

# QUALIFIED IMMUNITY AND THE COLORBLINDNESS FALLACY: WHY “BLACK LIVES [DON’T] MATTER” TO THE COUNTRY’S HIGH COURT

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DRAFT

## I. INTRODUCTION

On a November day in Charlotte, North Carolina, Dethorne Graham felt the onset of an insulin reaction.<sup>1</sup> Mr. Graham, an individual with diabetes, asked his friend, William Berry, to drive him to a convenience store to “purchase some orange juice to counteract the reaction.”<sup>2</sup> When he arrived at the store, Mr. Graham “saw a number of people ahead of him in the check-out line.”<sup>3</sup> Anxious about his deteriorating condition, Mr. Graham “hurried out of the store,” and asked Mr. Berry to drive him to a friend’s house instead.<sup>4</sup>

Meanwhile, Officer M.S. Connor with the Charlotte Police Department was watching Mr. Graham as he entered the store and “hastily” left without purchasing anything.<sup>5</sup> Officer Connor found Mr. Graham’s conduct “suspicious” and followed his vehicle as it left the parking lot.<sup>6</sup> A half mile from the convenience store, Officer Connor activated his patrol lights and initiated a traffic stop.<sup>7</sup>

When he reached the driver’s side window, Officer Connor was promptly informed that Mr. Graham “was [] suffering from a sugar reaction.”<sup>8</sup> In response, Officer Connor ordered Mr. Graham and Mr. Berry out of the vehicle.<sup>9</sup> Mr. Graham exited the vehicle, sat down on the curb, and briefly lost consciousness due to a drop in blood sugar.<sup>10</sup>

When police backup arrived, one of the officers “rolled [Mr.] Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring [Mr.] Berry’s pleas to get him some sugar.”<sup>11</sup> The officer turned to Mr. Berry and exclaimed, “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.”<sup>12</sup>

While Mr. Graham was lying on his stomach with his hands cuffed behind

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<sup>1</sup> Graham v. Connor (“*Graham I*”), 490 U.S. 386, 388 (1989).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 388-89.

<sup>4</sup> *Id.* at 389.

<sup>5</sup> *Id.*; Graham v. City of Charlotte (“*Graham II*”), 827 F.2d 945, 946 (4th Cir. 1987) (claiming Mr. Graham was “erratic” and “agitated”).

<sup>6</sup> *Graham I*, 490 U.S. at 389.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* The Fourth Circuit explained Mr. Graham suffered from a “diabetic insulin reaction” or “a reaction caused by a drop in blood sugar[.]” *Graham II*, 827 F.2d at 946.

<sup>9</sup> *Graham I*, 490 U.S. at 389.

<sup>10</sup> *Id.*; Graham v. City of Charlotte, 644 F. Supp. 246, 247 (W.D.N.C. 1986) [hereinafter *Graham III*].

<sup>11</sup> *Graham I*, 490 U.S. at 389.

<sup>12</sup> *Id.*

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his back, the officers picked him up and leaned him face-down on the hood of Mr. Berry's car.<sup>13</sup> As he began to regain consciousness, Mr. Graham asked the officers to check his wallet for his diabetic decal.<sup>14</sup> The arresting officer responded by telling him to "shut up" and "shoved his face down against the hood of the car."<sup>15</sup> The officers then carried Mr. Graham to the police cruiser and threw him in the backseat.<sup>16</sup> Mr. Graham waited in the car until dispatch confirmed that he "had done nothing wrong at the convenience store."<sup>17</sup>

During this encounter, the officers broke Mr. Graham's foot, bruised his forehead, injured his shoulder, cut his wrist, and permanently damaged his right eardrum.<sup>18</sup> In a moment when Mr. Graham desperately needed assistance, the police brutalized him. Mr. Graham was presumed guilty until proven innocent, dismissed as a liar and a drunk, and held at the mercy of law enforcement while he suffered a medical emergency.<sup>19</sup>

Mr. Graham's encounter with Officer Connor is a microcosm of a systemic problem that plagues policing in the United States. For the scores of men and women who suffer from police abuse and predatory practices, the Constitution is supposed to provide recourse. The right to recover for claims like Mr. Graham's, however, has been severely curtailed by the judicially-created doctrine of qualified immunity.<sup>20</sup>

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The Fourth Amendment of the Constitution of the United States protects "[t]he right of the people to be secure in their persons...against unreasonable...seizures[.]"<sup>21</sup> Pursuant to this constitutional guarantee, "free citizens" like Mr. Graham may sue a police officer for excessive force

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Graham I*, 490 U.S. at 389; *Graham II*, 827 F.2d at 947 (explaining Mr. Graham was "forcibly shoved into the car"). Mr. Graham described: "I was face down, an officer on this arm, officer on this arm, officer on my left leg, and on my right leg, and they [were] carrying me to the police car, and one of them opened the door and threw me in like a bag of potatoes and closed the door." *Graham v. Connor*, 1988 WL 1094091, at \*5-6 (1988) (Petition for Writ of Certiorari).

<sup>17</sup> *Graham I*, 490 U.S. at 389.

<sup>18</sup> *Id.* at 390 (explaining Mr. Graham suffers from "loud ringing in his right ear that continues to this day").

<sup>19</sup> See *id.* Mr. Graham was placed in custody before officers determined that he committed a crime and was released only when a call from dispatch proved his innocence. See *id.* at 389.

<sup>20</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (Stevens, J., dissenting) (opining Court's application of qualified immunity "stunningly restricts the constitutional accountability of the police....").

<sup>21</sup> U.S. CONST. amend. IV.

employed during an “arrest, investigatory stop, or other seizure of his person.”<sup>22</sup> Importantly, an individual cannot bring a lawsuit against a state law enforcement agency or police officer seeking monetary damages strictly “under” the Fourth Amendment.<sup>23</sup> Instead, the litigant must employ the statutory vehicle for remedying such a Fourth Amendment violation—18 U.S.C. § 1983.<sup>24</sup>

When police officers abuse their power, civil “actions for damages may offer the only realistic avenue for vindication of constitutional guarantees.”<sup>25</sup> However, the Supreme Court of the United States feared that suits against law enforcement would “entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”<sup>26</sup> Within the contours of balancing these competing interests arose the doctrine of qualified immunity.<sup>27</sup>

After an aggrieved victim files suit alleging a Fourth Amendment violation based on excessive force, an officer may invoke the doctrine of qualified immunity.<sup>28</sup> Procedurally, because qualified immunity was crafted as an affirmative defense, law enforcement officials bear the initial “burden” of invoking its protections after being sued.<sup>29</sup> However, once pled, the victim is tasked with overcoming the high threshold to establish that qualified immunity should not apply to shield the officer from liability.<sup>30</sup>

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<sup>22</sup> *Graham I*, 490 U.S. at 388.

<sup>23</sup> *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (“[S]ection [1983] is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred”).

<sup>24</sup> *Id.* at 140 (explaining “first inquiry in any § 1983 suit...is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws’”) (internal citation omitted).

<sup>25</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (collecting cases); *see also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring) (opining “some form of damages is the only possible remedy for someone in [the victim’s] position”).

<sup>26</sup> *Anderson*, 483 U.S. at 638 (citing *Harlow*, 457 U.S. at 814).

<sup>27</sup> *Id.* The Court has also found that protecting public officials protects the public at large: “to preserve [the officials’] ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.” *Wyatt v. Cole*, 504 U.S. 158, 168 (1992).

<sup>28</sup> *Harlow*, 457 U.S. at 815 (internal citation omitted) (opining “immunity is an affirmative defense that must be pleaded by a defendant official”).

<sup>29</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (“Since qualified immunity is a defense, the burden of pleading it rests with the defendant.”).

<sup>30</sup> Martin A. Schwartz, *Procedural Issues Relating to Qualified Immunity*, SEC. 1983 LITIG. CLAIMS & DEFS. § 9A.14(D)(1) (2020) (“[W]hile the defendant has the ultimate burden of establishing the qualified immunity defense, the plaintiff has the burden of demonstrating that the defendant violated a clearly established federal right.”) (collecting cases).

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The framework of qualified immunity is multi-faceted: it places the onus on the victim to demonstrate (1) their constitutional right was violated and (2) the right was “clearly established” at the time of the officer’s conduct.<sup>31</sup> In the Fourth Amendment context, the first inquiry hinges on whether the victim can prove that the officer’s intentional conduct was “objectively legally unreasonable.”<sup>32</sup>

The purpose of qualified immunity is allegedly best effectuated not just when law enforcement officials are excused from monetary repercussions, but also when they are spared the inconvenience of participating in invasive pretrial litigation and discovery.<sup>33</sup> As a result, the Court has repeatedly urged that defendants assert the defense early in a lawsuit’s tenure.<sup>34</sup> The doctrine may be invoked, for example, at the motion to dismiss phase, before discovery even begins.<sup>35</sup>

After the officer files a motion to dismiss on the basis of qualified immunity, the lawsuit is ordinarily halted.<sup>36</sup> Courts routinely issue a stay, ordering the parties not to engage in further litigation until a decision has been reached on whether the officer is entitled to qualified immunity.<sup>37</sup> It may be many months, or in some districts, years, before the court decides whether the officer is entitled to qualified immunity.<sup>38</sup> For Mr. Graham, nearly half a decade elapsed from when the officers broke his foot until he received a final decision on the application of qualified immunity.<sup>39</sup> In the meantime,

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<sup>31</sup> Pearson v. Callahan, 555 U.S. 223, 232 (2009).

<sup>32</sup> Anderson, 483 U.S. at 641.

<sup>33</sup> Hunter v. Bryant, 502 U.S. 224, 227 (1991) (emphasis in original) (internal quotations omitted) (explaining “entitlement is an *immunity from suit* rather than a mere defense to liability”).

<sup>34</sup> *Id.* at 228 (“Immunity ordinarily should be decided by the court long before trial.”).

<sup>35</sup> Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (concluding “defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery”).

<sup>36</sup> Harlow, 457 U.S. at 818 (“Until this threshold immunity question is resolved, discovery should not be allowed.”).

<sup>37</sup> See Gideon Mark, *Federal Discovery Stays*, 45 U. MICH. J.L. REFORM 405, 409 n.22 (2012) (collecting cases); *id.* at 409-10 (explaining “general rule that discovery may proceed while motions to dismiss are pending”).

<sup>38</sup> For example, in *Millender v. County of Los Angeles*, the plaintiffs were victims of police misconduct on March 28, 2005. 2007 WL 7589200, at \*1 (C.D. Cal. 2007). The district court issued an opinion on the question of qualified immunity nearly two years later, on March 15, 2007. *Id.* The Supreme Court issued a decision on the application of qualified immunity on February 22, 2012, almost exactly five years after the officers’ use of force. *Messerschmidt v. Millender*, 565 U.S. 535, 539 (2012).

<sup>39</sup> Mr. Graham was assaulted by officers on November 12, 1984, and the district court considered the case for nearly two years before denying relief on September 19, 1986. *Graham v. City of Charlotte*, 644 F. Supp. 246, 247 (W.D.N.C. 1986). It took the Supreme

evidence disappears, memories fade, and witnesses move away.

Only after a plaintiff overcomes the threshold showing to defeat qualified immunity can they present their case before a jury or receive a substantive decision on the merits.<sup>40</sup> Overcoming qualified immunity is the first step in the victim's road to recovery: before discovery is produced, pretrial motions are propounded, and the trial can commence.<sup>41</sup> However, most lawsuits fail at this stage.<sup>42</sup>

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This article first discusses the origins of Section 1983, the Civil Rights Act,<sup>43</sup> and its statutory purpose of protecting individuals from discrimination by state actors. The authors explore how, shortly after the law's codification, the Court embarked on a decades-long quest to diminish its efficacy. The largely conservative, all male, all white Court obscured the Act's purpose from its inception. In analyzing qualified immunity through the lens of the jurists who interpreted the doctrine, the authors demonstrate that the makeup of the country's highest Court defines the scope of protection afforded to police brutality victims.

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Court another two years to remand the case for final disposition. *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>40</sup> Schwartz, *supra* note 30 (“[C]ircuit courts...view qualified immunity as normally presenting[] an issue of law for the court and not a question for the jury”) (collecting cases).

<sup>41</sup> See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 15 (Oct. 2017) (explaining “interest in shielding government officials from the burdens of discovery and trial has taken center stage in the Court’s qualified immunity calculations”). Schwartz’s study reveals, however, that in the five districts she analyzed, qualified immunity was raised at the motion to dismiss phase 26% of the time, compared to 62% at the summary judgment stage. *Id.* at 30. Regardless of whether invoked in a motion to dismiss or on summary judgment, the defense is presented in a pretrial motion and forecloses the plaintiff from proceeding before a jury.

<sup>42</sup> See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 710-14 (April 2009) (explaining more than two-thirds of civil rights cases that invoked qualified immunity between 1990-2007 granted immunity for defendants).

<sup>43</sup> The modern 42 U.S.C. § 1983 was first passed by the Reconstruction Congress in the 1871 Ku Klux Klan Act, part of a series of three Enforcement Acts. Jay F. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Policy Analysis No. 901, THE CATO INSTITUTE (Sept. 14, 2020), <https://www.cato.org/publications/policy-analysis/qualified-immunity-legal-practical-moral-failure>. The three Enforcement Acts (passed in 1870 and 1871) were codified in an effort to effectuate the intent of the original Civil Rights Act of 1866 and the Fourteenth Amendment. *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Nov. 28, 2020). When referring to specific acts, the article uses “Act” or identifies the act by the year of its passage. When referring to the acts more generally, the authors refer to the “civil rights acts” or “civil rights legislation.”

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In its present-day application, the authors discuss the pain-staking academic exercise required to apply qualified immunity. The authors also emphasize that, absent concrete and uniform standards for applying qualified immunity in Section 1983 cases, judicial decision-making remains inconsistent. Indeed, a victim's right to recover for an officer's abuse depends on where they file suit, and whether there has been a previous victim of police brutality who suffered a fate similar enough to "clearly establish" the officer's wrongdoing. Through their articulation of the doctrine's history, the authors illustrate that the modern framework of qualified immunity is irreconcilable with Section 1983's remedial purpose.

In their analysis, the authors posit that the United States' long history of racism and anti-Blackness, and its present denial and minimization of the same, is unavoidably and inextricably enshrined in the doctrine of qualified immunity. The authors evince how messaging in U.S. culture has shaped the "objective" lens through which the judiciary determines whether an officer's use of force was "reasonable." Based on scientific evidence of the brain's response to perceived threats, and the messaging surrounding Black people in U.S. culture and jurisprudence, the authors posit that objectivity is impossible, and, at a minimum, not race neutral.

From this premise, the article outlines potential solutions. First, it highlights that policing in the U.S. is militarized, and precincts are often disconnected from the populations they serve. Thus, the authors suggest that reform begin with the underlying conduct that begets application of qualified immunity—police brutality, and the unnecessary and disproportionate use of force on Black people.

The article likewise proposes judicial reform. It emphasizes how the size and historical composition of the Court, in combination with the common law judicial system, has resulted in a modern framework of qualified immunity that is rife with problematic assumptions, thin rationalizations, discriminatory ranking of interests, and white supremacy. The authors contend that the judiciary endorses racist police practices by cloaking officers' criminality in immunity while insisting that the Court and the doctrine are "colorblind."

The authors conclude that underlying notions of anti-Blackness in U.S. law and culture are deeply entrenched in both the judiciary and policing, rendering it impossible to equitably apply an "objective" qualified immunity standard. As a result, the authors propose that the only realistic mechanism to lessen the abuse of Black people at the hands of police is to employ less policing and more healing. In addition, the authors assert that adding Justices to the Court will allow the system more easily to "self-correct"—based on the notion that more minds are less likely to coalesce into one problematic understanding of "reasonableness" or "objectivity," and instead will present a more representative "collective subjective." These solutions, the authors

explain, are based on the perspective that racism is part of U.S. culture and law. Thus, to lessen the prejudicial impact, we must remedy our own systemic racial biases both in policing and applying law.

## II. BACKGROUND

“The history should not require retelling. But old and established freedoms vanish when history is forgotten.” - Rutledge, J. (1945)<sup>44</sup>

### I.

After slavery was officially decried as illegal in the United States, Congress enacted laws in an effort to protect the rights of the nation’s newest citizens. Not long after Congress sought to remedy state-sanctioned discrimination, Southern states—emboldened by an apathetic Supreme Court and former slave-owning Justices—embarked on their own quest to dilute congressional efforts. Bitter and resentful, the South responded to equality efforts with its own counter-measures. At times, these efforts were discreet, couched in esoteric language not directly correlated to Black people, but, in other instances, Southern white rage fueled massacres, lynching, and violence. This “boomerang” phenomena, evidenced when strides are taken to advance the interests of the minority, results in the white majority “as a measure of the enduring role of caste interests in American politics,” fighting back.<sup>45</sup> Historians and social scientists trace the modern boomerang phenomena—*e.g.*, a swing from the first Black president to one who endorses white supremacy—to the moment state-sanctioned slavery was abolished in this country.<sup>46</sup> As evidenced by the history and origin of Section 1983 as explained below, this phenomena is deeply enshrined in U.S. antiquity.

### A. *History & Origin of Section 1983*

On April 9, 1866, at the start of the Reconstruction Era, Congress passed “[a]n Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.”<sup>47</sup> The Civil Rights Act of 1866 declared,

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<sup>44</sup> *Screws v. United States*, 325 U.S. 91, 120 (1945) (Rutledge, J., concurring).

