

Fall 2020

Black Lives Matter: Banning Police Lynchings

Mitchell F. Crusto

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly



Part of the [Constitutional Law Commons](#)

Recommended Citation

Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L.Q. 3 (2020).
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol48/iss1/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Black Lives Matter: Banning Police Lynchings

by Mitchell F. Crusto¹

Table of Contents

Introduction	4
I. Unequal Justice	9
A. Kill Policy	10
B. The Movement	15
C. Conundrum.....	19
II. George Floyd Anti-Lynching Code	26
III. Equal Justice	27
A. Executions.....	28
B. Systemic Racism	59
C. Lynching	63
Conclusion.....	68
Addendum I: The George Floyd Anti-Lynching Code.....	69

Abstract:

In the United States, police officers are granted a license to use lethal force and are subsequently exonerated from personal criminal liability for fatal killings, particularly when the victim is an African American. This Article advances the normative claim that the Court’s death penalty jurisprudence, including the “Cruel and Unusual Punishment” Clause of the Eighth Amendment, protects the victims of police homicides. Further, it contends that the police use of lethal force against African Americans constitutes “lynching”—a State-sponsored act of terror that supports systemic racism. Finally, it posits that the Constitution mandates that the

1. J.D., Yale Law 1981; M.A., Oxford 1985; Distinguished Henry F. Bonura, Jr. Professor, Loyola University New Orleans College of Law. Thanks to Loyola students Lindsey Freihoff, LaTreshia A. Hamilton, and Jillian Morrison; and to my colleagues at the John Mercer Langston Writers Workshop.

police use of lethal force be abolished—a transformative solution to save Black lives and to achieve equal justice.

Introduction**

In Louisville, on March 13, 2020, Breonna Taylor, a twenty-six-year-old Black² female emergency room technician, was slain while asleep in her bed in her home.³ Taylor was killed by at least eight of the more than twenty bullets fired by three white male plainclothes police officers who used a battering ram to force open the door while raiding her home pursuant to a no-knock warrant.⁴

In Minneapolis, on May 25, 2020, the media broadcasted a cellphone video of four police officers detaining a Black male who was handcuffed and lying face down in the street.⁵ One white⁶ male officer continuously pressed his knee to the man's neck, while two white male officers applied their knees to his back and legs, as another male police officer looked on.⁷ The detained man repeatedly cried out, "I can't breathe."⁸ The chokehold lasted for eight

2. This Article capitalizes the "B" in "Black," when referring to Americans of the African diaspora. See generally Kwame Anthony Appiah, *Opinion, The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/>; Dean Baquet et al., *Uppercasing 'Black'*, N.Y. TIMES (June 30, 2020), <https://www.nytc.com/press/uppercasing-black/> (announcing that the New York Times is capitalizing the word "Black" when describing people and cultures of African origin). Throughout this Article, I intentionally interchange the use of the words "Black" and "African American."

3. See Arian Campos-Flores et al., *Police Killing of Breonna Taylor Fuels Calls to End No-Knock Warrants*, WALL ST. J. (May 24, 2020), <https://www.wsj.com/articles/police-killing-of-breonna-taylor-fuels-calls-to-end-no-knock-warrants-11590332400>. Black women are victims of varying forms of police brutality, including fatal shootings, rape, and maiming. See Mary-Elizabeth Murphy, *Black Women Are the Victims of Police Violence, Too*, WASH. POST (July 24, 2020, 5:00 AM), <https://www.washingtonpost.com/outlook/2020/07/24/police-violence-happens-against-women-too/>. See generally KIMBERLÉ CRENSHAW ET AL., *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN* (2016).

4. Campos-Flores et al., *supra* note 2.

5. Evan Hill, *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html?auth=login-email&login=email> (George Floyd was arrested for allegedly passing a counterfeit twenty-dollar bill).

6. This Article intentionally notes that the officers who kill Blacks, particularly Black males, are white males, which raises masculinity issues that are beyond the scope of this Article. See generally Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (examining how masculinity contests specifically, and masculinities studies generally, affect policing).

7. Hill, *supra* note 4.

8. *Id.*

minutes and forty-six seconds, resulting in the man's death.⁹ That person's name was George Floyd.¹⁰

In Atlanta, on June 12, 2020, Rayshard Brooks, a twenty-seven-year-old Black male, was shot and killed by a white male police officer.¹¹ Brooks was shot twice in the back as he ran away from two police officers. His crime was "driving" while intoxicated, despite being asleep and parked in a Wendy's drive thru.¹²

The police killings of Rayshard Brooks, George Floyd, and Breonna Taylor¹³ compel examination of the legality and the morality of the police use of lethal force—raising disturbing questions about racial animus, systemic racism, and institutional racism against Blacks.¹⁴ In response to these questions, this Article contends that the police use of deadly force serves two purposes: first, it terminates the life of a Black person, usually a male, who refused to readily submit to police authority, and second, it terrorizes Blacks and thereby reinforces white supremacy. Thus, the police use of lethal force is both a moral issue and legal crisis that needs a transformative solution.

The recent police killings of Blacks, along with similar recent atrocities,¹⁵ have re-ignited the Black Lives Matter Movement (the "Movement").¹⁶ The Movement demands an end to racial injustice and

9. *Id.*

10. *Id.*

11. Helena Oliviero et al., *Who Was Rayshard Brooks?*, THE ATL. J. CONST. (June 14, 2020), <https://www.ajc.com/lifestyles/who-was-rayshard-brooks/IWjd3oZvR5D9QZywptiGkP/>.

12. *Id.*

13. These recent questionable uses of lethal force join those of Michael Brown, Tamir Rice, Trayvon Martin, Rodney King, and so many others.

14. *See infra* Part I, B.

15. For example, near Brunswick, Georgia, on February 23, 2020, Ahmaud Arbery, a Black male, was jogging when two white males, claiming they acted as civilian law enforcement, shot and killed him. *See* Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

In Aurora, Colorado, on August 24, 2019, Elijah McClain, a 23-year-old Black male, while walking home and unarmed, was stopped by white police officers. One officer placed McClain into a carotid hold, cutting off the flow of oxygen to his brain. Paramedics gave McClain ketamine to sedate him, while the officers held him down for fifteen minutes as McClain went into cardiac arrest. McClain was declared brain dead on August 30, 2019. *See* Stephanie Guerilus, *After Elijah McClain Was Killed by Police, a Petition Signed by More than 2M Seeks Justice*, THE GRIO (June 24, 2020, 6:10 PM), <https://www.aol.com/article/news/2020/06/24/after-elijah-mcclain-was-killed-by-police-a-petition-signed-by-more-than-2m-seeks-justice/24535890/>

16. *See* Alicia Garza, *A Herstory of the #BlackLivesMatter Movement* by Alicia Garza, THE FEMINIST WIRE (Oct. 7, 2014), <https://thefeministwire.com/2014/10/blacklivesmatter-2/Herstory>, BLACKLIVESMATTER, <https://blacklivesmatter.com/herstory/> ("Black Lives Matter

oppression in America, with a particular emphasis on stopping police brutality against Black people¹⁷ and eradicating systemic racism.¹⁸ The Movement is now a global protest of the police use of lethal force against Blacks.¹⁹

Unfortunately, the Movement faces a conundrum—(1) that police officers²⁰ are authorized to use deadly or “lethal force,”²¹ (2) that police

is an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise. It is an affirmation of Black folks’ humanity, our contributions to this society, and our resilience in the face of deadly oppression”). Parallel components of the Movement are the #BlackGirlsMatter and #SayHerName movements. *See also* Kimberlé Williams Crenshaw et al., *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, AFRICAN AMERICAN POLICY FORUM (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf; *Say Her Name, Resisting Police Brutality Against Black Women*, AFRICAN AM. POLICY FORUM (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf.

17. White male police officers’ killings of Black males raise particular concern. *See* Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed> (noting that unarmed Black males are seven times more likely than whites to die by police gunfire).

18. “Systemic racism,” for purposes of this Article, refers to the conscious and unconscious institutionalization of and the continuation of the oppression of Blacks. *See infra* Part III, B. Another example of systemic racism is the failure to properly investigate and to solve homicides of Blacks, from any perpetrator. *See, e.g.*, Wesley Lowery et al., *Murder with Impunity: An Unequal Justice*, WASH. POST (July 25, 2018), https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/?noredirect=on&utm_term=.281edee23750. *See generally* Paul Butler, *Race and Adjudication*, 3 REFORMING CRIMINAL JUSTICE 211-26 (Erik Luna ed., 2017) (2018), http://academyforjustice.org/wp-content/uploads/2017/10/10_Reforming-Criminal-Justice_Vol_3_Race-and-Adjudication.pdf [<https://perma.cc/7Q6N-2JX3>]; Terry Gross, *Policing Is the ‘Avatar of American Racism,’ Marshall Project Journalist Says*, NAT’L PUB. RADIO: FRESH AIR (June 10, 2020, 2:09 PM), <https://www.npr.org/2020/06/10/873564620/policing-is-an-avatar-of-american-racism-marshall-project-journalist-says>.

19. *See infra* Part I, B.

20. “Police officer(s),” for purposes of this Article, is defined as law enforcement personnel, who maintain public order, safety and health, and enforcement of laws and possess executive, judicial, and legislative powers, including police officers, sheriffs, prison guards, security guards, highway patrols, militia, and people acting in such roles.

21. “Lethal force,” for purposes of this Article, refers to the amount of force, deployed by a police officer, that is likely to cause either serious bodily harm or death to another person, or actually causes serious injury or death to another person. Lethal force includes shooting of firearms, chokehold, strangulation, stun guns aka Tasers, shooting rubber bullets, attack dogs, the injection of ketamine, aggravated assault, simple battery, no-knock raids, and failing to come to a person’s aid in a timely manner. *See* U.S. DEPT. OF JUSTICE, ATT’Y GEN. OCTOBER 17, 1995 MEMORANDUM ON RESOLUTION 14 (ATTACHMENT): COMMENTARY REGARDING THE USE OF DEADLY FORCE IN NON-CUSTODIAL SITUATIONS <https://www.justice.gov/archives/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1> (last updated Mar. 8, 2017) (defining deadly force as the use of any force that is “likely to cause death or serious physical injury”).

officers not only kill people,²² but the legal system condones those killings, particularly when the victims are Black,²³ and (3) that police officers who kill Blacks are seldom prosecuted and are rarely, if ever, convicted for homicide.²⁴ Such a lack of accountability of deadly force results in negative consequences— injustice for the victims and their families,²⁵ harm and fear for future victims,²⁶ and increased risk for police officers.²⁷

In response to this crisis, this Article uniquely challenges the constitutionality of the police use of lethal force²⁸ by analyzing the policies and Supreme Court doctrines that permit the killing of innocent Blacks.²⁹ It

22. See *infra* Part I, A.

23. See *infra* Part I, C.

24. See *infra* Part I, C. The police officers who killed George Floyd and Rayshard Brooks have been arrested and indicted for the killings, while only one officer was charged in the case of Breonna Taylor for “wanton endangerment.” Of note, no officers were charged with her actual killing. See Brittany Shammass et al., *Murder Charges Filed Against All Four Officers in George Floyd’s Death as Protests Against Bias Policing Continue*, WASH. POST (June 3, 2020), <https://www.washingtonpost.com/nation/2020/06/03/george-floyd-police-officers-charges/>; Faith Karimi et al., *Atlanta Officers Turn Themselves in on Charges in the Death of Rayshard Brooks*, CNN (last updated June 18, 2020), <https://www.cnn.com/2020/06/18/us/rayshard-brooks-atlanta-shooting-thursday/index.html>. See Richard A. Oppel Jr. et al., *Here’s What You Need to Know About Breonna Taylor’s Death*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>; see Rukmini Callimachi, et al., *Fired Officer is Indicted in Breonna Taylor Case; Protestors Wanted Stronger Charges*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/breonna-taylor-officer-indicted.html>.

25. *No Accountability for Police Shootings*, EQUAL JUST. INITIATIVE (Sept. 17, 2018), <https://eji.org/news/history-racial-injustice-no-accountability-for-police-shootings/>.

26. See generally Maquita Peters, *Being Black in America: “We Have a Place in This World Too,”* NAT’L PUB. RADIO (June 5, 2020), <https://www.npr.org/2020/06/05/867060621/being-black-in-america-we-have-a-place-in-this-world-too>; Amanda Graham et al., *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, VICTIMS AND OFFENDERS 549–573 (2020), <https://www.tandfonline.com/doi/full/10.1080/15564886.2020.1767252> (reporting on a nationwide study that found that Blacks are five times more likely to fear police brutality than whites). Racial profiling has a profoundly negative psychological impact on Black families, who fear for their safety and that of their family members and friends. See, e.g., Chuck Henson, *Reflections on Ferguson: What’s Wrong with Black People?*, 80 MO. L. REV. 1013, 1013–19 (2015).

27. Lawrence Rosenthal, *Police Violence Is Mostly Rooted in Fear. Ignoring That Makes Reform Harder*, NBC NEWS (June 12, 2020, 3:30 AM), <https://www.nbcnews.com/think/opinion/police-violence-mostly-rooted-fear-ignoring-makes-reform-harder-ncna1230266>; Martin Kaste, *Police Officers Fear More For Their Safety, Pew Survey Finds*, NAT’L PUB. RADIO (Jan. 11, 2017, 4:29 AM), <https://www.npr.org/2017/01/11/509361596/police-officers-fear-more-for-their-safety-pew-survey-finds>.

28. See *infra* Part III, A (utilizing Supreme Court death penalty jurisprudence to challenge the Supreme Court Fourth Amendment “search and seizure” jurisprudence views this issue as one of police officer’s accountability and the reasonability of using such force).

29. See *infra* Part III. This Article challenges the constitutionality of police use of lethal force, focusing on the process that legalizes killings and not the personal accountability of the

advances the normative claim that the police use of lethal force is an unconstitutional violation of the victims' right to life against State-sponsored³⁰ executions³¹ under the "Cruel and Unusual Punishment" Clause³² of the Eighth Amendment.³³ Further, it contends that the police use of lethal force is modern-day "lynching"³⁴—an act of terror that sustains

perpetrator. While this Article argues that racism is baked into policing policies in this country, a police officer who kills a person should not be permitted to naively claim that they were just following protocol. *Cf.* PERSPECTIVES ON THE NUREMBERG TRIAL (Guénaél Mettraux, ed., 2008) (in the Nuremberg trials of Nazi leaders, the court refused to accept the just-following-orders defense to the Holocaust atrocities). *See also* Jamie Ehrlich et al., *Federal Judge Pens Scathing Opinion on Qualified Immunity: 'Let Us Waste No Time in Righting This Wrong'*, CNN (Aug. 4, 2020, 9:52 PM), <https://www.cnn.com/2020/08/04/politics/qualified-immunity-federal-judge/index.html> (challenging qualified immunity's application to police use of lethal force).

30. "State-sponsored," for purposes of this Article, refers to actions authorized by and carried out on behalf of a State or the Federal governments.

31. "Execution(s)," for purposes of this Article, refers to a killing of a person by a state actor, that is, a person acting under the color of law, such as when a police officer kills a person during the course of performing their official duties. This Article seeks to distinguish a "wrongful" execution, such as the police use of lethal force versus a "rightful" execution, such as when the State "executes" a person in compliance with constitutionally-prescribed due process and in a humane manner, such as carrying out of a sentence of death of a condemned person, including by lethal injection, electrocution, gas inhalation, hanging, and firing squad. *See infra* Part III, A.

32. U.S. CONST. amend. VIII ("cruel and unusual punishments [shall not be] inflicted"). *See infra*, Part III, A. This Article refers to this and its ancillary constitutional provisions as "death penalty jurisprudence," as defined, for purposes of this Article as "all constitutional and fundamental rights provisions, such as and including Fifth and Fourteenth Amendment Due Process, which protect a person against Government infringement of the sanctity of a person's life."

33. U.S. CONST. amend. VIII. The Court's Eighth Amendment death penalty jurisprudence is plagued by racial bias, resulting in innocent Blacks being sentenced to death and executed. *See NAACP Death Penalty Fact Sheet*, NAACP (Jan. 17, 2017), <https://www.naacp.org/latest/naacp-death-penalty-fact-sheet/>; *Racial Bias*, NAT'L COAL. TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/pages/racial-bias> (last visited July 23, 2020). *See also* *Callins v. Collins*, 510 U.S. 1141, 1154 (1994) (Justice Blackmun dissenting, proclaimed that "[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."); *Cf. McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (holding that a pattern of racial disparities in the death penalty did not violate an individual's constitutional right of "equal protection of the law"). *Cf.* Eighth Amendment jurisprudence relative to the use of lethal force in custodial cases. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV L. REV 6 (2003) (providing one of the most comprehensive reviews of inmate litigation including those that pertained to conditions of confinement in violation of the Eighth Amendment); Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 NYU L. REV. 881 (2009) (examining when prison conditions would qualify as either "cruel" or "unusual" and how cruelty would be captured doctrinally for Eighth Amendment conditions of confinement analysis).

34. "Lynching," for purposes of this Article, is defined as State-sanctioned executions aka punishments, which, under the pretext of administering justice, without trial, tortured and

systemic racism which presently and continuously³⁵ kills, traumatizes, and subrogates Blacks.³⁶

This Article tests the thesis that the Eighth Amendment's death penalty jurisprudence mandates the abolition of the police use of lethal force, in three parts, seriatim. Part I explores the Black Lives Matter Movement's demand for equal justice and an end to systemic racism, and it describes a conundrum that the Movement faces. Next, Part II provides a transformative solution—the absolute abolition of the police use of lethal force. Part III argues that the solution is constitutionally mandated, and it is necessary to save Black lives and achieve equal justice.

I. Unequal Justice

In response to overwhelming evidence, including video recordings of unjustified and unaccountable police killings of Blacks,³⁷ Part I explains the legal challenges that the Movement faces in achieving the goal of equal justice.³⁸ It examines how police policies and practices promote the excessive use of lethal force, and it analyzes the true meaning of the phrase “Black Lives Matter.” Lastly, it presents a conundrum facing the Movement—that despite the protests, police officers have and will continue to get away with killing Blacks, as illustrated in the gruesome, yet underreported, police mass shootings of Blacks in New Orleans during Hurricane Katrina, which this Article refers to as the Katrina Massacre.³⁹

killed African American males, terrorizing Blacks and thereby maintaining white supremacy in the economic, social and political spheres. Historically, the most commonly utilized form of lynching was noose-hanging a Black man from a tree. *See infra* Part III, C.

35. *See generally* F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS (4th ed. 2015); Larry Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*, 53 *PHYLON* 42–66 (2016).

36. *See, e.g., To Make Them Stand in Fear*, KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 141 (1956) (“here, then, was the way to produce the perfect slave: accustom him to rigid discipline, *demand from him unconditional submission*, impress upon him his innate inferiority, *develop in him a paralyzing fear of white men*, train him to adopt the master's code of good behavior, and instill in him a sense of complete dependence”) (emphasis added); *see also id.* at 148. *See also* Lisette Voytko, *Viral Video Of Colorado Cops Holding Black Family At Gunpoint Ignites Outrage, Calls For Reform*, *FORBES* (Aug. 4, 2020, 12:05 PM), <https://www.forbes.com/sites/lisettevoytko/2020/08/04/viral-video-of-colorado-cops-holding-black-family-at-gunpoint-ignites-outrage-calls-for-reform/#335e71c074c5>.

37. *See generally* Andrea Castillo, *How Two Black Women in L.A. Helped Build Black Lives Matter from Hashtag to Global Movement*, *L.A. TIMES* (June 21, 2020, 7:00 AM), <https://www.latimes.com/california/story/2020-06-21/black-lives-matter-los-angeles-patricia-cullors-melina-abdullah>. *See also* Crenshaw, *supra* note 15; Garza, *supra* note 15.

38. *See supra* note 15.

39. *See infra* Part I, C, 2.

A. Kill Policy

Police killings have raised unique concerns following widely-publicized, controversial police shootings of Black children, females, and males.⁴⁰ Police officers kill Blacks at rates more than twice those of whites.⁴¹ Particularly, a white male police officer is most likely to fatally shoot a person who is a young Black male.⁴²

Police killings of Blacks reflect two problems: one is systemic racism and the other is the police policy that authorizes police officers to use lethal force. We begin with an analysis of the policies that license police officers to kill.

We start with detailed statistics of police killings in general. In the United States, officers kill people in many ways,⁴³ most commonly by shooting.⁴⁴ In 2019 alone, police officers fatally shot over one thousand

40. See, e.g., Mic, *23 Ways You Could Be Killed If You Are Black in America*, YOUTUBE (July 13, 2016), https://www.youtube.com/watch?v=U_VaNhI4CLo (showing video of the faces of many Black victims of police shootings and celebrities calling for change); Brittany Spanos, *Beyoncé, Rihanna, Alicia Keys: How to Get Killed While Black*, ROLLING STONE (July 13, 2016, 9:22 PM), <https://www.rollingstone.com/music/music-news/beyonce-rihanna-alicia-keys-how-to-get-killed-while-black-81976/> (showing video of the faces of many Black victims of police shootings and celebrities calling for change); see also Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html?_r=0.

41. See *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> (last visited Apr. 23, 2019) (noting the rate of death for young Black men was five times higher than white men of the same age, out of the 1,146 people killed by police in 2015); *Law Enforcement and Violence: The Divide Between Black and White Americans*, ASSOC. PRESS-NORC CTR. FOR PUB. AFFAIRS RES., <http://www.apnorc.org/projects/Pages/HTML%20Reports/law-enforcement-and-violence-the-divide-between-black-and-white-americans0803-9759.aspx>.

42. See Ryan Gabrielson et al., *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outsize Risk for Young Black Males*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white>; David Johnson et al., *Officer Characteristics and Racial Disparities in Fatal Officer-Involved Shootings*, 116 PNAS (July 22, 2019), <https://doi.org/10.1073/pnas.1903856116> (last updated Aug. 6, 2019).

43. See *supra* note 20 (listing the various types of lethal force). See also <https://mappingpoliceviolence.org> (providing an Excel database of the forms of officer caused death, the majority of which are from gun violence).

