

University of Miami Law School

University of Miami School of Law Institutional Repository

Articles

Faculty and Deans

Summer 2022

Blame the Victim: How Mistreatment by the State Is Used to Legitimize Police Violence

Tamara R. Lave

Follow this and additional works at: https://repository.law.miami.edu/fac_articles



Part of the [Civil Rights and Discrimination Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), and the [Law Enforcement and Corrections Commons](#)

Blame the Victim

HOW MISTREATMENT BY THE STATE IS USED TO LEGITIMIZE POLICE VIOLENCE

Tamara Rice Lave[†]

INTRODUCTION

The surprising thing about George Floyd is not that he was forcibly arrested for a nonviolent crime.¹ That is a regular occurrence for Black men in America.² Nor is it that he was killed by the police. A recent study published by the National Academy of Sciences found that “[p]olice violence is a leading cause of death for young men”—especially for Black men, who are 2.5 times more likely than whites to be killed.³ What is remarkable is that the officer who killed George Floyd was charged, convicted, and sentenced to more than twenty-two years in prison.⁴

Take Officer Daniel Pantaleo as a point of comparison. Pantaleo placed Eric Garner in a chokehold after Garner

[†] Tamara Rice Lave is Professor of Law at University of Miami School of Law. I would like to acknowledge the insightful comments of the participants at the symposium on rethinking The Role of the “Victim” in the Criminal Legal System at Brooklyn Law School and the Legal Theory Workshop at the University of Miami, especially Susan Bandes, Bennett Capers, Charlton Copeland, Margaret Garvin, Cynthia Godsoe, Bruce Green, Pat Gudridge, Alexis Karteron, Marnie Mahoney, Kate Manning, Kate Mogulescu, Kunal Parker, Anna Roberts, Brandon Ruben, Jocelyn Simonson, and Steve Zeidman. I am particularly indebted to Peter Smuts and Pablo Rueda for helping me crystallize my argument and craft my writing. This article would not be what it is without them. Finally, I would be remiss not to thank the editors at the *Brooklyn Law Review* for their careful work, especially Julia Cummings and Crystal Cummings. Any mistakes are my own.

¹ Floyd was arrested for buying cigarettes with a \$20.00 bill. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/X3KA-Y99U>].

² SHELLEY HYLAND ET AL., OFF. OF JUST. PROGRAMS, NCJ 249216, SPECIAL REPORT: POLICE USE OF NONFATAL FORCE, 2002–11, at 1 (2015), <https://bjs.ojp.gov/content/pub/pdf/punf0211.pdf> [<https://perma.cc/LCW5-GMML>].

³ Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-ethnicity, and Sex*, 116 PROC. NAT’L ACAD. SCI. 16,793, 16,793–94 (2019).

⁴ Tim Arango, *Derek Chauvin Is Sentenced to 22 and a Half Years for Murder of George Floyd.*, N.Y. TIMES (June 25, 2021, 3:57 PM), <https://www.nytimes.com/2021/06/25/us/derek-chauvin-22-and-a-half-years-george-floyd.html> [<https://perma.cc/Y4C8-26PQ>].

denied selling loose, untaxed cigarettes.⁵ A misdemeanor offense.⁶ Garner died, but a Staten Island grand jury declined to indict Pantaleo for the killing.⁷ Or Officer Betty Shelby. Shelby responded to calls “of a stalled SUV left abandoned in the middle of a road.”⁸ A dashboard camera recorded her shooting unarmed Terence Crutcher in the back as he walked away from her with his hands raised above his head.⁹ A Tulsa jury acquitted her of manslaughter.¹⁰ Or Officer Michael Slager. Slager pulled Walter Scott over for a broken brake light.¹¹ Scott fled, and Slager chased him, deploying his taser during the ensuing foot race.¹² Scott fell to the ground, but then got up, and after a brief tussle with Slager, ran away again.¹³ Slager fired eight times, hitting Scott five times in the back.¹⁴ Slager initially claimed that he had acted in self-defense, but he was charged with murder after a cellphone video showed him shooting an unarmed Scott from behind at a distance of at least fifteen feet.¹⁵ A mistrial was declared after one South Carolina juror wrote a letter to the court, stating “I cannot in good conscience consider a guilty

⁵ Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/6NGZ-K9BR>].

⁶ Michael R. Sisak, *NYPD Officer Says He Inflated Charge Against Eric Garner*, AP NEWS (May 21, 2019), <https://apnews.com/article/ce589240fb884ecea7eaba2bfdff9e2> (last visited May 18, 2022).

⁷ J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<https://perma.cc/F2HH-MRL7>].

⁸ Erik Ortiz & Phil Helsel, *Jury Acquits Tulsa Officer Betty Shelby in Shooting Death of Terence Crutcher*, NBC NEWS (May 18, 2017), <https://www.nbcnews.com/news/us-news/jury-acquits-tulsa-officer-shooting-death-terence-crutcher-n761206> [<https://perma.cc/NC8L-F97P>].

⁹ Liam Stack, *Video Released in Terence Crutcher's Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), <https://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html> [<https://perma.cc/K8TA-AMPN>].

¹⁰ Ortiz & Helsel, *supra* note 8.

¹¹ Press Release, U.S. Dep't of Just., Former North Charleston, South Carolina, Police Officer Michael Slager Sentenced to 20 Years in Prison for Federal Civil Rights Offense (Dec. 7, 2017), <https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-sentenced-20-years> [<https://perma.cc/2SGY-UW25>].

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; see also Jamiel Lynch & Jason Hanna, *A Judge Declined to Toss the Federal Sentence of Ex-officer Michael Slager in Fatal Walter Scott Shooting*, CNN (Apr. 20, 2021, 10:17 AM), <https://www.cnn.com/2021/04/20/us/michael-slager-walter-scott-sentence/index.html> [<https://perma.cc/9KZD-L3HX>].

¹⁵ *Id.*; Jeffrey Collins, *Judge Keeps Ex-cop's 20-year Sentence for Killing Black Man*, AP NEWS (Apr. 19, 2021), <https://apnews.com/article/shootings-police-walter-scott-michael-slager-south-carolina-9bc7b58a116fbc451671da2a96c3c6b9> (last visited May 18, 2022); Colin Dwyer, *Former S.C. Officer Who Killed Walter Scott Sentenced To 20 Years In Prison*, NPR (Dec. 7, 2017, 12:13 PM), <https://www.npr.org/sections/thetwo-way/2017/12/07/569070544/former-s-c-officer-who-killed-walter-scott-will-be-sentenced-to-up-to-24-years> [<https://perma.cc/3KAW-PVSG>].

verdict.”¹⁶ Slager ended up “plead[ing] guilty to a federal civil rights offense”¹⁷ to avoid the possibility of life in prison at a state facility.¹⁸ He was sentenced to twenty years in federal prison for the killing of Walter Scott.¹⁹

Are these killings and their aftermath anomalies or are they instead reflective of something more systemic? Scholars like Paul Butler contend that cases like these can best be understood as manifestations of a structurally racist criminal justice system.²⁰ Eduardo Bonilla-Silva defines structural racism as “specific mechanisms, practices, and social relations that produce and reproduce racial inequality at all levels.”²¹ To see if that definition accurately describes our criminal justice system, I will turn to the research. Studies have resoundingly shown that, in comparison with white people, the police are more likely to stop Black people, whether in a car²² or on foot,²³ more likely to search even though they were less likely to find contraband,²⁴ more likely to use force,²⁵ more likely

¹⁶ Elizabeth Chuck, *Lone Juror Says He Can't Convict Ex-cop in Walter Scott Killing*, NBC NEWS (Dec. 5, 2016, 1:43 PM), <https://www.nbcnews.com/news/crime-courts/jury-says-it-s-deadlocked-trial-officer-who-shot-walter-n691291> [<https://perma.cc/BGV8-VAQQ>].

¹⁷ Press Release, U.S. Dep't of Just., Former North Charleston, South Carolina, Police Officer Michael Slager Pleads Guilty to Federal Civil Rights Offense (May 2, 2017), <https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal> [<https://perma.cc/9SSW-AYYK>].

¹⁸ Collins, *supra* note 15.

¹⁹ *Id.*

²⁰ See PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 9 (2017); see also Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 31, 42, 40–46 (Angela J. Davis ed., 2017) (“[C]enturies of racism in American society continue to affect criminal justice practitioners, as it does all Americans, in decision-making, allocation of resources, and adoption of ‘race-neutral’ policies with unambiguously racially disparate outcomes.”). See generally POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* (collection of essays explaining how and why the criminal justice system disproportionately mistreats Black men and boys); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that the mass incarceration of Black men is a product of continued systemic racial discrimination); Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA EVIDENCE BRIEF (Vera Inst. of Just., New York, N.Y.), May 2018, at 1 (discussing how the modern trend of racial disparities in incarceration reflects the historical roots of racism in the criminal justice system).

²¹ Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 476 (1997).

²² Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737–38 (2020); CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 2 (2014).

²³ Andrew Gelman et al., *An Analysis of the New York City Police Department's “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, J. AM. STAT. ASS'N 813, 822 (2007).

²⁴ POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 8 (2016), https://igchicago.org/wp-content/uploads/2017/01/PATF_Final_Report_4_13_16-1.pdf [<https://perma.cc/WR4H-3J94>]; Gelman et al., *supra* note 23, at 820–21.

²⁵ HYLAND ET AL., *supra* note 2, at 2.

to arrest,²⁶ and more likely to kill.²⁷ Prosecutors are more likely to charge Black people with more serious charges than similarly situated white people²⁸ and less likely to reduce charges.²⁹ And judges sentence Black defendants to more time for the same offense as compared to white defendants, even when controlling for age and prior criminal history.³⁰

This article adds to the literature on structural racism by examining the institutional mechanisms that support police violence against Black people. In the process, I illuminate the insidious ways in which state actors exploit structural social, economic, and health mistreatment to legitimize police violence. Police officers exploit this mistreatment in justifying the decision to arrest and the subsequent use of deadly force; coroners wield it when assigning cause of death to something other than the police; prosecutors harness it in rationalizing not to charge; jurors employ it when deciding not to convict; and judges lean on it when minimizing punishment. In essence, I argue that a victim's prior mistreatment by the state is used as institutional mechanisms of structural racism.

Although I focus on Black people, these arguments could be extended to other marginalized groups. For example, the history of racism against, and mistreatment of, American Indians³¹ and

²⁶ Pierre Thomas et al., *ABC News Analysis of Police Arrests Nationwide Reveals Stark Racial Disparity*, ABC NEWS (June 11, 2020, 5:04 AM), <https://abcnews.go.com/US/abc-news-analysis-police-arrests-nationwide-reveals-stark/story?id=71188546> (last visited May 18, 2022); Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 490, 495–96, 498–99 (2011).

²⁷ Edwards et al., *supra* note 3, at 16,793.

²⁸ Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 1, 9, 63 (2013); Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 481–82 (1998).

²⁹ Carlos Berjedó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1188 (2018).

³⁰ U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 16–18, 27–28 (2017), <https://bit.ly/3vI8UY> [<https://perma.cc/V48R-CDX3>]; see also TUSHAR KANSAL, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4–5 (2005).

³¹ See generally ROXANNE DUNBAR ORTIZ, AN INDIGENOUS PEOPLE'S HISTORY OF THE UNITED STATES (2014) (recounting US history from the perspective of indigenous people); DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1970) (documenting the systematic destruction of American Indians during the second half of the nineteenth century); DAVID TREUER, THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT (2019) (documenting the Native American struggle for survival and cultural preservation since the end of the nineteenth century); Mary G. Findling et al., *Discrimination in the United States: Experiences of Native Americans*, HEALTH SERVS. RSCH. 1431 (2019), <http://doi.org/10.1111/1475-6773.13224> (last visited Mar. 9, 2022) (examining racial discrimination against Native Americans across various institutional domains); ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005) (revealing connections between colonialism and violence against American Indian women).