<sup>45</sup> ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS*, 313-14 (2020).

<sup>46</sup> *Id.*

<sup>47</sup> 39th Congress. Sess. I. Ch. 31. 1866.

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[C]itizens, *of every race and color*, without regard to any previous condition of slavery or involuntary servitude...*shall have the same right...to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.... any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude...or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor[.]*<sup>48</sup>

Section 3 of the 1866 Act granted jurisdiction to federal courts over civil and criminal matters “affecting persons who are denied or cannot enforce in the courts...of the State or locality...any of the rights secured to them by the first section of this act[.]”<sup>49</sup> Remedial by nature, the 1866 Act was enacted in the wake of the Civil War, and defined U.S. citizenship to include anti-discrimination provisions that afforded protection to the country’s former slaves.<sup>50</sup> The 1866 Act was based on the enabling clause of the Thirteenth Amendment,<sup>51</sup> and was the first act in U.S. history to be passed over the President’s veto.<sup>52</sup>

Less than one month after the Act’s codification, “[o]n May 1, 1866, in Memphis, Tennessee, white police officers began firing into a crowd of African American men, women, and children...and afterward white mobs rampaged through Black neighborhoods with the intent to ‘kill every Negro[.]’”<sup>53</sup> Forty-six Black people were killed.<sup>54</sup>

The passage of the 1866 Act in April, and the massacre of Black families in May, illustrates the early beginnings of the boomerang pattern that

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<sup>48</sup> Civil Rights Act 1866, ch. 31 § 1-2, 14 Stat, 27 (current version at 42 U.S.C § 1981 (2018)) (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> See *id.*

<sup>51</sup> Roy Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV., 258, 266 (1977).

<sup>52</sup> *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE, <https://lynchinginamerica.eji.org/report/> (last visited Jan. 12, 2021). Andrew Johnson vetoed the Act. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

continues to threaten democracy in the United States. The passage of the 1866 Act, and the decades of remedial legislation that followed, were not immune from the white elites' violent resistance to equality and the economic incentives tied to the subjugation of Black people.

Following ratification of the Fourteenth Amendment on July 9, 1868,<sup>55</sup> Congress passed another Civil Rights Act, known as the Ku Klux Kan Act of 1871, designed to enforce the rights guaranteed by the Amendment.<sup>56</sup> Through its language, the 1871 Act sought to remedy state-sanctioned discrimination, or acts 'done under color of state law' that operate to deprive a person of rights, privileges, or immunities secured by the Constitution on account of race, color, or alienage.<sup>57</sup> The 1871 Act constitutes the current text of Section 1983, serving as one of the only modern-day avenues for civil claimants to seek recourse from police brutality under the Fourth Amendment. However, since its initial codification, the 1871 Act has been curtailed to restrict its remedial power.

In 1872, Louisiana elected the first Black governor in the United States, P.B.S. Pinchback.<sup>58</sup> Not long after, in a boomerang reaction, in 1873, Colfax, Louisiana was the site of "the bloodiest single act of carnage in all of Reconstruction."<sup>59</sup> On Easter Sunday, 300 white townspeople attacked Black protesters who were peacefully occupying the town courthouse, "[a]s many as 150 African Americans were killed in the massacre."<sup>60</sup>

Some of the white perpetrators of the 1873 massacre were indicted under a section of civil rights legislation that made it illegal to conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise" of any right secured by the Constitution.<sup>61</sup> However, in 1875, the Court held that the right to peaceably assemble "is found wherever civilization exists," and, thus, "[i]t was not[] a right granted to the people by the Constitution."<sup>62</sup> The Court's holding, finding that the right to assemble

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<sup>55</sup> *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/14thAmendment.htm#:~:text=Passed%20by%20the%20Senate%20on,laws%2C%E2%80%9D%20extending%20the%20provisions%20of> (last visited Jan. 16, 2021).

<sup>56</sup> Enforcement Act of 1871, § 1, 17 Stat. 13 (current version at 42 U.S.C § 1983 (2018)).

<sup>57</sup> *Id.*

<sup>58</sup> *Lynching in America*, *supra* note 52.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* As recently as 2015, Colfax was still home to a placard memorializing three "heroes" who "fell" in the massacre, "fighting for white supremacy." *Id.*

<sup>61</sup> Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140.

<sup>62</sup> *United States v. Cruikshank*, 92 U.S. 542, 551 (1875). Similarly, it held "right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race,[] is." *Id.* at 555-56.

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was rooted in universal law rather than the First Amendment, rendered the 1870 Act inapplicable to the white criminals. As a result, the *Cruikshank* Court found the indictments insufficient and remanded the case with instructions to dismiss the charges against the murderers.<sup>63</sup>

*Cruikshank* was not the first case in which the Court curtailed congressional efforts to afford protections to Black people. Despite the Fourteenth Amendment's ratification in 1868—with the acclaimed intent of affording “equal protection” to all persons on U.S. soil—the Court narrowed its applicability just four years later in the *Slaughter-House Cases*.<sup>64</sup> Specifically, the *Slaughter-House* Court opined that the privileges and immunities clause of the Fourteenth Amendment protected only those incident to U.S. citizenship, not state citizenship.<sup>65</sup> This narrow interpretation of the Fourteenth Amendment rendered it effectively meaningless,<sup>66</sup> holding that it does not apply to inhibit state governments from violating a citizen's substantive rights delineated in the first ten amendments. In other words, the *Slaughter-House Cases* signaled that states could pass discriminatory laws, so long as they do not run afoul of a narrow set of federal rights—like, the right to access ports and waterways, or the right to run for federal office.<sup>67</sup> In short, the Court's holding severely restricted the possibility of a federal remedy for victims of race discrimination.<sup>68</sup> These nebulous explanations for narrowing protections, based in federalism, allowed the Court to slash protections for Black people using language that, on its face, did not appear racially motivated.

In 1896, the Court explicitly stalled equality efforts in *Plessy v. Ferguson*.<sup>69</sup> The *Plessy* Court infamously affirmed state-sanctioned discrimination under the theory that Black people can be forced to use “separate” facilities, so long as they are dubbed “equal” to the

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<sup>63</sup> *Id.* at 559. Neither the Supreme Court, nor the lower court, gave any recitation of the events that led to the indictments. After the Court's decision in *Cruikshank*, “the Justice Department dropped 179 Enforcement Act prosecutions in Mississippi alone.” *Lynching in America*, *supra* note 52. .

<sup>64</sup> The same year the Amnesty Act of 1872 was passed, restoring civil rights to former Confederate leaders.

<sup>65</sup> *Slaughterhouse Cases*, 83 U.S. 36 (1872).

<sup>66</sup> *See id.*(Field, J., Dissenting) (opining that majority opinion rendered Fourteenth Amendment “a vain and idle enactment, which accomplished nothing”).

<sup>67</sup> *See id.*

<sup>68</sup> *Id.* The Court recognized the Amendment was promulgated in recognition of the fact “the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before” and “[t]he laws were administered by the white man alone.” *Id.* at 71. However, the Court concluded the Amendment was not intended to disrupt the relationship of the federal government to the state governments so drastically. *Id.*

<sup>69</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

accommodations afforded to white ones.<sup>70</sup> Justice Harlan,<sup>71</sup> a former slaveowner and the lone dissenter, noted the ongoing boomerang effect, writing, “[c]onstitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom...have been so construed as to defeat the ends the people desired to accomplish[.]”<sup>72</sup> Nevertheless, the all-white, all-male majority made its sentiments clear: “If one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane.”<sup>73</sup>

In the decades following the Court’s ratification of discrimination in *Plessy*, the legislature, and both political parties, shifted their attention to the nation’s economic and labor problems, largely ignoring the atrocities of Jim Crow. In 1909, Section 20 of the Criminal Code, derived from the Civil Rights Act of 1866, was amended to outlaw only “willful” deprivations of constitutional rights on account of race by those acting under color of law.<sup>74</sup> The willfulness requirement was added “in order to make the section less severe.”<sup>75</sup>

#### *i. The Roosevelt Court*

In 1945, the Roosevelt<sup>76</sup> Court upheld the constitutionality of Section 20. Sheriff Screws of Baker County, Georgia, and two other officers arrested a

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<sup>70</sup> *Id.*

<sup>71</sup> Justice Harlan’s grandson sat on the Court the year after *Plessy* was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>72</sup> The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

<sup>73</sup> *Plessy*, 163 U.S. at 552.

<sup>74</sup> *Screws v. United States*, 325 U.S. 91, 100 (1945).

<sup>75</sup> *Id.* In its original form, Section 20 protected only rights “enumerated in the Civil Rights Act.” *Id.* at 120. It was broadened to cover any rights protected by the Constitution or laws of the United States in 1874. *Id.*

<sup>76</sup> Franklin Delano Roosevelt appointed eight Justices to the Court over his twelve years as president. His historic plan to “pack the Court” was the result of his frustration with the conservative Hughes Court, which repeatedly declared unconstitutional FDR’s first legislative attempts at the New Deal. See Howard Ball & Phillip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America’s Constitutional Revolution*, OXFORD UNIV. PRESS, at 54-75 (1992). The packing scheme was unsuccessful, but FDR was able to appoint a variety of New Dealers to the Court: Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James F. Byrnes, Wiley B. Rutledge, and Robert H. Jackson. Justices Black and Douglas came to be regarded as the leaders of the liberal block of the Court. Justices Rutledge and Murphy were generally part of that block, indeed, they were often more liberal than Justices Black and Douglas. However, they had much shorter tenures on the Court. Justice Murphy joined the Court in 1940 and Justice Rutledge in 1943; both died in 1949. *Id.* at 76-99.

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young Black man, Robert Hall, on charges relating to theft of a tire.<sup>77</sup> Mr. Hall was handcuffed and transported to the courthouse.<sup>78</sup> Upon his arrival, the officers beat him with their fists and a “solid-bar blackjack about eight inches long and weighing two pounds.”<sup>79</sup> Mr. Hall died from his injuries.<sup>80</sup> Following his death, the officers were indicted for conspiracy to violate Section 20, and violating the same.<sup>81</sup>

The Georgia Attorney General’s decision to charge the officers in federal court carried many benefits. In part, the federal government has more resources, and is often viewed as more impartial, expedient, and just. In a southern state like Georgia, charging the officers with violations of the federal crimes code allows a jury pool from a more diverse demographic region than a state court could empanel. In addition, federal charges are often pursued against state and local law enforcement officials, who work closely, and often have close relationships, with state and county prosecutors. In *Screws v. United States*, the officers were tried in the Middle District of Georgia, and convicted by a jury on all counts.<sup>82</sup>

Justice Douglas delivered the opinion of the Court in *Screws*, joined by Chief Justice Stone, Justice Black, and Justice Reed, holding that “[t]hose who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him.”<sup>83</sup> However, the majority determined that the jury instructions did not present the question of intent properly.<sup>84</sup> The proper construction and constitutionality of the Act was upheld, but the case was reversed and remanded for a new trial.<sup>85</sup>

*Screws* is illustrative of the battle between Justice Frankfurter and Justices Black and Douglas. The Douglas majority refused to accept Justice Frankfurter’s position that “under color of law” does not cover conduct by an official that violates state law. In his dissent, Justice Frankfurter opined that to interpret the language ‘under color of law’ as the majority did is “to attribute to Congress the making of a revolutionary change in the balance of the political relations between the National Government and the States

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<sup>77</sup> *Screws*, 325 U.S. at 92.

<sup>78</sup> *Id.* at 92.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 93-94.

<sup>81</sup> *Id.* at 93.

<sup>82</sup> *Id.* at 94.

<sup>83</sup> *Id.* at 106.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 113.

without reason[.]”<sup>86</sup> For Justice Frankfurter, the possibility of frivolous federal prosecutions of state actors was a greater concern than leaving truly-wronged victims without an effective method of redress.<sup>87</sup>

Nevertheless, in an effort to compromise, the *Screws* Court considered the issue of “vagueness,” which had not been raised by the parties. That way, the opinion would construe the Act as Justices Douglas and Black intended; however, in return, they would remand the case for a new trial. As Justice Rutledge explained, the issue of vagueness was not raised by the officers, it was addressed only by the dissenting opinion in the Fifth Circuit.<sup>88</sup> Rather, the officers argued, “it is murder they have done,[] not deprivation of a constitutional right.”<sup>89</sup>

## ii. *The Court’s Continued Quest to Curtail the Efficacy of the Civil Rights Acts*

Despite his inability to persuade a majority in *Screws*, in 1951, Justice Frankfurter presented an alternative means of limiting the effective operation of the civil rights acts, without relying on principles of constitutionality or federalism. In *Tenney v. Brandhove*, Justice Frankfurter wrote for the majority, framing the question as whether Congress, in the 1871 Act, meant “to subject legislators to civil liability for acts done within the sphere of legislative activity[.]”<sup>90</sup> The Frankfurter majority answered this question in the negative, determining that, “[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty[.]”<sup>91</sup>

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<sup>86</sup> *Id.* at 144. In other words, protecting Black people from injustices committed against them by state actors was not a compelling enough reason to adjust our concept of dual federalism. *See also supra* notes 61-63 (discussing *Cruikshank*).

<sup>87</sup> *Screws*, 325 U.S. at 160 (“[i]f it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a re-invigoration of State responsibility”). The number of prosecutions under Section 20 and its companion had never exceeded 76 in a given year. To this Frankfurter responded, “Evil men are rarely given power; they take it over from better men to whom it had been entrusted. There can be no doubt that this shapeless and all-embracing statute can serve as a dangerous instrument of political intimidation and coercion in the hands of those so inclined.” *Id.*

<sup>88</sup> *Id.* at 118 (Rutledge, J., concurring in the result).

<sup>89</sup> *Id.* at 114.

<sup>90</sup> *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The case involved freedom of speech and accusations of being a communist—topics that evoked highly emotional responses in 1951. Indeed, in 1950, Justice Jackson wrote “[t]here is no doubt...that the present rather hysterical fear of communists, etc. is due in some large part to the identification of left-wingers with this movement to end segregation.... Nothing promotes fascism as surely as a real and widespread popular fear of communism and ‘radicalism.’” Ball, *et al.*, *supra* note 76, at 173.

<sup>91</sup> *Tenney*, 341 U.S. at 377.

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Justice Douglas dissented, arguing that the Act would only subject a legislative committee to civil penalties if their conduct “departs so far from its domain to deprive a citizen of a right protected by the Constitution[.]”<sup>92</sup> Justice Douglas opined that “when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends.”<sup>93</sup> After all, the purpose of the civil rights legislation was to protect individuals from violation of federal rights by state actors. Absolute immunity for those who make state law would seem antithetical to the statute’s purpose.

Once more, in 1961, Justices Douglas and Frankfurter issued dueling opinions on the proper construction of “under color of law,” this time, in the statute relied on by modern-day litigants, 42 U.S.C. § 1983. In *Monroe v. Pape*, a Black man and his family sued the City of Chicago and certain individual police officers who “broke into [their] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room[.]”<sup>94</sup> The complaint alleged that the officers had no warrant to search the family’s home, and they held Mr. Monroe on unspecified charges, did not permit him to call his attorney or family, and never brought him to be arraigned before a judge.<sup>95</sup>

Justice Douglas wrote for the *Monroe* majority, holding that the complaint stated a claim against the individual officers under Section 1983.<sup>96</sup> Justice Douglas framed the issue as whether Congress intended Section 1983 to give parties a remedy for deprivation of constitutional rights by an official who abuses his authority.<sup>97</sup> The majority determined that the construction given to the phrase “under color of law” in *Classic* and *Screws* was correct.<sup>98</sup> Justice Frankfurter, in his final year on the Court, dissented.<sup>99</sup>

### iii. The Justices’ Ideologies and the Impact on Legal Interpretation

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<sup>92</sup> *Id.* at 382.

<sup>93</sup> *Id.*

<sup>94</sup> *Monroe v. Pape*, 365 U.S. 167, 169 (1961), *overruled by* *Monell v. Dep’t. of Soc. Svcs. of New York City*, 436 U.S. 658 (1978).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 192.

<sup>97</sup> *Id.* at 172.

<sup>98</sup> *Id.* at 187.

<sup>99</sup> This time, he justified his vote in *Classic* arguing, “I joined this opinion without having made an independent examination of the legislative history...or of the authorities drawn upon for the *Classic* construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study.” He characterized the construction of the phrase in *Classic* and *Screws* as “skimpily considered.” *Id.* at 222.

Justice Frankfurter, born in Vienna in 1882, grew up in New York City and graduated from Harvard Law.<sup>100</sup> “[A]n immigrant much in need of acceptance,<sup>[101]</sup> [Justice Frankfurter] clung to the promise of American democracy” and had close relationships and great admiration for Justices Louis D. Brandeis and Oliver Wendell Holmes.<sup>102</sup> According to historians, a key aspect of Justice Frankfurter’s personality was the way he responded to political opposition, which led him “to emphasize certain strands in his philosophy and to exclude others when they were adopted by his enemies, [and] to ignore and rationalize certain contradictions in his legal theory.”<sup>103</sup>

Justices Douglas and Black came to represent the liberal block of the Court and Justice Frankfurter grew to despise both of them.<sup>104</sup> Prior to joining the Court, Justice Frankfurter was a Progressive and a member of the NAACP.<sup>105</sup> Justice Douglas was born in Minnesota and worked for the Securities and Exchange Commission under President Franklin D. Roosevelt before being nominated to the Court.<sup>106</sup> In contrast, Justice Black was an Alabama Senator who strenuously opposed anti-lynching legislation. He was also a former member of the Ku Klux Klan, and his former law partner was the “Cyclops” of the Klan in Birmingham.<sup>107</sup>

Even though he is thought to have been, and thought himself, a proponent of judicial restraint, Justice Frankfurter laid the foundation for the judicially-

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<sup>100</sup> H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 24 (1981).

