

From Fugitives to Ferguson: Repairing Historical and Structural Defects in Legally Sanctioned Use of Deadly Force

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The lawful use of lethal force to subdue suspected wrongdoers has a long tradition in our nation.¹ There is certainly nothing wrong with securing, incapacitating, or even killing violent persons who pose a serious threat to the lives of innocent individuals.² One of the important roles of government is to protect people from harm and keep the peace.³ Recent events in Ferguson, Missouri, have

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1. Without adequate structural guidance, police are simply overwhelmed with the basics of doing their job, which affects the efficiency with which they exercise their discretion.

Neglect has permeated every aspect of the police function and left law enforcement unable to provide its essential services effectively. Jurisdiction, organization, definition of service, personnel and performance are all inadequate to present needs. The fragmentation of police jurisdictions alone makes excellence impossible and effectiveness limited. The nation has a crazy-quilt pattern of 40,000 police jurisdictions

RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATION ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* 115 (1970).

2. Clearly, without some measure of discretion, police may be subject to physical harm. I certainly do not suggest that all Supreme Court decisions demand second-guessing of police, particularly when it may involve their own safety or the safety of others. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649 (1984) (holding that asking a man suspected of having a gun where the gun is located is not a violation of the Fifth Amendment because of the public safety exception).

3. Policing has certainly changed in our country over the years. There were no professional police forces in the eighteenth century. Instead the power of government depended upon traditional institutions like the “hue and cry” dating back to the Middle Ages, when it had a representative form of summary justice similar to modern lynching law. By the eighteenth century magistrates turned most often to the posse committatus. Where greater and more

highlighted the tension between the officers on the beat and citizens on the street.⁴ These tensions are not likely to subside unless there are

organized support was needed, magistrates could call out the militia. Both the posse and the militia group depended on the local man, including many of the same people to dissipate extra-legal uprisings. This meant that insurrection good-naturedly assumed the manner of a lawful institution, as insurgents acted by habit with relative restraint and responsibility. PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION COLONIAL RADICALS IN THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN IN 1765–1776* 16 (1992).

See also JEFFREY R. BRACKETT, *THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY* 101 (Johns Hopkins Press 1889).

The constables of towns, also will usually ordered by special acts of the assembly to see, among other duties, that Negroes did not gather in noisy groups in the street or at meetings or remain out late at night . . . Often in towns with a considerable black population, a bell was rung at a certain hour in the evening—as nine in winter in ten in summer—in the black who were being out of doors thereafter had to rely on his good character, or on the carelessness or good nature of the constable, or his heel to save him from punishment. These restrictions, both in coyote in town, we're not the result a loan of fears of insurrection or lost by runaways. They were largely for the ordinary preservation of peace.

Id.

The job of a police officer is to provide public safety and to restrain persons who are a threat to public safety. These tasks are unpleasant, but they are necessary for a civil society. See generally James Q. Wilson, *The Police and Their Problems: A Theory*, in 12 *PUBLIC POLICY: A YEARBOOK OF THE GRADUATE SCHOOL OF PUBLIC ADMINISTRATION, HARVARD UNIVERSITY* 189–216 (Carl J. Friedrich & Seymour E. Harris eds., 1963).

4. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 5–6 (2015). The report, finding wide spread discrimination in policing, explained:

Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson's police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race.

Id. Ferguson's law enforcement practices overwhelmingly impact African Americans. Data collected by the Ferguson Police Department (FPD) from 2012 to 2014 shows that African Americans account for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests made by FPD officers, despite comprising only 67 percent of Ferguson's population. African Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26 percent less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search. African Americans are more likely to be cited and arrested following a stop regardless of why the stop was initiated and are more likely to receive multiple citations during a single incident. From 2012 to 2014, FPD issued four or more citations to African Americans on 73 occasions, but issued four or more citations to non-African Americans only twice. FPD appears to bring certain offenses almost exclusively against African Americans. For example, from 2011 to 2013, African Americans accounted for 95 percent of Manner of Walking in Roadway charges, and 94 percent of all Failure to Comply charges. *Id.* at 4.

major structural changes in the way the police do their job and the perception of officers in the community.⁵ Police are often perceived as getting special privileges in the courts, even when they engage in wrongdoing.⁶ This is particularly true in African-American neighborhoods, which seem to distrust police.⁷ Similar to other components of the judicial system that give rise to racial concerns—such as obtaining confessions⁸ or selecting a jury⁹—concerns that police officers receive special treatment instills little confidence in police for minority communities. Some of that distrust comes from the troubling application of the Fourth Amendment in the urban

5. Officers on the street confronting potentially armed and dangerous suspects are required to make a “quick decision” as to how to protect themselves. To subject their measurement of what is needed to protect themselves to post hoc second guessing to scrutinize whether they engaged in the least intrusive means of effecting the goal of the intrusion places an unrealistic and dangerous burden on police. Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of the Permissible Intrusion to Ascertain if a Detained Person is Armed*, 82 MARQ. L. REV. 491, 517 (1999).

6. In a contest of integrity, the defendant usually loses. See Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 696 (1996) (pointing out that a judge has difficulty spotting perjury since he must “decide cases one at a time, so the police almost always win the swearing contest” between the officer and the defendant).

7. A New Jersey state police department recently came under fire for racial profiling. Police superintendent Colonel Carl Williams was fined by then Governor Whitman after being quoted as saying, “cocaine and marijuana traffickers were most likely to be members of minority groups.” Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 260 (2000). Another writer has strongly suggested that “African-American men have become fair game for police harassment whenever they travel in public, be it by plane, car, bus, train, or foot. . . . [C]onsent’ and ‘free-to-leave’ doctrines prove unworkable given the racially abusive history between police and minorities.” Erika L. Johnson, “A Menace to Society:” *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 663 (1995).

