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A License to Kill: The Institutional Failure of the Legal System to Hold Police Accountable

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by

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Abstract

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In recent years, police shootings of unarmed African American men have become nationally visible. With few exceptions, the police officers involved in those shootings have escaped any criminal penalties. This paper addresses why so few police officers are convicted after shooting unarmed African Americans. Using an interdisciplinary approach, it addresses three aspects of the criminal justice system: prosecutorial power, Supreme Court case law, and jury bias. This paper argues that the legal system is structured to protect police officers from liability, making it unable to deliver justice after on-duty police shootings of unarmed African American men.

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Thesis presented

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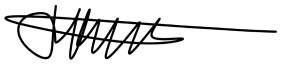

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Introduction

"Mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process."

- Thurgood Marshall

The American legal system is supposed to provide justice to all Americans. Due process should be afforded to every victim and every alleged offender, and the adversarial system should produce just verdicts. But regularly, the legal system fails to provide justice to those who need it the most. Racism, sexism, and socio-economic factors permeate the walls of courtrooms and prevent justice from ever truly being blind. At every step in the process, from policing to adjudication, biases contort the balance of fairness until there is no longer justice. Never is this more evident than when police officers stand accused of unnecessarily killing black men in the line of duty. The legal system favors police officers and often shields agents of law enforcement from punishment. At its worst, the legal system allows bad police officers blanket licenses to kill black men.

The function of law enforcement officers is to facilitate public safety in the United States. Police officers are tasked with protecting people and ensuring the safety of communities. Yet, in American cities with sizeable minority populations, police forces often target the very citizens they are supposed to protect. Recently, there have been particularly egregious examples of the antagonistic relationship between the state and its citizens. Law enforcement in Ferguson, Missouri had taken to the practice of excessively fining their citizens in order to raise their municipal revenue.[1] The police department in Chicago, Illinois lacked the training required to

[1] United States Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department, (March 4, 2015), 11-12, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

resolve situations without the use of force.[2] The Baltimore, Maryland police department engaged in frequent and overly aggressive unconstitutional stops, searches, and arrests without sufficient oversight.[3] While these practices are not unique to these three cities, the cities have been at the forefront of America's debate about the use of police force. In fact, many of these practices are common in urban districts all across the country. The modern American consciousness regarding police misconduct and violence has been shaped by Los Angeles officers beating Rodney King for nearly fifteen minutes in 1992, New York City officers shooting Amadou Diallo forty-one times in 1999, and an officer in Ferguson shooting Michael Brown, an unarmed eighteen-year-old with his hands raised, in 2014.[4] In all three cases, the police officers involved were never convicted of any criminal charges.

Policing black people violently and maliciously has its roots in America's tortured racial history. Southern states created the first law enforcement units to patrol slave communities. These slave patrols apprehended and returned runaway slaves, used terrorism to deter slave revolts, and sometimes disciplined slaves outside the law.[5] Slave patrols cast a long shadow over southern policing. After the federal government outlawed slavery, these groups adapted to become law enforcement and continued to contain and confine the black labor force. They were particularly instrumental in the convict leasing system, which arrested numerous African

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[2] United States Department of Justice, Civil Rights Division, and United States Attorney's Office, Northern District of Illinois, Investigation of the Chicago Police Department, (January 13, 2017), 5, https://www.justice.gov/opa/file/925846/download.

[3] United States Department of Justice, Civil Rights Division, Investigation of the Baltimore City Police Department, (August 10, 2016), 40, https://www.justice.gov/crt/file/883296/download.

[4] Sastry, Anjuli, and Karen Grigsby Bates, "When LA Erupted In Anger: A Look Back At The Rodney King Riots," NPR.org, April 26, 2017, https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots.
Nelson, Jill, *Police Brutality: An Anthology*, W.W. Norton, 2001, 9.

[5] Potter, Gary, "The History of Policing in the United States, Part 1," Eastern Kentucky University: Police Studies Online, June 25, 2013, https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1.
Dempsey, John, and Linda Forst, An Introduction to Policing, Fifth, Delmar, Cengage Learning, 2009, 10.

Americans by manufacturing Jim Crow laws, trumping up charges, and then leasing their labor to wealthy white Southerners. The police system in the American North also functioned to contain African Americans: the segregation perpetuated during Jim Crow was established and enforced first in the North before it was implemented in the South.[6] Across the country, when race riots broke out, police officers often joined mobs of white people attacking black populations.[7] Quite a few of these officers, especially in the South, were sympathetic to extralegal organizations that terrorized African American communities, like the Ku Klux Klan. American law enforcement has always had problems of racism inextricably linked to racial diversity.

Whether they are aware of the history or not, police officers continue the pattern of over policing minority communities using the inherited strategies that were originally created to subjugate black people.[8] The War on Drugs only multiplied this problem. President Nixon began criminalizing drugs on a large scale as a proxy for criminalizing the groups of people who most often used those drugs: people against the Vietnam War and African Americans, two groups least likely to support him for reelection.[9] Under President Reagan, the War on Drugs intensified

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[6] In the American South, there was a period of time between the end of Reconstruction and the creation of the Jim Crow laws that expanded segregation into all aspects of Southern life. Yet during that time, the North already had a vast system of laws to keep African Americans as second-class citizens. Thomas Wentworth Higginson, a staunch abolitionist who organized and led a black regiment during the Civil War, traveled to the South in 1878 and commented on the differences he observed between the treatment of black people in the country's two regions: "He compared the tolerance and acceptance of [African Americans] in the South on trains and street cars, at the polls, in the courts and legislatures, in the police force and militia, with attitudes in his native New England and decided that the South came off rather better in the comparison."
C. Vann Woodward. *The Strange Career of Jim Crow*. New York: Oxford University Press, 1955, 17.

[7] Bryan Stevenson. "A Presumption of Guilt." In *Policing the Black Man: Arrest, Prosecution, and Imprisonment*. Pantheon Books, 2017, 10-11.

[8] Williams, Hubert, and Murphy, Patrick V, "The Evolving Strategy of Police: A Minority View," Perspectives on Policing, National Institute of Justice, U.S. Department of Justice, and the Program in Criminal Justice Policy and Management, John F. Kennedy School of Government, Harvard University, January 1990, https://www.ncjrs.gov/pdffiles1/nij/121019.pdf.

[9] Sherman, Erik, "Nixon's Drug War, An Excuse To Lock Up Blacks And Protesters, Continues," Forbes, March 23, 2016, https://www.forbes.com/sites/eriksherman/2016/03/23/nixons-drug-war-an-excuse-to-lock-up-blacks-and-protesters-continues/.

and the federal government began financially incentivizing police departments to arrest large numbers of black drug users through laws that allowed the police to keep seized property and profits.[10] The new laws and the media campaign that accompanied them cemented the War on Drugs in America's political system, as politicians who do not advocate for "tough on crime" policies still have a hard time getting elected or reelected.[11] This history is evident in the practices of police officers today: Black Americans are overpoliced, and accordingly, account for disproportionately high rates of arrests. In fact, African Americans are twice as likely to be arrested than their white counterparts.[12] These practices result in increased contact and little trust between police departments and minority communities.

Police forces are one of the few government agents given the liberty to use death to enforce the law. This, too, is disproportionately directed at African Americans: it is twenty-one times more likely for a young black man to be shot and killed by a police officer than for a young white man.[13] Police violence has not gotten worse, it is getting filmed. Michael Brown, Samuel DuBose, and Tamir Rice were all unarmed when they were shot and killed by police officers. The proliferation of smart phones and body cameras placed a national spotlight on bad police-community relationships. The stories of these men and several others gained publicity and fueled what became a national protest against the police brutality of African Americans: The Black Lives Matter movement.

The injustice does not stop with the police department. These three cases mentioned above share another feature: in none of these cases was the offending police officer convicted.

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[10] Alexander, Michelle, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, New Press, 2012, 50, 79, 83.
[11] Butler, Paul, *Let's Get Free: A Hip-Hop Theory of Justice*, New Press, 2010, 118-119.
[12] Davis, Angela, ed, *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, Introduction.
[13] Gabrielson, Ryan, Eric Sagara, and Ryann Grochowski Jones, "Deadly Force, in Black and White," ProPublica, October 10, 2014, https://www.propublica.org/article/deadly-force-in-black-and-white.

Michael Brown's killer was not indicted for a crime, Samuel Dubose's killer had murder charges dropped after two trials ended without convictions, Tamir Rice's killer was never charged. These cases are not unique in this respect. Since 2005, fewer than one hundred police officers have been arrested for on-duty, fatal shootings, and only three officers have been convicted of murder.[14] Because of the public spotlight and scrutiny on these three cases there is a larger body of evidence publicly available than would be for similar cases, which provides the opportunity to study the common factors, but they are not outliers. These three cases are emblematic of a larger problem: Why is it that so few police officers are convicted after shooting unarmed African Americans?

The criminal justice system protects police officers after they fatally shoot unarmed African Americans. The legal system is set up to favor officers: Prosecutors have unchecked power, immense discretion, and are inherently biased due to their relationship with police departments; Supreme Court case law sets the burden of proof exceedingly high to convict police officers of crimes when using deadly force on the job; and demographically unbalanced juries bring implicit biases into the courtroom which psychologically predisposes them to favor the police officers. These factors set systemic barriers that make convicting police officers for on-duty shootings unreasonably difficult.

This study builds upon several bodies of scholarship and seeks to contribute to the body of literature focused on law enforcement and the use of deadly force. It questions why the legal

[14] Ross, Janell, "Police Officers Convicted for Fatal Shootings Are the Exception, Not the Rule," NBC News, March 14, 2019, https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741.

system so frequently fails to hold police officers accountable after shooting unarmed African American men. In answering this question, this effort interrogates three distinct aspects of the criminal justice system: the role of prosecutors, legal standards created by the Supreme Court, and the biases of juries. Scholars have written extensively on these three subjects.

In recent years, a growing body of literature has emerged on prosecutorial culture.[15] Cases live or die at the hands of prosecutors; it is completely within the discretion of the prosecutors' offices whether a case is pursued or dropped and what punishment is sought for alleged crimes.[16] Legal scholars agree that no supervisory system holds prosecutors accountable: since the creation of the prosecutor position in the 18th century, no system of prosecutorial standards has included a measure for accountability.[17] Prosecutors have absolute immunity from liability, both from public actions in the courtroom and the important non-public decisions that determine whether cases continue to trial.[18] Even when the decisions to indict alleged offenders are placed in the hands of grand juries, prosecutors still wield considerable power. Legal scholars contend that grand juries often function as extensions of the prosecutors' discretion, meaning that they rarely make a decision contrary to the prosecutor's opinion on any case. Moreover, the rules of grand jury trials are set up to practically ensure that grand juries decide the way the prosecutor believes they should.[19] The larger problem is that lawyers often use their positions as prosecutors for future careerist ambitions. One scholar found, "…the emergence of the prosecutor's office as

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[15] Angela J. Davis. *Arbitrary Justice: The Power of the American Prosecutor*. Oxford Scholarship Online, 2009.
Paul Butler. *Let's Get Free: A Hip-Hop Theory of Justice*. The New Press, 2009.
John F. Pfaff. *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*. Basic Books, 2017.
Michelle Alexander. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.
[16] Angela J. Davis. *Arbitrary Justice: The Power of the American Prosecutor*.
[17] Ibid.
[18] John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." *Virginia Law Review* 99, no. 2 (April 2013).
[19] Niki Kuckes. "The Useful, Dangerous Fiction of Grand Jury Independence." *American Criminal Law Review* 41, no. 1 (2004).

a stepping stone for higher office was a relatively recent/20th century phenomenon with dramatic consequences in American criminal law and mass incarceration."[20] This careerism often precludes occupational riskiness or independence: lead prosecutors face more risk in transitioning to higher office when having been more lenient towards alleged offenders than when having chosen to punish harshly.[21] Line prosecutors are beholden to the decisions of their bosses, which orients the entire prosecutor's office towards careerist tendencies.[22] Additional literature explains that elections, which are the supposed accountability mechanisms for lead prosecutors in almost all fifty states, almost always fail to make incumbent prosecutors explain their decision-making process or practices. A legal scholar wrote, "Instead of promoting debate about priorities and values, the [prosecutorial] campaigns concentrate on more technocratic claims about the lawyerly skills of the chief prosecutor or the personal rectitude of the candidates. These indicators of competence might tell voters about the ability of a prosecutor to choose wisely in a single case. These qualities, however, do not translate into high-quality justice for the office as a whole."[23] The historical reality perpetuated by the false-promise of competitive elections is only reinforced by the legal system's refusal to hold prosecutors accountable. The power of prosecutors is so far reaching and impenetrable that some scholars believe it is the root of the entire mass incarceration problem affecting our country.[24]

This study builds upon the body of work concerning prosecutorial power by demonstrating how prosecutors choose to wield significant influence on behalf of police officer

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[20] Shugerman, Jed. "'The Rise of the Prosecutor Politicians': Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017." *Shugerblog* (blog), July 7, 2017. https://shugerblog.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/.
[21] John F. Pfaff. *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.
[22] Paul Butler. *Let's Get Free: A Hip-Hop Theory of Justice*.
[23] Ronald F. Wright. "How Prosecutor Elections Fail Us." *Ohio State Journal of Criminal Law* 6, no. 2 (2009), 25.
[24] John F. Pfaff. *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

defendants. This is in stark contrast to the adversarial way in which prosecutors typically regard defendants. The collegial relationship between prosecutors' offices and police departments and the careerist ambitions of prosecutors create a system in which prosecutors have every motivation to advocate against punishment for police officers who use deadly force. The lack of accountability for prosecutors ensures that they can act on that motivation without threat of liability or likelihood of losing reelection. An evaluation of Michael Brown's case will demonstrate that prosecutors advocate for the innocence of police officers, a practice that rarely if ever occurs for any other defendant.

The Supreme Court has also played a vital role in deciding what happens to law enforcement after instances of deadly force. The Supreme Court created legal standards defining qualified immunity for public officials, including police officers. The Court's opinions explain that this standard was created to balance two opposing needs: the need for police officers to have some protection from liability so they can properly protect the public, and the need for accountability when police officers cross the line into violating constitutional rights.[25] Some legal scholars argue that qualified immunity has no basis in common law and is therefore unlawful.[26] Others disagree: they contend that qualified immunity is legal because its basis can be traced back to early American law and Congress has never indicated it disagrees with how the Court has defined or interpreted qualified immunity.[27] Scholars intimately familiar with the

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[25] *Pearson v. Callahan*, (2009) 555 US 223.

[26] "The [Supreme] Court's account of common-law qualified immunity has several historical problems. First, there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment. Second, to the limited extent a good-faith defense did exist in some common-law suits, it was part of the elements of a common-law tort, not a general immunity. Third, qualified immunity today is much broader than a good-faith defense."
William Baude. "Is Qualified Immunity Unlawful?" *California Law Review* 106, no. 45 (February 18, 2018), 55.

[27] "The [Supreme] Court has concluded that Congress incorporated qualified immunity in Section 1983. And based on that conclusion, the Court has done its best to see that Congress's will is respected."
Aaron L. Nielson, and Christopher J. Walker. "A Qualified Defense of Qualified Immunity." *Notre Dame Law Review* 93, no. 1853 (May 2018), 1862.

operations of law enforcement argue that qualified immunity is a necessary protection for police officers who must decide to put themselves at risk every day to do their jobs.[28] There is even recent disagreement within Supreme Court justices, with some upholding qualified immunity and others arguing it dangerously gives police officers carte blanche without possibility for accountability.[29] The doctrine of qualified immunity is informed and strengthened by two core Supreme Court cases governing the legal standards regarding police use of excessive force: *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989). The Supreme Court has repeatedly asserted that police use of force cases must be judged by the standards established in the Fourth Amendment only.[30] However, some legal scholars argue that the Court's divergence from using the Fourteenth Amendment as a basis to judge police conduct in such cases was the wrong decision because it restricted the breadth of arguments that could be made and did not allow for expansive remedies to police brutality based on collective treatment of racial groups. Two legal scholars stated, "By deracializing police use of force cases, the Court [in *Graham*] has effectively stripped the excessive force inquiry of its racialized component, which is a form of institutional colorblindness that ultimately perpetuates structural violence on communities of color by failing to acknowledge racially disparate results and the need for race-sensitive remedies."[31] Although the legal doctrine concerning police use of deadly force is generally considered settled law, there is contention over the merits of the legal standards that dictate how police use of violence cases must be adjudicated.

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[28] Richard G. Schott. "Qualified Immunity - How It Protects Law Enforcement Officers." FBI: Law Enforcement Bulletin, n.d. https://leb.fbi.gov/articles/legal-digest/legal-digest-qualified-immunity-how-it-protects-law-enforcement-officers.
[29] *Kisela v. Hughes*, (2018) 584 US __.
[30] *Graham v. Connor*, (1989) 490 US 386.
[31] Osagie K. Obasogie, and Zachary Newman. "The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine through an Empirical Assessment of Graham v. Connor." *Northwestern Law Review* 112, no. 6 (2018), 1496.

This study explains how the Court has shaped the legal doctrine into such a strong and binding precedent, detailing the historical evolution of qualified immunity under a Supreme Court that has consistently shifted towards conservative majority decisions. The doctrine of qualified immunity has expanded from a balanced test to a legal shield which protects police officers' immunity even in the most clearly unnecessary cases of excessive force. Furthermore, this study demonstrates that qualified immunity and the reasonable police officer standard established in *Graham v. Connor* created a legal test that often fails to accommodate the systemic faults in police use of force against communities of racial minorities. By treating each case as an individual incident and necessitating an extremely high standard in order to prove unreasonable force, this precedent favors police officers and severely limits the chances for police accountability.