Latinx³² people in the United States is well-documented, and there is clear evidence that this mistreatment impacts policing. For example, according to the National Academy of Sciences report mentioned above, American Indian men and Latinx men are respectively between 1.2 and 1.7 times and 1.3 and 1.4 times more likely to be killed by the police than white men.³³ Analyzing the institutional mechanisms that support police violence against Latinx and American Indians is of paramount importance; however it is beyond the scope of this article.

This article proceeds as follows. I begin by discussing how arrest has always been used as a means of exploiting Black people for the economic benefit of the state, and how the trauma of past police contact is used to justify arrest. In Part II, I consider police use of deadly force. I explain why there are little legal or institutional constraints on an officer's decision to use deadly force, and how and why that has particularly deadly consequences for Black people. In Part III, I delve into why so many police killings are not classified as such and how forensic doctors use traits that are vestiges of slavery to hide police responsibility. In Part IV, I examine the close relationship between the prosecutor and the police and how it impacts the prosecutor's decision to file charges. In Part V, I delve into why jurors are so unlikely to convict police officers, and in Part VI, I discuss how, in the rare event that there is a conviction, police officers benefit from their victim's past mistreatment by getting lower sentences than they arguably deserve under the law. Lastly, Part VII builds on the previous parts by suggesting reforms to these institutions that will bring about meaningful and lasting change.

I. THE DECISION TO ARREST

It may seem surprising that the police even decided to arrest George Floyd, Eric Garner, Terence Crutcher, and Walter Scott. Each man was suspected of committing a low-level, nonviolent offense.³⁴ The officer could have simply given each of them a ticket with a notice to appear in court. Instead, the officers

³² See generally MARK D. RAMIREZ & DAVID A.M. PETERSON, *IGNORED RACISM: WHITE ANIMUS TOWARD LATINOS* (2020) (expanding discussion of discrimination against Latinos beyond immigration); PAUL ORTIZ, *AN AFRICAN AMERICAN AND LATINX HISTORY OF THE UNITED STATES* (2018) (reinterpreting American history through the experiences of African and Latinx diaspora); LAURA E. GOMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* (2019) (documenting how and why Latinos developed a distinct racial identity); Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583 (1993) (exploring how the American legal system has long discriminated against Mexican people).

³³ Edwards et al., *supra* note 3, at 16,794.

³⁴ See *supra* text accompanying notes 1–19.

decided to deploy one of their most powerful institutional mechanisms of structural racism—arrest.

The decision to deprive Black people of their liberty for minor infractions is not arbitrary; it has been official policy throughout the history of the United States. Modern-day policing can be traced to formal slave patrols, which existed throughout nearly all of the Southern colonies and states.³⁵ The earliest slave patrols were established by law in South Carolina in 1704.³⁶ Slave patrollers “hunted runaways, looked for weapons and stolen goods in slave cabins, questioned slaves they met on the road, and broke up slave meetings.”³⁷ They could “detain and question whites while performing their duties, and enter their homes without warrants.”³⁸ Slave patrols were legally authorized to render punishment on the spot or take disobedient slaves to jail.³⁹ “W.L. Bost, a former slave from western North Carolina,” described their brutality in an interview with Works Progress Administration workers in 1937:

If you wasn't in your proper place when the paddyrollers come they lash you til' you was black and blue. The women got 15 lashes and the men 30. That was for jes bein' out without a pass. If the n[*****] done anything worse he was taken to the jail and put in the whippin' post.⁴⁰

Slave patrols were legally dismantled at the end of the Civil War, but their legacy of racial oppression was carried on, not just by vigilante groups like the Ku Klux Klan, but by another institutional mechanism of structural racism—the police.⁴¹

Despite the nation's formal abolition of slavery in 1865, the police ensured that de facto slavery continued through the Second World War.⁴² Southern states enacted a web of laws, known as the Black Codes, that criminalized all aspects of Black life. Among the most notorious were vagrancy laws that were defined “in [such] sweeping terms . . . [that they] gave local authorities a virtual mandate to arrest any poor man who did

³⁵ Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 59 (1988). There could be a path dependent story that links the history of slave patrols with modern day policing, however, this type of analysis would go beyond the scope of this article. See James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC'Y 507, 507 (2000).

³⁶ See SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 19, 24 (2001).

³⁷ *Id.* at 40.

³⁸ *Id.*

³⁹ *Id.* at 71, 105.

⁴⁰ *Id.* at 71.

⁴¹ *Id.* at 168, 218–20.

⁴² See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (documenting how abuses of the criminal and civil justice system to enforce exploitative practices and segregationist laws reenslaved Black Americans through the Second World War).

not have a labor contract.”⁴³ These institutional mechanisms of structural racism could hypothetically apply to anyone, but “it was widely understood that these provisions would rarely if ever be enforced on whites.”⁴⁴ Vagrancy laws were a “mainstay of the system of involuntary servitude.”⁴⁵ The police enforced them when there were labor shortages, like during harvest season for cotton.⁴⁶ In Newton, Georgia in 1904, “local officers made ‘wholesale arrests of idle Negroes . . . to scare them back to the farms from which they emanated.’”⁴⁷

Contract-enforcement laws, another institutional mechanism of structural racism, also kept former slaves in bondage. These laws required that Black workers enter a contract with their white employers by a certain date or risk arrest, which prevented them from negotiating a fair wage.⁴⁸ Should a freedman be arrested, he was given the “‘opportunity’ to sign a voluntary labor contract with his former employer or some other white who agreed to post bond.”⁴⁹ In 1867, a Louisiana Freedmen’s Bureau agent explained that some individuals in his area “would, ‘for the least provocation, have a freedman arrested and lodged in jail; some friend of the accuser will then . . . give bond for the freedman, [and] take him to his plantation and work him there perhaps a full year without remuneration.’”⁵⁰ Lawyers were also institutional mechanisms of structural racism, charging fifty to one hundred dollars for cases that never went to court, and these fees became part of the money the freedman owed to his surety.⁵¹

It was even worse for those who were convicted of a crime. Instead of spending time in prison, “[t]hey were leased—literally, contracted out—to businessmen, planters, and corporations in one of the harshest and most exploitative labor systems known in American history.”⁵² Convict leasing, another institutional mechanism of structural racism, generated significant funds for state and county government operations,⁵³ but it did so “in a system of labor hardly distinguishable in its

⁴³ William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 47 (1976).

⁴⁴ BLACKMON, *supra* note 42, at 53.

⁴⁵ Cohen, *supra* note 43, at 50.

⁴⁶ *Id.*

⁴⁷ *Id.* (alteration in original).

⁴⁸ *Id.* at 53.

⁴⁹ *Id.* at 34.

⁵⁰ *Id.* at 53 (alterations in original).

⁵¹ *Id.*

⁵² MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928, at 1-2 (1996).

⁵³ BLACKMON, *supra* note 42, at 68-69.

brutality and coercion from the old slavery that preceded it.”⁵⁴ Workers were chained, beaten, and forced to live in sickness and squalor.⁵⁵ If anything, the treatment was worse than during formal slavery because there was no incentive to treat the workers well.⁵⁶ “Instead of slave owners, the men who now controlled squads of black laborers available to the highest bidder were sheriffs,” Blackmon wrote.⁵⁷ “The key distinction, however, between the sheriff and the old slave masters was that since the African Americans were not his or anyone else’s permanent property, he had no reason for concern about how they were being treated by their new keepers or whether they survived at all.”⁵⁸

Seizing Black people to fund the state is not a relic of the past: cities, states, and even the federal government still rely on law enforcement to generate revenue through arrest.⁵⁹ One method is by charging fees related to a person’s arrest (investigation costs), adjudication (attorney costs and trial fees), and incarceration.⁶⁰ A 2015 Department of Justice report described this practice in Ferguson, Missouri:

Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs. . . .

. . .

The City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved. . . .

. . .

The City’s emphasis on revenue generation has a profound effect on FPD’s approach to law enforcement. . . . Partly as a consequence of City and FPD priorities, many officers appear to see some residents, especially those who live in Ferguson’s predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue.⁶¹

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 52, 69–74.

⁵⁶ See MANCINI, *supra* note 52, at 2–3 (recounting the comment of a Southern delegate after hearing an address denouncing the convict lease system in 1883: “Before the war, we owned the negroes.’ . . . ‘If a man had a good negro, he could afford to keep him. . . . But these convicts, we don’t own ‘em. One dies, get another.’”).

⁵⁷ BLACKMON, *supra* note 42, at 64–65.

⁵⁸ *Id.*

⁵⁹ Developments in the Law: Policing, *Chapter One Policing and Profit*, 128 HARV. L. REV. 1723, 1723, 1726–33 (2015) [hereinafter *Policing and Profit*].

⁶⁰ *Id.* at 1727.

⁶¹ C.R. DIV., DEPT OF JUST., INVESTIGATION OF THE FERUGSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferugson_police_department_report.pdf [<https://perma.cc/K6EP-QSC7>].

The most egregious form of policing for profit is civil asset forfeiture—“where police can seize property with limited judicial oversight and retain it for their own use.”⁶² Civil asset forfeiture is neutral on its face, but it is actually an institutional mechanism of structural racism. To permanently strip even innocent owners of their property, the government must generally show by a mere preponderance of the evidence that the property is related to a crime.⁶³ No charge or conviction is necessary.⁶⁴ One method for producing civil forfeitures is “highway interdiction,” in which the police use minor traffic violations as a pretext for stopping vehicles and then seizing property if the driver appears “suspicious.”⁶⁵ Sometimes the police and prosecution work together in so-called cash-for-freedom deals in which people are threatened with arrest, charges, and even losing their children if they do not sign away their property rights.⁶⁶ Civil forfeiture operations are “widespread and highly profitable . . . [and they] frequently target the poor”⁶⁷ and people of color.⁶⁸ A 2019 study by the *Greenville News* and *Anderson Independent Mail* found that although Black men make up 13 percent of the population for the state of South Carolina, they represent 65 percent of the people targeted for civil forfeiture in the state.⁶⁹ A more recent 2021 study by S. Nicholson-Crotty, J.

⁶² *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting the denial of certiorari); see also *Policing and Profit*, *supra* note 59, at 1730–33. See generally Note, *How Crime Pays: Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387 (2018) [hereinafter *How Crime Pays*] (explaining how modern civil forfeiture is unconstitutionally entwined with criminal law enforcement); Anne Teigan & Lucia Bragg, *Evolving Civil Asset Forfeiture*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx> [<https://perma.cc/KMZ8-8KTF>] (providing overview of federal and state civil asset forfeiture at federal and state levels).

⁶³ See *How Crime Pays*, *supra* note 62, at 2389; Teigan & Bragg, *supra* note 62; see also *Leonard*, 137 S. Ct. at 847 (noting that an appellate court upheld a trial court’s issuance of a forfeiture order because “the government had shown by a preponderance of the evidence that the [seized] money was either the proceeds of a drug sale or intended to be used in such a sale”).

⁶⁴ *Policing and Profit*, *supra* note 59, at 1731 (noting that for centuries civil forfeiture has not required governments to prove the underlying crime).

⁶⁵ *How Crime Pays*, *supra* note 62, at 2391.

⁶⁶ *Id.*; see also *Leonard*, 137 S. Ct. at 848.

⁶⁷ *Leonard*, 137 S. Ct. at 848. The federal government has received an average of \$3 billion annually in recent years, and it is estimated that state and local governments have averaged \$900 million a year. Brian Kelly, *An Empirical Assessment of Asset Forfeiture in Light of Timbs v. Indiana*, 72 ALA. L. REV. 613, 621–22 (2021). The money has been spent on “guns, armored cars, . . . electronic surveillance gear, . . . luxury vehicles, [and] travel.” Robert O’Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/> [<https://perma.cc/MAF8-XY68>].

