

Summer 2019

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Recommended Citation

María G. López Segoviano, *The Criminal Justice Standard for Determining Whether Police Officers Used Excessive Force: A Validation of White Supremacy*, 16 HASTINGS RACE & POVERTY L.J. 233 (2019).

Available at: https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol16/iss2/7

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The Criminal Justice Standard for Determining Whether Police Officers Used Excessive Force: A Validation of White Supremacy

MARÍA G. LÓPEZ SEGOVIANO*

Introduction

How do we know police violence when we see it? In March 2018, people gathered in Sacramento, California to block Highway I-5 and the Golden 1 Center entrance, calling for justice in the deadly shooting of Stephon Clark.¹ On March 18, 2018, two Sacramento Police Department (SPD) officers shot Clark in his grandmother's backyard within seconds of approaching him.² The two officers reportedly believed Clark was pointing a gun at them and shot him over twenty times.³ As is visible and audible in the body worn camera, one of the officers commanded Clark to show him his hands *after* he has fallen on the ground from being shot.⁴ Only after did officers realize the object in Clark's hand was a cell phone.⁵ In describing the incident, SPD Chief Daniel Hahn explained that the two officers "held their position for approximately five minutes until additional officers arrived."⁶ Officers then approached Clark and began life-saving measures, but not before first handcuffing him.⁷ The two SPD officers' treatment of Clark, a young Black man, is reminiscent of other incidents, namely the

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1. *Protesters Block Entrance to Golden 1 Center, Call for Justice After Deadly Police Shooting*, KCRA 3, Mar. 22, 2018, <http://www.kcra.com/article/protesters-block-entrance-to-golden-1-center-call-for-justice-after-deadly-police-shooting/19567843>.

2. *Gun, Gun, Gun, Sacramento Officer Shouts Moments Before Shooting Stephon Clark*, KCRA 3, Mar. 21, 2018, <http://www.kcra.com/article/video-audio-released-from-deadly-police-shooting-in-south-sacramento/19551537> (airing the aerial and body camera footage before and during the killing of Stephon Clark).

3. *Id.* (showing aerial and body worn camera footage before and during the killing of Stephon Clark).

4. *Id.* (showing police officer body worn camera footage from Axon Body 2 X81201231).

5. *Id.* (showing police officer body worn camera footage from Axon Body 2 X81201231).

6. *Id.* (showing video from March 20, 2018, when SPD Chief Daniel Hahn spoke to the Sacramento City Council about the incident).

7. *Id.*

killing of Michael Brown. After being shot by a Ferguson Police Department officer, eighteen-year-old Michael Brown's lifeless body—blood gushing out and brain exposed—was left uncovered in the middle of the street under the scorching sun for more than four hours for his grandmother, neighbors, other Black children to see.⁸

In the San Francisco Bay Area alone, Stephon Clark is just one of the many Brown and Black people who have been killed by the police. Sahleem Tindle, a twenty-eight-year-old Black man was killed by Bay Area Transit Authority Police in January 2018 in Oakland.⁹ Nineteen-year-old Latinx Jesus Adolfo Delgado Duarte was killed by San Francisco Police in March 2018 after being shot at ninety-nine times.¹⁰ There are many more.¹¹ Given these circumstances, what role can the law play to end state-perpetrated violence when Black and Brown people are misperceived as threats merely because of their skin color?

On April 3, 2018, California Assembly members Kevin McCarty and Shirley Weber, with the support of the American Civil Liberties Union, the National Association for the Advancement of Colored People, and Black Lives Matter Sacramento, announced Assembly Bill 931, which aimed to limit police officers' use of lethal force only to when it is *necessary* rather than to when police officers "feel threatened."¹² The Bill has since been

8. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES, Aug. 23, 2014, <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>. People described how unreal it felt for them to see Brown laying on the ground with beet red blood streaming out of his body, the neighborhood children seeing his lifeless body, and how, after a crowd began to gather around the yellow tape placed to isolate "the crime scene," more police arrived in riot gear and with police dogs as though they (the community members) had done something wrong. A Black man described seeing Brown's body face down on the pavement and how the image has stuck on his mind, each and every day. The way in which Clark's and Brown's body were handled after being mistakenly shot (note, neither of the two had weapons) calls to mind lynching and the goal accomplished by leaving Black and Brown people's bodies exposed for other Black and Brown people to see. See Campbell Robertson, *History of Lynchings in the South Documents Nearly 4,000 Names*, N.Y. TIMES, Feb. 5, 2015, <https://www.nytimes.com/2015/02/10/us/history-of-lynchings-in-the-south-documents-nearly-4000-names.html>; see also William D. Carrigan & Clive Webb, *When Americans Lynched Mexicans*, N.Y. TIMES, Feb. 20, 2015, <https://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html>.

9. Sarah Ravani & Jenna Lyons, *New Video Shows BART Police Officer's Path to Fatal Shooting*, S.F. CHRON., Feb. 21, 2018, <https://www.sfchronicle.com/bayarea/article/New-video-shows-BART-police-officer-s-path-to-12631061.php>.

10. Evan Sernoffsky, *SFPD Releases Video of Fatal Shooting of Man in Mission District*, SF GATE, Mar. 12, 2018, <https://www.sfgate.com/news/article/SFPD-releases-video-of-fatal-shooting-of-man-in-12748389.php#item-85307-tbla-5>.

11. See *infra* Part I.

12. Lydia O'Connor, *California Considering Unprecedented Law Restricting Police Firearm Use: Opening Fire Should Be Enforced as the Last Resort, The Bill's Supporters Say*, HUFFINGTON POST, Apr. 3, 2018, (internal quotations omitted) https://www.huffingtonpost.com/entry/california-police-force-legislation_us_5ac3c013e4b00fa46f872c28; CMB Newswire, *CA Legislators*

defeated, at least temporarily,¹³ but had it been successful, would adopting such legislation suffice to end state violence or would doing so merely change the language police departments use to defend their officers' actions?

Through an examination of contemporary allegations of police violence, this Note argues that the prevailing legal standard for unlawful force validates racism against Black and Brown people. Police officers disproportionately use lethal force against unarmed people of color.¹⁴ Officers facing excessive force allegations in civil and the ever-rare criminal cases assert that they feared for their life because they believed that the person against whom they used lethal force was armed.¹⁵ Because of the way that the legal standard is constructed, namely through a colorblind lens, officers are scarcely criminally charged, and when they are, they are overwhelmingly absolved of wrongdoing. The current "objective reasonableness" standard fails to take into account the basis for the "reasonable fear" in a manner that accounts for implicit and explicit biases. In this Note, I will argue that the lack of inquiry into the foundation of an officer's fear perpetuates white supremacy by validating the police officer's unstated fear of Black and Brown people. This Note takes an agnostic position on whether or not prosecution and incarceration are the best ways of ending police violence.

This Note does, however, focus on the criminal system as a critical locus of injustice because prosecuting attorneys theoretically represent "the people," and it is through the criminal justice field that harms posed to "society at large" are condemned. By focusing on the criminal justice system and its failure to condemn police violence, this Note argues that the criminal justice system functions to perpetuate racism and oppression against people of color—in addition to doing so through mass incarceration—by *condoning* harms committed against them.

Part I of this Note will provide an assessment of the prevalence of police's use of force and rates of charges and convictions against police officers for excessive force. Part II will provide a historical narrative of the "objectively reasonable" standard, which emerged from *Tennessee v. Garner*¹⁶ and *Graham v. Connor*,¹⁷ two federal civil rights cases. Part II will also explore the existing circuit split in federal court relating to one of the

Announce Plan to Restrict Police Use of Deadly Force (VIDEO), SAC OBSERVER, Apr. 4, 2018, <http://sacobserver.com/2018/04/ca-legislators-announce-plan-to-restrict-police-use-of-deadly-force-video/>.

13. Julian Mark, *Why AB 931, a Police Use-of-Force Reform Bill, Died This Week*, MISSION LOCAL, Aug. 31, 2018, <https://missionlocal.org/2018/08/why-ab-931-a-police-use-of-force-reform-bill-died-this-week/>; Natasha Minsker, *Justice Never Sleeps . . . and Neither Do We (Kind of)*, ACLU, Oct. 3, 2018, <https://www.aclunc.org/blog/justice-never-sleeps-and-neither-do-we-kind>.

14. See *infra* Part I.

15. See *infra* Part II.C.

16. 471 U.S. 1 (1985).

17. 490 U.S. 386 (1989).

standards' prongs, how prosecutors apply the standard, and how police departments train officers on what constitutes excessive force. Part III will provide a survey of research into racial biases and the effects they have on policing. Finally, Part IV will critique existing solutions and suggest that a colorblind solution to police violence cannot be the means by which the rights of communities of color are advanced.

I. The Frequency of Police Officers' Use Lethal Force, Its Disproportionate Impact on People of Color, and Resulting Convictions

Police violence in the United States is a common occurrence but it has been difficult, until recently, to have a good understanding of just how common it truly is. Part of the issue is that the efforts to collect this information have not been prioritized by governmental agencies. The Federal Bureau of Investigation (FBI) provides data on officer involved shootings based on information volunteered state police agencies.¹⁸ However, only approximately three percent of police departments volunteer this data to the FBI.¹⁹ As a result of the reliance on voluntary data—due to the federal government's inability to force state and local law enforcement agencies to provide this²⁰—the FBI identified 414, 397, 404, 426, and 461 “justifiable” homicides committed by law enforcement with weapons in 2009, 2010, 2011, 2012, and 2013, respectively.²¹ The FBI obtained similar

18. Federal Bureau of Investigation, *Data Quality Guidelines*, <https://ucr.fbi.gov/about-us/cjis/ucr/data-quality-guidelines-new> (last viewed Apr. 4, 2018) (noting that cities, universities, colleges, counties, states, tribes, and federal law enforcement agencies voluntarily provide reports); Federal Bureau of Investigation, Department of Justice, *Agency Information Collection Activities; Proposed eCollection eComments Requested; A Newly Approved Data Collection, National Use-of-Force Data Collection*, Oct. 2016, <https://www.federalregister.gov/documents/2016/10/05/2016-24173/agency-information-collection-activities-proposed-e-collection-e-comments-requested-a-newly-approved> (noting that the collecting is voluntary).