The American people are active agents in determining police accountability in cases of deadly force as members of juries. Although jury trials are one of the more secretive aspects of the legal system, considerable scholarship analyzes critical aspects of the jury process, from jury selection to what can influence the formation of memory recall during jury deliberation. Juries are supposed to be made up of random selections of the least biased individuals that are representative of the jurisdictions in which cases are tried, but scholarship shows this is rarely the case. One study conducted on federal courts in more than 700 counties found that racial minorities are consistently underrepresented in jury pools.[32] Experts agree that jury pools are formed by methods that are likely to disproportionately exclude people of color.[33] During the

[32] Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez. "Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts." *Journal of Empirical Legal Studies* 15, no. 2 (June 2018).
[33] Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries," Journal of Crime and Justice 39, no. 1 (August 20, 2015): 75–87, https://doi.org/10.1080/0735648X.2015.1087149.

period in which attorneys from both sides can choose to exclude specific people from the potential jury, studies have shown that the attorneys take race into account to make those decisions, even though the Supreme Court has forbidden this practice. One study found, "Both anecdote and empirical data converge on the conclusion that, indeed, race frequently influences attorneys' jury selection judgements and tendencies."[34] Scholarship shows that these exclusions from juries impact verdicts: studies conclude that more diverse groups of people perform better in decision-making tasks.[35] When only one juror of color sits on otherwise all-white juries, that juror becomes a token, which negates the benefits that could be attained by truly diverse juries.[36] Additionally, scholarship proves that every person on juries brings their own biases to every case, including unconscious, implicit biases that are created by societal stereotypes.[37] Studies have shown that implicit racial biases cause people to categorize information and even create or change memories in ways that hurt African American plaintiffs or defendants.[38]

This study applies theories concerning jury biases to cases of deadly force by police officers against unarmed African American men. The process for choosing jurors is systematically oriented to select people less likely to be willing to understand the perspective of the victims in these cases. The implicit biases based on stereotypes of African American men that impact how memories are formed in combination with the fact that the legal standards with which jurors must view the cases are favorable to police officers creates conditions in which

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[34] Sommers, Samuel R, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research," Social Issues and Policy Review 2, no. 1 (2008): 65–102, 73, https://doi.org/10.1111/j.1751-2409.2008.00011.x.
[35] Sommers, Samuel R, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research."
[36] Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries."
[37] Eberhardt, Jennifer L. *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do*. New York: Viking, 2019.
[38] Levinson, Justin D, "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering," Duke Law Journal 57 (2007), 376-377, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1336&context=dlj.

convictions of police officers are rare. Juries, this study argues, are not well-equipped to decide verdicts based on the available evidence in these cases. Analysis of Samuel DuBose's case will demonstrate where juries fail.

When taken together, the scholarship surrounding prosecutorial power, legal doctrine, and jury bias has significant implications for cases of police shootings of unarmed African American men. Unfortunately, much of this scholarship is siloed by subject-area; social scientists study prosecutorial power, legal scholars debate qualified immunity, and psychologists analyze jury biases. This study synthesizes these three topics in order to holistically study the combined effects they have on urban communities of color and the larger socio-political sphere. It contributes to the existing literature by examining the criminal justice system via this interdisciplinary lens. Ultimately, it underscores how prosecutorial discretion and unaccountability, an expanding doctrine of qualified immunity, and biased juries tip the scales heavily in favor of police officers within the legal system after instances of police brutality and deadly violence. Only by studying these disparate research areas can decisions like the absolute absence of consequences for Tamir Rice's killer be understood.

Chapter 1: "Absolute Power and Absolute Immunity:" How Prosecutors' Interests Preclude Police Accountability[39]

Prosecutors are the most powerful actors in the criminal justice system: they can make cases disappear or create cases at their whims. Their decisions are often the difference between convictions or vacated charges. The system incentivizes prosecutors to protect police officers in cases where police officers stand accused of unnecessarily using deadly force, which is in direct contrast to how prosecutors typically treat defendants. There is probably no better example of this than Ferguson, Missouri. The case against Darren Wilson, the officer who shot and killed Michael Brown in Ferguson in 2014, epitomizes prosecutorial discretion. Robert McCulloch, the prosecutor in charge of the case against Officer Wilson, used every opportunity to make a case *for* Wilson by showing that his actions in shooting Brown were justified. Although prosecutors typically act to secure as many convictions as quickly as possible, McCulloch legally acted with the opposite intentions to ensure Wilson would not be convicted. Marilyn Mosby provides an example of an alternative strategy. Mosby, a young, African American women who was elected lead prosecutor in Baltimore in 2015, was in charge of the case against the officers who killed Freddie Gray (another nationally scrutinized instance of deadly force). Unlike many prosecutors, she intended to use her position to advance change in her jurisdiction by granting leniency to those accused of nonviolent and drug-related crimes.[40] She responded to Freddie Gray's case by swiftly indicting the officers involved in his death. She announced, "I take this oath seriously and I want the public to know that my administration is committed to creating a fair and equitable justice system for all. No matter what your occupation, your age, your race, your color or your creed… To the people of Baltimore and the demonstrators across America: I heard your call for

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[39] John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." 231.
[40] Hylton, Wil S. "Baltimore vs. Marilyn Mosby." *The New York Times*, September 28, 2016. https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html.

'No justice, no peace.' Your peace is sincerely needed as I work to deliver justice on behalf of this young man."[41] Mosby's intentions as a lead prosecutor of a diverse, urban city stand apart from those of most prosecutors. While she made reform a priority, most prosecutors have career aspirations and relationships with police departments that lead them to use their discretion more similarly to McCulloch's strategy than Mosby's. The decisions McCulloch made in presenting Brown's case to the grand jury in Ferguson exemplify the typical prosecutorial reactions to police officers' use of deadly force, which stand in stark comparison to Mosby's handling of Gray's case and the way prosecutors approach most of their routine cases.

The powers and discretion that prosecutors have make them the most powerful people in the criminal justice system.[42] Although police officers make arrests, and therefore are responsible for bringing people into the criminal justice system, it is prosecutors who decide whether a case even enters a courtroom. When police officers make arrests based on probable cause, they bring the cases to prosecutors and make recommendations on charges the accused should face; but this is where law enforcement's power largely ends.[43] From that point until the case is dismissed or the person is acquitted or convicted, the prosecutor is the most powerful person to determine the outcome of that case. A report on prosecutorial misconduct wrote, "The prosecutor is the de facto law after an arrest…"[44] Prosecutorial power derives from discretionary powers to make the following decisions: whom to charge, what to charge, the terms of plea bargains, and whether to dismiss charges.

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[41] "Read the Transcript of Marilyn Mosby's Statement on Freddie Gray." *Time*, May 1, 2015. https://time.com/3843870/marilyn-mosby-transcript-freddie-gray/.
[42] Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 5.
[43] "Unlocking the Black Box of Prosecution." Vera Institute of Justice, n.d. https://www.vera.org/unlocking-the-black-box-of-prosecution/for-community-members.
[44] Steve Weinburg. "Breaking the Rules." The Center for Public Integrity, May 19, 2014. https://publicintegrity.org/politics/state-politics/harmful-error/breaking-the-rules/.

The power to charge is in the hands of prosecutors, and prosecutors alone. This decision is often based on the amount of evidence there is and can include considerations like the person's past criminal involvement or community reactions, but there are no definite standards with which to make the decision of whether to charge someone. The American Bar Association's Criminal Justice Standards for the Prosecution Function state, "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[45] However, there is nothing to mandate this, so many prosecutors see their primary duty as convicting and incarcerating people, irrespective of the circumstances in individual cases.[46] The Bar Association details the minimum requirements for filing and maintaining charges. It states, "…only if the prosecutor reasonably believes that the charges are supported by probable cause, the admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interest of justice."[47] But the standards put forth by the Bar Association are not enforceable, and at the early stage in the process, prosecutors do not have to demonstrate that the charge is supported by probable cause; as a result, prosecutors can file charges without any supporting evidence.

Prosecutors also choose *what* charges to bring against the accused. This discretionary power is important because of how many laws, both state and federal, one criminal action can fall under. Sometimes one action can be charged either as a misdemeanor, which can only be punished by fines, or a felony, which is punishable with significant prison time.[48] Both federal

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[45] American Bar Association. "Criminal Justice Standards for the Prosecution Function," 2017. https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.
[46] Davis, Angela J. "The Power and Discretion of the American Prosecutor." *Droit et Cultures*, no. 49 (2005): 55–66. http://journals.openedition.org/droitcultures/1580.
[47] American Bar Association. "Criminal Justice Standards for the Prosecution Function."
[48] "Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration." ACLU, 2019. https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf. 4.

and state criminal codes have an overwhelming number of different laws that criminalize the same conduct. These offenses do not all describe the same action with different levels of punishment, but also describe overlapping actions. As one scholar described, "To put this pattern in geometric terms, criminal codes consist of a great many more sets of overlapping circles than concentric circles. Which is to say that defendants who commit what is, in ordinary terminology, a single crime, can be treated as though they committed many different crimes – and that state of affairs is not the exception, but the rule."[49] Prosecutors can use these complicated criminal codes to choose charges with the recommended punishment that they believe properly fits the crime. For example, if someone were to be arrested holding a gun in New York, a prosecutor would have the choice of all of the following charges: "criminal possession of weapon in the second degree," which carries a mandatory minimum sentence of three and a half years and a maximum of fifteen years in prison, not including parole; "criminal possession of a weapon in the third degree," which carries a mandatory minimum sentence of two years and a maximum of seven years in prison; or "criminal possession of a weapon in the fourth degree," which is a misdemeanor instead of a felony and has no associated prison time at all.[50] Given mandatory minimum sentencing laws, which exist in every state and the federal government, this gives prosecutors more power than judges, because if a person is convicted of a crime with an attached mandatory minimum sentence, the judge is bound to the sentencing guidelines based on the charge chosen by the prosecutor.[51]

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[49] Stuntz, William J. "The Pathological Politics of Criminal Law." *Michigan Law Review* 100 (2001). http://dx.doi.org/10.2139/ssrn.286392. 17.
[50] Emily Bazelon. *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*. Random House, 2019.
[51] Davis, Angela J. "The Power and Discretion of the American Prosecutor." 55–66.

These powers manifest most clearly in the plea-bargaining process, during which the prosecutor is the most powerful actor. Plea bargains avoid trials, which are both expensive and time consuming.[52] About ninety-four percent of felonies cases are resolved via plea deals, which means prosecutors determine the punishment for the overwhelming majority of all felony cases.[53] Because prosecutors can choose what to charge, they often practice overcharging, which is charging the defendant with the charge that carries the highest penalty.[54] This pressures the defendant into accepting the plea deal even if they believe they have a chance to win their case at trial, because the consequences for losing at trial are too high. Prosecutors can do this with charges they do not believe they can prove if the case goes to trial because there is no standard of proof for plea bargains, so prosecutors do not have to show that the charge is justified.[55] Although both sides have to agree to a plea deal, prosecutors have incredible leverage in the process.[56] The only rule is that prosecutors cannot illegally threaten defendants to accept a plea bargain, but this allows for expansive legal threats.[57] For example, prosecutors can threaten to change the charge to one that carries a life sentence or even the death penalty unless the defendant accepts the plea.[58] Once the defendant has agreed to a plea deal, the deal briefly goes in front of a judge, but judges rarely reject plea deals. In fact, judges are incentivized not to reject the deals, because a renegotiation would make the case last longer and risk it going to a jury

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[52] "Guilty pleas are not simply cheaper than trials; they are enormously cheaper."
Stuntz, William J. "The Pathological Politics of Criminal Law." 36.
[53] Unlocking the Black Box of Prosecution." Vera Institute of Justice.
[54] Davis, Angela J. "The Power and Discretion of the American Prosecutor." 55–66.
[55] Unlocking the Black Box of Prosecution." Vera Institute of Justice.
[56] Prosecutors set the terms of a plea deal, such as how long a defendant has to accept the deal: sometimes prosecutors do not give defendants any time to consider the offer, but demand that they reject or accept the plea at that moment, which precludes the possibility of discussing the plea or possible defenses with an attorney.
Davis, Angela J. "The Power and Discretion of the American Prosecutor." 55–66.
[57] Walsh, Dylan. "On Plea Bargaining, the Daily Bread of American Criminal Courts." *The Atlantic*, May 2, 2017. https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.
[58] Ibid.

trial.[59] The results of the plea bargaining process en masse are staggering: one author asserts that prosecutors behaving this way is the reason that the United States has a problem of mass incarceration.[60] African Americans and minorities bear the brunt of this reality. 95 percent of all convictions in large urban areas attained through guilty pleas is the typical result of prosecutorial power.[61] This falls disproportionately on poor, black populations. Young men of color in urban areas are disproportionately arrested and disproportionately imprisoned.[62] If people accused of crimes cannot afford their own council and must have court-appointed representation, as 80 percent of felony defendants do, they are even more likely to accept an undesirable plea bargain.[63,64] This includes people who are innocent: the National Registry of Exonerations found that 18 percent of exonerations since 1989 were for people who plead guilty.[65]

There is an additional aspect required to charging a defendant in the federal system and about half the state systems: grand juries. For felony criminal charges in these jurisdictions, the prosecutor must convene a grand jury to pass judgement on whether there is probable cause to bring the charge against the defendant.[66,67] The grand jury practice was originally designed to act

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[59] McConkie, Daniel S. "Judges as Framers of Plea Bargaining." *Stanford Law & Policy Review* 26, no. 61 (2015). https://doi.org/10.2139/ssrn.2405270. 64.
[60] John F. Pfaff. *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.
[61] Rainville, Gerard, and Brian A. Reaves. "Felony Defendants in Large Urban Counties, 2000." U.S. Department of Justice, 2003. https://www.bjs.gov/content/pub/pdf/fdluc00.pdf.
[62] Angela J. Davis. *Policing the Black Man: Arrest, Prosecution, and Imprisonment*.
[63] Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration." 5.
[64] 73 percent of public defenders' offices have more than the maximum limit of cases and a lawsuit in Washington exposed that defense attorneys could only spend less than an hour on each case. Public defenders are forced to engage in a practice that is sometimes referred to as "meet 'em and plead 'em," in which defendants are only able to have a short conversation with their appointed lawyer before pleading guilty.
Brunt, Alexa Van. "Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them." *The Guardian*, June 17, 2015, sec. Opinion. https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked.
[65] Walsh, Dylan. "On Plea Bargaining, the Daily Bread of American Criminal Courts."
[66] Roger A. Fairfax, Jr. "The Grand Jury and Police Violence Against Black Men." In *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, 209–32. New York: Pantheon Books, 2017. 210.
[67] Grand juries make their decisions based on the probable cause standard, which is a radically different standard from the beyond a reasonable doubt standard that is used at trial. The distinction between the two standards is great. One scholar wrote, "The grand jury's role is to review the law and to conduct only a nominal review of the facts.

as a shield for the individual from the government, by allowing regular citizens a say in the process of whether a person should be indicted.[68] However, it now largely acts as a "rubber stamp" for prosecutors, in that it simply signs off on whatever decision the prosecutor would have made independently.[69] In fact, there is a saying that a prosecutor could get a jury to 'indict a ham sandwich.' Grand juries almost always decide in accordance with prosecutors' recommendations because the rules for grand juries favor prosecutors. Grand juries are presented with evidence and can hear witness testimony, but unlike a courtroom trial, there is no judge or defense counsel. Only the prosecutor is allowed to present the evidence from the case and acts as both an advocate for the government's position and the legal advisor to the citizens serving on the grand jury.[70] Grand jury proceedings are kept incredibly secretive, often referred to as "black boxes," so it is usually impossible to tell how the prosecutors explained the law to the grand jurors.[71]

Additionally, Supreme Court precedent has established that there are very few restrictions on what the prosecutor chooses to present. Prosecutors can present hearsay to grand juries, evidence that would not be admissible in court due to the exclusionary rule—meaning that it was obtained illegally—can be presented to grand juries, and prosecutors are under no obligation to present exculpatory evidence, which could demonstrate the defendant's innocence, to the grand

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While the probable cause standard ideally insures that there will be no gross errors, it is not nearly as rigorous as the beyond a reasonable doubt standard, which the trial jury uses. It is the trial jury that is supposed to accept the law as it is written and yet engage in a very rigorous review of the facts. The beyond a reasonable doubt standard at trial is designed to insure that an innocent person is not convicted." In contrast to the standard used in a trial, the probable cause standard to which the grand jury is held requires a much lesser standard of evidence for an indictment. This ensures that prosecutors can get grand jury indictments without overwhelming evidence of criminal activity. Kevin K. Washburn. "Restoring the Grand Jury." *Fordham Law Review* 76, no. 5 (2008). 2359.

[68] Ibid., 209.

[69] Ibid.

[70] Ibid., 222.

[71] Ibid.

jury.[72] Essentially, this ensures that prosecutors can present as much or as little evidence as they want and explain the relevant law in any manner they choose with no judge or defense attorney to contradict their evidence or method. Additionally, there is no double jeopardy for grand juries: if a grand jury were to vote that there was not probable cause to indict against the prosecutor's recommendation, the prosecutor could convene another grand jury and try again. This makes grand juries' functionally no more than a 'rubber stamp' for the decision of the prosecutor. As a statistician wrote, "'If the prosecutor wants an indictment and doesn't get one, something has gone horribly wrong… It just doesn't happen.'"[73] In the federal system, between October 2009 and September 2010, prosecutors pursued charges in 193,000 cases and prosecuted 162,350 cases; only 11 of the more than 3,000 cases that were not prosecuted were due to grand juries not indicting the defendant.[74] Yet, when the people accused of crimes are police officers, grand juries act in the opposite way, almost always refusing to indict police officers. In one county in Texas, 288 consecutive grand juries tasked with evaluating police officers all found no probable cause to charge any of them.[75]

These discrepancies are allowed to persist because prosecutors are largely unaccountable. For some prosecutorial powers, there are natural checks in place.[76] However, most prosecutorial

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[72] *Costello v. United States*, 350 U.S. 359 (1956).
United States v. Calandtra, 414 U.S. 338 (1974).
United States v. Williams, 504 U.S. 36 (1992).

[73] Casselman, Ben. "It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did." FiveThirtyEight, November 24, 2014. https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson/.