⁶⁸ Sean Nicholson-Crotty et al., *Race, Representation, and Assets Forfeiture*, 24 INT’L PUB. MGMT. J. 47, 61 (2021); see also Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?hpid=hp_hp-top-table-main-police-seizures%3Ahomepage%2Ft%3Astop-and-seize%3Fhpid=hp_hp-top-table-main-police-seizures%3Ahomepage%2Ft%3Astop-and-seize%3Ftid=ik_inline_manual_32 [<https://perma.cc/XRV9-9QPC>].

⁶⁹ Anna Lee et al., *Taken: How Police Departments Take Millions by Seizing Property*, GREENVILLE NEWS (Apr. 22, 2020, 7:34 PM), <https://www.greenvilleonline.com/in->

Nicholson-Crotty, Mughan, and Li analyzing more than 2,200 municipal police departments between 1993 and 2007 found “a significant relationship between minority population share and reported forfeiture revenue.”⁷⁰

By preying on Black people, the police benefit from past mistreatment. A 2020 Gallup poll reported that 71 percent of Black adults and 34 percent of white adults know people who have been mistreated by the police.⁷¹ Such an experience, whether personal or observed, has consequences. Studies have found police mistreatment to be “traumatic”⁷² and to be associated with depressive symptoms,⁷³ psychological distress,⁷⁴ PTSD,⁷⁵ and self-reported suicide ideation.⁷⁶ A 2021 study by Pickett, Graham, and Cullen found that personal fear of the police is widespread among Black respondents and uncommon among white respondents.⁷⁷ In addition, 42 percent of Black respondents (as compared with 11 percent of white respondents) were “very afraid that . . . police [would] kill them in the next five years.”⁷⁸ That means when the police pull a Black person over, he is likely to be nervous and afraid, not because he is doing something illegal, but because he fears the police. Yet the police can use his fear and anxiety—fear and anxiety they caused—to justify conducting a search. And once they search, they may find a large amount of cash,⁷⁹ not because the person is doing something illegal, but because he is likely to distrust the

depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002/ [https://perma.cc/K3YM-MRYV].

⁷⁰ Nicholson-Crotty et al., *supra* note 68, at 47.

⁷¹ Korpu Momolu, *Black Adults More Likely to Know People Mistreated by Police*, GALLUP (Aug. 3, 2020), <https://news.gallup.com/poll/316526/black-adults-likely-know-people-mistreated-police.aspx> [https://perma.cc/3HVK-GQ38].

⁷² Jocelyn R. Smith Lee & Michael A. Robinson, “*That’s My Number One Fear in Life. It’s the Police*”: *Examining Young Black Men’s Exposures to Trauma and Loss Resulting from Police Violence and Police Killings*, 45 J. BLACK PSYCH. 143, 169–70 (2019).

⁷³ Lisa Bowleg et al., *Negative Police Encounters and Police Avoidance as Pathways to Depressive Symptoms Among US Black Men, 2015-2016*, 110 AM. J. PUB. HEALTH S160, S160–61 (2020).

⁷⁴ J.E. DeVlyder et al., *Prevalence, Demographic Variation and Psychological Correlates of Exposure to Police Victimization in Four US Cities*, 26 EPIDEMIOLOGY & PSYCHIATRIC SCIS. 466, 474, 476 (2017).

⁷⁵ J.L. Hirschtick et al., *Persistent and Aggressive Interactions with the Police: Potential Mental Health Implications*, EPIDEMIOLOGY & PSYCHIATRIC SCIS. 1, 4 (Feb. 5, 2019), <https://doi.org/10.1017/S2045796019000015> [https://perma.cc/6TWA-STMP].

⁷⁶ J.E. DeVlyder et al., *Elevated Presence of Suicide Attempts Among Victims of Police Violence in the USA*, 94 J. URB. HEALTH 629, 631 (2017).

⁷⁷ Justin T. Pickett et al., *The American Racial Divide in Fear of the Police*, 60 CRIMINOLOGY (forthcoming 2022) (online version of record at 12–16), <https://online.library.wiley.com/doi/epdf/10.1111/1745-9125.12298> (last visited May 18, 2022).

⁷⁸ *Id.* at 13–14.

⁷⁹ See FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLD, EXECUTIVE SUMMARY 13 (2017), https://economicinclusion.gov/downloads/2017_FDIC_Unbanked_Underbanked_HH_Survey_ExecSumm.pdf [https://perma.cc/S9RC-H84Q].

banking system due to past discrimination⁸⁰ or be excluded from it due to present discrimination.⁸¹ But the police will point to this cash as incriminating and seize it, in effect punishing the person for the accommodations he has had to make due to his past and present mistreatment.

Victims of race-based, pretext stops should think again if they are hoping a court might offer some relief. In *Whren v. United States*,⁸² the Supreme Court effectively green lighted racial profiling by the police,⁸³ thus transforming the Fourth Amendment into an institutional mechanism of structural racism. As long as the police have probable cause to stop someone, “the actual motivations of the individual officers involved” are irrelevant.⁸⁴ “[C]onsiderations such as race . . . play no role in ordinary, probable-cause Fourth Amendment analysis.”⁸⁵ It is not that discrimination is OK; the Court “of course” agrees that the “Constitution prohibits selective enforcement of the law based on considerations such as race.”⁸⁶ The problem is that the constitutional basis for objecting is the equal protection clause,⁸⁷ and the standard for prevailing is almost impossible to meet.⁸⁸ “Racial profiling,” Gabriel (Jack)

⁸⁰ MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 260 (2019) (“There are two banking systems in America. One is the regulated and heavily subsidized mainstream banking industry; the other is the unregulated, costly, and often predatory fringe industry. The black community has historically been under the latter system, having been left out of the former.”).

⁸¹ See Emily Flitter, *Banking While Black: How Cashing a Check Can Be a Minefield*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/business/banks-black-customers-racism.html> [<https://perma.cc/GVY6-3A7A>]; see also *FDIC National Survey of Unbanked and Underbanked Households*, *supra* note 79, at 2–4.

⁸² *Whren v. United States*, 517 U.S. 806 (1996).

⁸³ See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1065–75 (2010); see also Devon W. Carbado, *Erasing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032–34 (2002) (“In *Whren*, the Supreme Court makes it clear that, at least under the Fourth Amendment, racial profiling claims are not constitutionally cognizable.”); David A. Harris, *“Driving While Black” and All Other Traffic Offenses, The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997) (“We may not always agree on the full contours of the Fourth Amendment, but if nothing else it stands for—indeed, imposes—restraint on the government’s power over the individual in the pursuit of crime. . . . *Whren* upends this venerable and sensible principle”); Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344 (1998) (“The reasoning of *Whren* begs the obvious question of why the Court considers police reliance on race when making a traffic stop reasonable conduct under the Fourth Amendment.”).

⁸⁴ *Whren*, 517 U.S. at 813.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI-KENT L. REV. 605, 605 (1998). For more detailed discussion on why the prevailing standard under the equal protection clause is difficult to meet, see Kristin E. Kruse, *Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to United States v. Armstrong*, 58 SMUL. REV. 1523, 1527–28, 1533–36 (2005); and

Chin and Charles J. Vernon write, “may be unconstitutional, yet it is reasonable, and therefore provides no basis for suppression of evidence.”⁸⁹

II. THE DECISION TO USE DEADLY FORCE

The US Constitution limits when the police may kill a suspect. In *Tennessee v. Garner*, the Supreme Court held that the police may only use deadly force when they have probable cause to believe the suspect “poses a threat of serious physical harm, either to the officer or to others.”⁹⁰ It is not obvious how George Floyd, Eric Garner, Terence Crutcher, and Walter Scott could have posed such a threat. Their alleged crimes were nonviolent, and none of them had a weapon. So, how did they end up dead?

Answering that question first requires a deeper dive into Supreme Court jurisprudence, which, at least in this area of law, functions as an institutional mechanism of structural racism. Although an officer is supposed to have probable cause to believe a suspect is dangerous before he can use deadly force, there is not much bite to that limitation.⁹¹ In *Graham v. Connor*, the Court held that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁹² “The calculus of reasonableness,” the Court wrote, “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁹³ Later, in *Scott v. Harris*, the Court made it clear that officers did not have to meet any preconditions before they could use deadly force.⁹⁴ Jeff Fagan and Alexis D. Campbell explained why these cases are so problematic: “[I]n addition to being opaque and defaulting nearly completely to an officer’s subjective judgements, *Graham* and *Scott* neither instruct police officers as to what is

Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2003–04, 2023–27 (1998). See also Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266–67, 271–73 (2002) (presenting statistics showing racial disparity in prosecution for drug offenses and explaining why it is difficult to prove discrimination).

⁸⁹ Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 886 (2015).

⁹⁰ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

⁹¹ Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119–20 (2008) (describing the Supreme Court’s standard for the Fourth Amendment doctrine, especially as applied to nondeadly force, as “indeterminate and undertheorized” and “incomplete”).

⁹² *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁹³ *Id.* at 396–97.

⁹⁴ *Scott v. Harris*, 550 U.S. 372, 382 (2007).

reasonable nor direct courts as to how to properly evaluate the reasonableness of an officer's actions."⁹⁵

Not only is an officer unlikely to be prosecuted for using deadly force, but there is little chance he will be held civilly liable.⁹⁶ Although federal law allows victims of police violence to bring civil suits under 42 U.S.C. § 1983 against individual officers, and in some cases entire police departments,⁹⁷ qualified immunity—another institutional mechanism of structural racism—creates an almost insurmountable bar to recovery.⁹⁸ Under this defense, the officer will prevail if he can show that his conduct did not violate “a statutory or constitutional right that was clearly established at the time of the challenged conduct.”⁹⁹ However, a court is allowed to grant qualified immunity without ever determining whether the purported right exists at all.¹⁰⁰ Instead the court may focus solely on the question of whether the right was “clearly established.”¹⁰¹ “To be clearly established,” the Court explained, “a right must be sufficiently clear that ‘every reasonable officer would [have understood] that what he is doing violates that right.’”¹⁰² “In other words,” the Court went on, “existing precedent must have placed the statutory or constitutional question beyond debate.”¹⁰³ In a 2018 dissent in *Kisela v. Hughes*, Justice Sotomayor criticized the Court’s “one-sided approach to qualified immunity [which] transforms the doctrine into an absolute shield for law enforcement officers It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”¹⁰⁴

Furthermore, in the unusual event that there is a settlement or judgment against an individual officer, he is unlikely to pay anything out of his own pocket.¹⁰⁵ In 2014, Joanna Schwartz conducted a national study of police indemnification, and found that governments forked out 99.8 percent of the money awarded to plaintiffs in lawsuits claiming civil rights violations by law

⁹⁵ Jeffrey A. Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 963 (2020).

⁹⁶ Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519–22 (2016).

⁹⁷ 42 U.S.C. § 1983 (creating a statutory right for private litigants to bring civil suits against state agents who deprive them of their “rights, privileges, or immunities”).

⁹⁸ See Carbado, *supra* note 96, at 1520–22; see also Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (last visited May 18, 2022).

⁹⁹ *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 227 (2009)).

¹⁰² *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

¹⁰³ *Id.* (quoting *al-Kidd*, 563 U.S. at 741).

¹⁰⁴ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

¹⁰⁵ See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014).

enforcement.¹⁰⁶ Officers did not even pay a cent of the punitive damages awarded.¹⁰⁷ For some of the jurisdictions in her study, including Atlanta, Boston, Cook County, Miami, Phoenix, and San Francisco, Schwartz wrote, “officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit.”¹⁰⁸

Nor is an officer likely to suffer any professional repercussions. Even when an officer has engaged in egregious misconduct, and even when his superiors want to fire or at least formally reprimand him, it is difficult to do so because of police unions¹⁰⁹—yet another institutional mechanism of structural racism. As Stephen Rushin explains, police union contracts shield officers from accountability.¹¹⁰ “Across America’s largest cities,” Rushin writes, “many police officers receive excessive procedural protections during internal disciplinary investigations, effectively immunizing them from the consequences of misconduct.”¹¹¹ And in the rare event an officer is fired for using excessive force, he knows he can probably land another job in law enforcement.¹¹²

Making matters worse, police officers in the United States enter this ambiguous, consequence-free terrain already primed to use deadly force. They are taught to see every citizen interaction as dangerous, to view even the most nebulous of encounters as being potentially lethal.¹¹³ As Seth Stoughton, a law professor and former police officer, explains:

[Officers] are constantly barraged with the message that . . . they should be afraid, that their survival depends on it. Not only do officers hear it in formal training, they also hear it informally from supervisors

¹⁰⁶ *Id.* at 890.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 914.