8. See Fadia M. Narchet, Christian A. Meissner & Melissa B. Russano, *Modeling the Influence of Investigator Bias on the Elicitation of True and False Confessions*, 35 LAW & HUM. BEHAV. 452 (2010) (finding results suggesting that racial bias in investigation can lead to increased use of tactics likely to induce false confessions).

9. “Although most northern blacks gained access to the regular court system by the middle of the nineteenth century, their testimony, when permitted against a white person, was rendered virtually meaningless by all-white juries.” Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 7 (1990).

setting.¹⁰ The right to be free from unreasonable searches and seizures, which is supposed to be a hallmark of liberty, historically has been interpreted to provide little protection against police officers who are of a mind to engage in harassment.¹¹ The idea that a person in America has the right to travel about has been challenged in both the spirit and the letter of the Constitution.¹² The recent history of racial discrimination against African Americans emerged out of the structural bias during slavery¹³ and legal rules that forced the

10. The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The news media has published many instances of allegations of police abuse. See Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999) (collecting many popular press accounts of racial discrimination and abuse by police in encounters with minorities).

11. For an extensive historical examination of the Fourth Amendment, see NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

12. The Fourth Amendment embodies what has popularly become known as the "right to be let alone," particularly from government officials. That right has been described as "perhaps the most personal of all legal principles. It is also one of the newest, since only more sophisticated of societies have the interest and the ability to nurture the subtle and most personal possession of man, his dignity." MORRIS L. ERNST & ALAN U. SCHWARTZ, *THE RIGHT TO BE LET ALONE I* (1962).

A medical psychiatric analysis of the slave era describe the dilemma of compliance of slaves in this way:

From the beginning of their enslavement, all slaves have been confronted with the option to "submit or die," and obviously those who survive to rear children had chosen to live in therefore to submit. . . . Each day they were given the option to work or die, obey or die, and with each day the role, the identity of slave became more real. To live for black man, was to submit completely, holding back no part of himself, but yielding all the vestigues of humanity to the slave owner, or at least giving the appearance of doing so.

WILLIAM H GRIER & PRINCE M. COBBS, *BLACK RAGE* 143 (1968).

13. The focus on such a sophisticated right is consistent with United States constitutional history at the time of the American Revolution, at least for those participants who were not operating under the limitations of racial oppression or slavery. "Americans knew they were probably freer and less burdened with cumbersome feudal and hierarchical restraints than any part of mankind in the eighteenth century." GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 3 (1969). Most blacks in the nation were not free at the time and those who were suffered greatly under the sophisticated race-based coercive system.

coercive punitive regime on persons of color both free and slave.¹⁴ There was a period in history when even a gesture or a look could lead to punishment or death if directed toward the white ruling class.¹⁵ The reckless disregard for African Americans during the Jim Crow¹⁶ era created some tensions that have yet to be resolved.¹⁷

14. The measure of justice received in this country has often been linked to racial, ethnic, or religious prejudice. In Maryland in 1717, laws were enacted that prohibited not only blacks, but also Indians and Mulattos from testifying in any case in which a Christian white person was concerned. These provisions applied to such persons whether they were slave or free. JEFFREY R. BRACKETT, *THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY* 191 (Herbert B. Adams ed., 1969). Another Maryland report commissioned in the early 1960s observed that in the years 1936–1961, of the 122 persons sentenced to death in Baltimore City, about 80 percent of those executed were African American. LEGISLATIVE COUNCIL COMMITTEE, *REPORT ON CAPITAL PUNISHMENT* 41 (1962), *cited in* THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY: AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978–1993, at 3 (1993).

In the mid-1800s a California court overturned the conviction of a white man charged with murdering a Chinese woman, since the testimony suggesting guilt was supported in part by the testimony of a Chinese witness. *People v. Hall*, 4 Cal. 399 (1854). The court reasoned that the statute preventing “blacks,” “mulattos,” and Indians from testifying against whites also applied to Chinese since the statute was designed to protect whites from testimony of all nonwhites. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1243, 1291 n.241 (1993). This is hardly a new phenomenon:

Slavery was a major institution in antiquity. Prehistoric graves in Lower Egypt suggest that a Libyan people of about 8000 BC enslaved a Bushman or Negrito tribe . . . The first code of laws, that of Hammurabi, silent on many matters now considered interesting, included clear provisions about slavery. For example, death was prescribed for anyone who helped a slave to escape, as well as for anyone who shelter the fugitive—A foretaste of 2000 years during which sleeves figured in most such complications.

HUGE THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440–1870* 25 (1997). “Far from being a humane institution, American slavery was diabolically cool in that it robbed the Negro of that sense of human dignity which underlies all social intercourse. Slavery destroyed the Negroes family, emptied his mind, and impoverished his soul. Or than that: it made him doubt himself.” LERONE BENNETT, JR. *CONFRONTATION: BLACK AND WHITE* 27 (1965).

15. An 1849 Virginia law made it a crime to use “provoking language or menacing gestures” to a white person. The law applied to both free blacks and slaves. 54 VA. CODE § 200-8 (1849).

16. The series of trials that came to be known as the “Scottsboro Boys” cases focused the attention of the country on discrimination in the criminal justice system, primarily in the South. *See Powell v. Alabama*, 287 U.S. 45, 49–53 (1932). The incident involved charges of rape against black youths accused by a white woman under prejudicial circumstances. *See id.* at 49. At the center of the controversy was the racial discrimination in jury selection in the case. *See id.* at 50. Under questioning at a hearing, prior to jury selection at a retrial of one of the

Following the abolition of slavery during the Civil War until the middle of the twentieth century, even a gesture or quick look could quickly lead to punishment or death.¹⁸ Racial disparities in income,¹⁹ educational achievement, and incarceration contribute to this disconnect.²⁰ I think a major issue between police and the community is not racial sensitivity alone, but the lack of appropriate police training.²¹ Police, like soldiers, are probably the most amenable

defendants, a Morgan County, Alabama jury commissioner said “he had never met a Negro fit for jury duty.” JAMES GOODMAN, *STORIES OF SCOTTSBORO* 123 (1994) (footnote omitted).

