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## Factors that Influence Jury Verdicts in Police Use of Force Cases

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# FACTORS THAT INFLUENCE JURY VERDICTS IN POLICE USE OF FORCE CASES

*Christopher M. Bellas*<sup>†</sup>

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## INTRODUCTION

This Article features the many factors that influence jurors' decision making in trials involving police use of excessive force. First, there is a discussion of what exactly police use of force is and how much exists. Second, there is a review of the relevant case law regarding police use of force that focuses primarily on the doctrine of qualified immunity (a code that affords police protection from being sued, most often under 18 U.S.C. § 1983). Third, in those rare police use of excessive force trials, the final decision regarding the liability of the defendant most often rests with a jury. Because the Sixth and Seventh Amendments to the U.S. Constitution state one is to be tried by a jury of one's peers,

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which comes from the community, I investigate the importance of community relations with the criminal justice system, in particular policing, and how these relationships shape a potential jury pool. Finally, I assess the psychology behind juror decision making and its impact in police use of force trials regarding the psychological schema already impressed on jurors prior to rendering verdicts or that could color or negate their interpretation of the evidence presented at trial.

## I. POLICE USE OF FORCE

According to the U.S. Department of Justice, as of 2018, roughly 61.5 million residents had at least one encounter with police in the twelve months prior, which is roughly 24 percent of the U.S. population.<sup>1</sup> With respect to these interactions, 8.9 million were the product of a traffic stop.<sup>2</sup> When it comes to police using force, a higher percentage of racial minorities reported police using force against them (4 percent of African Americans and 3 percent of Hispanics), compared to Whites (2 percent).<sup>3</sup>

The International Association of Chiefs of Police defined police use of force as “that amount of effort required by police to compel compliance from an unwilling suspect.”<sup>4</sup> Police officers are instructed to follow their own department’s policy in use of force confrontations, but the overall standard is one of reasonableness. Officers should only use the amount of force necessary to protect themselves and others while at the same time protecting the community.<sup>5</sup> Law enforcement across the country does not apply a uniform definition because every situation varies. It is difficult to put into carefully crafted language a narrow directive because human behavior has infinite possibilities.

The U.S. Department of Justice provides a continuum of police tactics available to obtain citizen compliance, which is as follows:

1. *Officer Presence.* The mere conversation between the officer and party involved can resolve the situation with only words.

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1. ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP’T JUST., NCJ 255730, CONTACT BETWEEN POLICE AND THE PUBLIC, 2018—STATISTICAL TABLES 3 (Dec. 2020), <https://bjs.ojp.gov/library/publications/contacts-between-police-and-public-2018-statistical-tables> [<https://perma.cc/XKA8-59VP>].
  2. *Id.*
  3. *Id.* at 1.
  4. INT’L ASS’N OF THE CHIEFS OF POLICE, U.S. DEP’T JUST., NCJ 197636, POLICE USE OF FORCE IN AMERICA, 2001, at 14 (2001), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/police-use-force-america> [<https://perma.cc/5YW4-N6JR>].
  5. *Overview of Police Use of Force*, NAT’L INST. JUST. (Mar. 5, 2020), <https://nij.ojp.gov/topics/articles/overview-police-use-force> [<https://perma.cc/UZ35-4G97>].

Most hope a peaceful conversation takes place, but a lot depends on the officer's attitude and professional demeanor as interpreted by the citizen.

2. *Verbalization.* In this situation, the officer is exercising his or her authority in a nonthreatening way. Still, the officer has a legitimate law enforcement purpose, mainly trying to gain important information or to stop a situation from getting worse. Asking for identification and commanding a suspect to "stop" are examples of verbalization.

3. *Empty Hand Control.* These techniques, according to the National Institute of Justice, can be broken down into soft techniques and hard techniques. The purpose of both is to restrain the individual. The former uses an open hand to grab hold of the suspect while the latter uses a closed hand or fist to restrain the individual.

4. *Less Lethal Methods.* These are technological or chemical applications to a suspect in order to obtain compliance. Such applications could be the use of pepper spray, a conductive energy device (taser), or a baton.

5. *Lethal Force.* The most severe use of police force has deadly consequences. Here, the officer uses a firearm or a technique such as a chokehold in order to gain compliance.<sup>6</sup>

Collecting crime data is important for practitioners and policymakers alike, but the numbers presented can be suspect. Rudimentary gaps exist in crime data gathering, which is cause for this suspicion.<sup>7</sup> First, some citizens do not report their victimization for multiple reasons, such as complicity, fear, and lack of faith in the criminal justice system. Second, some police agencies do not report crimes because reporting to the FBI is voluntary, not mandatory, and that makes some departments reluctant to report. For example, in 2021 only 63 percent of all law enforcement agencies reported their use of force statistics to the FBI (up from 53 percent in 2020). In some states, such as North Carolina, fewer than half of all law enforcement agencies reported use of force data to the FBI.<sup>8</sup> Although this is cause for

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6. *The Use-of-Force Continuum*, NAT'L INST. JUST. (Aug. 3, 2009), <https://nij.ojp.gov/topics/articles/use-force-continuum> [<https://perma.cc/75EM-22K3>].

7. H. Senger, *Darkened Figures of Criminology*, U.S. DEP'T JUST. (1986), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/darkened-figures-criminology> [<https://perma.cc/V5CJ-76ML>].

8. *FBI Releases 2021 and First Quarter 2022 Statistics from the National Use-of-Force Data Collection*, FBI (May 31, 2022), <https://www.fbi.gov/news/press-releases/press-releases/fbi-releases-2021-and-first-quarter-2022>

concern, one still should appreciate the statistics being made available, as this gives us some insight into how much use of force exists. For example, the FBI released statistics in May of 2022 showing that “[i]n 2021, 50.7% of use-of-force incidents submitted to the FBI resulted in serious bodily injury of a person, 33.2% caused the death of a person, and 17% involved the discharge of a firearm at or in the direction of a person.”<sup>9</sup> Furthermore, the most reported reason for initial contact for a citizen-police encounter was a police officer “responding to an unlawful or suspicious activity” (56.8 percent).<sup>10</sup> Finally, the number one justification for police having to use force was the failure of a citizen to comply with the officer’s demands.<sup>11</sup> The FBI approved a new database of information on police use of force in December 2015 and launched its data collection program in January 2019.<sup>12</sup>

## II. CASES INVOLVING POLICE USE OF FORCE

Police encounters often begin with an investigatory stop, and officers must protect themselves as part of that routine investigation.<sup>13</sup> Once police have reasonable suspicion to make such a stop, the officer can use the amount of force necessary to carry out the investigation.<sup>14</sup> This level of detainment can occur with the officer’s words or it can be with physical force. Regardless, it is a seizure within the meaning of the Fourth Amendment.<sup>15</sup>

In *Tennessee v. Garner*,<sup>16</sup> the U.S. Supreme Court first weighed in on police use of force and whether it is “reasonabl[e]” under the Fourth Amendment.<sup>17</sup> Although the suspect was fleeing at the time, the Court ruled that only if the suspect poses a potential threat to the officer or the community may the officer use lethal force.<sup>18</sup> The Court specified that it is unreasonable within the confines of the Fourth Amendment for police to use deadly force to prevent all fleeing felons without

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-statistics-from-the-national-use-of-force-data-collection [https://perma.cc/E34G-LZMK].

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Terry v. Ohio*, 392 U.S. 1, 23–24 (1968).

14. *United States v. Dotson*, 49 F.3d 227, 231 (6th Cir. 1995) (quoting *United States v. Weaver*, 8 F.3d 1240, 1244 (7th Cir. 1993)).

15. *Graham v. Connor*, 490 U.S. 386, 394–95 (1989).

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

17. *Id.* at 7–8.

18. *Id.* at 20–21.

identifying a potential threat first.<sup>19</sup> The dilemma for law enforcement is that police might not know whether a fleeing suspect carries such a threat. For example, one could argue that there is no obvious threat if the suspect is running away from the officer as opposed to running toward them. This is not true. A suspect could be running away but then pull out a gun and fire at the officer as they are fleeing. The debate is how much discretion one affords police in these situations. To date, courts have given a great amount of leeway.

In *Graham v. Connor*,<sup>20</sup> the Court found that use of force must be proportional to its underlying need based on the following factors: (1) the severity of the crime; (2) the danger to the officer(s) and community; and (3) the risk of evading police arrest or flight.<sup>21</sup> In *Graham*, the Court identified an “objectively reasonable” threshold and noted that the inquiry in use of force cases is “whether the totality of the circumstances justifies” the action.<sup>22</sup> The fact finder must scrutinize the situation the officer(s) were in at the time of the altercation rather than engaging in a post analysis, as was done by the lower court in *Cunningham v. Shelby County Tennessee*.<sup>23</sup> In *Cunningham*, the Sixth Circuit examined a district court judge’s decision that was based on an examination of a police video frame-by-frame in hindsight, rather than looking at the situation as viewed by the officers at the time.<sup>24</sup> Noting that “[t]he deputies’ perspective did not include leisurely stop-action viewing of the real-time situation that they encountered,” the Sixth Circuit held that the district court’s finding of reasonableness “was unsupported by any clearly established law and would constitute a reversible error.”<sup>25</sup> Courts have reiterated on numerous occasions that the totality of the circumstances standard must prevail. In *Forrett v. Richardson*,<sup>26</sup> the Ninth Circuit stated that the timing of a suspect’s capture as well as the opportunities for violence presented are critical to the reasonable necessity evaluation officers must perform and that the intent and motivation of the officer at the time are irrelevant.<sup>27</sup>

While *Graham* provides the prevailing factors taken into consideration when assessing whether an officer used excessive force, those factors assume that the person against whom force has been used

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19. *Id.* at 11.