¹⁰⁹ Daniel Oates, *Opinion: I Used to Be a Police Chief. This Is Why It's So Hard to Fire Bad Cops.*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/opinions/2020/06/12/i-used-be-police-chief-this-is-why-its-so-hard-fire-bad-cops/> [<https://perma.cc/B78B-5EUA>].

¹¹⁰ Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1253 (2017).

¹¹¹ *Id.*

¹¹² Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1687–88 (2020); Abe Street, *How Violent Cops Stay in Law Enforcement*, NEW YORKER (May 21, 2021), <https://www.newyorker.com/news/us-journal/how-violent-cops-stay-in-law-enforcement> [<https://perma.cc/FS5F-7FZ4>]; Ryan Mills et al., *Analysis: Most Florida Officers Disciplined for Excessive Force Kept Their Jobs*, FLA. TIMES-UNION (June 6, 2020), <https://www.jacksonville.com/story/news/crime/2020/06/06/analysis-most-florida-officers-disciplined-for-excessive-force-kept-their-jobs/41740219/> [<https://perma.cc/R5GC-3K5H>].

¹¹³ See David A. Harris, *How Fear Shapes Policing in the US*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 200, 200–01 (Tamara Rice Lave & Eric J. Miller eds., 2019).

and older officers. They talk about it with their peers. They see it on police forms and in law enforcement publications.¹¹⁴

The end result is an exaggerated fear. “No one would argue that officers do not, at least sometimes, face violence—even deadly violence,” David Harris explains, “But the picture captured in the data about what police actually experience varies considerably from the rhetoric and images one sees in the training police receive.”¹¹⁵ Harris then discusses FBI data that finds that, between 2003 and 2013, an average of fifty-one police officers were killed every year.¹¹⁶ This number reflects the total number of felonious deaths of

duly sworn [local,] state, tribal, and federal law enforcement officers . . . working in an official capacity . . . [with] full arrest powers . . . ordinarily w[earing] a badge and firearm. . . . paid from governmental funds set aside specifically for payment of sworn law enforcement representatives. . . . [and the officers’ deaths] . . . [were] directly related to injuries received during the incidents.¹¹⁷

Frank Zimring fills out the picture further by showing that in the period from 1977 to 2012, killings of officers dropped by 68 percent, while justifiable killings by police dropped by 9 percent.¹¹⁸ That means the number of justified killings by police remained roughly the same even as the risk of being killed dropped significantly.

The unlikelihood of criminal, civil, or professional consequences, along with the “warrior mentality,”¹¹⁹ help explain

¹¹⁴ Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681> [<https://perma.cc/7T6L-PP24>].

¹¹⁵ Harris, *supra* note 115, at 205.

¹¹⁶ *Id.* Harris refers to data compiled by the FBI as part of Law Enforcement Officers Killed and Assaulted (LEOKA). The FBI has been gathering this data since 1996. In 2013, the FBI provided a table containing data on the total number of felonious killings of active-duty officers from 2004 to 2013. The total number was 511. See *2013 Law Enforcement Officers Killed & Assaulted—Table 1*, https://ucr.fbi.gov/leoka/2013/tables/table_1_leos_fk_region_geographic_division_and_state_2004-2013.xls [<https://perma.cc/6MPQ-WZPK>].

¹¹⁷ *2013 Law Enforcement Officers Killed & Assaulted, FBI—Criteria: Which Officers Are in This Report?*, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/leoka/2013/felonious_accidental_assaults_criteria/officer_criteria_-2013 [<https://perma.cc/4RMG-MMUZ>].

¹¹⁸ Franklin E. Zimring, *What Drives Variations in Killings in Urban Police in the United States: Two Empirical Puzzles*, in *THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES*, *supra* note 113, at 296, 298. Zimring is confident that data on killings of officers is accurate, however he describes “several features of the reporting system for justifiable homicides by police that require some compromises in the research strategy and qualifications from its results.” *Id.* at 296, 299.

¹¹⁹ Seth W. Stoughton, *Law Enforcements’ “Warrior” Problem*, 128 HARV. L. REV. F. 225, 226 (2015); *id.* at 226–30 (“[T]he warrior mindset refers to a bone-deep commitment to survive a bad situation no matter the odds or difficulty, to not give up even when it is mentally and physically easier to do so. . . . Unfortunately . . . [t]he warrior mindset has mutated into the warrior mentality. . . . Under this warrior worldview, officers are locked in intermittent and unpredictable combat with unknown but highly lethal enemies. As a result, officers learn to be afraid. . . . Officers learn to treat every individual they interact with as an armed threat

why police officers in the United States kill many more people per capita than those in other advanced democracies.¹²⁰ And it is Black people who are most likely to die. A recent study published in *The Lancet* compared data on police violence from the US National Vital Statistics System (NVSS) to three nongovernmental, open-source databases.¹²¹ The study found that, from 1980 to 2019, the age-standardized mortality rate due to police violence for non-Hispanic Black people was 3.5 times higher than that for non-Hispanic white people.¹²² Another study found that “Black men [we]re about 2.5 times more likely to be killed by police over the[ir] life course than . . . white men. Black women [we]re about 1.4 times more likely to be killed by police than . . . white women.”¹²³

In explaining their decision to use deadly force, police officers often say they thought the victim was armed and dangerous even if—like George Floyd, Eric Garner, Terence Crutcher, and Walter Scott—he was not.¹²⁴ The officer might be lying, but it is also possible he was genuinely mistaken due to unconscious prejudice (implicit bias), which caused him to see “blacks, especially young men, as violent, hostile, aggressive, and dangerous.”¹²⁵ This means even an officer who sincerely disavows racism might still perceive behavior to be threatening if done by a Black person but innocuous if done by a white person.¹²⁶

Over the past forty-five years, social psychologists have studied the impact implicit bias has on the interpretation of

and every situation as a deadly force encounter in the making. *Every individual, every situation—no exceptions. . . . This approach inevitably affects the way that officers interact with civilians. First, it creates a substantial, if invisible, barrier to true community policing. . . . Counterintuitively, the warrior mentality also makes policing less safe for both officers and civilians. . . . The expansive version of the warrior mentality promotes the use of tactics that needlessly create use of force situations, and the fierce rhetoric that follows further fans the flames.* (footnotes omitted).

¹²⁰ See Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, GUARDIAN (June 9, 2015, 6:00 AM), <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries> (last visited Mar. 8, 2022). It makes sense that officers would be less careful if they know they are unlikely to go to jail for shooting someone. The possibility of a civil suit does not pose much of a deterrent due to qualified immunity, which has established an almost insurmountable bar to recovery. See *supra* notes 96–104 and accompanying text.

¹²¹ GBD 2019 Police Violence US Subnational Collaborators, *Fatal Police Violence by Race and State in the USA, 1980-2019: A Network Meta-Regression*, 398 LANCET 1239, 1241 (2021) [hereinafter *Fatal Police Violence by Race and State*].

¹²² *Id.* at 1245.

¹²³ Edwards et al., *supra* note 3, at 16,794.

¹²⁴ See Cynthia Lee, “*But I Thought He Had a Gun*”—Race and Police Use of Deadly Force, HASTINGS RACE & POVERTY L.J. 1, 18 (2004); see also Fagan & Campbell, *supra* note 95, at 991–1004; Trivedi & Van Cleve, *supra* note 192, at 901.

¹²⁵ See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011).

¹²⁶ *Id.*

ambiguous information.¹²⁷ In a groundbreaking study, Birt L. Duncan asked subjects to view what they thought was a live interaction in which two actors get increasingly argumentative until one shoves the other.¹²⁸ The dialogue and behavior were identical, but Duncan varied the race of the actors. If the harm-doer was white, subjects were more likely to label the behavior as a “little ‘horseplay’”; however, if the harm-doer was Black, they were more likely to label it “violent behavior.”¹²⁹

Researchers have also examined the impact of race on the decision to shoot.¹³⁰ Correll, Park, Judd, and Wittenbrink asked undergraduate subjects to participate in a computer simulation in which they had to decide whether a male suspect who appeared on screen was holding a gun or a nongun object.¹³¹ If he was holding a gun, they were supposed to quickly hit a button labeled “shoot.”¹³² If it was a neutral object, however, they were supposed to hit a “don’t shoot” button.¹³³ Correll and his colleagues found that subjects “decided not to shoot an unarmed [white suspect] more quickly than an unarmed [Black suspect]” and were more likely to mistakenly shoot a Black unarmed suspect.¹³⁴ “Both in speed and accuracy,” Correll and his colleagues wrote, “the decision to fire on an armed target was facilitated when that target was African American, whereas the decision not to shoot an unarmed target was facilitated when that target was White.”¹³⁵ E. Ashby Plant and B. Michelle Peruche repeated this same study in Florida with fifty

¹²⁷ See, e.g., H.A. Sagar & J.W. Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCH. 590–98 (1980) (finding that sixth grade boys were more likely to judge ambiguous behavior—like two boys bumping into each other or borrowing a pencil without asking—to be mean and threatening when the boy was Black instead of white); Kurt Hugenberg & Galen V. Bodenhausen, Research Report, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorizations*, 15 PSYCH. SCI. 342, 342–45 (2004) (finding that subjects evaluated the same facial expressions as more hostile on a Black face than a white face).

¹²⁸ Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 590, 592 (1976).

¹²⁹ *Id.* at 595–97.

¹³⁰ See, e.g., Samantha Moore-Berg et al., *Quick to the Draw: How Suspect Race and Socioeconomic Status Influences Shooting Decisions*, J. APPLIED SOC. PSYCH. 1–10 (2017) (finding that both suspect race and socioeconomic status (SES) impacted shooting decisions with subjects shooting armed high-SES Black suspects faster than armed white high SES suspects and responded “don’t shoot” faster for unarmed high-SES white suspects than unarmed Black SES suspects).

¹³¹ Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1315 (2002).

¹³² *Id.* at 1316–17.

¹³³ *Id.* at 1316.

¹³⁴ *Id.* at 1317.

¹³⁵ *Id.* at 1325.

certified sworn law-enforcement officers.¹³⁶ They found that “officers were initially more likely to mistakenly shoot unarmed Black suspects” as compared with unarmed white suspects, but this bias was eliminated in later trials when the officers became familiar with the program.¹³⁷ Plante and Peruche’s findings suggest that “it may be possible to eliminate racial biases in responses to criminal suspects,” but they acknowledge “there is currently no evidence that the elimination of bias in response to the simulation generalizes to other types of responses (e.g., decisions in the field).”¹³⁸

Although implicit bias may be unintentional, it is not accidental. Kathleen Osta and Hugh Vasquez at the National Equity Project emphasize that we are not born with bias, but instead we learn it.¹³⁹ “The negative associations and assumptions we make about people of color have been wired into our unconscious mind over hundreds of years and show up in all of our institutions today.”¹⁴⁰ In a 2019 study, Payne, Vuletic, and Brown-Iannuzzi studied the historical roots of implicit bias.¹⁴¹ They found white residents of states and counties “with a higher proportion of their populations enslaved in 1860 had greater anti-Black implicit bias.”¹⁴² “Rather than solely a feature of individual minds,” they wrote, “implicit bias may be better understood as a cognitive manifestation of historical and structural inequalities.”¹⁴³

III. THE DECISION TO CLASSIFY

The fact that the deaths of George Floyd, Eric Garner, Terence Crutcher, and Walter Scott were attributed to the police was no means a given. A recent study in *The Lancet* estimated 30,800 police killings between 1980 and 2018—17,100 more than recorded in the NVSS.¹⁴⁴ That means 55 percent of all estimated deaths due to police violence in the United States between 1980 and 2018 were not properly accounted for in official records.¹⁴⁵

¹³⁶ E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers’ Responses to Criminal Suspects*, 16 PSYCH. SCI. 180, 181 (2005).