<sup>101</sup> “Short of stature—he was less than five feet, five inches—he needed eloquence and intellectual power to keep the world of taller men from overlooking him.” Hirsch, *supra* note 100, at 18.

<sup>102</sup> Hirsch, *supra* note 100, at 10. “It was Holmes who symbolized to Frankfurter the best of everything: the Brahmin establishment, achievement in the law, culture, learning.” *Id.* at 32.

<sup>103</sup> Hirsch, *supra* note 100, at 9; *compare id.* at 135 (Justice Frankfurter writing in 1938, “Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements”); *with* W.V. State Board of Edu. v. Barnette, 319 U.S. 624, 649 (1943) (Frankfurter, J., dissenting) (describing Justice Holmes’s view as: “whenever legislation is sought to be nullified on any ground...this Court’s only and very narrow function is to determine whether...they have exercised a judgment for which reasonable justification can be offered”).

<sup>104</sup> However, in Justice Frankfurter’s later years on the Court, when Justice Black began to dissent from decisions of the Warren Court, the two reconciled to a degree. Justice Douglas was the only member of the Court who did not attend Justice Frankfurter’s funeral. *See* Ball, *et al.*, *supra* note 76, at 90.

<sup>105</sup> *See* Ball, *et al.*, *supra* note 76, at 161. Justice Frankfurter was also the first Justice to employ a Black law clerk, in 1948. *Id.* at 175.

<sup>106</sup> *See* Ball, *et al.*, *supra* note 76, at 33, 44.

<sup>107</sup> *See* Ball, *et al.*, *supra* note 76, at 19.

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created doctrine of qualified immunity.<sup>108</sup> He refused to admit that the federal government had authority to interfere with “states’ rights” when it came to protecting certain freedoms—a position he agreed with prior to joining the Court. His insistence on rooting the issues in federalism, instead of prejudice, remains a common theme in the United States, where promoting “states’ rights” has long been code for approving the subjugation of minorities. Newly-appointed Justice Amy Coney Barrett touts many of these same ideologies.<sup>109</sup>

Justice Douglas, although revered as a strong defender of civil rights, was also a perpetuator of white supremacy.<sup>110</sup> Both Justices Frankfurter and Douglas sat on the Court when it unanimously decided *Brown v. Board of Education*, a case heralded as a landmark victory for civil rights, but that implicitly, if not outright, held that segregation only had a negative effect on “colored children.”<sup>111</sup>

Justice Frankfurter argued passionately about the congressional intent behind the civil rights statutes in determining how the language should be construed and what conduct came within their scope.<sup>112</sup> Yet, in *Tenney*, he concluded that the language and intent of the statute should be ignored in favor of the English tradition of legislative immunity. Justice Frankfurter allowed his personal passions and animosity to shape his judicial philosophy at the expense of preserving his commitment to civil rights. His philosophy, advanced on the Court and through his progeny,<sup>113</sup> formed the basis for the

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<sup>108</sup> See *Pierson* discussion *infra* notes 118-120.

<sup>109</sup> See *Martin v. Milwaukee Cty.*, 904 F.3d 544 (7th Cir. 2018) (reversing \$6.7 million award for prisoner after concluding prison guard’s rape was not within scope of his employment).

<sup>110</sup> For example, Justice Douglas joined Justice Black’s majority opinion in *Korematsu v. United States*, which Justice Roberts described as “the case of convicting a citizen as punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry[.]” 323 U.S. 214, 226 (1944) (Roberts, J., dissenting), *abrogated by Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

<sup>111</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954). See Ball, *et al.*, *supra* note 76, at 172-79. According to Justice Clark, *Brown* was chosen as the lead case in the consolidated appeal “so that the whole issue would not smack of being a purely Southern one.” *Id.* at 173. While Justices Black and Douglas were prepared to overrule *Plessy*, Justices Jackson and Frankfurter preferred to put off deciding the issue for as long as possible. Chief Justice Vinson granted the government an extension to file a brief and then died suddenly of a heart attack. Upon hearing this news, Justice Frankfurter told his law clerks that it was “the first indication [he] ever had that there is a God.” *Id.* at 177. Chief Justice Vinson’s replacement, Chief Justice Earl Warren, managed to obtain unanimous consent to overrule *Plessy* by framing the issue in such a way that any Justice who wanted to affirm it would openly “have to accept the concept of inherent racial inferiority.” *Id.* at 178.

<sup>112</sup> See discussion re: *Screws*, *supra* notes 75-93; *Monroe*, *supra* notes 98-102.

<sup>113</sup> Justice “Frankfurter [] created in Washington a network of individuals, connected by

modern-day qualified immunity doctrine in *Pierson v. Ray*.<sup>114</sup>

*iv. Erosion of Protection under the Court's  
later Interpretation of Section 1983*

Relying on just two cases, including *Tenney*, the *Pierson* Court affirmed that judges are absolutely immune from liability under Section 1983 in ten sentences. Further, it concluded the police officers were entitled to present the defense of “good faith and probable cause,” which was rejected by the Fifth Circuit.<sup>115</sup> Specifically, Chief Justice Warren opined that the defense is available to officers under Section 1983 because “a police officer is not charged with predicting the future course of constitutional law.”<sup>116</sup> Similarly, in *Scheuer v. Rhodes*, the Court held there was immunity for officers in the state executive branch, which was qualified and of varying degree, depending upon the scope of discretion and responsibilities of the particular office, and the circumstances existing at the time the challenged action was taken.<sup>117</sup>

Based on *Tenney*, *Pierson*, and *Scheuer*, the Court determined that “there must be a degree of immunity” for all public officials in the execution of their duties.<sup>118</sup> Nevertheless, the Court continued to refer to qualified immunity as “a special exemption from the categorical remedial language of [Section] 1983.”<sup>119</sup> The Court characterized the qualified immunity standard as one that “necessarily contains elements of both” objective and subjective good faith.<sup>120</sup> Four Justices, including Chief Justice Burger, thought this standard was too harsh. Indeed, these Justices found it abhorrent that the doctrine required “not only good faith ‘but also [] knowledge of the basic, unquestioned constitutional rights of his charges.’”<sup>121</sup> The Justices cautioned that the Court’s application of the standard since *Scheuer*, “leaves little substance to the doctrine of qualified immunity.”<sup>122</sup>

Of course, the *Scheuer* decision had not taken the teeth out of qualified

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ideology, which spread his influence throughout the government.” Later, he “assembled a network of scholars, connected by personal loyalty to him, to create his version of the past.” Hirsch, *supra* note 100, at 200.

<sup>114</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>115</sup> *Id.* at 557.

<sup>116</sup> *Id.*

<sup>117</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

<sup>118</sup> *Wood v. Strickland*, 420 U.S. 308, 320-21 (1975).

<sup>119</sup> *Id.* at 322.

<sup>120</sup> *Id.* at 321.

<sup>121</sup> *Id.* at 322.

<sup>122</sup> *Id.* at 329.

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immunity as feared. Rather, “qualified” immunity was destroying the intent and effectiveness of Section 1983. In 1982, the Court in *Harlow v. Fitzgerald* determined that to quickly terminate “insubstantial” civil rights suits, the standard for good faith needed to be purely objective.<sup>123</sup> Inclusion of the subjective element meant that cases could not usually be terminated before discovery and summary judgment, which would be “peculiarly disruptive of effective government.”<sup>124</sup> The Court announced a new rule, “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 known.”<sup>125</sup>

Such a rule is wildly incompatible with enforcement of a statute that was intended to impose liability on “[e]very person” who causes a deprivation of constitutional rights to another “under color of any statute, ordinance, regulation, custom, or usage.”<sup>126</sup> The Court recognized that fact when it decided *Briscoe v. LaHue* in 1983, and wrote that, since the decision in *Tenney*, “it has been settled that the all-encompassing language of § 1983...is not to be taken literally.”<sup>127</sup>

In *Briscoe*, Justice Stevens determined that a police officer is absolutely immune from liability in a Section 1983 action for testifying falsely in a criminal case. The majority again discussed the debates in Congress over the 1871 Act and, this time, determined that the provisions regarding perjury in the Act were intended to prevent unjust *acquittals* of Klan members—not unjust convictions of Black people—and were therefore inapplicable to the case at bar.<sup>128</sup>

Implicit in the *Briscoe* Court’s decision is an assumption that the officer is not acting “under color of law” when he testifies as a witness. In dissent, Justice Marshall, the first-ever Black Justice on the Court, highlighted the clear disregard for traditional notions of statutory construction.<sup>129</sup> “[I]n the absence of clearly expressed legislative intent to the contrary, the Court simply presumes that Congress did not mean what it said.”<sup>130</sup> Further, he proffered, common law immunities in English and American courts would

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<sup>123</sup> *Harlow* 457 U.S. at 817.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 42 U.S.C. § 1983.

<sup>127</sup> *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983).

<sup>128</sup> *Id.* at 339-41.

<sup>129</sup> *Id.* at 348 (Marshall, J., dissenting).

<sup>130</sup> *Id.*

not have supported the Court's decision.<sup>131</sup>

Two years after the *Briscoe* decision, in 1985, an officer shot an unarmed, 15-year-old Black boy in the back of the head as he attempted to flee from the scene of a suspected burglary.<sup>132</sup> The teen, Edward Garner, had stolen ten dollars and a purse.<sup>133</sup> The statute at issue before the Court in *Tennessee v. Garner* authorized police to use any means necessary to effect an arrest. The Court held the statute was unconstitutional in that it authorized the officer's conduct.<sup>134</sup> Justice O'Connor, the Court's first female justice, joined by Chief Justice Burger and Justice Rehnquist, dissented.<sup>135</sup> She wrote, "the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer...who has no means short of firing his weapon to prevent escape."<sup>136</sup>

The officer who shot Edward Garner had long before been granted immunity for his murder. Still, the NAACP lawyer for Edward Garner's father told reporters that he was "stunned" by the Court's decision, adding, "[w]e couldn't have asked for more."<sup>137</sup> The lawyer thought they could not have asked for more than a decision that said "[i]t is not better that all felony suspects die than that they escape."<sup>138</sup> Indeed, Justice O'Connor's position essentially endorsed a "comply or die" theory of policing, which has since echoed throughout law enforcement.<sup>139</sup>

After *Garner*, the Rehnquist Court spent several decades further narrowing the contours of an individual's right to seek redress from police

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<sup>131</sup> *Id.* at 351.

<sup>132</sup> *Tennessee v. Garner*, 471 U.S. 1, 3-4, n.2 (1985).

<sup>133</sup> *Id.* at 4.

<sup>134</sup> *Id.* at 22.

<sup>135</sup> *Id.* at 22 (O'Connor, J., dissenting).

<sup>136</sup> *Id.* at 23.

<sup>137</sup> Linda Greenhouse, *High Court Limits Rights of Police to Shoot to Kill*, N.Y. TIMES (Mar.28,1985), <https://www.nytimes.com/1985/03/28/us/high-court-limits-rights-of-police-to-shoot-to-kill.html>.

<sup>138</sup> *Garner*, 471 U.S. at 11. Given the make-up of the Court at the time it decided *Garner*, the decision was a victory. In 1985, there was a six to three majority of Republican-appointed Justices. Unfortunately, courts around the country have recognized that the *Garner* holding was abrogated by *Scott v. Harris*, 550 U.S. 372 (2007) and *Mullenix v. Luna*, 577 U.S. 7 (2015). See *Johnson v. City of Phila.*, 837 F. 3d 343, 349 (3d Cir. 2016); *Pickett v. City of Perryton, TX*, Civ. A. No. 18-75, 2020 WL 562672 (N.D. TX Feb. 4, 2020).

<sup>139</sup> See e.g., 'Comply or Die' Policing: The Only Truly Compliant Person in a Police State is a Dead One, John Whitehead, <https://aninjusticemag.com/comply-or-die-policing-the-only-truly-compliant-person-in-a-police-state-is-a-dead-one-f2da5a6d8c82> (last visited Sept. 18, 2021) (quoting Los Angeles Police Officer, "If you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you").

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brutality.<sup>140</sup> Before joining the Court, Chief Justice Rehnquist served as Justice Jackson's law clerk in 1952, and authored a memo to Justice Jackson advising that "in the long run it is the majority who will determine what the constitutional rights of the minority are.... I think *Plessy*[] was right and should be reaffirmed."<sup>141</sup>

In *Graham v. Connor*, Chief Justice Rehnquist instructed lower courts on best practices for framing excessive force questions, emphasizing the risks associated with an officer's on-the-job duties and the inherent dangerousness that accompanies an officer's patrol.<sup>142</sup> Under Chief Justice Rehnquist's leadership, the Court solidified the trial court's task of weighing, and valuing, an officer's responsibility for making "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."<sup>143</sup>

Furthermore, in *Graham*, and a decade later in *City of Sacramento v. Lewis*, the Court articulated the distinction between a victim's rights under the Fourth, Eighth, and Fourteenth Amendments.<sup>144</sup> The Court distinguished an individual's right to be free from unreasonable force under the Fourth Amendment and that employed under the more rigorous Fourteenth Amendment substantive due process standard, requiring proof that law enforcement's conduct "shocks the conscience."<sup>145</sup> The Justices further divorced the Fourth Amendment framework from that advanced by the Eighth Amendment's "less protective" standard, requiring proof that an

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<sup>140</sup> See *inter alia* *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (holding that "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force necessary in a particular situation"); *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (explaining that "substantive due process, with its 'scarce and open ended' 'guideposts' can afford [petitioner] no relief" in police brutality case) (internal citations omitted); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) (opining that "only a purpose to cause harm unrelated to the legitimate object of the arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation").

<sup>141</sup> Ball, *et al.*, *supra* note 76, at 173.

<sup>142</sup> *Graham*, 490 U.S. at 396-97 (defining when force is "reasonable" in the Fourth Amendment context and implying that some degree of force is permitted to effectuate an arrest).

<sup>143</sup> *Id.* at 397. The Court summarized this standard in *Lewis*, explaining, "Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis* 523 U.S. at 848-49.

<sup>144</sup> *Graham*, 490 U.S. at 392.

<sup>145</sup> *Id.* at 395 ("Today we make explicit...that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.").

officer performed the abuse “maliciously and sadistically.”<sup>146</sup>

The Court’s application of the Fourth, Eighth, and Fourteenth Amendment rights hinged on when force was employed, and the victim’s corresponding level of culpability.<sup>147</sup> In support of the differing standards afforded to victims of police brutality—whether innocent victim, suspect, arrestee, or incarcerated person—the *Lewis* Court distinguished situations in which an officer has the “luxury...of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations” with those “unforeseen circumstances” which demand “an officer’s instant judgment.”<sup>148</sup> In the later situation, the Court explained that even an officer’s “recklessness...fails to inch close enough” to establish a constitutional violation.<sup>149</sup> Conversely, when the officer “enjoys” the luxury of time and “extended opportunities to do better are teamed with protracted failure even to care,” liability may attach.<sup>150</sup>

The reasoning invoked in *Lewis* and *Graham* left a hole in the qualified immunity analysis: what if an officer repeatedly uses unnecessary force when effectuating arrest and is, thus, afforded “extended opportunities to do better” but nonetheless continues to display “a protracted failure even to care”?<sup>151</sup> In hinging the varying standards for recovery on the element of hindsight, the Justices failed to consider the prolific and repeated use of force on Black people.<sup>152</sup> The rationale supporting the *Lewis* Court’s “objective standard”—and its reasoning supporting the different inquiries afforded to the Amendments protecting bodily autonomy—fails to consider when an officer’s “rushed, heat of the moment”<sup>153</sup> decisions transform into a repeated and intentional assault on communities of color.<sup>154</sup> Simply put: *Lewis* ignored

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<sup>146</sup> *Id.* at 398 (explaining test of whether officer acted “maliciously and sadistically...is incompatible with a proper Fourth Amendment analysis”); *see also id.* at 394 (citing *Whitley v. Albers*, 475 U.S. 312, 318-26 (1986)).

<sup>147</sup> *See Lewis*, 523 U.S. at 844 (1998); *Graham*, 490 U.S. at 395; *id.* at 398 (distinguishing circumstances for use of Fourth, Eighth, and Fourteenth Amendment standards). Notably, for pretrial detainees, the Fourteenth Amendment framework is applied rather than the Eighth Amendment. *Lewis*, 523 U.S. at 850-51.

<sup>148</sup> *Lewis*, 523 U.S. at 854.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *See id.* at 853 (referencing quoted language).

<sup>152</sup> *See Jeffrey Fagan & Alexis D. Campbell, Race and Reasonableness in Police Killings*, 100 B. U. L. REV. 951, 992 (concluding incidence-rate ratios “for Black victims...suggests that there are likely to be 1.29 times as many killings of Black civilians as white civilians over the study period”).

<sup>153</sup> *Lewis*, 523 U.S. at 853 (referencing quoted language).