44. See *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> (last visited Apr. 23, 2019).

people.⁴⁵ By comparison, police officers have fatally shot more people in the last eighteen months than the total number of people that the States have executed for capital punishment in the last forty-four years.⁴⁶ This startling fact demands that we examine the constitutionality of police killings and whether the police use of lethal force passes constitutional scrutiny.

Police policies direct police officers to use deadly force, but only as a last resort.⁴⁷ Specifically, officers are guided by their individual departments and are expected to use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm.⁴⁸ Police use of force should include base levels of verbal and physical restraint, non-lethal force, and lethal force;⁴⁹ yet, instead, they are permitted and trained to

45. Fatal Force, *See 1,004 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST (July 16, 2020) <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

46. *Executions Overview, Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (2020), <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> (documenting that from 1976 to June 2020, there were 1,518 executions, of which 1,338 were by lethal injection, 163 by electrocution, 11 by gas inhalation, 3 by hanging, and 3 by firing squad). The number of annual police killings has been consistent over the last several years and is usually high compared to other countries. See Rob Picheta et al., *American Police Shoot, Kill and Imprison More People Than Other Developed Countries. Here's the Data*, CNN (June 8, 2020, 7:13 AM), <https://www.cnn.com/2020/06/08/us/police-floyd-protests-country-comparisons-intl/index.html>.

47. See WHAT YOU NEED TO KNOW ABOUT DEADLY FORCE IN THE UNITED STATES, AMNESTY INT'L (2015), https://www.amnestyusa.org/wp-content/uploads/2015/06/aiusa_deadlyforcereportjune2015-1.pdf (presenting a state-by-state legislative survey on police use of lethal force statutes in the United States and noting that U.S. law does not comply with international standards which limit police use of lethal force to instances necessary to protect against the threat of death or serious injury); see, e.g., *Chicago Police Department General Order G03-02, Use of Force* (Issue Date: Feb. 28, 2020, Effective Date: Feb. 29, 2020), <http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true>. See also Libor Jany, *Minneapolis Police Reveal Changes to Use-of-Force Policy*, STAR TRIB. (Aug. 9, 2016, 9:40 AM), <http://www.startribune.com/minneapolis-police-reveal-changes-to-use-of-force-policy/389509371/>. Further, several States allow police officers to kill a person who is attempting to escape from a prison or jail. See *infra* Part III, A, 2, discussing *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (stating that deadly force can be used to prevent escape if “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others”). Additionally, many such States allow private citizens to use lethal force if they are carrying out law enforcement activities. See generally Frances Robles, *The Citizen's Arrest Law Cited in Arbery's Killing Dates Back to the Civil War*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/article/ahmaud-arbery-citizen-arrest-law-georgia.html> (discussing Georgia's citizen's arrest law that arose in 1863).

48. See *Chicago Police Department General Order G03-02*, *supra* note 46. See, Jany, *supra* note 46.

49. See, e.g., *Policy on Use of Lethal Force*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/faqs/what-is-the-fbis-policy-on-the-use-of-deadly-force-by-its->

use deadly or lethal force, including shooting and chokeholds, under said “justifiable” circumstances.⁵⁰ Moreover, regardless of the official or unofficial restrictions and controversies on the use of lethal force, a police officer might and, often times does, violate those limitations.⁵¹ To this day, there are no methods to objectively control police brutality.

Additionally, those lethal force policies are rationalized by the danger narrative: the inherent dangers that police officers face while policing.⁵² However, this narrative has been debunked,⁵³ as very few police officers die in the line of duty.⁵⁴ For example, in 2019, eighty-nine police officers died in the line of duty, forty-eight officers of which died as a result of felonious

special-agents (last visited Sept. 6, 2020) (“FBI special agents may use deadly force only when necessary—when the agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the agent or another person. If feasible, a verbal warning to submit to the authority of the special agent is given prior to the use of deadly force”).

50. See *Overview of Police Use of Force*, NAT’L INST. OF JUSTICE (Mar. 5, 2020), <https://nij.ojp.gov/topics/articles/overview-police-use-force> (reporting that [t]he International Association of Chiefs of Police has described use of force as the “amount of effort required by police to compel compliance by an unwilling subject”). “Justifiable” circumstances exist when the officer reasonably believes the subject poses a significant threat of serious bodily injury or death to themselves or others. Lethal force is judged by an objective reasonableness standard—not subjective as to what the officer’s intent might have been, and, therefore, must be judged from the perspective of a “reasonable police officer at the scene.” See *Graham v. Connor*, 490 U.S. 386 (1989), discussed in Part III, A (reporting that [t]he International Association of Chiefs of Police has described use of force as the “amount of effort required by police to compel compliance by an unwilling subject”).

51. See Bill Hutchinson, *Atlanta Police Use-of-Force Policy Violated Multiple Times in Fatal Shooting of Rayshard Brooks: Prosecutor*, ABC NEWS (June 18, 2020, 4:21 AM), <https://abcnews.go.com/US/atlanta-police-force-policy-violated-multiple-times-fatal/story?id=71295429/>. Following the George Floyd and Rayshard Brooks killings, some municipalities are reassessing their use of force policies. See, e.g., *Atlanta Mayor Orders Changes to Police Use-of-Force Policy, Calls Rayshard Brooks Shooting “Murder”*, CBS NEWS (June 16, 2020, 8:38 AM), <https://www.cbsnews.com/news/atlanta-mayor-keisha-bottoms-police-force-policy-rayshard-brooks-shooting/>.

52. See Ivana Dukanovic, Note, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911, 913 (2016).

53. See Jordan B. Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635 (2019) (analyzing a comprehensive data set of thousands of traffic stops that resulted in violence against officers across more than two hundred law enforcement agencies in Florida over a 10-year period and finding that “violence against officers was rare and that incidents that do involve violence are typically low risk and do not involve weapons”).

54. See *FBI Releases 2019 Statistics on Law Enforcement Officers Killed in the Line of Duty*, FEDERAL BUREAU OF INVESTIGATION (May 4, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty>.

acts, forty-four of whom were killed by firearms.⁵⁵ Despite the low risk of being killed by civilians, police officers are still licensed to kill, pursuant to and restricted by official police policies.⁵⁶

Further, many other controversial, yet legal, tactics are used to perform the policing function, often resulting in police brutality. Many of those are abusively used against Blacks, including use of “nonlethal” weapons,⁵⁷ no-knock warrants,⁵⁸ racial profiling,⁵⁹ bench warrants following default judgments,⁶⁰ and stop and frisk.⁶¹

55. See, *FBI Releases 2019 Statistics on Law Enforcement Officers Killed in the Line of Duty*, FEDERAL BUREAU OF INVESTIGATION (May 4, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty>.

56. See *supra* note 46.

57. Police officers are legally permitted to use “nonlethal” (but often deadly) weapons, including rubber bullets, tear gas, flash-bangs, beanbag rounds, Tasers, and attack dogs, as evidenced by their use during the recent Black Lives protests, sometimes causing serious, even fatal, injuries. Pepper spray is an example of nonlethal force, which along with other forms of non-lethal force can cause serious bodily harm. See Amy McKeever, *From Tear Gas to Rubber Bullets, Here’s What ‘Nonlethal’ Weapons Can Do to the Body*, NAT’L GEOGRAPHIC (June 2020), <https://www.nationalgeographic.com/science/2020/06/what-nonlethal-weapons-can-do-to-the-body-george-floyd/>; see Sgt. Tracee L. Jackson *Non-Lethal Packs a Punch*, JOINT INTERMEDIATE FORCE CAPABILITIES OFFICE (Aug. 12, 2006), <https://jnlwp.defense.gov/Press-Room/In-The-News/Article/577845/non-lethal-packs-a-punch/> (stating “a weapon is considered non-lethal because it does not produce penetrating trauma. If it doesn’t go into an individual’s skin, it’s called non-lethal. However, many weapons used may produce lethal results if employed in a different manner. The terminology better suited to this array of gadgets is ‘less than lethal’”). For a detailed recounting of all “less-lethal” weapons that law enforcement is allowed to use, see Alyssa Fowers et al., *A Guide to the Less-Lethal Weapons That Law Enforcement Uses Against Protestors*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/nation/2020/06/05/less-lethal-weapons-protests/?arc404=true>.

58. A judge may issue a no-knock warrant that allows police officers to enter a property without immediate prior notification of the residents, such as by knocking or ringing a doorbell. See generally Peter G. Berris et al., *“No Knock” Warrants and Other Law Enforcement Identification Considerations*, CONG. RESEARCH SERV. (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10499>.

59. Police use “racial profiling” when suspecting or targeting a person on the basis of assumed characteristics or behavior of a racial group, rather than on individual suspicion. See Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 HARV. C.R.-C.L. L. REV. 159, 167–73 (2016) (identifying racial profiling as a factor in police shootings).

60. A judge may issue a bench warrant, which authorizes police to arrest a person charged with some contempt, crime, or misdemeanor. See, e.g., Richard A. Webster, *One in 7 Adults in New Orleans Have a Warrant Out for Their Arrest, New Data Shows*, WASH. POST (Sept. 20, 2019, 12:47 PM), https://www.washingtonpost.com/national/one-in-7-adults-in-new-orleans-have-a-warrant-out-for-their-arrest-new-data-shows/2019/09/20/db85a5c8-da3d-11e9-a688-303693fb4b0b_story.html.

61. Police are allowed to stop and frisk, a controversial practice, allowing police to temporarily detain, question, search people for drugs, weapons, and contraband. See L. Song

The use of deadly force and other “nonlethal” tactics has become more pervasive, as the criminalization of petty crimes has increased law enforcement’s intrusion into our everyday lives,⁶² leading to over-policing⁶³ and the militarization of the police.⁶⁴ This is especially true in relation to the War on Drugs (the “WOD”),⁶⁵ which has increased searches⁶⁶ and arrests,⁶⁷ with a disproportionate impact on the Black community.⁶⁸ As a result of the

Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144–46 (2012) (identifying a reasonableness problem in the low hit rates of stop-and-frisks and the judgment of suspiciousness).

62. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1062 (2015).

63. Jonathan Blanks, *The War on Drugs Has Made Policing More Violent: What Can be Done to Curb the Excessive and, Sometimes, Predatory Policing that Has Emerged from the Drug War?*, DEMOCRACY: J. OF IDEAS (July 19, 2016), <https://democracyjournal.org/arguments/the-war-on-drugs-has-made-policing-more-violent/> (last visited July 22, 2019) (noting that “[p]olice are incentivized to initiate unnecessary contact with pedestrians and motorists, and they do so most often against ethnic and racial minorities. Such over-policing engenders resentment among minority communities and jeopardizes public safety”).

64. See, e.g., RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2013) (arguing that militarization has produced police forces inconsistent with the principles of a free society); see also WHO DO YOU SERVE, WHO DO YOU PROTECT? *POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES* (Maya Schenwar et al. eds. 2016) (exploring alternatives to the police for keeping communities safe); Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151 (2015).

65. “War on Drugs,” for purposes of this Article, refers to the politically-motivated legal and extra-legal campaign to discourage the production, distribution, and consumption of psychoactive drugs, particularly marijuana. See generally Scott C. Martin, *A Brief History of Marijuana Law in the United States*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america/>; Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367 (2020).

66. While the Fourth Amendment states “the right of the people to be secure in their persons, houses, paper and effects against unreasonable searches and seizures,” there is little doubt that WOD policy has whittled away significantly at that protection. U.S. CONST. amend. IV. See, e.g., Radley Balko, *The Drug War Exception for the Fourth Amendment*, WASH. POST (Mar. 31, 2014 1:26 PM), <https://www.washingtonpost.com/news/the-watch/wp/2014/03/31/the-drug-war-exception-to-the-fourth-amendment/>; Conor Friedersdorf, *Thurgood Marshall’s Prescient Warning: Don’t Gut the 4th Amendment*, THE ATLANTIC (July 10, 2013), <https://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>.

67. For example, about twenty percent, or about four hundred thousand of those incarcerated, are imprisoned for marijuana-related offenses. See *Drug War Statistics*, DRUG POLICY ALLIANCE <https://www.drugpolicy.org/issues/drug-war-statistics> (last visited Aug. 31, 2020) (noting that the U.S. spends over fifty billion dollars on the war on drugs, annually, with over six hundred thousand arrested in 2016 for marijuana law violations, of which eighty-nine percent were only for possession).

68. April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), <http://www.alternet.org/drugs/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison> (calling for reparations for

WOD, every person in America is a suspect, and Blacks, in particular, are presumed guilty until proven innocent.⁶⁹

In summary, the highly publicized, questionable police killings and the subsequent exoneration of the offending officers has heightened a centuries-old-call for an end to police brutality against Blacks.⁷⁰ That rallying call will be forever remembered, although one wonders whether it will produce real change.

B. The Movement

The Black Lives Matter Movement is an international movement against systemic racism and police brutality. It started in protest to the February 26, 2012, killing of Trayvon Martin, a seventeen-year-old Black male, by George Zimmerman, a white male and self-appointed “neighborhood watch coordinator.”⁷¹ Martin’s death prompted rallies, marches, and protests across the nation,⁷² including an online petition calling for a full investigation and prosecution of Zimmerman that received 2.2

the war on drugs, as the WOD has decimated families, spread despair and hopelessness through entire communities).

69. See *Drug War Statistics*, *supra* note 66 (“In the 39 states for which we have sufficient police data, Black adults were more than four times as likely to be arrested for marijuana possession as white adults.” (footnotes omitted.)). See also *Report: The War on Marijuana in Black and White*, AM. C.L. UNION, (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf (last visited July 22, 2019); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 391 (2002).

70. See e.g., Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, THE SMITHSONIAN (July 27, 2017) <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> (updated May 29, 2020); H. Bruce Pierce, *Blacks and Law Enforcement: Towards Police Brutality Reduction*, 17 THE BLACK SCHOLAR 3 (1986); Police Violence Against Afro-Descendants in the United States, Inter-Am. Comm’n H.R., Rep. No. OEA/Ser.L/V/II. doc. 156 (2018), <http://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf>.

71. Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012, 10:48 AM), <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html> (Martin was returning home to a condominium owned by his father’s fiancé, after buying a can of Arizona Iced Tea and a pack of Skittles, in Sanford, Florida. Zimmerman saw the teenager and reported him to the Sanford Police as “suspicious” and several minutes later, fatally shot the Black teenager in the chest.)

72. Karen Grigsby Bates, *A Look Back at Trayvon Martin’s Death and the Movement It Inspired*, NPR (July 31, 2018, 7:34 AM) <https://www.npr.org/sections/codeswitch/2018/07/31/631897758/a-look-back-at-trayvon-martins-death-and-the-movement-it-inspired>; Matt Williams et al., *Trayvon Martin Protests Being Held in More than 100 US Cities*, THE GUARDIAN (July 20, 2013, 10:35 AM), <https://www.theguardian.com/world/2013/jul/20/trayvon-martin-protests-us-cities>.

million signatures.⁷³ After national media focused on the incident, Zimmerman was eventually charged and tried, but a jury acquitted him of second-degree murder and manslaughter in July 2013.⁷⁴ In response to the acquittal of George Zimmerman, the Movement began with the use of the hashtag #BlackLivesMatter on social media.⁷⁵

Then, the Movement received national attention following the police shooting of Michael Brown in Ferguson, Missouri.⁷⁶ On August 9, 2014, Michael Brown, Jr., an eighteen-year-old Black male, was fatally shot by a white male Ferguson police officer Darren Wilson.⁷⁷ This incident ignited one of the first in-person public protests of the Movement, at a St. Louis mall, utilizing the slogan “Hands up, don’t shoot.”⁷⁸

Over five years later, the death of George Floyd by a police chokehold reignited the Movement, bringing broad national⁷⁹ and international attention⁸⁰ to racial inequity in this country.⁸¹ Throughout its history, the Movement demanded police reform, particularly, as it relates to brutality

73. Tracy Martin & Sybrina Fulton, *Prosecute the Killer of Our Son, 17-Year-Old Trayvon Martin* (Apr. 11, 2012), <https://www.change.org/p/prosecute-the-killer-of-our-son-17-year-old-trayvon-martin>.

74. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>.

75. See Garza, *supra* note 15.

76. Larry Buchanan et al., *Q&A What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0.

77. Eliot C. McLaughlin, *What We Know About Michael Brown’s Shooting*, CNN (Aug. 15, 2014, 12:10 AM), <https://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know/index.html>.

78. Nicholas Cannariato, *‘Hands Up, Don’t Shoot’ Examines What Led To Ferguson and Baltimore Protests*, NPR (Aug. 1 2019, 1:59 PM), <https://www.npr.org/2019/08/01/745484653/hands-up-don-t-shoot>. Despite the protest, on November 24, 2014, the local prosecutor announced the St. Louis County grand jury decided not to indict Officer Wilson, which resulted in more protests, injuries, and property damage. In March 2015, the U.S. Department of Justice concluded that Wilson shot Brown in self-defense, while also finding systemic discrimination against Blacks by the Ferguson Police Department and municipal court.

79. See *We Demand National Change to Protect Citizens and Communities from Police Violence and Misconduct*, CHANGE.ORG, <https://www.change.org/p/u-s-senate-we-demand-national-change-to-protect-citizens-and-communities-from-police-violence-and-misconduct> (last visited Apr. 28, 2019) (online petition).

80. See Arian Campo-Flores & Joshua Jamerson, *Black Lives Matter’s Years of Pressure Paved Way for Sudden Police Overhaul*, WALL ST. J. (June 18, 2020), <https://www.wsj.com/articles/black-lives-matters-years-of-pressure-paved-way-for-sudden-police-overhaul-11592516422>; Spencer Bokak-Lindell, *Why Is Police Brutality Still Happening?*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/opinion/minneapolis-police-brutality.html>.

81. See, e.g., *U.S. Must Take ‘Serious Action’ to Halt Police Killings of Unarmed African Americans*, U.N. NEWS (May 28, 2020) <https://news.un.org/en/story/2020/05/1065042>.

against Blacks.⁸² In distinguishing Black victims of such brutality, the Movement highlights how Blacks are the victims of State-sponsored violence:

Black Lives Matter is a unique contribution that goes beyond extrajudicial killings of Black people by police and vigilantes . . . When we say Black Lives Matter, we are talking about the ways in which Black people are deprived of our basic human rights and dignity. It is an acknowledgement [that] Black poverty and genocide is state violence . . . And the fact is that the lives of Black people—not ALL people—exist within these conditions is [a] consequence of state violence.⁸³

Hence, the Movement is about social injustice, equal protection under the law, and, most importantly, the need to redress State-sponsored racial oppression of Blacks.⁸⁴ Consequently, Black Lives Matter is one of the most significant social movements in recent history.⁸⁵

Analytically, to date, the Movement has produced some positive results in achieving two major objectives, (1) bringing attention to police brutality against Blacks and (2) seeking change in systemic racism.⁸⁶ Most importantly, it has awakened a moral conscience to redress systemic

82. *Id.*

83. See Garza, *supra* note 15.

84. See Rana Foroohar, *Black Lives Matter Is About Both Race and Class*, FINANCIAL TIMES (June 14, 2020), <https://www.ft.com/content/28dc48f8-b36b-4848-8e73-774999a8e502> (discussing the intersections of racism and capitalism as they pertain exploitation of labor, specifically Black labor); Jon Schwarz, *Black Lives Matter Wants to End Police Brutality. History Suggests It Will Go Much Further*, THE INTERCEPT (June 27, 2020, 5:00 AM), <https://theintercept.com/2020/06/27/black-lives-matter-police-brutality-history/> (discussing the broad concept of redirection of public money from policing to health care, housing, schools and jobs that the Movement has put to the table thus far).

85. See Larry Buchanan et al., *Black Lives Matter May Be The Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (noting that, based on recent polling, about fifteen million to twenty-six million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks). For a visual representation of the movement worldwide, see *Black Lives Matter Protests 2020*, <https://www.creosote.com/blm2020/> (last updated Sept. 3, 2020).

86. See *infra* Part III, B.

racism,⁸⁷ including a renewed call for reparations.⁸⁸ Overall, the Movement has brought attention to important conversations and fostered a spirit of equal justice for every American, particularly relating to police accountability.⁸⁹

Unfortunately, the Movement has yet to achieve a real change in policing.⁹⁰ Many of the proposed reforms have transformative potential, such as the re-imagining of policing;⁹¹ however, some of the changes have

87. See James Lartey, *Oppression America: 'To Root This Out We Need a Movement Against Racist Policies'*, THE GUARDIAN (June 6, 2018 6:00 PM), <https://www.theguardian.com/us-news/2018/jun/06/everyday-racism-in-america-how-to-fix-it>; Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/>; Washington Post Staff, *Resources to Understand America's Long History of Injustice and Inequality*, WASH. POST (June 26, 2020), <https://www.washingtonpost.com/nation/2020/06/08/understanding-racism-inequality-america/?arc404=true>.

88. The discussion around the case for reparations owes a great service to Ta-Nehisi Coates' thorough and thoughtful piece in *The Atlantic* from 2014, without which the case for reparations would be unlikely to have gained the momentum and traction that it now has. See Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>; see also, Nikole Hannah-Jones, *What is Owed*, N.Y. TIMES MAG., (June 26, 2020), <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html>; Patricia Cohen, *What Reparations for Slavery Might Look Like in 2019*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html>; Thai Jones, *Slavery Reparations Seem Impossible. In Many Places They're Already Happening*, WASH. POST (Jan. 31, 2020), <https://www.washingtonpost.com/outlook/2020/01/31/slavery-reparations-seem-impossible-many-places-theyre-already-happening/?arc404=true>; Seth Cohen, *An Overdue Debt-Why It's Finally Time to Pay Reparations to Black Americans*, FORBES (June 21, 2020, 8:00 AM), <https://www.forbes.com/sites/sethcohen/2020/06/21/its-finally-time-to-pay-black-americans-reparations/#472a85b65cb5>; Emma Goldberg, *How Reparations for Slavery Became a 2020 Campaign Issue*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/politics/reparations-slavery.html> (updated June 24, 2020).

89. See generally Monu Bedi, *The Asymmetry of Crimes by and Against Police Officers*, 66 DUKE L.J. ONLINE 79 (2017) (recommending that “[s]tates should care equally about harms by and against police officers and their impact on state activity”).