17. “Jim Crow” laws, which enforced legal separation among the races, characterized the period of American history at the turn of the twentieth century up to the middle 1950s and 1960s. “Jim Crow” laws were able to thrive because of the erosion of the right to vote which occurred after Reconstruction. As noted historian John Hope Franklin observed, “(o)nce the Negro was disfranchised, everything else necessary for White Supremacy could be done.” JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 342 (3d ed. 1967).

18. *Id.* at 439. Between 1889 and 1922, there were 3,436 lynchings in the United States. *Id.* at 488. Lynching as an alternative justice system has been explored by legal scholars. One scholar has commented that the race of the victim of the alleged offense (in most cases white women) motivated vigilante action from those too angry or too impatient to wait for the judicial process to work. Professor Lawrence M. Friedman writes:

[T]he mob decided that honor *demand*ed direct action—the honor of the white woman, her family, and the community. The lynching was part of an “unwritten code.” Southerners distrusted the state, and preferred, in these cases, “personal justice.” They “believed strongly that community justice included both statutory law and lynch law”; indeed, lynch law “was perceived as a legitimate extension of the formal legal system.”

LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 190 (1993) (citing ROBERT P. INGALLS, *URBAN VIGILANTES IN THE NEW SOUTH: TAMPA, 1882–1936* 4 (1st ed. 1988)). For another excellent review of the complicated question of the role lynching played in the system of punishment in America, see W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930* (1993).

19. Ironically, minorities and the poor are still overwhelmingly the victims of crime and poverty. Some scholars have reminded us that problems of crime are “closely intertwined with issues of discrimination.” See Peter E. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 *GEO. L.J.* 1697, 1698 (1993).

20. For an outstanding discussion of this issue, see Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side to Incarcerating, Not Educating, Students in Public Schools*, 68 *ARK. L. REV.* 55 (2015).

21. Occasionally, the Supreme Court would decide a case in favor of a black defendant and against the racist climate. See, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923). In *Moore*, the Court overturned a district court’s refusal to review the allegations in a black defendant’s habeas corpus petition. *Id.* at 87. The basis of the defendant’s claim was that his trial was dominated by a riotous mob.

Racial problems that occur between citizens and police are often difficult to prove. As the Supreme Court recently observed in an opinion by Justice Clarence Thomas, “[o]utright

group to training. When I was actively engaged in training police I found them to be thoughtful, ready to learn, and eager to do the job right.²² There are obviously exceptions to this rule, and some police engage in conduct that is unproductive to policing and does not respect constitutional rights.²³ Most police officers know that the greatest threat to their own safety is an untrained officer with poor judgment in the police vehicle sitting beside them. Many enter the police force because of a deep commitment to public and community service.²⁴ Policing is not simply a job; it is a profession requiring a measure of professional pride in order to attract the best and brightest police officers to the field. Current controversies about police conduct discourage those who would make good officers from considering such careers. Because of financial issues and budgetary concerns, police departments have reduced the amount of educational and training benefits that they are able to offer those who enter the professional ranks.²⁵ These decisions, while explainable and well-intentioned, were extremely shortsighted.

admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.” *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (involving a suit that challenged a voter redistricting plan that was allegedly drawn in a racially motivated manner in violation of the Equal Protection Clause).

22. I participated in a police training program in 2007 where my interaction with officers was largely pleasant and professional. From 2006 to 2008, the University of Baltimore School of Law was involved in a pilot project with the Baltimore City police academy. Two organizations worked together to allow law students to act as prosecutors and defense lawyers with police cadets as they prepared basic documents and basic testimony for the courtroom. Sessions were videotaped and cadets and law students were selected at random to present before the larger group. Judges and lawyers critiqued what was taking place and everyone learned in a nonthreatening environment. *Litigation Week Program*, Steven L. Snyder Center for Litigation Skills (Spring 2007) (on file with author).

23. The decision to waive the constitutional right not to consent to a search should be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

24. See *supra* text accompanying note 22.

25. It has been noted that many departments have greatly reduced training opportunities for their officers. The economic downturn of the past several years has devastated local economies and their local law enforcement agencies. Sworn to protect and serve the public, law enforcement faces a bleak outlook. The nation’s law enforcement agencies are confronting severe budget cuts and unmanageable layoffs, and they are fundamentally changing how they keep the public safe. *Impact of Economic Downturn on American Police Agencies*, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., <http://www.cops.usdoj.gov/Default.asp?Item=2602> (last visited Jan. 20, 2016).

Perhaps some of the Ferguson grand jury's reluctance to convict police has been the historical high regard many citizens hold for those who protect us each day.²⁶ Federal, state, and local governments need to take very seriously this watershed moment to restore the public's confidence in the integrity of law enforcement.²⁷ In this article, I hope to offer some perspectives and solutions that will make policing more professional and accountable.²⁸

However, in some states the need to help officers avoid improper racial profiling has led to a renewed focus on some training initiatives. For example:

[t]he Attorney General of Maryland will convene training sessions in the coming months and calls upon local law enforcement agencies to incorporate these statewide guidelines into their general orders and to ensure that violations are taken seriously. The Attorney General's Office of Civil Rights will also begin to issue an annual report sharing with the public what progress has been achieved. The report will propose strategies for strengthening and, where necessary, rebuilding relations between law enforcement and the communities they serve and protect.

MARYLAND ATTORNEY GENERAL, GUIDANCE MEMORANDUM: ENDING DISCRIMINATORY PROFILING IN MARYLAND (Aug. 2015), available at http://www.oag.state.md.us/Reports/Ending_Discriminatory_Profiling.pdf.

