play a primary role in the choice of punishment,¹³¹ that the decision of the Court in *Furman* was a limited one which left the death penalty available as a permissive punishment,¹³² and that

123. *Id.* at 316–17 (Marshall, J., concurring).

124. *Id.* at 322–29 (Marshall, J., concurring).

125. *Id.* at 329 (Marshall, J., concurring).

126. *Id.*

127. *Id.* at 342–43, 347 (Marshall, J., concurring).

128. *Id.* at 331 (Marshall, J., concurring).

129. *Id.* at 364 (Marshall, J., concurring).

130. *Id.* at 305 (Brennan, J., concurring).

131. *Id.* at 375 (Burger, C.J., dissenting).

132. *Id.*

continued popular support for the death penalty undercut any arguments that evolving standards of decency required its demise.¹³³

Although the Supreme Court as a whole has not embraced Marshall's view that the death penalty is inconsistent with the Eighth Amendment, other Justices have embraced that point of view. In 1994, Justice Blackmun, dissenting from a denial of certiorari in a Texas case, concluded in terms almost identical to the views Justice Marshall consistently expressed, that the American death penalty was constitutionally broken¹³⁴:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.¹³⁵

After a lengthy explanation of the evolution of his journey from morality concerns to constitutional ones, Justice Blackmun cited to Justice Marshall:

Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness “in the

133. *Id.* at 385–86 (Burger, C.J., dissenting).

134. *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993), *cert. denied* 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

135. 510 U.S. 1141, 1145 (Blackmun, J., dissenting).

infliction of [death] is so plainly doomed to failure that it—and the death penalty— must be abandoned altogether.” *Godfrey v. Georgia*, 446 U. S. 420, 442 (1980) (Marshall, J., concurring in judgment). I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all. I dissent.¹³⁶

In 2008, Justice Stevens came to the same conclusion shortly before his retirement in *Baze v. Rees*, wherein he expressed his view that the death penalty was unconstitutional.¹³⁷ Although Justice Stevens concurred in the judgment of the Court to uphold the constitutionality of Kentucky’s lethal injection protocol on stare decisis grounds, he spelled out the reasons for his decision regarding the penalty, relying on the grounds that Justice Marshall set down in his 1972 *Furman* concurrence.¹³⁸ He concluded that the justifications for the death penalty—deterrence and retribution—were simply vengeance objectives, that the risk of error was too great, and that the discriminatory application of the death penalty was inevitable.¹³⁹

In the recent case of *Glossip v. Gross*, questions of retribution and arbitrariness were never far from the surface of the discourse.¹⁴⁰ In that case, the Court held that a new lethal injection protocol, adopted by Oklahoma after a botched execution,¹⁴¹ did not violate the Eighth Amendment prohibition against cruel and unusual punishments.¹⁴² The condemned inmates attempted to establish that there were less painful means of execution using alternative drugs, but the Court upheld the district court’s rejection of those alternatives because the District Court found that *those* drugs were unavailable.¹⁴³

136. *Id.* at 1159.

137. 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).

138. *Id.* at 41.

139. *Id.* at 82–86 (Stevens, J., concurring in the judgment).

140. *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

141. *Id.* at 2734.

142. *Id.* at 2742–44.

143. *Id.* at 2726, 2738.

The dissenters, Breyer joined by Ginsburg,¹⁴⁴ and Sotomayor, joined by Ginsburg, Breyer and Kagan,¹⁴⁵ disagreed with this reasoning. They raised multiple points of disagreement, but there was an underlying thread throughout their opinions: who bears the risk that a method of execution will inflict cruel and unusual punishment, the inmate facing execution, or the state seeking to impose the ultimate penalty?

Justice Scalia's concurrence dripped disdain for the constitutional arguments on behalf of the condemned. The retributive element of Justice Scalia's dissent is clear. He noted;

We federal judges live in a world apart from the vast majority of Americans. After work, return to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans everyday lives. The suggestion that the incremental deterrence effects of capital punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake oblivious to the needs of others. Let the people decide how much incremental deterrence is appropriate.¹⁴⁶

Justice Thomas' concurring opinion, in which he focused relentlessly on the description of the crimes committed emphasized retribution as well. He wrote that there were no cases during his time on the Court that did not merit the death penalty and that "amnesty came in the form of unfounded claims".¹⁴⁷ The best way for the Court to rid it self of "disparate outcomes . . . is for the Court to stop making up Eighth Amendment claims in it ceaseless quest to end the death penalty through undemocratic means."¹⁴⁸

The Breyer dissent, joined by Ginsburg, focused on the evidence that the administration of the death penalty is flawed and fraught with human risk.¹⁴⁹ Although Breyer does not hold that the death penalty

144. *Id.* at 2755 (Breyer, J., dissenting).

145. *Id.* at 2780 (Sotomayor, J., dissenting).

146. *Id.* at 2749 (Scalia, J., concurring).

147. *Id.* at 2755 (Thomas, J., concurring).

148. *Id.*

149. *Id.* at 2755–57, 2759–64 (Breyer, J., dissenting).

violates the Constitution, he states the case for that conclusion. He notes that when the Supreme Court upheld the death penalty in its Gregg decision in 1976 and the accompanying decisions, it did so with the assumption that the statutes “contain safeguards sufficient to ensure that the penalty would be applied reliably and arbitrarily.”¹⁵⁰

Since then, Breyer noted, the circumstances have changed:

Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States abandoned its use . . . those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited “cruel and unusual punishment[t].”¹⁵¹

The dissent of Justice Sotomayor, with whom Justice Ginsberg, Justice Breyer and Justice Kagan join,¹⁵² contrasts sharply with the concurrences of Justices Scalia¹⁵³ and Thomas.¹⁵⁴ Justice Sotomayor’s dissent focuses on the courts approval of a drug protocol that the Justices believe “poses a substantial, constitutionally intolerable risk” that it will impose excruciating pain on the inmate in enduring execution, pain that might be masked by the other drugs that make up the cocktail.¹⁵⁵ The dissenters believe that the decision of the District Court to credit “scientifically unsupported and implausible testimony”¹⁵⁶ as well as the court’s requirement that the condemned inmates identify a less painful alternative drug for their own death

150. *Id.* at 2755 (Breyer, J, dissenting).

151. *Id.* at 2756 (Breyer, J, dissenting).

152. *Id.* at 2780 (Sotomayor, J., dissenting).

153. *Id.* at 2746 (Scalia, J., concurring).

154. *Id.* at 2750 (Thomas, J., concurring).

155. *Id.* at 2781 (Sotomayor, J., dissenting).

156. *Id.*

creates the risk that the condemned “will suffer . . . the chemical equivalent of being burned at the stake.”¹⁵⁷

The contrast between the dissenters and the majority’s view of the role of the court in safeguarding life is also evident in their contrasting views on the entitlement of condemned inmates to judicial protection and dignity. In one respect, the difference of opinion on the question of dignity comes down to a difference of opinion on the relevance of vengeance and retribution as the prolonged solitary confinement that accompanies a death sentence that may or may not be carried out. A portion of Breyer’s dissent focused on the documented dehumanizing effects of the prolonged solitary confinement that inevitably accompanies a sentence of death which may or may not be carried out.¹⁵⁸ Justice Thomas responds with a detailed description of by the heinous murders committed by those whose humanity Breyer touts.¹⁵⁹ Justice Scalia argues that the dissenters desire for more deterrence certainty would be an exercise in mathematical futility that would deprive potential victims of their protection from life-threatening crime.¹⁶⁰

The key difference in the Justices point of view lies in their willingness—or unwillingness—to tolerate the risk of mistake, arbitrariness, or innocence, in the imposition of the death penalty. It is the point to view that these concerns do not constitute significant constitutional risk that is an important part our constitutional jurisprudence of violence.

2. Prison Conditions and Indifference to Humanity

A recent key Supreme Court case on constitutional standards for prison conditions, *Farmer v. Brennan*, presents a paradigm similar to those involving deadly force as well as those involving the imposition of the death penalty.¹⁶¹ In *Farmer*, prison officials initially housed

157. *Id.*

158. *Id.* at 2765 (Breyer, J., dissenting).