19. Kimberly Knidy, *FBI to Sharply Expand System for Tracking Fatal Police Shootings*, WASH. POST, https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html?utm_term=.d3d19efaffe7 (noting that “the FBI has struggled to gather the most basic data, relying on local police departments to voluntarily share information about officer-involved shootings” and that [s]ince 2011, less than 3 percent of the nation’s 18,000 state and local police agencies have done so.”) Dec. 8, 2015.

20. *Tracking Police Shootings*, BALTIMORE SUN, Dec. 9, 2015, <http://www.baltimore.com/news/opinion/oped/bs-ed-fbi-20151209-story.html>.

21. FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES 2013: JUSTIFIABLE HOMICIDE: JUSTIFIABLE HOMICIDE BY WEAPON, LAW ENFORCEMENT 2009–2013, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls. Justifiable homicide is defined as “(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen.” FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORT: Offense Definitions, <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.->

findings for 2014 and 2015: 453 and 442 justifiable homicides by law enforcement with weapon in 2014 and 2015, respectively.²² Such data has not been made available for 2016 or 2017 nor is there a record of non-justifiable police-perpetrated homicides or how determinations of justifiability are made.

Assessments from other governmental agencies vary. A 2011 Bureau of Justice analysis found that between 2003 and 2009, there were a total of 4,813 arrest-related deaths, sixty-one percent or 2,931 of which were classified as homicides.²³ The data collected excluded deaths resulting from interactions with non-state police officers such as FBI and Drug Enforcement Agency as well as deaths that occurred when the decedent was in criminal custody.²⁴ These numbers underestimate the prevalence of the issue as a result of the collecting methods: the Bureau of Justice's data collection is highly dependent on information that state and local law enforcement agencies voluntarily provide.²⁵ A report from the U.S. Department of Justice found that between June 1, 2015 and March 31, 2016, the number of arrest-related deaths "consistently ranged from 87 to 156 [] deaths per month, with an average of 135 deaths per month."²⁶ About sixty-four percent of those arrest-related deaths were homicides,²⁷ which would result in a projected total of 1,036 arrest-related homicides at the hands of police officers for the ten-month-period of June 2015 and March 2016.

Nongovernmental assessments of fatal police force provide statistics that are on par with the Bureau of Justice's projection of arrest-related deaths,

2013/resource-pages/offense-definitions/13-offensedefinitions_final.

22. FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES 2013: Justifiable Homicide by Weapon, Law Enforcement, 2011-2015, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2011-2015.xls.

23. ANDREA M. BURCH, *2003-2009 Statistical Tables*, BUREAU OF JUSTICE STATISTICS, Arrest-Related Deaths 4 at T1 (2011); Kimberly Knidy, *FBI to Sharply Expand System for Tracking Fatal Police Shootings*, WASH. POST, Dec. 8, 2015, https://www.washingtonpost.com/national/fbi-to-sharply-expand-system-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html?utm_term=.d3d19efaffe7 (noting that "the FBI has struggled to gather the most basic data, relying on local police departments to voluntarily share information about officer-involved shootings. Since 2011, less than 3 percent of the nation's 18,000 state and local police agencies have done so.").

24. *Id.*

25. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Arrest-Related Deaths Program Redesign Study, 2015-16: Preliminary Findings, at 2 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/ardprs1516pf.pdf> (noting that the 2003-2009 data was gathered from public information sources like news outlets and official agency information as opposed to only from law enforcement agencies).

26. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Arrest-Related Deaths Program Redesign Study, 2015-16: Preliminary Findings, (Dec. 2016), https://www.bjs.gov/content/pub/pdf/ardprs1516pf_sum.pdf.

27. *Id.*

but are more than twice that of the FBI data available for the year of 2015, the only year for which data from both *The Washington Post* and the FBI is available. Nongovernmental agencies' impetus for gathering data stems from the lack of reliable national statistics.²⁸ Starting January 1, 2015, *The Washington Post* began maintaining a comprehensive database to document every police-committed fatal shooting.²⁹ *The Washington Post* reported that 995, 963, and 987 people were killed by the police in 2015, 2016, and 2017, respectively.³⁰ Through a similar project, *The Guardian* found slightly higher numbers: 1,146 people were killed by police officers in 2015 and 1,093 in 2016.³¹

The rate at which police officers kill civilians is not equal amongst racial groups. Of the arrest-related deaths reported in the 2011 Bureau of Justice report, 42.1% of decedents were White, 31.8% were Black, and 19.7% were Latinx.³² Data from *The Washington Post* suggest similar trends: between 2015 and 2017, of those killed by the police, an average of 48% were White, 25% were Black, and 17% were Latinx; the other victims were of another or an unknown race.³³

When one takes into account that Black people account for about 13%

28. Kimberly Knidy, *FBI to Sharply Expand System for Tracking Fatal Police Shootings*, WASH. POST, Dec. 8, 2015, https://www.washingtonpost.com/national/fbi-to-sharply-expand-syst-em-for-tracking-fatal-police-shootings/2015/12/08/a60fbc16-9dd4-11e5-bce4-708fe33e3288_story.html?utm_term=.d3d19efaffe7; *The Counted: People Killed by Police in the US*: THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>.

29. Julie Tate et al., *How the Washington Post is Examining Police Shootings in the United States*, WASH. POST, July 7, 2016, https://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-shootings-in-the-united-states/2016/07/07/d9c52238-43ad-11e6-8856-f26de2537a9d_story.html?utm_term=.db6ab08b5f6b. The methods of collecting information included gathering information regarding "the circumstances of the shooting, whether the person was armed and whether the person was experiencing a mental health crisis" by gathering information through local news reporting agencies, law enforcement and social media as well as through monitoring independent databases like Killed by Police and Fatal Encounters. *The Washington Post* also conducted independent investigation and later, in 2016, it also began filing open-record requests with specific police departments. Doesn't track deaths from interactions of police w/ people who are in police custody already or officers who are off-duty.

30. 2015 Washington Post Database of Police Shootings, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/>; 2016 Washington Post Database of Police Shootings, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/>; 2017 Washington Post Database of Police Shootings, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/>.

31. *The Counted: People Killed by Police in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (note that the database includes in-custody deaths).

32. Andrea M. Burch, *2003-2009 Statistical Tables*, BUREAU OF JUSTICE STATISTIC, ARREST-RELATED DEATHS 4 at T6 (2011).

33. 2015 Washington Post Database of Police Shootings, *supra* note 30; 2016 Washington Post Database of Police Shootings, *supra* note 30; 2017 Washington Post Database of Police Shootings, *supra* note 30.

of the U.S. population, Latinxs (of any race) account for about 17.8%, and White non-Latinxs account for about 61.3% of the population,³⁴ it becomes readily visible that there is an extreme racial disparity resulting in higher likelihood that Black persons will be killed by the police, as noted in Figure 1 below.³⁵

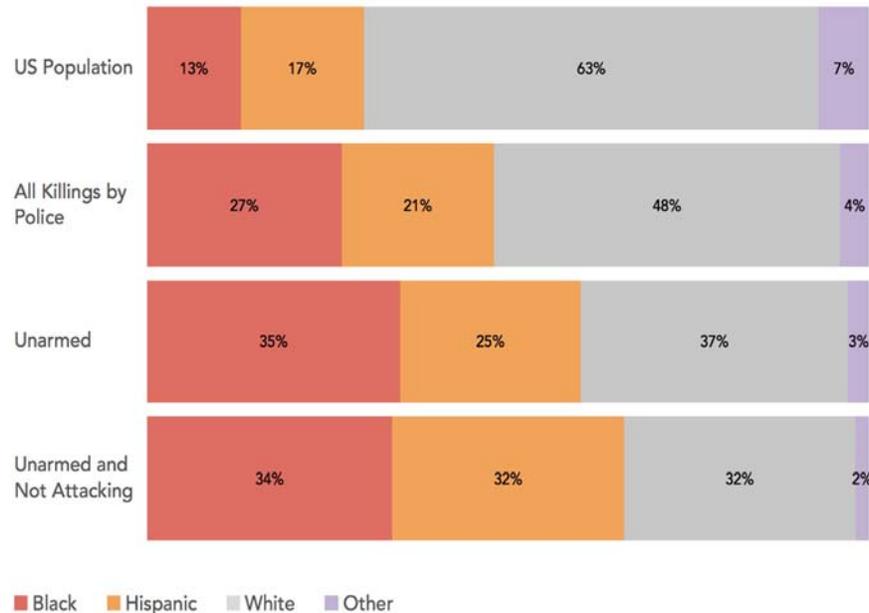


Figure 1. Racial Disparities in Police Violence

Based on the demographics of those under the criminal justice system's control, namely the incarcerated Black and Brown people in the criminal justice system,³⁶ an initial reaction might be to conclude that the disparate use of force against people of color is a result of higher propensity for criminality. That would be an inaccurate conclusion, however. It is difficult to quantify the pervasiveness of racial profiling and, because policing itself is racially

34. U.S. CENSUS BUREAU, Race and Hispanic Origin (2010), <https://www.census.gov/quickfacts/fact/table/US/POP010210#viewtop>.