Furthermore, police officers need to be very professional in order to do their difficult job:

Police are called upon to provide a wide variety of social services as well. . . . They rush accident victims to the hospital; bring alcoholics indoors on cold winter's night; break into a locked house or apartment to see whether an elderly occupant is alive or well; persuade a mentally ill person who has barricaded himself in his apartment to return to the hospital; administer emergency first-aid to a heart attack victim, or someone has taken a drug overdose. . . .

CHARLES EAST SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 203 (1978).

26. Racial polarization of juries in criminal cases is not a new subject. Such polarization has been seen in cases involving black and white defendants. For example, in the infamous O.J. Simpson case, public attention was brought to the jury process by the sensationalized stories about how race influences our attitudes about the justice system. One pollster noted that "[o]n almost every issue, blacks and whites are nearly mirror images of one another—on Simpson's innocence, police conduct, and the jury's efforts." Betty Streisand et al., *The Verdict's Aftermath*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 34. Simpson was acquitted by a majority black jury for the killing of his ex-wife and a friend. Another poll taken after the case suggested that 36 percent of whites believed that black jurors are more likely to convict a defendant who is white, and 59 percent of black jurors and 40 percent of white jurors believed white jurors are more likely to convict a defendant if he is black. Joe Urschel, *Poll: A Nation More Divided*, USA TODAY, Oct. 9, 1995, at 5A.

27. Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 827–28 (2000). See Benjamin B. Tucker, *How Do We Reduce Crime and Preserve Human Decency? The Role of Leadership in Policing for a Democratic Society*, 28 FORDHAM URB. L.J. 601, 615 (2000) (noting police community tensions as the basis for poor police community relations).

28. Elected public officials have expressed the idea that good police/community relations begin with the attitude of police toward minority citizens. The former Mayor of Detroit,

First, it is important to examine how the Supreme Court has constructed its use of deadly force jurisprudence. Recent Supreme Court opinions seem to reflect a hostility toward citizens and greatly favor the police in regards to the accountability tools citizens have available to control misconduct.²⁹ It took decades for the Supreme Court to resolve the tension between federal law-enforcement and state-sponsored illegal collection of evidence,³⁰ until the Court finally came to grips that the “silver platter doctrine,” which allows federal officials to use illegally seized evidence.³¹ Most often, scholars point to the changes in the Supreme Court after the liberal leanings of Chief Justice Earl Warren were replaced by the more conservative approach of Chief Justice Warren Burger during the 1970s.³² President Richard Nixon, who ran on a “law and order” platform

Coleman Young, expressed that view in his autobiography. He wrote, “For nearly twenty years, I had emphasized a firm but respectful style of law enforcement. I had campaigned on that issue and fought over it with the veteran cops. The police department’s attitude adjustment had been the first priority of my first term” COLEMAN YOUNG & LONNIE WHEELER, *HARDSTUFF: THE AUTOBIOGRAPHY OF COLEMAN YOUNG* 321 (1994).

29. See David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 557 (1998) (discussing the Supreme Court’s visible trend for the last two decades of “steadily increasing police power and discretion over cars and their occupants” and stating that “the Court has conferred upon the police nearly complete control over almost every car on the road and the people in it”).

30. See *Weeks v. United States*, 232 U.S. 383 (1914) (finding the Fourth Amendment bars use of illegal evidence by police).

31. The concept of judges denying police access to seized evidence reflects our general suspicion that police cannot police themselves entirely. “[H]aving judges decide what police conduct violates the Fourth Amendment reflects a distrust of society’s ability or willingness to apply the Fourth Amendment properly.” George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 149 (1993).

32. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 10 (1979).

As Chief Justice for fifteen years, [Earl] Warren led a judicial revolution that reshaped many social and political relationships in America. The Warren Court at often plunged the country into bitter controversy as it decreed an end to publicly supported racial discrimination, banned prayer in public schools, and extended constitutional guarantees to blacks, poor people, communists in those who were questioned, arrested or charged by police.

Id. It had become “commonplace to characterize the (Warren) [C]ourt’s headline making decisions of the past decade as political acts of Will—to accuse the justices, as . . . having become lawmakers instead of simply law expounders.” L. BRENT BOZELL, *THE WARREN REVOLUTION* 36 (1966).

during his 1968 campaign, began to replace more liberal judges with those who had a more conservative perspective.³³ Later in the 1980s, the so-called “War on Drugs” created at least three more decades of the most expensive incarceration in the Nation’s history.³⁴ During the Post-Warren Court era, civil liberties tools like the exclusionary rule³⁵ came under bitter attack, and were ultimately weakened by the Supreme Court’s continued conservative trend.³⁶ This tension between police and citizens came to a head during the sensational videotaped police beating of Rodney King in Los Angeles,³⁷ which caused destructive riots across the nation.

33. Even Chief Justice Warren recognized the “law and order” backlash against his criminal justice jurisprudence. He wrote:

Because the court, over the years, sought to make our criminal procedures conform to the relevant provisions of the Constitution and be a reality for the poor as well as the rich, it was made the target for widespread abuse Because police and indignant citizens were overwhelmed with the wave of violence that flooded the land, they found in the Court a stationary target and made us responsible for the increasing crime rate. We were “soft on criminals,” they said.

EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 316 (1977).

34. The Nixon Administration officially declared the “War on Drugs.” It has continued, at escalating levels, ever since. Today we annually spend \$15 billion in federal funds and \$33 billion in state and local funds to finance this war . . . however, the Drug War has been an extraordinary failure. Drugs are more available—at higher purity and lower prices—than they were at the start of the decade.