159. *Id.* at 2753–55 (Thomas, J., concurring).

160. *Id.* at 2749 (Scalia, J., concurring).

161. 511 US 825(1994).

transgendered man in administrative segregation.¹⁶² After prison authorities transferred the transgendered prisoner to the general population, other inmates beat and raped him in his cell.¹⁶³ The question in *Farmer* was whether prison officials violated the Eighth Amendment standard through “deliberate indifference” in regards “to his safety” when they exposed him to sexual violence.¹⁶⁴ The Court concluded that deliberate indifference to a substantial risk of the serious harm is the equivalent of recklessly disregarding that risk.¹⁶⁵ But in order for the Court to conclude that the Eighth Amendment was violated, it would be necessary to demonstrate that prison officials disregarded a risk of harm of which they were subjectively aware—in this instance the inmate would need to demonstrate that prison officials knew that he would be raped and brutalized, and that they disregarded that knowledge to the detriment of the incarcerated transgender man.¹⁶⁶

The standards which impose the risk of harm on inmates are exacerbated by the racialized conditions of incarceration that exist in the United States. Those conditions have been documented in numerous studies and in the records of prison condition litigation that states the potential for abuse of inmates under such lenient and forgiving standards.¹⁶⁷ Recently, tragedies such as the suicide of a teenager once held in solitary confinement at Rikers Island have exposed the poisonous combination of race, discretion and secrecy in the administration of prison facilities.¹⁶⁸ Although it is promising that both judges the Department of Justice are beginning to aggressively address violence and abuse in the context of prisons, it seems clear

162. *Id.* at 830.

163. *Id.*

164. *Id.* at 832.

165. *Id.* at 836.

166. *Id.* at 838.

167. Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, PRISON POL’Y INITIATIVE (July 2015), <http://www.prisonpolicy.org/racialgeography/report.html>; ANN CARSON, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, PRISONERS IN 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

168. Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide* N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?_r=0.

that systemic abuse over years seems to be the prerequisite for the ablation of the violence that is an integral part of mass incarceration disproportionately affecting Blacks, minorities, and poor in the united states today.

These permissive standards and attitudes demonstrate that official violence is permissible, and that due to disparities in the exposure of Black minorities to the prison system and to the criminal system, the effect of violence on our jurisprudence both pervasive and cumulative.

3. Deadly Force

Several areas of law come together when police use deadly force. With respect to criminal liability, prosecutions are rare and the circumstances rarely lead to conviction.¹⁶⁹ Recent police shootings of unarmed men, almost all Black, combine both unambiguous lack of threat to police officers and the use of multiple rounds, when deadly force seems unnecessary to protect either bystanders or police. There is a different dynamic at play, a busy intersection of stigmas—race, gender, age, hyper-criminalization, unemployment, marginal housing, and class and racial segregation—all creating circumstances in which the use of force may be targeted at a discrete stigmatized group in society, a group few will champion or defend.¹⁷⁰ As the New York Times Editorial Board said, these cases “show how the presumption of criminality, poverty, and social isolation threatens lives every day in all corners of this country.”¹⁷¹

The indifference to the humanity of those suspected or convicted of criminality accounts for the doctrine that all but immunizes these all-too-frequent incidents from both visibility and redress. The presumptions of legitimate government action, rather than the high cost of abuse of governmental power, empowers “a jurisprudence of

169. See Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014, 7:22 PM), <http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955>.

170. Editorial, *Forcing Black Men Out of Society*, N.Y. TIMES (Apr. 26, 2015), http://www.nytimes.com/2015/04/26/opinion/sunday/forcing-black-men-out-of-society.html?_r=0.

171. *Id.*

death” in which actual violence plays a symbolic and exemplary role in the maintenance of structural violence.¹⁷² It is a fetishization of violence that constantly reoccurs.¹⁷³

There are three major cases regarding deadly force and civil liability under 42 U.S.C. § 1983 which provides a cause of action for violations of the constitution or federal law against person acting under color of state law.¹⁷⁴ They are *Tennessee v. Garner*,¹⁷⁵ *Plumhoff v. Rickard*,¹⁷⁶ and *City and County of San Francisco v. Sheehan*.¹⁷⁷

Tennessee v. Garner defined the terms of the legal debate over the use of deadly force with two competing ideas—that killing an unarmed suspect violates the Fourth Amendment as an unreasonable seizure and that there are circumstances in which the police action to use deadly force is a reasonable seizure. Because of this it forms the backbone modern jurisprudence commonly implicated in police shootings. The Court noted that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.”¹⁷⁸ It ultimately held, however, that under the Fourth Amendment, a police officer may use deadly force against an unarmed fleeing felon when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”¹⁷⁹ The dissent in *Garner* offered a counterargument, written by Justice O’Connor and joined by Justices Burger and Rehnquist, that the interests of Society may be served by the execution of the suspect.¹⁸⁰ All deadly force cases potentially straddle this divide. Where police killings occur in

172. Professor Margeret Radin used the phrase in her 1978 article on the death penalty. See Margeret Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 PENN. L. REV. 989 (1978).

173. James Tyner & Joshua Inwood, *Violence as Fetish: Geography, Marxism, and Dialects*, 38 PROGRESS IN HUM. GEOGRAPHY 771 (2014).

174. 42 U.S.C. § 1983 (2012).

175. 471 U.S. 1 (1985).

176. 134 S. Ct. 2012 (2014).

177. 135 S. Ct. 1764 (2015.)

178. 471 U.S. at 11.

179. *Id.* at 3.

180. *Id.* at 26–28.

circumstances where there is no possible harm to the officer or imminent threat to the public, the implicit question is always whether the prevention of imminent threat rationale is sound or is in effect one sounding in “just desserts” or retribution in exchange for “being” a suspect.

The more recent *Plumhoff v. Rickard* sheds light on recent applications of *Garner*. In *Plumhoff*, the Court held that police acted reasonably in firing fifteen times at a driver and passenger following a high-speed chase.¹⁸¹ Nodding to *Garner*, the Court recognized that assessing the reasonableness of a particular seizure under the Fourth Amendment “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”¹⁸² The inquiry is an analysis of “the totality of the circumstances.”¹⁸³ Though the standard is the objective reasonableness of a particular seizure, the analysis requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests the court reiterated that it would analyze the question from the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” a quotation citing to *Graham*.¹⁸⁴ Courts must “allow for the fact that police officers are often forced to make split second judgments—in rapid circumstances that are chance, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.”¹⁸⁵

The Court emphasized the extended nature of the pursuit, stating that “[t]he chase in this case exceeded 100 miles per hour and lasted over five minutes.”¹⁸⁶ The Court concluded that a “reasonable police officer could have concluded that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.”¹⁸⁷ Thus, the court concluded

181. *Plumhoff*, 134 S. Ct. at 2014–16.

182. *Id.* at 2018.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 2021.

187. *Id.* at 2022.

that “Rickard’s flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk.”¹⁸⁸

Rickard also unsuccessfully contended the police officer acted unreasonably in firing a total of fifteen shots.¹⁸⁹ Justice Alito said, “[i]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended . . . ‘If lethal force is justified, officers are taught to keep shooting until the threat is over.’”¹⁹⁰

Finally, the decision of *Sheehan v. City and County of San Francisco* reinforces the judicial deference to police officers who use deadly force, even against ineffectually armed mentally ill persons.¹⁹¹ In the *Sheehan*, the Court adhered to a standard of immunity that forbids judicial second-guessing of police judgments to use deadly force in a circumstance in which they might have retreated and left a mentally ill person confined. This case is important, because some have observed that many police shootings of unarmed or ineffectively armed people involved the mentally ill.¹⁹²

Sheehan was a person suffering from schizophrenia who lived in a group home for the mentally ill and had stopped taking her medicine.¹⁹³ After attempting to refuse a social worker entry to her room and yelling that she had a knife, the social worker indicated that Sheehan was a threat to others and requested police.¹⁹⁴ When police entered the room, Sheehan grabbed a knife and the officers deployed pepper spray; Sheehan initially refused to drop the knife but after she

188. *Id.*

189. *Id.*

190. *Id.* at 2016.