35. MAPPING POLICE VIOLENCE, 2017 YEAR-END POLICE VIOLENCE REPORT, <https://policeviolencereport.org>.

36. Leah Salaka, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY INITIATIVE, May 28, 2014, <https://www.prisonpolicy.org/reports/rates.html> (last opened 3/18/18) (noting that based on the 2010 Census, White (non-Hispanics) accounted for 64% of the U.S. population and 39% or 450 per 100,000 of the incarcerated population, Latinos accounted for 16% of the U.S. populations and 19% or 831 per 100,000 of the U.S. incarcerated population, and Blacks accounted for 13% of the U.S. populations and 40% or 2,306 per 100,000 of the U.S. incarcerated population).

biased,³⁷ reliance on arrest data is problematic.³⁸ Examples of how policing practices have targeted people of color, particularly Black Americans, are prevalent.³⁹ Police officers' disparate use of force on Latinx and Black people is not explained by the alleged higher propensity for criminality amongst people of color. A 2016 study analyzing twelve law enforcement departments from geographically and demographically diverse regions in the U.S. found that "racially disparate crime rate is an insufficient explanation of racially disparate use of force rates for this sample of police departments."⁴⁰ The study found that "even when controlling for arrest demographics, participating departments revealed racial disparities across multiple levels of force severity" including use of Tasers.⁴¹ The study's sample size is small.⁴² However, its small sample size actually means that data underestimates the racial disparity negatively affecting Black Americans rather than overstating it.⁴³

A. Police Misconduct Charges and Convictions

In the case of excessive force prosecution, charges could be brought in the form of offenses like murder, manslaughter, assault, and battery.⁴⁴ In trend with other policing statistics, gathering information regarding excessive force prosecution is difficult because "statistics on prosecution efforts, reasons for prosecutorial decisions or prosecutorial success rates are not generally available to the public."⁴⁵ From data that is available, however, it

37. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW*, 2012; see generally UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION *THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2013).

38. Sharon Lafraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 24, 2015, https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-Black.html?_r=0 (describing that, for example, in "North Carolina's third-largest city, officers pulled over African-American drivers for traffic violations at a rate far out of proportion with their share of the local driving population. They used their discretion to search Black drivers or their cars more than twice as often as White motorists—even though they found drugs and weapons significantly more often when the driver was White." Further, "[o]fficers were more likely to stop Black drivers for no discernible reason. And they were more likely to use force if the driver was Black, even when they did not encounter physical resistance."

39. See generally ALEXANDER, *supra* note 37.

40. Phillip Atiba Goff et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, Center for Policing Equity, July 2016, http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdt at 26.

41. *Id.*

42. *Id.* at 4.

43. *Id.*

44. ALLYSON COLLINS & CYNTHIA BROWN, & HUMAN RIGHTS WATCH (ORGANIZATION), *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES*. New York: Human Rights Watch, 1998 at 115.

45. *Id.*

is clear that criminal charges are rarely filed against police officers involved in alleged misconduct.⁴⁶ After assessing twelve major cities in the United States, a late 1990s *Human Rights Watch Report* concluded that local prosecution of police officers for excessive force charges is very rare.⁴⁷ In San Diego, for example, there were 190 officer-involved shootings between January 1, 1985, and December 20, 1990.⁴⁸ All officers were cleared by the county prosecutor.⁴⁹ In Los Angeles, of 477 officer-involved shootings, an officer was charged in only one of those incidents.⁵⁰

The phenomenon has not changed much in more recent years.⁵¹ The *Washington Post* and Bowling Green State University criminologist Philip M. Stinson published an extensive assessment⁵² in April 2015 which concluded that since 2005, only fifty-four officers, forty-seven local and seven federal, had faced criminal charges after shooting at someone in the line of duty.⁵³ Of those fifty-four officers, twenty had a jury trial, three had a bench trial, nine took plea deals, and three had their case dismissed.⁵⁴ The

46. German Lopez, *The Cop Who Shot Philando Castile Was Cleared of Manslaughter. His Being Charged Was Still Rare*, VOX, June 16, 2017, <https://www.vox.com/2015/4/8/8369769/police-shooting-charges-convictions>; Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J., Nov. 24, 2014, <https://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955> (concluding that “41 officers were charged with murder or manslaughter for on-duty shootings over 7 years”); COLLINS & BROWN *supra* note 44.

47. COLLINS & BROWN *supra* note 44, at 115, 116 (noting that experts criminal prosecutions of officers are difficult to prove in court even when there is a federal investigation although jurors typically are “looking for a reason to convict, [i]n police misconduct cases, they are searching for reasons to acquit”) (citing to JEREMONE H. SNOLNICK AND JAMES FYFE, *ABOVE THE LAW*, (New York, The Free Press, 1993)); Philip Matthew Stinson, *Police Crime: The Criminal Behavior of Sworn Law Enforcement Officers*, SOCIOLOGY COMPASS, January 2015.

48. Police Executive Research Forum, *And Justice For All: Understanding and Controlling Police Abuse of Force* (William A. Geller & Hans Toch eds., 1995) (citing to Lisa Petrillo, *When a Cop Shoots, Who Takes a Closer Look? Here, Unlike in Most Cities, An Outside Probe Rarely Results When Officers Fire*, SAN DIEGO UNION, Dec. 21, 1990 at A1, A10).

49. CARL B. KLOCKARS, *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 3* (William A. Geller & Hans Toch eds., 1996).

50. *Id.*

51. Kimberly Kindy & Kimbriell Kelly, *Police Officers Charged In Fatal Shootings While On Duty: 54 Cases In The Past Decade*, WASH. POST, Apr. 12, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/04/12/police-officers-charged-in-fatal-shootings-while-on-duty-54-cases-in-the-past-decade/?utm_term=.1d7a0de233eb; *The Washington Post* & Philip M. Stinson, *Police Officers Prosecuted For Use Of Deadly Force*, WASH. POST, Apr. 11, 2015, <https://www.washingtonpost.com/graphics/investigations/police-shootings/>.

52. *Id.* (The methodology included a review of “news reports, grand jury announcements and news releases from prosecutors. For individual cases, reporters obtained and reviewed thousands of pages of court records, police reports, grand jury indictments, witness testimony and video recordings. Dozens of prosecutors and defense attorneys in the cases were interviewed, along with legal experts, officers who were prosecuted and surviving relatives of the shooting victims.”).

53. Kindy & Kelly, *supra* note 51; *The Washington Post* & Philip M. Stinson, *supra* note 51.

54. *Id.*

remaining nineteen had pending cases.⁵⁵ Twenty-one of the fifty-four officers were not convicted.⁵⁶ Of the eleven officers who were convicted and the three who took plea deals, two did not receive any sentence: Coleman “Duke” Brackney’s conviction was not imposed after he pled guilty to a misdemeanor charge of negligent homicide.⁵⁷ Similarly, Antonio Franklin Taharka’s conviction was not imposed after he accepted a plea deal for felony involuntary manslaughter; he did face a sentence that included three months of jail, nine months of house arrest, and nine years of probation.⁵⁸ Two police officers received less than a year sentence: James Bonard Fowler received a six-month sentence in state prison and Larry P. Norman received a sentence of probation, community service, and ninety days in jail.⁵⁹ Ten police officers received a sentence of one to ten years.⁶⁰

Although movements like Black Lives Matter have asserted to better organize around police violence, a bleak reality remains. Estimates suggest that between 2005 and April 2017, eighty police officers were arrested for alleged on-duty homicide of which they were accused.⁶¹ Of those, approximately thirty-five percent were convicted and the remaining officers’

55. Kindy & Kelly, *supra* note 51; *The Washington Post* & Philip M. Stinson, *supra* note 51.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* (Greg Junnier from the Atlanta Police Department in Georgia was sentenced to 6 years in federal prison for killing 92-year-old Kathryn Johnson in a drug raid in 2006; Jason R. Smith was indicted and charged for the same homicide and was sentenced to 10 years in federal prison; Paul Robert Carrier Jr. of Humboldt Police Department in Tennessee received a two-year prison sentence and served six months after killing 29-year-old unarmed Roy Glenn Jr. in 2009; Johannes Mehserle, BART Police Department in California, was convicted of felony involuntary manslaughter and was sentenced to two years in county jail after killing Oscar Grant in 2009; Brian Geoffrey Massa of Southwest City Police Department, Missouri was convicted of first-degree felony manslaughter after he killed Bobby Stacy in 2010 when Stacy attempted to flee after a traffic stop. The *Washington Post* database does not specify how long he was sentenced for although he is included in the group that was sentenced to 1-10 years; Richard Chrisman of the Phoenix Police Department in Arizona was serving a seven-year sentence after being convicted for killing Daniel Frank Rodriguez in 2010 during an domestic violence dispute to which Chrisman responded to; he shot Rodriguez when he attempted to leave the home on his bicycle; Randy “Trent” Harrison of Del City Police Oklahoma sentenced to four years in state prison following a first-degree manslaughter conviction for killing 18-year-old Dane Scott Jr. in 2012 when Scott attempted to run from police; Daniel Harmon-Wright of Culpeper Police Department in Virginia who shot 54-year-old Patricia Cook in 2012 four times while the unarmed woman sat in her vehicle. The *Washington Post* database does not specify how long he was sentenced for although he is included in the group that was sentenced to 1-10 years; Joshua Colclough of New Orleans Police Department in Louisiana who was sentenced to four years in prison after shooting 20-year-old Wendell Allen during a drug raid in 2012; and Stephen Merchant of Colfax Police Department in Louisiana was sentenced to five years in state prison after shooting he shot 54-year-old Harold Phillips five times in the back as Phillips attempted to run from police).

61. Madison Park, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN, Mar. 27, 2018, <https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html>.

charges were either dropped or pending.⁶² Based on estimate provided by *The Washington Post*,⁶³ during the twelve year period between 2005 and April 2017, more than 10,800 people would have been killed by the police. Nonetheless, only eighty officers, or less than 0.0074%, were even be charged.