20. 490 U.S. 386 (1989).

21. *Id.* at 396.

22. *Id.* at 396–97 (quoting *Tennessee v. Garner*, 471 U.S. 1, 9 (1985)) (internal quotation marks omitted).

23. 994 F.3d 761, 766–67 (6th Cir. 2021).

24. *Id.*

25. *Id.* at 767.

26. 112 F.3d 416 (9th Cir. 1997).

27. *Id.* at 420–21.

has engaged in criminal conduct. Yet police often arrive to situations where restraint is needed but the individual against whom force is used is a victim or patient and not a suspect. The 2017 Sixth Circuit case of *Hill v. Miracle*<sup>28</sup> dealt with police using a taser to subdue a distressed patient violently reacting to police officers and medical personnel because of being in a hypoglycemic state. The officer (Miracle) tasered the victim (Hill) after Hill became violent because of his medical crisis.<sup>29</sup> While the Sixth Circuit overturned the district court's dismissal of summary judgment,<sup>30</sup> the court believed that given the unique circumstances, the officer was justified in using force to restrain the victim.<sup>31</sup> More importantly, the court carved out criteria officers need to consider when contemplating the use of force in medical as opposed to non-criminal situations.

(1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?

(2) Was some degree of force reasonably necessary to ameliorate the immediate threat?

(3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

If the answers to the first two questions are “yes” and the answer to the third question is “no,” then the officer is entitled to qualified immunity.<sup>32</sup>

Even if police had options other than lethal force, courts have deferred to police in making such a call, proclaiming they are not constitutionally bound to use nondeadly force as a first option when their lives are in danger.<sup>33</sup> The fact that there *could* have been options available, or that another course of action *may* have resulted in a non-fatality, puts no obligation on officers to avoid using deadly force. In fact, even if the officer shot a suspect multiple times, that alone does not make the lethal force used by the officer necessarily unreasonable.<sup>34</sup>

One critique of the objective reasonableness standard set in *Graham* is that it gives too much deference to an officer's interpretation of what

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28. 853 F.3d 306 (6th Cir. 2017).

29. *Id.* at 310–11.

30. *Id.* at 318.

31. *Id.* at 314.

32. *Id.*

33. *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994).

34. *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996).

*might* happen, not what did or was even going to happen.<sup>35</sup> Relying on what could happen when police encounter a citizen to justify use of force, without supporting evidence, gives too much discretion to police.<sup>36</sup> Officer recounts may be wildly speculative. For example, an officer might state at the time of the incident that they thought the suspect *could have* grabbed a nearby knife and lunged toward the officer. To what articulable facts, at the time of the incident, can the officer point that would indicate the suspect was, in fact, going to pick up that knife? The *Graham* standard would allow jurors to conclude that it was reasonable to assume from the officer's point of view that it *could* happen. Anything *could* happen, but that does not mean that it was going to happen. There *may*, in fact, have been no immediate threat, yet because something may have taken place, a juror could find that was reasonable under *Graham*.<sup>37</sup> In fact, officers are not constitutionally required to wait until they see a weapon before employing deadly force to protect themselves. The Eighth Circuit stated in *Thompson v. Hubbard*<sup>38</sup> that whether the suspect is actually armed is irrelevant to the reasonableness requirement.<sup>39</sup> Likewise, the mental state of the suspect is irrelevant.<sup>40</sup> In *Smith v. Freland*,<sup>41</sup> the Sixth Circuit stated that a suspect does not have to be armed with a weapon to be dangerous. In that case, the suspect, who was not armed with a weapon, was driving in such a way that put citizens in danger, which was enough for the officer to be justified in using excessive force.<sup>42</sup> The court concluded avoiding capture by itself can place citizens in harmful situations.<sup>43</sup>

When a suspect created a situation that could have harmed the officer, the victim, or members of the community, courts have given deference to police in using force. However, the verbal or physical actions of the suspect can determine the level of danger. In *Eldridge v.*

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35. Jesus A. Alonso, *How Police Culture Affects the Way Police Departments View and Utilize Deadly Force Policies Under the Fourth Amendment*, 60 ARIZ. L. REV. 987, 990, 995 (2018) (citing Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 285–86 (2017)).

36. SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, *EVALUATING POLICE USES OF FORCE* 20–24 (2020).

37. Alonso, *supra* note 35, at 995.

38. 257 F.3d 896 (8th Cir. 2001).

39. *Id.* at 899.

40. *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir. 1999).

41. 954 F.2d 343 (6th Cir. 1992).

42. *Id.* at 347–48.

43. *Id.*



*City of Warren*,<sup>44</sup> the Sixth Circuit denied a motion for summary judgment, concluding that noncompliance alone does not indicate active resistance by the suspect. The court concluded that when a suspect is not actively resisting, it is unreasonable for officers to tase a suspect.<sup>45</sup> There needs, in the court's opinion, to be some "outward manifestation" of physical or verbal resistance.<sup>46</sup>

When we think of holding police accountable for misconduct involving excessive use of force, we most likely think of criminal liability, as in the Derek Chauvin trial regarding the use of lethal force against George Floyd.<sup>47</sup> Police departments and officers themselves are sued civilly under 42 U.S.C. § 1983, which reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>48</sup>

However, the concept of qualified immunity makes it extremely difficult for plaintiffs to win civil lawsuits against the police.<sup>49</sup> Qualified immunity is a balancing of interests.<sup>50</sup> On the one hand, police need to be free to perform their duties without the fear of frivolous lawsuits. On the other hand, government actors are not above the law when they engage in behaviors that abuse their positions, and they need to be held accountable. The case of *Scheuer v. Rhodes*<sup>51</sup> provided an early

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44. 533 F. App'x 529 (6th Cir. 2016).

45. *Id.* at 533, 535.

46. *Id.* at 533–34.

47. Erin Donaghue, *Derek Chauvin Trial 4/6/21: Officers Used Excessive Force Against Floyd, Training Expert Says*, CBS NEWS (Apr. 6, 2021, 7:40 PM), <https://www.cbsnews.com/live-updates/derek-chauvin-trial-george-floyd-death-2021-04-06/> [<https://perma.cc/U6RD-QCQP>].

48. 42 U.S.C. § 1983.

49. Alonso, *supra* note 35, at 992.

50. Pearson v. Callahan, 129 S. Ct. 808, 815 (2009).

51. 416 U.S. 232 (1974).

standard for assessing qualified immunity: (1) an officer must have a reasonable basis for the belief that, considering all the circumstances at the time, the amount of force was reasonable; and (2) the officer must have believed “in good faith” that their actions were lawful.<sup>52</sup>

The latter requires proving the officer’s state of mind—whether their intention was malicious—which is difficult to display to a jury. These standards were later amended in *Harlow v. Fitzgerald*<sup>53</sup> to: (1) Did the officer violate the plaintiff’s constitutional rights?; and (2) Was a constitutional right clearly established at the time of the violation?<sup>54</sup>

In April 2021, the Fifth Circuit reaffirmed the standards for qualified immunity in *Batyukova v. Doege*.<sup>55</sup> The plaintiff must show (1) that the officer violated her constitutional rights, and (2) that the right was clearly established such that another reasonable officer in the same situation would have known he was violating the plaintiff’s rights.<sup>56</sup> In order to show a right was clearly established, a plaintiff can show a case, or a line of relevant cases, in which an officer acted in similar circumstances and his conduct was held to violate the Constitution. Additionally, a plaintiff can also argue that it should have been obvious to any reasonable officer that the conduct violated the Constitution.<sup>57</sup>

As the court cases thus far have indicated, it can be extremely difficult to get a case of excessive force in front of a jury. This is often due to district courts granting motions for summary judgment based on the doctrine of qualified immunity.<sup>58</sup> Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.<sup>59</sup> In weighing the evidence to determine whether to grant a motion for summary judgment, the court will “construe the evidence in the light most favorable to the nonmoving party, drawing all inferences in the non-movant’s favor.”<sup>60</sup> Thus, if everything the alleged victim claims to have happened was in fact true, and the qualified immunity factors still protect the officer, then the court will grant the officer’s motion for summary judgment.

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52. *Id.* at 247–48.

53. 457 U.S. 800, 815–16 (1982).

54. *Id.* at 815–16, 818.

55. 994 F.3d 717, 724 (5th Cir. 2021).

56. *Id.* at 724–26.

57. *Id.* at 726.

58. *See supra* note 31 and accompanying text.

59. FED. R. CIV. P. 56(a).

60. *Eldridge v. City of Warren*, 533 F. App’x 529, 532 (6th Cir. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

While winning a motion for summary judgment is very difficult, it is not impossible. The 2015 cases of *Mullenix v. Luna*<sup>61</sup> and *Green v. New Jersey State Police*<sup>62</sup> both underscore the importance that the trier of fact, often the jury, has to decide whether qualified immunity applies in a particular case. The U.S. Supreme Court denied a motion for summary judgment in both cases and emphasized that the trier of fact must make the decision about the reasonableness of the police officer's conduct.<sup>63</sup> The fact that a motion for summary judgment was denied in these cases underscores how important juries are to an evaluation in cases involving police use of force, whether it be in a criminal case or a civil lawsuit. Before I detail what jurors may experience in trials involving police use of force, I briefly discuss the scholarly literature on community attitudes toward the police, which is significant given jurors are selected from communities of color, economically diverse communities, and communities that experience high crime rates all across the United States.