191. 135 S. Ct. 1765 (2015).

192. Dierdre Fulton, *In Latest Police Killing of Black Man, Victim was both unarmed and Mentally Ill*, COMMON DREAMS (Mar. 10, 2015); <http://www.commondreams.org/news/2015/03/10/latest-police-killing-black-man-victim-was-both-unarmed-and-mentally-ill>; Erick Ortiz, *Fatal Shooting of New Mexico Man Sparks ‘Killer Cop’ Protest*, NBC NEWS (Mar. 31, 2014, 9:10 PM); Gale Holland et al., *On Skid Row, Grief and Anger After Fatal LAPD Shooting of Homeless Man*, L.A. TIMES (Mar. 2, 2015, 1:46 PM), <http://www.latimes.com/local/lanow/la-me-ln-on-skid-row-empathy-for-homeless-man-fatally-shot-20150302-story.html#page=1>.

193. *See Sheehan*, 135 S. Ct. at 1769.

194. *Id.* at 1769–70.

dropped it, both officers shot her multiple times.¹⁹⁵ Sheehan brought a civil suit under the Americans with Disabilities Act (ADA) as well as 42 U.S.C. § 1983 for violation of her Fourth Amendment rights.¹⁹⁶

The Supreme Court concluded that the officers who shot Sheehan were entitled to qualified immunity on the basis that the officers had not violated the “clearly established” standard set by *Plumhoff* when considering whether the officers acted reasonably under the Fourth Amendment.¹⁹⁷ The Supreme Court concluded that the officers acted reasonably when they forced open the door, and also that they acted reasonably when they pepper sprayed her initially.¹⁹⁸

In considering whether the officers acted unreasonably when they decided to use potentially deadly force, the Court wrote that “[t]he real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan’s door rather than attempting to accommodate her disability.”¹⁹⁹ The Supreme Court concluded that because there was no clear case law stating that their chosen use of force violated the Fourth Amendment, and because *Plumhoff* permitted the officers to protect themselves by firing multiple rounds, their action did not violate the Fourth Amendment.²⁰⁰

The Court said that Sheehan was dangerous, recalcitrant, and law-breaking, and that, even if the officers “misjudged the situation,” Sheehan could not “establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.”²⁰¹ Because there was no clear precedent in the Court’s view establishing that the entry under the circumstances was unreasonable, the officers lacked fair notice that their contact would be unreasonable.²⁰²

195. *Id.* at 1771.

196. *Id.*

197. *Id.* at 1774–78.

198. *Id.* at 1775.

199. *Id.*

200. *Id.* at 1768–69.

201. *Id.* at 1777 (citing *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211 (9th Cir. 2014) (Graber, J., concurring in part and dissenting in part) (citing *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002)).

202. *Sheehan*, 135 S. Ct. at 1777.

The fact that the officers did not follow their training was also irrelevant. Even if they do so, they still retain qualified immunity if “a reasonable officer could have believed that his conduct was justified.”²⁰³ On summary judgment, “a jury does not automatically get to second-guess these life-and-death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently.”²⁰⁴ They would have voted to dismiss both legal issues as certiorari improvidently granted, on the ground that the petitioner city engaged in bait and switch tactics by asking the court to grant cert on “whether title II [of the ADA] applies to the arrest of violent and mentally ill individuals” while briefing only the question how it applied under the circumstances of this case, where the plaintiff threatened officers with a weapon.²⁰⁵ Police killings of mentally ill persons are not deterred by this permissive decision.

This tactic deprived the court of the “opportunity to consider, and settle, a controverted question of law that has divided the Circuits.”²⁰⁶ The Court’s approach is understandable on one level; as it has said multiple times, it does not want the judiciary second-guessing the street judgments of police officers.²⁰⁷ Yet others have observed that the Court has rejected substantive objections to police officer’s

203. *Id.*

204. *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 216 n.6 (2001) (Ginsburg, J., concurring in judgment). Scalia and Kagan concurred in part and dissented in part.

205. 135 S. Ct. at 1779.

206. *Id.* at 1779 (Scalia, J., concurring in part and dissenting in part).

207. *Id.* at 1777. The most recent Supreme Court cases on immunities does not depart from *Scott* nor *Plumhoff* in its deference to police judgments that result in the death of individuals. *Mullenix v. Luna*, 136 S. Ct. 305 (2015). The *per curiam* emphasizes that *Garner*’s broad language affords qualified immunity as long as there is no precedent forbidding a specific use of force in the specific circumstances of the shooting. *Id.* The court rejected the argument that the officer had a duty to employ a ‘less lethal alternative’ in light of the fugitive’s prior threatening behavior and his “high-speed vehicular flight”, noting that the question was whether under all the circumstances it was “beyond debate” that the officer acted unreasonably. *Id.* at 309. Justice Sotomayor dissented. *Id.* at 313 (Sotomayor, J., dissenting). She opined that the Court should reject civil immunity for deadly force when an officer had a less lethal option available, *id.* at 314, characterizing the Court’s decision as encouragement to a “rogue” officer and the establishment “of the culture...to use deadly force for no discernible gain... By sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow” she admonished. *Id.* at 316.

decisions on due process grounds, while constructing a Fourth Amendment analysis that defers entirely to police judgment in the absence of positive statements of law. In this gap—between clearly established violations of the Fourth Amendment and new fact situations involving dead or severely injured people—lies the broken content of a mandate that the State not take life without compelling justification.

Thoughtfully, some lower courts have pushed back on post-*Garner* permissiveness with respect to police killings of incapacitated suspects. In *Brockington v. Boykins*, a Fourth Circuit panel found no justification for a second series of shots fired by a police officer against a suspect who was obviously disabled by the first volley.²⁰⁸ The panel discussed the rules of qualified immunity²⁰⁹ including the rule that conduct that qualifies for qualified immunity “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²¹⁰ *Boykins* argued that “there needs to be a clear bright-line separating allowable actions from forbidden ones” and that conduct not specifically and previously found to violate the Fourth Amendment ought to qualify for qualified immunity.²¹¹ The Fourth Circuit responded that the fact that the exact conduct has not been found previously unconstitutional does not immunize the officer’s conduct from civil liability.²¹² The Court observed that *Tennessee v. Garner* made the point “that deadly force was not generally justified against a suspect who did not pose an immediate threat.”²¹³ The court plainly stated that “it is just common sense that continuing to shoot someone who is already incapacitated is not justified under these circumstances.”²¹⁴

The regime for the possible redress of excessive force makes the loss or preservation of life in police encounters dependent on the

208. *Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011).

209. *Id.* at 506.

210. *Id.* (citing *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292, 306 (4th Cir. 2006) (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999))).

211. 637 F.3d at 507.

212. *Id.* at 507–08.

213. *Id.* at 508 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

214. 637 F. 3d at 508.

judgment of an individual officer in a framework in which killing is permissible unless it has been strictly forbidden by prior precedent or limited by individual local police authority. This is sanctioned arbitrariness in the imposition of death that has affected Black communities around the nation.

IV. BEYOND A JURISPRUDENCE OF VIOLENCE TOWARD ACCOUNTABILITY

Our jurisprudence of violence includes approval, even celebration, of actual violence. It is the combination of immunity, weak criminal penalties, cultures of secrecy, and unfettered power through technology and militarization that renders the meaningful discussion of restraint on police violence impossible in the current legal framework. Our challenge is to find a meta-framework that aids our understanding and contributes to a transformation. There are several possibilities, including rethinking the regime of deference to police judgment, a moral and ethical framework for policing, and the elimination of the circumstances of economic discrimination, spatial discrimination, and hyper-criminalization in order to eliminate material and stigmatic disparities that that weaken communities and make them vulnerable to despair and crimes of survival.