In 2010 the Cato Institute⁶⁴ National Police Misconduct Reporting Project (NPMSRP) released similar findings.⁶⁵ Of the 8,300 “credible” police misconduct reports identified between April 2009 and December 2010, 3,238, or about thirty-nine percent resulted in criminal charges.⁶⁶ Of those, 1,063, or less than thirty-three percent, resulted in convictions.⁶⁷ In cases resulting in a conviction, officers were sentenced to jail or prison thirty-six percent of the time.⁶⁸

Notably, when NPMSRP compared sentences for convicted civilians and officers, it found that the average tended to be higher for civilians: officers’ average jail or prison sentence was about thirty-four months while that of the general public was forty-nine months.⁶⁹ Further, criminal charges were filed against members of the general public about sixty-eight percent of the time, and when they were sentenced, they were incarcerated seventy percent of the time.⁷⁰ Based on this and *The Washington Post*⁷¹ data, it’s clear that the criminal justice system is biased towards police officers. It is partly this bias that makes prosecutors hesitant to bring charges against police officers; at the end of the day, jurors generally look for a reason to acquit police officers but look for a reason to convict when it comes to civilians.⁷²

Seeking accountability through the civil system is possible. Federal and state statutes allow victims of police brutality and their families to sue civilly.

62. Park, *supra* note 61.

63. 2015 Washington Post Database of Police Shootings, *supra* note 30; 2016 Washington Post Database of Police Shootings, *supra* note 30; 2017 Washington Post Database of Police Shootings, *supra* note 30.

64. The Cato Institute “is a public policy research organization—a think tank—dedicated to the principles of individual liberty, limited government, free markets and peace. Its scholars and analysts conduct independent, nonpartisan research on a wide range of policy issues.” About Cato Institute, <https://www.cato.org/about> (last visited 5/8/2018).

65. David Packman, 2010 NPMSRP Police Misconduct Statistical Report –Draft, April 5, 2011, https://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/#_Prosecuting_Police_Misconduct (noting that it involved almost 11,000 police officers).

66. *Id.* (Note, the metrics by which an incident is deemed credible are unclear).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (relying on using data from the U.S. Bureau of Justice Statistics between 2002 and 2006 for the comparison).

71. 2015 Washington Post Database of Police Shootings, *supra* note 30; 2016 Washington Post Database of Police Shootings, *supra* note 30; 2017 Washington Post Database of Police Shootings, *supra* note 30.

72. COLLINS & BROWN *supra* note 44, at 116.

At the federal level, private claims of action can be filed under three sections of the Title of 42 of U.S. code: Sections 1983, 1985, and 1981.⁷³ Each of the sections establish a different claim; section 1983 “creates civil liability that is virtually identical to [c]riminal liability,” section 1985 claims are designed to remedy interference with someone’s civil rights, and section 1981 claims are designed to remedy interference with the “exercise of certain specific civil rights” not limited to cases where someone acted under the color of law as in 1983 and 1985 claims.⁷⁴ While it could be argued that the civil legal system makes justice more accessible it fails to promote accountability even when plaintiffs are successful.⁷⁵

Further, because the criminal justice system is the mechanism by which, at least in theory, harms posed to society are resolved, the failure to condemn the disproportionate use of violence against communities of color signals another mechanism by which people of color are disenfranchised.

II. Criminal Standard for Police Officer’s Use of Excessive force

Whether or not some police officers’ conduct is excessively forceful is a legal matter. However, it is also a policy concern. The United States is one of the countries with the highest rates of police violence and it is truly an outlier amongst developed countries.⁷⁶ And yet, as previously discussed, the criminal justice system itself has failed to address this serious problem.

The way in which the question of whether or not an officer used excessive force has not always been answered similarly. Before 1989, the majority of the federal courts addressed excessive force analysis under the Fourteenth Amendment substantive due process standard of “shocking to the consciousness” established under *Johnson v. Glick*.⁷⁷ The standard required

73. CARL B. KLOCKARS, *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 3* (William A. Geller & Hans Toch eds., 1996).

74. *Id.*

75. Allyssa Villanueva, *Police Terror and Officer Indemnification*, 13 HASTINGS RACE & POVERTY L.J. 201 (arguing that because of the extent to which taxpayers end up satisfying compensatory and punitive damage awards assessed against their police officers, liability is undercut); *Kisela v. Hughes*, No. 17-467, 2018 U.S. LEXIS 2066 at 13 (Apr. 2, 2018) (dissenting in the 7-2 decision, Sotomayor concludes that the “Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no ‘clearly established’ law. . . In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield.”).

76. Jamiles Lartey, *By The Numbers: US Police Kill More In Days Than Other Countries Do In Years*, THE GUARDIAN, June 9, 2015, <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries> (comparing the number of police shootings in the U.S. with those in United Kingdom, Australia, Iceland, Germany, Canada, and Finland).

77. Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 483 (1994) (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied 414 U.S. 1033 (1973)).

analyzing officers' subjective mental state to determine whether they applied force "maliciously and sadistically for the very purpose of causing harm."⁷⁸ Additionally, it required that the subjective analysis of whether the officer used excessive force include determine the need for application of force, the relationship between the need and the amount of force, the extent of injury.⁷⁹

Two Supreme Court cases changed the inquiry for determining whether police had used excessive force: *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). In *Tennessee v. Garner*, the Court considered the constitutionality of a Tennessee statute that allowed police officers to use "all the necessary means to effect [an] arrest" if criminal suspects fled or forcibly resisted after police officers gave them notice of their intent to arrest.⁸⁰ The issue rose to the U.S. Supreme Court after Edward Garner's father filed a 42 U. S. C. § 1983 action in Federal District Court asserting that his son's constitutional rights had been violated.⁸¹ Edward Garner, 15 years old at the time of his death, was shot by Memphis Police Officer Elton Hymon.⁸² Hymon and another officer were dispatched to respond to a potential break-in.⁸³ After arriving on scene, they saw Garner, whom Hymon perceived to be either 17 or 18 years old; Hymon noted seeing "no signs of any weapons" and being "reasonably sure" that he was unarmed.⁸⁴ Nonetheless, when Garner attempted to escape by climbing over a fence, Hymon shot Garner in the back of the head because "he was convinced [that if] Garner made it over the fence he would elude capture."⁸⁵ By a six to three vote, the Court found the Tennessee law unconstitutional and held that deadly force may only be used when "necessary to prevent the escape [of a suspected criminal defendant] and 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."⁸⁶ In so holding, the Court concluded that the reasonableness of the use of deadly force is a "seizure subject to the reasonableness requirement of the Fourth Amendment."⁸⁷

Graham v. Connor extended the reasonableness standard to claims of excessive force and overruled the previous standard of substantive due process.⁸⁸ Attorney H. Gerald Beaver, representing Dethorne Graham in the Supreme Court appeal, argued against the standard requiring "malicious and

78. Albert & Smith, *supra* note 77.

79. *Id.* at footnote 11.

80. *Garner*, 471 U.S. at 4.

81. *Id.*

82. *Id.* at 3.

83. *Id.*

84. *Id.* at 4.

85. *Garner*, 471 U.S. at 4.

86. *Id.* (emphasis added).

87. *Id.* at 7.

88. *Graham*, 490 U.S. at 388.

sadistic” on the part of the officer and in support of an “objective reasonableness” standard derived from the Fourth Amendment.⁸⁹ In November 1984, Mr. Graham, in the middle of an insulin reaction, hurriedly asked a friend of his, William Berry, to take him to the store to buy orange juice.⁹⁰ Upon entering the store, however, he realized that the line was too long and left.⁹¹ Officer M.S. Connor, saw Mr. Graham “entering and exiting the store unusually quickly”; Officer Connor followed Mr. Graham and Mr. Berry’s car and pulled them over after about half a mile, at which point Mr. Berry advised the officer that Mr. Graham was having a “sugar reaction.”⁹² When Mr. Graham exited the car, he ran around it twice.⁹³ Mr. Berry and Officer Connor stopped Mr. Graham who proceeded to sit on the curb and pass out.⁹⁴

Despite Mr. Berry pleading to the officers that they get Mr. Graham sugar, Officer Connor responded, “ain’t nothing wrong with the M.F. but drunk. Lock the S.B. up.”⁹⁵ When Mr. Graham regained consciousness after he had been handcuffed and moved by officers onto the hood of Mr. Berry’s car, Mr. Graham informed Officer Connor, and the other officers who had joined him by then, that he was diabetic and that he was having an insulin reaction.⁹⁶ The officer told Mr. Graham to shut up, shoved his head down against the hood of the car and, only after confirming that Mr. Graham had not in fact committed any offense at the convenience store, returned him home with a broken foot and other injuries.⁹⁷

In the ensuing civil suit Mr. Graham filed, the jury found against him, deciding that the officers had used an appropriate amount of force based on the circumstances and had not applied it “maliciously or sadistically for the very purpose of causing harm.”⁹⁸ The U.S. Supreme Court agreed with Mr. Graham’s appeal claim and held that all claims of law enforcement officers’ excessive force, deadly or not, “should be analyzed under the Fourth

89. OYEZ, *Graham v. Connor* Oral Argument - February 21, 1989, <https://www.oyez.org/cases/1988/87-6571> (last visited 5/8/2018).

90. *Id.*

91. *Id.*

92. *Graham*, 490 U.S. at 389.

93. *Id.*

94. OYEZ, *Graham v. Connor* Oral Argument - February 21, 1989, <https://www.oyez.org/cases/1988/87-6571> (last visited 5/8/2018); *Graham v. Connor* at 389.

95. 490 U.S. at 389.

96. OYEZ, *Graham v. Connor* Oral Argument - February 21, 1989, <https://www.oyez.org/cases/1988/87-6571> (last visited 5/8/2018).

97. *Id.*

98. *Graham*, 490 U.S. at 390.