Eric Blumenson & Eva Nilsen, *Policing Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 36–37 (1998) (footnotes omitted); see also Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987) (noting that police budgets have become heavily linked to drug enforcement).

35. The exclusionary rule is the judicially created doctrine that prevents evidence that has been obtained in violation of the Constitution from being admitted into evidence. It often has been criticized by leading conservatives because it “bars probative evidence that the police are judged, often on the sheerest technicality, to have obtained improperly.” ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 104 (1996).

36. Repealing the so-called “exclusionary rule” would not make the police any more effective in their “war” against crime. Despite loud and frequent complaints, the police have not been handcuffed by the rulings of the Warren Court. Except for minor drug offenses, there is no evidence to suggest that policemen make fewer arrests, or that prosecutors secure fewer convictions, because of the Supreme Court decisions safeguarding the rights of the accused; on the contrary, the evidence runs the other way. CHARLES EAST SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 201 (1978) (footnote omitted).

37. See Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1, D22 (reporting the acquittal and subsequent rioting after the controversial verdict rendered by an all white jury). See generally STACY C. KOON & ROBERT DEITZ,

In order to accurately examine the hostility between police and citizens, one needs to look at the legal framework of the nation going back to slavery.³⁸ During that sad season in the nation's history, African Americans were not even deemed worthy to participate in the criminal justice system.³⁹ Recognized only as property, every movement of slaves was under the dominion and control of their masters and owners. Free blacks were also constrained by their noticeably dark skin; many legal impediments against their participation in society were already in place in the colonies before the country became the United States of America.⁴⁰

These issues related to skin color and confinement accelerated during the period that extended from the 1793 Fugitive Slave Act, signed into law by President George Washington, which provided a criminal justice tool that prevented those living under bondage from enjoying the legal rights which were the jewel of our fledgling nation.⁴¹ The Missouri Compromise of 1820⁴² and the Fugitive slave

PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR (1992) (discussing the King case from the point of view of one of the officers involved).

38. In the early years of our country's history, the system of criminal justice in capital cases for blacks, both free and slave, was meager at best. In South Carolina, for example, blacks had no right to a trial by jury and no right to appeal a capital offense prior to 1833. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 180 (1978).

39. The measure of justice received in this country has often been linked to racial, ethnic, or religious prejudice. In Maryland in 1717, laws were enacted that prohibited not only blacks, but Indians and Mulattos, from testifying in any case in which a Christian white person was concerned. These provisions applied to such persons whether they were slave or free. BRACKETT, *supra* note 14, at 191.

In Virginia during the early 1800's, Negroes were not even permitted to testify in murder trials against a white defendant. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, "Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1239-40 n.142 (1993).

40. As early as 1680, states enacted slave codes which laid out more severe punishment for blacks committing the same offenses as whites. See DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 30-31 (1978).

41. Fugitive Slave Act of 1793, 1 Stat. 302.

An Act respecting fugitives from justice, and persons escaping from the service of their masters. *Be it enacted, &c.*,

That, whenever the Executive authority of any State in the Union, or of either of the Territories Northwest or South of the river Ohio, shall demand any person as a fugitive from justice, of the Executive authority of any such State or Territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or

an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her arrest to be given to the Executive authority making such demand, or to the agent when he shall appear; but, if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged: and all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

SEC. 2. *And be it further enacted*, That any agent appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled. And if any person or persons shall, by force, set at liberty, or rescue the fugitive from such agent while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.

....

SEC. 4. *And be it further enacted*, That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given and declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any Court proper to try the same, saving moreover to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them.

Id. §§ 1-2, 4. The Act was approved and signed into law by President George Washington on February 12, 1793. 2 ANNALS OF CONG. 1413-14 (1793). The effects were brutal:

To curb runaways, hold down into plantation theft, and prevent the formation of insurrectionary plots, the slaveholders developed an elaborate system of patrols. Some states required them, whereas others merely authorized local communities to organize them. Usually a captain and three others, appointed for a period of a few months, worked the roads and checked the plantation quarters every few weeks or as often as the current temper dictated. Slaves caught without passes could expect summary punishment of about twenty lashes.

Complaints against the patrols came from both masters and slaves. The masters, in ordinary times, bought their way out of patrol duty and then fumed because the poor whites who replaced them abuse the slaves and unsettled the quarters. The brutality of the patrols drew widespread protest from the slaves who suffered from arbitrary or excessive beating. As a result, the slaves often regarded their masters as protectors against the patrols, and sometimes the masters in fact were. However irregular and lax, the patrols accomplished their main purpose: they struck terror in the slaves

EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 617-18 (1976).

42. An Act to Authorize the People of the Missouri Territory to form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing

act of 1850,⁴³ further attempted to protect the slave culture by giving remedies to owners of runaways, which diminished free movement of

with the Original States, and to Prohibit Slavery in Certain Territories, H.R. 545, 16th Cong. (1st Sess. 1820).

43. Fugitive Slave Act of 1850, 9 Stat. 462.

Section 1

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the persons who have been, or may hereafter be, appointed commissioners, in virtue of any act of Congress, by the Circuit Courts of the United States, and Who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same under and by the virtue of the thirty-third section of the act of the twenty-fourth of September seventeen hundred and eighty-nine, entitled "An Act to establish the judicial courts of the United States" shall be, and are hereby, authorized and required to exercise and discharge all the powers and duties conferred by this act.

Section 2

And be it further enacted, That the Superior Court of each organized Territory of the United States shall have the same power to appoint commissioners to take acknowledgments of bail and affidavits, and to take depositions of witnesses in civil causes, which is now possessed by the Circuit Court of the United States; and all commissioners who shall hereafter be appointed for such purposes by the Superior Court of any organized Territory of the United States, shall possess all the powers, and exercise all the duties, conferred by law upon the commissioners appointed by the Circuit Courts of the United States for similar purposes, and shall moreover exercise and discharge all the powers and duties conferred by this act.