A. Rethinking Deference to “Reasonable” Police Officers

A recent Mireille Hildebrandt review of a book on police power offers useful insights.²¹⁵ She reviewed the contributions to a 2006 volume on policing which focused in part on processes necessary for the security of the contemporary state.²¹⁶ Her observations on the essays provide a framework for policing in the context of the contemporary administrative state. She took up the question of the “Undefinability and the Unlimited Nature of the Power of Police” to

215. Mireille Hildebrandt, *Governance, Governmentality, Police, and Justice: A New Science of Police?*, 56 BUFF. L. REV. 557 (2008) (reviewing MARKUS D. DUBBER & MARIANA VALVERDE, *THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE* (2006)).

216. *Id.*

probe arguments about the legitimacy of limitations on police authority, situating police authority initially in the context of administrative functions and the necessity of discretion²¹⁷:

Though its workings can be enumerated—from water management to civil registration, traffic regulation, taxation, social security, etc.—in the end, its scope cannot be determined. The productive dimension ventures into the future . . . always on the verge of the unknown that must be mastered to prevent mishaps and to create new opportunities.²¹⁸

Thus, we may assume for purposes of this discussion, as does Hildebrandt, that as to the police power generally, and also as to its potentially most lethal iteration, the police require a degree of discretion in order to operate in the realm of future “unknown[s]”.²¹⁹

Current doctrine theorizes limitations on policing but correlatively shuns specificity, and arguably celebrates the margins of excess, providing justifications for borderline barbaric conduct. The approaches are grounded in a normative of police benevolence and the dangerousness of their world. The concern, often expressed, is that the scrutiny of particular police decisions after the fact would cripple law enforcement. Put another way, Hildebrandt noted that those who espouse police work are often in the company of those who “claim that it is unlimited by definition and for that reason, cannot be limited.”²²⁰ She noted that several contributors to the volume “rightly reject a formal definition of what they mean by ‘police,’” not implying that “anything goes as far as the meaning of ‘police’ is concerned,” but rather that the scope of policing invokes “contested conceptions” with “evaluative dimensions” and contextual

217. *Id.* at 557–58.

218. *Id.* at 567.

219. *Id.*

220. *Id.*

dimensions.²²¹ Here, too Hillebrandt tackles the conflict of the dynamic needs police respond to and potentially unlimited authority:

In relation to the power of police, I would argue that this power is underdetermined because of its inherent need for discretion but, therefore, not necessarily unlimited as some of the authors claim. The idea that the power of police is unlimited must not be conflated with the issue of conceptual undefinability. The notion of being unlimited draws on the proposition that the law depends on the power to police . . . because of its supposedly unrestricted discretionary power.²²²

In this sense, she frames a classic “chicken or the egg” problem. The question is one involving a query about fundamental philosophical primacy. Here, it is whether police power precedes the state and if so to what extent, or whether despite its pedigree it must flow from the state and be subjected to fundamental limitations on the state.

Hillebrandt notes that Roman philosophers argued that certain bodies were unprotected by the existence of legal subjectivity and thus not subjects of the state. She notes that current reasoning about groups employs this non-subjectivity trope in which certain groups like “illegal immigrants, illegal enemy combatants . . . are in fact . . . to an extent no longer compatible with the notion of the human person.”²²³ She further describes that as to these objects, and also as to state power:

To suspend the rule of law . . . the sovereign is both inside and outside the domain of law: the choice to define a situation as an emergency is his own and cannot be contested as this contestation depends on the (re)instatement of the rule of law. In other words, the law does not rule, the sovereign rules [This] legal discourse is seen as a way to legitimize

221. *Id.* at 568.

222. *Id.* at 568–69.

223. *Id.* at 569.

disciplinary practices that follow a logic inherently opposed to the fundamental principles of law.²²⁴

Further on in the review, she sets up the question which flows from the previous proposition, whether even if organized society depends on a monopoly of violence, it remains crucial to determine whether in constitutional society, there must be normative limitations on the monopolization of violence for those who act on its behalf. This is not formally rejected in existing doctrine, but it is practically rejected by decisions that provide broad latitude to police and prison officials to deploy violence in pursuit of submission and sanction. Hildebrandt's observations seem to sum up the dilemma we face:

In as far as modern law depends on the monopoly of violence, the sovereign seems to be both inside and outside of the law. But, as far as constitutional democracy is at stake, the sovereign is bound by the dictates of the law in deciding about the state of emergency. The law will then contain rules about which subdivision of the sovereign prepares the decision, about the criteria that must be fulfilled to declare the emergency, as well as rules about its duration and ex ante and post hoc accountability. These dictates of the law will indeed leave room for discretion: like the power of police, the law is underdetermined, but—like the power of police in constitutional democracy—not indeterminate or unlimited.²²⁵

The current regime eschews legal responsibility in the absence of clear legal rules, and yet court decisions articulate broad areas of discretion in the use of deadly force, an irony in light of the legal processes and years of appeals required before the state sets official execution date.

224. *Id.* at 569–70.

225. *Id.* at 594.

B. Moral and Ethical Approaches

Do current remedies provide a framework for the end of a structure of violence, both actual and symbolic, that would reduce the vulnerability of poor minority communities to police violence? Current events do demonstrate that the problem of excessive force is not solely a problem of race but one in which multifaceted vulnerability is heightened by distance and discord between communities and their police departments. The role of some police departments in the economic subjugation of the minority communities they police has made visible the link between policing and structural economic despair of minority communities.²²⁶

A useful framework would include community acknowledgements of the complexity of policing as well as the significance of its inherent challenges to its fundamental legitimacy. The power to inflict fatal or near fatal bodily injury is unlike other examples of discretion. Hence Hillibrandt's point that the notion of near unchecked power must be examined and openly resisted. Cohen and Feldberg focused on the importance of the "moral dimension" of police work.²²⁷ While police work may involve matters of minor consequence, they noted "that in most generic moments, police can confront the question of whether to take human life."²²⁸ These occasions, they observed, are nonetheless exceedingly important as the decisions sharpen the focus on the very fundamental idea of the social contract.²²⁹ Felberg and Cohen emphasized that the idea of the social contract "lies at the very foundation of our society's social arrangement."²³⁰ The social contract is, in the abstract, an idea some would argue is far too lofty a ground upon which to lay the

226. See Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014), <http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>; see also INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 40 (2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

227. HOWARD S. COHEN & MICHAEL FELDBERG, POWER AND RESTRAINT: THE MORAL DIMENSION OF POLICE WORK 4–5 (1991).

228. *Id.* at 16.

229. *Id.* at 24.

230. *Id.*

opportunity to take a life, but embedded in a structural framework out of which might be constructed a new foundation for accountable policing. The idea has powerful transformative potential. Thus, the social contract requires “high standards of ethical policing. . . . Police must provide full access to their services to enforce that their powers heed and are used as a public trust and will not be abused.”²³¹

C. Increased Transparency: Video Cameras as Tools of Justice

1. Transparency and Morality

The establishment of an ethical and moral foundation is impossible without transparency, which is a foundation for the accountability that would strengthen the social contract as the foundation of police authority. Litigation over police practices, of course, does result in transparency; however, limited federal government resources suggest that adversarial processes may yield visible, albeit anecdotal, changes rather than pervasive structural reform.²³²

2. “Tools of Justice”

The role that technology has played in the renewed public fervor to curb illegal police practices was anticipated a decade ago. It is ironic that, in a prescient comment written ten years ago, Matthew Thurlow remarked on “video cameras as tools of justice” and in so

231. *Id.* at 145; see also Kevin A. Elliott & Jocelyn M. Pollock, *The Ethics of Force: Duty, Principle, and Morality*, in *LAW ENFORCEMENT ETHICS: CLASSIC AND CONTEMPORARY ISSUES* 231, 248 (Brian D. Fitch ed., 2014).

[E]ach decision to use force has significant ethical and moral implications for the officer, has agency and the community at large . . . Even when the application of deadly force is legally and ethically justified, such incidents have polarized communities, damaged the public trust, and left those most in need for police services suspicious and cynical.

Id.