[74] Zachary A. Goldfarb. "The Single Chart That Shows That Federal Grand Juries Indict 99.99 Percent of the Time." *The Washington Post*, November 24, 2014. https://www.washingtonpost.com/news/wonk/wp/2014/11/24/the-single-chart-that-shows-that-grand-juries-indict-99-99-percent-of-the-time/.

[75] James Pinkerton. "Hard to Charge." *Houston Chronicle*. 2013. https://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php.

[76] The biggest example of a natural check on prosecutorial power is the right to appeal: if a convicted person believes the prosecutor on their case acted incorrectly, they can appeal their case to the appellate court as an attempt for redress. Also, in the courtroom, prosecutors are held accountable by the opposing attorney and the judge. One scholar wrote, "…for misconduct in [court]—including inflammatory remarks in summation, or improper comment on the defendant's silence, or introduction of hearsay evidence, or even eliciting false testimony—correction in the

discretion manifests in decisions that are made outside of the public eye, and therefore are ripe for misconduct.[77] The most common form of misconduct is failing to disclose exculpatory evidence, and it is exacerbated by a culture of misconduct in prosecutors' offices.[78] The right of defendants to be presented with exculpatory evidence stems from a Supreme Court decision in 1963, *Brady v. Maryland*.[79] Yet prosecutors too often withhold this evidence, either purposefully or otherwise.[80] The Supreme Court has softened the *Brady* rules which gives prosecutors even more latitude: *United States v. Hasting* (1983) ruled that if prosecutorial misconduct leads only to harmless error at trial, the conviction should not be reversed.[81] This decision and others seemingly contradict the promise of *Brady* and the accountability standards set forth by the American Bar Association. Instead of punishing prosecutors for misconduct, the Court has fostered a legal environment in which punishment is rare. One prominent defense attorney, Angela Davis, wrote, "The Court's rulings have sent a very clear message to prosecutors—we

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courtroom seems the obvious remedy." In this sense, prosecutors need not be held personally accountable through an additional judicial process because these checks are in place already to ensure good practices.
John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." 221.

[77] Prosecutorial misconduct falls into several categories: courtroom misconduct (i.e. introducing inadmissible evidence and mischaracterizing facts of the case to the jury), mishandling of physical evidence (i.e. hiding or tampering with evidence), failing to disclose exculpatory evidence, threatening or badgering witnesses, using false or misleading evidence, displaying bias toward a defendant (i.e. denying a speedy trial), and improper behavior during grand jury proceedings.
Steve Weinburg. "Breaking the Rules."

[78] Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 126.

[79] In this landmark case, it became illegal for prosecutors to withhold evidence that could prove the defendant's innocence. Justice Douglas wrote, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of bad faith of the prosecution."
Brady v. Maryland, 373 US 83 (1963).

[80] The trial system is adversarial by nature, and prosecutors are competitive lawyers who need to secure convictions be seen as successful at the jobs. This makes disclosing exculpatory evidence that more unlikely. A legal scholar argued, "*Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task. Whether described as 'tunnel vision,' or with more sophisticated references to 'confirmation bias,' 'selective information processing,' 'belief perseverance,' and avoiding 'cognitive dissonance,' the all-too-human tendency to dismiss or discredit conflicting evidence is easily understood."
John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." 229.

[81] *United States v. Hasting*, 461 U.S. 499 (1983).

will protect your practices from discovery; when they are discovered, we will make it extremely difficult for challengers to prevail; and as long as you mount overwhelming evidence against defendants, we will not reverse their convictions if you engage in misconduct at trial."[82] Prosecutors know they are unlikely to face repercussions for misconduct based in their discretionary powers, and they use that to their advantage.[83]

When prosecutors engage in misconduct to further convictions, not only do they get away with it, but they can actually gain career advancements.[84] Even in situations where their misconduct is caught and reprimanded, it puts no hinderance on their careers. For example, in Cook County, Illinois, three prosecutors were harshly criticized in appellate decisions for their misconduct in trials, but all three were later promoted and became judges.[85] In most cases, misconduct is never exposed, because prosecutors have enormous power that plays out behind closed doors, and defendants who plead guilty forfeit their right to appeal. When the misconduct occurs in private spaces, prosecutors do not have to answer for their actions. This fact alone can result in prosecutorial misconduct: "The sense of absolute power engendered by absolute immunity is exactly the problem…"[86] One measure that attempts to make prosecutors accountable is elections. The lead state prosecutor is an elected position in 46 states.[87] These lead prosecutors, also known as District Attorneys, are in charge of the states' line prosecutors, and can therefore introduce and enforce prosecutorial standards. However, prosecutorial elections fail

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[82] Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 130.
[83] In Miami-Dade County, prosecutors created training slides about *Brady* violations specifically highlighting how difficult it is for the defense to establish that a violation occurred, with a picture mocking the defense for believing they could meet that burden.
Miami-Dade County's Prosecutor's Office. "Miami Prosecutors Brady Training Slides." November 15, 2018. https://assets.documentcloud.org/documents/6470092/Miami-prosecutors-Brady-training-slides.pdf.
[84] Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 138.
[85] Ibid.
[86] John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." 231.
[87] In Delaware, New Jersey, Rhode Island, Connecticut, and Washington, DC, District Attorneys are not elected. Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 10-11.

at properly being accountability structures for prosecutors. 75 percent of District Attorneys seek reelection, and when they do, incumbent prosecutors win 95 percent of the time.[88] This is largely because 85 percent of the times that prosecutors run for reelection, they are unopposed.[89] Even if elections were more contested and challengers had a better chance to beat incumbent District Attorneys, elections would still fail to properly hold chief prosecutors accountable because so much of prosecutors' jobs are not visible to the public. The problem is simple, Davis wrote, "The public cannot hold prosecutors accountable for behavior of which they are unaware."[90] This allows prosecutors the ability to engage in misconduct and use their discretion in ways that boost their conviction rates, which is the most common result of this system.

However, prosecutorial discretion cuts both ways. Typically, it is used to ensure high conviction rates and fill prisons with people of color. But when the accused person is a police officer who committed an on-duty police shooting and killed someone, prosecutorial discretion works in the opposite way: prosecutors typically do everything in their power to keep the officer out of the courtroom and avoid a conviction. This is because prosecutors are incentivized to advocate on behalf of police officers, even when they are the accused party. The very nature of their job requires a close relationship with police departments. The American Bar Association's aspirational standards for prosecutors includes a section describing the relationship prosecutors can build with police officers. The Bar Association says, "The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel… Representatives of the prosecutor's office should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies."[91] Police

[88] Wright, Ronald F. "How Prosecutor Elections Fail Us." 592.
[89] Ibid., 593.
[90] Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 167.
[91] American Bar Association. "Criminal Justice Standards for the Prosecution Function,"

officers start cases by bringing evidence to prosecutors, so naturally the prosecutor's office and police department build working relationships. Prosecutors' close relationships with police departments result in protecting police officers by covering up for officers who have broken laws to arrest people.[92,93] If prosecutors file charges against police officers, they could incur retaliation from the police department. One legal scholar writes, "The prosecutor's job can be made extremely onerous if he does not have willing cooperation from the police, both in investigating and in presenting evidence in court. As a consequence, the prosecutor sometimes finds himself compelled either to present charges against members of the police department for brutality or perjury—which impairs cooperation—or to condone or cover up police crime—which is unethical."[94] This is exactly what happened to Marilyn Mosby, the Baltimore lead prosecutor who charged police officers for Freddie Gray's death. She requested that the Baltimore police execute search warrants to investigate the case—a responsibility only a police officer is allowed to do—and the officers refused to carry out the warrants.[95] After charging the police officer's for Gray's death, she found herself at battle against the entire police department, whose help she needed to prosecute cases.

In addition to the institutional repercussions that accompany pursuing charges against police officers, prosecutors may face personal backlash for failing to protect police officers from

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[92] Freedman, Monroe H. "The Professional Responsibility of the Prosecuting Attorney." *The Georgetown Law Journal* 55 (1967). https://scholarlycommons.law.hofstra.edu/faculty_scholarship/6/.

[93] In accordance with *Brady*, prosecutors should keep lists of police officers with a history of misconduct or lying and should notify the defense when the arresting officer in a case appears on the list. Many prosecutor's offices do not compile these lists or do not make them public, which both protects the officers who have committed misconduct and increases the chances of a conviction for the prosecutor.
Reilly, Steve, and Mark Nichols. "Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison." *USA Today*, October 17, 2019. https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/.

[94] Freedman, Monroe H. "The Professional Responsibility of the Prosecuting Attorney." 1036.

[95] Hylton, Wil S. "Baltimore vs. Marilyn Mosby."

legal consequences. The role of prosecutor functions for many as a stepping-stone for higher public office. Studies of state political officials found evidence of so-called "prosecutorial politicians" in 38 states.[96] For prosecutors with ambitions for higher office, prosecuting a police officer would be damaging for their future career aspirations.[97] Politicians generally find success when they demonstrate that they are tough on crime and politicians who are opposed by police unions face an uphill battle for election.[98] This provides additional incentives for prosecutors to approach cases with accused police officers differently than they do most of their cases. Instead of pushing for quick, harsh convictions, prosecutors often protect the officers accused of unnecessarily using excessive force, especially when the victims are African American.

An examination of Michael Brown's case best demonstrates how the relationship between prosecutors and police forces results in a miscarriage of justice. Darren Wilson, a police officer in Ferguson, Missouri, shot and killed Michael Brown, an unarmed African American 18-year old, in August of 2014. Brown and his friend were walking in the middle of the road in Ferguson at night after having stolen some cigarillos from a local store. Wilson drove up in his police car and told them to move to the sidewalk, and recognized Brown from a description circulated regarding the stolen cigarillos. He positioned his car to block the street, and Brown approached the car. There was an altercation while Wilson was still in the vehicle, and two shots were fired, one of which grazed Brown's hand. Brown ran away from the car, and Wilson left the car and ran after him. Brown turned and moved towards Wilson, and Wilson fired ten shots, at

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[96] Sawyer, Wendy, and Alex Clark. "New Data: The Rise of the 'Prosecutor Politician.'" Prison Policy Initiative, July 13, 2017. https://www.prisonpolicy.org/blog/2017/07/13/prosecutors/.
[97] Ibid.
[98] Joel Mathis. "The Unjust Power of Police Unions." *The Week*, August 20, 2019. https://theweek.com/articles/860002/unjust-power-police-unions.

least six of which hit Brown, killing him.[99] The St. Louis County Prosecutor's Office's decision not to charge Wilson with a crime in this case was shockingly predictable.

The case of Michael Brown epitomizes not merely prosecutorial discretion but how it manifests in relation to grand juries. Under Missouri law, the chief prosecutor in Ferguson had a choice: he could have filed homicide charges against Wilson, but instead he chose to leave the decision to a grand jury.[100] He personally believed that no charges should be filed against the officer, but instead of declining to pursue the case, he brought it to a grand jury.[101] This arguably was a decision made to avoid accountability for the grand jury's decision. A legal scholar states, "By allowing the grand jury to deliberate regardless, [the prosecutor] evaded the need to state publicly that he personally was deciding not to prosecute Wilson for killing Brown. Instead, he argued that he was simply obeying the will of the grand jury."[102] The prosecutors conducted Wilson's grand jury proceedings in contrast to the norm.[103] The transcript of the grand jury demonstrated that it was closer to how a trial might be conducted than a grand jury proceeding.[104] In typical grand jury proceedings, only the reporting officer and the victim of the crime (if there is one) are called to give testimony, which is usually limited. In this case, about sixty witnesses were called to testify.[105] Moreover, the prosecutors cross-examined witnesses who supported the idea that Wilson should be charged, acting in a capacity that is more similar to

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[99] "What Happened in Ferguson?" *The New York Times*, August 10, 2015. https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html.
[100] Roger A. Fairfax, Jr. "The Grand Jury's Role in the Prosecution of Unjustified Police Killings - Challenges and Solutions." *Harvard Civil Rights-Civil Liberties Law Review* 52 (2017): 398–419. 403-406.
[101] Ben Trachtenberg. "No, You 'Stand Up': Why Prosecutors Should Stop Hiding Behind Grand Juries." *Missouri Law Review* 80 (2015): 1099–1110. 1102.
[102] Ibid., 1106.
[103] Jeffrey Fagan, and Bernard E. Harcourt. "Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision." Columbia Law School, December 5, 2014. https://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury.
[104] Ibid.
[105] Ibid.

defense attorneys than prosecutors. Although this practice is highly unusual for a prosecutor in a grand jury setting, the prosecutors asserted that they were trying get to the truth. One of the presenting prosecutors explained, "We want you to understand as attorneys it is our job to challenge witnesses' statements and that sometimes, you know, you don't get to the truth unless you challenge a witness statement."[106] The prosecutors also allowed exculpatory evidence to be presented, thereby building a case on behalf of Wilson. Grand juries do not allow for defense attorneys to be present or argue the opposing side, which usually results in that argument's omission from grand jury proceedings. In this case, the prosecutors called Officer Wilson as a witness and allowed him to present evidence on his own behalf. He gave four hours of testimony on his version of the events.[107] All of this represented highly irregular, but unfortunately predictable legal behavior. The Supreme Court ruled in *United States v. Williams* (1992) that the target of grand jury proceedings do not have a Constitutional right to testify to grand juries.[108] Yet the prosecutors in this case allowed Officer Wilson to testify at length to the grand jury. If prosecutors were to have acted in this case like they do typically, only witnesses that supported charging the defendant would have testified, and certainly Wilson would not have been invited to give his version of events. This was clearly a means for the prosecutors to advocate on Wilson's behalf instead of fully prosecuting him.

The prosecutors also acted contrary to their positions as legal advisors to the jurors. They gave "inaccurate and misleading" information to the jurors about the relevant case law regarding

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[106] "Grand Jury - Ferguson Police Shooting." *Circuit Court of St. Louis County, State of Missouri* 24 (November 21, 2014). https://int.nyt.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grand-jury-volume-24.pdf. 141.

[107] Jeffrey Fagan, and Bernard E. Harcourt. "Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision."

[108] Kristin Henning. "Status, Race and the Rule of Law in the Grand Jury." *Harvard Law Journal* 58 (2015): 833–44. 836.

whether police officers can shoot fleeing suspects under Missouri law.[109] Weeks after the wrong information was given to jurors about the relevant law, the prosecutors attempted to correct the mistake:

> "Previously in the very beginning of this process I printed out a statute for you that was, the statute in Missouri for the use of force to affect an arrest. So if you all want to get those out. What we have discovered, and we have been going along with this, doing our research, is that the statute in the State of Missouri does not comply with the case law… So the statute I gave you, if you want to fold that in half just so that you don't necessarily rely on that because there is a portion of that that doesn't comply with the law… It is not entirely incorrect or inaccurate, but there is something in it that's not correct, ignore it totally."[110]

The prosecutors were unclear about the relevant law, first giving jurors a Missouri law that had been overturned by the Supreme Court in 1985 and only correcting this weeks later, after Wilson had given his testimony.[111,112] In this case, the prosecutors also declined to recommend that the grand jury should indict the defendant, which contradicts common grand jury proceedings.[113] At the close of the proceedings, before deliberation, the prosecutors gave a statement that seemed to argue against an indictment:

> "So in this case because we are talking about probable cause, as we've discussed, you must find probable cause to believe that he committed the offense that you're considering and you must find probable cause to believe that he did not act in lawful self-defense. Not that he did, but that he did not and that you find

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[109] Jeffrey Fagan, and Bernard E. Harcourt. "Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision."
[110] "Grand Jury - Ferguson Police Shooting." 134-136.
[111] Jeffrey Fagan, and Bernard E. Harcourt. "Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision."
[112] The Missouri law had been overturned by *Tennessee v. Garner.*
[113] Ben Trachtenberg. "No, You 'Stand Up': Why Prosecutors Should Stop Hiding Behind Grand Juries." 1102.

> probable cause to believe that he did not use lawful force in making the arrest… Probable cause to believe that he committed the offense, which means that he met all the elements of that offense… And you must find probable cause to believe that Darren Wilson did not act in lawful self-defense and you must find probable cause to believe that Darren Wilson did not use lawful force in making an arrest. And only if you find those things, which is kind of like finding a negative, you cannot return an indictment on anything or a true bill [vote that he should be indicted] unless you find both of those things. Because both are complete defenses to any offense and they both have been raised in his, in the evidence."[114]

In every way, prosecutors acted contrary to how grand juries typically operate. They gave evidence they ordinarily would not have presented, questioned witnesses who supported an indictment, and allowed for a lengthy testimony from the defendant himself.[115] The prosecutors' conduct in Wilson's grand jury proceedings demonstrated how differently prosecutors act when the defendant is a police officer. A legal scholar wrote, "Unlike other prosecutors who typically highlight their best evidence for prosecution, the Ferguson team created an opportunity for jurors to *doubt* probable cause. Through the grand jury screening function, the prosecutors afforded Wilson with a degree of due process protection that far exceeded that which is typically granted to thousands of defendants who are prosecuted in our criminal justice system every day."[116]

There are many reasons why the prosecutors could have chosen to treat Wilson with more deference than any typical defendant gets. For one, their discretionary powers meant they could. Prosecutors have ultimate preference and the tools required to make decisions about the fate of those accused of crimes. They can drop all charges, pursue harsh penalties, or negotiate for some middle ground with hardly any resistance from inside the system and without threat of repercussions for misconduct. Robert McCulloch, the lead prosecutor in Ferguson, had many

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[114] "Grand Jury - Ferguson Police Shooting." 139-140.
[115] Kristin Henning. "Status, Race and the Rule of Law in the Grand Jury." 836.
[116] Ibid.

choices for how to address this case, and he made a conscious and significant choice to present the case to the grand jury in the most favorable way to Wilson as possible. Undoubtedly, he knew that the worst consequences he could face for this decision would be in the court of public opinion, not in any formal legal structure. Perhaps he was motivated by career aspirations and calculated that angering the public would be less damaging to any future career prospects than angering the police department. Maybe he made the decisions that he did because of the relationship that he and his entire office had with the police. The Ferguson Police Department was found to be engaging in tactics meant to raise revenue for the city, with little regard for how it impacted the safety of the community. This was overwhelmingly targeted at the city's African American population; although only comprising 67 percent of Ferguson's population, 93 percent of the arrested citizens in Ferguson between 2012 and 2014 were African Americans. In 90 percent of cases in which the police used force, the victims were African Americans.[117] McCulloch had to have been aware and complicit in these practices, given the prosecutors office's involvement with law enforcement. Maybe explicit racism motivated McCulloch to try the case in the way that he did because Michael Brown was simply another one of Ferguson's black youth, or maybe McCulloch did not even realize this case fit into the larger narrative of police violence against African Americans in Ferguson. There is no way to know what his exact motivation was, but the very nature of prosecutorial culture made his decision as predictable as it was indisputable. The police officer who killed Michael Brown, like so many other police officers who shoot and kill unarmed African American men, walked away without punishment because of the way the prosecutors presented the case to a grand jury. Darren Wilson received

[117] United States Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department, 4-5.

favorable treatment because of his status as a police officer, thus escaping the treatment that usually befalls people who end up in front of a prosecutor accused of a crime.