### III. RACE AND POLICE USE OF FORCE: COMMUNITY ATTITUDES

There is no denying that there is racial disparity in fatal police use of force cases. According to a 2019 study, “Black men are about 2.5 times more likely to be killed by police than white men.”<sup>64</sup> A plethora of scholars notice the inequality in police-citizen encounters when it comes to the potential suspect's race.<sup>65</sup> Academics aside, one only needs to look at the latest fatal police use of force case as of this writing to underscore the tragic nature of policing in our society today.

In Akron, Ohio, on June 27, 2022, eight police officers shot twenty-five-year-old, unarmed Jayland Walker dozens of times after a high-speed chase that, according to officers, became a “public safety issue”

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61. 136 S. Ct. 305 (2015).

62. 246 F. App'x 158 (3d Cir. 2015).

63. *Mullenix*, 136 S. Ct. at 309, 312; *Green*, 246 F. App'x at 159, 163.

64. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. U.S.A. 16793, 16794 (2019).

65. Mengyan Dai & Denise Nation, *Understanding Non-Coercive, Procedurally Fair Behavior by the Police During Encounters*, 37 INT'L J. L. CRIME & JUST. 170, 176 (2009). See generally Eric A. Stewart, Eric P. Baumer, Rod K. Brunson & Ronald L. Simons, *Neighborhood Racial Context and Perceptions of Police-Based Racial Discrimination Among Black Youth*, 47 CRIMINOLOGY 847 (2009); Rod K. Brunson & Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425 (2011).

after Walker fired a gun from his automobile.<sup>66</sup> The Walker shooting created the latest round of public protests regarding the fatal shooting of a young Black man.<sup>67</sup> While an investigation is underway, administrative personnel within the Akron Police Department seem supportive of each officer's account.<sup>68</sup> While this Article could recount page after page of tragic cases involving police use of force, it instead focuses on those rare police use of excessive force cases that make their way through the court system and in particular to trial. Because juries are critical to the criminal trial process, I turn to understanding juror behavior. To appreciate why jurors decide cases in a particular way, one needs to recognize community sentiment toward members of the criminal justice system.

The public's attitude toward the police is one of the most important issues in a democratic society.<sup>69</sup> To realize how jurors behave in cases involving police use of excessive force, it is essential to remember that juries are segments of the community, and thus what community members think about police and police-citizen encounters is important. It would seem logical, given the current climate regarding police-community relations,<sup>70</sup> that race is going to be one, if not the most important, predictor of how the public feels about police. Prior studies have referenced race as a "significant predictor" of the public's attitude regarding the police, with African Americans in particular.<sup>71</sup> There is literature to support the notion that social context matters just as much as, if not more than, individual demographics when it comes to the public's attitude toward the police.<sup>72</sup> For example, where a person lives has a great effect on how one views the police.<sup>73</sup> Victims' experiences with the criminal justice system shape their opinions about members within that system. If a person has been the victim of a crime, that

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66. Dakin Andone, *What We Know About the Fatal Police Shooting of Jayland Walker*, CNN (Jul. 5, 2022, 3:57 PM), <https://www.cnn.com/2022/07/04/us/jayland-walker-shooting-what-we-know/index.html> [<https://perma.cc/75LD-2Z4N>].

67. *Id.*

68. *Id.*

69. Liqun Cao, Steven Stack & Yi Sun, *Public Attitudes Towards the Police: A Comparative Study Between Japan and America*, 26 J. CRIM. JUST. 279, 280 (1998); *Building Trust*, U.S. DEP'T JUST., <https://cops.usdoj.gov/buildingtrust> [<https://perma.cc/8ND9-5NZ6>] (last visited Nov. 22, 2022).

70. Liqun Cao, James Frank & Francis T. Cullen, *Race, Community Context and Confidence in the Police*, 15 AM. J. POLICE 3, 3 (1996).

71. *Id.* at 10.

72. *Id.* at 4, 12.

73. Brian K. Payne & Randy R. Gainey, *Attitudes About the Police and Neighborhood Safety in Disadvantaged Neighborhoods: The Influence of Criminal Victimization and Perceptions of a Drug Problem*, 32 CRIM. JUST. REV. 142, 146 (2007).

person may have developed negative attitudes toward the criminal justice system that failed to protect them. Such people see a system failure where the police, who are paid to protect members of a community, failed to do so.<sup>74</sup> Other research has shown that a person's positive experience with police yields a more favorable attitude.<sup>75</sup>

Yung-Lien Lai and Solomon Zhao examined two areas of public attitudes toward policing: general attitudes toward the police and specific trust in the police.<sup>76</sup> General attitudes looked at the public's overall judgment of police (whether officers are respectful, courteous, and fair and communicate effectively).<sup>77</sup> To examine trust in police, Lai and Zhao examined whether a department adequately investigates citizen complaints against officers and whether officers are held accountable for misuse and abuse during their time on duty. Citizens' prior experiences as victims of a crime had a significant effect on how they viewed police.<sup>78</sup> It is clear that police, as they should be, are judged on how well they do their job. Yet this judgment varied by race. For instance, African Americans generally held unfavorable attitudes toward the police but Hispanics were less negative than African Americans in their general attitudes toward the police.<sup>79</sup> When it came to specific trust in police, Hispanics and Whites showed similar levels of trust.<sup>80</sup>

Other research has looked at the race and ethnicity of the suspect and their effect on the public's attitude toward the police. In 2017, researchers engaged college students as jurors in a mock police use of force case. College students served as the sample to better understand the influence of age on attitudes about the police.<sup>81</sup> Typically, college students are much more social media savvy and are more aware of social protests such as the Black Lives Matter movement as well as other

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74. *Id.* at 142, 145–46; Cao et al., *supra* 70, at 3.

75. Ling Ren, Liqun Cao, Nicholas Lovrich & Michael Gaffney, *Linking Confidence in the Police with the Performance of the Police: Community Policing Can Make a Difference*, 33 J. CRIM. JUST. 55, 62 (2005) (showing that positive contact with the police, in the form of volunteer activities, is most strongly positively correlated with positive impressions of the police among tested variables).

76. Yung-Lien Lai & Jihong Solomon Zhao, *The Impact of Race/Ethnicity, Neighborhood Context, and Police/Citizen Interaction on Residents' Attitudes Toward the Police*, 38 J. CRIM. JUST. 685, 687 (2010).

77. *Id.* at 688.

78. *Id.* at 688–89.

79. *Id.* at 689.

80. *Id.* at 690.

81. Alicia A. Girgenti-Malone, Carla Khoder, Gabriela Vega & Denise Castillo, *College Students' Perceptions of Police Use of Force: Do Suspect Race and Ethnicity Matter?*, 18(5) POLICE PRAC. & RSCH. 492, 496–97 (2017).

campaigns focused on social injustice.<sup>82</sup> Prior research shows that being in these age groups shapes attitudes toward policing in our society.<sup>83</sup> Non-White college students, who are largely young adults, are significantly less likely to perceive police use of force as justified compared to White students—regardless of the race or ethnicity of the suspect.<sup>84</sup> Interestingly, there was gender disparity regarding police perceptions. Female college students were less likely, compared to males, to see the officer’s use of force as justified, regardless of the race of the suspect.<sup>85</sup> This “gender effect” is rarely talked about in the ongoing conversations regarding the public’s perception of police-citizen encounters.<sup>86</sup> The race and gender of the respondents proved more insightful of how they were viewing the police compared to just the race of the suspect.<sup>87</sup>

Social context can also explain how the community views police. Emma Fridel, Keller Sheppard, and Gregory Zimmerman looked at the broader social context for lethal police-citizen encounters and found that fatalities are attributed more to “dangerous places, as opposed to dangerous people.”<sup>88</sup> Firearms in the immediate environment of citizens can define dangerousness. For example, all too often when police are called to a domestic violence situation, that situation can turn deadly for the officer. The officer may be unaware that firearms are in the home and available to the suspect.<sup>89</sup> Fridel and her coauthors concluded that the best way to reduce the level of violence between police and

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82. Chris Burt, *More Than 70% of College Students Motivated by Social Justice*, UNIV. BUS. (Aug. 2, 2021), <https://universitybusiness.com/more-than-70-of-college-students-motivated-by-social-justice/> [<https://perma.cc/2LJZ-FH7U>].
83. Yolander G. Hurst & James Frank, *How Kids View Cops: The Nature of Juvenile Attitudes Toward the Police*, 28 J. CRIM. JUST. 189, 191 (2000); Yolander G. Hurst, James Frank & Sandra Lee Browning, *The Attitudes of Juveniles Toward the Police*, 23 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 37, 38 (2000); Jospeter M. Mbuba, *Attitudes Toward the Police: The Significance of Race and Other Factors Among College Students*, 8 J. ETHNICITY CRIM. JUST. 201, 211 (2010).
84. Mbuba, *supra* note 83, at 206 (stating that White students categorically disagree with the statement that “police are too harsh on crime suspects” while non-White students borderline agree with it).
85. Girgenti-Malone et al., *supra* note 81 at 500.
86. *Id.* at 497, 501.
87. *Id.* at 500–01.
88. Emma E. Fridel, Keller G. Sheppard & Gregory M. Zimmerman, *Integrating the Literature on Police Use of Deadly Force and Police Lethal Victimization: How Does Place Impact Fatal Police–Citizen Encounters?*, 36 J. QUANTITATIVE CRIMINOLOGY 957, 980 (2020).
89. *Id.* at 958, 961–62, 977, 980–81.

citizens is to reduce gun availability; however, that is unlikely to happen in the current climate surrounding U.S. gun ownership.<sup>90</sup>

#### IV. JUROR DECISION MAKING AND POLICE USE OF FORCE IN CRIMINAL CASES

This Article focuses on the many factors that exist in a rare moment in the criminal justice process—the trial of a police officer who has been charged with use of excessive force. I examine jurors’ behavior and their decision making in trials, especially those cases involving police use of excessive (including deadly) force.