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

doing explored issues that have become salient today.²³³ His topics included video recordings “in interrogation rooms, in patrol cars, and with hand-held cameras.”²³⁴ In the main, the comment focused on the recording of confessions, statements, and interrogations.²³⁵ He noted, as had others, that the “totality of the circumstances standards” for the suppression of coerced confessions had been an uneven tool for the suppression of confessions obtained under coercive circumstances. The Supreme Court’s decisions in extreme cases—“lynching, whipping and torture”²³⁶ and multiday interrogations²³⁷ were arguably as necessary to a minimally civilized society as they were to judicial constitutional relevance. Other cases falling short of these extremes yielded unanimous opinions authored by judicial champions of defendants’ rights.²³⁸ Noting that depth of the debate over the importance of the admission of defendant statements, Thurlow concluded that the Court would never exclude confessions in a categorical set of circumstances and that best approach would be videotaping to “allow courts to properly assess the totality of the circumstances in which a confession has been obtained.”²³⁹ Furthermore, his comments on cameras in police cars and other recordings were insightful in an era not dominated by the cell phone as default camera. He observed then that “[v]ideo cameras in every police car in America may soon be a reality.”²⁴⁰

At the time he wrote, in 2005, although no court had held that due process required videotaping of interrogations,²⁴¹ some law enforcement agencies had already adopted recording of

233. Matthew D. Thurlow, Comment, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 771 (2005).

234. *Id.* at 774.

235. *Id.* at 771–72.

236. *Id.* at 782 (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)).

237. Thurlow, *supra* note 233, at 782 (citing *Ashcraft v. Tennessee*, 322 U.S. 143 (1944)).

238. *See, e.g.*, *Spano v. New York*, 360 U.S. 31, 322 (1959) (admitting confession after all night custodial interrogation of suspect by fourteen officers)

239. Thurlow, *supra* note 233, 783–84.

240. *Id.* at 795.

241. *Id.* at 784.

interrogations.²⁴² Some did so as a matter of course, and other did so on a discretionary basis.²⁴³

With the evolution of mobile videotaping technology, why not extend the protective and evaluative benefits to every police encounter with civilians?²⁴⁴

If cheap and easy-to-operate electronic recording devices have made videotaping feasible outside of the station house, it makes little sense for courts and legislatures to afford suspects one constitutional protection in the back of a patrol car while neglecting other, recognized constitutional rights.

Patrol car and officer-mounted cameras are the natural extension of any recording policy.²⁴⁵

By 2000, 50 percent of police cars in America had video cameras; the International Association of Chiefs of Police noted that every state agency had some video cameras in their patrol cars.²⁴⁶ “[E]xcessive use of force, dangerous police pursuits, and abusive detain suspects have driven many police agencies to install these cameras.”²⁴⁷ In his comment, Thurlow spoke of the development of “hands-free” wireless voice activated miniaturized technologies that might allow quality recording.²⁴⁸

The comment noted a number of objections to videotaping that mirror current concerns. One concern was privacy for both officers as well as subjects—witnesses, bystanders.²⁴⁹ Other objections include the inevitable technological problems, including concerns about malfunctioning microphones and recording equipment.²⁵⁰ On the positive side, a benefit of recording would be its use as a tool in

242. *Id.* at 790.

243. *Id.* at 790–91.

244. *Id.* at 794–97.

245. *Id.* at 794.

246. *Id.* at 795 (referencing Candice Combs, *Cameras Go on Patrol with Chattanooga Police*, CHATTANOOGA TIMES, Aug. 27, 2003, at B1).

247. Thurlow, *supra* note 233, 795.

248. *Id.* at 796.

249. *Id.* at 801–02.

250. *Id.* at 802.

officer training and monitoring.²⁵¹ Cellphones—particularly smartphones—have become tools of transparency and have established a powerful counter narrative.

This prediction from a decade earlier has become a reality. On the question of whether citizens have a First Amendment right to record police, there is robust debate. Four United States Courts of Appeals have so concluded²⁵² and the DOJ has so advocated,²⁵³ but that fact does not deter police officers from arresting those who record police treatment of young Black men.²⁵⁴ Nor does it deter lawmakers, even those in cities in which racialized deadly force has resulted in consent orders, from proposing to ban citizen filming of police officers.²⁵⁵

Although far from perfect, recordings can add a layer of protection. Video evidence rarely tells the complete story, as the recent events in Baltimore involving the death of Freddie Gray illustrated.²⁵⁶ Even where video evidence can be used, there are often timeline gaps and questions of interpretation. But technology does create the possibility of a record that will be illuminated by one

251. *Id.* at 810–11.

252. *Adkins v. Limtiaco*, 537 F. App'x 721 (9th Cir. 2013); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). See also Letter from Johnathan M. Smith, Chief, Special Litig. Section, Dep't of Justice, to Mark H. Grimes, Baltimore Police Dep't, et al. (May 14, 2012), available at http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf.

253. See Statement of Interest of the United States, *Garcia v. Montgomery Cnty., Maryland*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), available at http://www.justice.gov/sites/default/files/crt/legacy/2013/03/20/garcia_SOI_3-14-13.pdf; Statement of Interest of the United States at 1, *Sharp v. Baltimore City Police Dep't*, No. 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012), available at http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf (“[P]rivate citizens have a First Amendment right to record police officers” and “officers violate citizens’ Fourth and Fourteenth Amendment rights when they seize and destroy recordings without a warrant or due process.”).

254. *Charles v. City of New York (Challenging Unlawful Arrest of NYC Resident for Filming Stop-and-Frisk Encounter)*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/case/charles-v-city-of-new-york-challenging-unlawful-arrest-of-nyc-resident-filming-stop-and-frisk-e> (last visited June 16, 2015).

255. Richard Gonzales, *California Bill Could Limit Police Access to Body Camera Footage*, NPR (May 1, 2015 3:38 AM), <http://www.npr.org/2015/05/01/403316673/oakland-laws-could-limit-police-access-to-body-camera-footage>.

256. David Zurawik, *Video Technology Changes the Evidence, Maybe Society*, BALTIMORE SUN (Apr. 24, 2015), <http://www.baltimoresun.com/entertainment/tv/z-on-tv-blog/bs-ae-zontv-freddie-gray-video-20150424-story.html#page=1>.

additional lens. With instant uploading and smartphones in the hands of citizens, these *citizen journalists* will provide some—but not all—of the transparency necessary to a project of accountability.²⁵⁷

D. Incentivizing Proactive Police Department Self-Examination and Reform

In today's smartphone environment, the familiar "BUT I THOUGHT HE HAD A GUN" may be evaluated with additional visual evidence.²⁵⁸ In an article in which Professor Cynthia Lee reviewed the myriad of police officer explanations for the killings of unarmed Black man, she noted that "[w]ith more and more consumers purchasing camcorders, the video recording of police misconduct may become more common."²⁵⁹

Now that digital video technology is embedded in many mobile devices, recording of police encounters has become central to renewed concerns about police abuse of power. In the ten years since Lee wrote, there has been an explosion of multiuse devices, miniaturization, and wireless connectivity technology. Today, millions of people have high-resolution cameras with autofocus and zoom. More importantly, social media sites make it possible for courageous bystanders to shape the narrative of police encounters long before police officers are able to write their official reports.²⁶⁰ Public officials no longer need rely solely on post hoc explanations of police officers. Just as the Rodney King beating video elevated the visibility of essentially the group punishment of an unarmed suspect, the availability of video transforms the plausible self-defense rationales for the discharge of multiple rounds into unarmed people from "response to a threat" to narratives of summary execution for

257. Seth C. Lewis, *Citizen Journalism: Motivation, Methods, Momentum*, in *THE FUTURE OF THE NEWS* 59 (Maxwell McComb et al. eds., 2010).

258. Cynthia Lee, "But I Thought He Had A Gun": Race and Police Use of Deadly Force, 2 *HASTINGS RACE & POVERTY L.J.* 1 (2004).

259. *Id.* at 16.