Section 3

And be it further enacted, That the Circuit Courts of the United States shall from time to time enlarge the number of the commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act.

Section 4

And be it further enacted, That the commissioners above named shall have concurrent jurisdiction with the judges of the Circuit and District Courts of the United States, in their respective circuits and districts within the several States, and the judges of the Superior Courts of the Territories, severally and collectively, in term-time and vacation; shall grant certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such fugitives from service or labor, under the restrictions herein contained, to the State or Territory from which such persons may have escaped or fled.

Section 5

And be it further enacted, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act,

when to them directed; and should any marshal or deputy marshal refuse to receive such warrant, or other process, when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of such claimant, on the motion of such claimant, by the Circuit or District Court for the district of such marshal; and after arrest of such fugitive, by such marshal or his deputy, or whilst at any time in his custody under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the State, Territory, or District whence he escaped: and the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the requirements of the Constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or posse comitatus of the proper county, when necessary to ensure a faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose; and said warrants shall run, and be executed by said officers, any where in the State within which they are issued.

Section 6

And be it further enacted, That when a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service or labor may be due, or his, her, or their agent or attorney, duly authorized, by power of attorney, in writing, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district, or county, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive, where the same can be done without process, and by taking, or causing such person to be taken, forthwith before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent

all people of color.⁴⁴ Such legal assaults on the freedom of movement of persons both free and slave, continued until the conclusion of the Civil War.⁴⁵ Although amendments subsequent to the Civil War abolished slavery,⁴⁶ gave the right to vote⁴⁷ and, at least on paper, provided for the equal protection under the law,⁴⁸ the “fugitive from justice” provisions of these laws remained largely unaltered and permitted the treatment of African Americans to remain harsh under the criminal justice system, even today.⁴⁹ The primary connection between the fugitive slave acts and the criminal justice system of

or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first [fourth] section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

Id. §§ 1–6.

44. The status of people of color during the slavery era often created confusion and uncertainty. A white Maryland man named Elisha Tyson was confronted by an African American man who had claimed he had made a deal with his master to pay for his freedom in a certain number of years. The slave master who made the deal withdrew the offer after half the money had been paid but before the time had expired to complete payment. There was no receipt or witnesses to the transaction. Instead the slave was to be sold to a Georgia plantation. In the presence of Tyson the man said that “the Georgia man shall not have me . . . I cannot live away from my wife and children.” The man was soon after found drowned nearby. This incident spurred Tyson to go to court to obtain writs of habeas corpus in 1812 for five blacks who had been arrested on suspicion of being escaped slaves in order to help them obtain their freedom. SHERRY H. OLSON, *BALTIMORE: THE BUILDING OF AN AMERICAN CITY* 66–67 (1980).

45. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 19 (1992) (stating that, in 1877 when troops were pulled from the south former slaveholders, other white citizens were free to impose inferior status on blacks).

46. U.S. CONST. amend. XIII.

47. U.S. CONST. amend. XIV.

48. U.S. CONST. amend. XV.

49. Some scholars have forcefully argued that the greatest potential for discrimination occurs when these racial factors emerge. “Accordingly, in a contest between whites and blacks, the Law presumptively protects whites. In a conflict between relative harms between whites and blacks, the Law punishes blacks more severely when they offend whites.” Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 *HOW. L.J.* 1, 85 (1996).

today is that broad grant of authority to obtain dominion over persons that escaped from slavery or who were fugitives from justice. Such authority remains the backdrop of our criminal justice and law and enforcement structure. Support for the vigorous process of securing, through force, persons who are suspected of fleeing under the fugitive statutes is often duplicated in modern law enforcement approaches to apprehending criminal suspects.

I. IMMUNITY

Qualified immunity and other related doctrines have been the primary tools shielding police from personal and public responsibility for harm caused by their occasional lawless actions.

Sovereign immunity is an ancient tool which permits governments to avoid financial responsibility or being sued in court.⁵⁰ One of the primary hazards of having immunity is that the incentive for local governments to improve policing is greatly diminished. When a police department's financial exposure is limited for poor conduct and local officers' personal assets are unreachable in lawsuits, police accountability is greatly diminished.

Another problem that adds to the police and government misconduct is when fines for small criminal violations become the mainstay of the local tax base.⁵¹ Many jurisdictions have depended on police traffic fines and vehicle registration violations to support the economy of some local governments. Such financing structures encourage increased vehicle stops.⁵² When the inability to pay fines

50. Civil immunity insulates individual officers from lawsuits. See Derek W. Meineche, Note, *Assessment of Police Conduct During High-Speed Chases in State Tort Liability Cases: The Effects of Fiser v. City of Ann Arbor and Rogers v. City of Detroit*, 46 WAYNE L. REV. 325 (2000) (discussing generally the problems of obtaining civil judgments against police officers).

51. It has long been recognized that police officers often exercise a great deal of discretion at the street level that is unseen by their supervisors. Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543, 522 (1960).

52. As Professor Tracey Maclin has insightfully noted:

One need not accept that perjury is a pervasive problem in every police department to recognize that perjury (or the potential for perjury) may play a central role in how pretextual traffic stops are carried out. When narcotics officers and their supervisors admit to stopping as many cars as possible under the guise of traffic stops to

becomes an issue, people are unable to be removed from the grips of poverty because of mounting fines.⁵³ The addition of red light cameras and other forms of electronic monitoring to identify those that have minor traffic violation has increased the frequency of such techniques.⁵⁴

II. FORCE

The Supreme Court's most recent flawed Fourth Amendment jurisprudence regarding police use of force and the pursuit of suspects has created a troubling paradigm for the acceleration of police use of force.