<sup>154</sup> *See Fagan & Campbell, supra* note 152, at 998 (explaining “[p]olice killings [] are neither race-neutral nor linked to specific features of the incident,” rather, there is an

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the militarization of police in the U.S. and declined to craft a workable qualified immunity standard that addresses racial disparities in police killings.<sup>155</sup>

After nine minutes and 29 seconds of kneeling on a victim's neck,<sup>156</sup> or firing twenty bullets into their body,<sup>157</sup> the officer can no longer legitimately assert that a "rushed, heat of the moment decision" requiring his "instant judgment" defends his conduct. Intent to support a conviction for first-degree murder "may be formed while the killer is 'pressing the trigger that fired the fatal shot'" and "can be formulated in a fraction of a second."<sup>158</sup> Why, then, does the law instruct that the intent to kill can be formulated in mere milliseconds, unless the killer wears a police uniform? *Graham* and its progeny failed to explain why the law does not apply equally to those tasked with enforcing it.

Instead, in reaffirming *Harlow*'s objective inquiry for a victim's Fourth Amendment claim, *Graham* and *Lewis* also stripped the plaintiff of his ability to allege that the officer acted with racial animus.<sup>159</sup> Indeed, while *Graham* reasoned that the objective inquiry granted the plaintiff more protection, it nonetheless denied the plaintiff an ability to argue that he was maliciously and intentionally targeted by law enforcement because of his skin color.<sup>160</sup>

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"elevate[d] [] risk of police killings for Black...decedents").

<sup>155</sup> See Fagan & Campbell, *supra* note 152, at 1000 ("We suggest that the longstanding practice of deferring to the reasonableness of police officers' expertise fails to effectively protect persons of color by allowing racial bias to influence an officer's use of deadly force."); see also Amanda Geary, *Unequal Justice? A Look at Criminal Sentencing in Allegheny County*, 56 DUQ. LEV. 81, 86 (Winter 2018) (explaining four years before the *Lewis* Court's decision, "President Bill Clinton signed a \$30 billion federal crime bill which called for...the militarization of police departments").

<sup>156</sup> Describing George Floyd's death by Officer Derek Chauvin. Alia Chughtai, *Know their names: Black People Killed by the Police in the US*, AL JAZEERA (last visited Nov. 29, 2020), <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html>.

<sup>157</sup> Describing the death of 22 year-old Stephon Clark who was killed by police in his grandmother's backyard. Chughtai, *supra* note 156.

<sup>158</sup> Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 152 (1999).

<sup>159</sup> *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("[O]fficer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force").

<sup>160</sup> Intentionally targeting, in this context, is understood through the lens of implicit bias, rather than an outward recognition by officers of explicit discrimination. See Fagan & Campbell, *supra* note 152, at 958 n. 34 (collecting scholarship on implicit bias in policing). Undoubtedly, there are intentionally and explicitly racist officers within police departments who tout white supremacist beliefs and support the white nationalist movement. See Eric K. Ward, *SPLC Senior Fellow: Racial bias in U.S. Policing is a National Security Threat*, SOUTHERN POVERTY LAW CENTER (Jan. 12, 2021), <http://www.splcenter.org/news/2021/01/12/splc-senior-fellow-racial-bias-us-policing->

The unanimous Court never mentioned the race of the officers who broke Mr. Graham's foot, nor did it question whether Mr. Graham's diabetes-induced conduct would have been deemed "suspicious" if he were white.<sup>161</sup> Instead, the Court omitted any discussion of how race factored into a judge's qualified immunity analysis: at a time when police killed twenty-two Black people for every white one<sup>162</sup> and President George H.W. Bush proposed to spend \$7.9 billion on the War on Drugs,<sup>163</sup> disproportionately incarcerating Black men for nonviolent crimes.<sup>164</sup>

v. *Saucier v. Katz*

By 2001, the Court was well aware of the criticism leveled at its qualified immunity standard from all angles; the Bench,<sup>165</sup> the Bar,<sup>166</sup> and the dissent.<sup>167</sup> In response, the Justices steadfastly supported their prior jurisprudence, mandating the rigid formula for applying the doctrine.<sup>168</sup> In *Saucier*, a unanimous Court expressly held that "the first inquiry [in a qualified immunity analysis] *must* be whether a constitutional right would have been violated" and "second, assuming the violation is established, the question whether the right was clearly established *must* be considered...."<sup>169</sup> Nevertheless, despite the Court's instruction for judges to begin the qualified immunity analysis with the first prong, the *Saucier* Court skipped to the

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national-security-threat. The focus here is not on those who openly endorse racist ideologies, but on the more covert danger—the officers who unwittingly uphold white supremacy through implicit racial biases.

<sup>161</sup> See generally *Graham v. Connor*, 490 U.S. at 386-99.

<sup>162</sup> IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 27 (2019).

<sup>163</sup> Timothy J. McNulty, *Bush Heats up War on Drugs*, CHI. TRIB. (Sept. 6, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-09-06-8901100654-story.html>.

<sup>164</sup> "Nonviolent Black drug offenders remain in prisons for about the same length of time (58.7 months) as violent White criminals (61.7 months)." Kendi, *supra* note 162, at 25.

<sup>165</sup> See e.g., *Finnegan v. Fountain*, 915 F.2d 817, 820, 822 (2d Cir. 1990) (finding both jury and district judge who applied qualified immunity in excessive force context were "confused").

<sup>166</sup> See, e.g., Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for A Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61, 67 (Spring 1989) (explaining "question of qualified immunity for Fourth Amendment claims is less clear").

<sup>167</sup> *Saucier v. Katz*, 533 U.S. 194, 216 (2001) (Ginsburg, J., dissenting) (explaining in some cases, "Court's two-step procedure is altogether inutile").

<sup>168</sup> See *id.* at 197.

<sup>169</sup> *Id.* at 200 (emphasis added).

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second.<sup>170</sup>

In addition to steadfastly demanding that qualified immunity be decided in a linear fashion, the *Saucier* Court reiterated the “hazy border between excessive and acceptable force” and explained it may be “difficult” for an officer “to determine how the relevant legal doctrine...will apply to the factual situation the officer confronts.”<sup>171</sup> In this way, the *Saucier* Court brought to the forefront other issues that plagued the judiciary’s analyses.<sup>172</sup>

The Court opined, for example, that “to make an arrest or investigatory stop necessarily carries with it *the right* to use some degree of physical coercion or threat thereof to effect it.”<sup>173</sup> When, and under what constitutional framework, were officers awarded the “right” to use force to perform their job? The Court did not hesitate in articulating that officers have the right to use force against suspects and arrestees—a group disproportionately and unjustly dominated by Black men.<sup>174</sup>

In the years following *Saucier*, the qualified immunity standard continued to undergo scrutiny. Repeatedly, Justice Breyer, joined at times by others, voiced his opposition to *Saucier*’s “rigid order of battle.”<sup>175</sup> Despite the criticisms leveled from the high Court dissenters and the lower courts,<sup>176</sup> the Court continued to demand that litigants “slosh [their] way through the

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<sup>170</sup> *Id.* at 207-08; *id.* at 213 (Ginsburg, J., dissenting) (explaining majority was “skipping ahead of the basic...inquiry it admonished lower courts to undertake at the outset”).

<sup>171</sup> *Id.* at 205-06; *accord* *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier* for the proposition that it may be difficult for police to understand the relevant legal doctrines); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (same).

<sup>172</sup> *Saucier*, 533 U.S. at 214-15 (Ginsburg, J., dissenting) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972)).

<sup>173</sup> *Id.* at 208.

<sup>174</sup> *See Ward supra* note 160 (“Black teenagers are 21 times more likely than white teenagers to be killed by police.”).

<sup>175</sup> *See Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., dissenting) (“I would end the failed *Saucier* experiment now.”); *Scott v. Harris*, 550 U.S. 372, 387 (2007) (Breyer, J., dissenting) (“[W]e should overrule the requirement, announced in *Saucier*”); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (Breyer, J., dissenting) (“I...express my concern about the matter to which...lower courts are required to evaluate claims of qualified immunity under the Court’s decision in *Saucier*...”); *Bunting v. Mellen*, 541 U.S. 1019, 1026 (2004) (Scalia, J., dissenting) (explaining “Justice Stevens...would prefer to take the course we have repeatedly rejected, [] to repudiate the *Saucier* procedure”).

<sup>176</sup> Justices Ginsburg and Scalia were frequently at competing ends of the qualified immunity debate. Justice Scalia opined that repudiating *Saucier*’s mandatory two-part procedure was “unlikely” to “ever be satisfied.” *Bunting*, 541 U.S. at 1026 (Scalia, J., dissenting). In contrast, beginning with *Saucier*, Justice Ginsburg repeatedly voiced her dissent, claiming the mandatory procedure “holds large potential to confuse.” *Saucier*, 533 U.S. at 214-15 (Ginsburg, J., dissenting). The Justices bore ideological differences akin to the polarizing views of Justices Douglas and Frankfurter.

factbound morass of reasonableness.”<sup>177</sup> The Court urged lower courts to avoid crafting an “easy-to-apply legal test in the Fourth Amendment context” or fall victim to the “magical on/off switch” to make the jurisprudence more digestible.<sup>178</sup>

vi. *Pearson v. Callahan*

Finally, in 2009, the Court reversed course.<sup>179</sup> In *Pearson*, a unanimous Court overturned its *per curiam* opinion only eight years earlier in *Saucier*, expressly finding that “a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.”<sup>180</sup> Notably, in reversing course, Justice Alito reasoned “the *Saucier* rule is judge made and...[a]ny change should come from this Court, not Congress.”<sup>181</sup>

In support of its decision to no longer require a strict order of analysis, the *Pearson* Court opined that applying qualified immunity had become, in some instances, “an essentially academic exercise.”<sup>182</sup> The Court therefore reasoned that, despite the risk of “constitutional stagnation,” it was a better judicial philosophy to not require an adjudication on constitutional claims when such an exercise can otherwise be avoided.<sup>183</sup>

Thus, in 2009, the Court acknowledged some of the alleged shortcomings within the qualified immunity framework and seemingly unraveled its prior precedent.<sup>184</sup> The Court reasoned that its decision to overturn *Saucier* was consistent with the principles supporting *stare decisis*,<sup>185</sup> and came after years of lower courts steadfastly ignoring the qualified immunity standard or otherwise criticizing its application.<sup>186</sup> Finally, the Court responded, at least

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<sup>177</sup> *Scott*, 550 U.S. at 383.

<sup>178</sup> *Id.* at 382.

<sup>179</sup> *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>180</sup> *Id.* at 234.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 237.

<sup>183</sup> *Id.* at 232.

<sup>184</sup> *Id.* at 231 (asking litigants to “address the question whether *Saucier* should be overruled”).

<sup>185</sup> *Stare Decisis*, Latin for “to stand by decided matters,” is “doctrine or policy of following rules or principles laid down in previous judicial decisions....” *Definition of Stare Decisis*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/stare%20decisis> (last visited Nov. 29, 2020). Under *stare decisis*, “[a]dhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (internal quotation omitted).

<sup>186</sup> *Pearson*, 555 U.S. at 233-35, 242 (explaining “[l]ower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been

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in part.

### A. Modern Application

Today, when applying qualified immunity in Section 1983 cases, courts begin with the familiar two-prong approach. The modern-day qualified immunity framework is largely academic—requiring judges to rifle through cases in search of “clearly established law,” and comparing every new set of facts to a vaguely similar historical counterpart. This exercise is arbitrary, hinging on the assumption that law enforcement personnel have a thorough understanding of existing judicial precedent. In addition, the application of qualified immunity varies based on a judge’s own perception of “reasonableness” and “objectivity,” leading to inequitable outcomes based on where the victim filed suit.

Indeed, while *Pearson* changed the framework by which courts apply the doctrine of qualified immunity,<sup>187</sup> the basic principles and policy underlying the application of qualified immunity remained unchanged.<sup>188</sup> Under a modern post-*Pearson* qualified immunity analysis for Section 1983 allegations,<sup>189</sup> courts begin with assessing whether the plaintiff has established a violation of the Fourth Amendment.<sup>190</sup> Next, the court determines “whether the right in question was clearly established at the time of the violation.”<sup>191</sup> Post-*Pearson*, a court may address these two questions “in the order that will best facilitate the fair and efficient disposition of each case.”<sup>192</sup>

In practice, some courts follow *Saucier*’s guidance and analyze the qualified immunity question by first “determin[ing] whether the plaintiff has alleged a deprivation of a constitutional right.”<sup>193</sup> In support of this linear pre-*Pearson* approach, courts have opined that while it may be “easier” to move immediately to the second prong, an analysis on the first prong “provide[s]

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reticent in their criticism of *Saucier*’s rigid order of battle” and Court’s departure from *Saucier*, thus, “reflects respect for the lower federal courts that bear the brunt of adjudicating these cases”).

<sup>187</sup> See *id.* at 236 (holding “while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory”).

<sup>188</sup> See *id.* at 234 (declining to find *Saucier* was “badly reasoned” or “unworkable”).

<sup>189</sup> *Tolan v. Cotton*, 572 U.S. 650, 655 (2014).

<sup>190</sup> *Id.* at 655-56 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Graham v. Connor*, 490 U.S. at 394 (1989)).

<sup>191</sup> *Id.* at 656 (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

<sup>192</sup> *Pearson*, 555 U.S. at 242.

<sup>193</sup> *Estate of Armstrong ex rel Armstrong v. Village of Pinehurst*, 810 F.3d 892, 898 (4th Cir. 2016).

guidance” to law enforcement “within the confines of the Fourth Amendment.”<sup>194</sup> Courts claim this approach is “no mere dictum” because ruling on an officer’s conduct “creates law that governs the officials behavior.”<sup>195</sup>

Nevertheless, courts skip the first prong of the qualified immunity analysis when “the constitutional question is so fact-bound that a decision provides little guidance for future cases.”<sup>196</sup> In essence, judges who cite this rationale claim that even if their decision were to create “clearly established law” for successive litigants, the present factual scenario is so unique and unlikely to be replicated that the creation of law is a time-wasting expenditure that employs precious court, and party, resources.<sup>197</sup> Despite the high Court’s steadfast approach to resolving constitutional questions pre-*Pearson*, the Court also shifted course, warning that lower “[c]ourts should [now] think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional...interpretation that will have no effect on the outcome of the case.”<sup>198</sup>

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Notwithstanding which prong is analyzed first, the modern analysis continues to mirror the pre-*Pearson* articulation of the doctrine. Under the first prong, courts continue to apply an “objective reasonableness standard.”<sup>199</sup> In striving for objectivity, courts “filter” their analysis through

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<sup>194</sup> *E.W. by & through T.W. v. Dolgos*, 894 F.3d 172, 179 (4th Cir. 2018) (citing *Camreta v. Greene*, 563 U.S. 692, 707 (2011); *Armstrong*, 810 F.3d at 899).

<sup>195</sup> *Id.* (citing *Camreta*, 563 U.S. at 708); *Armstrong*, 810 F.3d at 898 (claiming this approach is “better approach to resolving cases”); *see also E.W. by & through T.W.*, 894 F.3d at 899 (citing *Pearson*, 555 U.S. at 236).

<sup>196</sup> *Thompson v. Howard*, 679 F. App’x 177, 180 (3d Cir. 2017) (citing *Pearson*, 555 U.S. at 237); *accord Militello v. Sheriff of Broward Sheriff’s Office*, 684 F. App’x 809, 812, n. 7 (11th Cir. 2017) (citing *Pearson*, 555 U.S. at 237) (declining to consider first prong because plaintiff’s claim presents “fact-bound Fourth Amendment issue for which a particularized analysis by our court would provide little precedential value”).

<sup>197</sup> The *Pearson* Court explained “*Saucier*’s two-step protocol ‘diserves the purpose of qualified immunity’ when it ‘forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.” *Pearson*, 555 U.S. at 237.

<sup>198</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Pearson*, 555 U.S. at 236-37).

<sup>199</sup> *Gandy v. Robey*, 520 F. App’x 134, 140 (4th Cir. 2013) (quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989)); *see also Cole v. Carson*, 935 F.3d 444, 457 (5th Cir. 2019). The Fifth Circuit in *Cole* relied on the Supreme Court’s guidance in *Mullenix v. Luna*, 577 U.S. 7 (2015). *Cole*, 935 F.3d at 447 (explaining “Supreme Court vacated *Cole* [which was then on appeal before it] and remanded for consideration in light of its intervening decision in *Mullenix*”). With the sting of a recent reversal—and the Fifth Circuit twice deciding to award qualified immunity to the officers—the *Cole* court (eventually, and, *en banc*), found in favor of the plaintiffs (the parents of a mentally ill teenager who was shot dead by police) and

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“the lens of the officer’s perceptions at the time of the incident in question.”<sup>200</sup> This approach aids in “limit[ing] second-guessing of the reasonableness of actions with the benefit of 20/20 hindsight.”<sup>201</sup> And, too, the standard was drafted to “limit the need for decision-makers to sort through conflicting versions of the actual facts and allows them to focus instead on what the police officer reasonably perceived.”<sup>202</sup>

In weighing the reasonableness of an officer’s use of force, the trial court begins with three key inquiries: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.<sup>203</sup> Even with the Court’s resistance to crafting a “mechanical”<sup>204</sup> framework to analyze Fourth Amendment cases, lower courts routinely apply these three factors—dubbed the “*Graham* factors”—when assessing a plaintiff’s claims.<sup>205</sup>

The first inquiry, the severity of the crime at issue, suggests that the more “serious” the crime based on the United States Crimes Code and its accompanying grade, the more justifiable the officer’s use of force. For example, “[w]hen the subject of a seizure has not committed any crime, this factor weighs heavily in the [plaintiff’s] favor.”<sup>206</sup> Likewise, when the plaintiff’s crime is merely “minor,” the first factor continues to weigh in his favor.<sup>207</sup>

However, if the plaintiff’s alleged crime is “serious,” but nevertheless

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remanded the case to the trial court for further proceedings. *Id.*

<sup>200</sup> *Gandy*, 520 F. App’x at 140 (quoting *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994)).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 140-41. All facts are ordinarily considered “in the light most favorable to the plaintiff.” *Scott v. Harris*, 550 U.S. 372, 378 (2007). However, if video of the consequential event exists, the court may use the video as definitive proof, rather than “accepting” either parties’ version of the facts. *Id.*

<sup>203</sup> *Graham*, 490 U.S. at 396. Notably, *Graham* only addressed Fourth Amendment violations for the excessive use of force during arrest, the application of qualified immunity was not at issue.