260. Ethan A. Huff, *Police Gun Down Man in Street, Threaten to Shoot Witnesses for Filming Incident*, *NATURAL NEWS* (June 9, 2011), http://www.naturalnews.com/032655_police_brutality_citizen_journalism.html.

failure to comply with police orders. Whatever the state of mind of the officer who shot eight bullets at Walter Scott from behind, the narrative of threat was no longer viable, and in fact, it was the failure to comply with the officer's orders that resulted in the ultimate sanction of death.²⁶¹

E. Rethinking the Scope of Immunity

Videos of police homicides are shocking in their own right. But when they are at sharp odds with official reports, they raise questions about the presumptions and immunities that are embedded in existing law and about the problem of perjury.²⁶² It is standard and sincere to observe that only few police encounters end with the death of a citizen, and that those who sacrifice normal lives and court danger to engage in police work deserve our thanks. Nonetheless, there is overwhelming anecdotal and statistical evidence that the deployment of excessive and deadly force occurs disproportionately in Black, minority, and poor communities. As argued above, the current legal framework governing the use of deadly force affords little accountability for the abuse of that power. Until recently, beginning with the viralization of the Rodney King beating to the heart breaking murders of Walter Scott²⁶³ and Tamir Rice,²⁶⁴ but for the citizen video, the police version—the dominant narrative of Black men threatening armed police officers—would have prevailed. The transparency possible with current technology in the hands of citizens is responsible for the credible counter-narrative of force in response to reasonable threat leading to the possibility of criminally culpable homicide.²⁶⁵

261. Christina Elmore & David MacDougall, *Man Shot and Killed by North Charleston Police Officer After Traffic Stop; SLED Investigating*, POST AND COURIER (Apr. 4, 2015, 11:54 PM), <http://www.postandcourier.com/article/20150404/PC16/150409635>.

262. See Maclin, *supra* note 28, at 378–86. “Many scholars and observers of the criminal justice system [who] have acknowledged the . . . police perjury connected with Fourth Amendment cases.” *Id.* at 382 n.212.

263. See *supra* note 19 and accompanying text.

264. See *supra* note 18 and accompanying text.

265. See *supra* notes 18–22 and accompanying text.

F. A Continued Role for the Department of Justice?

The DOJ has two tools available to combat excessive deadly force. One is its power to bring criminal prosecutions pursuant to 18 U.S.C. § 242.²⁶⁶ This statute has resulted in few investigations and criminal charges in less than one percent of cases.²⁶⁷ The other tool is 42 U.S.C. § 14141,²⁶⁸ which Congress enacted in the aftermath of the videotaped police beating of Rodney King in March 1991.²⁶⁹ 42 U.S.C. § 14141 raised hopes that the DOJ might be able to use its power to deter or redress police excessive force.²⁷⁰

Rushin's statistics show fifty-five investigations opened between 1995 and 2012,²⁷¹ with twenty-four negotiated settlement agreements dated between April 1997 and January 2013.²⁷² Since Rushin's article, the DOJ has investigated additional police departments, including three that figured prominently in recent police shootings and deaths: (1) Ferguson, Missouri, in the aftermath of the killing of Michael Brown;²⁷³ (2) Cleveland, Ohio, in the aftermath of Cleveland police Officer Timothy Loehman's killing of twelve-year-old Tamir Rice;²⁷⁴ and (3) Baltimore, Maryland, in the aftermath of the death of Freddie Gray while in police custody.²⁷⁵ The Justice Department has also reached settlement agreements with Albuquerque, New

266. 18 U.S.C. § 242 (2012).

267. Stephen Rushin, *Federal Enforcement of Law Reform*, 82 *FORDHAM L. REV.* 3189, 3203 (2014).

268. 42 U.S.C. § 14141 (1994)..

269. *Rodney King Beating Video*, THE HOUR http://www.thehour.com/rodney-king-beating-video/youtube_38f3798c-b891-11e1-92ec-0019bb30f31a.html (last visited July 9, 2015); see also Black Musics, *Rodney King Beating*, DAILYMOTION (July 12, 2008), http://www.dailymotion.com/video/x63u0w_rodney-king-beating_news.

270. 42 U.S.C. § 14141.

271. Rushin, *supra* note 267, at 3244–46.

272. *Id.* at 3437.

273. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 40.

274. See INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE, *supra* note 38.

275. *Attorney General Loretta Lynch on Baltimore Police Investigation*, CBS NEWS (May 8, 2015, 11:12 AM), <http://www.cbsnews.com/videos/attorney-general-loretta-lynch-on-baltimore-police-investigation/>; Matt Apuzzo & Sheryl Gay Stolberg, *Justice Department Will Investigate Baltimore Police Practices*, N.Y. TIMES (May 7, 2015), http://www.nytimes.com/2015/05/08/us/politics/justice-department-will-investigate-baltimore-police-practices-after-freddie-gray-case.html?_r=0.

Mexico;²⁷⁶ Portland, Oregon;²⁷⁷ Puerto Rico;²⁷⁸ Seattle, Washington;²⁷⁹ The District of Columbia;²⁸⁰ Cleveland, Ohio;²⁸¹ and Antelope Valley, California.²⁸²

The Justice Department has played a significant role in the events of 2013 through 2015, in both adversarial and cooperative roles, creating the possibility of a way out of imminent community breakdown and the possibility of investigations where public police killings threaten to undermine public trust in and beyond vulnerable Black communities.²⁸³ In other situations, the DOJ has provided federal resources and the opportunity for local officials to seek assistance when they are unable to protect citizens from excessive force due to both institutional police and community dynamics—such as excessive citizen on citizen violence beyond their control.²⁸⁴

276. Settlement Agreement, *United States v. City of Albuquerque*, No. 1:14-cv-1025 (D.N.M. Nov. 14, 2014), available at http://www.apd_settlement_11-14-14.pdf.

277. Order Entering Settlement Agreement, Conditionally Dismissing Litigation, and Setting First Annual Settlement-Compliance Hearing, *United States v. City of Portland*, No. 3-12-cv-226J (D. Or. Aug. 29, 2014), available at http://www.justice.gov/crt/about/spl/documents/ppb_orderenteringsettle_8-29-14.pdf.

278. Agreement for the Sustainable Reform of the Puerto Rico Police Department, *United States v. Puerto Rico*, No. 12-cv-2039 (D.P.R. Dec. 12, 2012), available at http://www.justice.gov/sites/default/files/crt/legacy/2012/12/21/prpd_agreement_12-21-12.pdf.

279. Settlement Agreement and Stipulated [Proposed] Order of Resolution, *United States v. City of Seattle*, No. 12-cv-1282-JLR (D. Wash. July 27, 2012), available at http://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentdecree_7-27-12.pdf; Memorandum Regarding Instructional System Design Model for Search and Seizure and Bias-Free Policing Training, *United States v. City of Seattle*, No. C12-1282-JLR (W.D. Wash. Sept. 2, 2014), available at http://www.justice.gov/crt/about/spl/documents/spd_docket176.pdf. *United States v. City of Seattle* Civil Action no. 12-cv-1282, July 27, 2012.

280. *United States v. Retta*, “Order Approving Consent Judgment, *United States v. Retta*, No. 1:11-cv-1280-JEB (D.D.C. Jan. 14, 2013), available at http://www.justice.gov/crt/about/spl/documents/retta_order_1-14-13.pdf.”

281. Settlement Agreement, *United States v. City of Cleveland*, No. 1:15-CV-1046 (N.D. Ohio May 26, 2015), available at http://www.justice.gov/crt/about/spl/documents/cleveland_agreement_5-26-15.pdf.

282. Settlement Agreement, *United States v. Los Angeles* (C.D. Cal. Apr. 28, 2015), http://www.justice.gov/crt/about/spl/documents/antelope_agreement_4-28-15.pdf.

283. See, e.g., Mollie Reilly, *Justice Department to Investigate Eric Garner’s Death*, HUFFINGTON POST (Dec. 3, 2014, 11:59 PM), http://www.huffingtonpost.com/2014/12/03/justice-department-eric-garner_n_6264928.html (reporting DOJ investigation of Eric Garner’s death after Staten Island grand jury declined to indict officer at the request of the U.S. Senators from New York).