Understanding the detailed practices involved in how jurors decide cases is significant because these practices illustrate the psychological processing jurors undertake when making imperative decisions, especially if they involve cases where police officers have used excessive force. Although much of the literature regarding juror decision making is focused on the action(s) of the defendant,<sup>91</sup> as one would expect in deciding whether a police officer has used excessive force, jurors have thoughts and feelings regarding the victim in these cases as well. Citizens encounter the police, even if only for minor incidents such as traffic violations, and can relate to some of these police-citizen encounters. Jurors, who can identify with the victim’s experience of police practices, could form strong opinions about a case.

Although the literature on jurors’ attitudes toward victims is sparse, there is a lot of literature on juror decision making in general. The research in this area is replete with studies spanning several disciplines. In the social sciences, there is a record of scholarship

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90. *Id.* at 980.

91. *See, e.g.*, John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155 (2016) (focusing on officers’ conduct); Bailey M. Fraser, Emily Pica & Joanna D. Pozzulo, *Mock Jurors’ Judgements in a Sexual Assault Case: The Influence of Defendant Race and Occupational Status, Delayed Reporting, and Multiple Allegations*, 38 J. INTERPERSONAL VIOLENCE 7964 (2023) (focusing primarily on the impact of sexual assault defendants’ race, economic status, and behavior on mock-jurors’ verdicts); John Eligon, Tim Arango, Shaila Dewan & Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html> [<https://perma.cc/4A2R-7TSZ>] (discussing defendant’s actions).

regarding jury deliberations in psychology,<sup>92</sup> sociology,<sup>93</sup> and even the world of business.<sup>94</sup> The plethora of literature in this area is certainly understandable, in that jurors are central to the criminal trial process, and it reflects one of the rare opportunities civilians have to participate in the democratic process, much like voting.<sup>95</sup> This Article explores how jurors make their decisions in criminal trials and, more specifically, will turn to research on the factors that influence juror decision making in police use of force cases. Exploring the emotional and cognitive process jurors undertake is paramount to attorneys, judges, and the public gaining better insight as to what jurors focus on in these types of cases.

Reid Hastie, Steven Penrod, and Nancy Pennington's book *Inside the Jury* is an important examination on the psychology of jury behavior. Using simulations to explore jury deliberations, the authors use what they call the "story model" as a comprehensive explanation of information processing by jurors. The model relies on three components. First is the story construction stage, in which each juror comprehends and organizes into a plausible schema what they believe happened.<sup>96</sup> Therefore, how jurors create a story from the moment police make the decision to interact with a citizen to the conclusion becomes important.<sup>97</sup> Since jurors, of course, were not part of the event, these schemata are essential for reconstructing the events.<sup>98</sup> Police departments' recent move toward the use of body-worn cameras by police officers may help jurors develop their story models to a better degree of precision.<sup>99</sup> While becoming more common in police agencies, it was not until 2021 that even some highly violent communities such as Youngstown, Ohio instituted their use.<sup>100</sup> The second stage is the

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92. See, e.g., REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983); Mary E. Pritchard & Janice M. Keenan, *Does Jury Deliberation Really Improve Jurors' Memories?*, 16 *APPLIED COGNITIVE PSYCH.* 589 (2002).
93. See, e.g., Douglas W. Maynard & John F. Manzo, *On the Sociology of Justice: Theoretical Notes from an Actual Jury Deliberation*, 11 *SOCIO. THEORY* 171 (1993).
94. See, e.g., Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 *DEPAUL L. REV.* 327 (1998).
95. See John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 *J. POL.* 585, 586 (2002).
96. HASTIE ET AL., *supra* note 92, at 22.
97. See *id.* at 22–23.
98. See *id.*
99. Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 *U.C. DAVIS L. REV.* 897, 948 (2017).
100. Gerry Ricciutti & Joe Gorman, *Youngstown Police Officers Begin Implementing Body Cameras*, WKBN, <https://www.wkbn.com/news>



verdict category stage, where each juror sorts out the possible options based on instructions presented to them by the judge.<sup>101</sup> Finally, jurors are required to match up the stories they have framed with the verdict possibilities presented to them under the law.<sup>102</sup> Numerous studies have highlighted such a model as a baseline for how jurors frame events described to them during the trial.<sup>103</sup> It follows that what will obviously capture the attention of a juror and influence how they construct their story is whether the juror has empathy for any of the participants. Part V, below, examines empathy in greater detail.

## V. EMPATHY

Empathy is the ability of people to place themselves in the situations of others.<sup>104</sup> Although empathy is often confused with sympathy, the two are not the same. Sympathy is the ability of one person to share in the feelings of another and can be passive as well as reactive on the part of the individual.<sup>105</sup> Empathy, on the other hand, is a more active process involving multiple cognitive factors.<sup>106</sup> Empathy incorporates a deliberative process and encompasses taking appropriate steps to “step outside the self and ‘into’ the experiences of others.”<sup>107</sup> There has never truly been a universal definition of empathy due in part to a long-standing academic dispute over whether empathy is an emotionally driven or cognitive-functioning process.<sup>108</sup> For example, Martin Hoffman defines empathy as “an affective response more appropriate to someone else’s situation rather than one’s own.”<sup>109</sup> This depiction is a more affective ability rather than a cognitive one. The affective versus cognitive debate blends with a multidimensional

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[/local-news/youngstown-police-officers-begin-implementing-body-cameras](https://perma.cc/Q3H7-BX2C)  
[<https://perma.cc/Q3H7-BX2C>] (May 19, 2021, 8:28 PM).

101. HASTIE ET AL., *supra* note 92, at 22.

102. *Id.* at 22.

103. *Id.* at 23.

104. See Mark H. Davis, *Measuring Individual Differences in Empathy: Evidence for a Multidimensional Approach*, 44 J. PERS. & SOC. PSYCH. 113, 113 (1983) (“Empathy in the broadest sense refers to the reactions of one individual to the observed experiences of another.”).

105. ROBERT L. KATZ, EMPATHY: ITS NATURE AND USES 8–9 (1963). See generally Davis, *supra* note 104.

106. MARK H. DAVIS, EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH 5–6 (1996).

107. *Id.*

108. *Id.* at 5–10.

109. Martin L. Hoffman, *The Contribution of Empathy to Justice and Moral Judgment*, in EMPATHY AND ITS DEVELOPMENT 47, 47–48 (Nancy Eisenberg & Janet Strayer eds., 1987).

approach to understanding empathy via an organizational model.<sup>110</sup> Thus, empathy is the result of an observer exposed to a situation that elicits a response from the observer by bringing to light both cognitive and affective behavior.<sup>111</sup> Such a multidimensional approach involves understanding several constructs referred to in the literature as “antecedents,” “processes,” and “outcomes.”

Antecedents are the intuitive abilities of a specific individual and can be broken down into the distinctiveness of the person as well as the current situation.<sup>112</sup> Every human is distinct and possesses unique intellectual abilities. Whether or not a person has the natural capacity to experience the emotions associated with their intellect depends on innate as well as environmental factors. Such innate characteristics can be intelligence as well as the ability and capacity to learn from significant others. Another antecedent is the impact produced by the situation—some situations will produce a more visceral reaction in an observer than others.<sup>113</sup> Perhaps more important to a juror’s final decision, the more he or she can identify with the target, either the police officer or the victim, the greater the chance that the observer will have a more intense reaction.<sup>114</sup>

The second construct involved in empathy is cognitive processing. Mark Davis, drawing on Hoffman’s organizational model, divides cognitive processing into both simple and complex stages.<sup>115</sup> Simple cognition is the basic ability to associate, which does not necessarily take a great deal of aptitude and could be a false narrative.<sup>116</sup> For example, one might obviously associate the birth of a child with a happy event, when, in fact, it might have involved tragedy (a complicated birth, previous miscarriages, et cetera). In such cases, the observer is merely looking at the surface and only available to capture rudimentary associations.<sup>117</sup> Advanced cognitive processing, on the other hand, includes the ability of the role taker to assume the perspective of another.<sup>118</sup> Understanding these types of cognition is paramount to

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110. See DAVIS, *supra* note 106, at 10–12.

111. *Id.* at 12.

112. *Id.* at 12–14.

113. See *id.* at 14–15.

114. See generally *id.*

115. *Id.* at 16–17. See generally Martin L. Hoffman, *Interaction of Affect and Cognition in Empathy*, in EMOTIONS, COGNITION & BEHAVIOR 103, 103 (Carroll E. Izard, Jerome Kagan & Robert B. Zajonc eds., 1984).

116. See DAVIS, *supra* note 106, at 16.

117. *Id.* at 16–17.

118. *Id.* at 17; see also GEORGE H. MEAD, MIND, SELF AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 141 n.3 (Charles W. Morris ed., 1934).

seeing how jurors view police use of force cases and whether they can even possess empathy and, if so, for whom.

The final construct, outcomes, relates to how the observer emotionally reacts to the target's experiences.<sup>119</sup> These outcomes are subdivided into either affective or cognitive.<sup>120</sup> Affective outcomes stem from when the observer has a visceral reaction to the target and may display emotionally driven characteristics such as smiling, crying, and shaking.<sup>121</sup> Cognitive reactions may be methodological and judgmental.<sup>122</sup> The juror in these cases may be more willing to assign blame or praise after a careful evaluation of the circumstances, which may or may not be based on pure emotion.