Amendment and its “reasonable” standard rather than the four-part “substantive due process” test⁹⁹ under *Johnson v. Glick*.¹⁰⁰

Noting that the test could not be mechanically applied or subject to a precise definition, the Court did not define the test; however, it noted that the proper application of the test

[R]equired careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight [. . .] the question is whether the totality of the circumstances justify[es] a particular sort of . . . seizure [. . .] The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.¹⁰¹

Emphasizing that the reasonableness question was an inherently objective one, the Court remanded the case for consideration under the appropriate standard.¹⁰² The Court also added that just as an officer’s good intentions would not make an objectively unreasonable use of force constitutional, evil intentions would not make a Fourth Amendment violation out of an objectively “reasonable use of force.”¹⁰³ On remand, the jury found that the officers’ conduct had been permissible based on the new “objectively reasonable” standard.¹⁰⁴

a. Application of “Objectively Reasonable” Standard

The way in which “objectively reasonable” has been interpreted differs amongst federal courts. Courts mainly differ on how narrowly they construct the “totality of circumstances” criterion included in the *Graham v. Connor*.¹⁰⁵ In the narrower approach, the conduct of the officer is looked at only at the

99. *Graham*, 490 U.S. at 392.

100. *Id.* at 390 (Four-part test under *Johnson v. Glick* entailed looking at “(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4)” [w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.”).

101. *Id.* at 396.

102. *Id.* at 397, 399.

103. *Id.* at 386, 397.

104. *More Perfect: Mr. Graham and the Reasonable Man* (Nov. 29, 2017), WNYC Studios, <https://www.wnycstudios.org/story/mr-graham-and-reasonable-man>.

105. *Id.*; JOHN MICHAEL CALLAHAN, LETHAL FORCE AND THE “OBJECTIVELY REASONABLE” OFFICER: LAW, LIABILITY, POLICY, TACTICS AND SURVIVAL (2015), 19–28.

moment of the action while, in the broader approach, the courts look to what the officer did leading up to the moment.¹⁰⁶ The Second, part of the Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits use the narrower approach.¹⁰⁷ The First, Third, part of the Fourth, Ninth, and Tenth Circuits use the broader approach.¹⁰⁸

i. Narrow Interpretation of “Totality of the Circumstances”

As will be presented in the following section, the narrow approach of the circuits entails narrowing down the time of inquiry as to when the police officer allegedly used excessive force. In *Salim v. Proulx*, a case before the Second Circuit, the court held that [t]he reasonableness inquiry depends upon only the officer’s knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.”¹⁰⁹ Similarly, the Fourth Circuit’s analysis of whether force was objectively reasonable is based on the totality of circumstances,¹¹⁰ and is based on “the information available to the Deputies immediately prior to and at the very moment they fired the fatal shots.”¹¹¹ There is an internal conflict to the Fourth Circuit as some of the federal courts follow the approach providing for broader analysis.¹¹²

In analyzing whether the police officer’s force was objectively reasonable, the Fifth Circuit’s inquiry revolves around whether the officer’s decision was based on perceived danger *at the moment of the threat*.¹¹³ The Sixth Circuit has declined to directly consider whether an officer’s role in recklessly “creating the circumstances which required the use of deadly force” can be a part of the excessiveness analysis.¹¹⁴ Instead the Sixth Circuit

106. *More Perfect: Mr. Graham and the Reasonable Man supra* note 104; JOHN MICHAEL CALLAHAN, LETHAL FORCE AND THE “OBJECTIVELY REASONABLE” OFFICER: LAW, LIABILITY, POLICY, TACTICS AND SURVIVAL at 19–28 (2015).

107. *Id.* at 19, footnote 47.

108. *Id.* at 19–20, footnote 48.

109. *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996).

110. *Hensley v. Price*, 876 F.3d 573, 582 (4th Cir. 2017) (citing *Yates v. Terry*, 817 F.3d 877, 883 (4th Cir. 2016)).

111. *Id.*

112. *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (appealed from the United States District Court for the Eastern District of North Carolina) (noting that “artificial divisions in the sequence of events do not aid a court’s evaluation of objective reasonableness.”).

113. *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) (citing *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001) holding that “The excessive force inquiry is confined to whether the [officer or another person] was in danger in the at the moment of the threat that resulted in the [officer’s use of deadly force].”) (emphasis added).

114. *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (rejecting to apply the plaintiff suggested approach used by the Ninth Circuit in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002)).

affirmed its approach of analyzing excessive force claims in segments.¹¹⁵ Through this approach, the circumstances leading to the seizure, are ignored and the reviewer must “focus on the ‘split-second judgements’ made immediately before the officer used allegedly excessive force.”¹¹⁶

The Seventh Circuit follows the conservative approach as well; it observed that it “carve[s] into segments and judge[s] each on its own terms to see if the officer was reasonable at each stageFalse [And does] not return to prior segments of the event, and, in light of hindsight, reconsider whether the prior police decisions were correct.”¹¹⁷ Similarly, the Eighth Circuit limits its inquiry’ to “only those facts known to the officer at the precise moment the officers effectuate[d the] seizure” without regard for the events leading to the seizure and use of force.¹¹⁸ Finally, the Eleventh Circuit, following the same approach has added that the objectively reasonable approach extends to continued use of force by an officer until the suspect is fully secured.¹¹⁹

ii. *Broad Interpretation of “Totality of the Circumstances”*

The broader interpretation of the “totality of the circumstances” prong is used by the First, Third, part of the Fourth, Ninth, and Tenth Circuits.

The First Circuit has noted that the inquiry of reasonableness should focus on “the actions of the government officials leading up to the seizure” and the inquiry should cease when it is “clear that a seizure has occurred.”¹²⁰ Additionally, the court expressly clarified that the jury need not limit its examination of the police officers’ conduct to the moment of the shooting.¹²¹

Similarly, the Third Circuit has expressly rejected the usefulness of “artificial divisions in the sequence of events” and has emphasized that “[t]he better way to assess the objective reasonableness of force is to view it in full

115. Livermore, 476 F.3d 397, 406.

116. *Id.* (citing Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996)).

117. Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994); *see generally* JOHN MICHAEL CALLAHAN, LETHAL FORCE AND THE “OBJECTIVELY REASONABLE” OFFICER: LAW, LIABILITY, POLICY, TACTICS AND SURVIVAL (2015), at 19–21; Horton v. Pobjecky, No. 17-1757, 2018 U.S. App. LEXIS 4885 (7th Cir. Feb. 27, 2018).

118. Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995); JOHN MICHAEL CALLAHAN, LETHAL FORCE AND THE “OBJECTIVELY REASONABLE” OFFICER: LAW, LIABILITY, POLICY, TACTICS AND SURVIVAL (2015), at 19, footnote 47.

119. Jean-Baptiste v. Gutierrez, 627 F.3d 816, 821 (11th Cir. 2010).

120. Young v. City of Providence, 404 F.3d 4, 22 (1st Cir. 2005) (citing St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995)); JOHN MICHAEL CALLAHAN, LETHAL FORCE AND THE “OBJECTIVELY REASONABLE” OFFICER: LAW, LIABILITY, POLICY, TACTICS AND SURVIVAL (2015) at 19–20 footnote 48, 23–25. (note that the victim was an off-duty-police officer) (internal quotations omitted).

121. 404 F.3d 4, 22 (1st Cir. 2005) (citing St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995)).

context, with an eye toward the proportionality of the force in light of all the circumstances.”¹²² This does not mean that courts view all preceding events as important; rather, courts question the causal relationship of an event to the seizure and not to *when* the seizure occurred.¹²³ As discussed above, the Fourth Circuit has a split amongst some of the U.S. District Courts under its jurisdiction. In the broad approach, District Courts have also rejected “artificial divisions in the sequence of events.”¹²⁴ In the Ninth Circuit’s analysis of the events leading up to the use of force and the use of force itself.¹²⁵ In doing so, however, a showing of “bad tactics that result in a deadly confrontation that could have been avoided” does not allow a plaintiff to establish an excessive force claim.¹²⁶ The Tenth Circuit has similarly ruled that under *Graham*, it is entitled to consider whether the officer reasonably perceived himself to be in danger “at the precise moment that he used force and whether his own reckless or deliberate conduct—as opposed to his mere negligent conduct—unreasonably created the need to use force.”¹²⁷

b. Applicability in Criminal Law

Although the objectively reasonable standard emerged in federal cases, the standard is also used in the criminal context. In criminal cases, which are typically filed in state court, grand juries or prosecutors employ the objectively reasonable standard to determine whether or not to charge an officer.¹²⁸ The use of the objectively reasonable standard in the decisions to charge officers who have killed civilians is evidenced in the report filed to explain the decision not to charge officers in the killing of 12-year-old Tamir Rice.¹²⁹ In the report, county prosecutor Timothy McGinty explains that

122. *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) (citing *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (internal quotation omitted).

123. *Id.*

124. *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (appealed from the United States District Court for the Eastern District of North Carolina).

125. *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002).

126. *Id.*

127. *Thomas v. Durastanti*, 607 F.3d 655, 664 (10th Cir. 2010) (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 699 & n.7 (10th Cir. 1995)).

128. Leon, Neyfakh, *The Legal Reason Tamir Rice’s Killer Wasn’t Prosecuted*, THE SLATEST, Dec. 15, 2015 (interview of University of South Carolina School of Law assistant professor Seth Stoughton on how *Graham v. Connor*’s “objectively reasonableness” standard is used in criminal cases).

129. Timothy J. McGinty, CUYAHOGA COUNTY, PROSECUTOR’S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE *available at* http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf (noting at 37 that “[a]t the pre-indictment stage, the policy in all fatal use of deadly force cases requires that decision be left in the hands of the grand jury. If the grand jury determines the officer’s actions violated the Fourth Amendment, it will then consider what criminal charges should be brought against the officer.”)