<sup>204</sup> *Bell v. Wolfish*, 411 U.S. 520, 559 (1979) (“Fourth Amendment is not capable of precise definition or mechanical application”).

<sup>205</sup> *Graham*, 490 U.S. at 396; *see e.g.*, *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 899-901 (4th Cir. 2016) (applying *Graham* factors to Fourth Amendment analysis).

<sup>206</sup> *Village of Pinehurst*, 810 F.3d at 899-900.

<sup>207</sup> *Id.*; *accord* *Muehler v. Mena*, 544 U.S. 93, 102-03 (2005) (Kennedy, J., concurring) (“[A] matter of first concern is that excessive force is not used on the persons detained, especially when these persons, though lawfully detained, are not themselves suspected of any involvement in criminal activity.”).

nonviolent, law enforcement is more justified in using force.<sup>208</sup> In the eyes of the court, an officer's decision to use deadly force hinges, in part, on the criminal culpability of his victim.<sup>209</sup> This standard usurps the role of the judge as sentencer and invites the police—who, by the Court's own admission, do not know the “hazy borders”<sup>210</sup> of the law—to enforce a “punishment” in proportion to the victim's alleged crime.

This first prong is both in defiance of the Court's pre-*Graham* precedent and not effectuated in modern-day policing. As Justice Douglas opined writing for the majority in *Screws*, “[i]t is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a ‘trial by ordeal.’”<sup>211</sup> Justice Douglas explained, “[e]ven those guilty of the most heinous offenses are entitled to a fair trial.”<sup>212</sup> Nowhere did Justice Douglas attest that those charged with “more serious” crimes may proportionally be harmed more seriously by police. Rather, he steadfastly maintained the opposite.<sup>213</sup>

Moreover, the first *Graham* factor has not resulted in a policing practice that relates the use of force in escalating police encounters to the seriousness of a victim's alleged crime. George Floyd was killed after trying to use a counterfeit \$20 bill,<sup>214</sup> and Eric Garner was choked to death for selling loose cigarettes.<sup>215</sup> The purpose of crafting this standard, and the *Graham* factors more generally, was allegedly to create “clearly established law” to afford

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<sup>208</sup> See *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (explaining plaintiff “was stopped for a minor traffic violation...making the need for force substantially lower than if she had been suspected of a serious crime”).

<sup>209</sup> See *Darden v. City of Fort Worth*, 880 F.3d 722, 729 (5th Cir. 2018) (“The magistrate judge who issued the warrant determined that there was probable cause to believe that suspects at the residence were dealing drugs. These types of drug crimes are certainly serious offenses. Thus, the severity of the crime at issue weighs in favor of the officers”) (citing *Orr v. Copeland*, 844 F.3d 484, 493 (5th Cir. 2016)). In *Orr*, the Fifth Circuit opined that the decedent's vehicle “smelled like marijuana,” he “had a white residue on his face,” and the officer who ultimately killed him “observed drug paraphernalia—plastic baggies—hidden in the backseat.” *Orr*, 844 F.3d at 493. Based on these facts, the Fifth Circuit declared the officer “already had reason to suspect [the decedent] was involved in serious drug crimes. As such, some degree of non-lethal force was reasonable to counter the [decedent's] efforts to flee.” *Id.*

<sup>210</sup> *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 18 (2015) (per curiam)).

<sup>211</sup> *Screws v. United States*, 325 U.S. 91, 106 (1945).

<sup>212</sup> *Id.* at 107.

<sup>213</sup> See *id.* at 106-08.

<sup>214</sup> Chughtai, *supra* note 159.

<sup>215</sup> *Id.*

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officers notice of when their conduct may be deemed unconstitutional.<sup>216</sup> Decades later, there is no indication that *Graham*'s first factor plays any part in achieving this intent.

The second factor, whether the plaintiff poses an immediate threat to the safety of the officers or others, analyzes the temporal link between a plaintiff's threatening conduct and an officer's reaction.<sup>217</sup> Consequently, if an individual "has already been restrained," or is unrestrained and "presents no serious safety threat," the need for law enforcement's use of force is not "immediate."<sup>218</sup>

What constitutes an "immediate threat," however, differs depending on where the plaintiff files suit. For example, in the Fourth Circuit, "resistance and noncompliance" do not pose an immediate threat necessitating police use of force.<sup>219</sup> Indeed, in the Fourth Circuit, even running "full bore" towards law enforcement does not justify the use of force.<sup>220</sup> Comparatively, in the Fifth, Eighth, and Tenth Circuits, "a suspect's refusal to comply with instructions" may warrant "physical force...to effectuate [his] compliance."<sup>221</sup> Thus, whether your conduct poses an "immediate threat" justifying shots fired depends largely on where you live in the United States.<sup>222</sup>

During the second inquiry, courts are also encouraged to analyze "the size and stature of the parties involved."<sup>223</sup> This invites the court and the officer

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<sup>216</sup> *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) ("A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'") (internal citation omitted).

<sup>217</sup> *Estate of Armstrong ex rel Armstrong v. Village of Pinehurst*, 810 F.3d 892, 905 (4th Cir. 2016) (concluding "police officer may only use serious injurious force...when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force").

<sup>218</sup> *Id.* at 903-04.

<sup>219</sup> *Id.* at 904 ("Even noncompliance with police directives and nonviolent physical resistance do not necessarily create 'a continuing threat to the officers' safety.'") (collecting cases).

<sup>220</sup> *Park v. Shiflett*, 250 F.3d 843, 852-53 (4th Cir. 2001) (concluding pepper spraying unarmed woman sprinting toward officers constituted excessive force).

<sup>221</sup> *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) ("Officers may consider a suspect's refusal to comply with instructions during a traffic stop in assessing whether physical force is needed to effectuate a suspect's compliance.") (citing *Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007); *Wertish v. Krueger*, 433 F.3d 1062 (8th Cir. 2006)).

<sup>222</sup> See Andrew Chung, *et al.*, *Shot by cops, thwarted by judges and geography*, REUTERS INVESTIGATES (Aug. 25, 2020, at 10:00 AM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/> ("[P]laintiff's chances are so much better in California that one who was armed in an encounter with police is more likely to overcome qualified immunity than one who was unarmed in Texas.").

<sup>223</sup> *E.W. by and through T.W. v. Dolgos*, 894 F.3d 172, 181 (4th Cir. 2018).

to judge whether force is necessary based on the body before it.<sup>224</sup> This exercise inherently involves judging the plaintiff based on our own notion of dangerousness—i.e., finding the plaintiff was “very strong,”<sup>225</sup> lived in a “rough neighborhood,”<sup>226</sup> “had white powder on his face,”<sup>227</sup> or the area “smelled like marijuana.”<sup>228</sup>

Third, and finally, the court is tasked with analyzing whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight.<sup>229</sup> If the plaintiff “reasonably” appeared to be resisting arrest or attempting to flee, this factor weighs in favor of the officer’s use of force.<sup>230</sup> Conversely, if the individual is within the officer’s “control,” the use of force is more likely to be judged unreasonable.<sup>231</sup> The third factor, despite its origin in the 1980s, has failed to apprise officers of the appropriate use of force when a suspect is not resisting. Nearly forty years after this standard was first announced, for example, officers still found it appropriate to kneel on a restrained suspect for almost nine minutes, suffocating him to death.<sup>232</sup>

Although many lower courts begin their analysis with the *Graham* factors, the court may employ other inquiries when assessing whether an officer’s conduct was objectively reasonable.<sup>233</sup> Ultimately, *Graham* advises lower courts to consider reasonableness based on “the totality of the circumstances.”<sup>234</sup> In practice, some courts omit discussion of the *Graham* factors entirely.<sup>235</sup> Other courts have insisted that the Fourth Amendment

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<sup>224</sup> See e.g., *Muehler v. Mena*, 544 U.S. 93, 105 (2005) (Stevens, J., concurring) (“I think it clear that the jury could properly have found that this 5-foot-2-inch young lady posed no threat to the officers at the scene....”).

<sup>225</sup> *Galvan v. City of San Antonio*, 435 F. App’x 309, 311 (5th Cir. 2010) (finding decedent lived in “rough neighborhood,” was “very strong,” and “on cocaine”).

<sup>226</sup> *Id.*

<sup>227</sup> *Orr v. Copeland*, 844 F.3d 484, 493 (5th Cir. 2016) (explaining decedent’s vehicle “smelled like marijuana,” he “had a white residue on his face,” and the officer “observed drug paraphernalia—plastic baggies—hidden in the backseat”).

<sup>228</sup> *Id.*

<sup>229</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

<sup>230</sup> *Pauly v. White*, 814 F.3d 1060, 1078 (10th Cir. 2016) (citing *Graham*, 490 U.S. at 396) *vacated on other grounds by White v. Pauly*, 137 S. Ct. 548 (2017).

<sup>231</sup> *Id.*

<sup>232</sup> Describing George Floyd’s death by Officer Derek Chauvin. Chughtai, *supra* note 159.

<sup>233</sup> See *infra* note 328.

<sup>234</sup> *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9).

<sup>235</sup> *Estate of Redd by & through Redd v. Love*, 848 F.3d 899, 908 (10th Cir. 2017) (“Fourth Amendment reasonableness analysis is not limited to the three *Graham* factors...Because *Graham*’s circumstances differ so greatly from those in this case, its

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analysis requires consideration of *Graham* and its progeny.<sup>236</sup> Subsets and branches of *Graham* have also developed, with separate criteria used to determine the reasonableness of police use of force in specific contexts, like medical emergencies or fatal shootings.<sup>237</sup>

The Court's open-ended invitation to disregard the only formulaic approach to applying qualified immunity is consistent with its urging to avoid "easy-to-apply legal test[s] in the Fourth Amendment context."<sup>238</sup> In the absence of precise guidance on the Fourth Amendment's application, courts are ultimately free to determine an officer's reasonableness within their own understanding of objectivity. It is, thus, no surprise that similar facts give rise to vastly different outcomes based on what judges each characterize as "reasonable." In Texas, for example, judges grant immunity to police officers at nearly twice the rate in California—59% of cases, compared to 34%.<sup>239</sup> There is no "Equal Justice for All" under the Court's current framework; rather, only equal justice for some.

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If the court finds the plaintiff has established that the officer violated his Fourth Amendment rights based on the "totality of the circumstances,"<sup>240</sup> the court moves to the second prong: the "easier"<sup>241</sup> task of determining whether the law was clearly established. The court may also begin with the second

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framework doesn't fit the constitutional question here."); *Pace v. Capobiano*, 283 F.3d 1275, 1283 (11th Cir. 2002) ("[W]hen we look at decisions such as *Garner* and *Graham*, we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply with such obvious clarity to the circumstances of this case....").

<sup>236</sup> *Pauly*, 814 F.3d at 1070 (opining analysis "requires careful attention to the facts and circumstances...including [consideration of the *Graham* factors]") (emphasis added).

<sup>237</sup> *Id.* at 1071 (weighing four-factor test to determine whether officer's use of deadly force was reasonable) (collecting cases); *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (reciting three-factor test to establish claim for excessive force under Fourth Amendment); *Estate of Larsen ex rel Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("In assessing the degree of threat facing officers [] we consider a number of non-exclusive factors...[including]: (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.").

<sup>238</sup> *Scott v. Harris*, 550 U.S. 372, 382 (2007).

<sup>239</sup> *See Chung*, *supra* note 222 (analyzing 435 federal district court rulings between 2014 and 2018).

<sup>240</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

<sup>241</sup> *Militello v. Sheriff of Broward Sheriff's Office*, 684 F. App'x 809, 812, n. 7 (11th Cir. 2017).

prong, of course, and omit the first prong entirely.<sup>242</sup> To overcome qualified immunity, the plaintiff must succeed on both prongs, regardless of the order in which the court endeavors to resolve them.<sup>243</sup>

To satisfy the second prong, the plaintiff's constitutional right must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."<sup>244</sup> While a "case directly on point" is supposedly not required to prove clearly established law, "existing precedent must have placed the statutory or constitutional question beyond debate."<sup>245</sup> There must be, at a minimum, "either controlling authority or a robust consensus of cases of persuasive authority" to deem an officer's conduct "clearly established."<sup>246</sup>

In defining what is "clearly established," lower courts have been cautioned "not to define [the] law at a high level of generality."<sup>247</sup> Because of the specificity required, "clearly established law...depends very much on the facts of each case."<sup>248</sup> Resultingly, "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law."<sup>249</sup>

The "demanding standard" to prove the right was clearly established at the time of the officer's conduct assumes many things, the most brazen of which is that it somehow promotes the fair administration of justice.<sup>250</sup> Indeed, "[a]t its core...the clearly established inquiry boils down to whether [the officer] had fair notice that he acted unconstitutionally."<sup>251</sup> For a "fair warning" to be effective, the court must assume that officers usually follow the law, or otherwise know and understand it.

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<sup>242</sup> *Pearson v. Callahan*, 555 U.S. 223, 234 (2009) (overruling the mandatory two-step process from *Saucier*).

<sup>243</sup> *Id.*

<sup>244</sup> *Mullenix v. Luna*, 577 U.S. 7, 11 (2015).

<sup>245</sup> *Id.* at 12; *id.* at 21 (Sotomayor, J., dissenting) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>246</sup> *Plumhoff v. Rickard*, 572 U.S. 765, 780 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-43 (2011)); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>247</sup> *Mullenix*, 577 U.S. at 12 (quoting *Ashcroft*, 563 U.S. at 742); *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (citing *Anderson*, 483 U.S. at 641).

<sup>248</sup> *Mullenix*, 577 U.S. at 8, 12; *Plumhoff*, 572 U.S. at 779 (citing *Brosseau*, 543 U.S. at 201); *Kisela*, 138 S.Ct. at 1153).

<sup>249</sup> *Mullenix*, 577 U.S. at 12; *Malley v. Briggs*, 475 U.S. 335, 341 (1986); Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1026 (Summer 2012) ("[T]est is evolving to the point where almost every governmental actor will be shielded from individual liability by the doctrine of qualified immunity.").

<sup>250</sup> *See Wesby*, 138 S.Ct. at 589 (citing *Malley*, 475 U.S. at 341).

<sup>251</sup> *Kisela*, 138 S.Ct. at 1158 (Sotomayor, J., dissenting).

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As aptly expressed by Justice Murphy's dissent in *Screws*, however, "knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation."<sup>252</sup> Justice Murphy continued, "no appreciable amount of intelligence or conjecture on the part of the lowliest state official is needed for him to realize that fact; nor should it surprise him[.]"<sup>253</sup> Justice Rutledge agreed, explaining "[i]gnorance of the law is no excuse for men in general. It is less an excuse for men whose special duty it is to apply it, and therefore to know and observe it."<sup>254</sup> How much warning does an officer need, for example, to understand that shooting a Black man six times for selling CDs and DVDs is unconstitutional?<sup>255</sup>

The clearly established right standard creates other obvious conundrums. Perhaps most notably, to be clearly established, there must be prior precedent finding similar police conduct unlawful.<sup>256</sup> Every time a court finds the right was not clearly established, with or without independently deciding the constitutional question, it reaffirms this preordained cyclical conclusion.<sup>257</sup> For the law to be clearly established, the court must engage in judicial gymnastics, massaging case-specific facts to fit within a shrinking body of precedent.<sup>258</sup> Indeed, "it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force[.]"<sup>259</sup>

The Court's liberal wing expounded on this conflict, explaining, "[t]he Court routinely displays an unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervenes where courts wrongly afford officers the benefit of qualified immunity in these same cases."<sup>260</sup> The Justices feared that "[s]uch a one-sided

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<sup>252</sup> *Screws v. United States*, 325 U.S. 91, 136-37 (1945) (Murphy, J., dissenting).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 129 (Rutledge, J., concurring). In his concurrence, Justice Rutledge discussed the officer's general duty to know "something of the individual's basic legal rights." *Id.*

<sup>255</sup> Chughtai, *supra* note 159. Describing the shooting death of Alton Sterling by Officer Blane Salamoni, after Mr. Sterling was already pinned to the ground.

<sup>256</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

<sup>257</sup> Caroline H. Reinwald, *A One-Two Punch: How Qualified Immunity's Double Dose of Reasonableness Dooms Excessive Force Claims in the Fourth Circuit*, 98 N.C. L. REV. 665, 675 (March 2020) (explaining "doctrine 'creates a silent echo chamber, in which civil rights questions go repeatedly unanswered'").