Prosecutors' main responsibility is to advocate for the punishment of those who allegedly committed crimes. They are exceedingly good at this—in fact, they are overly willing to punish alleged offenders—with the exception of police officers. The system in place for holding police officers accountable is the criminal justice system, in which prosecutors ought to prosecute police officers for on-duty crimes just as they would any other alleged offender, yet Darren Wilson's case is an example of their consistent failure to do so. The institutional attributes of prosecutors that allow them to systematically imprison large portions of African Americans and create mass incarceration also works to inherently protect police officers who use violence unnecessarily and illegally. The Ferguson Police Department failed to protect the community on an institutional level, practicing criminal behavior as state agents, primarily against the city's African American population.[118] The prosecutors' office is responsible for punishing criminal activity, but as it is incentivized to work with and shield the police department from investigation, it is incapable of punishing police officers who use unnecessary deadly force against the citizens. Police departments like Ferguson's and police officers like Wilson can continue to misuse their power and target their citizens without fear of repercussions because the prosecutors' office, with whom they collaborate, will refuse to fully and meaningfully prosecute cases of police violence.

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[118] "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. Further, Ferguson's police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes."
United States Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department.

Chapter 2: "Shoot First and Think Later:" How the Supreme Court Created a Comprehensive Legal Shield for the Police[119]

In 2013, a 24-year old black man named Jonathan Ferrell lost control of his car when he was driving home in Charlotte, North Carolina. He did not have his phone with him, so he left his car and walked to the closest suburban home. He knocked on the door of the house, presumably to get help, but the woman inside perceived him as a threat and called 911. Several police cars arrived at the scene, under the assumption that Ferrell was attempting to break into a woman's home. As Ferrell walked towards the police, the officers instructed him to get on the ground. Presumably fearful, he began to run. One of the officers fired twelve rounds, and ten shots hit Ferrell, killing him.[120] One year later, in 2014, a black man with a history of mental illness named Dennis Grigsby banged on a neighbor's window in Texas. The neighbors had been burglarized before, and they too called the police. Grigsby advanced on the officer who arrived at the scene with a metal object, and the officer shot and killed him. The metal object turned out to be a spoon.[121] These instances are not specific to African Americans. In 2015, a Hispanic man named Daniel Covarrubias had been to a hospital in Washington because of hallucinatory drug use. Bystanders saw him running and called the police, who found him in a lumber yard. Two police officers confronted him and, thinking the cell phone that he took out of his pocket was a gun, shot him five times and killed him.[122] While these three cases are unique, they also have shocking similarities.

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[119] *Kisela v. Hughes.*
[120] Jad Abumrad. "Mr. Graham and the Reasonable Man." More Perfect, n.d. https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/mr-graham-and-reasonable-man.
[121] Pérez-Peña, Richard. "Fatal Police Shootings: Accounts Since Ferguson." *The New York Times*, April 8, 2015, sec. U.S. https://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html, https://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html.
[122] Pérez-Peña, Richard. "Fatal Police Shootings: Accounts Since Ferguson.".

From a legal standpoint, all three of these cases have one very important fact in common: the officers who shot and killed these men felt that their lives were in danger. In two of the cases, officers mistook everyday objects for deadly weapons, and shot out of mistaken self-defense. In the third case, there was a dispute over whether Ferrell was running at the officers or between them in an attempt to get away.[123] The justification for the use of force when officers feel threatened is a matter of much legal debate. The legal doctrine created by the Supreme Court is structured around protecting officers when they act out of fear for their own and others' lives. The doctrine has had a profound influence on police culture, the use of deadly force, and heightened skepticism of the legal system by minority communities. Qualified immunity, the protection from liability afforded to police officers, is intimately related to America's racial history and modern relations.

Law enforcement officers are one of the few state agents given the liberty to use deadly force. When officers' on-duty actions fall within the protection of qualified immunity, the officers cannot be legally punished for the consequences of those actions. This protection is derived from their position as public officials: when public officials make discretionary decisions on behalf of the government, they are entitled to a certain level of protection from legal punishment. Just as police officers have the authority of the state to make decisions like whom to arrest and when to use force to subdue a threat, they have the protection of the state, within certain bounds, if they are wrong about those decisions. When citizens allege that their constitutional rights were violated by police officers, those officers are often protected via qualified immunity and do not have to answer for the violation.[124]

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[123] Jad Abumrad. "Mr. Graham and the Reasonable Man."

[124] Qualified immunity is irrespective of which constitutional right was allegedly violated. John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." 1.

Qualified immunity has a long history and it is inextricably connected to race relations. In the wake of the American Civil War, Congress passed laws to explicitly protect vulnerable African American communities from state and vigilante forces.[125] One such law was the Civil Rights Act of 1871, which was specifically aimed at providing a recourse for legal remedy in response to Ku Klux Klan activities.[126] Section 1 of the Civil Rights Act of 1871 later became known as Section 1983, and it gives individuals the right to sue state government employees for official actions taken. The law states, "Every person who…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…"[127] The law is not a source of rights itself, but codifies the ability for individuals who suffer rights violations, as defined in other laws, to seek a remedy from the judicial system. A century later, Justice Foster wrote, "The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law…"[128] Section 1983 is the legal basis for bringing allegations of illegal conduct against police officers.

Section 1983 is so broad that, on its face, it seems to allow legal action against any state official for deprivation of any constitutional right. However, the courts have consistently interpreted it as narrower than its language implies. Specifically, it is read not to conflict with the

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[125] Before the Civil War, there was little protection from discriminatory or oppressive state laws. The federal government largely did not constrict state power and there was no affirmative legal remedy for citizens whose constitutional rights were restricted by states.
Blackmun, Harry A. "Section 1983 and Federal Protection of Individual Rights-Will the Statute Remain Alive or Fade Away?" *New York University Law Review* 60, no. 1 (1985): 1–29. 3-4.
[126] Ibid., 5.
[127] LII / Legal Information Institute. "42 U.S. Code § 1983 - Civil Action for Deprivation of Rights," n.d. https://www.law.cornell.edu/uscode/text/42/1983.
[128] *Mitchum v. Foster*, (1972) 407 US 225. (Internal citations omitted.)

immunities of state officials, like qualified immunity for police officers. The Court first applied qualified immunity to police officers in a case called *Pierson v. Ray* (1967).[129] The case was brought to the Court after a group of clergymen, both white and African American, planned a prayer pilgrimage to promote bus integration. The group planned to pass through Jackson, Mississippi and use the segregated bus facilities, knowing they were likely to be arrested. They were indeed arrested, although all the charges were later resolved or dropped. The clergymen brought a case against the officers for damages for their false arrest under Section 1983.[130] In the decision, the Supreme Court stated that Congress's intent in passing Section 1983 was not to undermine understood immunities for public officials. Justice Warren wrote, "The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities."[131] Common law is a tradition of law, dating back to British colonial law, that is not necessarily codified but is understood to be the law by the judicial system. *Pierson* clarified that the common law protection of immunity for police officers was not invalidated by Section 1983. The judicial process after the clergymen's arrests concluded that they did nothing criminal, but the police officers who arrested them were protected from liability for making the false arrests originally.

This case established that police officers could not be held liable for making arrests that did not later result in criminal penalties. The Court declared, "Under the prevailing view in this country, a peace officer who arrests someone with probable cause is not liable for arrest simply because the innocence of the suspect is later proved."[132] This demonstrated the basis for the Court's use of qualified immunity to protect police officers: while not an absolute shield, it

[129] *Pierson v. Ray*, (1967) 386 US 547.
[130] Ibid.
[131] Ibid.
[132] Ibid.

allowed officers to act within their official capacity without fear of punishment for making a mistake in the course of their work. *Pierson v. Ray* was the first instance in which qualified immunity was applied to police officers, but the concept of qualified for government officials far predates that decision. The principles underlying qualified immunity have been protecting government officials long before the twentieth century. Legal scholars wrote, "…from the earliest days of the republic, American law has sometimes shied away from holding government officials liable for reasonable mistakes."[133] Because qualified immunity is not a statutory protection but a legal construction, the Court has the freedom to manipulate its requirements, and thus it has evolved over time.[134]

It was not until 1982, in a case called *Harlow v. Fitzgerald* (1982), that the Court adjusted the qualified immunity test so as to not base it on intent. This case was about the allegedly retaliatory firing of an Air Force employee who sued the presidential aides who were involved in the decision to fire him. The Court ultimately ruled that the aides were entitled to immunity for their conduct.[135] In articulating the parameters of qualified immunity in his majority opinion, Justice Powell clearly defined what actions would be protected by immunity. Powell wrote, "We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

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[133] Aaron L. Nielson, and Christopher J. Walker. "A Qualified Defense of Qualified Immunity." 1864.

[134] A Supreme Court case in 1849, *Wilkes v. Dinsman*, provides an early example of qualified immunity for government officials. Justice Woodbury wrote, "…the officer, being entrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him either that he exercised the power confided in cases without his jurisdiction or in a manner not confided to him, as with malice, cruelty, or willful oppression… In short, it is not enough to show that he committed an error in judgement, but it must have been a malicious and willful error." At the time, the parameters for qualified immunity were determined by the motivation of the government official; if the court found no evidence of malicious intent, the officer was entitled to immunity. In other words, qualified immunity protected all but malicious government officials.
Wilkes v. Dinsman, (1849) 48 US 89.

[135] *Harlow v. Fitzgerald*, (1982) 457 US 800.

known."[136] This changed the test of qualified immunity to an objective standard; instead of relying on the intent of the government official in question, it based immunity on whether the actions of the official were reasonable. Justice Powell explained exactly why this is a superior method for applying qualified immunity:

> "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences."[137]

Although this case was not about police conduct specifically, the standard it created extended to police officers as well as other government officials. This objective reasonableness standard replaced the "malicious and willful" standard as the test to determine whether a police officer was entitled to qualified immunity. The objective test in *Harlow* recognized the paradox inherent in the discretion of government officials. Police officers have immense discretion: every time they make a decision, they are deciding whether or not to restrict a person's freedom. If they do so mistakenly, they infringe on a person's rights, but failure to act can result in a person's ability to commit further crime. In the *Harlow* decision, this choice is referred to as the two evils: the choice between false arrest or mistaken restraint. Justice Powell wrote, "The resolution of

[136] Ibid.
[137] Ibid. (Internal citations omitted.)

immunity questions inherently requires a balance between the evils inevitable in any available alternative."[138]

The legal system recognizes that one evil is more likely to result in a lawsuit that can lead to punishment for the police officer and has structured the qualified immunity doctrine to specifically protect against that likelihood. A legal scholar wrote, "An individual hurt by government conduct usually knows exactly whom to blame. The causal connection between the plaintiff's injury and the defendant's conduct is typically clear, and the victim has no trouble stating a cause of action. A person injured by official *in*action—by the officer who foregoes an arrest… often has difficulty identifying any officer responsible for subsequent injury and proving a causal connection. As a result, the risk of being sued for erroneous *action* is much higher than the risk of being sued for erroneous *inaction*…"[139] In granting police officers some protection from liability, qualified immunity minimizes the deterrent to action that possible lawsuits would pose to police officers. In this way, it encourages police action. This can be good, especially because people expect the police to help curb crime, or at least facilitate the removal of criminals from an environment in which they could continue committing crime. The police should be a force that ensures security, and if police officers too often err on the side of inaction due to fear of liability, they would not be able to provide safety and security. However, if qualified immunity gives too broad a protection for police officers, then constitutional violations can occur frequently without punishment. The Supreme Court granted qualified immunity to police officers using a standard of reasonableness in *Harlow* in 1982; ever since, the Court's decisions on qualified immunity for police officers have expanded the doctrine to protect police officers in

[138] Ibid.
[139] John C. Jeffries, Jr. "The Liability Rule for Constitutional Torts." 34.

more scenarios, thereby limiting the ability for citizens to use the courts to protect their constitutional rights.

In 1986, the Supreme Court heard the case of *Malley v. Briggs* (1986), and despite ruling against the police officers, the Court actually expanded the protections of qualified immunity. This case centered around an improper warrant: police officers obtained a warrant to search a house for marijuana, but they had not established enough evidence for probable cause, so the warrant was improperly signed. The police officer who served the warrant argued that he should be protected by qualified immunity because he believed he was serving a proper warrant, but the Court found that this did not entitle him to qualified immunity. However, the language the Court used in applying the qualified immunity test was broadened from the standard set in *Harlow*. In his majority decision, Justice White wrote: "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law… Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized."[140] This was more than a restatement of *Harlow*, but a significant change in the qualified immunity doctrine as it relates to police officers.

Harlow created a test that balanced two evils, ostensibly so all police officers could both keep communities safe and refrain from over-policing. While the differences in *Harlow* and *Malley* may be linguistically subtle, the impact of the change in language is substantial. *Harlow*'s standard protects police officers from liability unless their actions *violate clearly established*

[140] *Malley v. Briggs*, (1986) 475 US 335.

statutory or constitutional rights according to *a reasonable person*.[141] *Malley*'s standard protects police officers unless their actions *obviously* violate rights according to *all reasonably competent police officers*. This new standard in *Malley* explicitly protects *all but the plainly incompetent* police officers and *those who knowingly violate the law*.[142] As such, under the *Malley* standard, if any reasonable and competent police officers could disagree on whether someone's rights were violated, then the court must find that the police officer who committed the questionable acts has immunity from liability. This is different from *Harlow*'s standard: if a reasonable person could believe that the officer's actions were in violation of a clearly established right, then under *Harlow*, the officer would not be entitled to immunity. This tipped the scales to favor police officers over victims of alleged rights violations by broadening the requirements for granting immunity. In relegating the denial of immunity only to officers who are "plainly incompetent" or "knowingly violate the law," the Court substantiates the narrative that police officers who unjustifiably use force and violate constitutional rights are simply 'bad apples.' This mitigates the idea that there can be problems with the police system as a whole, especially when it comes to police brutality.

In 1987, just a year after *Malley*, the Supreme Court took on another case of police misconduct and broadened qualified immunity still further. *Anderson v. Creighton* (1987) was a case brought against an FBI agent after he conducted a warrantless search on a house, operating on the belief that a suspected bank robber was hiding in the house. There was no bank robber, and the residents of the house brought a case against the FBI agent for unreasonable search and seizure. The Court found that the agent was entitled to qualified immunity for his actions.[143] In

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[141] *Harlow v. Fitzgerald.*
[142] *Malley v. Briggs*.
[143] *Anderson v. Creighton*, (1987) 483 US 635.

the majority opinion, Justice Scalia explained that the qualified immunity test must not be applied at a general level; in order for officers to be denied immunity, their actions must violate a clearly established right. Justice Scalia emphasizes that the right must not be alleged at an abstract, general level because immunity would be denied too often. For example, if plaintiffs could argue that an officer violated their rights as codified in the Due Process Clause, then no officer would be granted immunity: it would turn qualified immunity into "virtually unqualified liability."[144] Instead, in order for an officer to be denied immunity, "in light of preexisting law, the unlawfulness must be apparent."[145] Once again, this language broadened the scope of qualified immunity. Not only must an officer's actions violate a clearly established right in order for the officer to be denied immunity from liability, but the violation must be *apparent* from *preexisting law*. This means that previous cases of similar conduct by police officers must have been found to be clear constitutional violations in order to demonstrate that all reasonable police officers would know that conduct is illegal.

The result of the preexisting law requirement is that police officers' blatant but novel misconduct is legally protected under qualified immunity. One such example was displayed in a case called *Robles v. Prince George's County* (2002), a case that made its way to the Fourth Circuit. This case began when the police responded to a disorderly noise complaint at 3:30am in an apartment in Prince George's County (PGC) and found several men drinking, including Nelson Robles. Robles had an outstanding traffic warrant in the neighboring county, so he was arrested. The police officers needed to arrange a prisoner transfer with the police department of the neighboring county but arranging an official prisoner transfer is a time-consuming process,

[144] Ibid.
[145] Ibid.

so the officers attempted to facilitate the transfer informally, which was not an uncommon occurrence. The PGC officers called the neighboring county to get an officer to meet them at the border of the two counties, but no one from the neighboring county was available at the time. The PGC police officers decided to drive Robles to a deserted parking lot in the neighboring county. They tied him to a metal pole and left a note that he had an outstanding warrant out for his arrest in that county, and then the officers drove away. They called the neighboring county's non-emergency number to tell them to pick up Robles, but they left out that they were police officers and that Robles was tied to a pole. Robles had to stand there for about ten to fifteen minutes before officers from the neighboring county showed up and arrested him.[146] Robles sued the police officers from Prince George's County for violating his civil rights. The Fourth Circuit ruled that the police officers were entitled to qualified immunity.