Ohio uses the standard set by *Graham v. Connor*¹³⁰ and that in assessing the officers' actions in the case, the inquiry should "focus on the 'split-second judgments' made immediately before the officer used allegedly excessive force."¹³¹

c. Police Officer's Training of *Graham's* "Objectively Reasonable" Standard

For legal and policy reasons, it is critical to understand how police officers have understood an integrated *Graham v. Connor's* holding into their training. Journalist Kelly McEvers had the opportunity to view a Calibre Press law enforcement training on the use of permissible force per *Graham v. Connor*.¹³² In a "Street Survival" training, Jim Glennon shows officers video footage of two officer involved shootings: the 2015 killing of 'Freddy Centeno in 2015 and the 2013 killing of John Farrell.¹³³ Fresno Police Officers shot at forty-year-old Freddy Centeno ten times after they approached him and asked him to drop to the ground.¹³⁴ At the Calibre Press training, Glennon plays and replays the bodycam footage from the incident.¹³⁵ When replaying it, Glennon slows it down and emphasizes the moment when Mr. Centeno receives the command to get down on the ground and when he reaches into his right pocket.¹³⁶ Glennon emphasizes that the moment that Mr. Centeno's hand starts to move towards his pocket "is the only moment that matters" in asking "what would a reasonable officer do right now?"¹³⁷ Glennon narrates to trainees that at that moment Mr. Centeno does not go to the ground as he is told and rather reaches into his pocket for what the reasonable officer would think it is a gun.¹³⁸ He proceeds to asks officers whether the officers' use of force is justified under *Graham* and, after they do not respond, then tells them, that it is.¹³⁹ He then proceeds to ask them what they knew at that moment that the officers shot at Mr. Centeno. A similar script follows after Glennon presents footage of other police

130. McGinty, *supra* note 130, at 33–36 (noting that the court relied on the conservative interpretation used by the majority of circuits).

131. McGinty, *supra* note 130, at 38 (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir.1996)).

132. *More Perfect: Mr. Graham and the Reasonable Man* *supra* note 104 (describing a "Street Survival" training law enforcement officers receive through Jim Glennon at Calibre Press).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

shootings.¹⁴⁰ It is noteworthy that, in addition to training law enforcement officers, Calibre Press also provides expert witness services in the area of permissible use of force.¹⁴¹

One of the problems of such trainings, is that they bias trainees to interpret interactions with civilians in an oversimplified manner likely to result in overestimating threats. The way that the training provides meaning to 'civilians' body language fails to take into account different explanations for behavior. It assumes that officers are in danger and that civilians are ready to pull out guns out of their pockets and shoot at officers who usually outnumber them. Needless to say, it fails to address that an officer's implicit biases or stress experienced might result in giving White civilians more leeway before the officer shoots.

As in the case of Mr. Graham, the training that Calibre Press provides officers reinforces the schema that if a person is acting "suspiciously" they are up to no good. Further, the training fails to take into account the extent to which a person will become a suspect just for *being* Black.¹⁴² In those moments, officers fail to give the benefit of the doubt to people whom society has taught them to fear; while the officers might be willing to give someone who is light-skinned the benefit of the doubt, in Mr. Graham's case, before assuming he had committed a criminal offense, they might have first attributed his erratic behavior to a potential medical issue, as was actually the case. In the case of Mr. Centeno, the police might have taken more time to view his actions rather than rushing to shoot him ten times. After realizing that he did not actually have a gun in his pocket, his life would have been spared. The failure to address these alternatives through trainings perpetuates a cycle that further precludes use of tactics to deescalate situations and prevent civilian deaths.

In making incremental change within the objectively reasonableness standard, trainings should emphasize the innocent reactions civilians may have to being abruptly ordered on the ground by the police as to preserve civilians' lives. Furthermore, given that police department's culture or messaging regarding the normative expectations of officers can influence the "level of force that they deem reasonable,"¹⁴³ police departments should rely

140. *More Perfect: Mr. Graham and the Reasonable Man*, *supra* note 104.

141. Expert Witness, CALIBRE PRESS, <https://www.calibrepress.com/consulting/expert-witness/> (last visited Jan. 12, 2019).

140. *More Perfect: Mr. Graham and the Reasonable Man*, *supra* note 104.

143. Alpert & Smith, *supra* note 78, at 494. For example, if an officer is not reprimanded for an improper action, other officers are likely to construe the action as permissive. *See* reference to messaging within Kern County, recognized having the highest rates of police violence in the U.S. shooting suspects. Jon Swaine & Oliver Laughland, *Kern Co. Sheriff Once Said It's Cheaper to Kill Inmates*, THE GUARDIAN, Apr. 9, 2018, <https://www.theguardian.com/us-news/2018/apr/09/us-police-killings-kern-county-sheriff-donny-youngblood>.

only on training companies that are not solely focused on officer survival at all costs but rather ones that promote officer safety while seeking to also persevere civilian life.

d. Case Study: Philando Castile

On July 6, 2016, Philando Castile was driving with his girlfriend, Diamond Reynolds, and her daughter in Falcon Heights, Minnesota when Saint Anthony Police Department Officer Jeronimo Yanez conducted a pretextual traffic stop.¹⁴⁴ Yanez reportedly told Castile and Reynolds he had stopped them because of a broken taillight.¹⁴⁵ Just prior to the stop, however, Yanez radioed in that “the two occupants just look like people that were involved in a robbery . . . The driver looks more like one of our suspects, just because of a wide-set nose.”¹⁴⁶ However, Yanez later told investigators that he had stopped them because he believed that Castile “matched the description of a suspect in a robbery [that had occurred] days earlier.”¹⁴⁷

After Yanez asked Castile for his license and registration, Castile informed Yanez that he had a gun, which he was legally carrying.¹⁴⁸ The dash-cam footage demonstrates that at this point, Yanez’s hand moved to his gun.¹⁴⁹ Yanez later said he then “saw Castile “reaching down between his right leg, his right thigh area and the center console.”¹⁵⁰ He later expressed a concern about the smell of marijuana he had smelled when he first approached the car and noted that “he didn’t know whether Castile had the gun for ‘protection’ from a drug dealer or people trying to rob him.”¹⁵¹ In response, Yanez “told Castile to not to reach for the gun, and Castile said he was not reaching for it.”¹⁵² Castile’s girlfriend echoed that he was not reaching for it.¹⁵³ Yanez then yelled “Don’t pull it out” just before drawing his gun and shooting Castile seven times, all while Reynold’s four-year-old daughter was in the back seat.¹⁵⁴ After this, Reynolds began a Facebook Live

144. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST, June 21, 2017 <https://www.washingtonpost.com/amphtml/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/>.

145. *Id.*

146. Donald F. Tibbs, *Racial Profiling in the Era of Black De-Constitutionalism*, 23 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 181, 182 (2016).

147. Berman *supra* note 146.

148. *Id.*

149. *Id.*

150. *Id.*

151. Berman *supra* note 146.

152. *Id.*

153. *Id.*

154. *Id.*

video in which she is heard telling Yanez that Castile was reaching for his ID, which Yanez had asked for, and not the gun.¹⁵⁵

Yanez defended his actions afterwards saying that when Castile was reaching for something that he thought he saw a gun in Castile's hands and that he thought his hands were "wrapped around the butt of the gun."¹⁵⁶ Yanez' perceived smell of marijuana also had an effect in Yanez' decision to shoot: "if he had the "audacity to smoke in front of the four-year-old girl and risk her lungs and risk her life by giving her secondhand smoke and the front seat passenger," Yanez said "what care does he give about me."¹⁵⁷

Unlike many police officers, Yanez was charged with second-degree manslaughter and with two felony counts for intentionally discharging the gun and endangering Reynolds and her four-year-old daughter.¹⁵⁸ Despite these egregious circumstances and the availability of camera footage of the incident, the jury acquitted him of all charges.¹⁵⁹

III. Survey of Implicit Bias Research – The Impact of Bias on Policing and Fear

In a police misconduct civil case, the Court of Appeals from the Sixth Circuit highlighted that a person has a "right not to be shot unless they are *perceived* as posing a threat to officers or others."¹⁶⁰

What does it mean to be perceived as a threat? For people of color, Black men especially, being perceived as a threat means dying because your cell phone will be *perceived* as a gun.¹⁶¹ It means that if you are twelve-year-old boy who had toy gun, you will be *perceived* as dangerous man, and you will be killed.¹⁶² As a White man, it means that even when you are actually

155. Berman *supra* note 146.

156. *Id.* (original quotations).

157. *Id.*

158. Mark Berman, *Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed From Police Force*, WASH. POST, June 17, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm_term=.9db8b2c43990.

159. *Id.*

160. *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006). *See also* *Latits v. Phillips*, 878 F.3d 541, 548 (6th Cir. 2017) (emphasis added).

161. Laurel Wamsley, *Video Shows Sacramento Police Shooting Unarmed Black Man in Grandparents' Backyard*, NPR, Mar. 22, 2018, <https://www.npr.org/sections/thetwo-way/2018/03/22/596051907/video-shows-sacramento-police-shoot-unarmed-Black-man-in-grandparents-backyard> (depicting homicide of Stephon Clark in Sacramento a Black 22-year-old man whom they perceived to have a gun).