90. See generally *President's Trump's Executive Order on Safe Policing* (June 16, 2020); <https://www.whitehouse.gov/presidential-actions/executive-order-safe-policing-safe-communities/>. There has also been stalled legislation. See Catie Edmonson, *Democrats Unveil Sweeping Bill Targeting Police Misconduct and Racial Bias*, N.Y. TIMES, <https://www.nytimes.com/2020/06/08/us/politics/democrats-police-misconduct-bill-protects.html> (June 23, 2020); Sara Ferris et al., *House Passes Seeping Police Reform Bill*, POLITICO, (June 25, 2020, 8:55 PM), <https://www.politico.com/news/2020/06/25/police-reform-plan-house-339691>; E. Greve, *Democrats Block 'Empty' Republican Police Reform Bill*, THE GUARDIAN (June 24, 2020), <https://www.theguardian.com/us-news/2020/jun/24/congress-police-reform-republican-bill-democrats>; Niv Elis, *House Democrats Include \$597 Million for Police Reform in Spending Bill*, THE HILL (July 7, 2020 10:11 AM), <https://thehill.com/policy/finance/506152-house-democrats-propose-597-million-toward-police-reform>.

91. See, e.g., Tom Jackman, *African American Mayors Lay Out Plan for Police Reform Without 'Defunding'*, WASH. POST (July 27, 2020, 6:00 AM), <https://www.washingtonpost.com/crime-law/2020/07/27/african-american-mayors-lay-out-plan-police-reform-witho>

remained symbolic, such as the taking down of controversial monuments, particularly those dedicated to Confederate generals.⁹²

The movement has not ended police killings of Blacks nor has it produced convictions of police officers who use deadly force.⁹³ That is because, when it comes to stopping police officers from killing Blacks, the Movement faces formidable legal and policy obstacles, which will be discussed in section C and are referred to as a conundrum.

C. Conundrum

When it comes to the issue of police use of lethal force against Blacks, the Movement faces a conundrum—that the legal system and policing culture unintentionally condone the killings of Blacks by white police officers.⁹⁴ This contention is supported by statistical evidence and a case study of an eleven year investigation and prosecution of a mass shooting of Black people by a band of white police officers, in the Katrina Massacre.⁹⁵ The next section has two parts: (1) it introduces the concepts of the Blue Shield and the Blue Code and argues that those combine to protect police officers from criminal liability when they use deadly force, and (2) it presents

ut-defunding/; Kristina Sgueglia et al., *New York Police Department's Budget Has Been Slashed by \$1 Billion*, CNN (July 1, 2020, 4:26 PM), <https://www.cnn.com/2020/07/01/us/new-york-budget-nypd-1-billion-cut-trnd/index.html>; Vanessa Romo, *Minneapolis Council Moves to Defund Police, Establish 'Holistic' Public Safety Force*, NPR (June 26, 2020, 8:14 P.M.), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/26/884149659/minneapolis-council-moves-to-defund-police-establish-holistic-public-safety-forc>; David Zahner et al., *Los Angeles Cut LAPD Spending, Taking Police Staffing to its Lowest Level in 12 Years*, L.A. TIMES (July 1, 2020), <https://www.latimes.com/california/story/2020-07-01/lapd-budget-cuts-protesters-police-brutality>.

92. See Robert Draper, *Toppling Statues Is a First Step Toward Ending Confederate Myths*, NAT'L GEOGRAPHIC (July 2, 2020), <https://www.nationalgeographic.com/history/2020/07/toppling-statues-is-first-step-toward-ending-confederate-myths/>; Alisha Ebrahimji et al., *Confederate Statues Are Coming Down Following George Floyd's Death. Here's What to Know*, CNN (July 1, 2020 3:45 PM), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html>; Colleen Walsh, *Must We Allow Symbols of Racism on Public Land*, THE HARVARD GAZETTE (June 19, 2020), <https://news.harvard.edu/gazette/story/2020/06/historian-puts-the-push-to-remove-confederate-statues-in-context/>.

93. See *infra*, Part I, A.

94. This Article refers to this problem as the “Black Lives Matter Conundrum.” See, e.g., Jamiles Lartey, *Why It's Not So Simple to Arrest The Cops Who Shot Breonna Taylor: Memes and Billboards Are Calling for Arresting the Three Officers. But What Does Kentucky Law Say?*, THE MARSHALL PROJECT (Aug. 8, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/08/08/why-it-s-not-so-simple-to-arrest-the-cops-who-shot-breonna-taylor>. See generally FINAL REPORT ON THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING I (2015), <http://elearning-courses.net/iacp/html/webinarResources/170926/FinalReport21stCenturyPolicing.pdf>.

95. See *infra* Part I, C, 2.

the lessons from the Katrina Massacre, which shows how those concepts work in tandem to frustrate police accountability.

1. Hyper-Protection

In order for the Movement, and society,⁹⁶ to succeed in saving Black lives, one must understand the systemic ways in which the law protects white police officers who kill Blacks. This preferential treatment is referred to as unequal justice.⁹⁷

There are unequal, hyper-protective rights and privileges that protect officers from criminal liability. The first is the “Blue Shield”⁹⁸— the legal rules and doctrines that promote and condone the police use of lethal force.⁹⁹ The second is the “Blue Code”¹⁰⁰—a system and culture that protects police officers from personal and criminal liability and supports systemic racism.¹⁰¹

In addition to these extralegal protections, relative to criminal liability, every police officer enjoys all the constitutional and State-based legal protections that each person enjoys. Those include the right to due process,¹⁰² the presumption of innocence,¹⁰³ the State’s burden to prove the

96. Sadly, to date, the legal system, including policymakers, academics, bar associations, legislators, police associations, and the like, have not taken responsibility for reforming a legal system that promotes and condones police killings of Blacks.

97. “Unequal justice,” for the purpose of this Article, refers to the preferential body of rules to judge the criminal liability of police officers for killing people, which differs, unequally, from the rules used to judge other members of the public.

98. “Blue Shield,” for purposes of this Article, is defined as a combination of Supreme Court judicial doctrines that serve to shield police officers from personal, criminal liability, for harm done during the course of policing. *See also* Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL’Y 1, 4 (2015) (“[I]ndividual instances of police deadly force against unarmed Black men are enabled by a legal jurisprudence of structural violence which provides no accountability for the societal marginalization and stigmatization of young Black men”).

99. *See infra* Part III, A.

100. “Blue Code,” for purposes of this Article, is defined as a system of police culture, local practices, and racism that serves as an additional layer of protection, by which police offices avoid criminal liability. *See infra* Part III, B.

101. *See infra* Part III, B.

102. *See infra* Part III, B.

103. In criminal prosecutions, a person is presumed innocent until proven guilty. *See Coffin v. United States*, 156 U.S. 432, 460 (1895) (establishing the presumption of innocence of persons accused of crimes). This means the State has the burden of proving beyond a reasonable doubt that the alleged committed the crime.

elements of the charge of criminality,¹⁰⁴ the beyond a reasonable doubt standard,¹⁰⁵ mens rea,¹⁰⁶ and other legal defenses.¹⁰⁷

Those normal protections, combined with the hyper-protections of the Blue Shield and the Blue Code, make it nearly impossible to prosecute and convict a white male police officer for killing a Black person.¹⁰⁸ Statistics report that while police officers fatally shot over one thousand people each year over a ten-year period, only fifty-four officers were charged with a crime during that same period.¹⁰⁹ In the exceptional instance where an

104. To convict, the State must have the evidence necessary to convince a jury that the accused is guilty of the charges, beyond a reasonable doubt. In the case of George Floyd, the evidence of the killing seems clear: the police officer kneeled on the victim's neck. Yet, there is a dispute over whether that heinous act was the actual cause of Mr. Floyd's death. There are competing coroner reports on the cause of death and how Mr. Floyd's existing medical condition may have contributed to his death. See Molly Hennessy-Fiske, *Independent Autopsy of George Floyd Contradicts Official Report*, L.A. TIMES (June 1, 2020), <https://www.latimes.com/world-nation/story/2020-06-01/george-floyd-independent-autopsy-asphyxia>.

105. The State has the duty to prove its case of criminality beyond a reasonable doubt. See *Coffin*, 156 U.S. at 460. This requires the prosecutor to establish sufficient proof or evidence to charge a police officer. *Id.* This varies from State to State, with each crime requiring differing requirements of proof. For example, as it is very difficult to prove first-degree murder charges, police officers, such as those in the George Floyd case are seldom, if ever, charged with first-degree murder. See Ian Millhiser, *The Charges Against Former Minnesota Police Officer Derek Chauvin, Explained*, VOX (June 1, 2020, 2:30 PM), <https://www.vox.com/2020/6/1/21276936/derek-chauvin-charges-third-degree-murder-explained-george-floyd>.

106. To convict, the State must prove the required mens rea, that is, that the accused had the intent or knowledge of the wrong for which he or she is charged. See generally PAUL H. ROBINSON ET AL., *CRIMINAL LAW: CASE STUDIES & CONTROVERSIES* (4th ed. 2017). Sometimes, intent can be negated by certain defenses such as the plea of insanity. See Stephen J. Morse et al., *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona* 97 NORTHWESTERN J. CRIMINAL LAW AND CRIMINOLOGY 1071 (2007).

107. There are many other legal defenses to homicide charges. For example, self-defense statutes provide an affirmative defense to the justifiable use of deadly force.¹⁰⁷ See, e.g., FLA. STAT. ANN. § 776.012 (providing that a person is free to use lethal force if that person reasonably believes that using such force is necessary to prevent imminent danger or great bodily harm to that person or another or to prevent the imminent commission of a forcible felony). See Morse, *supra* 105.

108. However, these hyper-protections failed to protect a Black police officer from prosecution and conviction, for killing a white woman, while policing. One example is the case of Mohamed Noor, who is a Black, Somali-American, Muslim police officer who fatally shot Justine Ruszczyk (Damond), a white, Australian woman, in Minnesota on July 15, 2017. And then was convicted for the homicide and sentence to twelve and a half years in prison. See John Eligon, *A Black Officer, a White Woman, A Rare Murder Conviction. Is It 'Hypocrisy,' or Justice?*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/us/mohamed-noor-guilty.html> (reporting also that the victim's family received an unprecedented \$20 million settlement).

109. See Kimberly Kindy et al., *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-fe-w->

officer was charged in a deadly shooting, there were “high profile” factors such as a victim shot in the back, a video recording of the incident, incriminating testimony from other officers, or allegations of a cover-up.¹¹⁰ Further, the few police officers who were convicted or pled guilty to a fatal shooting received an average of four years of jail time, and sometimes only weeks.¹¹¹

In addition to the convincing statistical evidence, section two presents conclusive evidence that it is nearly impossible to convict a white police officer for killing a Black person. This is the finding of a case study of the Katrina Massacre, where several white policemen were *not* convicted for fatally shooting two Blacks and maiming others,¹¹² even though the officers admitted the Blacks they shot were innocent victims, and that the crimes were committed without justification, willfully, and then covered up.¹¹³

2. The Katrina Massacre

In New Orleans, on August 30, 2005, Hurricane Katrina’s storm surge decimated the city’s flood level protection system,¹¹⁴ creating a humanitarian crisis.¹¹⁵ On Sunday, September 4, 2005, two Black families were struggling

prosecuted/; Matt Ferner et al., *Here’s How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da.

Parenthetically, many of these cases result in expensive settlements of wrongful death claims. See, e.g., Nick Wing, *We Pay a Shocking Amount for Police Misconduct, and Cops Want Us to Accept It. We Shouldn’t*, HUFFINGTON POST (May 29, 2015, 7:39 AM), <http://m.huffpost.com/us/entry/7423386>. See, e.g., Eric Levenson, *What Georgia Law Says About When Police Can Use Deadly Force*, CNN (June 15, 2020, 3:22 PM), <https://www.cnn.com/2020/06/15/us/rayshard-brooks-force-law/index.html> (“From 2015 to 2020, police in Georgia have shot and killed 182 people, according to The Washington Post’s Fatal Force tracker. In that time, only one Georgia officer has been charged with murder.”).

110. *Id.* See also *infra* Part I, C.

111. See Kindy, *supra* note 108.

112 John Burnett, *What Happened on New Orleans’ Danziger Bridge?*, NPR (Sept. 13, 2016 1:28 AM), <https://www.npr.org/templates/story/story.php?storyId=6063982>.

113. See *id.*

114. See generally LeevesOrg, *The Katrina Myth; the Truth About a Thoroughly Unnatural Disaster*, YOUTUBE (Aug. 30, 2008), https://www.youtube.com/watch?v=wln_iq5bc8k&t=6s.

115. See generally HURRICANE KATRINA: AMERICA’S UNNATURAL DISASTER 186 (Jeremy I. Levitt & Matthew C. Whitaker eds. 2009); UNNATURAL DISASTER: THE NATION ON HURRICANE KATRINA (Betsy Reed ed. 2006) (viewing Katrina as “a social catastrophe directly caused by the government’s callous indifference to the needs of the region’s most vulnerable residents”).

to survive the floodwaters and chaotic conditions.¹¹⁶ On the same day, several white male New Orleans Police Department officers, in an unmarked rental truck, sped west down U.S. Highway 90, toward the Danziger Bridge.¹¹⁷ As the police officers approached, one of the families, the Bartholomews, started running up the bridge, in fear that criminals were shooting at them.¹¹⁸

One officer then took out an assault rifle and open fired on all six fleeing, unarmed Blacks.¹¹⁹ More police officers continued driving toward the supposed suspects, while firing at them.¹²⁰ The police officers' bullets struck nearly every member of the Black family, leaving only one physically unharmed.¹²¹ Stunned, one of the victims, nineteen-year-old Jose Holmes, stopped to examine the wounds on his stomach.¹²² When the police officers reached him, they shot him two more times.¹²³

Meanwhile, on the west end of the bridge, other white male police officers saw two men running in a direction away from the police.¹²⁴ At that point, one officer leaned out of the window of the moving car and fired a shotgun into the back of a Black male who was mentally-challenged, fatally wounding him.¹²⁵ Another officer then got out of the police car and began to kick his dying body.¹²⁶

Sadly, two of the victims died on the Danziger Bridge that day.¹²⁷ In addition, four other Black victims were maimed by police gunfire,¹²⁸ including a mother whose right arm was nearly shot off and had to be amputated.¹²⁹ When the media first reported the Danziger Bridge shootings,

116. See RONNIE GREENE, SHOTS ON THE BRIDGE: POLICE VIOLENCE AND COVER-UP IN THE WAKE OF KATRINA 20, 31–34 (2015).

117. Joe Rawley, *Officer Who Initiated Danziger Call Testifies*, WGNO (June 29, 2011, 6:08 PM), <http://wgno.com/2011/06/29/officer-who-initiated-danziger-call-testifies/>.

118. See Burnett, *supra* note 111; LeevesOrg, *supra* note 113. As noted, the police officers were in an unmarked rental van, with no distinguishing identification that they were police officers.

119. See *id.*

120. Laura Maggi et al., *Judge in Danziger Case Sickened by “Raw Brutality of the Shooting and the Craven Lawlessness of the Cover-Up”*, TIMES-PICAYUNE (Apr. 8, 2010), <http://www.nola.com/crime/index.ssf/2010/04/judgesickenedbyrawbrutalit.html>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Burnett, *supra* note 111; LeevesOrg, *supra* note 113.

127. See *id.*

128. See *id.*

129. See Burnett, *supra* note 111; LeevesOrg, *supra* note 113.

they celebrated the police officers as heroes who diligently protected the city from criminals.¹³⁰

Over the next eleven years, the federal government conducted an investigation and prosecuted the police officers for civil rights' violations, after controversial local investigations and two failed prosecutions at the state level.¹³¹ During a federal trial, the police officers who fatally shot and maimed the Black families admitted that they had acted without justification and covered up their wrongdoings, including planting a gun and arresting an innocent victim.¹³² Despite this overwhelming evidence, the federal conviction was ultimately thrown out; yet, the officers served some prison time for lesser offenses, following the negotiation of a plea bargain.¹³³

The Katrina Massacre teaches the following valuable lessons: (1) police internal investigations of the use of lethal force incidents are unreliable and likely biased to protect fellow officers;¹³⁴ (2) justice must be demanded and family members are the key to a successful prosecution;¹³⁵ (3) local prosecutors and local judges are pro-police, showing unconscious racial bias;¹³⁶ (4) an independent, federal investigation is needed to conduct a

130. Christine Lagorio, *Indicted N.O. Cops Greeted as "Heroes"*, CBSNEWS (Jan. 3, 2007, 5:55 AM), <http://www.cbsnews.com/news/indicted-no-cops-greeted-as-heroes/>.

131. See *United States v. Bowen*, No. 10-20, 2010 WL 2771476 (E.D. La. July 12, 2010).

132. Laura Maggi, *Police Supervisor Encouraged Cover-Up, Knew Officer Planted Gun While Still on Danziger Bridge*, TIMES-PICAYUNE (Feb. 24, 2010), https://www.nola.com/crime/index.ssf/2010/02/police_investigator_encouraged.html; Justin Elliott, *New Orleans Cop Explains How Police Gunned Down Unarmed Civilians in Post-Katrina Incident*, TALKING POINTS MEMO (Apr. 8, 2010, 5:47 AM), http://tpmmuckraker.talkingpointsmemo.com/2010/04/new_orleans_cop_explains_how_police_gunned_down_ci.php.

133. After being found guilty, the Court threw out the conviction on a technicality. The U.S. Attorney decided not to retry the case and to settle for a plea bargain. See *U.S. Attorney Kenneth A. Polite Delivers Remarks Following the Guilty Pleas and Sentencings of Five Former New Orleans Police Officers in the Danziger Bridge Shooting*, U.S. DEP'T JUST. (Apr. 20, 2016), <https://www.justice.gov/usao-edla/pr/us-attorney-kenneth-polite-delivers-remarks-following-guilty-pleas-and-sentencings-five>.

134. Brendan McCarthy, *Danziger Bridge Case Suggests Culture of Corruption at NOPD*, TIMES-PICAYUNE (Mar. 21, 2010), http://www.nola.com/crime/index.ssf/2010/03/danziger_bridge_details.html; Sarah Moughty, *Former NOPD Officers Testify About "Secret Meeting" to Determine Danziger Bridge Cover-Up*, PBS FRONTLINE (Jan. 27, 2012), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/law-disorder/former-nopd-officers-testify-about-secret-meeting-to-determine-danziger-bridge-cover-up/>.

135. See Paul Harris, *Relatives Demand Justice as Police go on Trial over Katrina Killings*, THE GUARDIAN (Mar. 3, 2007, 9:23 PM), <https://www.theguardian.com/world/2007/mar/04/hurricanekatrina.usa>.

136. See *Charges Dismissed Against Police in Post-Katrina Shootings*, CNN (Aug. 13, 2008, 6:10 PM), <http://www.cnn.com/2008/CRIME/08/13/danziger.seven/>; see also *United States v. Bowen*, 969 F. Supp. 2d 546, 550 n.3 (E.D. La. 2013) ("The primary basis for the dismissal of the indictment was the order of defendant Kenneth Bowen to give testimony,

proper gathering of the evidence and facts;¹³⁷ (5) police officers lie, destroy evidence, and cover-up the facts;¹³⁸ (6) charges of conspiracy to obstruct justice and misprision of a felony are effective means to discover the truth;¹³⁹ and (7) federal indictments and trials will *not* result in a homicide conviction,¹⁴⁰ despite a finding of willful actions and admissions by the police and the imprisonment of an innocent person who the police wrongfully arrested and accused of shooting at them.¹⁴¹

over his assertion of his Constitutional rights, before the state grand jury on October 30, 2006, in exchange for immunity under La.C.Cr.P. Art. 439.1(C).”).

137. *Feds Take Up Investigation of Cops in Post-Katrina Bridge Shooting Case*, FOX NEWS (Sept. 30, 2008), <https://www.foxnews.com/story/feds-take-up-investigation-of-cops-in-post-katrina-bridge-shooting-case>; Brendan McCarthy, *FBI Seizes Police Files in Danziger Bridge Shootings*, TIMES-PICAYUNE (Aug. 7, 2009, 8:44 PM), http://www.nola.com/crime/index.ssf/2009/08/fbi_seizes_police_files_in_bri.html.

138. See *United States v. Lehrmann*, No. 10-51, 2011 WL 4344582, at *1–*3 (E.D. La. Sept. 15, 2011); *United States v. Bowen*, 969 F. Supp. 2d 546, 612 (E.D. La. 2013). See also *Ex-Police Officer Admits Role in Cover-Up of Louisiana Bridge Shooting*, CNN (Mar. 11, 2010, 1:48 PM), <http://www.cnn.com/2010/CRIME/03/11/nopd.shooting/index.html>; *Former Detective Describes Cover-Up, “Ham Sandwich”*, PBS FRONTLINE (July 12, 2011), <http://www.pbs.org/wgbh/pages/frontline/law-disorder/blog/2011/07/former-detective-describes-c-over-up-ham-sandwich.html>.

139. Press Release, U.S. Attorney’s Office, *Fifth New Orleans Police Officer Pleads Guilty in Danziger Bridge Case* (June 4, 2010), <https://archives.fbi.gov/archives/neworleans/press-releases/2010/no060410.htm>.

140. Subsequently, the rogue police officers were not prosecuted and did not serve time for the homicides, instead, they were permitted to plea bargain for lesser crimes and with reduced sentences. On April 20, 2016, the U.S. Attorney announced that, under the terms of the deal, the police officers’ sentences would be dramatically reduced, with the four police officers who actually shot the civilians to serve sentences ranging from seven to twelve years in prison—a great reduction from the original sentences that were handed down in 2012 which had ranged from thirty-eight to sixty-five years imprisonment. See *U.S. Attorney Kenneth A. Polite Delivers Remarks Following the Guilty Pleas and Sentencings of Five Former New Orleans Police Officers in the Danziger Bridge Shooting*, *supra* note 132; Ashley Fantz et al., *Former New Orleans Officers Plead Guilty in Danziger Bridge Shootings*, CNN (Apr. 21, 2016, 8:25 AM), <https://www.cnn.com/2016/04/20/us/new-orleans-danziger-bridge-plea-deal/index.html>.