284. See, e.g., Dep’t of Justice, *Department of Justice Releases Report on Philadelphia*

The DOJ has been a stabilizing force during a volatile period in which shocking acts of police violence against unarmed Blacks have exposed community vulnerability to arbitrary police violence. There are signs that local law enforcement officials and political leaders are stepping forward when a shooting occurs to promise investigation, to condemn the misuse of deadly force, and to vow to become directly involved in the community, arguing for a peaceful way forward.²⁸⁵ Moreover, there is evidence that several current and future agreements may focus on changes in the very nature of policing, from military and broken-windows strategy toward collaborative processes that strengthen relationships between Black communities and their police department, establishing common norms and accountability.

G. Restorative and Transitional Justice Approaches

1. Paradigm Shift—The Cincinnati Collaborative Process

Cincinnati, like many American cities, had serious racial policing issues that led to multiple reports and recommendations, which did not transform the Cincinnati Police Department (CPD), nor stem the tide of police shootings of Black men.²⁸⁶ The ACLU and Cincinnati's

Police Department's Use of Deadly Force (Mar. 23, 2015), <http://www.justice.gov/opa/pr/department-justice-releases-report-philadelphia-police-departments-use-deadly-> ("In 2013, in response to an increase in officer-involved shootings, Philadelphia Police Commissioner Charles Ramsey requested technical assistance from the COPS Office. Launched in November 2013, the Collaborative Reform Initiative in Philadelphia focuses on the use of deadly force over a seven-year period."); GEORGE FACHNER & STEVEN CARTER, COMMUNITY ORIENTED POLICING SERVICES, DEP'T OF JUSTICE, AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT (2015), available at <http://ric-zai-inc.com/ric.php?page=detail&id=COPS-W0753>; Cheryl Corley, *Baltimore Mayor Asks Justice Department to Investigate Police Department*, NPR (May 6, 2015, 4:19 PM), <http://www.npr.org/2015/05/06/404739764/baltimore-mayor-asks-justice-department-to-investigate-police-department>; Luke Broadwater, *Baltimore Mayor Seeks Federal Investigation of Police Department*, BALT. SUN (May 6, 2015, 8:49 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ci-doj-partnership-20150506-story.html>.

285. See, e.g., *Walter Scott Shooting: North Charleston Orders 250 Body Cameras for Officers*, NBC NEWS (Apr. 8, 2015, 7:34 PM), <http://www.nbcnews.com/storyline/walter-scott-shooting/north-charleston-police-chief-walter-scott-shooting-i-was-sickened-n337941>.

286. SAUL A. GREEN & RICHARD B. JEROME, CITY OF CINCINNATI INDEPENDENT MONITOR'S FINAL REPORT (2008), available at <http://www.cincinnati-oh.gov/police/linkservid/>

Black United Front sued to redress an alleged thirty-year pattern of racially discriminatory policing.²⁸⁷ Little progress in negotiations occurred until—just a month later—police shot and killed Timothy Thomas, “a young unarmed African American man.”²⁸⁸ Thereafter, Cincinnati established a “collaboration” which eventually involved thousands of citizens and multiple community groups.²⁸⁹ Pursuant to 42 U.S.C. § 14141, negotiation between the Justice Department and City of Cincinnati ensued. As a result of these parallel processes, two agreements emerged: a memorandum of understanding between the City and the CPD, and a collaborative agreement among the City and the Fraternal Order of Police, which focused on the implementation of shared goals by the end of the tragic year. These included:

- Police officers and community members will become proactive partners in community problem solving;
- Build relationships of respect, cooperation and trust within and between police and communities;
- Improve education, oversight, monitoring, hiring practices and accountability of the CPD;
- Ensure fair, equitable, and courteous treatment for all; and
- Create methods to ensure the public understands police policies and procedures, as well as recognize exceptional police service in an effort to foster community support for CPD officers.²⁹⁰

97D9709F-F1C1-4A75-804C07D9873DC70F/showMeta/0/ [hereinafter CINCINNATI FINAL REPORT].

287. *Id.* at 4.

288. *Id.* See also Francis X. Clines, *Officer Charged in Killing That Roiled Cincinnati*, N.Y. TIMES (May 8, 2001), <http://www.nytimes.com/2001/05/08/us/officer-charged-in-killing-that-roiled-cincinnati.html>.

289. CINCINNATI FINAL REPORT, *supra* note 286, at 5.

290. *Id.*

Although the record of success may be less rosy than the picture painted by The Monitor's final report in 2008,²⁹¹ The Monitor acknowledged as much:

The Collaborative created high expectations and difficult challenges. To some, the Collaborative was seen as the solution to decades of discord, with the expectation that high profile, unjust and unnecessary uses of force would no longer occur. When questionable uses of force did occur, some started to second-guess the effectiveness and worth of the Collaborative. It was also extremely difficult to harness the energy and emotion of an entire community over an extended period of time to participate in the transition of the police and the community to the new form of public safety envisioned by the CA.²⁹²

There seems to be consensus that the breakthrough development lay in the incorporation of Herman Goldstein's conception of problem oriented policing in the collaborative agreement.²⁹³ "A significant element of problem-oriented policing is the surfacing for analysis of repeat or recurring problems so that police and others can devise new and more effective means of reducing them and the harms from them" (including databases and community consultation).²⁹⁴ The lessons of Cincinnati have begun to emerge in other, more recent Justice Department consent decrees and settlements. The May 26, 2015, DOJ Settlement with Cleveland adopted a community and problem-oriented policing model in order to increase community engagement and build trust.²⁹⁵ The Albuquerque Settlement included

291. See generally *The Cincinnati Collaborative Agreement*, ACLU OF OHIO (Feb. 5, 2013), <http://www.acluohio.org/issue-information/the-cincinnati-collaborative-agreement>.

292. CINCINNATI FINAL REPORT, *supra* note 286, at 8.

293. HERMAN GOLDSTEIN, PROBLEM ORIENTED POLICING (1977).

294. CINCINNATI FINAL REPORT, *supra* note 286, at 44.

295. Settlement Agreement, *United States v. City of Cleveland*, No. 1:15-CV-1046 at 8-9 (N.D. Ohio May 26, 2015), available at http://www.justice.gov/crt/about/spl/documents/cleveland_agreement_5-26-15.pdf.

problem-oriented approaches,²⁹⁶ and the April 28, 2015, agreement between the DOJ and Antelope Valley, California, agreed that “methods, strategies, and techniques to reduce misunderstandings, conflict, and complaints due to perceived bias or discrimination, including problem oriented policing strategies.”²⁹⁷ It is promising that police departments are reaching out to the Justice Department for assistance in the creation of new paradigms of policing. Perhaps cities like Baltimore, Philadelphia, and Cleveland, to name a few, have no choice. In the new environment in which young people courageously film the police killings of their friends and publicize them to the world, there is the possibility for both accountability and action.

V. CONCLUSION: BEYOND MICHAEL BROWN

Recent police killings of unarmed men—eighteen-year-old Michael Brown in Ferguson, Missouri;²⁹⁸ twelve-year-old Tamir Rice in Cleveland, Ohio;²⁹⁹ forty-three-year-old Eric Garner in Staten Island, New York;³⁰⁰ fifty-year-old Walter Scott in North Charleston, South Carolina;³⁰¹ nineteen-year-old Tony Robinson in Madison, Wisconsin;³⁰² twenty-five-year-old Freddie Gray in police custody in Baltimore, Maryland;³⁰³ and seventeen-year-old Laquan McDonald in

296. Settlement Agreement, *United States v. City of Albuquerque*, No. 1:14-cv-1025 at 78-86 (D.N.M. Nov. 14, 2014), available at http://www.justice.gov/crt/about/spl/documents/apd_settlement_11-14-14.pdf.

297. Settlement Agreement, *United States v. Los Angeles* (C.D. Cal. Apr. 28, 2015), http://www.justice.gov/crt/about/spl/documents/antelope_agreement_4-28-15.pdf.

298. *Michael Brown Shooting*, NBC NEWS, <http://www.nbcnews.com/storyline/michael-brown-shooting> (last visited June 17, 2015).