¹³⁷ *Id.* at 182.

¹³⁸ *Id.* at 183.

¹³⁹ Kathleen Osta & Hugh Vasquez, *Implicit Bias and Structural Inequity*, NAT’L EQUITY PROJECT 2, <https://static1.squarespace.com/static/5e32157bff63c7446f3f1529/t/5f173bc8da7d1115210824c0/1595358153358/National-Equity-Project-Implicit-Bias.pdf> [https://perma.cc/LAG9-32PE].

¹⁴⁰ *Id.* at 2.

¹⁴¹ B. Keith Payne et al., *Historical Roots of Implicit Bias in Slavery*, 116 PROC. NAT’L ACAD. SCI. 11,693, 11,693 (2019).

¹⁴² *Id.* at 11,694.

¹⁴³ *Id.* at 11,697.

¹⁴⁴ See *Fatal Police Violence by Race and State*, *supra* note 121, at 1243.

¹⁴⁵ *Id.* at 1247.

Although this underreporting occurred across all racial groups, it was highest for Black Americans (59 percent).¹⁴⁶

To understand how a mistake of this magnitude could occur, we must consider how this information is recorded. As *The Lancet* article authors explain, medical doctors usually fill out the cause of death, unless there is suspicion of crime or foul play (including police violence), in which case the medical examiner or coroner is supposed to enter such information.¹⁴⁷ According to the World Health Organization, deaths resulting from police violence should be explicitly classified as such.¹⁴⁸ Such a rule is critical because if the person filling out the death certificate does not mention that the decedent was killed by the police, then the death will not be assigned for legal intervention.¹⁴⁹ This makes the medical examiner/coroner an institutional mechanism of structural racism because, as *The Washington Post* explained, “once a death is determined to be accidental or natural, there is no investigation”¹⁵⁰ meaning that the police officer will almost never face criminal prosecution for killing a Black person or anyone else.¹⁵¹

And who is the coroner or medical examiner? Coroners are often elected officials, and for the most part, “there are no age, education, or . . . medical training requirements.”¹⁵² Only four states even “require . . . coroners to be physicians.”¹⁵³ Despite their importance, some states do not have a separate office of the coroner but instead allow government officials like

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1248.

¹⁴⁹ *Id.*

¹⁵⁰ Radley Balko, Opinion, *It's Time to Abolish the Coroner*, WASH. POST (Dec. 12, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/12/12/its-time-to-abolish-the-coroner/> [<https://perma.cc/MF3U-9K7M>].

¹⁵¹ Scholars show that coroners have actually used their power to erase violence against Black people since before the Civil War. For example, Gaby et al. wrote, “Drawing on the extended case study of the Willis Jackson lynching, we detail coroner administrative performances intended to uphold white innocence and elite interests through generating official documentation on black deaths with an absence of evidence or through the introduction of inconclusive evidence.” Sarah Gaby et al., *Exculpating Injustice: Coroner Constructions of White Innocence in the Postbellum South*, 7 SOCIUS: SOCIO. RSCH. FOR A DYNAMIC WORLD 1, 9 (2021).

¹⁵² Ira P. Robbins, *A Deadly Pair: Conflicts of Interest Between Death Investigators and Prosecutors*, 79 OHIO STATE L.J. 901, 909 (2018).

¹⁵³ Maanvi Singh, *How America's Broken Autopsy System Can Mask Police Violence*, GUARDIAN (July 3, 2020, 8:13 PM), <https://www.theguardian.com/us-news/2020/jul/02/autopsies-police-killings-medical-misleading> [<https://perma.cc/4DYE-7MC5>]. The four states are: Kansas, see KAN. STAT. ANN. § 22a-226 (West, Westlaw through the 2022 Reg. Sess. of the Kan. Leg. effective on Mar. 10, 2022); Louisiana, see LA. STAT. ANN. § 13:5704 (Westlaw through the 2021 Reg. Sess. and Veto Sess.); Minnesota, see MINN. STAT. ANN. § 390.005 (West, Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.); and Ohio, see OHIO REV. CODE ANN. § 313.02 (West, Westlaw through file 75 of the 134th Gen. Assemb. (2021–2022)).

prosecutors and even sheriffs to assume the role.¹⁵⁴ In California, for example, the elected sheriff automatically assumes the coroner's duties in forty-eight of the state's fifty-eight counties.¹⁵⁵ Medical examiners, in contrast, are usually licensed physicians, and they are often required to be trained in forensic pathology.¹⁵⁶ Unfortunately, there are not enough medical examiners to staff available positions.¹⁵⁷ Some states have hybrid systems "in which a medical examiner" does the autopsy, but the coroner makes the final determination as to manner of death.¹⁵⁸

Given the power coroners and medical examiners have in determining whether, how, and if a killing will be prosecuted, it is critical that they remain independent. Yet 70 percent of respondents of a web-based survey of the National Association of Medical Examiners (NAME) reported having been pressured by an elected official or appointee to alter the cause or manner of death, and some reported experiencing negative consequences when they resisted.¹⁵⁹ Such pressure can be particularly acute when coroners/medical examiners are investigating a death in police custody. These officials often work for, or are housed in, police departments, which, as the authors of *The Lancet* article argue, creates a clear conflict of interest and may disincentivize recording police involvement in a death.¹⁶⁰ The problem is serious enough that the NAME Board of Directors released a position paper in which it wrote, "While medical examiners and coroners necessarily work with police in the investigation of death, and should have access to law enforcement reports, they should not be dependent upon the police for all their information and should not be subject to pressure from police to modify their conclusions."¹⁶¹

Should there be a conflict of opinion between a medical examiner and a politically appointed or elected coroner, the medical examiner may lose even though he is the only one with extensive training in forensic pathology. That is what happened in 2017 in San Joaquin County, California.¹⁶² Two medical

¹⁵⁴ See *Fatal Police Violence by Race and State*, *supra* note 123, at 1247–48.

¹⁵⁵ See Balko, *supra* note 150. Note that in 2017, Balko wrote that coroners automatically assumed the role of coroner in forty-one counties, but according to the official California website, it was actually forty-eight. *Sheriff-Coroner*, CAL. STATE ASS'N OF CNTYS., <https://www.counties.org/county-office/sheriff-coroner> [<https://perma.cc/ZAZV-57JU>].

¹⁵⁶ See Robbins, *supra* note 152, at 910.

¹⁵⁷ *Id.* at 910–11.

¹⁵⁸ Balko, *supra* note 150.

¹⁵⁹ Judy Melinek et al., *National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence*, 3 *ACAD. FORENSIC PATHOLOGY* 93, 93 (2013).

¹⁶⁰ *Fatal Police Violence by Race and State*, *supra* note 121, at 1250.

¹⁶¹ Melinek et al., *supra* note 159, at 97.

¹⁶² See Balko, *supra* note 150.

examiners—one of whom (Bennett Omalu) was hired ten years earlier to modernize and professionalize the county's medical examiner's office—resigned because they alleged the Sheriff-Coroner (Steve Moore) was putting pressure on them to alter their autopsy findings for deaths in police custody.¹⁶³ The two started documenting specific incidents in which Moore classified particular deaths as “accidents” instead of “homicides” to safeguard the police from prosecution.¹⁶⁴ In one notable case, Omalu found that Samuel Augustine Jr. had died of a traumatic brain injury and spinal cord injury while being arrested and deemed the manner of death homicide.¹⁶⁵ After Moore told Omalu he was wrong and requested that Omalu change his findings, Omalu wrote: “This is simply daylight corruption and nothing else.’ . . . He is using his office and powers to protect police officers.”¹⁶⁶

If a person dies in police custody, how do coroners/medical examiners explain it away? Sometimes they attribute the death to so-called “excited delirium,” a controversial diagnosis that refers to a “condition characterized by the abrupt onset of aggression and distress, typically in the setting of illicit substance use, often culminating in sudden death.”¹⁶⁷ Neither the American Psychiatric Association¹⁶⁸ nor the World Health Organization¹⁶⁹ recognize excited delirium as a valid diagnosis, and the American Medical Association denounces it as “a sole justification for law enforcement use of excessive force.”¹⁷⁰

Other times, the death report lists underlying health conditions, like hypertension or sickle cell trait (SCT), that could not have caused the person's death.¹⁷¹ A May 2021 investigation by *The New York Times* uncovered at least forty-six cases “over the past [twenty-five years] in which medical examiners, law enforcement officials, or defenders of accused officers” identified SCT “as a cause or major factor in” the “deaths of Black people in custody” even though about two-thirds of them had also been forcefully

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Joshua Budhu et al., *How “Excited Delirium” Is Misused to Justify Police Brutality*, BROOKINGS INST. (Aug. 10, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/08/10/how-excited-delirium-is-misused-to-justify-police-brutality/> [<https://perma.cc/245N-KTE6>].

¹⁶⁸ See COUNCIL ON PSYCHIATRY & L., AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON CONCERNS ABOUT USE OF THE TERM “EXCITED DELIRIUM” AND APPROPRIATE MEDICAL MANAGEMENT IN OUT-OF-HOSPITAL CONTEXTS (2020).

¹⁶⁹ See Singh, *supra* note 153; Budhu et al., *supra* note 167.

¹⁷⁰ Press Release, Am. Med. Ass'n, New AMA Policy Opposes “Excited Delirium” Diagnosis (June 14, 2021), <https://www.ama-assn.org/press-center/press-releases/new-ama-policy-opposes-excited-delirium-diagnosis> [<https://perma.cc/DLW2-D5JU>].

¹⁷¹ See Singh, *supra* note 153.

restrained, pepper sprayed, or “shocked with stun guns.”¹⁷² Blaming these deaths on SCT likely allowed the offending officers to avoid criminal or civil penalties.

In support of *The New York Times* investigation, three hematologists who specialize in SCT and sickle cell disease wrote an opinion piece explaining how benign SCT really is.¹⁷³ They clarified that SCT “is not a disease and is not associated with decreased life expectancy.”¹⁷⁴ It is “extremely common,” and most people “will live normal life spans with no adverse health events related to SCT.”¹⁷⁵ “Cases of sudden death in people with SCT,” they state, “are the . . . exception rather than the rule.”¹⁷⁶ The hematologists then contextualize *The New York Times* findings within a larger context of past victimization:

The medical field . . . has a shameful history of creating and perpetuating the pseudoscience of race-based physiological differences and performing unethical research. The onus is therefore on us, as physicians, to publicly denounce the use of these outdated and racist notions when they are used to provide cover for the mistreatment and murder of Black men and women at the hands of the police.¹⁷⁷

The fact that the medical examiners thought they could get away with blaming SCT for these men’s death is especially perverse. Sickle cell disease (SCD), is a painful, life-threatening blood disorder that is caused by inheriting the SCT from each parent.¹⁷⁸ Its presence “in the United States, [a]s a direct result of the transatlantic slave trade,” and most of those who suffer from it are Black.¹⁷⁹ In an article in *The New England Journal of Medicine*, Alexandra Power-Hays and Patrick T. McGann

¹⁷² Michael LaForgia & Jennifer Valentino-DeVries, *How a Genetic Trait in Black People Can Give the Police Cover*, N.Y. TIMES (May 15, 2021), <https://www.nytimes.com/2021/05/15/us/african-americans-sickle-cell-police.html> [<https://perma.cc/FE42-MSM4>]. K.C. Cage-Singleton is a glaring example of this practice. *Id.* Cage-Singleton was chased by the police into an apartment complex “because they thought his clothing resembled that of” a suspect in an armed robbery. *Id.* There they “shocked him with a stun gun and beat him with a baton.” *Id.* Although the coroner indicated Cage-Singleton had suffered a number “of injuries, including abrasions, lacerations, and broken teeth, . . . the manner and cause of death were ‘undetermined.’” *Id.* Instead, the coroner cited “probable’ sickle cell trait.” *Id.*

¹⁷³ A. Kyle Mack et al., *Some Medical Examiners Say Sickle Cell Trait Causes Sudden Death—They’re Wrong*, SCI. AM. (June 20, 2021), <https://www.scientificamerican.com/article/some-medical-examiners-say-sickle-cell-trait-causes-sudden-death-theyre-wrong/> [<https://perma.cc/V4KH-S953>].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Alexandra Power-Hays & Patrick T. McGann, *When Actions Speak Louder than Words—Racism and Sickle Cell Disease*, 383 NEW ENG. J. MED. 1902, 1902 (2020); *What Is Sickle Cell Trait?*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/sicklecell/traits.html> [<https://perma.cc/Q69V-P2NT>].