In *Stanton v. Sims*, the Court held that a police officer was protected by qualified immunity when he made a warrantless entry into the curtilage of a private residence when there was no violation of a clearly established constitutional provision.⁵⁵ The case resulted in a unanimous plurality opinion which might have largely gone unnoticed, except for its peculiar and the troubling proposition that seemed to sanction police behavior that was both intrusive and dangerous to innocent persons.⁵⁶

Mike Stanton, a police officer, observed a suspicious man heading toward the residence of Drendolyn Sims.⁵⁷ The man failed to heed Stanton's verbal warnings to stop and proceeded to enter her property through a gate in a fence that completely blocked Stanton's view.⁵⁸ Believing that the man had violated the law by disobeying his order

investigate drug trafficking, the possibilities and temptation to lie about a motorist driving skills are manifest.

Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 381 (1998).

53. The Editorial Board, *Policing for Profit in St. Louis County*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/2015/11/15/opinion/sunday/policing-for-profit-in-st-louis-county.html>.

54. See, e.g. Leah Thorsen, *Missouri Supreme Court Strikes Down Red-Light Ordinances*, ST. LOUIS POST-DISPATCH (Aug. 19, 2015, 7:30 AM), http://www.stltoday.com/news/local/metro/missouri-supreme-court-strikes-down-red-light-ordinances/article_f5967dba-5e9a-5e22-9682-b3cc9ed89f35.html.

55. 134 S. Ct. 3 (2013).

56. *Id.*

57. *Id.* at 4.

58. *Id.*

to stop, Stanton forcefully kicked the gate open, injuring Sims as she stood behind the gate.⁵⁹

Sims filed suit alleging a violation of the Fourth Amendment insofar as Stanton's actions were an unreasonable search of her home.⁶⁰ The district court granted summary judgment in favor of the police officer but United States Court of Appeals for the Ninth Circuit reversed.⁶¹

The Supreme Court reversed the decision of the Ninth Circuit and held that Stanton's warrantless entry into Sims' yard was not necessarily unconstitutional.⁶² It stated that Stanton did not lose the protections of qualified immunity because the constitutionality of his actions were not "clearly established."⁶³ In particular, it reasoned that the violation of the curtilage of a home was not clearly established in the hot pursuit circumstances (a person suspected of a misdemeanor) of the case.⁶⁴

Furthermore, the use of deadly force by police to effectuate an arrest during an encounter has been a matter that has generated a good deal of controversy to in recent years.

In 2014, the Supreme Court endeavored to clarify the police power during a chase of a criminal suspect in *Plumhoff v. Rickard*.⁶⁵ Donald Rickard was the driver of a vehicle involved in a dangerous high-speed chase in Arkansas.⁶⁶ After being cornered, Rickard collided with police vehicles as he attempted to escape. In response, officers pursuing him fired fifteen shots toward the vehicle, causing Rickard to lose control and collide with a building⁶⁷ Rickard and his passenger, Allen, "died from some combination of gunshot wounds and injuries suffered during the chase and crash."⁶⁸

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 4–7.

63. *Id.*

64. *Id.*

65. 134 S. Ct. 2012 (2014).

66. *Id.* at 2017.

67. *Id.* at 2017–18

68. *Id.* at 2018.

Rickard's estate filed suit alleging excessive force in violation of the Fourth and Fourteenth Amendments of the Constitution.⁶⁹ The lower court denied the officers' motion for summary judgment and determined that the officers' conduct violated the Fourth Amendment, which was eventually affirmed by a merits panel of the Sixth Circuit.⁷⁰

In an opinion reversing the judgment, the Supreme Court extended qualified immunity protection to the police for their conduct during the chase.⁷¹ The Court noted that police often are forced to make "split-second judgments" in certain circumstances that rapidly evolve.⁷² The Court suggested that it is these rapidly unfolding circumstances that play a role in the amount of force police perceive is necessary in a particular situation.⁷³

Addressing the argument whether police were entitled to use deadly force to terminate the chase or went to far in applying such force, the Court noted the potential danger to the lives of innocent bystanders when police engaged in high-speed chases.⁷⁴ However, the Court in strongly rejected the argument that the use of police force in this case was constitutionally excessive.⁷⁵ Indeed, the Court held that "if police officers are justified and firing at a suspect in order to and a severe threat to public safety, the officers need not stop shooting until the threat has ended."⁷⁶ In other words, shooting until the suspect is incapacitated might well be constitutionally appropriate in the Supreme Court's view, if the officer perceived the suspect is a threat to his life.

The opinion, authored by Justice Alito, held that the officer was not prohibited "from using the deadly force that they employed to terminate the dangerous car chase,"⁷⁷ ruling that each of the officers was entitled to qualified immunity from the civil lawsuit filed in

69. *Id.*

70. *Id.*

71. *Id.* at 2022.

72. *Id.* at 2020.

73. *Id.*

74. *Id.* at 2021.

75. *Id.* at 2022.

76. *Id.*

77. *Id.* at 2024.

these proceedings.⁷⁸ In my view, the Alito opinion for the use of deadly force sets a dangerous precedent.

CONCLUSION

The troubling issue of slavery and its relationship to law-enforcement colors all criminal justice issues in existence today. The structural relationship between law-enforcement and citizens has never truly been colorblind.⁷⁹ Although many have worked hard to eliminate racial prejudice from our criminal justice system,⁸⁰ particularly the troubling disparity in capital punishment,⁸¹ challenges still remain. Our society needs to first recognize the ornaments of slavery that have hindered our ability to develop a law-

78. *Id.*

79. One insightful observer asserted that “[a]ny honest chronicler of American legal history must acknowledge that the legal system in its treatment of blacks has been characterized by inequality.” LOIS G. FORER, CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT 226 (1980). Another critic of the inequality in the criminal justice system has surmised that “[w]hile criminal justice is explicitly based on the promise of equality before the law, the administration of criminal law—from the officer on the beat to state legislators to the Supreme Court—is in fact predicated on the exploitation of inequality.” David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUM. RTS. 2 (1999).