The Fourth Circuit Court's decision in this case clearly demonstrates that qualified immunity no longer serves to protect citizens by regulating police conduct, but only protects police officers from legal repercussions. The Fourth Circuit used the previous Supreme Court precedent to arrive at the conclusion that the officers who tied up Robles and left him in a parking lot were entitled to qualified immunity for doing so and therefore could not be held liable for violating Robles's constitutional rights. They relied on the test put forth by *Anderson* to formulate their opinion. The justice writing for the majority wrote, "Police officers performing discretionary acts generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Thus, liability in this case turns on what notice the PGC officers had that their conduct violated federal constitutional

[146] *Robles v. Prince George County Maryland*, (2002) 308 F.3d 437.

law."[147] This was interpreted by the Fourth Circuit to mean that the exact conduct that the officers did in this case must have been previously ruled to be illegal. The Fourth Circuit justices found that there was no such precedent:

> "Although the officers' actions in this instance were foolish and unorthodox, it is also not clear that at the time they acted they should have reasonably known that their conduct violated Robles' constitutional rights. The officers should have known, and indeed did know, that they were acting inappropriately. But whether they understood their conduct violated clearly established federal law is an altogether different question… Going forward, officers are now on notice that the type of Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose implicates federal due process guarantees. Going backward, however, and imposing retrospective liability would eviscerate the requirement of notice at the core of the qualified immunity doctrine."[148]

Justice Scalia explained in *Anderson* that the qualified immunity test must be applied specifically and with reference to preexisting law. In practice, this meant that *foolish, unorthodox, inappropriate,* and *degrading* police conduct would be shielded from punishment unless a previous court decision has found that same conduct to be unlawful. In response to this decision, one scholar commented, "The *Robles* defendants similarly escaped liability, not because there was some reasonable basis or legitimate (if misguided) governmental purpose in their actions, but because they were lucky enough to find that there were no cases on the books in which the right kind of pole was used for the right amount of time."[149] When qualified immunity is so expansive as to protect officers from misconduct that has not been already proven illegal, it no

[147] Ibid. (Internal citation omitted.)
[148] Ibid.
[149] Saiman, Chaim. "Interpreting Immunity" 7, no. 5 (October 2005): 51. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1324&context=jcl. 1188.

longer balances two evils, but protects police from having to answer for their conduct in almost every situation.

Two Supreme Court cases within the last ten years demonstrate that the Supreme Court continues to be committed to expanding protections for police officers. *Ashcroft v. al-Kidd* (2011) was a case concerning a native-born U.S. citizen who was arrested as a federal material witness after the events of September 11, 2001 but was never called to testify nor charged for a crime.[150] *District of Columbia v. Wesby* (2018) was a case of false arrest brought forth by people who were partying at an empty, abandoned house.[151] In both cases, the Supreme Court unanimously ruled that the public officials were entitled to qualified immunity. Justice Scalia wrote the majority opinion in *Ashcroft*, and his linguistic license further expanded qualified immunity. Scalia wrote, "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[152] In this iteration of the qualified immunity test, Justice Scalia adds two modifications: that *every* reasonable official would have to regard the officer's actions as constitutional violations in order for immunity to be revoked, and that preexisting law must demonstrate that the question of the rights violation is *beyond debate.* In the majority opinion in *Wesby*, the requirements for immunity were further expanded. Justice Thomas wrote, "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling

[150] *Ashcroft v. Al-Kidd*, (2011) 563 US 731.
[151] *District of Columbia v. Wesby*, (2018) 583 US __.
[152] *Ashcroft v. Al-Kidd*.

authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule that the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know."[153] Justice Thomas reaffirms Justice Scalia's qualified immunity test and adds that the preexisting law that makes the misconduct clear must be *settled law*. While these cases do not add substantive requirements to the qualified immunity doctrine, they do continue to protect police officers from liability by making the requirements to revoke immunity even harder to achieve. At this point, qualified immunity has moved far from the balance between the two evils that worried Justice Powell in *Harlow* and has become a nearly all-encompassing shield of immunity for police officers.

Complicating the qualified immunity doctrine is the doctrine of excessive force. While qualified immunity applies to all police conduct, including examples such as serving an improper warrant or wrongfully arresting someone, the doctrine of excessive force applies specifically to cases in which it is alleged that a police officer used more force than was necessary in a given situation. In cases without alleged excessive force, qualified immunity is the only relevant case law to determine whether a case should proceed to trial. When a case includes alleged excessive force, the qualified immunity test must be interpreted in light of the excessive force doctrine. This means that when a judge must determine whether clear preexisting law makes an officer's conduct unlawful, the judge takes into account the standards for determining whether the force used was excessive. If the force used is not found to be excessive, then the qualified immunity test will most likely entitle the officer to immunity; if the force is excessive, then immunity is significantly less likely. When a plaintiff alleges that the officer used excessive force, the

[153] *District of Columbia v. Wesby*.

qualified immunity test cannot proceed without first determining whether the force was legally excessive. There are two Supreme Court cases that established the current test used to determine whether police force is excessive: *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989).

Tennessee v. Garner began with a simple burglary. Edward Garner, an African American teenager, broke into a house in Memphis, Tennessee. Neighbors called the police, and two officers responded to the call. One of the officers, Elton Hymon, went around to the back of the house. He saw Garner run across the backyard to a chain-link fence that was six feet tall. His flashlight illuminated part of Garner including his face and hands, so the officer knew that Garner was young, and he was "reasonably sure" that Garner was unarmed.[154] Hymon identified himself and yelled for Garner to stop, but Garner began to climb the chain-link fence. Hymon shot him in the back of the head, and Garner died later in the hospital. He was found to have stolen a purse and ten dollars.[155] The Supreme Court ruled against the state, holding that Garner's death amounted to an unreasonable seizure under the Fourth Amendment. The relevant Tennessee statute allowed deadly force to be used to stop any fleeing suspects; the Court ruled that this statute was unconstitutional. The majority opinion stated that the use of deadly force is not reasonable if there is no threat of harm. Justice White wrote, "It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him

[154] *Tennessee v. Garner*, (1985) 471 US 1.
[155] Ibid.

dead."[156] The Tennessee statute was found unconstitutional because it allowed deadly force against people who were not a danger to anyone, which the Court found violated the Fourth Amendment. Justice White explained that deadly force would be constitutional if the suspect posed a threat. He wrote, "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[157] The precondition required for police officers to legally use force are very broad: essentially, if suspects are a threat to anyone, have a weapon, or there is probable cause to believe they have committed a violent crime, then using force is justified.

In *Graham v. Connor* (1989), the Supreme Court ruled that the circumstances for the use of force are to be evaluated from the perspective of police officers, which expands the circumstances in which force is justified. The case began when Dethorne Graham, an African American diabetic, felt he was beginning to have an insulin reaction. He knew that he needed to raise his blood sugar, so he asked a friend to drive him to a convenience store nearby to get some orange juice. However, when Graham entered the convenience store, he saw that the checkout line was too long, and so he hurried out of the store and asked his friend to drive him to another friend's house instead. A police officer, Officer Connor, saw him enter the store and leave quickly, seemingly without buying anything, and found his behavior suspicious. He pulled over

[156] Ibid.
[157] Ibid.

the car to investigate. Graham's friend told the officer that Graham was having a sugar reaction, but the officer ordered them to wait while he found out what had happened at the store. While Officer Connor went back to his car to call for backup, Graham got out of the car, ran around it in a circle twice, sat down on the curb, and passed out. Backup police officers arrived, and despite the friend's insistence that Graham just needed some sugar, Graham was rolled over and his hands were handcuffed behind his back. One officer said, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."[158] Multiple officers picked Graham up and put him face down on the hood of the car, and which point he regained consciousness and asked the officers to check his wallet for the diabetes card he carried. In response, one of the officers shoved his face into the hood of the car. Then multiple officers grabbed Graham and threw him headfirst into the police car. Meanwhile, a friend brought Graham orange juice, but the officers refused to let Graham drink it. When Officer Connor finally heard that nothing had happened at the convenience store, the officers drove Graham home and let him go. Graham was left with a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and a loud ringing in his ear that never went away.[159]

Through the lens of this case, the Court created a standard to judge excessive force that is based on objective reasonableness and grounded in the Fourth Amendment.[160] Similar to the qualified immunity case law, the Court recognized that the excessive force doctrine was a matter of balancing opposing interests. It is important both that force not be used improperly and that

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[158] *Graham v. Connor*.
[159] Ibid.
[160] Basing this standard in the Fourth Amendment continued the Court's practice of judging officers' conduct from an objective standpoint instead of requiring that the officers' intentions be examined: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."
Ibid. (Internal citations omitted).

police officers can use force to protect themselves and others. In the majority opinion, the Court acknowledged that officers must make decisions regarding the use of force within a split second. Justice Rehnquist wrote, "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[161] The Court considered the Fourth Amendment's objective standard and the speed at which officers must decide whether or not to act to create the test with which police force must be judged. This objective reasonableness standard requires that police use of force must be evaluated from the perspective of the officer, in the moment that the action is taken, without the benefit of hindsight. In the *Graham* case, this test was used to find the officer's use of force was justified. The case facts from the perspective of the officer in the moment the action was taken and without hindsight display a different story than reality: Officer Connor saw a man run in and then out of a convenience store very quickly without buying anything. He pulled over the car, and the man started behaving erratically and unpredictably. None of the information that the officer learned after the moment of action, like the fact that Graham was having an insulin reaction and he did nothing wrong at the convenience store, could be used to evaluate the officer's actions.[162] As a result, the treatment that Graham was subjected to while having the insulin reaction was deemed justified. This test was created to be objective and reasonable and attempted to balance the two evils of excessive force. However, in taking into account the precarious position of police officers, it mandates that the jury must view police actions from their perspective. If this perspective conflicts with the truth, the actual facts of the case must be

[161] Ibid.
[162] Jad Abumrad. "Mr. Graham and the Reasonable Man."

disregarded in favor of the facts as presented by the officer. When judging a case based on what a police officer could reasonably believe was happening, instead of based on what actually happened, it can excuse actions like in Graham's case, in which a diabetic was brutalized for having an insulin reaction in view of a police officer. It can also justify police officers who shoot people who they believe were carrying a weapon, and therefore were posing a threat to others, even if in actuality they were unarmed.

The doctrine of qualified immunity and the doctrine of excessive force must be used in conjunction to evaluate cases in which police officers are alleged to have used excessive force. In order for police officers' immunity to be revoked, the officers' conduct must clearly be in violation of the Fourth Amendment, which is determined by the *Graham* test, in light of preexisting, settled law. *Scott v. Harris* (2007) provides an example of this standard's high threshold. The case began when Victor Harris, and African American man, was driving in Georgia at seventy-three miles per hour on a fifty-five miles per hour street. Deputy Timothy Scott saw him speeding and tried to pull him over, but Harris increased his speed and drove away. Scott and multiple other police cars began chasing Harris. After six minutes and nearly ten miles of pursuing Harris's car, Scott asked permission from his supervisor to engage in a Precision Intervention Technique, which is a method of causing a fleeing car to spin to a stop. He received permission, and Scott pushed his bumper to the back of Harris's car. Harris lost control, and the car flew off the road, down an embankment, and turned over. Harris was rendered a quadriplegic from the crash.[163]

The Court ruled that Scott was entitled to qualified immunity. The Court evaluated the threat that Harris's behavior posed to the responding officers and bystanders and found that in

[163] *Scott v. Harris*, (2007) 550 US 372.

light of these factors, Scott's response was objectively reasonable. Justice Scalia wrote in his majority decision that the Court had to weigh the larger probability of injuring or killing the singular driver of the vehicle against the smaller probability of potentially injuring or killing several innocent bystanders, as this was the dilemma presented to Scott in the moment that he took action.[164] To properly weigh these concerns, Justice Scalia explained that Harris's culpability should also be considered. He wrote, "It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did."[165] *Garner* established that police officers can use force when someone presents a threat to the officers or to the public, and *Graham* instructs the Court to evaluate the case from the perspective of the officer. In this case, from Deputy Scott's perspective, Harris's driving was a threat to others, so the Court found that Scott forcing him off the road was an objectively reasonable response to the danger.[166] Given that Scott's conduct was objectively reasonable, it did not violate any clearly established law, which meant Scott was entitled to qualified immunity.

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[164] There were conflicting reports between the Eleventh Circuit Court and the Supreme Court on whether bystanders were present and in danger.
Ibid.
[165] Ibid.
[166] Justice Scalia also explained that to stop pursuing Harris was not a viable option to end the danger. Firstly, because there was no guarantee that stopping would have persuaded Harris to stop speeding: "Given such uncertainty [of the goal of police officers stopping their pursuit], respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." Secondly, to stop pursuing the vehicle would set a poor precedent: that any fleeing suspect could get away from police officers if they simply drove recklessly enough to endanger the lives of bystanders, because it would force police officers to stop their pursuit.
Ibid.

In addition to requiring that cases be examined from the officer's perspective, *Graham v. Connor* firmly established that Section 1983 cases must be evaluated under the Fourth Amendment. Before *Graham*, police use of force cases could be judged based on the Fourth Amendment or the Fourteenth Amendment, in which the Due Process clause and the Equal Protection clause provide a source of collective rights and protection for groups who experience collective inequality. After *Graham* was decided, cases were evaluated using the Fourth Amendment, which protects an individual's right against search and seizure by the government. This was a substantial change: before *Graham*, only 28 percent of federal cases about police excessive force included an evaluation of the Fourth Amendment. After *Graham*, that rose to 90.4 percent.[167] On the other hand, discussion of the Fourteenth Amendment fell from 40 percent before *Graham* to 26 percent after, and of the 26 percent of cases in which it was discussed, 82.8 percent of those cases rejected the victim's Fourteenth Amendment claim.[168] This suggests that *Graham* substantially changed case law on this issue. As two scholars reported, "…the Supreme Court's holding in *Graham produced rather than mirrored* any consensus or normative understanding regarding police excessive force claims being rendered as Fourth Amendment concerns."[169] The Court's decision in *Graham* was not a reflection of common practices in the courts at the time, but a dramatic change in how the reasonableness of police officers must be judged. Under the Fourth Amendment, all cases must be viewed individually. If cases were to be adjudicated under the Fourteenth Amendment, arguments could be made based on the collective rights of groups.

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[167] Obasogie, Osagie K., and Zachary Newman. "The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor."
[168] Ibid.
[169] Ibid.

When a police officer uses excessive force against an African American individual, *Graham* requires that the case be viewed as a whole, rather than part of a larger practice of police force against African Americans. After *Graham,* only 17.2 percent of cases mentioned the race of the victim.[170] This displays "constitutional colorblindness," or the practice of ignoring the racial aspect of the pattern of police use of force.[171] Due to the decision in *Graham,* Section 1983 claims cannot be made under the Fourteenth Amendment, meaning that the legal system cannot evaluate the larger pattern of police violence against African Americans. The pattern of police violence against African American communities cannot color the court's decisions in these cases. Every case must be viewed from the perspective of the police officer, substantially preferencing police officers' protection above the collective experience of African Americans. Not only does this separate each victim from accessing a remedy based on a history of repeated injustice against the group to which they belong, but it also frames each officer who does not qualify for immunity as a rogue cop or bad apple; not part of a bigger problem, but as an individual whose actions are unconnected to the broader history of racial injustices. The author of the study strongly stated the effect of *Graham* on the legal system's treatment of these cases:

> "By individualizing police violence and scaling it down from a structural matter steeped in centuries of racial tensions to an individual dispute between officer and citizen, the Fourth Amendment has been used to depoliticize, deracialize, decontextualize, and ahistoricize a distinctive racial justice issue concerning the disproportionate use of force against people of color. This individualizing dynamic not only warps our understanding of the causes and consequences of police violence, but often leaves victims without any remedy."[172]

[170] Ibid.
[171] Ibid.
[172] Ibid.

The Court in *Graham* effectively eliminated the possibility for courts to view police brutality as a whole, which would have allowed for race-conscious conclusions to be made and remedies to be granted. Instead, the Court's precedent requires isolating each case from its historical context, which does not allow for groups to claim collective violations of their rights. This decision effectively isolated the Court from the larger societal patterns of disproportionate police violence and removed the legal system from being a means for addressing and changing those patterns.

The Supreme Court's choice to base *Graham* on the Fourth Amendment and the incremental broadening of the qualified immunity doctrine are representative of the Court's ideological shift after Chief Justice Earl Warren stepped down in 1969. The Warren Court was known for its "judicial activism" and turned the Court into "an independent and aggressive guarantor of constitutional rights."[173] This ended with the Warren Court, however, and the next three Chief Justices—Burger, Rehnquist, and the current Chief Justice John Roberts—were all appointed by Republican presidents with very different ideas about the role of the Court. The agenda of the Court shifted from protecting civil liberties, especially those of minorities, to limiting laws that were created to counteract the effects of historical discrimination and shift power to state governments instead of the federal government. Between 1965 and 2019, Republican coalitions in elected positions appointed likeminded, conservative individuals to unelected positions like the Supreme Court. These unelected justices, unaccountable to the public, were able to decide controversial civil rights cases in favor of increasing state power at the expense of individual liberties, following an agenda that elected officials were unable to

[173] Jeffrey Toobin. *The Nine: Inside the Secret World of the Supreme Court*. Knopf Doubleday Publishing Group, 2008. 2.

implement through legislation for fear of public backlash that could result in losing reelection.[174] This is reflected in the evolution of the Court's decisions in qualified immunity cases. A Ninth Circuit judge explained that the Supreme Court has adopted "…a strictly conservative and often extreme ideology that elevates the interests of state courts and local officials above those of the individual and dictates the Court's decisions whenever it considers the cases of persons who seek the enforcement of their constitutional rights through habeas corpus or §1983."[175] The Court's reluctance to grant claims under Section 1983 has resulted in the expansion of the qualified immunity doctrine from being a balance of two evils to an all-encompassing legal shield for police officers that fails to protect the rights of individuals.