141. On August 5, 2011, nearly six years after the shootings and three days of deliberation, the jury found each of the accused police officers guilty of all twenty-five counts, inclusive of depriving of civil rights, using firearms to shoot innocent people, conspiracy to obstruct justice, falsifying prosecution, planting a firearm, and making false statements to the FBI. *United States v. Bowen*, 799 F.3d 336, 340 (5th Cir. 2015). However, on September 17, 2013, U.S. District Judge Kurt D. Engelhardt, in a 129-page ruling, threw out the convictions and granted a new trial based on prosecutorial misconduct. Order and Reasons, *Bowen*, 969 F. Supp. 2d at 612 (E.D. La. 2013). That ruling was later affirmed by an *en banc* decision of the U.S. Fifth Circuit Court of Appeals. On February 23, 2016, the district court reported that the Fifth Circuit affirmed the district court decision to vacate the convictions and to order a new trial. *United States v. Bowen*, 813 F.3d 600, 601 (5th Cir. 2016) (reporting a straw poll of the

In summary, the Katrina Massacre supports the proposition that the Blue Code and the Blue Shield make it nearly impossible to successfully prosecute a rogue police officer for the use of lethal force, even when they willfully kill people. Further, the case study demonstrates that there needs to be a transformative change in the law. Such a solution must address the policies and practices of the use of deadly force, must be constitutionally mandated, and must dismantle the Blue Shield and the Blue Code. That solution is presented next, in the form of a model code.¹⁴²

II. George Floyd Anti-Lynching Code

The “George Floyd Anti-Lynching Code” (the “GFAC”) is the proposed solution to the Black Lives Matter Conundrum. It reflects the normative claim that every person in this country has the constitutional right to be protected from police executions—without a conviction of a capital offense, without due process, and in an inhumane manner.¹⁴³ Additionally, the Code provides for the absolute abolition of the police use of lethal force.

The Code serves as a model for government officials and policymakers to achieve just police reform.¹⁴⁴ The specific provisions of the GFAC follow the main text of this Article as Addendum I. The three tenets reflected in the provisions of the GFAC are as follows.

Tenet #1: The GFAC recognizes that there is a symbiotic relationship between the police and the community and that any solution to the Black Lives Matter Conundrum must comply with Dean Derrick Bell’s “interest-convergence” principle.¹⁴⁵

appellate court judges where seven judges voted for and seven judges voted against granting the portion for a new trial, with one abstention).

142. The use of a code instead of a statute is due to the recognition that a constitutionally mandated remedy reflects the victim’s right to protection against wrongful governmental infringement. It applies broadly and to all levels and branches of government.

143. This rights-based approach to the application of capital punishment jurisprudence to lethal force killings is consistent with former U.S. Supreme Court Justice Sandra Day O’Connor’s vision of federalism, as a means to protect individuals from undue governmental intrusion. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 42 (dissenting in a medical marijuana decision, stating “This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens”). *See generally* Bradley W. Joondeph, *The Deregulatory Valence of Justice O’Connor’s Federalism*, 44 HOUS. L. REV. 507 (2008).

144. As the Fourteenth Amendment expressly grants Congress the authority to guarantee the effectiveness of the Amendment, Congress is authorized to enact the GFAC. *See* U.S. CONST. amend. XIV, § 5.

145. *See* Derrick A. Bell, Jr., *Brown v. Board of Education “and the Interest-Convergence Dilemma”*, 93 HARV. L. REV. 518, 523 (1980) (“The interests of [B]lack in achieving racial equality will be accommodated only when it converges with the interests of whites”).

Tenet #2: The GFAC seeks to identify a constitutionally based solution to the Conundrum, one that supports the fundamental rights of the victim; rather than one based on a privilege granted by the white power structure.

Tenet #3: The GFAC's primary goal is the end of police killings, by eliminating the policies, practices, and training that permit police officers to use lethal force, and by placing a special burden on the Federal Government to protect the constitutional rights of those victims and would-be victims.¹⁴⁶

In conclusion, the GFAC's prohibition of the police use of lethal force constitutes a win-win, as it protects life and frees police officers from the duty to use lethal force. This change will deliver both justice and peace. Part III will argue why the GFAC is both constitutionally mandated and dismantles a feature of systemic racism.¹⁴⁷

III. Equal Justice

Part III presents the constitutional and policy basis for the proposed George Floyd Anti-Lynching Code, concluding that the Code is mandated both by the Constitution and systemic racism. First, it argues that the Court's death penalty jurisprudence, which emphasizes the sanctity of life, is a superior approach to the constitutionality of lethal force compared to the Court's current doctrines, which is focused on police officer liability, with

146. See generally *Dombrowski v. Pfister*, 227 F. Supp. 556, 558 (E.D. La. 1964) (involving a civil rights criminal prosecution regarding segregation activities). Judge John Minor Wisdom, dissenting, argues: “[T]he crowning glory of American federalism . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms . . . it makes federalism workable.” *Id.* at 570–71 (Wisdom, J., dissenting) (footnotes and emphasis omitted); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (holding, *inter alia*, that a federal remedy exists for a violation of section 1983 even where a state remedy is available—that the intent of section 1983 was for concurrent jurisdiction to exist and state remedies need not be exhausted first). See Part III for a brief response on the application of the abolition of lethal force and when, if ever, it might be permissible.

147. The GFAC also complies with international law. See AMNESTY INT’L, *supra* note 46, at 13 (“In its [UN’s] General Comment 6 on the right to life under the Covenant, the Committee stated that ‘The deprivation of life by the authorities of the State is a matter of the utmost gravity’ and that states must take measures to prevent arbitrary killing by their own security forces. All states must ensure compliance with international law and standards including the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials, Principle 9 of which states: ‘Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.’”).

reference to the Blue Shield.¹⁴⁸ Second, it argues that the Code's abolition of lethal force serves to dismantle a key feature of systemic racism, or the Blue Code,¹⁴⁹ that subrogates Blacks and protects white male officers from criminal accountability for killing Blacks, which this Article refers to as modern-day lynching.

A. Executions

As previously noted in Part I, and as illustrated in the Katrina Massacre, the Black Lives Matter Movement faces a conundrum. That is, despite the Constitution's extensive provisions that protect the sanctity of life against wrongful Government infringement, police officers are permitted to and protected when they use deadly force. Overall, this section posits that the policies and the practice of police use of lethal force is an unconstitutional execution, which fails to comply with this Court's death penalty jurisdiction.

This analysis is presented as three subsections, (1) the constitutional protections of the sanctity of life against wrongful Government infringement and how particularly Black lives matter, (2) an analysis of Supreme Court decisions relative to the police use of deadly force, which effectuated the Blue Shield, and (3) an argument why police use of lethal force policies and practices are executions, in violation of the Court's death penalty jurisprudence, and, therefore, must be abolished.

1. Black Lives Do Matter, Constitutionally and Statutorily

This subsection begins with an examination of the Government's taking of human life within the context of the Constitution.¹⁵⁰ The Founders, in enacting the Constitution, recognized the sanctity of life.¹⁵¹ In addition to the explicit provisions in the Constitution protecting life from wrongful Government infringement, the Supreme Court has recognized the sanctity of life in several key cases.¹⁵² However, the Founders also adopted the then-

148. *See supra* note 97.

149. *See supra* note 99.

150. *See generally* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Bernard Bailyn, ed., 1993).

151. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), http://www.archives.gov/exhibits/charters/declaration_transcript.html ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

152. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399 (1986) (where the Court held that the Constitution forbids the execution of the insane, it also expressly recognized the fundamental right to life, stating: "For today, no less than before, we may seriously question the retributive

accepted principle that the Government has the authority to end a human life, but only when subjected to strict limitations.¹⁵³

Specifically, when it came to the question of how the Government could take a life, the Founders provided utmost clarity with the Fifth and Eighth Amendments, along with numerous due process protections against wrongful prosecutions.¹⁵⁴ First, the Fifth guards against wrongful prosecutions of crimes, stating “No person shall . . . be deprived of life . . . without due process of law.”¹⁵⁵ Then, with restrictions on punishment, comes the Eighth which prohibits “cruel and unusual punishment.”¹⁵⁶

value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.” *Id.* at 409).

153. The Declaration of Independence reflected the common law of England, *see* 1 WILLIAM BLACKSTONE, COMMENTARIES at 12930 (“The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law And it is enacted by the statute 5 Edw. III. c. 9. (that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law”). Today, the death penalty is recognized as barbaric. *See generally* Mythili Sampathkumar, *UN Demands America End ‘Barbaric’ Use of Death Penalty*, INDEPENDENT UK (Oct. 10, 2017), <https://www.independent.co.uk/news/world/americas/us-politics/death.-penalty-america-undemands-end-capital-punishment-a7993706.html>.

154. (1) Article I, Section 9, prohibits the federal and state governments from passing bills of attainder. U.S. CONST. art. I, § 9, cl. 3. (2) Article I, Section 10, prohibits the federal and state governments from passing *ex post facto* laws. *Id.* art. I, § 10, cl. 1. (3). The Fifth Amendment expressly provides for the Grand Jury Clause (a person cannot be tried for an offense that carries the death penalty unless indicted by a grand jury) and the Double Jeopardy Clause (ordinarily, if a person has been tried and either acquitted or convicted and sentenced to imprisonment, the person cannot be tried again for the same offense and sentenced to death). U.S. CONST. amend. V. (4). A person is also entitled to the protections provided by the Supreme Court’s expansion of the rights it deems to be fundamental, that is, substantive due process. *See* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) (in establishing when a right is fundamental, based on its past tests and formulations, the Court has looked to “history, legal traditions, and practices [to] provide the crucial ‘guide-posts for responsible decision-making.’”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (holding that marriage is a fundamental right and applied with equal force to same-sex couples).

155. *See* U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

156. *See* U.S. CONST. amend. VIII; *see generally* John Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment*, 27 WM & MARY BILL RTS. J. 989 (2019).

Regardless of the constitutional allowance on the Government's right to execute a life, some States, and even the Supreme Court for a short time, have found that human life is so sacred that the Government is absolutely forbidden from taking a life.¹⁵⁷ This prohibition is also supported by international human rights principles and treaties, which were adopted and ratified by the United States.¹⁵⁸ Relative to the George Floyd Anti-Lynching Code, the sanctity of life is embraced as a fundamental and constitutional right that should predominate over other constitutional provisions, when in conflict. Additionally, over the centuries, the U.S. has recognized that Black lives are particularly vulnerable to government-sponsored abuse,¹⁵⁹ as will be discussed next.

Next, we will explore (1) a brief legal history of enslavement, oppression, and discrimination of Blacks, (2) an explanation of how and why Black lives are constitutionally and statutorily protected, and (3) evidence that the Government has failed to protect Black lives against police killings.

African Americans have experienced a long history of State-sponsored oppression¹⁶⁰ and harmful discrimination.¹⁶¹ From its inception, the Constitution supported the enslavement of Blacks.¹⁶² Following the Civil

157. In 1972 the US Supreme Court struck capital punishment statutes in *Furman v. Georgia*, 408 U.S. 238 (1972), reducing all death sentences pending at the time to life imprisonment, subsequently many states passed new death penalty statutes and the court affirmed the legality of capital punishment in *Gregg v. Georgia*, 428 U.S. 153 (1976).

158. See Eur. Convention on Human Rights art. 2, Nov. 4, 1950, E.T.S. No. 005 (protecting the right of every person to his or her life and imposing on the state, through its agents, to refrain from itself causing the deprivation of life and to investigate instances of alleged unjustified use of lethal force).

159. See the Reconstruction Amendments (13th, 14th, and 15th Amendments) which sought to protect the constitutional rights of the newly freed enslaved people of African descent. In particular, see U.S. CONST. amend. XIV, § 1 (“... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

160. As the Confederate leadership regained power in the South, southern legislatures enacted “black codes,” state-sanctioned, racially based controls on the lives, liberty, and property rights of Blacks. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

161. See generally Meilan Solly, *58 Resources to Understand Racism in America*, SMITHSONIANMAG.COM (June 4, 2020, 11:47 AM), <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/>.

162. Prior to the Civil War, the Constitution protected the institution of enslavement and did not consider Blacks as U.S. citizens. See U.S. CONST. art. I, § 2, cl. 3., or the Enumeration Clause or Three-Fifths Compromise. Article 1, Section 9 protected the legalization of the trade and the importation of enslaved persons of African descent (“The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and

War, the Reconstruction Amendments to the Constitution¹⁶³ sought to guarantee the legal status of Blacks as free citizens, prohibiting enslavement,¹⁶⁴ guaranteeing citizenship,¹⁶⁵ and granting Black males the right to vote.¹⁶⁶ In 1870 and 1871, pursuant to the Fourteenth Amendment, Congress enacted two Enforcement Acts and the Ku Klux Klan Act, all designed to protect Blacks from being terrorized by private citizens and public officials.¹⁶⁷ These statutes as embodied in Title 18; Sections 241¹⁶⁸ and 242¹⁶⁹ provide for criminal liability and Sections 1983 and 14141

eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” *Id.* art 1, § 9). Article IV, Section 2, Clause 3, or the Fugitive Slave Clause, required: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom Service or Labour may be due.” *Id.* art. IV, § 2, cl. 3. *See also* *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that “a negro, whose ancestors were imported into [the U.S.], and sold as slaves,” whether enslaved or free, was not and could not be a U.S. citizen).

163. The Reconstruction Amendments (13th, 14th, and 15th Amendments) abolished enslavement, guaranteed citizenship rights, and voting rights of newly freed Blacks. The Fourteenth Amendment echoes the Fifth Amendment’s protection of the sanctity of life. *See* U.S. CONST. amend. XIV, § 1 (“... No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

164. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall be duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

165. U.S. CONST. amend. XIV § 1 (“...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

166. U.S. CONST. amend. XV § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”).

167. *See generally* DAVID MARK CHALMERS, *BACKFIRE: HOW THE KU KLUX KLAN HELPED THE CIVIL RIGHTS MOVEMENT* 72–74 (2005); MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987).

168. *See* 18 U.S.C. § 242; Conspiracy Against Rights [hereinafter “Conspiracy Against Rights”], <https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes> (making “it unlawful for two or more persons to conspire to injure, oppress, threaten, or intimidate any person of any state, territory or district in the free exercise or enjoyment of any right or privilege secured to him/her by the Constitution or the laws of the United States, (or because of his/her having exercised the same)”). The law was enacted and is protected pursuant to constitutionally granted authority granted by the Fourteenth Amendment.

169. *See* 18 U.S.C. § 242 (1996); Deprivation of Rights Under Color of Law [hereinafter “Color of Law”], <https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes> (making “it a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S. This law further

provide for civil liability.¹⁷⁰ As will be discussed later, these federal statutes have been deemed ineffective due to Supreme Court decisions.¹⁷¹

The Federal Government's protection of Blacks was short lived.¹⁷² Following Reconstruction and the restoration of southern white supremacy,¹⁷³ the Supreme Court diminished the protective impact of the

prohibits a person acting under color of law, statute, ordinance, regulation or custom to willfully subject or cause to be subjected any person to different punishments, pains, or penalties, than those prescribed for punishment of citizens on account of such person being an alien or by reason of his/her color or race. Acts under 'color of any law' include acts not only done by federal, state, or local officials within the bounds or limits of their lawful authority, but also acts done without and beyond the bounds of their lawful authority; provided that, in order for unlawful acts of any official to be done under 'color of any law,' the unlawful acts must be done while such official is purporting or pretending to act in the performance of his/her official duties...."). There are four elements to establish offenses under this section: (1) the victim must have been an inhabitant of a U.S. state, district, or territory when the alleged violation occurred; (2) defendant acted under color of any law; (3) the defendant's conduct deprived the victim of some right secured or protected by the U.S. Constitution; and (4) the defendant acted willfully, that is, with specific intent to violate the protected constitutional right.

170. Civil cases may be brought under 42 U.S.C. § 1983 and 42 U.S.C. § 14141 (now 34 U.S.C. § 12601). Claims under § 1983 can be filed *by citizens* for civil rights violations by persons acting under "color of law," that is, police or other government officials. Whereas § 14141 is a civil remedy available to the *government* against a law enforcement agency to correct "policies and practices that fostered the misconduct and, where appropriate, may require individual relief for the victim(s)." 42 U.S.C. § 1983 (1996) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

171. See generally Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 153 (1993). See also Barry C. Scheck, *Criminal Prosecution and Section 1983*, 16 TOURO L. REV. 895 (2000); *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP'T JUST., <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> (last updated Feb. 28, 2019); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 14 (2009).

172. See generally JUAN WILLIAM, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1987) (documenting the Black struggle for civil rights).

173. See CHALMERS, *supra* note 166.

Fourteenth Amendment;¹⁷⁴ again exposing Black lives to renewed exploitation, oppression, and abuse.¹⁷⁵

Then, in 1954, the Court issued the landmark decision of *Brown v. Board of Education*¹⁷⁶ holding that racially segregated public schools were unconstitutional.¹⁷⁷ That decision restored Blacks' hope that the Federal Government and the courts would once again be an ally in their struggle for equal justice.¹⁷⁸ The jurisdictional posture of the *Brown* decision was consistent with a series of the Court's decisions, encompassing several of the specific entitlements from the Bill of Rights, thereby binding the States.¹⁷⁹ As a result, today, such civil liberties provide protection against both Federal and State governments and are now analyzed under the auspices of "fundamentality."¹⁸⁰

174. See, e.g., the Slaughter-House Cases, 83 U.S. 36, 81–83 (1872) (effectively limited the application of the Fourteenth Amendment to the Constitution to federal rights, such as the right to interstate travel, but not "state rights" such as intra-state travel); *United States v. Cruikshank*, 92 U.S. 542 (1875) (in a case where a white mob killed a hundred Blacks, the Court ruled that the First and Second Amendments do not apply to state governments, further restricting the reach of the Fourteenth Amendment, and resulting in no convictions of the perpetrators). However, in the 1920s, the Supreme Court began a series of decisions that interpreted the Fourteenth Amendment to "incorporate" most portions of the Bill of Rights, making these portions, for the first time, enforceable against the State governments. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (expressly holding that States were bound to protect freedom of speech).

175. See generally JUAN WILLIAM, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965* (1987) (documenting the Black struggle for civil rights).

176. 347 U.S. 483, 495 (1954) (ruling that U.S. State laws establishing racial segregation in public schools were unconstitutional, even if the segregated schools were otherwise equal in quality). This was followed by decades of the battle of the desegregation of public schools, including universities. See generally JACK BASS, *UNLIKELY HEROES* (1990) (documenting the role federal circuit court judges played in the implementation of the *Brown* decision).

177. *Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954).

178. See WILLIAM, *supra* note 174.

179. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000). Under Selective Incorporation, the Court used the Fourteenth Amendment Due Process and Equal Protection Clauses to "incorporate" individual elements of the Bill of Rights against the states. *Id.*

180. See *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir.1990) ("The test usually articulated for determining fundamentality under the Due Process Clause is that the putative right must be 'implicit in the concept of ordered liberty', or 'deeply rooted in this Nation's history and tradition.'") (internal references omitted). In 2010, in *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010), the Court incorporated the Second Amendment's right to bear arms into the protection against state actions, holding that the right to bear arms as a fundamental and individual right that will necessarily be subject to strict scrutiny by the courts).

In the 1960s, Blacks pressed for their constitutional rights through peaceful civil rights protests, marches, and sit-ins.¹⁸¹ In 1964, in response to the movement, Congress enacted legislation and President Lyndon B. Johnson signed into law the Civil Rights Act of 1964.¹⁸²

Hence, the Federal Government has both a constitutional and a statutory duty to protect Blacks from police officers who violate people's civil rights¹⁸³ or commit hate crimes.¹⁸⁴ The laws provide federal courts with the jurisdiction to protect Black lives, recognizing that throughout our history, Blacks are particularly vulnerable to both governmental and societal abuse and should be afforded special, federal protection.¹⁸⁵ Yet, even today, there is no federal statute that expressly prohibits the police use of deadly force against Blacks.¹⁸⁶

Consequently, the Federal Government has a duty to protect Black lives that includes investigating claims that civil rights have been violated.¹⁸⁷ Recently, in January 2019, in furtherance of the need to monitor police behavior, the FBI launched a national use-of-force database for officer-involved shootings or incidents in which police used excessive force.¹⁸⁸

181. See generally *Civil Rights Act of 1964*, HISTORY.COM., <http://www.history.com/topics/black-history/civil-rights-act> (last updated Sept. 20, 2018); WILLIAM, *supra* note 174.

182. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (U.S. federal anti-discrimination law protects groups of people with a common characteristic, from discrimination on the basis of that characteristic, including race, color, religion, national origin, and other such categories).

183. Conspiracy Against Rights, *supra* note 167; Color of Law, *supra* note 168; see also *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP'T JUST., <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> (last updated Feb. 28, 2019).

184. See 18 U.S.C. § 249; Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, <https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes> (making "it unlawful to willfully cause bodily injury—or attempting to do so with fire, firearm, or other dangerous weapon—when 1) the crime was committed because of the actual or perceived race, color, religion, national origin of any person, or 2) the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person and the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction...").

185. See WILLIAM, *supra* note 174.

186. See AMNESTY INT'L, *supra* note 46, at 17.

187. See U.S. CONST. amend. XIV, § 1. The U.S. Justice Department has the statutory authority to investigate alleged violations of civil rights. See generally Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999).

188. FEDERAL BUREAU OF INVESTIGATION, NATIONAL USE-OF-FORCE DATA COLLECTION, <https://www.fbi.gov/services/cjis/ucr/use-of-force>; BUREAU OF JUSTICE, STATISTICS, SEC. 210402; Data on Use of Excessive Force, <https://www.bjs.gov/index.cfm?ty=tp&tid=84>; The Marshall Project and other nonprofits have also been collecting this data prior to the FBI's

Unfortunately, the mere monitoring of police use of lethal force has not saved lives, and apparently has not resulted in federal prosecutions. Relative to the George Floyd Anti-Lynching Code, the sanctity of Black lives is particularly embraced as a fundamental and constitutional right that should predominate over other constitutional provisions, when in conflict.

At first glance, the civil rights statutes appear to be a compelling authority to protect Black lives from police brutality. However, the facts evidence otherwise.¹⁸⁹ The Justice Department reported that federal prosecutors *declined* to pursue civil rights allegations against law enforcement officers *ninety-six percent* of the time.¹⁹⁰ This reality is hard to explain to a victim's family who watched as a police officer callously killed their loved ones. In order to understand this stark and painful reality, we need to analyze the Court's doctrines that fundamentally negate the effectiveness of the civil rights laws.