162. German Lopez, *An Open Carry Law Didn't Stop Police from Killing Keith Lamont Scott*, VOX, Sept. 21, 2016, <https://www.vox.com/2014/12/13/7384813/Black-open-carry> (describing the killings of Black 12-year-old Tamir Rice in Ohio and 43-year-old Black Keith Lamont Scott in North Carolina each because the police perceived them to have real guns when in actuality they had toy guns. Both of the incidents occurred in open carry states.).

armed, have killed people, and are threatening to use a gun to harm police officers and others around you, you will be humanized and seen as a someone's loved one, and given the benefit of the doubt; it means that police officers will be more likely to deescalate the situation rather than shooting and asking questions later.¹⁶³ The disparity with which people of color and White civilians are treated is visible even within the same police department. For example, in San Francisco, San Francisco Police officers engaged with people of color civilians such as Latino Alex Nieto, killed in March 2014,¹⁶⁴ undocumented Guatemalan immigrant Almicar Perez-López, killed in February 2015,¹⁶⁵ and Black American Mario Woods, killed in December

163. Charlene Adams, *Woman, 45, Dressed In Body Armor Is Arrested After Shooting Into Cars Waiting At Stop Signs Before Pointing Her Gun At Police*, DAILY MAIL, Dec. 29, 2014, <http://www.dailymail.co.uk/news/article-2890342/Woman-45-dressed-body-armor-goes-shooting-spree-leads-police-chase-points-loaded-gun-officer-arrested-peacefully.html>; Michael Segalov, *Tensions Flare As Confederate Flag Supporter Reaches For Gun When Confronted By Protests – In Pictures*, INDEPENDENT, Aug. 2, 2015, <https://www.independent.co.uk/news/world/americas/tensions-flare-as-confederate-flag-supporter-reaches-for-gun-when-confronted-by-protests-in-pictures-10433094.html> (describing police officers “stepp[ing] in to stop protests escalating as hundreds of people gathered at Stone Mountain in Georgia this weekend to celebrate the Confederate flag, as calls continue across the country for the flag to be banned.” In picture, a White supremacist reaches for his gun as the police officer moves his hand towards his, motioning as if to calm him down and to deescalate the situation—not to reach for his gun in self-defense); Bill Chappell, *Planned Parenthood Shooting Suspect Robert Lewis Dear To Appear In Court Monday*, NPR, Nov. 28, 2015, <https://www.npr.org/sections/thetwo-way/2015/11/28/457674369/planned-parenthood-shooting-police-name-suspect-procession-for-fallen-officer> (noting that Robert Lewis Dear, “accused of attacking a Planned Parenthood clinic in Colorado Springs and killing three people, including a police officer” and injuring nine others, was taken into custody after a five-hour standoff); Misha Dibono, *Man Gets 3-month Sentence For Waving Gun at Cops*, FOX S.D., June 22, 2015, <http://fox5sandiego.com/2015/06/22/man-gets-3-month-sentence-for-waving-gun-at-cops/> (describing incident where San Diego man “pointed his gun recklessly at various people in [a] park” and at a police helicopter *before* being shot in the stomach; the man survived).

164. Rebecca Solnit, *Alejandro Nieto Was Killed By Police In The Neighbourhood Where He Spent His Whole Life. Did He Die Because A Few White Newcomers Saw Him As A Menacing Outsider?* THE GUARDIAN, Mar. 21, 2016, <https://www.theguardian.com/us-news/2016/mar/21/death-by-gentrification-the-killing-that-shamed-san-francisco> (positing that “Nieto died because a series of White men saw him as a menacing intruder in the place he had spent his whole life. They thought he was possibly a gang member because he was wearing a red jacket. Many Latino boys and men in San Francisco avoid wearing red and blue because they are the colours of two gangs, the Norteños and Sureños—but the colours of San Francisco’s football team, the 49ers, are red and gold. Wearing a 49ers jacket in San Francisco is as ordinary as wearing a Saints jersey in New Orleans.”).

165. Oliver Laughland, *Chronicle of a Death Untold: Why Witnesses to Killings of Latinos by Police Stay Silent*, THE GUARDIAN, June 2, 2015, <https://www.theguardian.com/us-news/2015/jun/02/amilcar-perez-lopez-san-francisco-police-killing> (describing the murder of 20-year-old Almicar Perez-López, who was shot ten times by San Francisco police. SFPD contends that Perez-López was lunging at them with a knife but eyewitnesses, who also allege that they were driven underground, say that he was walking away after he dropped the knife.); Jonah Owen Lamb, *No Charges for SFPD Officers Who Killed Amilcar Perez Lopez*, S.F. EXAMINER, Apr. 12, 2017, <http://www.sfexaminer.com/no-charges-sfpd-officers-killed-amilcar-perez-lopez/>.

2015¹⁶⁶ strikingly more harshly with other White presenting folks. These men of color were not given the same courtesy that White man was given on a Saturday in September 2016 after pulling out a semi-automatic weapon in San Francisco's Civic Center, pointed it at officers and threatened to shoot officers and himself.¹⁶⁷ The San Francisco Police Department responded by evacuating people from the area and deploying a negotiator to convince the man to surrender.¹⁶⁸ These examples are demonstrative of the disparate impact Brown and particularly Black civilians face when it comes to policing. A report compiled through nongovernmental efforts has concluded that of the 98 of 102 people killed "by the Officers in Command in San Francisco since 1985" whose races has been identified, 69% were people of color.¹⁶⁹ Notably, while Blacks made up only 6% of the population in 2014, they made up 40% of those killed by police.¹⁷⁰ Within the San Francisco Police Department, uncovered incidents have given glimpses not just bias of against people of color but overt racism. In light of a corruption investigation against Ian Fruminger, a San Francisco Police Officer, racist and homophobic text messages were discovered amongst ten different SFPD officers.¹⁷¹ With such

166. Vivian Ho et al., *Killing by S.F. Police Sets Off Public Debate*, SF GATE, Dec. 4, 2015, <https://www.sfgate.com/crime/article/Man-shot-dead-by-S-F-cops-IDd-as-26-year-old-6673167.php> (describing then Police Chief Greg Suhr standing by the actions of his officers and saying "they were justified in shooting at 26-year-old Mario Woods, who investigators said was armed with a knife and was *suspected* in an earlier stabbing" (emphasis added)).

167. Cornell Barnard, *Suspect Involved in Civic Center Standoff Surrenders To San Francisco Police*, ABC NEWS, Sept. 24, 2016, <http://abc7news.com/news/suspect-involved-in-civic-center-standoff-surrenders-to-sf-police-/1525268/> (describing incident where "police and fire officials initially evacuated the plaza and asked people to avoid the area. Police say the armed man called police just before noon and was threatening to use it.").

168. *Id.*

169. *Killings by Law Enforcement*, San Francisco 1/1985-2016, Anti-Eviction Mapping Project, <http://www.antievictionmappingproject.net/murdermap.html> (data was gathered from police reports and news sources).

170. *Id.*

171. Phil Matier & Andy Ross, *SFPD looking at 10 more officers in offensive-text probe*, SF GATE, Mar. 17, 2015, <https://www.sfgate.com/bayarea/matier-ross/article/M-R-SFPD-looking-at-10-more-officers-in-6139314.php>; Government's Opposition To Defendant Furminger's Motion For Bail Pending Appeal, Appendix A, Case3:14-cr-00102-CRB Document247-, Filed 03/13/15, <https://drive.google.com/file/d/0B4pdvMvLhJfdQXNKtU0R04tUUU/view>; Aleksander Chan, *The Horrible, Bigoted Texts Traded Among San Francisco Police Officers*, GAWKER, Mar. 18, 2015, <http://gawker.com/the-horrible-bigoted-texts-traded-between-san-francisc-1692183203> (Quote from article: "We got two Blacks at my boys [sic] school and they are brother and sister! There cause dad works for the school district and I am watching them like hawks." In response to a text asking "Do you celebrate quanza [sic] at your school?" Furminger wrote: "Yeah we burn the cross on the field! Then we celebrate Whitemas." "Its [sic] worth every penny to live here [Walnut Creek] away from the savages." "Those guys are pretty stupid! Ask some dumb ass questions you would expect from a Black rookie! Sorry if they are your buddies!" "The buffalo soldier was why the Indians Wouldnt [sic] shoot the niggers that found for the confederate They [sic] thought they were sacred buffalo and not human." "Gunther Furminger was a famous slave auctioneer." "My wife has 2 friends over that don't know each other the cool one says to me get me a drink nigger

strong evidence of overt racism, it is difficult to believe that these officer's interactions with civilians were not colored by their racism and homophobia.

At minimum, however, most police officers are not free from implicit bias. Evidence of that has been well established. Scholarship in the field of implicit bias has alleged that race and gender on their own do not influence an officer's reaction or response but rather, that factors like environment, and perception thereof as dangerous (i.e., rate of violence) influence an officer's view of an environment as dangerous, which results in varied responses by the officer.¹⁷² Race, undeniably, is a factor.¹⁷³ A study assessing the effect of racial bias on police shootings asserts that bias is indeed a factor.¹⁷⁴ Others assert that while racial bias is not apparent in shootings, it is evident in other kinds of treatments, such as that relating to pepper-spray use, being handcuffed but not arrested, or being pushed to the ground.¹⁷⁵ Others still suggest that factors like the socioeconomic status of a community is outcome-determinative in how police officers treat people with whom they interact.¹⁷⁶

However, these theories fail to recognize the extent to which people of color, particularly Black Americans, are presumed to be violent and have criminal tendencies, even as children. After many years of being unaccredited, the Normandy School District in Missouri, which includes the high school that Michael Brown attended and which primarily served Black

not knowing the other is married to one just happened right now LMFAO.” “White power.” In response to a text saying “Niggers should be spayed,” Furminger wrote “I saw one an hour ago with 4 kids.” “I am leaving it like it is, painting KKK on the sides and calling it a day!” “Cross burning lowers blood pressure! I did the test myself!” In response to a text saying “All niggers must fucking hang,” Furminger wrote “Ask my 6 year old what he thinks about Obama.” In response to a text saying “Just boarded train at Mission/16th,” Furminger wrote “Ok, just watch out for BM’s” [Black males]. “I hate to tell you this but my wife friend [sic] is over with their kids and her husband is Black! If [sic] is an Attorney but should I be worried?” Furminger’s friend, an SFPD officer, responded: “Get ur pocket gun. Keep it available in case the monkey returns to his roots. Its [sic] not against the law to put an animal down.” Furminger responded, “Well said!” In response to a text from another SFPD officer regarding the promotion of a Black officer to sergeant, Furminger wrote: “Fuckin nigger.”).

172. Alpert & Smith, *supra* note 77, at 495.

173. Ronald Weitzer, *American Policing Under Fire: Misconduct and Reform*, SOCIAL SCIENCE AND PUBLIC POLICY, 475, 477 (2015).

174. Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States*, 2011-2014, Nov. 5, 2015, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141854>.

175. Kirsten Weir, *Policing in Black & White: Police Departments Are Eager for Ways to Reduce Racial Disparities—And Psychological Research Is Beginning To Find Answers*, 2016, Vol. 47, No. 11, <http://www.apa.org/monitor/2016/12/cover-policing.aspx> (citing Roland G. Fryer Jr. An Empirical Analysis of Racial Differences in Police Use of Force, Working Paper, July 2016, revised Jan. 2018, <http://www.nber.org/papers/w22399.pdf>).

176. Ronald Weitzer, *supra* note 173, at 477 (noting that “In middle-class and affluent communities, a police presence is typically episodic and, on the rare occasions when officers are called to the neighborhood, they are likely to treat residents with a measure of respect.”).

students, was closed.¹⁷⁷ As a result, students were incorporated into predominantly White schools against the wishes of parents at that district.¹⁷⁸ Parents furiously demanded that Normandy students, the Black children, be forced to pass through metal detectors because, as one parent incorrectly stated, the Normandy District school had closed because of violent incidents.¹⁷⁹ The biased views of these parents are not out of the norm. Race and criminality for Black Americans is presumed.¹⁸⁰ The process by which police officers, like the rest of society, act on their implicit biases against Blacks results in the disproportionate use of excessive force, and the fact that the standard does not create a check to prevent this, results in the validation of these implicit biases.

IV. The Excessive Force Standard Should Test the Foundation for Fear

Needless to say, police violence is a complex issue. As such, the solutions to address the police violence epidemic must be creative and multifaceted and the legal system can make strides to resolve the issue. However, in this journey, legal advocates must not forget the critical role that artists and others can have in ending police violence. The people who society fear are the same people that the police are more likely to assume pose threats to their safety. In order for policing to systemically change, a cultural revolution is necessary.¹⁸¹

The broader application of the objectively reasonable standard is the better standard to use considering public policy issues. Police departments should not be excused when they fail to respond to a situation adequately and innocent people, including criminal suspects, are made to pay the price for officers' mistakes with their bodies and life. However, even such a broad interpretation of the objectively reasonable standard fails to penalize officers who deserve to be reprimanded for their actions, from discharge from the force to civil and criminal liability. In reality, the standard that is used to evaluate whether police officers' use excessive force should take into consideration, amongst other factors, whether an officer's actions exacerbated a situation such that it became necessary to for them to use force.

177. *This American Life: The Problem We All Live With*, CHICAGO PUBLIC RADIO (July 31, 2015), <https://www.thisamericanlife.org/562/the-problem-we-all-live-with-part-one>

178. *Id.*

179. *Id.*

180. Jacqueline Johnson, *Mass Incarceration: A Contemporary, Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301 (2011).

181. In the context of film, for example, Black and Latinx Americans must occupy more roles than those of thugs, gangsters, and people committing criminal offenses.

As stated previously, the purpose of the note is not to argue that more police officers should be incarcerated for use of force. However, as currently used, the objectively reasonable standard fails to protect the people under its jurisdiction, particularly when those people are Black Americans. Even the broader approach is colorblind at its core: it does not in any way inquire whether the officer may have misperceived a person as a threat because of racial biases and stereotypes. For example, in the killing of Castile, the inquiry on reasonableness should have taken into account that Yanez's decision to shoot Castile a result of the perceived threat was informed by his anti-Blackness. Yanez noted stopping Castile's car because he just looked like the person involved in a crime because of his wideset nose. He also perceived Castile as a malicious person, as evidenced by Yanez' statement regarding Castile's (imagined) decision to expose the child in his car to smoke. It is important to decode such language that has usurped more explicit racist language but which, unconsciously, perpetuates Jim Crow laws. It may be the case that the legal system is inept at guiding the necessary transformation of society to stop police violence. However, the legal inquiry, at minimum, can begin to encapsulate the necessary considerations and not from the perspective of the colorblind officer. Policing, as described in this note, is evidently applied differently depending on the color of skin of the person. As many people of color can attest, they have become suspects merely because of the color of their skin. Policing, it seems, readily considers race in such circumstances. It seems impossible, therefore, to correct such a system that is devoid of analyzing this reality. More thought is needed to really determine how to adequately end the current, colorblind analysis in the use of force inquiry. However, it is necessary.

In the 1986 case of *People v. Goetz*, the Court of Appeals of New York got close to doing this. New York law allowed for the use of deadly force in self-defense only if one reasonably believed an attacker was using or was about to use deadly force or was committing or attempting to commit a kidnapping, forcible rape, forcible sodomy, or robbery.¹⁸² Two years earlier, Bernhard Goetz was on the subway train when he was approached on the train by four Black young men, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen.¹⁸³ The four young men reportedly went up to Goetz and said, "give me five dollars."¹⁸⁴ Goetz, who was illegally carrying a gun, stood up, pulled out his gun, and fired four times hitting Canty in the chest, Allen in the back, and Ramseur's arm and side and just missing Cabey.¹⁸⁵ While

182. *People v. Goetz*, 68 N.Y.2d 96, 106 (1986).

183. *Id.* at 96, 100 (1986); Bob Kappstatter, *The Story of Bernhard Goetz, the Subway Vigilante*, N.Y. DAILY NEWS, Aug. 14, 2017, <http://www.nydailynews.com/new-york/story-bernhard-goetz-subway-vigilante-article-1.815968>.

184. *Id.*

185. *Id.*

the decision of the court did not actually consider the race factor—Goetz was a White man and the four young men were Black—the court emphasized that “deadly force could be justified under the statute even if the actor’s beliefs as to the intentions of another turned out to be wrong, but noted there had to be a reasonable basis, viewed objectively, for the beliefs.”¹⁸⁶ In so doing, the court rejected the view “that the defendant’s own belief that the use of deadly force was necessary sufficed to justify such force regardless of the reasonableness of the beliefs.”¹⁸⁷ An adequate standard to evaluate the use of police force must take into consideration the way that people of different skin colors are policed, namely, the extent to which criminality is assumed and how this may affect an officer’s decision to use force. It is necessary that this occur not only to ensure that victims of police violence obtain justice, but also to ensure that moving forward, police departments train officers to actively combat reliance on implicit biases.

Further, in order to begin to remedy policing practices, the power of police “unions” must be limited. As of now, police lobby groups have the ability to shape policies that goes beyond what traditional unions are able to negotiate such as pay and benefits. For police unions, access to power has translated into policies now integrated into the Law Enforcement Bill of Rights¹⁸⁸ variations of which are alive in fourteen states including California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin.¹⁸⁹ Typically these the Police Bill of Rights create a veil precluding public transparency: when officers are charged, Police Bill of Rights sections limit the information that can be released to the public including the names of officers, the evidence that is presented in investigations, and the discipline, if any, resulting from internal investigation.¹⁹⁰ In order to change policing practices, they first have to be known and police departments must respond to external, community-based boards that have real authority to enforce agendas.

Finally, the legal standard must change. In California, AB 931, has proposed amending California Penal Codes Sections 196 and 835, which relate to permissive and permissive use of force.¹⁹¹ The resolution would

186. 68 N.Y.2d 96, 106 (1986).

187. *Id.*

188. Eli Hager, *Take A Look At The Law Enforcement Officers’ Bill Of Rights*, HUFFINGTON POST, Apr. 27, 2015, https://www.huffingtonpost.com/2015/04/27/law-enforcement-bill-of-rights_n_7153106.html.

189. *Id.*

190. *The Bay: Righteous Black Rage* (featuring interview with Cat Brookz, Black Lives Matter leader and co-founder of Anti-Police Terror Project).

191. Assem. B. 931, CA 2018.

result in changing the current process to require officers to using force only when

necessary to prevent imminent and serious bodily injury or death to the officer or to a third party, as specified. The bill would prohibit the use of deadly force by a peace officer in a situation where an individual poses a risk only to himself or herself. The bill would also limit the use of deadly force by a peace officer against a person fleeing from arrest or imprisonment to only those situations in which the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving serious bodily injury or death, and there is an imminent risk of serious bodily injury or death to the officer or to another person if the subject is not immediately apprehended.¹⁹²

It is questionable whether the above amendments would actually result in less use of police violence. Arguably, it would merely result in a change of rhetoric for defense. However, the AB 931 would allow for consideration of an officer's gross negligence and whether it contributed towards creating the necessity. Such standard is more of what is necessary. However, even this falls short. As discussed, it is necessary not only to amend the standard and to apply it to the benefit of police victims who often do not have the capacity to tell their side of the story, but also to change the underlying policy of only considering the context in which the officer made the decision absent considerations of the incident from the victim's perspective. Further, such standard still fails to capture an analysis of whether the foundation of an officer's decision-making is the result of any racial prejudices.

Conclusion

The process by which police officers, like the rest of society, act on implicit biases against Black people results in the disproportionate use of excessive force against Black and Brown people. The fact that the current objectively reasonableness standard does not create a check to prevent this results in the validation of these implicit biases.

Moving forward, attempts to address police violence must first and foremost acknowledge the extent to which not all people are equally affected by this. In order for a solution to be proper and truly address the complexities of the issue, it is necessary that solutions consider structural racism. Failing to do so will merely result in the defensive rhetoric transforming to defend the same issue. Future iterations of AB 931, for example, may prove wholly

192. Assem. B. 931, CA 2018.

unsuccessful in addressing state-sanctioned violence if it fails to require concrete, long-term, non-militarized training that allows police officers to come to terms to the extent to which they have been indoctrinated to racially profile people and to make assumptions on danger based on civilian's perceived race. Merely changing the standard without inquiring into officers' foundation for fear in a non-colorblind inquiry will merely result in defenses claiming necessity rather than reasonableness. Failure to include this will mean the police violence crisis will continue for centuries to come.