In *Kisela v. Hughes* (2018), the Court again ruled in favor of a police officer, granting him qualified immunity for shooting a woman with a history of mental illness. The opinion in this case was written per curiam and Justice Sotomayor wrote a strong dissent (joined by Justice Ginsburg). This case started when someone called the police and reported a woman who was acting erratically and hacking at a tree with a kitchen knife. Officer Kisela and two other officers responded and found Chadwick in the driveway of her house and then Hughes, who matched the description of the woman acting erratically, exiting the house holding a knife. There was a chain-link fence between the two women and the police officers. Hughes stopped about six feet from Chadwick, and all three officers told her to drop the knife. She looked calm, but did not comply, and Officer Kisela dropped to the ground to avoid the bar of the chain-link fence and shot Hughes four times. Then the officers jumped the fence and handcuffed Hughes. The time elapsed

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[174] Jesse H. Rhodes. *Ballot Blocked: The Political Erosion of the Voting Rights Act*. Stanford University Press, 2017.
[175] Reinhardt, Stephen R. "The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences." *Michigan Law Review* 113, no. 7 (2015). https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1217&context=mlr.

between the officers seeing Chadwick and Officer Kisela shooting Hughes was less than a minute.[176] Using the standards mandated by *Garner* and *Graham*, the Court evaluated whether, from the officer's perspective, Hughes was a threat. The majority opinion found that Kisela reasonably believed that Hughes was a danger to Chadwick. Although the officers were not in danger, *Garner* allows police officers to use force to protect the safety of other people, and Hughes was only a few feet from Chadwick and not complying with demands to drop the knife. Kisela knew that a concerned citizen had called the police because Hughes was hacking at a tree with a knife, and he had only seconds to assess the danger Hughes posed to Chadwick. The majority opinion stated, "This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment."[177] The Court also found that there were no clear cases in which a police officer acted similarly and their conduct was ruled unconstitutional, which did not make the officer's actions unquestionably unconstitutional. Applying the relevant precedents, both in the doctrine of excessive force and the doctrine of qualified immunity, the Court ruled that Kisela's actions were not apparently unlawful, and therefore he was entitled to qualified immunity.

Justice Sotomayor disagreed. She wrote, "If [the] account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no clearly established law."[178] In her dissent, Justice Sotomayor reiterated the facts of the case, adding a few that the majority opinion left out: before Hughes was shot, she was unmoving and seemed "composed and content" about six feet away from Chadwick. She was holding the knife down

[176] *Kisela v. Hughes*.
[177] Ibid.
[178] Ibid. (Internal citations omitted.)

and the blade was not facing Chadwick. Justice Sotomayor also emphasized that Hughes had done nothing illegal, was not suspected of a crime, and did not raise the knife to threaten Chadwick or anyone else. She did not seem to be aware of the officers at all. Moreover, the two other officers who arrived on the scene with Officer Kisela did not choose to shoot; one of them testified that they wanted to continue talking to Hughes to get her to drop the knife. Kisela was the only one who thought force was necessary at that time, and he shot without giving any warning that he was about to do so. To determine that a police officer is entitled to qualified immunity, the Court must evaluate that no reasonable officer would have acted differently in that situation. Justice Sotomayor argued that the presence of two other police officers in the exact same situation as Officer Kisela, yet who chose not to fire their weapons, proves that not all reasonable officers would not have used deadly force when faced with the same scenario. This should be proof that Kisela's actions were unreasonable.

Justice Sotomayor disparaged the Court's interpretation of qualified immunity: she wrote that the Court "routinely displays an unflinching willingness" to reverse decisions in which lower courts wrongfully denied an officer qualified immunity, but rarely acts in the reverse to remove qualified immunity when it was wrongfully given.[179] The effect of this on jurisprudence is significant. Sotomayor wrote, "Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."[180] Finally, she finished her dissent with a powerfully worded statement about the Court's interpretation of the doctrine of qualified immunity and its impact on all Americans. She wrote, "The majority today exacerbates that troubling asymmetry. Its decision is

[179] Ibid.
[180] Ibid.

not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent."[181]

Justice Sotomayor's dissent proved telling. The Court created qualified immunity for police officers to be a balance between evils, but the recent decisions demonstrate that all balance has been lost: the qualified immunity that is supposed to allow police officers to protect both themselves and the public has become almost an absolute immunity that excuses any misconduct. These decisions made by the highest court mean that police officers are rarely held accountable in any court. Police violence that seems patently unreasonable to the average observer has become justifiable in the eyes of the law because it must be evaluated from the officer's perspective, without the benefit of hindsight, and in light of preexisting settled law. Justice Sotomayor's dissent emphasizes the danger of these legal doctrines: not only do they excuse past police violence, but it communicates to police officers that they will be shielded from liability for their actions, so they need not fear consequences for acting with excessive violence. This makes for a problematic if not dangerous police force.

This is something that should concern every citizen in every jurisdiction, not just for poor, urban, majority-minority areas. The doctrine of qualified immunity protects police officers no matter the race of the victim. The law will favor police officers no matter who the officers target with excessive force. However, these doctrines hurt African Americans most. Because African American citizens are disproportionately likely to be stopped and arrested by police officers (2.5 times more likely to be arrested than white citizens), and much more likely to be

[181] Ibid.

shot and killed by police officers (21 times more likely than white citizens), it follows that African Americans are hurt most by the lack of access to legal remedies for constitutional violations.[182] The Court's binding precedent that excessive force cases must be adjudicated under the Fourth Amendment and not the Fourteenth further hurts African Americans, because it precludes a chance at a collective remedy. The Supreme Court's decisions have forced the legal system to evaluate each instance of police force individually, instead of addressing the violent and deadly pattern of police violence against black people. In her dissent for a different case in regard to police conduct for searches and seizures, Justice Sotomayor explained that the pattern of black men stopped without suspicion and searched should not be viewed on an individual level. She wrote, "We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."[183] The way the legal system regards police violence against African Americans—by isolating the incidents and painting the officers as 'bad apples' instead of acknowledging the larger problem—reinforces the state perpetuated violence against African Americans. At best, the law excuses violence, and at worst, it allows police officers a license to kill.

The three cases referenced at the beginning of this chapter were representative of a larger pattern. In 2019, 1004 people were shot and killed by the police, and at least 23 percent of those people were black.[184] African Americans make up about 13 percent of the country's population, but in the past five years, at least 24 percent of people shot and killed by police officers were

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[182] Davis, Angela, ed. *Policing the Black Man: Arrest, Prosecution, and Imprisonment*.
Ryan Gabrielson, Eric Sagara, and Ryann Grochowski. "Deadly Force, in Black and White."
[183] *Utah v. Strieff*, (2016) 579 US __.
[184] "Fatal Force." The Washington Post, January 22, 2020.
https://www.washingtonpost.com/graphics/national/police-shootings-2016/.

black.[185] And yet, convictions for police officers are incredibly rare. Since 2005, only 35 police officers have been convicted for on-duty shootings.[186] This is not surprising given that the law is on the side of the officers. The police officers who killed Jonathan Ferrell, Dennis Grigsby, Daniel Covarrubias, and many more people who were unarmed and unthreatening, needed only to claim fear, either for themselves or other people nearby. The law is such that if a person poses a threat to police officers or bystanders, officers can legally use deadly force to prevent the person from hurting others. Moreover, the law requires that the circumstances be evaluated from the point of view of the officers and without the benefit of hindsight, so the threat does not need to be real, it just needs to be perceived. Dennis Grigsby was brandishing a spoon when he died, and Daniel Covarrubias was holding his cell phone. Jonathan Ferrell's only supposed weapon was his body, and he was (arguably) running at the police officers. None of these three men posed a real significant threat to any of the police officers who killed them, but nonetheless, the officers' use of force was found justifiable because of their fear. All the police officers had to say in their defense was that they were fearful for their lives because of what they thought was happening, and their deadly use of force against these men were excused.

The Supreme Court has incrementally yet substantially expanded the legal protections afforded to police officers. It adapted the institution of the criminal justice system itself to excuse, allow, and even perpetuate violence against black people. The Court's standard of "objective reasonableness" demands that every reasonable officer recognize an action as unconstitutional, but the way this works does not seem objective or reasonable. The point of view of the police officers is the only perspective from which deadly force cases can be judged,

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[185] Ibid.
[186] "Police Officers Convicted for Fatal Shootings Are the Exception, Not the Rule." *NBC News*, March 13, 2019. https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741.

which seems incredibly subjective, and the qualified immunity test repeatedly excuses ostensibly unreasonable actions. The Court recognizes that officers must know at least the generalities of the legal doctrine in order to act without unnecessary and excessive force, and therein lies the biggest problem. As Justice Sotomayor wrote, the Supreme Court told police officers they can "shoot first and think later," and as long as they articulate their fear in the aftermath, their conduct will not be punished. This is nothing less than the Supreme Court knowingly and outwardly communicating to police officers that they can kill citizens and walk away without consequences.

Chapter 3: A "Distorting Lens:" How Jury Biases Cause Unjust Verdicts in Police Use of Force Cases[187]

In 2015, Samuel DuBose, a 43-year old African American man, was pulled over by a University of Cincinnati police officer because he did not have a front license plate on his car.[188] Officer Ray Tensing approached his car and asked to see his driver's license, which DuBose admitted he did not have with him and asked the officer to run his name in the system. Officer Tensing instructed DuBose to get out of the car. Tensing attempted to open the car door, and DuBose pulled it shut and restarted the engine. Tensing reached inside the car in an attempt to restrain DuBose and pulled out his gun.[189] For the first minute and fifty seconds of the interaction, both men were calm and polite. Within five seconds after the car was restarted, Tensing reached through the window and shot Samuel DuBose point blank in the head.[190] Officer Tensing was never convicted for DuBose's death. His case stands out because he was indicted by a grand jury and his case went to trial, not once but twice. Two separate juries failed to convict him for DuBose's death.[191] The reason for this result, and the final reason why it is so difficult to hold police officers accountable for deadly violence against African American men, lies in the jury. The system of leaving the decision to twelve ordinary Americans fails to be an unbiased, equally balanced method of evaluating evidence in these cases to come to just conclusions.

The trial by jury is one of the cornerstones of the American legal system. Hailed as the most democratic method for determining justice, juries are supposed to be made up of twelve

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[187] Eberhardt, Jennifer L, *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do*, 5-6.
[188] Jacon-Duffy, Marais, "TIMELINE: Sam DuBose's Shooting Death to Ray Tensing's Murder Trial," 9WCPO Cincinnati, October 24, 2016, https://www.wcpo.com/news/crime/timeline-sam-duboses-shooting-death-to-ray-tensings-murder-trial.
[189] "Review and Investigation of Officer Raymond M. Tensing's Use of Deadly Force on July 19, 2015: University of Cincinnati Police Department," Kroll, August 31, 2015, 4-5, https://www.uc.edu/content/dam/uc/publicsafety/docs/Reform/documents/Kroll%20Report%20of%20Investigation%208.31.2015.pdf.
[190] Jacon-Duffy, Marais, "TIMELINE: Sam DuBose's Shooting Death to Ray Tensing's Murder Trial."
[191] Ibid.

citizens, randomly selected from a group representative of the community, that neutrally and with an open mind hear a criminal case. While sentencing is the responsibility of judges, the verdict—deciding whether a defendant is guilty or not guilty—is in the hands of people with no legal training or background. The job of juries is to determine the facts of a case. While the law is a matter for the judge to determine, the jury must apply the law to the case in question.[192] Juries must work together to reach a verdict; unanimity is required for a conviction.[193] The right to a trial by jury in a criminal case is codified in the Sixth Amendment to the Constitution. It states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed…"[194] The jury is an inherently democratic idea, in which every citizens should have the opportunity to serve. In describing the jury, Thomas Jefferson asserted that it must not be exclusionary. He wrote, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[195]

Yet, the American jury process historically excluded much of the population.[196] It began as an inherently undemocratic institution, in that it only represented a small portion of Americans. It was not until 1880 that the Supreme Court ruled that participation on juries must

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[192] Marder, Nancy S, *The Jury Process*, Turning Point Series, New York: Foundation Press, 2005, 7.
[193] Ibid., 8.
[194] "Sixth Amendment," LII / Legal Information Institute,
1791, https://www.law.cornell.edu/constitution/sixth_amendment.
The trial by jury was such a fundamentally important right to the Framers of the Constitution that it is the only right that can be found both in the original Constitution and the Bill of Rights.
Alschuler, Albert W., and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," The University of Chicago Law Review 61, no. 3 (1994), 870, https://doi.org/10.2307/1600170.
[195] Alschuler, Albert W., and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States."
[196] In 1791, only men were allowed to serve on juries and every state except one only allowed property owners or taxpayers to serve on juries. Throughout American history, juries slowly became more inclusive, although not without frequent setbacks. During Reconstruction, the Federal Civil Rights Act of 1875 stated that "no citizen… shall be disqualified for service as a grand or petit juror in any Court of the United States, or of any State on account of race." However, four years later the Federal Judicial Selection Act was passed, which reversed the previous Civil Rights Act and allowed federal courts to discriminate in jury selection.
Alschuler, Albert W., and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States.".

not be restricted only to white citizens.[197] Despite this decision, local officials easily circumvented the ruling, using various creative strategies to ensure that no black citizens were chosen to serve on juries.[198] In 1968, the Jury Selection and Service Act standardized jury selection methods across the United States. It also codified certain virtues in the jury: that jurors must be "selected at random from a fair cross section of the community," and that "all citizens shall have the opportunity to be considered for service on grand and petit juries."[199] But the jury system continues to perpetuate the historical tradition of failing to proportionately select African American citizens for juries.

The process of creating the jury pool, which is the list of citizens who might be called to serve on a jury, is a flawed process that disproportionately excludes minorities from the chance to serve on juries. The formation of the jury pool today begins with every citizen filling out a questionnaire. This is already a limiting practice: questionnaires are sent to citizens who are listed on voter registration bases and driver's license databases, so those who are not on either

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[197] This case was *Strauder v. West Virginia* (1880).
"Illegal Racial Discrimination in the Jury Selection: A Continuing Legacy." Equal Justice Initiative, August 2010. https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf. 9.

[198] In some places, potential eligible jurors were compiled using a "key-man system," in which prominent men in the community submitted the names of people who they thought would be good jurors. In other places, people who were near the courthouse at the right time would be called in to serve on a jury. In 1961, the Department of Justice found that ninety-two different federal jurisdictions each used a different method of jury selection, and that none of the methods accurately reflected the local populations.
Kassin, Saul M., and Lawrence S. Wrightsman, *The American Jury on Trial*, Psychological Perspectives, New York: Hemisphere Publishing Corporation, 1988, 22-23.
Other ruses to exclude African Americans from juries included writing the names of black citizens on a differently colored paper than white citizens so their names could easily be avoided when selecting the venires, and creating vague requirements for jury service, such as levels of necessary intelligence, experience, or moral character, that were only applied to exclude black citizens.
"Illegal Racial Discrimination in the Jury Selection: A Continuing Legacy." Equal Justice Initiative. 10.
Louisiana and Oregon responded to nondiscriminatory jury laws with an additional strategy to silence black citizens on juries. In those two states, laws were passed to allow criminal convictions to stand with only ten out twelve jurors voting to convict. Louisiana's law was created at a constitutional convention for which the stated purpose was ensuring white supremacy. These laws were only very recently struck down by the Supreme Court.
Michael Barbaro. "The Supreme Court Rules From Home." The Daily, n.d.
https://www.nytimes.com/2020/04/21/podcasts/the-daily/supreme-court-coronavirus.html.

[199] "28 U.S. Code § 1861," LII / Legal Information Institute, n.d. https://www.law.cornell.edu/uscode/text/28/1861.

list are never given the questionnaire.[200] Minority populations are less likely to be registered to vote or have a driver's license, and are therefore less likely to be included in jury pools.[201] Additionally, minority populations are less likely to have a permanent address, so even if they are included on these lists, they may not get the questionnaire through the mail.[202] From the completed and returned questionnaires, some people are excused or disqualified from jury duty.[203] Common reasons for disqualification include the inability to speak English or a criminal record.[204] These characteristics are also more prevalent in minority communities.[205] It is common for counties not to provide childcare and have very low compensation for jurors, which results in further underrepresentation of low-income and unemployed citizens, many of whom are people of color.[206] The citizens remaining on the list after this process make up the jury pool. A predominant reason why juries are overpopulated by white citizens and underrepresent racial minorities is due to the system through which jury pools are formed.

The next step in the process to forming a jury is creating a venire, a step that provides lawyers the opportunity to intentionally discriminate against potential jurors of color. A venire is a panel of prospective jurors, usually ranging from thirty to sixty people, who are summoned to the courthouse for a specific case.[207] The panel undergoes a voir dire, during which the attorneys for both parties and the judge conduct a pretrial interview of the jurors. Each voir dire is

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[200] Sommers, Samuel R, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research," 69.
[201] Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries," 78.
[202] Ibid., 78-79.
[203] Excuses are temporary and are commonly given to people who are responsible for young children and those with jobs that are deemed vital, like doctors and teachers.
Kassin, Saul M., and Lawrence S. Wrightsman, *The American Jury on Trial*, 23.
[204] Ibid.
[205] Sommers, Samuel R, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research," 70.
[206] Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries," 79.
[207] Kassin, Saul M., and Lawrence S. Wrightsman, *The American Jury on Trial*, 23.

different, as the judge sets the rules for how it must be conducted.[208] Based on the answers given by potential jurors during the voir dire, attorneys can challenge the inclusion of particular people on the jury. There are two methods that an attorney can use to challenge prospective jurors: the challenge for cause and the peremptory challenge.[209] When attorneys challenge a person for cause, it is because they believe there is a reason why that person will be unable to come to an unbiased conclusion. For example, that potential juror might know one of the parties in the case or might have a financial interest in the outcome of the case. Each attorney can submit an unlimited number of challenges for cause and the judge decides whether to grant or reject the challenge. If the challenge is granted, the person is excused from the case and will not become a juror.[210] The second method of challenging the inclusion of a person on the jury is the peremptory challenge. This allows an attorney to remove a juror without providing any explanation.[211] Each jurisdiction allows a different number of peremptory challenges. The peremptory challenge is viewed as a necessary aspect of jury selection in order to have an impartial jury: it allows attorneys to excuse potential jurors whom they feel will not be able to come to an unbiased decision, even if the attorney cannot articulate why they believe that to be the case.[212]

Of course, with discretion comes the possibility of abuse and discrimination. In 1965, the Supreme Court heard allegations that discriminatory peremptory challenges violated defendants' right to a fair trial. In this case, Robert Swain was an African American man convicted of rape in

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[208] Some judges ask all the questions while others let attorneys ask questions during a voir dire. Sometimes voir dires are done with groups of prospective jurors while sometimes they are done individually, and some judges allow for broader questions to be asked while others require that the questions are specific to the case. The duration of voir dires also varies depending on the judge and the case.
Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid., 24.
[212] Marder, Nancy S, *The Jury Process*, 85.