Empathy is a human emotion that weighs heavily on decision making.<sup>123</sup> As prior literature has suggested, emotions can play a vital role in juror decision making,<sup>124</sup> and since empathy is an emotion,<sup>125</sup> it warrants further inquiry in trials involving police use of force.

## VI. EMPATHY AND THE CRIMINAL JUSTICE SYSTEM

Attorneys have always relied on emotion to persuade jurors in criminal cases. Although jury instructions underscore the importance of only considering the facts presented in a case, jurors are human, and so too are the litigants in the courtroom. Attorneys are encouraged to utilize every strategy possible for arousing empathetic feelings toward their client during a trial.<sup>126</sup> According to Sonya Hamlin, “[t]he ability

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119. DAVIS, *supra* note 106, at 17–18.

120. *Id.* at 17, 19.

121. *Id.* at 17–19.

122. *Id.* at 19.

123. See Albert Mehrabian & Norman Epstein, *A Measure of Emotional Empathy*, 40 J. PERSONALITY 525, 526, 533 (1972). See generally R.J.R. Blair, *Responding to the Emotions of Others: Dissociating Forms of Empathy Through the Study of Typical and Psychiatric Populations*, 14 CONSCIOUSNESS & COGNITION 698 (2005).

124. Richard L. Wiener, Brian H. Bornstein & Amy Voss, *Emotion and the Law: A Framework for Inquiry*, 30 LAW & HUM. BEHAV. 231, 232–33 (2006); Jessica M. Salerno & Bette L. Bottoms, *Emotional Evidence and Jurors' Judgments: The Promise of Neuroscience for Informing Psychology and Law*, 27 BEHAV. SCI. & L. 273, 274 (2009).

125. Ezra Stotland, *Exploratory Investigations of Empathy*, in 4 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 272 (Leonard Berkowitz ed., 1969); David Aderman & Leonard Berkowitz, *Observational Set, Empathy, and Helping*, 14 J. PERSONALITY & SOC. PSYCH. 141, 141 (1970); see also Mehrabian & Epstein, *supra* note 123, at 525.

126. EDWARD T. WRITING, HOW TO USE COURTROOM DRAMA TO WIN CASES 256–62 (1987); LAWRENCE J. SMITH & LORETTA A. MALANDRO, COURTROOM COMMUNICATION STRATEGIES 375–76 (1985).

to actually experience, internally, what is at issue, to empathize and put themselves in another person's place, is something of which jurors are not consciously aware. Yet this process is human and universal, and it is a powerful inner voice in decision making."<sup>127</sup>

Empathy plays a significant and sometimes controversial role in jury verdicts. A classic study recited in the groundbreaking book *American Jury* by Harry Kalven Jr. and Hans Zeisel demonstrates that jurors often go well beyond rational decision making by employing empathy in their verdicts.<sup>128</sup> In the book, judges interviewed seemed keenly aware that victim portrayals raised emotional sentiment in jurors in both criminal and civil cases.<sup>129</sup>

Juror empathy has been studied in specific types of criminal cases. Sheila Deitz and Lynne Byrnes were the first researchers to employ a Rape Empathy Scale (RES), which was designed as a continuum to measure a person's attitude about the roles of the victim and defendant in relation to rape cases.<sup>130</sup> Jurors who empathized the most with the rape victim sentenced the defendant to a longer prison term, expressed positive feelings about the victim, and stated fewer positive feelings about the defendant compared to those who scored lower on the RES.<sup>131</sup> This conclusion supported earlier research that characterized a person's ability to empathize with another as a highly influential indicator of the amount of responsibility jurors will assign to an actor in negative situations.<sup>132</sup> Even in situations where the defendant is also the victim, such as in criminal cases in which a defendant was abused as a child and used this information to explain to the jury their own criminal behavior, a juror's empathy toward that defendant will affect their decision making. Tamara Haegerich and Bette Bottoms, using a Defendant Empathy Scale (DES), which is a similar concept to the RES, asked participants if they could affectively and cognitively put themselves in the place of a victim of child sexual abuse who later killed

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127. SONYA HAMLIN, WHAT MAKES JURIES LISTEN: A COMMUNICATIONS EXPERT LOOKS AT THE TRIAL 315 (1985).

128. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 131–32 (1971).

129. *Id.* at 94–95, 122, 149–51.

130. Sheila R. Deitz & Lynne E. Byrnes, *Attribution of Responsibility for Sexual Assault: The Influence of Observer Empathy and Defendant Occupation and Attractiveness*, 108 J. PSYCH. 17, 19–20 (1981).

131. Sheila R. Deitz, Karen Tiemann Blackwell, Paul C. Daley & Brenda J. Bentley, *Measurement of Empathy Toward Rape Victims and Rapists*, 43 J. PERSONALITY & SOC. PSYCH. 372, 380 (1982).

132. *See generally* Jefferson L. Sulzer & Ruth Kloepfer Burglass, *Responsibility Attribution, Empathy, and Punitiveness*, 36 J. PERSONALITY 272 (1968).

the abuser, who happened to be their father.<sup>133</sup> Jurors who scored high on the DES were more lenient in their judgment on guilt, held the defendant less culpable, and were more likely to use the acts of sexual abuse as mitigating factors to consider during deliberations.<sup>134</sup> In this study, jurors appeared to even ignore the law with respect to assessing whether the defendant killed because they were in immediate danger (as the judge instructed them to do), but rather based their decisions on the past sexual abuse of the defendant (a mitigating factor).<sup>135</sup> This can be viewed as an indication that the power of empathy is strong and can override the legal requirement for ascertaining guilt or innocence. Even in cases of battered woman syndrome, jurors' ability to empathize with the defendant when instructed to do so by the defense attorney in closing arguments affected their verdict.<sup>136</sup> Finally, juror empathy has been studied with respect to capital cases, the ultimate sanction within the criminal justice system.<sup>137</sup> According to Scott Sundby, jurors tend to make a clear distinction between adult and child victims, even though those jurors initially dismissed the notion of any inherent prejudice when asked.<sup>138</sup>

In examining jury decision making in South Carolina, Stephen Garvey found that race makes a difference as to the empathetic response of jurors determining the sentencing in capital cases.<sup>139</sup> African American jurors tended to have more empathetic feelings than White jurors for defendants of any race, but especially African American defendants.<sup>140</sup> One of the more noteworthy findings in Garvey's work was that empathy for the defendant and empathy for the victim were not mutually exclusive. The rationale is that just because jurors may have empathy for the victim(s) in a case, this does not necessarily mean they fail to empathize with the defendant.<sup>141</sup> This revelation is

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133. Tamara M. Haegerich & Bette L. Bottoms, *Empathy and Jurors' Decisions in Patricide Trials Involving Child Sexual Assault Allegations*, 24 L. & HUM. BEHAV. 421, 424–26 (2000).

134. *Id.* at 437.

135. *Id.* at 438–39.

136. Karyn M. Plumm & Cheryl A. Terrance, *Battered Women Who Kill: The Impact of Expert Testimony and Empathy Induction in the Courtroom*, 15 VIOLENCE AGAINST WOMEN 186, 196, 201 (2009).

137. Christopher M. Bellas, "I Feel Your Pain": How Juror Empathy Effects Death Penalty Verdicts (Aug. 2010) (Ph.D. dissertation, Kent State University) (available through OhioLINK and on file with author).

138. Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 345–48 (2003).

139. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 30, 44–45 (2000).

140. *Id.* at 46–47.

141. *Id.* at 50, 52–54.

important in police use of force cases, where an overall empathic juror may envelop such feelings around the police officer who is viewed as doing their job. At the same time, a juror could also feel empathy for the victim/potential suspect who could have justifications for resisting arrest, such as a mental illness or fear of law enforcement.

With respect to juror decision making in police use of force cases, there could already be an implicit bias toward favoring police officers, irrespective of race. The public is often confused about police practices and often sides with police even without knowing all the facts.<sup>142</sup> Certainly, there is no shortage of incorrect or overinflated criminal justice topics in the news, on TV programs, or on social media. Jurors who could see themselves in potentially dangerous situations and feel they can rely on law enforcement to help, not hurt, them are going to have an implicit bias that favors police officers. This example, of course, aligns with the work of Sundby on worthy versus unworthy victims.<sup>143</sup> When a juror cannot identify with the victim in a case, they are less punitive toward the defendant.<sup>144</sup> The status of victims matters, but so too does the status of defendants. A police use of force case is one of the rarest of times the defendant is admired, since the defendant is highly regarded for their occupational status as a law enforcement officer.<sup>145</sup> However, with the high-profile cases of police misuse of force, especially the publicity surrounding the George Floyd case,<sup>146</sup> jurors may scrutinize police conduct more. In 2018, researchers studied what is known as the “bandwagon effect”—defined as “strongly held *public or peer* attitudes toward a particular topic [that] result in more strongly held *individual* attitudes.”<sup>147</sup> Their findings suggest that jurors exposed to police misconduct, especially considering the murder of George Floyd, have an implicit negative bias toward police, especially when the officer is White and the victim is Black.<sup>148</sup> Results of the study suggest that when race is a salient issue in a use of excessive force case, jurors

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142. Jessica Huff, Mauricio J. Alvarez & Monica K. Miller, *Mock Juror Perceptions of Police Shootings: The Effects of Victim Race and Shooting Justifiability*, 14 APPLIED PSYCH. CRIM. JUST. 87, 88–89 (2018).

143. See generally Sundby, *supra* note 138.

144. *Id.* at 359–61, 364–69.