¹⁷⁹ Power-Hays & McGann, *supra* note 178, at 1902.

compare funding for SCD with cystic fibrosis, which is a comparable disease, but it affects mostly white Americans.¹⁸⁰ “Cystic fibrosis affects one third fewer Americans than SCD but receives 7 to 11 times the research funding per patient, which results in disparate rates of development of medications: currently, the Food and Drug Administration has approved 4 medications for SCD and 15 for cystic fibrosis.”¹⁸¹ Not only has the development of SCD modifying therapies remained minimal, but those suffering from the disease receive suboptimal care.¹⁸² As Power-Hays and McGann explain:

Despite inexorable pain, patients report getting dressed nicely before presenting to the emergency department in an attempt to avoid judgment and receive better care. . . . Deplorably, especially in the midst of the opioid crisis, patients with SCD are often described as drug seekers and accused of feigning their pain, which results in inadequate treatment and more suffering. Because of the challenges in receiving adequate care and the stress associated with perceived racial stigma, many patients choose to avoid care altogether, further increasing the risk of life-threatening complications.¹⁸³

Not only are medical examiners and coroners too beholden to the police, but one of the lies they tell to hide police brutality hinges on a disease that would not be here if men, women, and children had not been kidnapped from Africa and brought to America as slaves. And the disease would not have taken on mythical powers of destruction if the US health care system adequately funded its treatment and fairly treated the people suffering from it.

IV. THE DECISION TO CHARGE

Although prosecutors ultimately filed charges against the officers who killed George Floyd, Terence Crutcher, and Walter Scott,¹⁸⁴ such prosecutions are rare. According to Mapping Police Violence, which compiles data from media reports, obituaries, public records, and databases, 9,901 people were killed by the police between 2013 and 2021,¹⁸⁵ but less than 3 percent a year were charged with a crime.¹⁸⁶ Policing is a dangerous job, and undoubtedly, many of those killings were justified to protect the life of the officer or a third party. However, given that 37 percent of the

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1902–03.

¹⁸⁴ *See supra* text accompanying notes 1–19.

¹⁸⁵ *See* SAMUEL SINYANGWE ET AL., MAPPING POLICE VIOLENCE, 2021 POLICE VIOLENCE REPORT 3 (2021), <https://policeviolencereport.org> [<https://perma.cc/7H92-4UVJ>].

¹⁸⁶ *See id.* at 6.

killings in 2021 began with either nonviolent offense-traffic stops (10 percent),¹⁸⁷ mental health checks (9 percent),¹⁸⁸ or other nonviolent offenses (18 percent),¹⁸⁹ how could so-called “ministers of justice” prosecute just 1 percent of these cases?¹⁹⁰

Prosecutors have an “entangled,”¹⁹¹ “codependent”¹⁹² relationship with the police, which turns them into institutional mechanisms of structural racism. “From a structural standpoint,” ACLU attorney Somil Trivedi and Nicole Gonzalez Van Cleve wrote, “police officers are prosecutors’ star witnesses, central to the prosecutors’ ability to earn the convictions that are so essential to their conception of public safety (and professional success, including internal promotion).”¹⁹³ This dependence puts enormous pressure on prosecutors to get along with the police—even if they lie, withhold evidence, or use excessive force. Prosecutors who attempt to stand up to the police pay a professional price.¹⁹⁴ “A prosecutor who reports police crimes or advocates zealous prosecution of the police will necessarily run afoul of law enforcement’s good graces, which may impact conviction rates and therefore her career advancement,” Kate Levine explains.¹⁹⁵ Should a reform-minded district attorney anger police unions, her chance of being reelected is significantly diminished.¹⁹⁶ Given the cost of standing up to the police, is it any surprise that “ample evidence indicates that when police are the ones committing the crimes, prosecutors deploy their immense discretion to cover for and effectively encourage the criminality rather than to combat it and seek justice?”¹⁹⁷

Sometimes community outrage over a police killing is so great that prosecutors cannot simply decline to file charges. In those instances, they have another option available to them—using a grand jury as cover.¹⁹⁸ By that I mean, prosecutors can convene a

¹⁸⁷ *Id.* at 10 (117/1134=10.3%).

¹⁸⁸ *Id.* (104/1134=9.2%).

¹⁸⁹ *Id.* (201/1134=17.7%).

¹⁹⁰ See Sinyangwe et al., *supra* note 187, at 5 (11/1134=.097%); Amelia Thomson-DeVaux et al., *Why It’s So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (Sept. 23, 2020, 4:53 PM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/> (last visited May 18, 2022).

¹⁹¹ Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1475 (2016).

¹⁹² Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 912 (2020).

¹⁹³ *Id.* at 909.

¹⁹⁴ *Id.* at 910.

¹⁹⁵ Levine, *supra* note 191, at 1472.

¹⁹⁶ *Id.* at 1476–77.

¹⁹⁷ Trivedi & Van Cleve, *supra* note 192, at 898.

¹⁹⁸ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 25 (2007) (stating that “in most cases, the grand jury is simply a tool of the prosecutor”); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the*

grand jury, deliberately sandbag their case, and then proclaim that they did their best when the jurors decline to indict. Yet, consider this: grand juries are not adversarial hearings, and the defendant usually has no right to present evidence or even be present.¹⁹⁹ “[T]he prosecutor maintains unilateral control over the grand jury,”²⁰⁰ and the burden of persuasion is low.²⁰¹ Because it is an accusatory and not an adjudicatory proceeding, the Supreme Court has ruled that the prosecutor has no obligation to present exculpatory evidence.²⁰² That means the prosecutor should almost always win, and he does.²⁰³ In 2016,²⁰⁴ there were just six federal cases across the entire country where the grand jury failed to indict!²⁰⁵

And yet prosecutors failed to secure an indictment for the officers that killed Michael Brown²⁰⁶ and Eric Garner.²⁰⁷ Prosecutors usually present one-sided evidence and the entire proceeding is completed in anywhere from a few minutes to a few hours.²⁰⁸ But, as Kate Levine points out, “the Ferguson prosecutors put on hours of conflicting testimony” in the indictment proceeding for the officer that killed Michael Brown.²⁰⁹ Similarly, in the Eric Garner case, the Staten Island prosecutor called “Pantaleo’s partner, Justin D’Amico,” to the stand “after [first] granting . . . [D’Amico] immunity from any future prosecution.”²¹⁰ We do not know what D’Amico said because the records have been sealed,²¹¹ but we do know that he lied

Accused, 80 CORNELL L. REV. 260, 269 (1995) (“[I]t has become nearly an article of faith among both grand jury critics and defenders that the grand jury is a ‘rubber stamp’ for the prosecution.” (footnotes omitted)).

¹⁹⁹ See DAVIS, *supra* note 198, at 26; see also Leipold, *supra* note 198, at 266–67.

²⁰⁰ DAVIS, *supra* note 198, at 25.

²⁰¹ See Leipold, *supra* note 198, at 264.

²⁰² *United States v. Williams*, 504 U.S. 36, 51 (1992).

²⁰³ Leipold, *supra* note 198, at 274; Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson/> (last visited May 18, 2022).

²⁰⁴ Data reported for federal fiscal year 2016, running from October 1, 2015 through September 30, 2016. MARK MOTIVANS, BUREAU OF JUST. STATS., NCJ 251772, FEDERAL JUSTICE STATISTICS, 2016—STATISTICAL TABLES, at 1 n.1 (2020).

²⁰⁵ *Id.* at 13, tbl.2.3.

²⁰⁶ Casselman, *supra* note 203.

²⁰⁷ Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 4, 2014), <https://www.nbcnewyork.com/news/local/grand-jury-decision-eric-garner-staten-island-chokehold-death-nypd/1427980/> [<https://perma.cc/TJ32-UHJL>].

²⁰⁸ Levine, *supra* note 191, at 1473.

²⁰⁹ *Id.*

²¹⁰ Gregory Krieg, *The Eric Garner Case Exposes a Huge Problem with How We Prosecute Police Officers*, MIC (Dec. 4, 2014), <https://bit.ly/380B9JA> [<https://perma.cc/P9MR-QPKA>].

²¹¹ J. David Goodman, *Appeals Court Rules for Transcript in Eric Garner Case to Remain Sealed*, N.Y. TIMES (Nov. 23, 2015), <https://www.nytimes.com/2015/11/24/nyregion/ap-peals-court-rules-for-transcripts-in-eric-garner-case-to-remain-sealed.html> [<https://perma.cc/4XND-DP33>].

about what Garner had done in posthumous arrest papers, making it seem like Garner had committed a felony when his actions constituted, at most, a misdemeanor.²¹² All in all, it is hard to characterize these proceedings as good faith efforts on the part of either prosecutor to secure an indictment.

But this is all inside baseball. A prosecutor is not going to say that she is prioritizing her relationship with the police over her duty to uphold the rule of law; she must have a “good” reason not to prosecute. So, she often defers instead to the officer’s claim of self-defense,²¹³ which exposes the prosecutor’s implicit racial bias or, more cynically, her faith in the community’s implicit racial bias.²¹⁴

V. THE DECISION TO CONVICT

Derek Chauvin’s conviction was an aberration. Between the start of 2005 through June 24, 2019, just 104 nonfederal law enforcement officers were “arrested for murder or manslaughter resulting from an on-duty shooting . . . [and] [o]f those . . . [just] thirty-five [(34 percent)] [were] convicted of a crime.”²¹⁵ Fifteen pleaded guilty, and of the forty-three that went before a jury, twenty were convicted (47 percent).²¹⁶ But how could twelve people not agree that Officer Michael Slager had committed murder after watching the cellphone video of him shooting unarmed Walter Scott five times in the back from a distance of at least fifteen feet?²¹⁷ And why did jurors acquit Officer Betty Shelby of manslaughter after watching video of her shooting Terence Crutcher in the back when he had his hands raised above his head?²¹⁸ Implicit bias, as discussed above,

²¹² Sisak, *supra* note 6.

²¹³ Trivedi & Van Cleve, *supra* note 192, at 901, 905–15.

²¹⁴ See Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 807–08 (2012).

²¹⁵ Philip M. Stinson, Sr. & Chloe A. Wenzlof, *On-Duty Shootings: Police Officers Charged with Murder or Manslaughter, 2005-2019*, BOWLING GREEN STATE UNIV.: POLICE INTEGRITY RSCH. GRP. (2019), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1100&context=crim_just_pub [<https://perma.cc/L6YL-CWEY>]. Of these, only four were convicted of murder. The others were convicted of lesser offenses, including manslaughter (nine); voluntary manslaughter (four); involuntary manslaughter (five); official misconduct (two); reckless homicide (two); negligent homicide (three); federal criminal deprivation of civil rights (five), and reckless discharged of a firearm (one). *Id.* An additional four officers were convicted of murder, but their convictions were overturned, and they ended up being convicted of federal criminal deprivation of civil rights. *Id.*

²¹⁶ *Id.*

²¹⁷ Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html> [<https://perma.cc/7D4M-46FG>]; Dwyer, *supra* note 15; *supra* notes 11–19 and accompanying text.