Alabama. 26 percent of the county in which he was tried was black, but venires averaged only 10 to 15 percent black representation, and not a single black person had been selected to serve on a jury in the county since 1950. In Swain's case, eight black people were on the venire; two were exempt for cause and six were excused using peremptory challenges, which left no African Americans on his jury.[213] The Court ruled that while the venire should represent an accurate distribution of the community, a defendant "is not entitled to a jury containing members of his race."[214] In other words, any particular jury is not required to be representative of the community; only the venire from which the members of the jury are chosen must be. The Court did acknowledge that a pattern of systematically removing prospective jurors of one race is a violation of the Equal Protection Clause.[215] However, the process the Court required for determining whether a violation occurred was overly burdensome. To challenge a state's use of peremptory challenges, the defendant had to show "consistent and systematic discriminatory use of peremptory challenges by the state."[216] This standard was so burdensome that Swain's case failed to meet it.[217] In this racially charged case, all eight potential black jurors were systematically struck from the jury, and for six of the challenges no reason was given for their exclusion. If this did not demonstrate a consistent and discriminatory practice of exclusion of black people, the standard was set inaccessibly high. The *Swain* test clearly would not have overturned the discriminatory exclusion of one black juror, as it failed to overturn peremptory challenges against six. A remedy that does not correct for discrimination towards even one potential black juror is not a sufficient remedy for discrimination on juries.

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[213] *Swain v. Alabama*, (1965) 380 U.S. 202.
[214] Ibid.
[215] Ibid.
[216] Josephs, Mark L, "Fourteenth Amendment--Peremptory Challenges and the Equal Protection Clause," The Journal of Criminal Law and Criminology 82, no. 4 (1992), 1002, https://doi.org/10.2307/1143714.
[217] Ibid.

Twenty years later, the Supreme Court heard *Batson v. Kentucky* (1986) which amended the *Swain* precedent to ease the burden of proof and provides the standard still used today to determine whether particular peremptory challenges are constitutional violations. The case began when James Batson was indicted in Kentucky for burglary. The prosecutor excused all of the potential black jurors from the venire using peremptory strikes, which resulted in an all-white jury.[218] In *Batson,* the Court found that the burden set in *Swain* was too high. Justice Powell wrote, "Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."[219] The new standard set forth in *Batson* required a three step process to determine the legality of the peremptory challenge: first, the defendant must show a *prima facie* case for discriminatory use of peremptory strikes. If that is successful, the burden shifts to the prosecutor in the second step to provide a race-neutral reason for excusing the potential jurors. The third step is determining if the reason is "pretextual;" if so, the peremptory challenge is found to be illegal.[220] Essentially, what a *Batson* challenge comes down to is whether a judge finds the prosecutor's race-neutral reason for dismissing the juror to be dubious, and if so, the challenge will not be allowed.[221]

The *Batson* decision was meant to reduce racial discrimination in peremptory challenges, but evidence shows that attorneys still take race into account when selecting jurors.[222] In his concurrence in *Batson*, Justice Marshall predicted this would be the case. He wrote, "The decision today will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges

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[218] *Batson v. Kentucky*, (1986) 476 U.S. 79.
[219] Ibid.
[220] Marder, Nancy S, *The Jury Process*, 87-88.
[221] Ibid.
[222] Sommers, Samuel R, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research," 75.

entirely."[223] Instead reducing racial discrimination in jury selection, *Batson* only forced attorneys to provide race-neutral reasons for their peremptory strikes. A Supreme Court case in 1995, *Purkett v. Elem* (1995), demonstrated just how easy that is. In *Purkett*, the Court evaluated two peremptory challenges for discrimination. The prosecutor who struck the two African American jurors stated that it was because their hair was too long. The prosecutor argued, "He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair… I don't like the way they looked, with the way the hair is cut, both of them."[224] This was a thinly veiled attempt at distinguishing those two black jurors without directly stating their race, and the Court accepted his reasoning as race-neutral. The Court's per curiam opinion stated that the required race-neutral reasons did not have to be "persuasive, or even plausible."[225] As long as the reason is face-specific and not explicitly stating the potential juror's race, it does not need to be related to the case at all: reasons such as "the prospective juror stared, hesitated before responding, or failed to make eye contact" or "their professions, clothing, or the way they wore their hair" all pass the *Batson* review.[226] This means that any creative attorney can excuse a black juror and give a vague, unrelated reason for their decision.

The landmark *Batson* decision fails to live up to its intention: to diversify juries. As a scholar wrote, "*Batson*… poses no genuine impediment to prosecutorial attempts to remove minorities from venires."[227] It is too easy to provide a race-neutral reason for dismissing a black potential juror, and it is too hard to appeal an unfavorable *Batson* decision.[228] While *Batson* fails

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[223] *Batson v. Kentucky*.
[224] *Purkett v. Elem*, (1995) 514 U.S. 765.
[225] Ibid.
[226] Marder, Nancy S, "Batson Revisited," Iowa Law Review 97, no. 5 (2012): 1585–1612, 1590, https://heinonline.org/HOL/P?h=hein.journals/ilr97&i=1595.
[227] Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries," 77.
[228] Appealing a *Batson* challenge to the appellate court is unlikely to result in a change. While trial court judges see the challenge happen in their courtroom, appellate court judges must get all the facts from a transcript, which

to adequately provide a remedy for discriminatory peremptory challenges, it is not the main reason why juries are not as diverse as the community they are supposed to represent. The prosecution and the defense typically use their peremptory strikes on people of opposite races, so the impact of peremptory strikes on jury diversity tends to balance out between the two sides.[229] However, given the disproportionately low representation of racial minorities on venires, any peremptory strikes of black potential jurors have disproportionately large impacts on the racial diversity of juries.[230]

Diverse juries often result in better outcomes in a trial, no matter the circumstances of the case. When cases are racially charged, it is even more important for juries to be diverse. Studies have concluded that diverse groups, broadly defined, produce better performances and are more apt at decision making.[231] Racially diverse juries can, and often do, influence trial outcomes.[232] Justice Marshall best described what is lost when juries are homogeneous. He explained, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion

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increases the difficulty of evaluating the race-neutral reason. Appellate courts are unlikely to overturn a trial court judge's evaluation of the *Batson* claim; the Seventh Circuit explained that trial judges were in a better position to rule on the facts of the claim, so they only overrule the trial judge's decision if it is "completely outlandish" or its "falsity [is] readily apparent."
Marder, Nancy S, "Batson Revisited," 1592-1593.

[229] On average, the defense's peremptory strikes are 60.8 percent white potential jurors and 39.1 percent black potential jurors, while the prosecution's peremptory strikes on average strikes are 60.9 percent black potential jurors and 39.2 percent white potential jurors. These shockingly similar, mirrored statistics show that peremptory strikes as a whole are not proportionately used to strike black people more often than white people.
Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries," 82.

[230] Ibid., 79.

[231] Sommers, Samuel R, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research," 83.

[232] Ibid.

deprives the jury of a perspective on human events that may have unsuspected importance in any case that might be presented."[233] The benefits of racially diverse juries are only attained when there is more than one person of color on the jury. The inclusion of only one African American person on a jury often leads to tokenism. Token minorities, such as a single black juror on an otherwise entirely white jury, experience marginalization, alienation, and intimidation.[234] The benefits of diverse juries require a meaningful numerical minority population.

When police officers are on trial for shooting unarmed black men, the racial make-up of the juries are especially important because white jurors are more likely to have implicit biases against African American men that will influence their decision-making. Implicit bias is not synonymous with racism; a person with implicit biases against black people is not necessarily racist. Implicit biases are like "distorting lenses" created by the way brains function and the structure of society.[235] Human brains are flexible and actually change in response to experiences and environmental cues, which is called neuroplasticity.[236] Brains adapt in response to people's surrounding environment in order to best make sense of the world. One way in which the brain does this is by categorizing stimuli. In order to understand the chaotic world in which we live, the brain recognizes patterns and categorizes new information into already existing groups.[237] This is not an inherently harmful practice; for example, it means that a person who dislikes apples does not need to try every apple to find out if it tastes good, but can generalize from the knowledge of what apples have looked and tasted like for them in the past.[238] However,

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[233] *Peters v. Kiff* (1972) 407 US 493.
[234] Gau, Jacinta M, "A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries," 83.
[235] Eberhardt, Jennifer L, *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do*, 5-6.
[236] For example, studies of the brains of London taxi drivers show that their hippocampus, which controls special memory and navigation, actually grew with their experience on the job.
Ibid., 15-17.
[237] Ibid., 23.
[238] Ibid., 31.

categorization can lead to bias. Stereotypes are built through categorization, as experiences or environmental cues are generalized to apply to all people with the same identifying characteristics. The brain makes automatic assumptions about people it does not know based on these patterns, which results in prejudice—literally pre-judging a person.[239] The process of making these assumptions is known as bias, and it can occur "unintentionally," "unconsciously," "effortlessly," and "in a matter of milliseconds."[240] A psychological scholar wrote, "…these associations can take hold of us no matter our values, no matter our conscious beliefs, no matter what kind of person we wish to be in the world."[241]

Implicit biases can distort thoughts and shape realities without our awareness of their existence. One of the most powerful racial stereotypes in American collective consciousness is the association between blackness and criminality.[242] This negative stereotype is so powerful that it can even change memories: studies show that information that is consistent with stereotypes can be recalled with more ease than stereotype-inconsistent information.[243] Even worse, the mind is more likely to create false memories that are consistent with stereotypes. Information that is stereotype-consistent is loosely encoded in the brain, so when people try to recall this information, they can create new memories of things that never happened but align with the stereotype without realizing it.[244] These tendencies are particularly problematic for jurors to exhibit during a racially-charged trial, like when a white police officer stands accused of unnecessarily killing an unarmed black man. The job of the jury is to determine the facts of the case; this makes the ability for brains to generate stereotype-consistent false memories very

[239] Ibid.
[240] Ibid.
[241] Ibid.
[242] Ibid., 6.
[243] Levinson, Justin D, "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering," 376-377.
[244] Ibid.

dangerous. In fact, people serving on a jury are particularly likely to generate false memories in this way because they must evaluate so much information in a short span of time. This leads to "cognitive depletion," which results in a higher likelihood of more memory errors.[245]

In cases in which police officers shot unarmed black men, much of the verdict rests on the reasonableness of the officer's fear. If the jury believes the officers truly feared for either their lives or the lives of others, then the law requires that the jury regard the officer's use of deadly force as justified. Implicit biases increase the likelihood that jurors will view the officer's fear as reasonable because of the stereotyped perceptions of black men: African American men are perceived to be more threatening and dangerous than white men. One study specifically examined people's recollections of aggressive behavior of white and black men; the study participants were more likely to recall the black man's aggressive behavior than the white man's aggressive behavior, even just fifteen minutes after reading the facts of the scenario.[246] The jurors in cases of on-duty shootings are given descriptions of events of the case and sometimes videos of the actual event. This study implies that the jurors will remember any acts of aggression from the black victim more readily than any of the white police officer's actions, which will make the jury more likely to believe the officer's fear of the black man. Participants in the study were also found to be more likely to generate false memories of black men's behavior in a way that reflected poorly on them, than they did for the white men.[247] If jurors are both remembering aggressive behavior of black men and generating false memories that hurt their opinion of the black men, they are certainly more likely to view the police officers' fear and subsequent use of force as reasonable.

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[245] Ibid., 376-377, 380-381.
[246] Ibid., 376-377, 399.
[247] Ibid., 376-377, 401.

Additionally, non-black people regularly perceive young black men as "taller, heavier, stronger, more muscular, and more capable of causing physical harm" than young white men of the same size.[248] Study participants perceived black men as more capable of doing harm than white men, even between two groups of the same size, with actual size differences controlled for.[249] If juries are completely or predominately made up of white people, the jury as a whole will be susceptible to the findings in these studies.[250] They will be more likely to believe the black man shot by the police officer was a threat to the officer, meaning the deadly force used was justified. Further studies have mimicked reality to study people's reactions to police officers' use of deadly force and found that found that participants rated the use of force against black men as more justified than against white men.[251] Juries presented with cases of on duty shootings in which white officers shoot unarmed black men will be unconsciously biased to favor the officers' arguments that deadly force was used justifiably. White jurors, in particular, have implicit biases that predispose them to believe that officers who use deadly force against unarmed African American men did so justifiably.

The jury system is meant to be an essential part of a fair trial for a defendant. The jurors are supposed to be randomly chosen from a representative sample of the population, given all the facts of the case, and tasked with determining a just verdict. But instead of twelve randomly

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[248] Wilson, John Paul, Kurt Hugenberg, and Nicholas O. Rule, "Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat," Journal of Personality and Social Psychology 113, no. 1 (2017): 59–80, 74, https://doi.org/10.1037/pspi0000092.

[249] Ibid., 65-66.

[250] An additional study added black participants and found that while both white and black people perceive black men as more muscular than white men, black participants perceived the difference to be significantly smaller than white participants. Also, the black participants did not perceive black men to be more capable of doing harm. This shows that the implicit racial biases that are most likely to affect the decisions of jurors in cases of on-duty police shootings are more strongly and decisively held by white people.
Ibid., 69.

[251] The study concluded that "…the racial bias in size and harm perceptions… extended to justifications of the hypothetical use of force against unarmed suspects of crime."
Ibid., 70-71.

selected, diverse, open-minded jurors, verdicts are determined all too often by a group of white citizens with implicit preconceptions and biases that interfere with their ability to decide a verdict fairly. One author wrote, "Looking at the theory and the mechanics of jury selection, it becomes apparent that the system is based on an idea that, in turn, requires that at least one of the following conditions be fulfilled: (a) that jurors appear in court in tabula rasa form, neutral and untainted by previous experience; (b) that jurors can leave their pretrial biases at the courthouse door, making fair and objective judgements despite their predispositions; or (c) that those candidates for jury service who are irrevocably prejudiced will be detected and eliminated at some point during the selection process."[252] Given both the process of the jury selection system and the psychological processes in our brains, meeting any of these three conditions is exceedingly difficult for cases involving police shootings of unarmed black men. The jury selection process excludes a significant portion of the racial minority population before anyone is even summoned to the courthouse, and dismissals of potential jurors during the voir dire process severely limits the possibility of a diverse, representative jury. Furthermore, jurors—particularly white jurors, who so often make up the entire or at least most of the jury—carry unconscious and implicit racial biases that predisposes them to find the police officer's actions justifiable. For twelve jurors to be truly representative of the community and to overcome their psychological predispositions to hear a case of this nature with a truly open mind is nearly impossible. This means that, if a police officer shoots and kills an unarmed African American man and is charged by a prosecutor or a grand jury and is denied summary judgement based on qualified immunity, the system will still likely protect the officer: the process for selecting the jury will disproportionately exclude racial minorities, the jury will be made up of mostly white citizens

[252] Kassin, Saul M., and Lawrence S. Wrightsman, *The American Jury on Trial*, 26.

with implicit biases against African Americans, and the verdict will hinge upon whether these biased, white citizens believe the officer when he says he feared the black man was attacking him.