<sup>258</sup> Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018) ("Court's definition of 'clearly established' law has narrowed significantly over the past thirty-five years.").

<sup>259</sup> *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018).

<sup>260</sup> *Id.* at 1162 (Sotomayor, J., dissenting); *see also* *Salazar-Limon v. City of Houston, Tex.*, 137 S.Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity

approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.”<sup>261</sup> Specifically, “[s]ince *Harlow v. Fitzgerald*, the Supreme Court has confronted the issue of qualified immunity in over thirty cases. Plaintiffs have prevailed in two of those cases.”<sup>262</sup> Now, “the Court’s acceptance rate for police appeals seeking immunity has three times its average acceptance rate for all appeals.”<sup>263</sup>

The high Court’s pro-police rulings trickle down to the appellate and district courts that are tasked with applying the law expounded above. Illustratively, between 2005 and 2007, 44% of appellate cases granted qualified immunity for police.<sup>264</sup> Ten years later, between 2017 and 2019, 57% of appellate cases granted qualified immunity for police.<sup>265</sup> As the Supreme Court grows more conservative, the rest of the judiciary follows suit.

Justice Sotomayor and, at times, Justice Ginsburg, have been outspoken in their criticism of the values qualified immunity promotes in U.S. police culture. Justice Sotomayor opined, “[b]y sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.”<sup>266</sup> Justice Sotomayor explained that the Court’s recent qualified immunity jurisprudence “tells the public that palpably unreasonable conduct will go unpunished.”<sup>267</sup> Justice Ginsburg explained that “the Court’s jurisprudence...sets the balance too heavily in favor of police unaccountability[.]”<sup>268</sup> Plainly stated, Justice Sotomayor wrote, “[t]here is nothing right or just under the law about this.”<sup>269</sup>

### III. ANALYSIS

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in cases involving the use of force.”) (citing *inter alia* *White v. Pauly*, 127 S.Ct. 548 (2017); *Mullenix v. Luna*, 136 S.Ct. 305 (2015)).

<sup>261</sup> *Kisela*, 138 S.Ct. at 1162 (Sotomayor, J., dissenting).

<sup>262</sup> Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (May 2018).

<sup>263</sup> Andrew Chung, *et al.*, *For Cops who Kill, Special Supreme Court Protection*, REUTERS INVESTIGATES, <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (last visited Dec. 13, 2020).

<sup>264</sup> Chung, *supra* note 222.

<sup>265</sup> *Id.*

<sup>266</sup> *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissent).

<sup>267</sup> *Kisela*, 138 S.Ct. at 1162 (Sotomayor, J., dissenting); *see also* *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 909 (4th Cir. 2016) (internal quotations omitted) (opining “repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content”)

<sup>268</sup> *District of Columbia v. Wesby*, 138 S.Ct. 577, 594 (2018) (Ginsburg, J., dissenting).

<sup>269</sup> *Kisela*, 138 S.Ct. at 1162 (Sotomayor, J., dissenting).

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### A. *Current Judicial Themes & Trends in the Application of Qualified Immunity*

“No man can know where he is going unless he knows exactly where he has been and exactly how he arrived at his present place.”

- Maya Angelou<sup>270</sup>

As illustrated by the Court’s jurisprudence, racism is embedded in the interpretation of the Civil Rights Acts, and the Court’s creation of qualified immunity. Bearing this inextricable history in mind, the authors next detail how the modern understanding of social science debunks the theory of “objective” analysis and the ever-shifting ideal of “reasonableness.” Can there be a truly “objective” vantage point to assess “reasonableness,” when the very construction of objectivity is premised on implicit and overt racial ordering? The answer, we argue, is no.

#### 1. *The Impact of the Supreme Court’s Examination of Qualified Immunity*

From its initial codification in the late-1800s, the intent to combat discriminatory state action through the civil rights acts has been slowly eroded. At times, the intent to destroy the efficacy of the acts was explicit.<sup>271</sup> For most of history, though, the acts’ degradation was implicit,<sup>272</sup> and done under the guise of federalism.<sup>273</sup> Even the Court’s liberal Justices—those lauded as staunch and steadfast civil rights activists—were plagued by their own shared white-supremacist world view. Justice Harlan, for example, dubbed the Court’s “great dissenter” for his refusal to overtly strip the civil rights acts of their intended focus, owned slaves and denounced the

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<sup>270</sup> Resmaa Menakem, *My Grandmother’s Hands*, at 37 (2017).

<sup>271</sup> See *Screws v. United States*, 325 U.S. 99, 120 (1945) (explaining inclusion of word “willful” to make Section 20 “less severe”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (removing “subjective” element from qualified immunity analysis).

<sup>272</sup> For example, “the Supreme Court strengthened the doctrine [of qualified immunity] through a subtle change in its language” in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). Reinwald, *supra* note 260, at 671. In *Ashcroft*, the Court opined that to be clearly established, prior precedent must place the constitutional question “beyond debate.” *Id.* at 672. After the Court’s inclusion of this phrase strengthening the doctrine, “the phrase has appeared in the majority of the Court’s qualified immunity cases.” *Id.*; see also *Malley v. Briggs*, 475 U.S. 335 (1986) (citing *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)) (using “would” as Fourth Amendment standard) and *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (using “could” as Fourth Amendment standard).

<sup>273</sup> See e.g., *Slaughter-House Cases*, 83 U.S. 36 (1872).

Emancipation Proclamation as unconstitutional.<sup>274</sup> Justice Black, a Roosevelt appointee and member of the Court's "liberal block," was a former member of the Ku Klux Klan.<sup>275</sup>

Whether explicit or implicit, Section 1983 was shaped and interpreted by Justices who, even among the most liberal, were a product of the nation's elite: the white, the educated, and the aristocratic. The civil rights acts have never been interpreted with the inclusion of those they were designed to protect.<sup>276</sup> Instead, those who allegedly best represented their interests brutalized and tortured their own slaves, and served as former Klansmen.<sup>277</sup>

Qualified immunity is a creature of judicial creation, a doctrine that the Justices believed was so well-founded in the ideals of Anglo-American society that it needed little justification.<sup>278</sup> Indeed, the Court's early Justices were quick to opine that Section 1983 included an inherent protection from liability.<sup>279</sup> In so doing, the Court ranked an officer's right to be free from civil liability above a victim's right to recover for a breach of their bodily autonomy.<sup>280</sup> The Court has plainly and repeatedly chosen to value the officer over the victim, and needed little justification in doing so.

Today, the application of qualified immunity hinges on arbitrary factors, like the victim's geographic location<sup>281</sup> and their alleged criminal culpability.<sup>282</sup> Furthermore, courts are routinely tasked with finding "clearly

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<sup>274</sup> James R. Belpedio, *John Marshall Harlan I*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1335/john-marshall-harlan-i>.

<sup>275</sup> Brian P. Smentkowski, Hugo Black, ENCYCLOPEDIA BRITANNICA (Sept. 21, 2020), <https://www.britannica.com/biography/Hugo-L-Black>.

<sup>276</sup> See *Justice Thurgood Marshall: First African American Supreme Court Justice*, NAT'L ARCHIVES FOUND., <https://www.archivesfoundation.org/documents/justice-thurgood-marshall-first-african-american-supreme-court-justice/> (last visited, Dec. 13, 2020).

<sup>277</sup> See *supra* note 111.

<sup>278</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967) ("defense of good faith and probable cause...is also available to [the officers] in the action under Section 1983").

<sup>279</sup> *Id.* ("We agree that a police officer is not charged with predicting the future course of constitutional law.").

<sup>280</sup> Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1791 (Nov. 2016) (opining in deleting *Harlow's* "good faith" requirement, "Court prioritized docket saturation and intrusive discovery concerns over intentional government abuses of civil rights"); *id.* at 1814 ("Whatever the rule or test that the Court adopts, litigation costs and concerns over muted police enforcement trump the individual's liberty interests.").

<sup>281</sup> Chung, *supra* note 222 (comparing 64% of cases in Fifth Circuit that granted immunity for police in excessive force cases, with 42% of cases in Ninth Circuit).

<sup>282</sup> See *supra* notes 209-219 (explaining first prong of qualified immunity considers victim's criminal culpability and seriousness of alleged offense).

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established law” in an ever-shrinking body of precedent.<sup>283</sup> The Court’s commitment to crafting law that avoids punishing an innocent officer has resulted in precedent that fails to provide meaningful guidance on the appropriate use of force. As a result, there is no evidence that police involved killings have declined post-*Pearson*.<sup>284</sup> At bottom, judicial decision-making over the last several decades has left virtually all government officials entitled to immunity, shielding even the most egregious conduct from liability.<sup>285</sup>

#### 2. Framework of Objectivity & Reasonableness

The Court’s repeated reliance on “reasonableness” to assess the viability of excessive force cases is misplaced. Behind the pretext of “objectivity” and the Court’s hesitancy to “second-guess” law enforcement’s judgments is an inherently racial component, obscuring the judiciary’s qualified immunity analysis. Objectivity is a myth—a myth crafted from our lived experiences, and the scale of “reasonableness” assumes a thoughtful and trained response to the perceived threat of Black people, a fallacy in modern policing.

Indeed, our body responds to our present circumstances before our mind does—much faster, and more instinctively.<sup>286</sup> Within our brains, in our limbic system, our life experiences pass through the amygdala,<sup>287</sup> “our unconscious

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<sup>283</sup> Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 934-35 (May 2015) (“[M]any lower courts are eschewing tough constitutional questions, instead disposing of cases on the grounds that whether or not a constitutional right has been violated on the facts alleged, the defendant prevailed on qualified immunity because the right was not clearly established at the time.”) (collecting cases); see also Blum, *supra* note 265, at 1889-1890 (explaining “clearly established prong” has resulted in “lower federal courts [] disposing of cases based on qualified immunity at an astonishing rate.”) (collecting cases).

<sup>284</sup> See Mapping Police Violence, *National Trends*, <https://mappingpoliceviolence.org/nationaltrends> (last visited Feb. 2, 2021) (showing consistent number of deaths by police between 2013 and 2020).

<sup>285</sup> Blum, *supra* note 265, at 1899 (“[I]nsisting on precedent with the degree of particularity required by the Supreme Court in recent cases means that many claims against individual officers will be disposed of on the second prong and plaintiffs with serious and substantial injuries will be left without redress for actual constitutional violations or without explanation as to why their injuries did not rise to the level of constitutional harms”).

<sup>286</sup> Bessel van der Kolk, *The Body Keeps the Score*, at 60-61 (2014) (“[B]y the time we realize what is happening, our body may already be on the move”).

<sup>287</sup> Van der Kolk, *supra* note 289, at 60 (describing amygdala as “two small almond-shaped structures that lie deeper in the limbic”).

brain[s].”<sup>288</sup> Before we “think” or “reason,”<sup>289</sup> an experience’s “sensory input” is scanned by our brain “in a fraction of a second.”<sup>290</sup> Our unconscious brain “override[s] our thinking brain whenever it senses real or imagined danger.”<sup>291</sup> This portion of our brain processes information faster than our conscious brain does,<sup>292</sup> and “decides whether incoming information is a threat to our survival even before we are consciously aware of the danger.”<sup>293</sup> Our unconscious brain blocks information from reaching conscious thought until after it has sent a message to “fight, flee, or freeze.”<sup>294</sup>

Picture, for example, when you touch a hot object and burn yourself: your body reflexively and instinctively pulls your hand away before your conscious mind has time to consider what happened or how to respond.<sup>295</sup> Your body reacts before your conscious brain processes the danger, in an effort to protect your body from the threat of impending real or perceived injury.<sup>296</sup>

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<sup>288</sup> *Id.* Social scientists refer to the amygdala in a myriad of different ways: the unconscious brain, the subconscious brain, the non-thinking brain, the emotional brain, the reptilian brain, and the lizard brain, to name a few. For purposes of consistency, we have chosen to use Van der Kolk’s “unconscious brain” in the text. However, we note that the amygdala is anything but “unconscious,” and use this terminology simply to distinguish the amygdala from the “frontal lobe,” our “conscious, thinking brain.” *See id.* (distinguishing the amygdala and frontal lobe functions).

<sup>289</sup> Our “emotional brain has first dibs on interpreting incoming information. Sensory information about the environment and body state received by the eyes, ears, touch, kinesthetic sense, etc., converges on the thalamus, where it is processed, and then passed on to the amygdala to interpret its emotional significance.” Van der Kolk, *supra* note 289, at 61.

<sup>290</sup> Menakem, *supra* note 273, at 4. If the non-thinking part of our brain senses a threat, “it sends an instant message down to the hypothalamus and the brain stem, recruiting the stress-hormone system and the automatic nervous system...to orchestrate a whole body response.” Van der Kolk, *supra* note 289, at 60-61.

<sup>291</sup> *Id.* at 5-6.

<sup>292</sup> Van der Kolk, *supra* note 289, at 60.

<sup>293</sup> *Id.*

<sup>294</sup> Menakem, *supra* note 273, at 6. “The amygdala’s danger signals trigger the release of powerful stress hormones, including cortisol and adrenaline, which increase heart rate, blood pressure, and rate of breathing, preparing us to fight back or run away.” Van der Kolk, *supra* note 289, at 61. “Whenever the limbic system decides that something is a question of life or death, the pathways between the frontal lobes and the limbic system become extremely tenuous.” *Id.* at 64.

<sup>295</sup> *Id.* (“When it comes to safety, our thinking mind is third in line after our body and our lizard brain.”).

<sup>296</sup> Van der Kolk, *supra* note 289, at 82 (“Any threat to our safety...triggers changes in the areas innervated by the [ventral vagal complex]”). Eventually, “the sympathetic nervous system takes over, mobilizing muscles, heart, and lungs for fight or flight.” *Id.* at 82. “Danger turns off our social-engagement system, decreases our responsiveness to the human voice, and increases our sensitivity to threatening sounds.” *Id.* at 83. “The amygdala doesn’t make

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The brain's decision of how to react and digest each of our life experiences is based on "wordless stories about what is safe and what is dangerous."<sup>297</sup> Our notions of dangerousness are learned: we see and view "*de facto* segregation in neighborhoods and schools...and discrimination in the workplace."<sup>298</sup> We hear thousands of messages repeated in the employment sector, by the media, by law enforcement.<sup>299</sup> We bear witness to "the small but persistent and pervasive ways in which white people express their disdain" for Black people in our society.<sup>300</sup> Each of these experiences shapes our own understanding of what is safe, what is dangerous, and what the brain understands as threatening.

Our understanding of the world is further crafted "against the background of preexisting understandings of social reality."<sup>301</sup> In the United States, our social reality is born from the fabric of slavery. At present, Black people were enslaved for longer than they have been free.<sup>302</sup> For "most of our country's history, the Black body was forced to serve white bodies."<sup>303</sup> This arrangement was "systematically maintained through murder, rape, mutilation, and other forms of trauma, as well as through institutions, regulation, norms, and beliefs."<sup>304</sup> Black people were "turned to fuel for the

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[] judgments; it just gets you ready to fight back or escape, even before the frontal lobes get a chance to weigh in with their assessment." *Id.* at 62.

<sup>297</sup> Menakem, *supra* note 273, at 5.

<sup>298</sup> *Id.* at 74.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 75. Dr. Menakem is defining "microaggressions," a term coined by Harvard psychiatrist Chester Peirce in 1970. Kendi, *supra* note 165, at 45. Dr. Derald Wing Sue defines microaggressions as "brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership." *Id.* The authors recognize that the terms "micro" and "aggression" can belittle the pervasive discrimination facing Black people. *See id.* at 46 ("A persistent daily low hum of racist abuse is not minor"); *see also* Ta-Nehisi Coates, *Between the World and Me*, at 10 (2015) ("[A]ll our phrasing—race relations, racial chasm, racial justice, racial profiling, white privilege, even white supremacy—serves to obscure that racism is a visceral experience, that it dislodges brains, blocks airways, rips muscle, extracts organs, cracks bones, breaks teeth.").

<sup>301</sup> Dan M. Kahan, *et al.*, *Whose Eyes are you Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 883 (Jan. 2009).

<sup>302</sup> Coates, *supra* note 303, at 69-70; *See also* Wilkerson, *supra* note 53, at 47 ("It is a measure of how long enslavement lasted in the United States that the year 2022 marks the first year that the United States will have been an independent nation for as long as slavery lasted on its soil. No current-day adult will be alive in the year in which African-Americans as a group will have been free for as long as they had been enslaved. That will not come until the year 2111.").

<sup>303</sup> Menakem, *supra* note 273, at 27-28.

<sup>304</sup> *Id.* at 28.