As presented next, there are reasons why federal officials fail to prosecute these clear violations of the civil rights of Blacks. Federal prosecutions of police officers for use of lethal force are solidly blocked by three Supreme Court doctrines, which eviscerate the federal civil rights laws by constructing a high burden of proof standard for punishing police misconduct.

2. The Court's Blue Shield Frustrates Prosecutions.

The prior subsection explained that the sanctity of life, and particularly of Black lives, is strongly protected by the Constitution and the federal civil rights laws. This, however, begs the question: how is it that police officers can blatantly terminate Black lives without accountability? This subsection will describe three key Supreme Court doctrines relative to police accountability. It will demonstrate that together the Court precedent grants police officers extraordinary protections against criminal liability for committing homicide while policing, effectively creating the Blue Shield.¹⁹¹

database; see MAPPING POLICE VIOLENCE, (updated June 30, 2020), <https://mappingpoliceviolence.org/>; FATAL ENCOUNTERS, <https://fatalencounters.org/>.

189. See generally Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3207–09 (2014); Dukanovic, *supra* note 51.

190. Brian Bowling & Andrew Conte, *Trib Investigation: Cops Often Let off Hook for Civil Rights Complaints*, TRIBLIVE (Mar. 12, 2016, 6:00 PM), <http://triblive.com/usworld/nation/9939487-74/police-rights-civil>. This reality will be explored in Part III, B. This reality will be explored in Part III, B.

191. Alison M. Smith, *Overview of Selected Federal Criminal Civil Rights Statutes*, CONGRESSIONAL RESEARCH SERVICE (Dec. 16, 2014), <https://fas.org/sgp/crs/misc/R43830.pdf>. "State actors" may also include prison guards, judges, and others who are acting

The next discussion shows how the Court greatly limited the reach of the federal civil rights, through this aforementioned Blue Shield.

a. Specific Intent to Deprive a Constitutional Right

As discussed above, the greatest sources of protecting a Black person from police abuse are the Constitution and the civil rights laws. However, the Court, in a narrow decision, created the first major roadblock to the prosecution of police officers for killing Blacks.¹⁹²

In 1945, in *Screws v. United States*,¹⁹³ the Court reviewed the civil rights act,¹⁹⁴ which resulted in the federal conviction of a sheriff.¹⁹⁵ This was an all-too-familiar case, where a white male sheriff beat to death a handcuffed Black male, accused of stealing a tire.¹⁹⁶ In reaching its final holding, the Court analyzed the civil rights law at issue, finding (1) the constitutionality of the civil rights criminal act against a due process challenge that alleged it was vague and lacked specificity,¹⁹⁷ (2) the act originated as an “anti-discrimination measure” that was later extended to prohibit the “deprivation of any rights, privileges, or immunities” guaranteed by federal law, after examining its legislative history,¹⁹⁸ and (3) that the legislative history indicated a desire to reduce the section’s severity as reflected in Congress’s special requirement of intent to violate federal rights,

as public officials. *See* *United States v. Classic*, 313 U.S. 299 (1941) (finding that the actions of election commissioners who conducted a primary election and willfully altered and falsely counted and certified ballots were acts under color of state law depriving the voter of constitutional rights); (finding that state judge may be found criminally liable for civil rights violations). A private actor may also act “under color of law” under certain circumstances. *See, e.g.*, *United States v. Price*, 383 U.S. 787 (1966); *Dennis v. Sparks*, 449 U.S. 24 (1980).

192. *Id.*

193. *Screws v. United States*, 325 U.S. 91 (1945).

194. *Id.* at 94. In *Screws*, the U.S. Supreme Court narrowly interpreted the predecessor of Section 242, 18 U.S.C. § 52, and upheld its constitutionality against a due process challenge that alleged that the statute was vague and lacked the specificity constitutionally mandated for criminal statutes. In reaching its decision, the Court examined the legislative history and noted the section’s origins as an “anti-discrimination measure” that was later extended to prohibit the “deprivation of any rights, privileges, or immunities” guaranteed by federal law. The Court concluded that the legislative history indicated a desire to reduce the section’s severity. To express this reduction in severity, Congress created a special requirement of intent to violate federal rights, rather than just a generalized “bad purpose.”

195. 18 U.S.C. § 52 (the predecessor of today’s Section 242).

196. In *Screws v. United States*, 325 U.S. 91 (1945), the local U.S. Attorney convened a grand jury that indicted a sheriff, Screws, in Baker County, Georgia the lethal beating of the handcuffed Black male, Hall. *See* Smith, *supra* note 190.

197. *See* Smith, *supra* note 190.

198. *Screws*, 325 U.S. at 91.

rather than just a generalized “bad purpose.”¹⁹⁹ The majority decision, penned by Justice William O. Douglas, determined:

One who does act with such specific intent is aware that what he does is precisely that which the statute forbids . . . He violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law.²⁰⁰

Using this narrow construction, the Court reversed the conviction against the sheriff, concluding that the jury should have been instructed on the specific intent to deprive the victim of a constitutional right.²⁰¹ Following this precedent, federal courts have interpreted *Screws* to strictly construe the federal authority to prosecute a civil rights violation.²⁰² Arguably, the specific intent requirement established in *Screws* makes a federal prosecution nearly impossible, requiring the prosecutor to show (1) the accused’s intent to violate the victim’s federal rights, (2) the action was done under “color of law,” and (3) the force was unreasonable, unnecessary, and unprovoked.²⁰³ As a result, a strict interpretation of section 242 has been uniformly followed by federal courts,²⁰⁴ requiring proof of the defendant’s specific intent to deprive a victim of a constitutional or federal right.²⁰⁵

Hence, due to the *Screws*’ precedent,²⁰⁶ relative to police use of lethal force, the current federal laws fail to result in the successful federal

199. *Id.*

200. *Id.* at 106.

201. Then, upon retrial, the Government failed to prove that the sheriff’s willful intent to deprive the Black victim of his constitutional rights when he killed him. *Screws*, 325 U.S. at 101. See CHALMERS, *supra* note 166.

202. See, e.g., U.S. v. Shafer, 384 F. Supp. 496 (N.D. Ohio 1974) (stating, “[e]ven the specific intent to injure, or the reckless use of excessive force, without more, does not satisfy the requirements of 242 as construed in *Screws*. There must exist an intention to ‘punish or to prevent the exercise of constitutionally guaranteed rights, such as the right to vote, or to obtain equal protection of the law.’” *Id.* at 501).

203. See Smith, *supra* note 190.

204. See Smith, *supra* note 190.

205. See United States v. Delorme, 457 F.2d 156 (3rd Cir. 1972) (stating, “Thus we conclude that in a criminal prosecution under 242, it is only where there is supportive evidence found by the fact finder of a willful intention to deprive another of his constitutional rights that the federal statute comes into play. It is one thing to be guilty of excessive force, and thus chargeable with violating the law of the state and territory; *it is quite another for a policeman to administer a physical beating as punishment for allegedly breaking the law. In the latter case the police officer has acted as prosecutor, judge, and jury; he has brought the charges, found the suspect guilty, administered punishment.*” *Id.* at 161 (emphasis added).

206. See *Screws*, 325 U.S. at 91.

investigations and prosecutions of wrongdoers.²⁰⁷ This fact became clear following the shootings of Trayvon Martin in 2012 and of Michael Brown in 2014.²⁰⁸

Each case demonstrates that a police officer's wrongdoings are greatly shielded from federal criminal liability,²⁰⁹ as the *Screws* decision practically bars the Federal Government from charging a police officer for the wrongful use of lethal force, making it the local authorities' sole responsibility.²¹⁰

The *Screws* case raised the burden of proof standard and, thereby, diminished the application of the civil rights laws. It is still precedent and continues to frustrate federal prosecution for civil rights violations.²¹¹ We continue with a second Supreme Court doctrine, qualified immunity, and explain how police accountability remains frustrated.

b. Qualified Immunity Exempts Police from Liability²¹²

Next, we present the second Court doctrine that frustrates the constitutional mandate to protect a person's life from wrongful governmental infringements, with (1) a brief history of the development of the Court's

207. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., FY 2014 PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION 20–21 (2014) (reporting that in cases brought in 2011, out of 10,000 complaints, only 224 officers were charged); Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years after Garner*, 35 ST LOUIS UNIV. L.J. 109 (2016); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 370 (2011).

208. See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 206. Then-U.S. Attorney General Eric Holder called on Congress to lower the bar on the standard the Justice Department must meet to prosecute civil rights cases. Moreover, under then-President Barack Obama, the Justice Department aggressively investigated police shootings.

209. See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 206.

210. See *infra* Part III, B, for a discussion of the obstacles that police departments and local prosecutors have in bringing such prosecutions.

211. Under state and federal law, including all provisions of the Civil Rights Act, Sections 241, 242, and 1983, it is difficult for the prosecution to succeed in such claims, if the investigation ever gets to that stage. *Police Avoided Federal Civil Rights Charges in 96% of Cases over 20 Years—Report*, RT (Mar. 15, 2016), <https://www.rt.com/usa/335602-police-civil-right-charges/> (“Based on analysis of nearly 3 million records from the US Department of Justice’s National Caseload Data, the Pittsburgh Tribune-Review found that the 94 US Attorney offices declined 12,703 referrals of potential civil rights violations made by the FBI and other agencies out of a total of 13,233 complaints.”); cf. Marc Debbaudt, *Legislation Calling for Independent Police Prosecutor Is Unnecessary*, L.A. ASS’N DEPUTY DISTRICT ATTORNEYS (June 9, 2015), <https://www.laadda.com/legislation-calling-for-independent-police-prosecutor-is-unnecessary/>; Eric Lichtblau, *Bush Sees U.S. as Meddling in Local Police Affairs*, L.A. TIMES (June 1, 2000), <http://articles.latimes.com/2000/jun/01/news/mn-36333>.

212. See generally Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468 (2011); Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016).

doctrine of “qualified immunity,”²¹³ (2) followed by an argument that this doctrine wrongfully precludes claims against police officers who harm Blacks.²¹⁴

The Enforcement Acts and the Ku Klux Klan Act²¹⁵ were specifically enacted to protect Blacks from State-sponsored, white supremacists’ retaliation and oppression following the Civil War and Reconstruction.²¹⁶ As previously mentioned, the effect of these provisions was short lived²¹⁷ and later solidly negated by Supreme Court decisions, including and following *Screws*, which greatly reduced *criminal* liability.²¹⁸ However, in 1961 *Monroe v. Pape*,²¹⁹ the Court changed its approach to the prosecution of civil actions for police brutality cases, permitting such claims to move forward without restrictions.²²⁰ Hence, it was arguably within the context of increasing civil rights claims in federal court that the Court adopted the doctrine of qualified immunity.²²¹

213. See generally Legal Information Institute, *Qualified Immunity*, CORNELL LAW, https://www.law.cornell.edu/wex/qualified_immunity (“Specifically, qualified immunity protects a government official from lawsuits alleging that the official violated a plaintiff’s rights, only allowing suits where officials violated a ‘clearly established’ statutory or constitutional right. When determining whether or not a right was ‘clearly established,’ courts consider whether a hypothetical reasonable official would have known that the defendant’s conduct violated the plaintiff’s rights. Courts conducting this analysis apply the law that was in force at the time of the alleged violation, not the law in effect when the court considers the case.... Qualified immunity is not immunity from having to pay money damages, but rather immunity from having to go through the costs of a trial at all. Accordingly, courts must resolve qualified immunity issues as early in a case as possible, preferably before discovery.”).

214. See generally Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, THE APPEAL (June 20, 2019), <https://theappeal.org/qualified-immunity-explained/> (noting “[t]his standard shields law enforcement, in particular, from innumerable constitutional violations each year. In the Supreme Court’s own words, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’ It is under this rule that officers can, without worry, drag a nonthreatening, seven months pregnant woman into the street and tase (sic) her three times for refusing to sign a piece of paper.”); Jamie Ehrlich, *The Question Before the Supreme Court Is Who Polices the Police*, CNN (June 3, 2020, 5:12 PM), <https://www.cnn.com/2020/06/03/politics/supreme-court-qualified-immunity-police-accountability-george-floyd/index.html>.

215. See *infra* Part III, A, 2, these laws were enacted in 1870 and 1871 and currently embodied in Sections 241, 242, and 1983.

216. *Id.*

217. *Id.*

218. *Id.*

219. See *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that the purpose of Section 1983 was “to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official’s abuse of his position.”).

220. *Id.*

221. See Ali & Clark, *supra* note 213.

From the Court's initial adoptions of qualified immunity, the doctrine was used to minimize police officers' personal liability for wrongdoings.²²² In 1967, in *Pierson v. Ray*,²²³ the Court first introduced the doctrine of qualified immunity.²²⁴ This allowed for police officers to escape from personal liability from being sued for civil rights violations under Section 1983,²²⁵ so long as they acted in "good faith" and believed that their conduct was authorized by law.²²⁶ However, in 1971, in *Bivens v. Six Unknown Named Agents*,²²⁷ the Court decided that claimants had a federal cause of action for damages, if a federal official violated a restricted list of constitutional rights.²²⁸

Throughout the 1980s, the Court continuously and drastically expanded the qualified immunity defense. In 1982, in *Harlow v. Fitzgerald*,²²⁹ the Court held that the protection afforded to public officials would no longer

222. *Id.*

223. *Pierson v. Ray*, 386 U.S. 547 (1967) (relative to exonerating police officers from personal liability, the Court justified the need for qualified immunity by reasoning that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does." *Id.* at 555).

224. *Id.*

225. *Id.*

226. *Id.* (that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause and being mulcted in damages if he does.").

227. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that while there is no explicit right to file a civil lawsuit against federal government officials who have violated the Fourth Amendment, this right can be inferred. This is because a constitutional protection would not be meaningful if there were no way to seek a remedy for a violation of it). Parenthetically, the Court expressly reserved the question of whether qualified immunity applied, as the Court of Appeals had not rules on that issue.

228. *Id.* However, not all Constitutional violations give rise to a *Bivens* cause of action, in addition to the Fourth Amendment which was in *Bivens*, the Court recognized such claims for violations of the Fifth Amendment's equal protection component of due process in *Davis v. Passman*, 442 U.S. 228, 245 (1979) and the Eighth Amendment in *Carlson v. Green*, 446 U.S. 14, 25 (1980). See generally *Actions Against Federal Agencies and Officers*, 14 FED. PRAC. & PROC. JURIS. § 3655 (4th ed.).

229. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding "that [federal] government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818). The Court reasoned that "the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 800. The Court noted that [w]e emphasize that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties and in 'objective' good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available." *Id.* at 819, fn. 34. This case involved White House aides to former President Nixon, not law enforcement officers.

turn on whether the official acted in “good faith.”²³⁰ Instead, an official, even when acting in a malicious manner and violating a person’s constitutional rights, is immune from personal liability unless the claimant could show that the right was “clearly established.”²³¹ Equally significantly, in *Harlow*, the Court pronounced that qualified immunity had a preemptive procedural role, one that denied a claimant’s right to proceed in federal court.²³²

Relative to liability for police brutality, the Court quickly applied this broad concept of qualified immunity to limit personal liability in Fourth Amendment searches. In 1986, in *Malley v. Briggs*,²³³ the Court held that qualified immunity does *not* apply to a police officer when the officer wrongfully arrests someone on the basis of a warrant, but only if the officer could not have reasonably believed that there was probable cause for the warrant.²³⁴ Then, in 1987, in *Anderson v. Creighton*,²³⁵ the Court again applied a broad interpretation of qualified immunity, holding that, when an officer of the law (here, an FBI officer) conducts a search and violates the Fourth Amendment, that officer is entitled to qualified immunity, if the officer proves that a reasonable officer could have believed that the search constitutionally complied with the Fourth Amendment.²³⁶

Fourteen years later, the Court reiterated its pronouncement in *Harlow* on the uniquely preemptive procedural role of qualified immunity. In 2001, in *Saucier v. Katz*,²³⁷ the Court held that a ruling on a qualified immunity

230. *Id.*

231. *Id.*

232. *Harlow*, 457 U.S. at 808 (the Court noted, quoting *Butz v. Economou*, 438 U.S. 478 (1978):

Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that *damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity*. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Butz, 438 U.S. 507-08 (citations omitted). (emphasis added).

Id. at 457.

233. *Malley v. Briggs*, 457 U.S. 335 (1986).

234. Reasonability is determined by the action that an objectively reasonable officer would take.

235. *Anderson v. Creighton*, 483 U.S. 635 (1987).

236. *See id.* at 636. The relevant question that a court should ask is whether a reasonable officer could have believed the warrantless search to be lawful, considering clearly established law and the information which the officer possessed. The Supreme Court also held that “subjective beliefs about the search are irrelevant.”

237. *Saucier v. Katz*, 533 U.S. 194 (2001).

defense must be made early in the trial court's proceeding, because qualified immunity is a defense to stand trial, not merely a defense from liability.²³⁸ The Court elaborated a two-part test or sequence for whether a government official is entitled to qualified immunity: (1) a court must look at whether the facts indicate that a constitutional right has been violated and (2) if so, a court must then look at whether that right was clearly established at the time of the alleged conduct. Thus, the *Saucier* test for qualified immunity will apply, unless the officer's conduct clearly violated a suspect's constitutional right(s).²³⁹ This test has been criticized as stifling the development of constitutional rights.²⁴⁰ However, in 2009, in *Pearson v. Callahan*,²⁴¹ the Court restricted the application of the *Saucier* test,²⁴² holding that the *Saucier* sequencing does not need to be applied in qualified immunity claims.²⁴³ Furthermore, the Court broadly increased the application of qualified immunity to searches.²⁴⁴

Despite its expansive application of the doctrine, the Court recognized an exception to qualified immunity. In 2002, in *Hope v. Pelzer*,²⁴⁵ the Court found that an officer does *not* have qualified immunity where his cruelty was "so obvious" that he should have had "fair warning" that his actions were unconstitutional and contrary to the Eighth Amendment's cruel and unusual

238. When there is a summary judgment motion for qualified immunity, the court should rule on the motion, even if a material issue of fact remains on the underlying claim.

239. *Id.*

240. See generally Ted Sampson Jones et al., *Measuring Pearson in the Circuits*, 80 *FORDHAM L. REV.* 623 (2011) (discussing that the Court's retreat from the mandatory *Saucier* order was due to the lower courts' difficulty in applying the mandatory *Saucier* framework); Pierre N. Level, *Judging Under the Constitution: Dicta about Dicta*, 81 *NYU L. REV.* 1249 (2006) (arguing that the Supreme Court's command in *Saucier* that before dismissing a constitutional tort suit by reason of good faith immunity, a court must first declare in dictum where the alleged conduct violates the Constitution, is ill advised).

241. *Pearson v. Callahan*, 555 U.S. 223 (2009).

242. *Id.* at 227.

243. Rather, a trial court should have more discretion in whether it should apply *Saucier*, 536 U.S. 730 (2002).

244. *Id.* at 243–44. ("[a]n officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment."); see also *Safford Unified School Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009), where the Court held that even when an individual's Fourth Amendment right to be safe from unreasonable search and seizure is violated, the person performing the search may still be immune under qualified immunity, if "clearly established law does not show that the search violated the Fourth Amendment." *Id.* at 243.

245. *Saucier*, 536 U.S. 730 (2002) (in that case, corrections officers disciplined a prisoner by handcuffing him to a hitching post for seven hours, with his hands above his shoulders, shirtless in the summer sun, and being taunted the prisoner by giving water to a guard dog in plain sight).

punishment standard.²⁴⁶ As a result, the Court affirmed the denial of a motion for summary judgement.²⁴⁷ This case has not taken hold to diminish the effectiveness of qualified immunity which is under attack by civil rights proponents and others as will be discussed next.

Qualified immunity has been sharply criticized for various reasons,²⁴⁸ particularly because it hinders the protection and development of civil rights.²⁴⁹ Relative to the lives of Blacks, the doctrine protects police officers from being personally accountable, even when an officer clearly violated a person's federal or constitutional rights.²⁵⁰ One study concluded that qualified immunity "has become a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights."²⁵¹

Pursuant of the accountability for police officers' killings of Blacks, the Movement recently advocated for the end of qualified immunity in excessive force cases.²⁵² However, on June 15, 2020, in *Baxter v. Bracey*,²⁵³ where an

246. *Saucier*, 536 U.S. at 741.

247. *Id.* at 736–48 (the defense of qualified immunity was precluded at the summary judgment phase, noting "The Eighth Amendment violation here is obvious on the facts alleged. Any safety concerns had long since abated by the time Hope was handcuffed to the hitching post, because he had already been subdued, handcuffed, placed in leg irons, and transported back to prison ... Despite the clear lack of emergency, respondents knowingly subjected him to a substantial risk of physical harm, unnecessary pain, unnecessary exposure to the sun, prolonged thirst and taunting, and a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.")

248. See Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE L.J. (2017), retrieved Feb. 26, 2020).

249. See Ali & Clark, *supra* note 213 (noting that qualified immunity hinders the protection of civil rights in three ways: (1) victims of brutality or harassment by law enforcement generally get no relief in court and have no ability to hold offending officers accountable for their actions, (2) many claims will never be brought to court in the first place, acting as a disincentive for lawyers to bring such claims, and (3) "freezes" the development of constitutional law, instead of reviewing, analyzing, and applying constitutional doctrine to determine whether a person's rights were violated.

250. See Ian Millhiser, *Why Police Can Violate your Constitutional Rights and Suffer No Consequences in Court*, VOX (June 3, 2020), <https://www.vox.com/2020/6/3/21277104/qualified-immunity-cops-constitution-shaniz-west-supreme-court>; John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67 (2017); Jordan S. Rubin et al., *How the Law Shields Cops From Suit: Qualified Immunity Explained*, BLOOMBERG LAW (June 5, 2020, 2:46 PM), <https://news.bloomberglaw.com/us-law-week/how-the-law-shields-cops-from-suit-qualified-immunity-explained?context=article-related>; Andrew Satter, *Qualified Immunity: Origins of a Police Liability Shield (Video)* BLOOMBERG LAW (July 24, 2020, 1:47 PM), <https://news.bloomberglaw.com/us-law-week/qualified-immunity-origins-of-a-police-liability-shield-video>.