299. Cory Shaffer, *Extended Tamir Rice Shooting Video Shows Officers Restrained Sister*, CLEVELAND.COM (Jan. 8, 2015, 10:39 AM), http://www.cleveland.com/metro/index.ssf/2015/01/extended_tamir_rice_shooting_v.html.

300. *'I Can't Breathe': Eric Garner Put in a Chokehold by NYPD Officer—Video*, THE GUARDIAN (Dec. 4, 2014, 2:46 PM), <http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>.

301. *Walter Scott Shooting*, *supra* note 13.

302. Alex Johnson, *Tony Robinson Shooting: No Charges for Wisconsin Police Officer*, NBC NEWS (May 12, 2015, 7:17 PM), <http://www.nbcnews.com/news/us-news/tony-robinson-shooting-no-charges-lawful-use-force-n357876>.

303. Alexander, *supra* note 13.

Chicago³⁰⁴—are part of a longstanding pattern.³⁰⁵ They have thrust the nation into one of its perennial rituals, the debate over whether race matters. There is no doubt that circumstances do arise in which force may be necessary to protect life, but the notion that the review of its use should be a deferential one of “reasonableness” flouts the irreversible results of the use of today’s weapons and rejects the understanding that “death is different.”³⁰⁶ When police shoot unarmed civilians with weapons that cause grievous bodily injuries, police officers convert the badge to the hunting license that Joe Friday deplored.³⁰⁷ Moreover, with the development of an increasingly militarized police culture, trained to deploy with military SWAT tactics in communities that experience symbolic violence through structural racism, the use of deadly force against unarmed Blacks is an integral part of phenomena (including systemic hyper-criminalization and mass incarceration) that stigmatize entire communities and contribute to stereotypes about the inherent dangerousness of those communities. Judicially sanctioned summary execution is an integral part of a jurisprudence of violence that shapes limited oversight of official violence in the streets, in the prisons, and in the imposition of the ultimate sanction of death. Without nationwide systemic interventions, the current legal regime will permit infrequent but highly symbolic ritualistic and Peckinpah-like³⁰⁸ killings in defense of the authority of the State to demand

304. See *supra* note 13 and accompanying text.

305. Ryan Gabrielson, Ryann Grochoswski Jones & Eric Sagara, *Deadly Force*, in *Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white>.

306. Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2:117 OHIO ST. J. CRIM. L. 117 (2004).

307. See, e.g., Thomas P. Gilson, Medical Examiner’s Verdict, State of Ohio, Cuyahoga County Case No. 2014-01991, Dec. 11, 2014, available at <http://ftpcontent4.worldnow.com/woio/pdf/riceautopsy.pdf>. Governor Cuomo of New York signed an executive order to require that an independent prosecutor investigate police shootings. Erin Durkin & Glenn Blain, *Gov. Cuomo Signs Order Giving Attorney General Eric Schneiderman Authority to Probe Police-Involved Deaths*, N.Y. DAILY NEWS, (July 9, 2015, 10:34 AM), <http://www.nydailynews.com/news/politics/cuomo-appoints-schneiderman-prosecute-cop-involved-deaths-article-1.2285970>.

308. *Sam Peckinpah Overview*, IMDB, <http://www.imdb.com/name/nm0001603/>, (last visited June 17, 2015). See also *Strawdogs Overview*, IMDB, <http://www.imdb.com/title/tt0067800/> (last visited June 17, 2015).

obedience and submission.³⁰⁹ Though death row grows elastically—now at 2,635 inmates, 41 percent who are Black, there are relatively few executions; there were fifty from January 1, 2014, to May 18, 2015, all carried out in relative secrecy via drug protocols. The death penalty still plays its historical racial subordination role:

Capital punishment also has been crucial in the processes of demonizing young, black males and using them in the pantheon of public enemies to replace the Soviet “evil empire.” The death penalty is directed disproportionately not only against racial minorities, but also against those who kill white victims. In some jurisdictions blacks receive the death penalty at a rate 38 percent higher than all others; since 1976, 35 percent of those executed have been African Americans. State killing is thus but one part of the intense criminalization of African American populations that occurred during the 1990s. “Governing through crime,” law professor and criminologist Jonathan Simon contends, “is a way of reviving the traditional appeal of white supremacy that African-Americans be governed in a distinct and degrading set of institutions.”³¹⁰

But the only public killing of Blacks today takes place by police officers, while the death penalty is carried out in secret. In contrast, “citizen journalists” and public video surveillance made the use of firearm deadly force visible, renewing the discussion of whether “race matters,” filling the streets with a new generation of young civil rights activists, asking whether “Black Lives Matter.”

309. Foucault called this the spectacle of violence. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

310. AUSTIN SARAT, *WHEN THE STATE KILLS* 18 (2001).

Across the nation, multiracial young activists are urging City Fathers³¹¹ and City Mothers³¹² to establish racial justice in policing in America, such that it will be clear that “Black Lives Matter.” That aspiration is arguably vague, but it is less important and fundamental than the aspiration of Due Process and Equal Protection. It is unfortunate that recent circumstances involving smartphone footage of brutal killings have been suffered in order to re-clarify its minimal content—an end to the brutalization and killings of unarmed Black men and women. This is not a new concern, but it is one that must be a baseline priority in the course of our quest for an inclusive constitutional democracy.

311. See e.g., Caroline Bach, *Madison Mayor Paul Soglin Speaks at the Scene of the Shooting*, WKOW.COM (Mar. 7, 2015, 9:13 AM), <http://www.wkow.com/story/28287232/2015/03/07/madison-mayor-paul-soglin-speaks-at-the-scene-of-the-shooting>; Scott Bauer, *Police Shooting Forces Discussion of Madison’s Racial Divide*, FOX11ONLINE.COM (Mar. 10, 2015), <http://fox11online.com/2015/03/10/police-shooting-forces-discussion-of-madisons-racial-divide/>; Brandon Blackwell, *Tamir Rice Rally and Counter-Protest Leaders Seek Peace Saturday at Cleveland’s Impett Park*, CLEVELAND.COM, (May 22, 2015, 6:10 PM), http://www.cleveland.com/metro/index.ssf/2015/05/tamir_rice_rally_and_counter_p.html; Betsey Bruce, *Mayor Slay Meets with Ferguson Protestors*, FOX2NOW.COM (Oct. 16, 2015, 6:13 PM), <http://fox2now.com/2014/10/16/mayor-slay-meeting-with-ferguson-protesters/>; “Protestors Interrupt North Charleston Mayor”, YouTube, Apr. 8, 2015 (last accessed June 17, 2015), <https://www.youtube.com/watch?v=PG0MgMxD8Zg>.

312. The nationwide spotlight is on three Black women working to restore order and establish a new approach to police justice in Baltimore: Mayor Stephanie Rawlings-Blake, State’s Attorney Marilyn Mosby, and the new US Attorney General Loretta Lynch. See Carrie Johnson, *Attorney General Loretta Lynch Visits Baltimore*, NPR (May 5, 2015, 4:29 PM), <http://www.npr.org/2015/05/05/404483260/attorney-general-loretta-lynch-visits-baltimore>; *Attorney Loretta Lynch Visits Baltimore in Wake of Unrest*, REUTERS (May 5, 2015, 10:42 PM), <http://rt.com/usa/255913-loretta-lynch-visits-baltimore/>; Mark Puente & Alison Knezevich, *Attorney General Loretta Lynch Does Not Rule Out Broader Federal Probe of Baltimore Police*, BALTIMORE SUN, (May 5, 2015, 8:52 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-gray-loretta-lynch-20150505-story.html#page=1>; Jessica Anderson, *Rev. Al Sharpton, Other Leaders to Meet With Mayor to Discuss Plans to Support Baltimore*, BALTIMORE SUN (Apr. 30, 2015, 8:05 AM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-civil-rights-leaders-summit-20150430-story.html>; Theodore Schleifer, *Baltimore Mayor Struggles in Response to Riots*, CNN.COM (Apr. 28, 2015), <http://www.cnn.com/2015/04/23/politics/stephanie-rawlings-blake-freddie-gray-baltimore/>.