145. Huff et al., *supra* note 142, at 88–89.

146. See Jay Senter & Shalia Dewan, *Killer of George Floyd Sentenced to 21 Years for Violating Civil Rights*, N.Y. TIMES (July 7, 2022), <https://www.nytimes.com/2022/07/07/us/derek-chauvin-george-floyd-sentence.html> [<https://perma.cc/76S7-DZWP>] (discussing the murder of George Floyd by Derek Chauvin, a White former police officer, who was criminally convicted).

147. Huff et al., *supra* note 142 at 90 (citing David G. Myers, Sandra Brown Wojcicki & Bobette S. Aardema, *Attitude Comparison: Is There Ever a Bandwagon Effect?*, 7 J. APPLIED SOC. PSYCH. 341, 344–47 (2006)).

148. *Id.* at 96–97.

pay more attention to the facts of the case to distinguish between a justified and unjustified scenario. Therefore, when race is a crucial part of a trial, jurors pay very close attention.<sup>149</sup>

While one may applaud the fact that jurors have become more sensitive to the criminal injustice that has taken place in recent years, the 2018 study highlights the fact that race still creates an extra hurdle that prosecutors must overcome in a police use of force trial. The government in its presentation against the defendant must make sure to clearly demonstrate that the police officer's use of force was unjustified when the victim is Black, but not White.<sup>150</sup> Why do jurors only perk up their ears to "get it right" when Black people are the victims? Might there be a need for a confirmation bias that now comes with a use of force case where the victim is Black and the officer is White? This theory is not what one would expect, unless they support the hypothesis that because of the negative public attention regarding police abuse toward minorities, jurors have subconsciously adopted those beliefs.

Few studies have researched the race of jurors with respect to their decision making in police use of excessive force cases. A 2022 Canadian study examined the effect the race of the jurors as well as their attitudes toward policing in our society had on their decision making.<sup>151</sup> Attitudes toward the criminal justice system as a whole, and especially policing, seem to have a direct effect on how a person interrelates with components of our justice system.<sup>152</sup> Minority jurors are more skeptical of police, and thus more likely to vote not guilty for a defendant accused of murdering a police officer in self-defense.<sup>153</sup> This effect could be circular in that a positive experience with police officers makes one have a more positive attitude toward policing, and a more positive attitude about policing provides that citizen (potential juror) with seeing the police as more legitimate. Therefore, police legitimacy is an important variable to underscore in studying juror decision making in criminal cases. Jurors are likely asked during the voir dire process in a police use of force case about their own experiences with the police. It makes intuitive sense that when a citizen has a positive experience with police, they are likely to have a positive perception of them, while the inverse is true. Some people's experiences with police are negative,<sup>154</sup> which could negatively influence perceptions of law enforcement. When we

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149. *Id.*

150. *Id.* at 98.

151. Logan Ewanation, Evelyn M. Maeder & Susan Yamamoto, *Mock Juror Decision-Making in a Self-Defence Trial Involving Police Use of Force*, 54 CAN. J. BEHAV. SCI. 19, 20 (2022).

152. *Id.* at 23–24.

153. *Id.* at 24.

154. *Id.* at 20.

encounter the police, whether we initiate contact with the police (calling 911 to report a crime) or whether the police initiate contact with us (pulling us over for a traffic violation), these experiences are not good. While there has been an effort in community policing to stimulate more positive police–citizen encounters (breakfast with a cop),<sup>155</sup> that is the exception more so than the rule. I now turn to research on other factors that influence how jurors will evaluate police use of excessive force cases.

## VII. JUROR ATTITUDES IN POLICE USE OF FORCE CASES

A 2020 study sought to take the race of the officer and suspect into account in mock jury cases where the police officer used deadly force.<sup>156</sup> The authors added other variables to their study that turned out to be significant, looking at the weapon the officer used; whether the officer was, in fact, on duty or off duty at the time of the use of force; and the gender of the officer.<sup>157</sup> Officers can kill suspects without the use of a gun. No weapon was used in the case of George Floyd; an officer caused his death by holding his knee on Floyd’s neck.<sup>158</sup> Jurors were more critical when an officer used a gun compared to a taser.<sup>159</sup> Jurors see guns differently in that they assign higher levels of guilt when the officer used a gun, compared to an assault glove or a taser. Jurors could assign negative motives to police who use guns rather than tasers or assault gloves.<sup>160</sup> When an officer did not use a gun, but rather a taser or gloves, perhaps jurors believed the true intention of the officer was to de-escalate the situation as opposed to merely killing the suspect.<sup>161</sup>

The 2020 study also looked at the race and gender of the officer, as well as whether the officer was on duty when they applied lethal use of

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155. See, e.g., COFFEE WITH A COP, <https://coffeewithacop.com/> [<https://perma.cc/KG9V-WMC8>] (last visited Nov. 12, 2022); Chris Cognac, *Community Engagement Through Coffee with a Cop*, POLICE CHIEF MAG., <https://www.policechiefmagazine.org/community-engagement-coffee-with-a-cop/> [<https://perma.cc/L3PW-VD9T>] (last visited Nov. 12, 2022).

156. Emily Pica, Chelsea L. Sheahan, Joanna Pozzulo & Craig Bennell, *Guns, Gloves, and Tasers: Perceptions of Police Officers and Their Use of Weapon as a Function of Race and Gender*, 35 J. POLICE & CRIM. PSYCH. 348, 350 (2020).

157. *Id.* at 351–55.

158. See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Hayler Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/NFH7-NANV>] (Jan. 24, 2022).

159. Pica et al., *supra* note 156, at 352.

160. *Id.*

161. *Id.* at 352, 355–56.



force.<sup>162</sup> The findings suggest that the race of both the officer and the suspect mattered to jurors. Mock jurors assigned higher levels of guilt to the officer when the officer was White and the suspect was White. Jurors were also more likely to assign guilt to officers when they engaged in deadly police use of force while off duty.<sup>163</sup> On the one hand, an argument could be made that officers who employ such tactics on their off time are going beyond their job to protect society even on their own time. However, this was not the case. Citizens viewed the police as overly aggressive when they were not on the clock; “[u]se of force was viewed more negatively when the officer was off duty compared to on duty.”<sup>164</sup> Jurors may have viewed police as overstepping their role or too eager to engage in a “take down” of a suspect when they engaged in use of force while off duty. Gender also mattered in assigning guilt. Jurors ranked male officers who used deadly force higher in guilt as opposed to female officers who used the same level of force.<sup>165</sup> The gender disparity could also be a subconscious bias on the jurors’ part toward female officers who are viewed as helpless and who had no choice but to use a gun to take a suspect down.<sup>166</sup>

Although jurors acting in a rational manner implement cognitive information processing, legal decision makers still rely on an affective element that is undeniable yet often ignored in the legal literature.<sup>167</sup> For example, studies have demonstrated that photographic evidence has a stronger emotional impact on jurors during a trial than mere verbal descriptions of a crime scene.<sup>168</sup> Crime scene photos can be very gruesome, and the emotional impact of those pictures can influence jurors’ decision making.<sup>169</sup> When jurors are exposed to visual evidence, they are more emotional, even if they are unaware of their responses. For example, in a study of jurors’ responses to different versions of mock testimony by a rape victim, the jurors tended to assign greater credibility to the witness when they viewed the version where she displayed more emotion.<sup>170</sup> Attorneys who understand this phenomenon

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162. *Id.* at 352–55.

163. *Id.* at 351, 354.

164. *Id.* at 355.

165. *Id.* at 355–56.

166. *See id.* at 355.

167. Wiener et al., *supra* note 124, at 232–36.

168. David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW HUM. BEHAV. 183, 197–200 (2006).

169. *Id.* at 197–99.

170. Geir Kaufman, Guri C.B. Drevland, Ellen Wessel, Geir Overskeid & Svein Magnussen, *The Importance of Being Earnest: Displayed Emotions and Witness Credibility*, 17 APPLIED COGNITIVE PSYCH. 21, 25–27, 28–31 (2003).

may coach witnesses to display more emotion but could also run the risk that jurors will perceive this as phony. Nevertheless, it is important to understand the role emotions play in jurors' information processing, especially if judges are to decipher which evidence is probative and which is prejudicial for admissibility purposes. In police use of force cases that turn deadly, the more jurors can see what happened with their own eyes, the more influence this evidence will have on their verdicts. Since a picture is worth a thousand words, visual evidence in police use of force cases, especially evidence captured on cell phones by witnesses, the suspect, and even the police, can be vital to juror decision making.

Since police use of force has received so much attention, police departments and their communities are looking for ways to keep communities safer while also protecting citizens from police brutality and excessive force, and technology is playing a larger part in those efforts. Body-worn cameras are increasingly used by police departments to protect both the officer and the suspect when police-citizen encounters take place.<sup>171</sup> In a study where mock jurors were presented with body-worn camera evidence, jurors found the defendant who resisted arrest less culpable (or less likely to have resisted arrest) with the presence of body-worn camera evidence at trial as opposed to cases presented without it.<sup>172</sup> Visual imagery, especially when police are accused of using excessive force, is critical evidence that affects juror decision making. What would the jury have done in the George Floyd case had there been no footage of the eight-minute incident of Officer Chauvin placing his knee on Floyd's neck? Images are powerful, and prior research on jury decision making highlights that visual evidence is more powerful than testimonial evidence.<sup>173</sup> Jurors' high regard for law enforcement makes them predisposed to take their testimony as fact.<sup>174</sup> However, when there is visual evidence that contradicts the statements of officers or the visual evidence forces police to alter their testimony, jurors will be more critical of police action.<sup>175</sup>

Although this Article focuses on juror decision making in criminal cases, civil trials—especially against police departments to hold officers liable—may also have racial overtones. A 2022 study utilized a mock jury to render a decision in a fictitious case where the defendant sought

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171. Cynthia Lum, Megan Stolz, Christopher S. Koper & J. Amber Scherer, *Research on Body-Worn Cameras: What We Know, What We Need to Know*, 18 CRIMINOLOGY & PUB. POL'Y 1, 2–3 (2019).