251. See Andrew Chung et al., *Special Report: For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 30, 2020), <https://web.archive.org/web/20200612051417/https://www.reuters.com/article/us-usa-police-immunity-scotus-specialrep-idUSKBN22K18C>.

252. See generally *id.*

253. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

appellate federal court applied qualified immunity when a police officer unleashed attack dogs on a suspect, after the suspect had been apprehended,²⁵⁴ the Court declined to review the doctrine.²⁵⁵ Further, from a legislative prospective, members of Congress have proposed bills to end qualified immunity when applied to police violations of federal rights, but with no success to date.²⁵⁶

The frequency of such cases has prompted a growing chorus of criticism from lawyers, legal scholars, civil rights groups, politicians and even judges that qualified immunity, as applied, is unjust,²⁵⁷ including members of the Court.²⁵⁸ Spanning the political spectrum, this broad coalition says the

254. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020). Parenthetically, Justice Clarence Thomas dissented to this decision, stating that qualified immunity should be reformed to allow individuals a right to sue state officers for damages and to remedy violations of the individuals' constitutional rights.

255. See Jamie Ehrlich et al., *Supreme Court Declines to Weigh in on Legal Doctrine that Shields Law Enforcement*, CNN (June 15, 2020, 11:57 AM), <https://www.cnn.com/2020/06/15/politics/supreme-court-qualified-immunity/index.html> (reporting “[i]n recent years, legal scholars, judges and justices on all sides of the ideological spectrum have criticized the legal doctrine known as “qualified immunity,” arguing that it is not grounded in the proper legal authorities and too often shields officials from accountability.”); Jamie Ehrlich et al., *Federal Judge Pens Scathing Opinion on Qualified Immunity: ‘Let Us Waste No Time in Righting This Wrong’*, CNN (Aug. 4, 2020, 9:52 PM), <http://cdn.cnn.com/cnn/2020/images/08/04/jamison-v-mcclendon.pdf> (providing a history of Black people's battles against police brutality).

256. See David Morgan, *U.S. Lawmaker Prepares Bill Aiming to End Court Protection for Police*, REUTERS (June 4, 2020), <https://www.reuters.com/article/us-minneapolis-police-congress/u-s-lawmaker-prepares-bill-aiming-to-end-court-protection-for-police-idUSKBN23831W>; see, e.g., Harris, Markey, Booker Introduce Senate Resolution to Abolish Qualified Immunity for Law Enforcement, Hold Officers Accountable for Police Brutality, WEBSITE OF U.S. SENATOR FOR CALIFORNIA KAMALA HARRIS (June 3, 2020); The Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2019-2020); Seth Stoughton et al., *How to Actually Fix America's Police*, THE ATLANTIC (June 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/>.

257. See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409 (2016); John C. Jeffries Jr., *What's Wrong with Qualified Immunity?*, 62 FL. L. REV. 851 (2010).

258. See, e.g., *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016), cert. denied, 137 S. Ct. 1277 (2017), where in reviewing the U.S. Fifth Circuit's granted of summary judgment for the respondent, a Houston police officer, who shot the petitioner in the back, the Court denied certiorari, with Justices Sotomayor and Ginsburg dissenting and noting, “The question whether the officer used excessive force in shooting Salazar-Limon thus turns in large part on which man is telling the truth. Our legal system entrusts this decision to a jury sitting as finder of fact, not a judge reviewing a paper record.” See Debra Cassens Weiss, *Sotomayor Sees “Disturbing Trend” of Failing to Intervene on Behalf of Victims of Police Shootings*, AM. BAR J. (Apr. 24, 2017, 3:35 PM), http://www.abajournal.com/news/article/sotomayor_sees_disturbing_trend_of_failing_to_intervene_on_behalf_of_victim/.

doctrine has become a failsafe tool to permit police brutality to go unpunished and deny victims their constitutional rights.²⁵⁹

While qualified immunity is broad, it is not absolute.²⁶⁰ For example, a police officer, even while policing, can still be sued for *intentionally* violating a person's constitutional rights, although intent is hard to prove.²⁶¹ Further, State criminal codes provide that any police action not sanctioned by the police department that is found to be illegal may lead to criminal charges.²⁶²

In summary, the Court has inserted the immunity doctrine as an additional procedural and substantive barrier to holding police officers accountable for brutality. In doing so, they added to the *Screws* case in raising the burden of proof standard and, thereby, diminishing the application of the civil rights laws. However, the Court's protection of police misdoings does not stop there. In rare instance, where federal or state charges are made against rogue police officers, those officers are additionally protected by another Court doctrine, as will be discussed next.

c. "Objective Reasonableness"

Objective reasonableness, in combination with the two Court-generated doctrines already discussed, creates a nearly impenetrable legal shield which protects police officers from being held criminally liable for killing Blacks.²⁶³ The following analysis of the Court's doctrine shows (1) the parameters of the doctrine and (2) argues why it fails to protect Black lives against police killings.

The Court's doctrine of objective reasonableness results from its development of a Fourth Amendment "search and seizure" approach to analyzing police use of lethal or excessive force. This approach was developed in two cases, the first, in 1985, in *Tennessee v. Garner*²⁶⁴ and the second, in 1989, in *Graham v. Connor*.²⁶⁵ The doctrine creates a very high

259. See generally Baude, *supra* note 256.

260. See generally Baude, *supra* note 256.

261. See Marcus Nemeth, *How was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C.K. REV. 989 (2019).

262. Under qualified immunity, the managers of police officers are also exempt from personal liability, contrary to *respondeat superior*, although the municipality or employing body is still civilly liable for the wrongdoing. See *Baxter v. Bracey*, 140 S. Ct. 1862, (2020), https://www.supremecourt.gov/orders/courtorders/061520zor_f2bh.pdf.

263. See Jill I. Brown, *Defining 'Reasonable' Police Conduct: Graham v. Connor and Excessive Force During Arrest*, 38 UCLA L. REV. 1257–1286 (1991).

264. *Tennessee v. Garner*, 471 U.S. 1 (1985).

265. *Graham v. Connor*, 490 U.S. 386 (1989).

barrier for indicting a police officer for using lethal force—needing to overcome the presumption that the officer believed at the time of the killing that his or another’s life was at risk.²⁶⁶ To understand the nature of that standard of culpability, we will (1) present the *Garner* Court’s adoption of the Fourth Amendment basis for assessing excessive force, (2) review the bases for the *Graham* Court’s expansion of the *Garner* analysis, and (3) critique the *Graham* Court’s objective reasonableness standard.

We begin in 1985, with *Tennessee v. Garner*,²⁶⁷ in which the Court found the use of deadly force to prevent escape was an unreasonable seizure under the Fourth Amendment, in the absence of probable cause that the fleeing suspect posed a physical danger.²⁶⁸ In reaching its decision, the Court adopted a Fourth Amendment’s “search and seizure” analysis to assess the legality of excessive force, in lieu of the Fourteenth Amendment’s due process approach.²⁶⁹ In doing so, the Court set forth instances in which an officer’s use of deadly force is reasonable.²⁷⁰ However, the Court framed the legal issue as one based on “the totality of the circumstances,” weighing the nature of the intrusion of the suspect’s Fourth Amendment rights against the government interests which justified the intrusion.²⁷¹ In this particular case, the Court found in favor of the suspect.²⁷²

266. See *infra* discussion of the *Graham* decision.

267. *Garner*, 471 U.S. 1 (1985) (Justice Byron White, writing for the majority; reviewed the facts that, on October 3, 1974, a Memphis police officer fatally shot a fleeing, unarmed suspect, a fifteen-year-old, as he began to climb a fence. In a civil case, the officer relied on a Tennessee state statute and official Memphis Police Department policy authorizing deadly force against a fleeing suspect. The statute provided that, “if, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” The Court held that the statute was unconstitutional.).

268. *Garner*, 471 U.S. 1 (1985).

269. *Id.* at 7 (“apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment”).

270. *Id.* (the Court stating (1) when threatened with a deadly weapon; (2) when the officer has probable cause to believe that the suspect poses an imminent threat of serious harm or death to the officer or to others; or (3) when probable cause exists that the suspect has committed a crime involving threatened or actual serious physical harm or death to another.

271. *Id.*

272. The Court noted that as the use of deadly force against a subject is the most intrusive type of seizure possible, because it deprives the suspect of his life, and that the state failed to present evidence that its interest in shooting unarmed fleeing suspects outweighs the suspect’s interest in his own survival. The Court concluded, “[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.” *Id.* at 11.

Four years later, in 1989, in *Graham v. Connor*,²⁷³ the Court elaborated on *Garner's* approach to the boundaries of the police use of lethal force.²⁷⁴ In *Graham*, the Court held that the lower court had incorrectly applied a test that focused on an officer's subjective motivations.²⁷⁵ Instead, the Court held that the standard should be whether a police officer used an objectively unreasonable amount of force under the Fourth Amendment "search and seizure" analysis.²⁷⁶

Prior to *Graham*, the federal courts had used the Due Process analysis under the Fifth and Fourteenth Amendments to regulate the Government's abuse of civil rights, along with the Eighth Amendment's "cruel and unusual punishment" analysis for in police custodial abuse cases.²⁷⁷ However, in *Graham*, the Court rejected the notion that the judiciary should use the Due Process Clause, instead of the Fourth Amendment, in analyzing an excessive force claim.²⁷⁸ In its decision, the *Graham* Court provided the basis for what constituted reasonableness, asserting that it applied to what is reasonable "under the given circumstances."²⁷⁹

273. *Graham*, 490 U.S. 386 (1989). The facts of the case are worth mentioning. The plaintiff, Dethorne Graham, a Black man, who suffered from type 1 diabetes entered a convenience store to get orange juice but seeing a long line decided to leave. The defendant, Connor, a Black police officer, became suspicious and pulled Graham over for an investigative stop to determine what he was doing at the store. When backup officers arrived, one of the officers rolled Graham over on the sidewalk and applied handcuffs tightly behind Graham's back. Several officers then lifted the still-unconscious body of Graham and put him face down on the hood a car. Then four officers picked up Graham and threw him headfirst into the back of a police car. Once Officer Connor confirmed that Graham had done nothing wrong at the convenience store, the officers drove him home and released him. Due to the police encounter, Graham suffered a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.

274. *Id.* at 395.

275. *Graham*, 490 U.S. 386, at 397-98 (1989).

276. *Id.* at 395.

277. *Id.*

278. *Id.* ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.") Writing for the majority, Chief Justice William Rehnquist stated, "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 396. Further, the Court stated that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment [search and seizure] and its 'reasonableness' standard. *Id.* at 399.

279. *Id.* ("Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the test's "proper application requires careful attention to the facts and circumstances of each particular case.").

In *Graham*, the Court held that determining the objective reasonableness of a particular seizure under the Fourth Amendment “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”²⁸⁰ As such, the *Graham* Court’s inquiry requires analyzing the totality of the circumstances *from the officer’s perspective*.²⁸¹ As a result, the *Graham* decision is the prevailing standard for determining whether a police officer’s use of force is excessive or justified—whether a police officer reasonably believed his or her life, or the life of another, was being threatened at that time.²⁸²

This doctrine is misguided for two reasons: (1) it promotes over-policing by treating every police encounter as a “search” and (2) condones the use of lethal force by granting police virtually absolute immunity from criminal liability in the policing of nonfelonious suspects. First, its application is overly broad as it wrongly views all lethal or excessive force cases as seizures strongly protected by the Fourth Amendment,²⁸³ ignoring the sanctity of life, protected by the Due Process Clause of the Fourteenth Amendment.²⁸⁴ This fatal constitutional misdirection sets in motion a

280. *Graham*, 490 U.S. 386. at 394 (“Where, as here, the excessive force claim arises in the context of an arrest . . . it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against unreasonable . . . seizures.’”).

281. *Id.* at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 2022).

282. See Osagie K. Obasogie et al., *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NORTHWESTERN U. L. REV. 1465 (2018) (noting, that based on an empirical study, the Court’s adoption of the Fourth Amendment did not reflect a preexisting trend or consensus in the federal courts and has contributed to the perpetuation of police excessive use of force in many communities of color).

283. *Graham*, 490 U.S. at 394 (1989) (“Where, as here, the excessive force claim arises in the context of an arrest . . . it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against unreasonable . . . seizures.’”).

284. *Cf.*, *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), in the context of high-speed police pursuit of a motorcyclist, the Court has rejected a Fourth Amendment approach and instead used a Fourteenth Amendment due process analysis. *Id.* at 836–37. In a Section 1983 claim against the sheriff’s deputy who caused their son’s death, based on deprivation of their son’s substantive due process right to life, while addressing a circuit split on the culpability level required to establish a Fourteenth Amendment violation in high-speed pursuit cases, the *Lewis* Court also specifically rejected a Fourth Amendment analysis. *Id.* at 836. The Court was presented with the question of whether deliberate or reckless indifference was enough to establish a Fourteenth Amendment violation, or whether the higher “shock the conscience” standard must be met. The Court held that the shock the conscience standard was applicable stating that “only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” *Id.* at 836.

restrictive approach to judging police misconduct, unintentionally permitting wrongdoing to go unpunished. Viewing a police officer's lethal shooting as the apprehension of a suspect and, therefore, a seizure under the Fourth Amendment is deficient protection of the suspect's right to life: it ignores other controlling principles of constitutional law and deprives the law of moral principles. This results in over-policing, as the Court grants police officers, with already pervasive authority, absolute criminal immunity from harming or even killing people. Consequently, police officers have virtually unfettered "search and seizure" authority in an arrest or investigatory stop.²⁸⁵

The overextension of *Graham* is illustrated in 2014, in *Plumhoff v. Rickard*.²⁸⁶ There the Court found that officers did *not* use excessive force in violation of the Fourth Amendment, when they killed a motorist and passenger by shooting fifteen times into their fleeing vehicle.²⁸⁷ Looking at the totality of the circumstances, the Court concluded that the officers acted reasonably as the driver's reckless driving posed a grave public safety risk and under those circumstances the firing of fifteen shots was not excessive.²⁸⁸ Hence, the Court's "objective reasonableness" test promotes police brutality and does not deter or address the authority to use lethal

285. See, e.g., William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551 (1984); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment* (1974) MINN. L. REV. 848, <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1847&context=mlr>.

286. *Plumhoff v. Rickard*, 572 U.S. 765 (2014).

287. *Id.* The car was originally pulled over for an inoperable taillight, however, the Court found that the high-speed car chase that ensued endangered the lives of both the police, and bystanders.

288. *Id.* at 766 (according to the Court, "a reasonable officer could have concluded that [the driver] was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat to others.").

force,²⁸⁹ and extends protection beyond the “rule of necessity” adopted by reputable law enforcement agencies.²⁹⁰

Another example of how the *Graham* standard produces tragic consequences is the killing of Tamir Rice.²⁹¹ In that case, a police officer was allowed to legally kill an unarmed child, because the officer stated he “reasonably believed” (objectively assessed) that the child was a threat to

289. The Court continues to reaffirm its commitment to its *Graham* jurisprudence; *see, e.g., County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1543–44 (2017) (reviewing the U.S. Court of Appeals for the 9th Circuit’s “provocation” rule, by which officers found to have acted reasonably on one Fourth Amendment claim could, nevertheless, be held liable for that action based on a separate Fourth Amendment violation that contributed to their need to use that force); *id.* at 1543. The Court held that rule should be barred as it conflicts with *Graham* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff’s Fourth Amendment rights). There, in a unanimous decision, the Court reiterated its controversial standard for assessing police criminal liability in lethal force cases. *Id.* at 1548; *see also* *When v. United States*, 517 U.S. 806, 813 (1996) (barring courts from considering a police officer’s subjective motivations for making police stops and conducting). In rejecting the Ninth Circuit’s “provocation rule,” the Court upheld the standard outlined in *Graham* as the “settled and exclusive framework” for excessive force claims under the Fourth Amendment. *Id.* at 1548.

290. Memorandum on Resolution 14, *supra* note 20:

The Department of Justice hereby establishes a uniform policy with respect to the use of deadly force in both custodial and non-custodial situations [T]he touchstone of the Department’s policy regarding the use of deadly force is necessity. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time

Deadly force should never be used upon mere suspicion that a crime, no matter how serious, was committed, or simply upon the officer’s determination that probable cause would support the arrest of the person being pursued or arrested for the commission of a crime. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

See also Olevia Boykin et al., Opinion, *A Better Standard for the Use of Deadly Force*, N.Y. TIMES (Jan. 1, 2016), http://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html?_r=0 (suggesting the adoption of a necessity rule—does not permit deadly force if non-deadly or less deadly alternatives are available and adequate to meet the threat); J. Michael McGuinness, *Law Enforcement Use of Force: Safe and Effective Policing Requires Retention of the Reasonable Belief Standard*, THE CHAMPION, May 2015 at 26, 27.

291. *See, e.g.,* Shaila Dewan et al., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> (reporting on the November 22, 2014 case of Tamir Rice, a twelve year old Black male, killed in a Cleveland park by a white male police officer, who claims the boy had a pistol, which turned out to be a toy, in which the grand jury failed to indict).

himself, his fellow officer, and potentially to others.²⁹² Under the *Graham* standard, this would apply even where the child was thirty feet away from the officer and was walking away with his or her back facing the officer. This doctrine is devoid of moral principles and disregards the sanctity of life. This doctrine places the burden of proof on the (sometimes deceased) victim, to show that the officer's action was unjustified. This leads to the question under *Graham*—when is an officer's use of lethal force ever unjustified?²⁹³

The second critique is the *Graham* doctrine grants police officers virtually absolute immunity against criminal liability. This is contrary to the Court's better approach to protecting lives, as it established in *civil* liability cases, using a Fourteenth Amendment "due process" analysis, which relies on a "shock the conscious" approach.²⁹⁴ This critique was embraced by the Court in *County of Sacramento v. Lewis*²⁹⁵ decided in line with *Graham*. In a Section 1983 claim against the sheriff's deputy who caused a young male's death, the Court rejected a Fourth Amendment approach and instead used a Fourteenth Amendment due process analysis.²⁹⁶ The Court held that the shock the conscience standard was applicable stating that "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."²⁹⁷

Relying on *Graham v. Connor*, the Court explained that, under Section 1983, if a particular Constitutional Amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."²⁹⁸ But the Court reasoned that a police pursuit was neither a search nor a seizure and therefore does *not* fall under a Fourth Amendment analysis but rather under the Fourteenth Amendment substantive due process protection of a person's

292. *Id.* This would apply even where the child was thirty feet away from the officer and was walking away with his back facing the officer.

293. *See, e.g.*, Manny Fernandez, *North Charleston Police Shooting Not Justified, Experts Say*, N.Y. TIMES (Apr. 9, 2015), http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html?_r=2; Eric Tucker, *When Can Police Use Lethal Force Against a Fleeing Suspect?*, PBS NEWS HOUR (Apr. 8, 2015, 4:17 PM), <http://www.pbs.org/newshour/rundown/can-police-use-lethal-force-fleeing-suspect/>. *See also infra* Introduction in the recent killings of Rayshard Brooks, George Floyd, and Breonna Taylor, the officers' lives nor the lives of others were not at risk.

294. *See infra* Part III, B (subject to the usual due process protections including the presumption of innocence).

295. *Cty. of Sacramento*, 523 U.S. 833 (1998).

296. *See id.* at 83637 (1998).

297. *Id.* at 836.

298. *Id.* at 842.

life.²⁹⁹ Thus, the Court reiterated a substantive due process approach that emphasized the sanctity of life, inherent in the Fourteenth Amendment, explaining that its prior cases have held the amendment to guarantee “more than fair process,” to include a “substantive sphere” which bars “certain government actions regardless of the fairness of the procedures used to implement them.”³⁰⁰

In summary, the *Graham* doctrine unintentionally condones police use of excessive force and results in a substantial barrier to investigations and prosecutions of such incidents.³⁰¹ The Court’s “objective reasonableness” standard defies reality. Handcuffed and pinned on his stomach by three police officers in a chokehold for nearly nine minutes, George Floyd posed no threat.³⁰² Running away from the police after a peaceful interrogation, Rayshard Brooks posed no threat.³⁰³ Sleeping in her bed in her home, Breonna Taylor posed no threat.³⁰⁴ Clearly, the life of the law has not been logic,³⁰⁵ nor has it been moral.

* * *

299. The Court stated,

The Fourth Amendment covers only “searches and seizures,” neither of which took place here. No one suggests that there was a search, and our cases foreclose finding a seizure. We held in *California v. Hodari D.*, that a police pursuit in attempting to seize a person does not amount to a “seizure” within the meaning of the Fourth Amendment. And in *Brower v. County of Inyo*, we explained that “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied* (emphasis added).” We illustrated the point by saying that no Fourth Amendment seizure would take place where a “pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit,” but accidentally stopped the suspect by crashing into him. That is exactly this case.

Id. at 833–845.

300. *Cty. of Sacramento*, 523 U.S. at 840 (first quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); then *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

301. See Obasogie et al., *supra* note 281, AMNESTY INT’L, *supra* note 46, at 2.

302. See Hill, *supra* note 4.

303. See Oliviero et al., *supra* note 10.

304. See Campos-Flores et al., *supra* note 2.

305. See OLIVER WENDELL HOLMES, THE COMMON LAW (1881) (observing “[t]he life of the law has not been logic but experience”).

The Court's construction of the Blue Shield—judicial doctrines of willful intent, qualified immunity, and objective reasonableness—makes it practically impossible to successfully prosecute a police officer for using lethal force.³⁰⁶ These extraordinary legal safeguards greatly protect police officers from being convicted for unjustified killings of Blacks. Hence, the Court's current jurisprudence on police accountability creates unequal justice, tilting the scales of justice by heavily weighing in favor of the perpetrator and against the victim.

In response to the Court-created Blue Shield, this Article contends that, from the viewpoint of saving Black lives, the Court's current doctrines are morally bankrupt, as they devalue life, unfairly protect rogue police officers, and promote reckless or wanton shootings by police officers. It proposed the adoption of the GFAC which challenges the constitutionality of the authority and practices in the use of excessive force. In doing so, it rightfully shifts the conversation from whether a particular officer's action was justified under the circumstances to whether the State has the authority to take a person's life pursuant to a search or an arrest. Further, it places greater weight on the sanctity of life and less on over-policing of innocent suspects.