²¹⁸ See *supra* notes 8–10 and accompanying text.

certainly plays a role.²¹⁹ Preexisting beliefs about Black men being dangerous or aggressive can impact jurors' perceptions of the evidence²²⁰ and may also impact their willingness to believe a police officer's claims of being afraid, conflicting evidence notwithstanding.

We also need to consider who serves as jurors. Every state has a law that prohibits those "with criminal convictions" and sometimes "pending charges[]" from serving on juries."²²¹ Some only apply to felonies, but others include misdemeanors.²²² The net effect of these laws, whether intentional or not, is to disproportionately exclude Black people. A 2017 study found that 23 percent of Black adults had a felony conviction, compared with 6 percent of non-Black adults.²²³ The study also found that 33 percent of adult Black men had a felony conviction, compared with 13 percent of all adult males.²²⁴

An absence of Black jurors makes it more difficult for the prosecution. To convict a police officer of unlawful killing, the state must convince jurors beyond a reasonable doubt that the officer did not have the right to use deadly force.²²⁵ This burden is especially onerous when the officer takes the stand and says, as Officer Betty Shelby did in explaining why she shot an unarmed Terence Crutcher in the back, "I feared for my life."²²⁶ Jurors who trust the police may be more likely to believe her, and a 2020 Pew Research Center survey taken one month before George Floyd's death found that there was a large discrepancy across racial groups in confidence in the police.²²⁷ Fifty-six

²¹⁹ Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 513, 546–48 (2014).

²²⁰ See Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgements of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309 (2010); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007).

²²¹ Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, PRISON POLY INITIATIVE (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html> [<https://perma.cc/98M5-REGY>].

²²² *Id.*

²²³ Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795, 1807 (2017).

²²⁴ *Id.*

²²⁵ See *In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). See also *supra* notes 90–95 for discussion of the Supreme Court's standard for police officer use of deadly force.

²²⁶ Ortiz & Helsel, *supra* note 8.

²²⁷ Hannah Gilberstadt, *A Month Before George Floyd's Death, Black and White Americans Differed Sharply in Confidence in the Police*, PEW RSCH. CTR. (June 5, 2020), <https://www.pewresearch.org/fact-tank/2020/06/05/a-month-before-george-floyds-death-black-and-white-americans-differed-sharply-in-confidence-in-the-police/> [<https://perma.cc/VQ2L-GX2M>].

percent of Black Americans “said they had at least a fair amount of confidence in [the] police . . . to act in the best interests of the public,” compared with 84 percent of white Americans and 74 percent of Hispanic Americans.²²⁸

This poll reveals another hurdle for the prosecution—that of confirmation bias, meaning the tendency for people to seek or interpret evidence in a manner that is partial to existing beliefs, expectations, or existing hypotheses.²²⁹ Let me explain. The 2020 Pew Research Center survey found that most Americans had “at least a fair amount of confidence in [the police] to act in the best interests of the public.”²³⁰ It follows that since most prospective jurors implicitly trust the police, most are more likely to discount contradictory evidence that conflicts with this original belief. Nickerson described the general phenomenon in his oft-cited 1998 article:

A great deal of empirical evidence supports the idea that the confirmation bias is extensive and strong and that it appears in many guises. The evidence also supports the view that once one has taken a position on an issue, one’s primary purpose becomes that of defending or justifying that position. This is to say that regardless of whether one’s treatment of evidence was evenhanded before the stand was taken, it can become highly biased afterward.²³¹

Of course, there are potential jurors who have had bad experiences with the police, but they are not likely to be selected for a jury. Like all criminal defendants, police officers have the right to a fair and impartial jury.²³² This means people who have been mistreated by the police, know people who have been mistreated by the police, or have protested against police violence are likely to be removed for cause or stricken by the defense through a peremptory challenge.²³³ The exclusion of a

²²⁸ *Id.*

²²⁹ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

²³⁰ Gilberstadt, *supra* note 227.

²³¹ Nickerson, *supra* note 229, at 177.

²³² *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”).

²³³ See Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 828–29 (2020); see also *Race and the Jury: Illegal Discrimination in Jury Selection*, EQUAL JUST. INST. 34–39 (2021), <https://ejl.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf> [<https://perma.cc/A5NY-XJ6R>]. For discussion of the dismissal of a Black potential juror in Officer Chauvin’s trial, see Adrian Florido, *Half of the Jury in the Chauvin Trial Is Nonwhite. That’s Only Part of the Story*, NPR (Mar. 25, 2021, 9:00 AM), <https://www.npr.org/2021/03/25/980646634/half-of-the-jury-in-the-chauvin-trial-is-non-white-thats-only-part-of-the-story> [<https://perma.cc/WJ5U-GYWM>]; and Mary Moriarty, *Juror #76: Black Juror’s Rejection Reveals Flaws in System*, MINN. SPOKESMAN RECORDER (Mar. 18, 2021), <https://spokesman-recorder.com/2021/03/18/juror-76-black-jurors-rejection-reveals-flaws-in-system/> [<https://perma.cc/V7HF-EJRK>].

disproportionate number of Black people due to felony convictions,²³⁴ and of those who have experienced police misconduct turns juries into institutional mechanisms of structural racism.

And what if the defendant waives his right to a jury trial? As unlikely as it is for an officer to be convicted by a jury, he is even less likely to be convicted by a judge.²³⁵ Between 2005 and June 2019, *none* of the nine officers who were tried before a judge for murder or manslaughter resulting from an on-duty shooting were convicted.²³⁶ Part of the reason why, as Bennett Gershman explains, is that judges, as former prosecutors, “might have a pro-police bias” or they might be able to “more intelligently understand the circumstances facing the officer when he concluded that lethal force was necessary.”²³⁷ Alternatively, an elected judge might not want to jeopardize the potential endorsement of law enforcement.²³⁸ All of this means that the odds are stacked in favor of acquittal even before the trial begins.

VI. THE DECISION TO PUNISH

In the rare event that an officer is convicted of murder, he is unlikely to do much time. Sure, Derek Chauvin was sentenced to 22.5 years for the murder of George Floyd, but that was still 25 percent less than the prosecutor’s requested sentence of 30 years, which itself was 25 percent less than the maximum sentence of 40 years.²³⁹ And Chauvin was sentenced to a relatively long time compared with other police officers. Between 2005 and June 24, 2019, just four nonfederal officers were convicted of murder.²⁴⁰ These officers were sentenced to 81 months to 192 months in prison with an average sentence of 150.75 months (12.6 years).²⁴¹ As a point of comparison, the

²³⁴ See *supra* notes 223–224 and accompanying text.

²³⁵ Philip M. Stinson & Chloe Wentzlof, *No. 9: On-Duty Shootings: Police Officers Charged with Murder or Manslaughter, 2005-2019*, BOWLING GREEN STATE UNIV.: RSCH. BRIEF ONE-SHEET (2019), <https://www.bgsu.edu/content/dam/BGSU/health-and-human-services/document/Criminal-Justice-Program/policeintegritylostresearch/9-On-Duty-Shootings-Police-Officers-Charged-with-Murder-or-Manslaughter.pdf> [<https://perma.cc/9ZHC-MJLS>].

²³⁶ *Id.*

²³⁷ Bennett Gershman, *Why Do Police Defendants Want to Be Tried by Judges, and Not By Juries?*, LAW & CRIME (Feb. 2, 2018), <https://lawandcrime.com/high-profile/why-do-police-defendants-want-to-be-tried-by-judges-and-not-by-juries/> [<https://perma.cc/ZSB6-8MFX>].

²³⁸ Rebecca Mae Salokar, *Endorsements in Judicial Campaigns: The Ethics of Messaging*, 28 JUST. SYS. J. 342, 344 (2007).

²³⁹ Bill Chappell, *Derek Chauvin Is Sentenced to 22 ½ Years for George Floyd’s Murder*, NPR (June 25, 2021, 6:02 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder> [<https://perma.cc/FPB2-YHSQ>].

²⁴⁰ Stinson & Wentzlof, *supra* note 235.

²⁴¹ *Id.*

average sentence length for murder in state courts is 585.6 months (48.8 years).²⁴² That means police officers who murdered were, on average sentenced to only one-fourth the time of civilians. Judges' unwillingness to convict officers during bench trials, as described above, combined with their sentencing discount for officers who kill, makes them institutional mechanisms of structural racism.

Before going on, it is worth spending some additional time on Derek Chauvin. In determining Chauvin's sentence, Judge Peter A. Cahill had to "ensure that the sanctions imposed . . . are proportional to the severity of the . . . offense and the offender's criminal history."²⁴³ Because of Chauvin's nonexistent criminal history, his presumptive sentence was 150 months.²⁴⁴ Judge Cahill then determined that there were two aggravating factors involved in Chauvin's case: (1) abusing a position of trust,²⁴⁵ and (2) "treating George Floyd with particular cruelty."²⁴⁶ The judge found no mitigating factors, and sentenced Chauvin to an additional 120 months for a total of 270 months.²⁴⁷

The fact that Chauvin (or any other officer) had no prior criminal history does not mean that he had not committed any crimes. We know that Chauvin was the subject of at least thirty-two complaints, five of which were sustained and resulted in a formal reprimand.²⁴⁸ Very little information is publicly available about those cases, but the prosecutor exposed one of particular note during the pretrial portion of Chauvin's trial.²⁴⁹ In 2017, Chauvin and his partner responded to a domestic assault call of a woman who reported being assaulted by her two minor children, one a fourteen-year-old boy.²⁵⁰ Chauvin's written report made it seem like the boy repeatedly resisted arrest, which is why Chauvin claimed he struck the boy and held him to the floor. But, the body worn cameras revealed a completely different story.²⁵¹ The truth is that the boy told the officers *he* had been beaten, but they decided to

²⁴² DANIELLE KAEBLE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 255662, TIME SERVED IN STATE PRISON, 2018, at 4 (2021), <https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf> [<https://perma.cc/W8KD-77YP>].

²⁴³ *State v. Chauvin*, No. 27-CR-20-12646 (Minn. Dist. Ct. June 25, 2021) (alteration in original) (quoting MINNESOTA SENTENCING GUIDELINES 1.A) (sentencing order and memorandum opinion).

²⁴⁴ *Id.* at 3–5.

²⁴⁵ *Id.* at 7–11.

²⁴⁶ *Id.* at 11–15.

²⁴⁷ *Id.* at 2, 6, 22.

²⁴⁸ *Results: Derek M. Chauvin, Badge #1087*, CMTYS. UNITED AGAINST POLICE BRUTALITY, http://complaints.cuapb.org/police_archive/officer/2377/ [<https://perma.cc/X4PK-Q39U>].

²⁴⁹ See *State's Supplemental Memorandum of Law in Support of Other Evidence at 2*, *State v. Chauvin*, No. 27-CR-20-12646 (Minn. Dist. Ct. June 25, 2021).

²⁵⁰ *Id.* at 1–2.

²⁵¹ *Id.* at 2–3.

arrest him anyway.²⁵² After ordering the boy to come out of his bedroom, they waited thirty-three seconds before grabbing him.²⁵³ Chauvin then hit the boy with a flashlight, grabbed him by the throat, and hit him again in the head with the flashlight.²⁵⁴ The boy then “cried out that they were hurting him and [asked them] to stop,” but instead Chauvin applied a neck restraint to the boy, which caused him to lose consciousness and go to the ground.²⁵⁵ Chauvin and his partner put the boy in the prone position (meaning on his stomach) and handcuffed him behind his back.²⁵⁶ Chauvin then held him down, knee-to-upper back, just as he held down George Floyd, all the while as the boy complained that he could not breathe and as his mother begged for Chauvin to let him go.²⁵⁷ Chauvin continued to hold the boy down even though the boy was already handcuffed and even though the boy’s ear was actively bleeding and the boy was repeatedly telling the officers that he was in pain.²⁵⁸ Eventually, a paramedic arrived, examined the boy’s ear, and told him he would need stitches.²⁵⁹ Two minutes later, Chauvin told the boy he was under arrest, tightened the handcuffs, and finally—seventeen minutes after first restraining the boy to the floor and kneeling on him—removed his knee from the boy’s back.²⁶⁰ Two minutes after that, Chauvin and his partner assisted the boy in rolling to one side and standing up before walking him to a waiting ambulance.²⁶¹

For four years, it seemed that this case would be ignored. The Minneapolis police have a long history of abuse accusations, and past attempts at reform have been unsuccessful.²⁶² The boy Chauvin struck and held down is Black, which is consistent with complaints of racism (including those made by police officers against the department²⁶³) and excessive force disproportionately inflicted against Black people.²⁶⁴ Chauvin’s partner was legally obligated to

²⁵² *Id.* at 3–5.