172. Alana Saulnier, Kelly C. Burke & Bette L. Bottoms, *The Effects of Body-Worn Camera Footage and Eyewitness Race on Jurors' Perceptions of Police Use of Force*, 37 BEHAV. SCIS. & L. 732, 732–45 (2019).

173. Salerno & Bottoms, *supra* note 124, at 277–78, 289–90.

174. *Id.* at 284–85.

175. Saulnier et al., *supra* note 172, at 734–35, 741–43, 745.

\$10 million in compensation, with the added variable of a mental health condition diagnosis placed upon the suspect.<sup>176</sup> Here, the authors were primarily looking at award amounts, perception of law enforcement (referred to as “police legitimacy”), and perception of officer consequences.<sup>177</sup> The statistical methodology was a two-by-two design, where the race of the victim was either Black or White and the victim either had a mental illness (schizophrenia) or did not.<sup>178</sup> The findings indicate that the stigma of mental illness is alive and well. Whether the victim had schizophrenia had a significant effect on jurors’ liability decision, more so than the victim’s race.<sup>179</sup> It most likely comes from the “fear factor” prejudice that those with mental illness are inherently violent, thus giving law enforcement officers a justified reason for having to use excessive force against an obviously dangerous person.<sup>180</sup> The study, however, discusses the mediating role of police legitimacy. According to the study’s results, the more a juror believed in police legitimacy, the less money the victim was awarded in compensatory damages.<sup>181</sup> The authors found an interaction effect between jurors’ attitudes toward the police and the race of the victim when they awarded punitive damages. When the victim was White, punitive damages did not significantly differ as a function of participants’ attitudes toward police legitimacy. However, when the victim was Black, mock jurors assigned increasingly less punitive damages to the defendant, as their attitude toward police legitimacy increased.<sup>182</sup> Even when one is the victim in a civil case, race matters in a jury verdict—a minority complainant may not get the financial compensation their White counterpart pockets.<sup>183</sup>

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176. Haley A. Sturges, Cassandra Flick, Karlee Provenza & Narina Nunez, *Civil Juror Compensation and Judgments of Police Use of Force at the Intersection of Race and Mental Illness*, 40 BEHAV. SCIS. & L, 514, 519–20 (2022).

177. *Id.* at 518.

178. *Id.* at 520.

179. *Id.* at 523.

180. *Id.* at 516.

181. *Id.* at 523.

182. *Id.* at 524.

183. *Id.* at 526.

VIII. THE PSYCHOLOGY OF MORAL DISENGAGEMENT  
AND THE CRIMINAL JUSTICE SYSTEM

According to Albert Bandura, human beings engage in conduct based on their morality.<sup>184</sup> Through the socialization process, people make choices on self-imposed sanctions that act as a moral compass. Because human beings want to engage in behavior that provides them with the most satisfaction, they will usually behave in rational ways, avoiding self-condemnation while also seeking self-worth.<sup>185</sup> This behavior applies to group decision making, the obvious process in jury deliberations. British psychoanalyst W.R. Bion was one of the first scholars to study group dynamics.<sup>186</sup> His 1961 book *Experiences in Groups* is not only relevant to his own field of study, but also the study of law, human behavior, and jury decision making.<sup>187</sup> In the book, Bion explores group mentality, which he defines as “the unanimous expression of the will of the group . . . [where] individuals contribute anonymously.”<sup>188</sup> Group mentality applies to jury decision making since the law requires that the group come to a decision, even if it is not required to be unanimous.<sup>189</sup> While Bandura discusses individual goals of self-satisfaction, Bion expresses those same goals in a group dynamic process. He posits, “when a group forms the individuals forming it hope to achieve some satisfaction from it.”<sup>190</sup> While feelings of satisfaction are highly important to those assigned the responsibility for the ultimate decision, there are also psychological mechanisms that people utilize to rationalize their behavior.<sup>191</sup> These rationalizations could cultivate excuses in police use of force cases, where jurors cannot deny that police did, in fact, use excessive force, but are able to subconsciously utilize some level of justification on the officer’s behalf, making such use of force permissible. This Article defines the theory of moral disengagement and examines its different stages before applying it to juror decision making in police use of force cases.

Sometimes people engage in harmful conduct, creating moral opposition to their internal schema. This harmful conduct must be rationalized if people are going to carry it out without betraying their internal moral codes. The actors are often said to engage in a process

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184. Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCH. REV. 193, 193 (1999).

185. *Id.* at 193–94.

186. *See generally* W.R. BION, EXPERIENCES IN GROUPS (1961).

187. *Id.*

188. *Id.* at 59.

189. *Id.* at 50.

190. *Id.* at 53.

191. *Id.* at 54–56.

of moral disengagement. “[M]oral disengagement is the process by which a person can justify his or her harmful or aggressive behavior, or . . . disengage from moral self-sanctions that typically serve to regulate behavior.”<sup>192</sup> The mechanisms of this moral disengagement process can be delineated in stages.

The first is moral justification, which can only be satisfied if the actor believes that their behavior has some altruistic purpose. In this instance, an actor believes they are engaging in a questionable action only because they are called to do so.<sup>193</sup> A second mechanism is euphemistic labeling, which is used by participants to “soften the blow” of the results of their actions.<sup>194</sup> Irving Janis illustrates the point in a discussion of how policymakers often become detached from the consequences of their policy decisions. In the presidential administration of Lyndon Johnson, for instance, it was common for policymakers to discuss the Vietnam War using military vocabulary without ever mentioning human suffering.<sup>195</sup> In a more recent example, the Iraq War popularized euphemistic terms such as “insurgents” and “collateral damage” to describe war-related deaths.<sup>196</sup>

Another mechanism is advantageous comparison. A person engages in advantageous comparison when they deflect criticism from their actions and shift the focus to the actions of another. The real motive is to mitigate the actions of the decider.<sup>197</sup> Mechanism four is displacement of responsibility. This justification transfers accountability to the legal system and the rule creators by requiring the decision maker to carry out certain actions.<sup>198</sup> Very close to displacement of responsibility is diffusion of responsibility. When multiple parties are responsible for a task, with each party assigned their own mission, it becomes increasingly difficult to place blame on only one party.<sup>199</sup> Some actors will try to minimize the consequences of their actions, which is the sixth mechanism of moral disengagement.<sup>200</sup> Using the Iraq War again as an example, data was manipulated and shared with the public that seemed

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192. Jennifer Pelton, Mary Gound, Rex Forehand & Gene Brody, *The Moral Disengagement Scale: Extension with an American Minority Sample*, 26 J. PSYCHOPATHOLOGY & BEHAV. ASSESSMENT 31, 31 (2004).

193. *Id.*

194. Bandura, *supra* note 184, at 195.

195. Irving L. Janis, *Groupthink Among Policy Makers*, in SANCTIONS FOR EVIL: SOURCES OF SOCIAL DESTRUCTIVENESS 71, 73–74 (Nevitt Sanford & Craig Comstock eds., 1971).

196. Bandura, *supra* note 184, at 195.

197. *Id.* at 195–96.

198. *Id.* at 196.

199. *Id.* at 198.

200. *Id.* at 199.

to skew or deflate numbers (such as casualties of war) to minimize the horrific results of the war.<sup>201</sup> The seventh mechanism is assigning blame to victims, somehow placing them at fault for the circumstances in which they find themselves.<sup>202</sup> The last is the process of dehumanization.<sup>203</sup> Defendants in violent criminal cases are viewed as less than human—or worse, evil entities.<sup>204</sup> Specifically, to dehumanize is to help overcome the human inhibition against perhaps taking a human life, especially the lives of those who deserve it.<sup>205</sup>

These mechanisms of moral disengagement have been applied to a wide variety of topics, including war,<sup>206</sup> parenting skills,<sup>207</sup> child behavior,<sup>208</sup> and criminal justice. For example, a 2005 prison study examined the process of moral disengagement that prison personnel utilize when having to execute someone on death row.<sup>209</sup> The execution team sees their function as morally justified, as their duty is to carry out a sentence rendered by the court. While no one wants to carry out an execution, since witnessing death is an unpleasant experience and traumatizing event, discussions with prison personnel suggest that they accept the execution process as humane, particularly when compared to the heinousness of the crime.<sup>210</sup> The team both diffuses and displaces responsibility. They justify their behavior with the full knowledge that they are following orders.<sup>211</sup> The nature of the death penalty pre-

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201. Phil Stewart & Andrea Shalal-Esa, *U.S. Says Did Not Under-Report Iraq Civilian Deaths*, REUTERS (Oct. 25, 2010, 4:49 PM), <https://www.reuters.com/article/us-wikileaks-iraq/u-s-says-did-not-under-report-iraq-civilian-deaths-idUSTRE69L54J20101025> [<https://perma.cc/7WFS-6BXZ>].

202. Bandura, *supra* note 184, at 203; Pelton et al., *supra* note 192, at 31.

203. Bandura, *supra* note 184, at 200.

204. For parallel discussions of dehumanization in the context of war, see Janis, *supra* note 195, at 71, 73–74; Viola W. Bernard, Perry Ottenberg & Fritz Redl, *Dehumanization*, in *SANCTIONS FOR EVIL: SOURCES OF SOCIAL DESTRUCTIVENESS* 102, 103 (Nevitt Sanford & Craig Comstock eds., 1971).