In support of the GFAC, this Article posits that the Court's death penalty jurisprudence should be the controlling authority to assess the constitutionality of police use of lethal force. This thesis is fleshed out by (1) examining the Court's death penalty jurisprudence and (2) arguing that police use of lethal force policies and practices do not comply with the Court's strict restrictions on executions, as discussed next.

3. The Court's Death Penalty Jurisprudence Prohibits Police Use of Lethal Force

The sanctity of life against government infringement has been constitutionally recognized and protected in the Court's death penalty jurisprudence, which arguably should apply to police use of lethal force cases. The GFAC is based on the contention that the policies and practices of deadly force are unconstitutional violations of the Court's death penalty

306. Tom Jackman et al., *Charging Officers with Crimes Is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020 7:25 PM), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/>; Kristy Parker, *Prosecute the Police*, THE ATLANTIC (June 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/prosecutors-need-to-do-their-part/612997/>. See also Mike Allen, *Holder's Parting Shot: It's Too Hard to Bring Civil Rights Cases*, POLITICO (Feb. 27, 2015, 7:00 AM), <http://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575> (reporting that former U.S. Attorney General Eric Holder called for lowering the legal standard for assessing police accountability).

jurisprudence.³⁰⁷ This contention is argued next in two parts: (1) that the Court has questioned whether the Government has the right to execute a person, moving toward abolition of the death penalty, (2) that, in the meanwhile, the Court has established strict restrictions of the Government's taking of a person's life, and (3) that police use of lethal force policies and practices do not comply with those strict restrictions. This leads to the conclusion that such deadly or excessive force policies and practices are unconstitutional and, therefore must be abolished.

The first point is that both Federal³⁰⁸ and State governments³⁰⁹ believe the government lacks the constitutional authority to take a person's life.³¹⁰ Consequently, the Court's death penalty jurisprudence reflects this uncertainty. In 1972, in *Furman v. Georgia*,³¹¹ the Court struck down capital punishment statutes, reducing all death sentences pending at the time to life imprisonment.³¹²

307. "Death penalty," also known as capital punishment, is a government-sanctioned practice whereby a person is put to death by the State as a punishment for a crime. See Defining "death penalty" jurisprudence, *supra* note 31.

308. Unfortunately, currently capital punishment is currently authorized by the federal government.

309. See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (visited Aug. 20, 2020) (reporting that as of 2020, twenty-eight states have the death penalty, with twenty-states and the District of Columbia have legislatively abolished the death penalty). Four others, Colorado, Pennsylvania, California, and Oregon have suspended executions by gubernatorial moratorium. The Nebraska Legislature also abolished capital punishment in 2015, but it was reinstated by a statewide vote in 2016; see also Staff, *Colorado Becomes 22nd State to Abolish Death Penalty*, INDEPENDENT (Mar. 25, 2020, 8:24 PM), <https://www.independent.co.uk/news/world/americas/colorado-death-penalty-abolished-executions-a9423146.html>. Additionally, courts in Washington and Delaware recently ruled that the states' capital punishment laws are unconstitutional. See generally *States and Capital Punishment*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 24, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>.

310. See generally John Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 GEO. CRIM. L. REV. 4 (2012) (providing a detailed analysis of death penalty jurisprudence, specifically around the contours of under what circumstances the death penalty is forbidden); *The Case Against the Death Penalty*, ACLU (2012), <https://www.aclu.org/other/case-against-death-penalty> ("The American Civil Liberties Union believes the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law. Furthermore, we believe that the state should not give itself the right to kill human beings—especially when it kills with premeditation and ceremony, in the name of the law or in the name of its people, and when it does so in an arbitrary and discriminatory fashion.").

311. *Furman*, 408 U.S. 238 (1972).

312. *Id.* at 240 (declaring that under then-existing laws "the imposition and carrying out of the death penalty . . . constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments," after finding that the manner in which death penalty laws had been applied to be "harsh, freakish, and arbitrary" as to be constitutionally unacceptable).

Subsequently, in 1976, in *Gregg v. Georgia*,³¹³ the Court affirmed the legality of capital punishment,³¹⁴ after many states passed new death penalty statutes.³¹⁵ After resuming its reassessment of the constitutional parameters of the death penalty, the Court has absolutely prohibited the execution of certain classes of individuals.³¹⁶ Further, on the procedural front, the Court decided that juries, not judges, find facts that (1) make a defendant eligible for capital punishment³¹⁷ and (2) impose a sentence of death.³¹⁸ Therefore, the government continues to assess whether there should be an absolute abolition of the death penalty, as existed in the past.

The second point is that while reconsidering an absolute abolition of government executions, the Court has established very strict requirements on when the Government can constitutionally terminate a person's life.³¹⁹ The Court's Eighth Amendment "Cruel and Unusual Punishment" cases are the capstone of the death penalty jurisprudence.³²⁰ However, the Court's

313. *Gregg*, 428 U.S. 153 (1976).

314. *Id.* (reporting that "the U.S. federal government, the U.S. military, and 31 states have a valid death penalty statute, and over 1,400 executions have been carried in the United States since it reinstated the death penalty in 1976").

315. See generally ACLU, *supra* note 309 (noting these statutes require a two-stage trial procedure, in which the jury first determines guilt or innocence and then chooses imprisonment or death in the light of aggravating or mitigating circumstances).

316. The Court has abolished the death penalty in several instances, ruling that the execution of such individuals is unconstitutional, violating cruel and usual punishment. See *Ford v. Wainright*, 477 U.S. 399, 409–10 (1986) (prohibiting the death penalty for insane persons), in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting execution of mentally retarded criminals); in *Roper v. Simmons*, 543 U.S. 551, 555, 578–79 (2005) (prohibiting the execution of minors); and in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), for those convicted of raping a child where death was not the intended or actual result. State courts have also restricted death penalty executions. See generally Amber Widgery, *Debating the Death Penalty: Capital Punishment Divides Legislators, But Not Along Party Lines*, STATE LEGISLATURES (Jan./Feb. 2020), https://www.ncsl.org/Portals/1/Documents/magazine/2020/DeathPenalty_JanFeb_2020_SL.pdf. See, e.g., on August 2, 2016, in *Rauf v. State*, 145 A.3d 430 (Del. 2016), the Delaware Supreme Court struck down the state's death penalty statute, ruling that it violated the Sixth Amendment as interpreted by the U.S. Supreme Court decision *Hurst v. Florida*, 136 S.Ct. 616 (2016). On October 11, 2018, in *State v. Gregory*, 427 P.3d 631 (Wash. 2018), the Washington Supreme Court also struck down the State's death penalty, ruling for the fourth time that it was unconstitutional, finding it "invalid because it is imposed in an arbitrary and racially biased manner," and found that the law as applied violates Article I, Section 14 of the State Constitution because it fails to serve any legitimate penological goal.

317. See *Ring v. Arizona*, 536 U.S. 584 (2002).

318. See *Hurst v. Florida*, 136 S.Ct. 616 (2016).

319. See generally *Death Penalty/Capital Punishment Law*, MEGALAW.COM (Aug. 20, 2020), <https://web.archive.org/web/20060614135521/http://www.megalaw.com/top/deathpenalty.php>.

320. See Melvin Gutterman, *The Contours of Eighth Amendment Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373 (1995) (describing the historical context of the Eighth Amendment and its application to conditions of confinement for prison reform litigation); Schlanger, *supra* note 32 (providing one of the most comprehensive reviews of

death penalty jurisprudence encapsulates all applicable constitutional and fundamental rights that protect a person's life from government infringement.³²¹

These "pro-sanctity of life" constitutional rights can be categorized in a five-part process by which the government can legally execute a person: (1) Rights of the Accused, including a fair trial, pre-trial, speedy trial, jury trial, counsel, presumption of innocence, exclusionary rule, self-incrimination, double jeopardy, defenses, juvenile status; (2) Verdict, including conviction, acquittal, not proven, directed verdict; (3) Sentencing, including mandatory, suspended, custodial, periodic, discharge, guidelines, totality, dangerous offender; capital punishment, execution warrant, cruel and unusual punishment, imprisonment, life imprisonment, indefinite imprisonment, three-strikes law; (4) Post-sentencing, including habeas appeals, parole, probation tariff, life license, miscarriage of justice, exoneration, pardon, recidivism, habitual offender, sex offender registration, sexually violent predator legislation, and (5) Execution, including methods of execution,³²² and humane considerations.³²³

Relative to the George Floyd Anti-Lynching Code, the Court's prescriptions on government's authority to take a person's life dictates that the executions strictly comply with those strict, exacting requirements. Next,

innate litigation including those that pertained to conditions of confinement in violation of the 8th Amendment); Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 NYU L. REV. 881 (2009) (examining when prison conditions would qualify as either "cruel" or "unusual" and how cruelty would be captured doctrinally for Eighth Amendment conditions of confinement analysis).

321. See generally RAYMOND PATERNOSTER, ET AL., *THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT* (2007).

322. See CORRECTIONS WILLIAM J. CHAMBLISS 4-5 (2011) (noting that in the U.S. executions are typically done in non-public setting, shielded from public view behind the walls of the penitentiary). Cf., Steven A. Blum, *Public Executions: Understand the "Cruel and Unusual Punishments" Clause*, 19 HASTINGS CON. L.Q. 415 (Winter 2019) (describing the public executions in Florida and in Utah as of 1992).

323. In 2008, in *Baze v. Rees*, 553 U.S. 35 (2008), the Court held that the lethal injection does not constitute a cruel and unusual punishment, applying an "objectively intolerable" test to determine if the method of execution violates the Eighth Amendment's ban on cruel and unusual punishments. The legality of lethal injection was upheld in *Glossip v. Gross*, 576 U.S. 863 (2015). See also, GAIL A. VAN NORMAN ET AL., *CLINICAL ETHICS IN ANESTHESIOLOGY* 285-91 (2010) (reporting on a separate study published in *The Lancet* in 2005 that found that in forty-three percent of cases of lethal injection, the blood level of hypnotics was insufficient to guarantee unconsciousness). State courts and lower federal courts have refused to strike down hanging and electrocution as impermissible methods of execution. See generally David Down & Jeffrey R. Newberry, *Conceptual and Scientific Defects in the Supreme Court's "Method of Execution" Jurisprudence*, 92 YALE J. BIOL. MED. 210, 793-803 (2019) (providing a scientific analysis regarding specific methods of execution which may violate the Eighth Amendment).

we will examine the contention that the police policies authorizing lethal force are wrongfully licensing “executions,” subject to the Court’s death penalty jurisprudence.

The third and most important point is that the police use of lethal force policies and practices do not comply with the Court’s exacting restrictions for the taking of a person’s life.³²⁴ As previously noted, the Court’s restrictions go beyond its Eighth Amendment cases. For there to be a constitutionally-sanctioned execution, the Court requires the following substantive and procedural safeguards: such an execution must, at the minimum, (1) follow a conviction of a capital crime, (2) be mandated by a jury of one’s peers, (3) beyond a reasonable doubt, (4) following post-conviction remedies, and (5) in a humane manner of execution.

Many states have eliminated the death penalty as inhumane, noting its racial implications.³²⁵ Even in states where the death penalty is permitted it remains highly regulated.³²⁶ This begets the question, when such strict regulations regarding executions abound, how can the law permit a police officer to execute a person without a charge of a capital crime, without presenting defenses, without a jury of one’s peers, and oftentimes in an inhumane manner?

The arguments presented for the abolition of the death penalty³²⁷ also apply to support the GFAC’s abolition of death by police killings: (1) police killings are “unusual” punishment, because the United States is the only western industrialized nation that engages in this punishment³²⁸ and because only a random sampling of people in the United States are killed by police;³²⁹ (2) police killings, like capital punishment, deny due process of law; its imposition is often arbitrary,³³⁰ and always irrevocable—forever depriving an individual of the opportunity to benefit from new evidence or new laws that might warrant the reversal of a conviction, or the setting aside of a death sentence; (3) police killings violate the constitutional guarantee of equal protection, as they occur randomly—and discriminatorily, imposed disproportionately upon those whose victims are Black, often poor and uneducated, and concentrated in certain geographic regions of the country;³³¹

324. See Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987, 1011 (2015) (arguing that a re-conceptualization of the use of the police use of lethal force as punishment shows that the Eighth Amendment should apply).

325. See *supra* note 308.

326. *Id.*

327. See *The Case Against the Death Penalty*, *supra* note 309.

328. See *infra* Part I.

329. *Id.*

330. *Id.*

331. *Id.*

(4) police use of lethal force is clearly not a viable form of crime control, compared to curbing drug use, putting more officers on the street, and gun control;³³² (5) police use of deadly force wastes limited resources, squandering the time and energy of courts, prosecuting attorneys, defense counsel, juries, and courtroom and law enforcement personnel, unduly burdens the criminal justice system, and thus is counterproductive as an instrument for society's control of violent crime, and has resulted in higher insurance premiums to cover the rising cost of wrongful death civil actions;³³³ (6) police killings do irreparable harm to the victims (death), to their families (trauma), to the offending police officer (termination, suspicion, and potentially jail time), and to policing (damaged community relations);³³⁴ (7) police brutality demonstrates a lack of respect for human life, as Black lives matter and as all life is precious and as death is irrevocable, murder is abhorrent, and a policy of state-authorized killings is immoral, epitomizing the tragic inefficacy and brutality of violence, rather than reason, as the solution to difficult social problems.

In summary, the Court's death penalty jurisprudence protects a person, particularly a Black person, from being executed by the police use of lethal force. This is a more appropriate application of a constitutional principle over the current Fourth Amendment search and seizure jurisprudence. The ongoing controversial and highly publicized police killings of Blacks sends a message that our society does not respect life, when it permits its officials to deliberately kill human beings. These killings are executions, a violent public spectacle of official homicide, and one that endorses killing to solve social problems—the worst possible example to set for the citizenry, and especially children. Overall, there are no good legal or policy reasons to support lethal force policies or practices, but the bloodshed and the resulting destruction of community decency are real.

* * *

The George Floyd Anti-Lynching Code is a constitutionally mandated solution to the unequal justice, which results from the Court's three doctrines that compose the Blue Shield. As analyzed in this section, the GFAC achieves five points, (1) it embraces the sanctity of life (2) it protects particularly vulnerable Black lives, (3) it bypasses the Blue Shield by focusing on the unconstitutionality of the authority of police to use lethal force, (4) it complies with the strict constitutional restrictions on the

332. *Id.*

333. *See The Case Against the Death Penalty, supra* note 309.

334. *See infra* Part I.

government's authority to execute a person's life, and (5) it properly categorizes the use of lethal force as an execution, subject to the Eighth Amendment. In addition to these bases of the Code, it addresses the conscious and unconscious negative impact of systemic racism, the Blue Code, which is discussed next.

B. Systemic Racism

In addition to the Court generated Blue Shield protection, police officers are also protected by the "Blue Code"—the combination of a protective police culture and systemic racism that provides additional safeguards for police officers who use lethal force. The Blue Code is composed of six components that combined create a nearly impermeable barrier to police accountability, (1) police officers are protected from criminal liability by an unofficial but real code of silence, in which police officers guard each other from outside criticism, including misconduct.³³⁵ (2) police officer misconduct is staunchly defended by the Fraternal Order of Police ("FOP"), a national police union,³³⁶ which provides officers with legal counsel to defend them in investigations and lawsuits,³³⁷ (3) police officers have broad authority to investigate themselves, through their internal affairs division,³³⁸ (4) the principles of comity and federalism give local prosecutors

335. Robert M. Myers, *Code of Silence: Police Shootings and the Right to Remain Silent*, 26 GOLDEN GATE U. L. REV. 497, 505 (1996).

336. Paul Butler, *Commentary, Why the Fraternal Order of Police Must Go: The Nation's Largest Police Organization does more Harm to Public Safety than Good*, THE MARSHALL PROJECT (Nov. 11, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/10/11/why-the-fraternal-order-of-police-must-go>.

337. Noam Scheiber, et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>; Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEW YORKER (June 18, 2020), <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses>; Don Gonyea, *Labor Leaders Call for Police Reform Even As Police Unions Face Growing Criticism*, NPR (June 10, 2020 3:49 PM), <https://www.npr.org/2020/06/10/874096421/labor-leaders-call-for-police-reform-as-they-face-criticism-for-police-union-tie>; Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, THE ATLANTIC (Dec. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>; Christopher Ingraham, *Police Unions and Police Misconduct: What the Research Says about the Connection*, WASH. POST (June 10, 2020 7:54 AM), <https://www.washingtonpost.com/business/2020/06/10/police-unions-violence-research-george-floyd/>.

338. See Naomi Creason, *Police Departments Often Investigate Themselves in Non-Lethal Use-of-Force Incidents*, THE SENTINEL (Apr. 19, 2015), http://cumberlandlink.com/news/local/police-departments-often-investigate-themselves-in-non-lethal-use-of/article_5af2e65d-ff32-5451-9c52-adaa7eb758f2.html; Sheila McLaughlin, *What Happens When Officers*

jurisdiction to prosecute fatal shootings pursuant to local or state laws,³³⁹ (5) the grand jury process has also been shown to be pro-police and anti-Blacks,³⁴⁰ and (6) if a police officer is indicted for committing a homicide, that officer will benefit from a pro-police jury.³⁴¹ Relative to the pro-police juries, these jurors are often white, middle class, suburban citizens who see the police as guardians of the American way of life.³⁴² They bring to a trial a pro-police, anti-Black bias, which often results in the acquittal of the police officer suspect.³⁴³

Those components of the Blue Code result in faulty, biased investigations of the alleged wrongful use of lethal force. This is also inclusive of tainted evidence and police cover-ups.³⁴⁴ Hence, due to these

Use Deadly Force?, USA TODAY (Feb. 21, 2014, 2:49 P.M.), <https://www.usatoday.com/story/news/nation/2014/02/21/police-deadly-force-accountability/5697611/>.

339. See generally Flanders & Welling, *supra* note 206; Jason Hanna, *No Charges Against Officers in Alton Sterling Death; Other Videos Are Coming*, CNN (Mar. 27, 2018, 6:22 AM), <https://www.cnn.com/2018/03/27/us/alton-sterling-investigation/index.html>; David A. Graham, *Most States Elect No Black Prosecutors*, THE ATLANTIC (July 7, 2015), www.theatlantic.com/politics/archive/2015/07/american-prosecutors-are-incredible-white-does-it-matter/397847/.

340. See Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC NEW YORK (Dec. 4, 2014, 1:59 PM), <https://www.nbcnewyork.com/news/local/grand-jury-decision-eric-garner-staten-island-chokehold-death-nypd/1427980/>; Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 296–97 (1994); see also Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 410 (2017) (recommending reforms of the grand jury system for cases involving police use of lethal force).

341. See Maura Dolan, *California Prosecutors Routinely Strike Black and Latino People from Juries, Report Says*, L.A. TIMES (last updated June 15, 2020, 11:02 am), <https://www.latimes.com/california/story/2020-06-15/prosecutors-strike-black-latino-jurors-report>.

342. Janell Ross, *How Big of a Difference Does an All-White Jury Make? A Leading Expert Explains*, WASH. POST (May 30, 2016 8:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/30/how-big-a-difference-does-an-all-white-jury-make-a-leading-expert-explains/>.

343. See Samira Puskar et al., *3 Chicago Officers Acquitted of Covering Up for Colleague Who Shot Laquan McDonald*, NBC NEWS (Jan. 17, 2019, 2:58 PM), <https://www.nbcnews.com/news/us-news/chicago-officers-found-not-guilty-attempted-cover-laquan-mcdonald-killing-n959411>; Phoebe Ellsworth, et al., *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 11, 1367–79 (2000); Ashish S. Joshi et al., *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>.

344. See U.S. COMMISSION ON CIVIL RIGHTS, POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES (Nov. 15, 2018), <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>.

six components of the Blue Code, there is usually a finding that the use of force was justified, with reliance on the testimony of the police officer who committed the shooting.³⁴⁵

Relative to the principles of comity and federalism, the typical investigation and charges are primarily a matter of local control and pursuant to local or state laws.³⁴⁶ As local prosecutors work closely with and rely on the cooperation of police officers in prosecuting other criminal matters, they arguably face unresolvable conflicts of interest in investigating and prosecuting police for alleged misconduct.³⁴⁷

The Blue Code functions as the ultimate protection of police misconduct, as it reflects and supports systemic racism.³⁴⁸ It also condones the policies and practices that in most states and under common law rules, permit police to use deadly force when the officer reasonably believes a suspect poses a significant threat of serious bodily injury or death to themselves or others.³⁴⁹ Some states have the use of deadly force statute included within a larger use of force statute, while others cover deadly force in their “justifiable homicide” statute, which applies to both law enforcement officers and private citizens.³⁵⁰

Relative to systemic racism, the federal government has investigated several police departments’ lethal force policies and practices.³⁵¹ These investigations concluded that the use of excessive lethal force was prevalent

345. Benjamin Wallace-Wells, *Police Shootings, Race, and the Fear Defense*, NEW YORKER (July 12, 2016), <https://www.newyorker.com/news/benjamin-wallace-wells/police-shootings-race-and-the-fear-defense>. See generally Creason, *supra* note 339.

346. *Id.*

347. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5, 128, 150–51, 180–81 (2009); Angela J. Davis, *Justice for Michael Brown Rests Almost Entirely in the Hands of This One Man*, NEW REPUBLIC (Aug. 18, 2014), <https://newrepublic.com/article/119123/ferguson-missouri-prosecutor-does-he-have-too-much-power>; Simone Weichselbaum, *The Problems with Policing the Police*, TIME, <http://time.com/police-shootings-justice-department-civil-rights-investigations/> (last visited Apr. 28, 2019); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

348. See, e.g., Katie Benner, *Barr Says There Is No Systemic Racism in Policing*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/justice-department-barr-racism-police.html>.

349. That also applies to prevent the escape of a fleeing felon when the officer believes escape would pose a significant threat of serious bodily injury or death to members of the public. See AMNESTY INT’L, *supra* note 46, at 2.

350. *Id.* at 2, 9, 21.