²⁵³ *Id.* at 3.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 3–4.

²⁵⁶ *Id.* at 4.

²⁵⁷ *Id.* at 4, 6.

²⁵⁸ *Id.* at 4.

²⁵⁹ *Id.* at 5.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> [<https://perma.cc/8GEU-HHJD>].

²⁶³ See, e.g., Complaint & Demand for a Jury Trial at 4, *Arradondo v. Minneapolis*, 2015 WL 4727202 (D. Minn. Aug. 10, 2015) (No. 13-2488) (five police officers suing the Minneapolis Police Department to “redress race and color discrimination in employment”).

²⁶⁴ See Matt Furber et al., *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2020/05/27/us/minneapolis-police.html> [<https://perma.cc/4NYH-46BU>].

report the abuse,²⁶⁵ but his silence was nothing out of the ordinary. As the Minnesota Reformer explained, “[t]he clearest pattern to emerge when examining the disciplinary files is that when a Minneapolis police officer does something wrong, no matter how big or small, other officers on the scene will minimize what happened or report not having seen or heard anything.”²⁶⁶ Nor did the state prosecutor ever prosecute even though there was body camera footage documenting Chauvin’s misdeeds.²⁶⁷

Finally, in May 2021, Chauvin was indicted for violating the boy’s federal civil rights,²⁶⁸ and he pleaded guilty seven months later.²⁶⁹ Ironically it was the same day he pleaded guilty to violating the civil rights of George Floyd²⁷⁰—a person whose life might have been spared if the police and prosecutor had held Chauvin to account earlier. The delayed prosecution also meant Judge Cahill was presented with a whitewashed criminal history, which in turn meant he could not sentence Chauvin to the time he arguably deserved under Minnesota law for murdering George Floyd.

VII. SOLUTIONS

In this article, I have discussed the ways in which state actors exploit prior victimization in justifying and minimizing police killings. Doing something about this issue will be difficult given the deep-seated structural roots of this victimization and the way different actors work together (even if unintentionally) to perpetuate it. Only a multiplicity of reforms will be able to enact meaningful and lasting change.

Scholars and activists often focus on reforms that will change police behavior through deterrence rooted in punishment. For instance, if it becomes more difficult as a matter of law to assert that use of deadly force was justified, then officers will be less likely to shoot because they will fear going

²⁶⁵ See Max Nesterak & Tony Webster, *The Bad Cops: How Minneapolis Protects Its Worst Police Officers Until It’s Too Late*, MINN. REFORMER (Dec. 15, 2020, 5:30 AM), <https://bit.ly/37XCyA9> [<https://perma.cc/GP7G-EPGP>].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Ray Sanchez & Omar Jimenez, *What We Know About the 2017 Encounter that Led to Derek Chauvin’s Second Indictment*, CNN (May 7, 2021, 3:44 PM), <https://www.cnn.com/2021/05/07/us/derek-chauvin-indictment-2017-incident/index.html> [<https://perma.cc/7ATF-FF5S>].

²⁶⁹ Erin Brady, *Derek Chauvin Pleads Guilty to Violating Civil Rights of George Floyd and 14-Year-Old Boy*, NEWSWEEK (Dec. 15, 2021, 11:00 AM), <https://www.newsweek.com/derek-chauvin-pleads-guilty-violating-civil-rights-george-floyd-14-year-old-boy-1659707> [<https://perma.cc/MJ65-NYQW>].

²⁷⁰ Leila Fadel, *Derek Chauvin Pleads Guilty to Violating George Floyd’s Civil Rights in Federal Court*, NPR (Dec. 15, 2021, 4:28 PM), <https://www.npr.org/2021/12/15/1064614556/derek-chauvin-pleads-guilty-to-violating-george-floyds-civil-rights-in-federal-c> [<https://perma.cc/W5RT-JQBV>].

to prison.²⁷¹ Or, if legislatures abolish or at least abrogate qualified immunity, then police officers will think twice before striking someone with their baton because they will worry about being held civilly liable.²⁷² Although these changes should be made, they are unlikely to be as effective as people hope. After all, it is still a prosecutor who decides whether to charge a police officer with murder and a judge or jury who decides whether to convict. The law of qualified immunity should also change, but the Supreme Court has thus far been unwilling to do so.²⁷³ Even if the Court does change the standard, it is still a judge or jury that will decide whether a violation occurred.

In addition to pushing for these changes, policy makers should follow the lead of Franklin Zimring²⁷⁴ and Lawrence W. Sherman²⁷⁵ in trying to reduce police killings by moving the focus from blaming individual officers to identifying change points that can save lives. For example, they should try and reduce the opportunity for lethal force. Ten percent of police killings in 2021 started with a traffic stop.²⁷⁶ Legislatures should reduce the likelihood of a potentially lethal traffic stop by changing the law on civil forfeiture. Most civil forfeiture laws allow the police to keep the property they seize,²⁷⁷ which creates an incentive to use minor traffic infractions as a pretext for stopping people.²⁷⁸ Legislatures should amend these laws to remove this incentive. The laws should also be amended to make it more difficult for the state to strip a person of their property. Without these financial incentives, the police are likely to conduct fewer traffic stops, which in turn should reduce the number of police killings.

²⁷¹ See Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2 U. ILL. L. REV. 629, 638 (2018); see also Jane Coaston, *California's New Law to Stop Police Shootings, Explained*, VOX (Aug. 23, 2019, 1:00 PM), <https://www.vox.com/2019/8/23/20826646/california-act-to-save-lives-ab-392-explained> [<https://perma.cc/9DPV-7MJ2>].

²⁷² See Jay R. Schweikert, *Qualified Immunity: A Legal Practical, and Moral Failure*, POLY ANALYSIS (Cato Inst., Wash. D.C.), Sept. 14, 2020, at 13–16, 19, <https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf> [<https://perma.cc/7VU3-3WPZ>].

²⁷³ See Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. 1, 1 (2021).

²⁷⁴ See generally FRANKLIN E. ZIMRING, *WHEN POLICE KILL* (2017) (recommending federal, state, and local policy changes to reduce police killings).

²⁷⁵ See generally Lawrence W. Sherman, *Reducing Fatal Police Shootings as System Crashes: Research, Theory, and Practice*, 1 ANN. REV. CRIMINOLOGY 421 (2018) (proposing a theoretical framework to reduce fatal police shootings).

²⁷⁶ See *supra* note 190 and accompanying text.

²⁷⁷ David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve this Problem?*, 25 GEO. MASON L. REV. 173, 173, 181–82 (2017).

²⁷⁸ *How Crime Pays*, *supra* note 62, at 2388; Nick Sibilla & Inst. for Just., *Cops Use Traffic Stops to Seize Millions From Drivers Never Charged With a Crime*, FORBES (Mar. 12, 2014, 11:38 AM), <https://www.forbes.com/sites/instituteforjustice/2014/03/12/cops-use-traffic-stops-to-seize-millions-from-drivers-never-charged-with-a-crime/?sh=6a487c0df54b> (last visited May 18, 2022).

In instances when police do engage a suspect, the question becomes how we can lessen the chance that they will use deadly force. Sherman contends that we should design policing systems that place “preservation of life on an equal (and often higher) level with swift enforcement of the law.”²⁷⁹ Sherman tells the story of a man in Camden, New Jersey who brandished a knife and then walked away, slashing the knife in the air as he walked.²⁸⁰ Instead of opening fire on the man, up to fifteen police officers and two police cars surrounded the man and walked with him for at least seven minutes.²⁸¹ This approach allowed them to contain the risk and keep the community safe until they had the opportunity to disarm the man and put him under arrest.²⁸²

When a shooting does take place, then saving the life of the victim becomes paramount. Officers should be required to make every effort to save the victim’s life. To that end, Sherman suggests having officers carry and be trained in the use of “battlefield-grade hemostatic bandages” immediately after a shooting has occurred.²⁸³ Sherman also recommends requiring officers to transport the wounded in patrol cars instead of waiting for an ambulance.²⁸⁴ Both of these interventions will help save lives.

Even with these changes, people will continue to die in police custody. When they do, it is critical that an independent forensic pathologist determine their manner of death. That means states should follow the recommendations of the National Academy of Sciences and abolish the existing coroner systems.²⁸⁵ Journalist Radley Balko’s explanation as to why hits the nail on the head: “The very act of electing someone to determine manner of death suggests that there’s room for political factors to guide or influence that determination. That shouldn’t be something we encourage.”²⁸⁶ Also in line with the recommendations of the National Academy of Sciences, Congress should authorize and appropriate sufficient funds to create regional medical examiner systems, modernize facilities, and provide adequate education,

²⁷⁹ Lawrence W. Sherman, *Reducing Fatal Police Shootings as System Crashes: Research, Theory, and Practice*, 1 ANN. REV. CRIMINOLOGY 421, 441 (2018).

²⁸⁰ *Id.* at 440.

²⁸¹ *Id.*

²⁸² *See id.*

²⁸³ *Id.* at 441.

²⁸⁴ *See id.*

²⁸⁵ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT’L RESCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 49 (2009).

²⁸⁶ Balko, *supra* note 150.

training and staffing of medical examiner offices.²⁸⁷ To insulate medical examiners from pressure when they investigate and testify in cases of police violence, legislatures should afford them official whistleblower status.²⁸⁸

CONCLUSION

The killings of George Floyd, Eric Garner, Terence Crutcher, and Michael Scott are more than just isolated tragedies. They are manifestations of a structurally racist criminal justice system. Eduardo Bonilla-Silva describes that system well when he writes, “[i]n contrast to race relations in the Jim Crow period, however, racial practices that reproduce racial inequality in contemporary America (1) are increasingly covert, (2) are embedded in normal operations of institutions, (3) avoid direct racial terminology, and (4) are invisible to most Whites.”²⁸⁹

From arrest through sentencing, the fact of race, the legacy of slavery, and the legal consequences of that legacy are imbedded in the very foundations of our legal system. Police, coroners, prosecutors, jurors, and judges. However unintentionally or unaware, each perpetuates a system in which Black people are more likely to die at the hands of the police because police aren’t held accountable. In this article, I have discussed the various institutional mechanisms that help to reproduce and legitimize police killings. They include vagrancy and civil forfeiture laws, which, though facially neutral have been deployed disproportionately against Black people; institutions like the Supreme Court, which has effectively legitimized racial profiling by the police; and actors like prosecutors and coroners who are so intertwined with law enforcement that it is almost impossible to hold the police accountable.

The most insidious mechanism of all, however, is the way prior mistreatment has been harnessed against Black people as justification for continuing state violence against them. Police officers exploit this mistreatment in justifying the decision to arrest and the subsequent use of deadly force; coroners and medical examiners wield it when assigning cause of death to something other than the police; prosecutors harness it in rationalizing the decision not to charge; jurors employ it when deciding not to convict; and judges lean on it when minimizing punishment.

²⁸⁷ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., *supra* note 285, at 267.

²⁸⁸ See *Fatal Police Violence by Race and State*, *supra* note 121, at 1251.

²⁸⁹ Bonilla-Silva, *supra* note 21, at 476.

Although prosecuting individual officers who kill is important, it fails to address the more foundational problem. Unless and until we acknowledge the racial foundation of our criminal justice system, we will never be able to truly address police violence. At stake is nothing less than the next George Floyd, Eric Garner, Terence Crutcher, or Michael Scott.