80. The Supreme Court has rarely given the question of race much weight in shaping its jurisprudence. One insightful scholar wrote that “social science data reflect[s] [that] the Court has underestimated the extent to which racial factors affect an individual officer’s perceptions, memory, and reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure.” Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1012 (1999).

81. For two particularly insightful reviews of the problem of racial discrimination in capital punishment, see Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 439–43 (1988) (suggesting that jurors are influenced by the race of both the victim and the defendant) and Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) (discussing historical disparities in punishment between white and black).

Even the Supreme Court has recognized that racial discrimination “still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not real or less pernicious.” *Rose v. Mitchell*, 443 U.S. 545, 558–59 (1979). See also *McClesky v. Kemp*, 481 U.S. 279, 286 (1987) (citing a study conducted by Professors David C. Baldus, George Woodworth and Charles Pulaski); and Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 39 (1984).

enforcement system that is more race-neutral.⁸² The war on drugs of the 1980s only points to inherent flaws that were built into the system decades before.⁸³ Similarly, the Supreme Court's mishandling of the qualified immunity doctrine has insured a lack of accountability for force used against citizens.⁸⁴

Additionally, the Supreme Court's recent use-of-force cases have done little to create an incentive for safer policing and a more cautious exercise of deadly force.⁸⁵ Unless local governments decide to regulate these issues, we are destined to encourage police exercise of excessive force in life-or-death situations.⁸⁶

82. While unexplainable yet obvious racial disparity of jury verdicts in death penalty cases are examined, it is often assumed that black jurors would favor black defendants automatically. Professor Derrick Bell has written that there is "a widespread assumption that blacks, unlike whites, cannot be objective on racial issues and will favor their own no matter what. This deep-seated belief fuels a continuing effort . . . to keep black people off juries in cases involving race." DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 113 (1992).

83. One course of action would be to enact state statutes that place limitations on police discretion and provide for financial compensation when police make mistakes. "[G]rowing numbers of law enforcement agencies have been morally and sometimes criminally deformed by their dependence on drug war financing. In Paducah, Kentucky, the lawless operations of one agency . . . came to light when the discovery of almost \$66,000 secreted in its headquarters provoked an official inquiry and a major scandal." Eric Blumenson & Eva Nilsen, *The Drug War's Hidden Economic Agenda*, *THE NATION*, Mar. 9, 1998, at 15.

84. Forms establish a recorded written record, which establishes accountability. Some states have already begun the process of collecting information. "Without admitting wrongdoing, several police departments across the country have agreed to start collecting racial data on who is stopped and why." Florangela Davila, *ACLU Ads to Spotlight 'Racial Profiling' Issue*, *SEATTLE TIMES*, Apr. 20, 2000, at B5.

85. Some commentators have written about an unwritten code of silence among police that makes discovering some forms of improper conduct difficult. See generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (discussing the problem of police perjury).

86. Mistrust of the police stopping citizens has long been documented. One report in support of this idea generated in the late 1960s states the following:

The typical interaction between policemen and suspect, when people are questioning for us is not congenial. Only 9% of the policeman report that people they stop or usually fully cooperative. . . . More than 80% admit that the usual reaction is at least a dislike of being frisked. 41% of the policeman report that they usually have to use direct or forced to get the suspect respond adequately. 11% find that they are suspects usually physically resist their efforts to question and frisk. Such responses from suspects would be expected from hardened criminals. But in a situation in which a majority of those stopper need to carry weapons nor are criminals, and which 40% of

The better-reasoned approach is the one taken by the United States Court of Appeals for the Fourth Circuit. In the case of *Brockington v. Boykins*,⁸⁷ The court held that police officers who took multiple shots at the fleeing victim, after surrounding him, did not have qualified immunity because of the circumstances of the multiple shootings that occurred in that case.⁸⁸ The court reasoned that the circumstances of the stop, and how it unfolded, suggested that the officer overreached in his approach to using deadly force.⁸⁹ The Fourth Circuit takes a more balanced approach than the recent pronouncement of Justice Alito in *Plumhoff*.⁹⁰ *Plumhoff*'s summary explanation that force can be used until the subject of the force is incapacitated is too simplistic for an important issue of policy, as suggested by the facts of that case.⁹¹ It is that very type of rationale that has led to investigations regarding controversial killings when the police have used deadly force. Police forces like those in Cleveland, Ohio,⁹² and in Ferguson, Missouri have been subjected to detailed federal investigations by the United States Attorney General regarding many of their questionable police practices and procedures.⁹³ Given the reports issued in both cities by United States Justice Department. I fear that if local legislatures do not take action to make local police forces more accountable, there is little hope that street encounters with police will become less dangerous. The

the policeman frequently stop and frisk people, it is clear that considerable hostility is generated among many others than those directly engage in criminal behavior.

J. PAUL MITCHELL, RACE RIOTS IN BLACK AND WHITE 73 (1970).

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

88. *Id.* at 508.

89. *Id.* at 505.

90. *Id.*

91. Prior to the 1940s, civil rights groups complained about the problem of police abuse. "In 1939 and 1940 NAACP lawyers persuaded the Supreme Court to reverse three convictions on the ground that confessions had been coerced. The cases involved confessions that had been produced by severe beatings extending over several days." MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 50 (1994). This litigation was the catalyst for examination of other police misconduct issues.

92. U.S. ATTORNEY'S OFFICE, N.D. OHIO, INVESTIGATION OF THE CLEVELAND DIV. OF POLICE (2014).

93. See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 4.

Supreme Court's recent jurisprudence in *Stanton* and *Plumhoff* combine to make the use of force environment across the nation more deadly, and without further action, the danger to all citizens will only increase.