205. Bernard et al., *supra* note 204, at 102–03.

206. See Alfred L. McAlister, Albert Bandura & Steven V. Owen, *Mechanisms of Moral Disengagement in Support of Military Force: The Impact of Sept. 11*, 25 *J. SOC. & CLINICAL PSYCH.* 141, 142–44 (2006) (explaining how the Iraq War had an effect on moral disengagement).

207. See generally Pelton et al., *supra* note 192 (describing an in-depth study concerning parenting and resulting child behavior and their relation to moral disengagement).

208. *Id.*

209. See Michael J. Osofsky, Albert Bandura & Philip G. Zimbardo, *The Role of Moral Disengagement in the Execution Process*, 29 *L. & HUM. BEHAV.* 371, 371 (2005).

210. *Id.* at 386–89.

211. *Id.* at 379.

sentencing process also includes these moral disengagement mechanisms. Craig Haney discusses how a capital trial is designed for jurors to see the defendant as less than human, making it much easier for jurors to impose the death penalty.<sup>212</sup> Not only can jurors seeing the defendant as less than human throughout a capital trial make it easier for them to sentence that person to death, but empathy for a victim could also make such a death sentence easier.<sup>213</sup>

#### IX. MORAL DISENGAGEMENT BY JURORS IN POLICE USE OF FORCE CASES

Jurors in police use of force cases understand they are charged with a very difficult mission. Serving as a juror in a criminal case is no easy assignment, and most jurors take their responsibility seriously.<sup>214</sup> When jurors reach a conclusion about a case and they struggle to live with their decision, they will often justify their actions as being bound by the law.<sup>215</sup> If a juror thoroughly reviewed the evidence, and the facts led them to believe that law enforcement was trying to protect the community from harm, then whatever actions the officer took must be morally justified.<sup>216</sup>

The second mechanism of moral disengagement is euphemistic labeling.<sup>217</sup> Words that jurors use to explain their verdicts could range from discarding any discussion of the victim or his or her family to creating a story frame that does not make the use of force by police seem that extreme—stating that the victim was not injured that badly or that the police did not cause the injury, even if the victim ends up dead. Although the jurors in the George Floyd case did not express it, we saw this euphemistic language when witnesses described Floyd's death as caused by something other than the actions of the police.<sup>218</sup> A victim is often described as having prior health problems with more than one factor contributing to their death. This transpired in the fatal

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212. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1451–55 (1997).

213. Bellas, *supra* note 137.

214. Ted Rohrlich, *Serious Business: Jury Duty: It's Trying, but It Works*, L.A. TIMES (Sept. 2, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-09-02-mn-1157-story.html> [<https://perma.cc/P9RT-SEMT>].

215. Haney, *supra* note 212, at 1481–85.

216. Bandura, *supra* note 184, at 194–95.

217. *Id.* at 195; Pelton et al., *supra* note 192, at 31.

218. Sheri Fink, *George Floyd's Cause of Death Is Crucial in Trial. Forensic Pathologists Explain*, N.Y. TIMES, <https://www.nytimes.com/2021/04/08/us/george-floyd-cause-of-death.html> [<https://perma.cc/ZP9N-SX4K>] (Apr. 14, 2021).

police use of force on Eric Garner on July 17, 2014, where obesity, not excessive force, was peddled as the cause of death.<sup>219</sup>

Jurors could also shift the blame from the police officer, who could be the one on trial, to the actions of the victim. Of course, understanding the role of both the officer and the victim is central to understanding whether an officer was justified in using force, but the issue can be one of extremes. Jurors could spend a great deal of time assessing only the behavior of the victim and not the officer. Trying to proportionally compare the actions of the police officer to the actions of the victim is in the jurors' mind an advantageous comparison, but, in fact, it is not. One should not compare the two parties. Police officers in their official capacity are held to a much higher standard in how they comport themselves compared to the victim.<sup>220</sup>

Jurors could also displace and diffuse responsibility. These rationalization techniques are used to transfer responsibility from perhaps each juror on the case to another, or to the legal system. The fact jurors did not volunteer but were *called* to jury service helps them diffuse responsibility. Jurors may speculate prosecutors would not bring a criminal case against one of their own (police and prosecutors are often seen as the government working together toward the same goal),<sup>221</sup> so jurors feel comfortable backing up a case that has already, in their minds, been well vetted.<sup>222</sup> Furthermore, should jurors get it wrong, they know there are appellate procedures in place to correct any errors.<sup>223</sup> The diffusion of responsibility could also extend to the defense team. A juror could suggest they witnessed bad lawyering or the lack of a quality defense on behalf of the defendant. Thus, if the defense attorney had done more to help their client's case (despite the burden being on the state), jurors may have reached a different conclusion.

Jurors can also minimize the consequences of their actions by diminishing the finding of guilt or innocence because the ramifications

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219. Wesley Lowery, *'I Can't Breathe.'* Five Years After Eric Garner Died in Struggle with New York Police, *Resolution Still Elusive*, WASH. POST (June 13, 2019, 8:03 PM), [https://www.washingtonpost.com/national/i-cant-breathe-five-years-after-eric-garner-died-in-struggle-with-new-york-police-resolution-still-elusive/2019/06/13/23d7fad8-78f5-11e9-bd25-c989555e7766\\_story.html](https://www.washingtonpost.com/national/i-cant-breathe-five-years-after-eric-garner-died-in-struggle-with-new-york-police-resolution-still-elusive/2019/06/13/23d7fad8-78f5-11e9-bd25-c989555e7766_story.html) [<https://perma.cc/XHV4-J3GW>].

220. *See, e.g., Officer's Code of Conduct*, CANTON OHIO PUB. SAFETY, <https://www.cantonohio.gov/389/Officers-Code-of-Conduct> [<https://perma.cc/D82Q-VYSF>] (last visited Nov. 8, 2022).

221. *See, e.g.,* THURGOOD MARSHALL INST., NAACP LEGAL DEF. FUND, *THE RELATIONSHIP BETWEEN PROSECUTORS AND POLICE: PROMOTING ACCOUNTABILITY AND BUILDING PUBLIC TRUST* (2020), [https://votingforjustice.azurewebsites.net/wp-content/uploads/2020/10/B\\_LDF\\_09282020\\_VFJToolkit\\_PromotingAccountability-w\\_finished-endnotes-1.pdf](https://votingforjustice.azurewebsites.net/wp-content/uploads/2020/10/B_LDF_09282020_VFJToolkit_PromotingAccountability-w_finished-endnotes-1.pdf) [<https://perma.cc/RXF8-EY35>].

222. *See* Osofsky et al., *supra* note 209, at 375.

223. *See id.*



are not extreme. If the defendant is found not guilty of police use of excessive force, then there is no consequential outcome—life, in fact, goes on. The final mechanisms of moral disengagement, which are to dehumanize as well as assign blame to the victim, might be easy for jurors depending on who the victim is, compared to who the defendant is. Defendants in criminal trials often blame the victim, although this is a strategic gamble.<sup>224</sup> Portraying someone whom police officers have seriously injured or killed as evil or blameworthy is difficult. Attorneys move gently to avoid demonizing the victim outright, but such a strategy is often woven into the trial. One high-profile case was Trayvon Martin. Trayvon Martin was a seventeen-year-old Florida resident who was fatally shot by George Zimmerman on February 26, 2012.<sup>225</sup> Martin, who was on the phone at the time, was not armed; nevertheless, Zimmerman claimed he shot Martin in self-defense after a struggle. Part of the record shows a 911 call Zimmerman made to local police reporting Martin's alleged suspicious activity, in which Zimmerman used racial slurs and made an effort to demonize Martin as a drug user and dangerous person.<sup>226</sup>

### CONCLUSION

A case involving police use of excessive force going to trial is rare.<sup>227</sup> This Article examined the important case law that demonstrates a major roadblock for having a jury decide whether police engaged in excessive force—getting past the granting of a motion for summary judgment based on the doctrine of qualified immunity. Assuming the plaintiffs can overcome such a hurdle, only then can a jury operationalize both internal and external factors in their decision-making process for deciding if a police officer did in fact use excessive

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224. See Bandura, *supra* note 184, at 203.

225. Dan Barry, Serge F. Kovaleski, Campbell Robertson, & Lizette Alvarez, *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES (Apr. 1, 2012), <https://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html> [https://perma.cc/Y9TP-H26J]; *Trayvon Martin Fast Facts*, CNN, <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html> [https://perma.cc/2J2W-KJFK] (Feb. 14, 2022, 1:55 PM).

226. Matt Gutman & Seni Tienabeso, *Trayvon Martin Killing: 911 Tape Reveals Possible Racial Slur by Neighborhood Watchman*, ABC NEWS (Mar. 20, 2012, 8:50 PM), <https://abcnews.go.com/US/neighborhood-watch-killing-911-tape-reveals-racial-slur/story?id=15966309> [https://perma.cc/9DVC-SEQ3]; André Munro, *Shooting of Trayvon Martin*, BRITANNICA, <https://www.britannica.com/event/shooting-of-Trayvon-Martin> [https://perma.cc/S52R-4XVV] (Sept. 20, 2022).

227. German Lopez, *Police Officers Are Prosecuted for Murder in Less Than 2 Percent of Fatal Shootings*, VOX (Apr. 2, 2021, 11:30 AM), <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter> [https://perma.cc/9AZC-5ZNF].

force. However, as long as courts protect law enforcement from civil claims under the doctrine of qualified immunity, understanding what shapes jury verdicts in police use of force cases will continue to be under studied.