American machine.”<sup>305</sup> Throughout U.S. history, “white bodies have colonized, oppressed, brutalized, and murdered Black [] ones.”<sup>306</sup>

The United States has never truly reckoned with the fact that we are a country that was founded by white supremacists and puritans.<sup>307</sup> This conflict is “embedded in founding documents that could simultaneously proclaim all men equal and yet count a slave as three-fifths of a man.”<sup>308</sup> After slavery was abolished, Jim Crow laws criminalized trivial conduct in an effort to remove Black people from society and continue to profit off forced labor.<sup>309</sup> However, “white social scientists presented the new crime data as objective, color-blind, and incontrovertible” proof that Black people are more prone to criminality.<sup>310</sup> Characterizing these statistics “[a]s an ‘objective’ measure...shield[ed] white Americans from the charge of racism when they used [B]lack crime statistics to support discriminatory public policies and social welfare practices.”<sup>311</sup> However, “[f]rom the beginning, the collection and dissemination of racial crime data was a eugenics project, reflecting the supremacist beliefs of those who created them.”<sup>312</sup> After the 1890 census, “raw census data showed that African Americans, as 12 percent of the population, made up 30 percent of the nation’s prison population.”<sup>313</sup>

The messaging in modern society, coupled with our history of criminalization of Black people, informs our brain on the concepts of dangerousness, safety, and risk.<sup>314</sup> Our brain unconsciously registers this information and stores it for future use, to ascertain when to reflexively pull our hand away from the hot stove, or when something is safe for us to hold.<sup>315</sup>

Our brain then works to reaffirm our unconscious understanding of safety

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<sup>305</sup> Coates, *supra* note 303, at 70.

<sup>306</sup> Menakem, *supra* note 273, at 61.

<sup>307</sup> See Robin Diangelo, *White Fragility: Why It’s So Hard for White People to Talk About Racism* at 59, BEACON PRESS (2018); see also Wilkerson, *supra* note 53, at 81 (“The Nazis were impressed by the American custom of lynching its subordinate caste of African Americans, having become aware of the ritual torture and mutilations that typically accompanied them. *Hitler especially marveled at the American ‘knack for maintaining an air of robust innocence in the wake of mass death.’*”) (emphasis added).

<sup>308</sup> BARACK OBAMA, *A PROMISED LAND*, xv (2020).

<sup>309</sup> See GEARY, *supra* note 158, at \*83.

<sup>310</sup> KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* 4 (2019).

<sup>311</sup> MUHAMMAD, *supra* note 313, at 63.

<sup>312</sup> *Id.* at 21.

<sup>313</sup> *Id.* at 4.

<sup>314</sup> See Kendi, *supra* note 165, at 72 (“Blackness armed us even though we had no guns. Whiteness disarmed the cops”).

<sup>315</sup> Van der Kolk, *supra* note 289, at 62 (“Structures in the emotional brain decide what we perceive as dangerous or safe.”).

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and threats. We are psychologically driven “to resolve disputed facts in a manner supportive of [our] group identities.”<sup>316</sup> Principally, we “tend to conform factual beliefs about risk to [our] cultural evaluations of putatively dangerous behavior.”<sup>317</sup> Our brains, thus, actively reaffirm our understanding of “risk” and “danger” in a form of “psychological self-defense,” validating our perception of events, even when we are woefully unaware of it.<sup>318</sup> Our social networks and daily interactions cement these ideologies, making it more likely that we engage in behavior consistent with our own preexisting worldview.<sup>319</sup>

These psychological and unconscious systems work collaboratively to create racial biases across races, causing “white children [to] attribute positivity to lighter skin and negativity to Dark skin, a colorism that grows stronger as they get older.”<sup>320</sup> Researchers conclude that “Americans today see the Black body as larger, more threatening, more potentially harmful, and more likely to require force to control than a similarly sized [w]hite body.”<sup>321</sup> This unconscious messaging leads “individuals to interpret identical facial expressions as more hostile on [B]lack faces than on white faces, and to perceive identical ambiguous behaviors as more aggressive” when engaged in by Black faces as opposed to white ones.<sup>322</sup>

#### *i. The Judiciary’s Fallacy of “objectivity” and “reasonableness”*

To illustrate these phenomena, think again of Mr. Graham. The district judge who first heard Mr. Graham’s case wrote that “Officer Connor determined [Mr. Graham] had not done anything unlawful while in the convenience store.”<sup>323</sup> The judge then continued to opine that Officer Connor was nonetheless “advised by his dispatcher that [Mr. Graham] was the owner

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<sup>316</sup> Kahan, *supra* note 304, at 838.

<sup>317</sup> *Id.* at 852.

<sup>318</sup> *Id.*

<sup>319</sup> Fagan & Campbell, *supra* note 152, at 970 (“Recent studies of social networks suggest that the density of interactions and social ties among people determines the behaviors of individuals in those groups and increases the likelihood that they will engage in similar behaviors, both alone and in groups.”).

<sup>320</sup> Kendi, *supra* note 165, at 110.

<sup>321</sup> *Id.* at 71; *see also* Menakem, *supra* note 273, at 114 (“To many police bodies... African Americans are foreign bodies that need to be corralled, controlled, damaged or destroyed.”).

<sup>322</sup> L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 121 (2014).

<sup>323</sup> *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986).

of one or more guns.”<sup>324</sup> The fact that Mr. Graham owned a gun, which was wholly irrelevant to the court’s inquiry, was important enough for the judge to mention in his three-page opinion. Likely, because it supported the judge’s conclusion that Mr. Graham somehow deserved to be brutalized by Officer Connor.<sup>325</sup> In other words, this fact validated Officer Connor’s fear of Black men, painted here as dangerous gun owners, as reasonable.

Similarly, throughout his opinion, the judge referred to the officer over a dozen times as “Officer Connor.”<sup>326</sup> However, he never once identified Mr. Graham by name, instead referring to him only as “Plaintiff”<sup>327</sup> — a nameless figure in the retelling of his own story. The judge’s choice of language, and his inclusion of irrelevant information that hurt Mr. Graham’s reputation, invites the reader to think that Mr. Graham’s interests are less important than the officer’s. The judge “succumb[ed] to the subconscious influence of [his] cultural predispositions,”<sup>328</sup> even though he likely meant no harm in making these choices, and he likely views himself as both reasonable and non-racist.<sup>329</sup> The reader, then, too, likely walked away from reading the opinion on the “side” of the officer, as a result of pervasive and unthinking messaging displayed in the judge’s choice of language.

While this illustration may seem innocuous or minute, stereotypes and subconscious messaging have a profound and deadly impact on Black people.<sup>330</sup> After birth, systemic racial inequities dictate that a Black infant is twice as likely to die than a white one, and the white child will, on average, live 3.5 years longer than his Black counterpart.<sup>331</sup> Throughout their lives, Black Americans remain 25% more likely to die of cancer than white ones.<sup>332</sup> In policing, “unarmed Black bodies” are “twice as likely to be killed as

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<sup>324</sup> *Id.* (“Officer Connor then determined that the Plaintiff had not done anything unlawful while in the convenience store, but was advised by his dispatcher that the Plaintiff was the owner of one or more guns.”).

<sup>325</sup> The district judge, Judge Potter, concluded Officer Connor did not use excessive force when he broke Mr. Graham’s foot after he lost consciousness from a diabetic episode, and was forcefully shoved in the back of the police cruiser. *Id.* at 249.

<sup>326</sup> Specifically, Judge Potter refers to Officer Connor by name on 13 occasions, excluding the case caption. *See id.* at 247-48.

<sup>327</sup> Mr. Graham’s name is only mentioned in the case caption. *Id.* at 247-49.

<sup>328</sup> Kahan, *supra* note 304, at 899.

<sup>329</sup> Kahan, *supra* note 304, at 897 (paraphrasing Professor Cass Sunstein, noting “Judges...are boundedly rational, just like the rest of us, and as a result are prone to err both about the legal correctness of their decisions and about the practical consequences of them”).

<sup>330</sup> Coates, *supra* note 303, at 90 (“This need [for Black bodies] to be always on guard was an unmeasured expenditure of energy, the slow siphoning of the essence. It contributed to the fast breakdown of our bodies.”).

<sup>331</sup> Kendi, *supra* note 165, at 21.

<sup>332</sup> *Id.*

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unarmed [w]hite bodies.”<sup>333</sup> Indeed, while Black people comprise roughly 13 percent of the United States population, they accounted for at least 26 percent of those killed by police in 2015.<sup>334</sup> Black people “are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles.”<sup>335</sup>

#### ii. *The Fallacy of Colorblindness in Policing*

When an officer proclaims, “I feared for my life,” after he shoots and kills a Black man—he likely means it. His brain truly sensed a threat, albeit an imagined one, and his body responded without critical thinking because of institutionalized messaging that Black people are inherently dangerous. Afterwards, the officer’s “conscious mind[] make[s] up after-the-fact self-protective rationales,”<sup>336</sup> like, “he was reaching for his waistband,” or “I thought he had a gun in his hand.”

Our unconscious brain’s “cellular organization and biochemistry are simpler than those of the neocortex, our rational brain, and it assesses incoming information in a more global way.”<sup>337</sup> Resultingly, the unconscious brain automatically “jumps to conclusions based on rough similarities...without any thought or planning on our part.”<sup>338</sup> This leaves our “conscious, rational capacities to catch up later, often well after the threat is over.”<sup>339</sup> These decisions are, on a basic muscular and physiological level, not reasonable.<sup>340</sup> Did the officer really “think” that he was going to die, “or did a non-thinking part of his brain, infected with the ancient trauma of white-body supremacy, reflexively react?”<sup>341</sup> Afterwards, as a means of “psychological self-defense,” did he process the killing “in a selective fashion that bolsters beliefs dominant” with the perceived identity of Black people?<sup>342</sup>

The brain senses a threat based on what we have been unconsciously

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<sup>333</sup> *Id.* at 73.

<sup>334</sup> *Id.*

<sup>335</sup> *United States of America v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, J., concurring).

<sup>336</sup> Menakem, *supra* note 273, at 37.

<sup>337</sup> Van der Kolk, *supra* note 289, at 57.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 57.

<sup>340</sup> Menakem, *supra* note 273, at 36.

<sup>341</sup> *Id.* at 118-19.

<sup>342</sup> Kahan, *supra* note 304, at 852.

taught and perceived as “threatening,” and it reacts: scientifically, based on ancestral trauma,<sup>343</sup> and without conscious regard to what we are doing.<sup>344</sup> The officer pulls the trigger much like we instinctively pull our hand away from the hot stove: a second-nature, unconscious response to perceived threats and actualized pain, whether real or fabricated.<sup>345</sup> Officer Cosgrove, who killed Breonna Taylor, describes having no sensation or recollection of shooting his weapon. He fired sixteen rounds.<sup>346</sup>

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The concepts of “objectivity” and “reasonableness,” especially in the context of police killings of Black people in the United States, are unsupported by the modern understanding of racism. Simply stated, the police officer is not “objective,” and neither is the judge who decides his entitlement to qualified immunity: “different people, with different experiences, can see different things.”<sup>347</sup> Objectivity is crafted from a system that is “based on the historical and current accumulation of structural power that privileges, centralizes, and elevates white people as a group...”<sup>348</sup> Objectivity, then, is more aptly declared a “collective subjectivity.”<sup>349</sup>

There is nothing “reasonable” or “thoughtful” about an officer’s decision

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<sup>343</sup> All humans metabolize trauma differently, and all bodies are impacted by intergenerational, ancestral, and lived trauma in their own way. See Kendi, *supra* note 165, at 97 (“[S]tudies show that many, many people who endure traumatic environments don’t contract post-traumatic stress disorder”). The authors recognize that “there is a thin line between an antiracist saying individual Blacks have suffered trauma and a racist saying Blacks are a traumatized people.” *Id.* The authors further recognize that there is debate surrounding Joy DeGruy’s theory of trauma in the United States. Compare Menakem, *supra* note 273, at 58 (calling DeGruy’s work “groundbreaking”) with Kendi, *supra* note 165, at 97 (claiming DeGruy’s work used “misleading studies” and was based on “anecdotal evidence”); see also Van der Kolk, *supra* note 289, at 86 (“[T]he memory of trauma is encoded in the viscera, in heartbreaking and gut-wrenching emotions, in autoimmune disorders and skeletal/muscular problems”). The authors refer to trauma and trauma theories in all bodies to reframe the concepts of objectivity and reasonableness, and to challenge the framework that informs the qualified immunity analysis. All trauma is incomparable.

<sup>344</sup> Menakem, *supra* note 273, at 119. “In some instances the[se comments] are not a dodge, but an honest description of a trauma-inspired fight, flee, or freeze—or in many cases, annihilate—response. A lizard brain has sensed a threat, overridden the thinking brain, and sent out an order to destroy.” *Id.* at 121-22. “Variations of the phrase I feared for my life get repeated over and over by law enforcement professionals who fired their weapons when they shouldn’t have.” *Id.* at 122. “The fear these police officers speak of is surely real.” *Id.* at 123.

<sup>345</sup> See Malachy Browne et al., *How the Police Killed Breonna Taylor*, NEW YORK TIMES (Dec. 28, 2020), <https://www.nytimes.com/video/us/100000007348445/breonna-taylor-death-cops.html?act ion=click&module=Top%20Stories&pgtype=Homepage>.

<sup>346</sup> *Id.*

<sup>347</sup> Kahan, *supra* note 304, at 848.

<sup>348</sup> Menakem, *supra* note 273, at xviii.

<sup>349</sup> Kendi, *supra* note 165, at 167 (“It is impossible to be objective”).

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to pull the trigger.<sup>350</sup> Rather, it is done without thought, in response to generations of messaging and because of what we perceive, unconsciously, as threatening.<sup>351</sup> These notions are fed to us by the media, by billboards and advertising, by the magazines we read, and the shows we watch. The concept of whiteness as the norm is so pervasive that it is largely undetected and unchallenged, fiercely protected by those who benefit from it.<sup>352</sup>

As a result, when the Court refuses to mention the race of the victim killed by the unlawful use of force, it reaffirms a fallacy that these standards are “race neutral.”<sup>353</sup> The Court’s decision strengthens the officer’s neurological response to the perceived threat of Blackness in society. The Court, and all judges, should explicitly factor race into their calculus. The Court should ask, “would the officer have feared for his life and shot, if the victim was white?” When we understand that racism is stored in our bodies, we can understand why there is no true “objective” vantage point upon which to assess the officers’ purported “reasonableness.”<sup>354</sup>

The “I feared for my life” card, often employed after-the-fact to justify our brain’s response to an ill-conceived threat posed by a Black person, is mimicked throughout the judiciary. Phrases like “high-crime area,” “reaching for his waistband,” “odor of marijuana,” and “slurred speech” or “glassy eyes,” function as “get out of jail free cards.”<sup>355</sup> When an officer invokes one of these phrases, it allows him to retroactively escape liability for his conduct,<sup>356</sup> permitted by the judiciary’s hesitancy to “second-guess” the officer’s decision.

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The authors note that “when people hear the words white supremacy or white-body supremacy they often think of neo-Nazis and other extremists

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<sup>350</sup> “All our sensory input has to pass through the reptilian part of our brain before it even reaches the cortex, where we think and reason.” Menakem, *supra* note 273, at 4; *see also id.* at 114 (explaining unarmed killing of Black people by police “in many cases, is not cognitive...[i]t’s reflexive and reptilian”).

<sup>351</sup> Richardson, *et al.*, *supra* note 325, at 121 (“This unconscious racial profiling is automatic and unrelated to individuals explicit racial attitudes.”).

<sup>352</sup> Kendi, *supra* note 165, at 22 (“Racist ideas have defined our society since its beginning and can feel so natural and obvious as to be banal.”).

<sup>353</sup> *Id.* at 9 (“[C]ommon idea of claiming ‘color blindness’ is akin to the notion of being ‘not racist’—as with the ‘not racist,’ the color-blind individual, by ostensibly failing to see race, fails to see racism and falls into racist passivity.”).

<sup>354</sup> *Id.* at 38 (“It is a racial crime to be yourself if you are not White in America.”).

<sup>355</sup> Coates, *supra* note 303, at 95 (“[S]o that America might justify itself, the story of a [B]lack body’s destruction must always begin with his or her error, real or imagined.”).

<sup>356</sup> “Even after controlling for neighborhoods’ actual crime rate, police disproportionately invoke the ‘high-crime neighborhood’ label in predominantly minority neighborhoods....” Fagan & Campbell, *supra* note 152, at 973.

with hateful and violent agendas. That is certainly one extreme type of white-body supremacy. But mainstream American culture is infused with a more subtle and less overt variety.”<sup>357</sup> Like many modern commentators, we use the term white supremacy “to capture the pervasiveness, magnitude, and normalcy of white dominance and assumed superiority.”<sup>358</sup>

We note, too, that very few people would admit to being outwardly and explicitly racist.<sup>359</sup> This has long been the case, and “[i]n the era of mass lynching, it was so difficult to find who, specifically, served as executioner that such deaths were often reported by the press as having happened ‘at the hands of persons unknown.’”<sup>360</sup> We all implicitly<sup>361</sup> and unconsciously make decisions that reaffirm our understanding of the country’s social hierarchy.<sup>362</sup> This stems from our history, our psychology, and our culture. It is then reaffirmed by our social psychological mechanisms and our brains’ protective

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<sup>357</sup> Menakem, *supra* note 273, at x.

<sup>358</sup> *Id.* at xviii; Kendi, *supra* note 165 at 8 (“To be American is to be White.”). We also understand that some readers find the term “white supremacy” distracting. See Michael Powell, ‘White Supremacy’ Once Meant David Duke and the Klan. Now it Refers to Much More, *NEW YORK TIMES* (Oct. 17, 2020), <https://www.nytimes.com/2020/10/17/us/white-supremacy.html>. Professor Orlando Patterson, sociologist at Harvard, explains the phrase “comes from anger and hopelessness and alienates rather than converts.” *Id.* Similarly, author Wesley Yang claims “the phrase is destructive of discourse.” *Id.* The authors recognize this debate and consciously chose the framework of “white supremacy” to illustrate the pervasive and dangerous nature of whiteness in law and culture.