The two trials that failed to convict Ray Tensing, the officer who killed Samuel DuBose, demonstrate how the supposedly democratic jury system is unable to fairly adjudicate these cases. After Tensing killed DuBose, protests ignited in Cincinnati, demanding justice for Samuel DuBose. It was not until a year after the shooting that questionnaires were mailed to the citizens of Hamilton County with the goal of choosing a venire that would be made up of people who were not outwardly biased about the case already.[253] The questionnaire asked about whether citizens had seen the body camera video that was released and their opinions on the Black Lives Matter movement.[254] The twelve-person jury was made up of ten white people and two black people.[255] During the trial, the prosecutor presented the evidence from the body camera Tensing wore, which showed that he was not dragged by the car, and the coroner's testimony, which showed that DuBose was shot at a downward angle (meaning Tensing had not been dragged by the car and forced to shoot upwards), among other evidence.[256] Tensing's testimony was the last evidence presented to the jurors. Despite the prosecution's evidence to the contrary, he stood by his story, saying that when he put his hand inside the car in an attempt to restrain DuBose, DuBose started driving and he felt that he was being dragged by the car. He said he feared for his

[253] Tensing's attorney wanted the trial moved out of Hamilton County, arguing that Hamilton County citizens could not be objective given all the publicity and protests surrounding the shooting.
Jacon-Duffy, Marais, "TIMELINE: Sam DuBose's Shooting Death to Ray Tensing's Murder Trial."
[254] Ibid.
[255] The process to select the jurors for this case was atypical: 1000 potential jurors made up the venire, and the pool was narrowed to 195 citizens for the voir dire. They were brought into the courtroom in three groups and both the attorneys for the defense and the prosecution were able to ask them questions.
Ibid.
[256] One shocking piece of evidence presented was that the shirt that Tensing wore under his uniform that day pictured a Confederate flag.
Ibid.

life. Tensing got emotional during his testimony, and explicitly stated that from his "perception," his life was in danger.[257] The jury deliberated for four days but could not reach a verdict. Four jurors believed Tensing guilty of murder, four jurors only believed him guilty of voluntary manslaughter, and four believed he was not guilty. The judge was forced to declare a mistrial.[258] The state decided to try Tensing a second time.[259] The jury for the second trial was slightly more diverse than at the first trial: three of the jurors were black and the other nine were white.[260] The same evidence was presented, and again, the jury was unable to reach a verdict, even after five days of deliberation. Once again, the judge declared a mistrial.[261] The prosecutor's office decided not to try the case a third time after coming to the conclusion that the case could not be won.[262]

An independent investigation on the incident told a different story: it concluded in no uncertain terms that Officer Tensing's actions were not justifiable. The report found that Tensing's traffic stop of DuBose was lawful and justified, and his initial approach was conducted appropriately and safely. However, after DuBose admitted he did not have his license with him, Tensing's conduct changed. The report stated, "Officer Tensing thereafter made critical errors in judgement and exercised poor police tactics that created a hazard of serious bodily injury or death."[263] Tensing drew his weapon unnecessarily, as DuBose's hands were visible and he had not displayed any aggression. Tensing testified that his arm was caught in the steering wheel when DuBose started to drive, and that he was "holding on for dear life" to avoid getting dragged

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[257] Ibid.
[258] Ibid.
[259] There were several changes between the first and second trials: the judge from the first trial recused herself and a new prosecutor took over the case.
Ibid.
[260] Ibid.
[261] Ibid.
[262] Ibid.
[263] "Review and Investigation of Officer Raymond M. Tensing's Use of Deadly Force on July 19, 2015: University of Cincinnati Police Department," 5.

under the car. He believed his life was in danger, and that if he had not fired his weapon, he would have been killed or seriously injured.[264] The report found that the body camera footage did not support Tensing's story. At no point did the footage show Tensing's arm caught in the car, and Tensing was in complete control of his arm before he fired his weapon. In fact, his left arm was mostly, if not entirely, out of the car when he used his right arm to aim at DuBose's head.[265] The report concluded that the entire situation was preventable, Tensing lied in his testimony, and the shooting that killed Samuel DuBose was *not* justified.[266]

It is impossible to know exactly what biases, implicit or otherwise, these twenty-four jurors brought with them into the trials of Ray Tensing. Additionally, the information about how accurately the venire represented the larger community and which potential jurors were struck for what reasons were not released to the public. But there are important conclusions that can be drawn from this case about the inability for juries to fairly judge cases in which white police officers shoot and kill unarmed African American men. Rarely are there instances in which the verdicts of two separate jury trials on the same case can be compared to an independent report to examine how accurate the jury was in deciding guilt based on the facts, but Tensing's trials provide a unique opportunity to do just that. The results do not fare well for jury trials, the supposedly democratic institution that is tasked with delivering justice. While an independent investigation unquestionably concluded that Officer Tensing unjustifiably killed Samuel DuBose, two different jury trials were unable to come to the same verdict. The jurors believed Tensing's account that DuBose, a black man, acted aggressively, and that Tensing would have died had he not shot into the car that day. Experts who testified to the contrary and the literal

[264] Ibid., 5-6.
[265] Ibid.
[266] Ibid.

footage of the incident were not enough to unanimously persuade twelve ordinary American citizens that Tensing's testimony was false; in believing that Tensing was in danger, they concluded that the shooting was justified. Officer Ray Tensing, like so many other police officers, was able to shoot an unarmed African American man and walk away without criminal consequences because the legal system is designed in a way that favors police officers, even in the face of overwhelming evidence to the contrary.

Chapter 4: Conclusion

On November 22, 2014, a twelve-year-old African American boy named Tamir Rice was shot and killed by Timothy Loehmann, an officer of the Cleveland Division of Police. The events of the day were caught on several cameras; there was no question about the circumstances that brought about the young boy's death. Tamir Rice's death and the lack of consequences for his killer epitomize the institutional protection afforded to police officers by the legal system. All of the elements described in the previous chapters culminate in the story of what happened to Tamir Rice. The prosecutor's office applied Supreme Court case law, evaluated the threat that Tamir Rice posed to Loehmann, and presented it to a grand jury without recommending that charges be filed against the officer. Unsurprisingly, the Loehmann was not charged: he was shielded from consequences by a system that was shaped to protect him. The prosecutor in charge of the case called the incident "a perfect storm of human error, mistake and communications by all involved that day…"[267] No one faced any punishment for the death of the twelve-year old boy. The legal system found that the police officer who shot and killed Tamir acted reasonably. This begs the question: if this is a "just" result, then is the legal system a system of justice at all?

The day of Tamir's death began like any other day. He, his sister, and some friends went to the Cudell Recreation Center in Cleveland. Tamir had his friend's airsoft pistol that looked like a real firearm: there used to be an orange tip on the end to signify that it was not a real gun, but it had fallen off. Tamir was playing with the gun, pointing it at people and objects, and a bystander who was waiting for the bus nearby saw him. The bystander called the police to alert them about Tamir's behavior. The bystander reported, "I'm sitting here in the park by West Boulevard by the West Boulevard Rapid Transit Station. There's a guy with a pistol. It's

[267] Ashley Fantz, Steve Almasy, and Catherine E. Shoichet. "Tamir Rice Shooting: No Charges for Officers." *CNN*, December 28, 2015. https://www.cnn.com/2015/12/28/us/tamir-rice-shooting/index.html.

probably fake, but he's like pointing it at everybody… Guy keeps pulling it in and out of his pants. It's probably fake, but you know what? It's scaring the shit out of me."[268] Notably, the bystander says both that Tamir looks young and that the gun is probably not real.[269] However, when the call taker relayed the information to the dispatcher, she did not include those details. The dispatcher then notified the police that this was a Code-1, which was the highest priority, and Officers Garmback and Loehhmann agreed to respond.[270] Garmback drove the police car to the Recreation Center via a dead-end street and drove over the curb onto the grass of the park. It had snowed recently, so the car skidded forward 40 feet and stopped right in front of the gazebo, under which Tamir was sitting. As the car was sliding, Tamir walked a few steps towards the field and then towards the police car. Loehmann got out of the car as soon as it stopped moving, and Tamir reached into his waistband. Two seconds after exiting the car, Loehmann fired two shots, and one hit Tamir in the abdomen. Three minutes later, a detective and an FBI Special Agent who were investigating a nearby bank robbery arrived at the scene after hearing the shots fired report. The Special Agent immediately began to administer first aid to Tamir and told Garmback to help. No one had attempted to help Tamir in the interim time before the Special Agent arrived; Loehmann was nursing his ankle in the car, which he had twisted after firing his weapon. An ambulance arrived about ten minutes later and Tamir was rushed to the nearest hospital, but his injuries were too severe, and he died later that day.[271]

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[268] Timothy J. McGinty. "Cuyahoga County Prosecutor's Report on the November 22, 2014 Shooting Death of Tamir Rice." Cuyahoga County, n.d. http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf. 2-3.

[269] "He's sitting on a swing right now, but he keeps pulling it in and out of his pants, and pointing it at people. He's probably a juvenile; you know?"
Ibid., 3.

[270] Officer Loehmann was a trainee at the time, under the supervision of Officer Garmback.
Ibid., 2-4.

[271] Ibid., 2-5.

In an unsurprising decision given their position and power within the legal system, when the Cuyahoga County Prosecutor's Office did a full investigation of Tamir Rice's case, they found Officer Loehmann's actions justified. They applied the relevant case law to the facts of the case and concluded that Loehmann acted reasonably in his use of force against Tamir Rice. They used the objective reasonableness test from *Graham v. Connor*: from Officer Loehmann's perspective, at the time of the shooting, without the benefit of hindsight, the prosecutors concluded that Tamir reasonably posed a threat to Loehmann, Garmback, and anyone nearby at the Recreation Center. Officer Loehmann knew that there was a black person with a gun at the Recreation Center. He did not have the relevant information or the benefit of hindsight to know that the gun was not real. The prosecutors' report wrote, "Within the Cleveland Police dispatch system, a Code-1 was the highest priority call and designated the incident as a significant public risk… Because the 911 call-taker had not transmitted any information to the Dispatcher about the suspect possibly being a juvenile, or the gun possibly being fake, Officers Loehmann and Garmback only knew that a man in a camouflage hat and a gray jacket with black sleeves was sitting at the Cudell swings pulling a gun out of his pants and pointing it [at] people."[272] The prosecutors used forensic video analysis to corroborate the evidence from the officers' statements that they saw Tamir with a gun and that they gun he was holding "was functionally identical to a real firearm."[273] *Tennessee v. Garner* allows police officers to use deadly force if a suspect poses a threat to them or to others. The prosecutors referenced Supreme Court and Sixth Circuit case law to argue that Loehmann's mistaken belief in a threat was still sufficient to fulfill the *Garner* requirement for deadly force. The prosecutors explained, "What is a 'reasonable' belief in light of the officer's perceptions could also be a *mistaken* belief, and the fact that it

[272] Ibid., 41.
[273] Ibid., 50-55, 66-69.

turned out to be mistaken does not detract from its reasonableness when considered within the factual context and compressed time-frame of his decision to act."[274] The legal precedent, as applied to this case, supports the idea that Officer Loehmann acted reasonably and justifiably used force, therefore securing him the advantages of qualified immunity.

Implicit bias no doubt played a role in the prosecutors' belief that Tamir Rice was a real threat to the officers. Tamir was tall and large for his age: the autopsy report indicated that he was 5 feet 7 inches tall and weighed 195 pounds, and when one of the officers reported shots fired on the radio, he estimated Tamir to be around 20 years old.[275] At a glance, Tamir probably looked more like an adult than a twelve-year old boy, and this likely influenced the prosecutors' assessment that Tamir was a real threat to the officers instead of just a child playing at the local Recreation Center. The prosecutors took the perspective of Officer Loehmann—the man against whom they were supposedly building a case—and saw that from his point of view at the time of the shooting, it seemed that a large black male with a gun that he was using to threaten people was reaching into his waistband to use it against the officers. While *all* the evidence suggests that Tamir was pulling out the gun either to show that it was fake or give it to the officers, Officer Loehmann could only act within the information that he knew.[276] The prosecutors then presented a preponderance of evidence to a grand jury. They made an argument as if they were acting as Officer Loehmann's defense attorney and did not recommend any charges against the officer. The grand jury was then left to make a decision, and with the legal advice of the prosecutors

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[274] Ibid. 36. (Internal citations omitted.)
[275] Ralph Ellis, and Melissa Gray. "Tamir Rice Report: No Proof Police Officer Shouted Warning before Shooting." *CNN*, June 15, 2015. https://www.cnn.com/2015/06/13/us/tamir-rice-report/index.html.
Timothy J. McGinty. "Cuyahoga County Prosecutor's Report on the November 22, 2014 Shooting Death of Tamir Rice." 4.
[276] Ashley Fantz, Steve Almasy, and Catherine E. Shoichet. "Tamir Rice Shooting: No Charges for Officers."

supporting Officer Loehmann and the grand jury's own implicit biases, it is unsurprising that the grand jury acted as a rubber stamp for the prosecutors' office and voted against criminal charges.

The Tamir Rice case rocked America to its core, both when the shooting occurred and when the prosecutors' office announced that Tamir's killer would not even be charged with a crime. There were protests in Cleveland and all over the country, and Tamir Rice's name and story became a rallying cry for the Black Lives Matter movement. Tamir Rice's death rightfully enraged people, especially at a time when cases of police officers killing unarmed black men were widely publicized. Many people viewed this case within the context of the Cleveland Division of Police, which displayed a pattern of Fourth Amendment violations against the citizens of Cleveland, including unnecessarily and excessively using deadly force and tactics that endanger citizens and make the use of force inevitable.[277] President Obama contextualized the shooting within the larger criminal justice system. He said, "These fatal shootings are not isolated incidents… They are symptomatic of the broader challenges within our criminal-justice system, the racial disparities that appear across the system year after year, and the resulting lack of trust that exists between law enforcement and too many of the communities they serve."[278]

Those who saw Tamir Rice's death and his killer's lack of punishment as part of a larger problem in America still failed to grasp the gravity of what Tamir Rice's case exposes: the criminal justice system is *purposefully made* to have these results. Prosecutors are powerful enough to keep police officers from facing any punishment and are themselves unaccountable to the public when they make decisions based on career incentives. The Supreme Court has

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[277] Vanita Gupta, and Steven M. Dettelbach. "Investigation of the Cleveland Division of Police." United States Department of Justice Civil Rights Division, December 4, 2014. https://assets.documentcloud.org/documents/1375050/doc.pdf.

[278] Nora Kelly Lee. "President Obama: 'This Is an American Issue That We Should All Care About.'" *The Atlantic*, July 7, 2016, sec. Politics. https://www.theatlantic.com/politics/archive/2016/07/obama-shootings-minnesota-louisiana/490403/.

structured legal immunities for police officers to encompass unethical, violent behavior and effectively prioritized officers' power over individuals' freedom and safety. The de facto discrimination of the jury selection process continues a historical tradition of unfair jurisprudence that allows implicit biases to impede fair verdicts. These parts of the greater system all work in tandem to protect police officers and excuse on-duty shootings of unarmed African Americans.

Nearly everyone would benefit from the legal system being structured differently as to not allow for these regular miscarriages of justice. Although the repercussions of this structure are most easily observed in urban, black populations, the same laws and structures that protect police officers from liability when they use excessive force against African Americans still apply when excessive force is used against people of any other race. The people who benefit from the current system are those who take advantage of it to further their own career ambitions, such as prosecutor politicians that have been able to use the system to gain power.[279] Bad police officers also use the system to excuse their bad behavior and avoid punishment for their actions. Paradoxically, good police officers are hurt by the favorability that the criminal justice system affords them. Good police officers—those without malicious intentions, with no desire to unjustifiably kill citizens—have exceedingly difficult and dangerous jobs because of the lack of

[279] One of the more recent and public examples of this can be found in Kamala Harris, who formerly served as the District Attorney of San Francisco and then the Attorney General of California. As an African American woman, Harris might seem an unlikely person to benefit from a system that justifies abuses against African Americans. However, she recognized how to gain power within the system and used it to her advantage, playing into the pattern of prosecutorial practices that had been established previously by racist white prosecutors. In her role as the lead prosecutor, Harris built a reputation for excusing misconduct and continuing to fight cases of wrongful conviction by exploiting legal technicalities to ensure that sentences were not overturned. In 2015, she opposed legislation that would have required her office to investigate police officers after shootings. After serving as the Attorney General of California, Kamala Harris was elected to the United States Senate, and later ran an unsuccessful campaign for President of the United States. She is but one example of prosecutors who use the system to advance their careers, at the expense of the most vulnerable populations in their jurisdictions.
Bazelon, Lara. "Kamala Harris Was Not a 'Progressive Prosecutor.'" *The New York Times*. January 17, 2019, sec. Opinion. https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html.

trust citizens have in them. When the justice system fails to hold police officers accountable, the community becomes even less trusting of the legal system and its agents. This makes it harder for police officers to keep those communities safe; it is a cycle of unaccountability and unnecessary danger.

America's legal system allows for, excuses, and accepts the kind of state-sponsored violence against African Americans that most people believe ended during the Civil Rights Movement. In light of this, Tamir Rice's death is not an anomaly, but a tragic example of the perpetuation of racial violence by the American legal system itself, and his killer's escape from punishment is a foregone conclusion. Tamir Rice and so many others have paid the price for the way the criminal justice system is structured. The American legal system, just like the country itself, was founded with roots in inequality, but with idealistic beliefs in its possibilities. It was structured with the ability to change with time and new understandings of morality. Because of this, the legal system can become a body that no longer excuses the current violence against African Americans, and in fact can be a part of dismantling the institutional forces that allow for its perpetuation. Prosecutorial reform could be accomplished by strengthening ethical rules and a having a functional disciplinary system for prosecutorial misconduct, as well as improved electoral processes through public information campaigns, prosecution review boards, and studies on the racial disparities of prosecutorial decisions.[280] The Supreme Court could retreat from their previous decisions concerning the doctrines of qualified immunity and excessive force, restoring qualified immunity to balance the two evils it was originally intended to check and allowing for Fourteenth Amendment claims in excessive force cases.[281] This could be

[280] Davis, Angela J. *Arbitrary Justice: The Power of the American Prosecutor*. 179-195.

[281] One leading legal scholar on the subject has argued that the complete abolishment of qualified immunity would be beneficial to the entire legal system. She wrote, "…abolishing qualified immunity would clarify the law, reduce the costs of litigation, and shift the focus of Section 1983 litigation to what should be the critical issue in these

fostered through an unlikely partnership between Justices Sotomayor and Thomas, the latter of whom wrote a concurrence in a recent qualified immunity case arguing that qualified immunity should only protect conduct that would be protected by historical common law notions of qualified immunity.[282] Juries could be formed using more inclusive methods of constructing venires that do not disproportionately exclude African Americans, *Batson* standards could be more rigorously applied by trial judges and scrutinized by Appeals Courts, and more education on the practice of jury nullification could inspire jurors to make decisions based not just on the letter of the law but on the principles of justice.[283] The criminal justice system is working the way it has been designed to work, which is to say, excusing and allowing state-sponsored violence against African Americans through the justification of inherently unjust police shootings. But it does not need to work this way. Just as the Supreme Court incrementally changes legal doctrines, the criminal justice system can be incrementally reformed to become the just legal system it ought to be.

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cases—whether government officials have exceeded their constitutional authority. But eliminating qualified immunity would not significantly alter the scope of constitutional protections, dramatically increase plaintiffs' success rates, or transform government practices that currently dampen the effects of lawsuits on officers' and officials' decisionmaking."
Joanna C. Schwartz. "After Qualified Immunity." *Columbia Law Review* 120, no. 309 (2020).

[282] *Ziglar v. Abbasi*, (2017) 582 US __.

[283] Jury nullification is mostly used to acquit defendants for whom a strict interpretation of the law would result in their conviction. However, the purpose of jury nullification is for individual jurors to look past the letter of the law and vote in a way that they believe produces a just result. One scholar wrote on the benefits of jury nullification, "The jury listens to the evidence presented in the case and decides who is telling the truth. 'In a sense, the jury serves as the conscience of the community.' Jurors may interpret the law in question without any repercussions. Ultimately, 'jurors can do as they please, and refusing to apply a law sometimes pleases them.'"
John Clark. "The Social Psychology of Jury Nullification." *Law & Psychology Review* 24, no. 39 (2000). 53.

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