351. See FINAL REPORT, *supra* note 93; Julie Hirschfeld Davis, *Obama Calls for Changes in Policing After Task Force Report*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/us/politics/obama-calls-for-changes-in-policing-after-task-force-report.html> (reporting that President Obama said that requiring independent investigations when the police use lethal force, would be “controversial”).

in some police departments along with patterns of civil rights violations.³⁵² In response, the federal government sued several local police departments and negotiated consent decrees to ensure police accountability.³⁵³ In 2017, these investigations of police departments were halted by the President Donald J. Trump Administration,³⁵⁴ likely erasing years of positive police reforms.³⁵⁵

Therefore, the Blue Code and systemic racism work hand in hand to ensure that white police officers are seldom, if ever, found guilty for killing Black people, which leads to the question, is this failure of equal justice deliberate?

352. See U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 23 (2017), <https://www.justice.gov/opa/file/925846/download> (finding Chicago police officers have a pattern of using excessive force). See generally U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMUNITY POLICING REPORT 2015-2016 3 (2017), <https://www.justice.gov/opa/press-release/file/925431/download>; Matt Stroud et al., *A 'Pattern or Practice' of Violence in America*, BLOOMBERG (May 27, 2015), <https://www.bloomberg.com/graphics/2015-doj-and-police-violence/>.

353. See Jerry Abramson, *10 Cities Making Real Progress Since the Launch of the 21st Century Policing Task Force*, WHITE HOUSE (May 18, 2015, 7:26 PM), <https://www.whitehouse.gov/blog/2015/05/18/10-cities-making-real-progress-launch-21st-century-policing-task-force>; *Accomplishments Under the Leadership of Attorney General Eric Holder*, U.S. DEP'T JUST. (Jan. 18, 2017), <https://www.justice.gov/archives/doj/accomplishments-under-leadership-attorney-general-eric-holder> ("Since 2009, the Department has opened more than 20 investigations state and local law enforcement agencies regarding civil patterns or practices in violation of the Constitution or federal law... the largest number of law enforcement agencies being reviewed at any one time in the history of the Department."); cf. Sarah Wheaton et al., *Police Union Accuses White House of Politicizing Cop Safety, Obama Administration Has Announced Plan to Restrict Police Forces' Access to Military Gear*, POLITICO (May 18, 2015, 6:00 AM), <http://www.politico.com/story/2015/05/white-house-limiting-military-equipment-for-police-118041> (noting opposition to the Obama Administration's proposed changes from the nation's largest police union).

354. Then U.S. Attorney General Jeff Sessions announced that "in recent years, . . . law enforcement as a whole has been unfairly maligned and blamed for the crimes and unacceptable deeds of a few bad actors." U.S. DEPT. OF JUSTICE, JUSTICE NEWS, ATTORNEY GENERAL JEFF SESSIONS DELIVERS KEYNOTE REMARKS AT THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE DIVISION MIDYEAR CONFERENCE, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-keynote-remarks-international-association-chiefs> (last updated Apr. 11, 2017).

355. See John Byrne et al., *Concerns Mount over Chicago Cop Reform as Sessions Vows to 'Pull Back'*, CHI. TRIB. (Mar. 1, 2017, 5:30 AM), <http://www.chicagotribune.com/news/local/politics/ct-emanuel-sessions-consent-decree-react-met-20170228-story.html>; Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html?_r=0; Pete Williams, *AG Sessions Says DOJ to 'Pull Back' on Police Department Civil Rights Suits*, NBC NEWS (Feb. 28, 2017, 1:52 PM), <http://www.nbcnews.com/news/us-news/ag-sessions-says-trump-administration-pull-back-police-department-civil-n726826>.

C. Lynching

To appreciate the Black Lives Matter Movement, this Article critically analyzes the context of the white police officers' killings of Blacks in light of the State-sanctioned violence and the State deprivation of the human rights and dignity of all Blacks, which is discussed next.

Previously, this Article contended that the police use of lethal force violates the victim's protection against Cruel and Unusual Punishment. In what follows, this Article argues that the abuse of that right is more suspect when the perpetrator is a white male police officer and the victim is a Black person. As such, the police killing of Blacks in such a blatant, unabashed, and authorized manner constitutes modern-day lynching and is a key component of systemic racism.³⁵⁶

This section begins with an analysis of lynching and its role in racial oppression. Lynching was often used throughout our Nation's dark history to kill, punish, and subrogate Black people.³⁵⁷ Usually, this was in a violent public display, where whites terrorized and traumatized Blacks in order to enforce racial subordination and segregation.³⁵⁸

Certain elements must be present for a lynching. Specifically, it is (1) an act of violence; (2) under the pretext of administering justice without trial, (3) an execution of a presumed offender; (4) with use of torture and corporal mutilation; and (5) to instill fear and to promote white supremacy.³⁵⁹ Further, lynching or "lynch law" is where a self-constituted court imposes a death sentence on a person without due process of law.³⁶⁰

356. Martin Luther King III, a leading Black Lives advocate, concluded that when a police officer kills a Black person, that officer is acting illegally as judge, jury, and executioner. See Andrew Naughtie, *George Floyd Death: Martin Luther King III Says Police Acted as 'Judge, Jury and Executioner'*, THE INDEPENDENT UK (June 1, 2020), <https://www.independent.co.uk/news/world/americas/george-floyd-martin-luther-king-son-police-riots-bbc-interview-a9542151.html>.

357. See also EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017), <https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf> (documenting more than 4,400 racial terror lynchings in the United States during the period between Reconstruction and World War II).

358. Over the years, lynching was frequently supported by various State and federal law enforcement officials, and traumatized Blacks throughout the country. Even to this day, Congress has not been able to enact an anti-lynching statute. See Tal Kopan, *Sen. Kamala Harris' Anti-Lynching Bill Caught in Police Reform Fight*, S.F. CHRONICLE (June 23, 2020, 6:59 PM), <https://www.sfchronicle.com/politics/article/Kamala-Harris-anti-lynching-bill-caught-in-15361078.php>.

359. See Geoffrey Abbott, *Lynching, Mob Violence*, BRITANNICA, <https://www.britannica.com/topic/lynching> ("Lynching, The term 'lynch law' refers to a self-constituted court that imposes sentence on a person without due process of law.").

360. See *id.* (noting the terms derived from the name of Charles Lynch (1736-96), a Virginia enslaver of people of African descent).

The contemporary police killings of Blacks exhibit all of the elements of a lynching. Specifically, they are (1) act of violence, whether by shooting or chokehold; (2) committed under the pretext of administrating justice such as responding to a person who is resisting arrest; (3) executing a presumed offender, such as a presumption that George Floyd knowingly passed a phony twenty dollar bill; (4) with the use of torture such as kneeling on George Floyd's throat for nearly nine minutes, while handcuffed and lying on his back; and (5) to instill fear and to promote white supremacy as seen in the political fallout in support of the police's actions.³⁶¹

The Black Lives Matter Movement has emphasized that the police killing of Blacks is a key component of systemic racism, which makes Black lives less valued in our society.³⁶² In addition to those killings, the legal system continues to support and reflect centuries of overt and unconscious racial oppression and discrimination against Blacks, particularly males.³⁶³ Systemic racism is evidenced by the financial disparities in the Black community.³⁶⁴

The criminal justice system plays a key role, if not *the* key role, in systemic racism. That includes mass incarceration,³⁶⁵ a broken criminal

361. Zack Beauchamp, *What the Police Really Believe: Inside the Distinctive, Largely Unknown Ideology of American Policing and How It Justifies Racist Violence*, VOX (July 7, 2020, 8:10 AM), <https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd>.

362. See *supra* note 15. See, e.g., Christina Pazzanese, *The Fire This Time*, THE HARVARD GAZETTE (June 2, 2020), <https://news.harvard.edu/gazette/story/2020/06/lawrence-d-bobo-examines-police-killings-of-black-men/>; Lydia Denworth, *A Civil Rights Expert Explains the Social Science of Police Racism*, SCIENTIFIC AMERICAN (June 4, 2020), <https://www.scientificamerican.com/article/a-civil-rights-expert-explains-the-social-science-of-police-racism/>.

363. See, e.g., Richard Delgado et al., *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L. J. 1531 (2016) (positing that the imprisonment of African-American men is one means by which society removes minority populations from mainstream life).

364. See, e.g., David Leonhardt, *Opinion, The Black-White Wage Gap Is as Big as It Was in 1950*, N.Y. TIMES (June 25, 2020) <https://www.nytimes.com/2020/06/25/opinion/race-wage-gap.html> (reporting that recent research indicates little progress since the Truman administration).

365. The United States incarcerates two million people, which is more than any other country. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th ed. 2010).

justice system,³⁶⁶ racial disparities,³⁶⁷ and the economic devastation of communities of color.³⁶⁸ Relative to policing, there are many features of systemic racism including: capital punishment,³⁶⁹ racial profiling,³⁷⁰ institutional racism,³⁷¹ unconscious bias,³⁷² mass incarceration,³⁷³ the war on drugs,³⁷⁴ reform of the criminal justice system,³⁷⁵ the criminalization of misdemeanors,³⁷⁶ and discriminatory over-policing,³⁷⁷ shooter bias

366. See also Peter Wagner et al., *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> (last visited July 22, 2019) (cautioning that “being locked up is just one piece of the larger pie of correctional control. There are another 840,000 people on parole (a type of conditional release from prison) and a staggering 3.7 million people on probation (what is typically an alternative sentence). Given the often-onerous conditions of probation, policymakers should be cautious of ‘alternatives to incarceration’ that can easily widen the net of criminalization to people who are not a threat to public safety.”).

367. See, e.g., Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016) (noting “[d]espite that legalization, marijuana usage continues to disproportionately impose serious consequences on racial minorities, while white entrepreneurs and white users enjoy the early fruits of legalization.”).

368. See Candace Caruthers, *When the Cops Become the Robbers: The Impact of Asset Forfeiture on Blacks and How to Curtail Asset Forfeiture Abuses*, 62 HOW. L.J. 277 (2018); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors Prison*, 65 UCLA L. REV. 2 (2018).

369. See, e.g., Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329 (2003); Matthew R. Doherty, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 VAL. U. L. REV. 445 (2004).

370. See, e.g., *End Racial Profiling Act of 2015*, H.R. 1933, 114th Cong. (2015), introduced in the U.S. House of Representatives on April 22, 2015, <https://www.congress.gov/bill/114th-congress/house-bill/1933>; Carbado & Rock, *supra* note 58.

371. See, e.g., Lewis R. Katz, Symposium, *Whren at Twenty: Systematic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923 (2016).

372. See, e.g., L. Song Richardson et al., *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2016); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

373. See, e.g., Delgado, *supra* note 362 (positing that the imprisonment of Black men is one means by which society removes minority populations from mainstream life).

374. See, e.g., Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks*, 6 J. GENDER RACE & JUST. 381 (2002).

375. See, e.g., Michele L. Jawando & Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, CENTER FOR AMERICAN PROGRESS (Dec. 18, 2014), <https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>; Dukanovic, *supra* note 51.

376. See, e.g., Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

377. See L. M. VAN HET LOO ET AL, CANNABIS POLICY, IMPLEMENTATION AND OUTCOMES (2003) (stating that statistics show that controlling cannabis use leads in many cases to selective law enforcement, which increases the chances of arresting people from certain ethnicities. For example, while Blacks and Hispanics constitute about twenty percent of

studies,³⁷⁸ and masculinity studies.³⁷⁹ Further, Blacks, particularly males, are disproportionately unemployed,³⁸⁰ under-educated,³⁸¹ and underpaid even when overeducated.³⁸²

This Article contends that the George Floyd Anti-Lynching Code is a compelling response to the constitutional protection against “cruel and unusual punishments,” which is prohibited by the Eighth Amendment. This contention is based on the premise that police policies and practices on using lethal force constitute modern-day lynching; that they are State-sponsored executions and, therefore, subject to the strict requirements in death penalty cases.

* * *

Despite the overwhelming constitutional and policy bases for banning police use of lethal force, there are critiques to such an approach. Next, this section briefly responds to two positions against the proposed solution, the GFAC. The first critique is that police killings are not executions and, therefore, are not subject to death penalty jurisprudence. The second criticism is that the GFAC strips police officers of the means to protect themselves and others from imminent threats to their lives and the lives of

cannabis users in the U.S., they accounted for fifty-eight percent of cannabis offenders sentenced under federal law in 1994).

378. See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–29 (2002); Saul Miller et al., *The Basis of Shooter Biases: Beyond Cultural Stereotypes*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1358 (2012) (finding that participants with strong beliefs about interpersonal threats were more likely to mistakenly shoot outgroup members than in-group members).

379. See, e.g., Frank Rudy Cooper, *America's Police Culture Has a Masculinity Problem*, THE CONVERSATION (July 19, 2016, 6:07 AM), <https://theconversation.com/americas-police-culture-has-a-masculinity-problem-62666>.

380. See, e.g., *Black Male Millennial Unemployment and Mental Health*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Aug. 2018), <https://www.apa.org/advocacy/health-disparities/black-male-unemployment.pdf>; Katelyn Burns, *The Unemployment Rate Improved in May, But Left Black Workers Behind*, VOX (June 6, 2020 5:20 PM), <https://www.vox.com/policy-and-politics/2020/6/6/21282611/black-workers-left-behind-unemployment>.

381. See generally Dionne Rosser-Mims et al., *Swimming Upstream: Black Males in Adult Education*, NEW DIRECTIONS FOR ADULT AND CONTINUING EDUCATION (No. 144, 2014).

382. See generally Michelle F. Davis, *Black and White on Wall Street: The Unwritten Code on Race*, BLOOMBERG (June 29, 2020, 5:00 AM), (https://www.bloomberg.com/news/features/2020-06-29/rules-of-working-on-wall-street-from-black-employees-who-lived-it?utm_campaign=news&utm_medium=bd&utm_source=applenews); Dion Rabouin, *The Myth of Closing the Racial Wealth Gap Through Education*, AXIOS (June 29, 2020), <https://www.axios.com/racial-wealth-gap-ten-myths-d14fe524-fec6-41fc-9976-0be71bc23aec.html>.

others. Each critique is accompanied by a response, which provides how the benefits of the solution outweigh its possible shortcomings.

First, some critics of the GFAC might argue that it is fatally flawed because it is based upon the premise that the police lethal force policies and practices constitute an “execution,” subject to Eighth Amendment death penalty jurisprudence. Accordingly, this Article contends that unjustified use of lethal force by police officers is a wrongful infringement of the right to life and should be abolished. If, following the abolition, a police officer uses lethal force, that officer will be judged as an ordinary citizen, without the protection of qualified immunity or Fourth Amendment search and seizure jurisprudence. To be more explicit, if after abolition, a police officer is accused of an unjustified shooting of a person, the GFAC seeks to shift the burden of proof to the police officer who uses lethal force to prove the force was factually justified, in response to a threat on his life or on the lives of others.

Second, some critics of the GFAC argue that the GFAC strips police officers of the legal right to defend themselves and others from imminent threat. The answer is even with the abolition of the use of lethal force, police officers would still have the right to self-defense under state laws. Simply, the GFAC allows for the use of State self-defense laws.³⁸³ Furthermore, if a police officer reasonably believed his or her life, or the life of another, was being threatened at that time, then the officer is freed from *civil* liability for the use of lethal force.³⁸⁴ This is consistent with the doctrine of qualified immunity, which protects officers from civil liability in instances where “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁸⁵ Following the enactment of the GFAC, a police officer who uses lethal force would not be protected by the qualified immunity doctrine.

Therefore, the GFAC is both constitutionally mandated and good public policy. Contrary to critics, the GFAC does not leave officers totally defenseless. The GFAC does not incorrectly assume that the police use of lethal force is a State-sponsored execution and does not unduly put police officers’ lives at risk. Neither of these allegations negates the positive impact of the GFAC in protecting the sanctity of life. Instead, the GFAC subjects police officers to the same standards and defense of an ordinary citizen.

383. See Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 401–07 (2007) (providing state constitutional provisions that expressly state that the right to defend life is a constitutional right, either as inalienable, inherent, natural or God given).

384. See generally 42 U.S.C. § 1983 (1996) (civil action for deprivation of rights).

385. See *infra* Part III, A.

Conclusion

It is time to end the reign of terror against Blacks and abolish the unconstitutional, reckless police use of lethal force. The George Floyd Anti-Lynching Code is a necessary solution to redress the Blue Shield and the Blue Code, which operate to systemically protect and condone the use of lethal force. Currently, the system creates a double standard, one for the public and another for police officers, sparking a demand for equal justice.

Further, the fact that police officers are rarely prosecuted for killing Blacks raises vexing questions about the morality and constitutionality of the police officers' authority to use lethal force. That reality creates a challenging conundrum for Black Lives Matter advocates on how to save lives while promoting community policing. Consequently, notwithstanding the Black Lives Matter Movement, police officers will continue to kill Blacks; unless we embrace a transformative intervention.

The continuous struggle for equal justice is supported by the sanctity of life principles found in the Constitution. This Article challenges the current Supreme Court jurisprudence, which focuses on the regulation of police use of lethal force, over the sanctity of life. It defends the principle that if the State has the constitutional authority to take a life, such a punishment must comply with very strict constitutional constraints, as provided by the Court in its death penalty jurisprudence protection against "cruel and unusual punishment," under the Eighth Amendment.

If Black lives matter, and they do, then we must redress systemic racism—by eradicating racist policies and practice from policing. By immediately abolishing the police use of all lethal force tactics, particularly shootings and chokeholds, we will save the lives of all Americans and prove that Black lives really do matter.

Without the GFAC, we will continue to repeat the question, "Do Black lives really matter?"³⁸⁶ Without the GFAC, we will continue to suffer from the horrific cycle of additional police killings, followed by anger, more protests, and riots—"no justice, no peace."

386. Tim Arango, *In Los Angeles, the Ghosts of Rodney King and Watts Rise Again*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/us/rodney-king-george-floyd-los-angeles.html>; Anjali Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>; Jennifer Medina, *The L.A. Riots 25 Years Later: A Return to the Epicenter*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/us/la-riots-rodney-king-south-central-1992.html>.

* * *

Addendum I: The George Floyd Anti-Lynching Code (the “GFAC”)

As noted in Part II of the Article, the following is a proposed code that the government, courts, and policymakers should adopt to provide past, present, and would-be victims of police use of lethal force with the protection ensured to them by the U.S. Constitution.

A. Overview:

Recognizing the symbiotic relationship between the police and the community, any solution to reform police practice seeks to reach two interrelated goals: (1) to protect persons from the use of lethal force by police officers, and (2) to renew public confidence in the integrity of policing.

To achieve these goals, it is proposed that the government, at all levels, including Congress, the federal judiciary, and the Executive branches, as well as state and local governments, absolutely prohibit the police use of lethal force. Specifically, it views such force as an execution and a modern-day form of lynching.

The Constitution, public policy, and morality demand that police officers be banned from using lethal force. Further, equal justice demands that an offending police officer be held criminally liable, contrary to qualified immunity and current Fourth Amendment jurisprudence. Specifically, it requires that any police officer who kills a person be judged as if that officer were acting as an ordinary citizen, without the benefit of qualified immunity. It also mandates a thorough, federal investigation and, where appropriate, prosecution of all incidents of police use of lethal force. To behave otherwise would arguably violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Furthermore, under the Fifth and the Fourteenth Amendments, the government has a solemn and sworn duty to act to protect the private citizen against all wrongful governmental infringements of the fundamental right to life.

The legislative solution is proposed herein as the George Floyd Anti-Lynching Code (the “GFAC”), which provides as follows:

B. The Provisions

Whereas, there is a cultural and political shift relating to the police use of lethal force;

Whereas, there are ongoing efforts at every level of government to address the negative impacts on our criminal justice system, including racial

inequities, wasted resources in the policing, prosecution, and incarceration of such offenses in crowded prison conditions, and the collateral consequences of these offenses;

Whereas, systemic racism has produced negative, collateral damage to the lives of millions of Americans, creating a second-class citizenry;

Whereas, African Americans have been victims of racial injustice for centuries and suffer continuous harm by such past criminalization, imprisonment, or collateral consequences of having a criminal record;

Whereas, African Americans have been victims of centuries of racial injustice have and continue to be harmed by such past criminalization, imprisonment, or collateral consequences of having a criminal record and there is a recognized need to reconcile these past racial injustices;

Whereas, the U.S. Supreme Court has established a right to be protected against Cruel and Unusual Punishment in the death penalty, pursuant to the Eighth Amendment;

Whereas, the U.S. Constitution embraces the fundamental principle of the sanctity of life, with due process protection against wrongful infringement and the substantive due process through the penumbra of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution;

Whereas, the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the government from killing a person, without due process and in a humane manner;

Whereas, a police officer's use of lethal force violated the due process of a person, as it is an execution without a trial by jury, legal representation, and the presumption of innocence;

Whereas, incidents of police use of lethal force negatively impact the policing function, creating distrust between police and the communities they serve;

Whereas, existing federal legislation creates a federal crime when a state actor wrongfully takes the life of a citizen; and

Whereas, Section Five of the Fourteenth Amendment gives Congress the authority to enact this legislation.³⁸⁷

Therefore, It Is Hereby Pronounced that the GFAC provides as follows:

(1) All levels and branches of government, to the highest extent of their powers and authorities, are hereby mandated to abolish all forms of use of lethal force. This mandate is self-evident and does not require supplemental action other than the immediate endeavors needed to facilitate these requisites.

387. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

(2) The Justice Department is hereby mandated to investigate each and every death of any person in the custody or under investigation or arrest by the police.

In the GFAC, the term “lethal force,” shall be defined as the amount of force deployed by a police officer that is likely to cause either serious bodily harm or death to another person, or actually causes serious injury or death to another person. Examples of mechanisms of lethal force includes, but is not limited to, shooting of firearms, chokehold, strangulation, stun guns aka tasers, shooting rubber bullets, attack dogs, the injection of ketamine, aggravated assault, simple battery, no-knock raids, and failing to come to a person’s aid in a timely manner.

The GFAC shall be subject to strict judicial scrutiny. The legal standard for assessing criminal liability shall be whether the police officer who used lethal force did so in self-defense and/or in response to imminent lethal harm to another. The police officer will be considered innocent until proven guilty. This statute does not change the mens rea element needed to prove a case of murder or involuntary manslaughter or other criminality under state or local laws.