<sup>359</sup> Kahan, *supra* note 304, at 842-43. “Social psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor. We thus simultaneously experience overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites.” *Id.*; see also Kendi, *supra* note 165, at 8 (“When racist ideas resound, denials that those ideas are racist typically follow).

<sup>360</sup> Coates, *supra* note 303, at 97.

<sup>361</sup> The authors recognize that deeming racial biases “implicit” protects individuals from accountability by insinuating that “racist ideas are buried in the mind.” Kendi, *supra* note 165, at 221. We use this language to demonstrate the pervasive nature of racism in law—showcasing that even “well-meaning” or “not racist” judges and lawyers, and police officers and litigants, are implicitly biased through their language and affirmance of racism in the United States.

<sup>362</sup> “Science reveals that racial animus is not a necessary prerequisite for racial harms. Instead, discrimination is pervasive and inevitable because it has become embedded not only within institutions and society, but also within our minds, such that it is often practiced unconsciously and consequently, without malice. This science demonstrates that unconscious negative racial stereotypes and attitudes about subordinate groups can affect the behaviors and judgments of even the most egalitarian individuals.” Richardson, *et al.*, *supra* note 325, at 117.

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measures to ensure adequate preparation in the face of perceived risk. In fact, our egalitarian attitudes “are relatively weak predictors of behavior” and, thus, merely because we “think” we are not racist, does not make it true.<sup>363</sup>

This is not to say that there is not overt and explicit racism, or to undermine the severity and prevalence of judges and officers who claim allegiance to white supremacist groups or actively support and engage with racist organizations. That is undoubtedly a prolific problem. However, the purpose here is to discuss how racism inherent in the judicial application of “objectivity” and “reasonableness” makes these concepts fallacies.

Humans are products of their own lived experiences. And, thus, despite the Court’s best efforts, there is no uniform standard of objectivity or reasonableness.<sup>364</sup> We perceive threats based on our understanding of Black people—through messaging, the media, and common culture. This standard is not “objective,” although it is pervasive and shared. The starting point of objectivity is tainted: it is not colorblind and we must stop pretending that it is. The foundation upon which qualified immunity is based—indeed, its first element—is, fatally flawed.

Judges, who shape our common law system, and police, who enforce our laws, are not immune from our shared human characteristics. However, neither psychology nor the understanding of institutionalized racism excuses an officer’s decision to kill. Rather, it is the officer’s responsibility to learn about these systems and dismantle them.<sup>365</sup> Racism is pervasive, unspoken, unconscious, and systemic.<sup>366</sup> It is also inexcusable.

### B. Moving Forward

With the help of modern social science, we know that rational thinking is difficult, if not impossible, to employ in split-second decisions. Rather, an officer cannot unpack years of learned implicit and overt biases in mere

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<sup>363</sup> Richardson, *et al.*, *supra* note 325, at 126.

<sup>364</sup> Kendi, *supra* note 165, at 171 (“[T]here is no such thing as the ‘real world,’ only real worlds multiple worldviews.”).

<sup>365</sup> See *infra* Section (B) (1) “Policing in the United States.”

<sup>366</sup> Kendi, *supra* note 165, at 18 (“‘Institutional racism’ and ‘structural racism’ and ‘systemic racism’ are redundant. Racism itself is institutional, structural, and systemic”); see also *id.* at 219 (explaining term “institutional racism” was “coined in 1967 by Black Power activist Kwame Toure and political scientist Charles Hamilton in *Black Power: The Politics of Liberation in America*”). The efficacy and blame-shifting of this language is criticized. See *id.* at 220 (“Separating the overt individual from the covert institutional veils the specific policy choices that cause racial inequities, policies made by specific people.”). The authors use this language not to strip blame from the officers who kill, but to demonstrate the depth of racism in the United States, touching nearly every aspect of life.

moments when deciding whether to utilize deadly or serious force. With this understanding of the brain's response to perceived and imagined threats, the current theory of policing is, at best, antiquated. As a result, we suggest reforms that more clearly align with our brains unconscious behavior systems, to more effectively curtail police brutality.

Next, the authors outline proposed changes to the judicial system. At present, the judiciary continues to boldly endorse themes of "objective" decision-making and reasonableness, which are steeped in racist ideals from the Supreme Court's early jurisprudence. Therefore, to effectively combat racism in the judiciary, we must modify the judicial system to eliminate the fallacy of colorblindness and endorse a new proposed method of redress.

### *1. The Modern Model of Policing in the United States*

1. From inception, the civil rights acts were designed to eliminate state-sponsored discrimination against Black people in society.<sup>367</sup> However, as demonstrated, the judicial response to these legislative efforts, and the development and expansion of qualified immunity, has stripped the civil rights acts of their intended purpose. The acts were inadequate in achieving their desired effect, and the systemic racial inequity that existed at the time of the acts' codification remains largely unchanged in modern times.<sup>368</sup>

2. At bottom, the strengthening of qualified immunity has allowed more police brutality to go unpunished.<sup>369</sup> If not for the prolific and calculable excessive force levied against Black people in our community,<sup>370</sup> there would be little need to address the

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<sup>367</sup> See *The Enforcement Acts of 1870 and 1871*, UNITED STATES SENATE, [https://www.senate.gov/artandhistory/history/common/generic/Enforcement\\_Acts.htm](https://www.senate.gov/artandhistory/history/common/generic/Enforcement_Acts.htm) (last visited Nov. 28, 2020).

<sup>368</sup> "Most people would agree that equal opportunity to participate as a full and functioning member of society is important. Nonetheless, existing social and economic disparities among racial and ethnic groups suggest that our society has yet to achieve this goal." NAT'L RSCHREBECCA M. BLANK, ET AL. COUNCIL, MEASURING RACIAL DISCRIMINATION, AT 15, NATIONAL RESEARCH COUNCIL 15 (Rebecca M. Blank et al. eds., 2004).

<sup>369</sup> Richardson, *et al.*, *supra* note 325, at 119 ("[V]iolence is an inevitable and foreseeable consequence of current policing strategies, even in the absence of institutional and individual racial animus.").

<sup>370</sup> Wesley Lowery, *Study finds police fatally shoot unarmed Black men at disproportionate rates*, THE WASHINGTON POST (April 7, 2016), <https://www.wash>

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doctrines that protect the perpetrators from facing justice. Police officers, and the judiciary's protection of them, work in tandem to maintain inherent power and curtail racial equality.<sup>371</sup> There can be no thorough discussion of Fourth Amendment excessive force jurisprudence without an examination of the individuals who appear before the court as the defendants in these cases.

Police “are merely men enforcing the whims of our country, correctly interpreting its heritage and legacy.”<sup>372</sup> Within our current framework and societal response to Black people, there can be no effective or long-lasting change. Indeed, these systems are functioning exactly the way they were designed; as they have been interpreted for centuries; respected and reinforced through generations.

From this perspective, many commentators agree that police training, whether through implicit bias workshops or teaching deescalating force tactics, would be of little, if any, consequence.<sup>373</sup> Researchers discovered that

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ingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3story.html?tid=sm\_tw (“[O]nly thing that was significant in predicting whether someone shot and killed by police was unarmed was whether or not they were [B]lack.”).

<sup>371</sup> Juan Villaseñor & Laurel Quinto, *Judges on Race: The Power of Discretion in Criminal Justice*, LAW360, [https://www.law360.com/access-to-justice/articles/1330865/judges-on-race-the-power-of-discretion-in-criminal-justice?pk=263b1935-0800-4c0f-9fc1-bb9e3d3d1abc&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=access-to-justice](https://www.law360.com/access-to-justice/articles/1330865/judges-on-race-the-power-of-discretion-in-criminal-justice?pk=263b1935-0800-4c0f-9fc1-bb9e3d3d1abc&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice) (last visited Feb. 2, 2021) (“[B]y the time an individual who’s prosecuted reaches the courts, he’s passed through many points in the criminal justice system where he’s likely to experience disparate treatment.”).

<sup>372</sup> Coates, *supra* note 303, at 10; *see also* Richardson, *et al.*, *supra* note 325, at 119 (“[E]nvironment that nurtures the unconscious racial biases and self-threats that can lead even consciously egalitarian officers to be more likely to use force disproportionately against [B]lack suspects relative to suspects of other races.”); Menakem, *supra* note 273, at 114 (“American police are not an alien race.... they don’t just live with the typical intergenerational trauma. They also work in a field that regularly requires them to witness other people’s trauma and tragedy—and, as a result, to experience their own secondary trauma or vicarious trauma.”).

<sup>373</sup> “[P]olice reflect America in all of its will and fear, and whatever we might make of this country’s criminal justice policy, it cannot be said that it was imposed by a repressive minority. The abuses...are the product of democratic will. And so to challenge the police is to challenge the American people who send them into the ghettos armed with the self-generated fears that compelled the people who think they are white to flee the cities and into the dream.” Coates, *supra* note 303, at 78; *see also* Solutions, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions#train> (last visited Dec. 27, 2020) (“[E]xisting research literature is inconclusive on the effectiveness of training at reducing police violence”); Maha Ahmed, *A Hidden Factor in Police Shootings of Black Americans: Decades*

the “more officers were concerned with appearing racist, the more likely they were to have used force against [B]lack suspects.”<sup>374</sup> The problem with policing is pervasive racism in our society,<sup>375</sup> boldly and unforgivingly stemming from the non-thinking part of our brain and systemic messaging in all facets of life.<sup>376</sup> As such, no number of workshops or sensitivity trainings will defeat the officer’s subconscious response to Black people in “bad neighborhoods.”<sup>377</sup>

If we understand racism as an undeniable part of society in the United States, including in the judiciary and the police academy, we can evaluate our response from a more holistic perspective.<sup>378</sup> It follows, then, to decrease the number of Black people killed at the hands of police, we must decrease policing.<sup>379</sup>

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of *Housing Segregation*, THE INTERCEPT (March 10, 2018), <https://theintercept.com/2018/03/10/police-shootings-public-health/> (explaining “implicit bias training and police body cameras” are “solutions that try to intervene right at the last possible moment, right before or during the moment an officer pulls the trigger”); Fagan & Campbell, *supra* note 152, at 951 (“We find no evidence that enhanced police training focused on mental health crises can reduce the incidence of fatal police shootings of persons in mental health crisis or racial and ethnic disparities generally in police killings.”).

<sup>374</sup> Richardson, *et al.*, *supra* note 325, at 126.

<sup>375</sup> Menakem, *supra* note 273, at 90 (“When many white American bodies encounter [B]lack bodies, the white bodies automatically constrict, and their lizard brains go on high alert.”).

<sup>376</sup> In an analysis of 990 fatal shootings in 2015, “police exhibit[ed] shooter bias by falsely perceiving [B]lacks to be a greater threat than non-[B]lacks to their safety.” Lowery, *supra* note 372.

<sup>377</sup> A recent study analyzing police shootings found the biggest factor that had “strongest relationship with police shooting disparities was residential segregation.” Ahmed, *supra* note 375; *see also* Menakem, *supra* note 273, at 121 (“When a police body unnecessarily harms a Black one, all attention is typically deflected away from police culture—and from the widespread pattern of behavior—and onto the particular officer and the particular incident under scrutiny. The incident is treated by police culture as an anomaly, even when—as in Ferguson, Missouri—the widespread pattern is painfully evident.”); Van der Kolk, *supra* note 289, at 205 (“Understanding *why* you feel a certain way does not change *how* you feel.”) (emphasis in original).

<sup>378</sup> Ahmed, *supra* note 375 (“Structural racism had a strong effect on the fatal police shootings of [B]lack individuals.”).

<sup>379</sup> Despite the statistics on the ineffectiveness of training to lessen the death of Black people at the hands of law enforcement, some commentators still persist that training, and higher standards for admission into the police force, are viable solutions. The authors found this narrative akin to Kendi’s “failure doctrine,” “the doctrine of failing to make change and deflecting fault,” because the idea of racism stemming from ignorance aligns with people’s understanding of inequality. *See* Kendi, *supra* note 165, at 212. Demanding that law enforcement “learn” about racial patterns in policing insinuates that racism is a “problem of immorality or ignorance,” when in reality, “[t]he problem of race has always been at its core the problem of power.” *Id.* at 207.

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We do not recommend the elimination of police, but rather, a more diversified police force and broader network of professionals to assist in times of crises. Often, when the police are summoned, a militarized response<sup>380</sup> is both unnecessary and an inherent escalation of an ongoing emergency.<sup>381</sup> In fact, “[n]early sixty percent of victims [of police killings] did not have a gun or were involved in activities that should not require police intervention such as harmless ‘quality of life’ behaviors or mental health crises.”<sup>382</sup> To stop the disproportionate killing of Black people, we need to stop deploying militarized units to “deescalate” otherwise non-violent scenarios.<sup>383</sup>

Instead, the enormous budget for policing<sup>384</sup> can be divided among other sectors, to employ trauma therapists to respond to domestic disputes and welfare checks, and social workers to deal with suicidal callers or reports of child abuse and neglect.<sup>385</sup> There are professionals who better understand the appropriate response to people in distress or those experiencing mental health and emotional crises, and who are better equipped to address these situations without drawing a gun.<sup>386</sup> When advocates demand that we “Defund the Police,” they are requesting a knowledgeable and varied response team to crises situations.<sup>387</sup>

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<sup>380</sup> Menakem, *supra* note 273, at 116, “[T]oday, some American cities literally own tanks. Tactics that were formerly used only by SWAT teams have become standard operating procedures.”

<sup>381</sup> “[I]n 2014, police killed at least 287 people who were involved in minor offenses and harmless activities like sleeping in parks, possessing drugs, looking ‘suspicious’ or having a mental health crisis.” *Problem*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions#brokenwindows> (last visited Dec. 28, 2020).

<sup>382</sup> *Problem*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/problem> (last visited Dec. 27, 2020).

<sup>383</sup> “Studies show that more militarized police departments are significantly more likely to kill civilians.” *Problem*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions#demilitarization> (last visited Dec. 28, 2020).

<sup>384</sup> *What Policing Costs: A Look at Spending in America’s Biggest Cities*, VERA INSTITUTE, <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities> (last visited Dec. 29, 2020) (“Nationally, the cost of policing is [] \$115 billion per year”).

<sup>385</sup> *Problem*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions#brokenwindows> (last visited Dec. 28, 2020) (explaining minor offenses and harmless activities “are often symptoms of underlying issues of drug addiction, homelessness, and mental illness which should be treated by healthcare professionals and social workers rather than the police”).

<sup>386</sup> *Problem*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/solutions#brokenwindows> (last visited Dec. 28, 2020).

<sup>387</sup> Rashawn Ray, *What does ‘defund the police’ mean and does it have merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what->

Police currently cannot do all that we expect of them, to serve and protect and to react calmly and without fear when repeatedly faced with stressful scenarios and perceived threats of violence.<sup>388</sup> Traumatized and exhausted people do not have the necessary cognitive functioning to make informed decisions about when to pull the trigger.<sup>389</sup> At present, officers wear too many hats to wear any of them effectively.<sup>390</sup>

Seeing and responding to trauma repeatedly inherently puts officers “on guard”<sup>391</sup> and, thus, renders them more likely to pull the trigger when there is no need.<sup>392</sup> Repeated exposure to perceived violence and fear fosters a hyperactive response and creates traumatized people:<sup>393</sup> unhealed from their own trauma and an unsettled sympathetic nervous system, they cannot appropriately respond to situations with rational, meaningful thought about when it is appropriate to shoot or stand down.<sup>394</sup>

If we lessen the burden for law enforcement to serve as caregivers, military personnel, and community healers, we can allow them to be more settled and attuned with their decision-making; to think rationally and make life-or-death decisions from a place of thoughtfulness.<sup>395</sup>

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In addition to outsourcing certain tasks of law enforcement, there are other methods that render policing more effective, and, ultimately, less deadly. After reducing the varied responsibilities of officers, we can more efficiently focus on a “community policing” model—encouraging officers to volunteer in the community, “smile, nod, and wave at residents...[h]elp out with community projects, such as picking up trash during a neighborhood cleanup...[and] [s]top[ping] in at community events such as bake sales,

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does-defund-the-police-mean-and-does-it-have-merit/.

<sup>388</sup> Menakem, *supra* note 273, at 115. “[M]any police live with the biochemicals of chronic stress in their bloodstreams.”

<sup>389</sup> *Id.* at 7 (“Trauma can cause us to react to present events in ways that seem wildly inappropriate, overly charged or otherwise out of proportion.”).

<sup>390</sup> *Id.* at 116 (explaining “chronic stress and confusion for police bodies”).

<sup>391</sup> *Id.* at 8.

<sup>392</sup> *Id.* at 14, “Your body acts as if the danger is real, regardless of what your cognitive brain knows. The body’s imperative is to protect itself.”

<sup>393</sup> *Id.* at 117 (explaining “law enforcement professionals routinely face high-stress situations”).

<sup>394</sup> “Trauma affects the entire human organism—body, mind, and brain.... After trauma the world is experienced with a different nervous system.” Van der Kolk, *supra* note 289, at 53.

<sup>395</sup> *Id.* at 117, “Police bodies are visibly suffering from their own form of trauma and, in turn, inflicting unnecessary harm on the less powerful, including some of the people they have pledged to protect.”

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rummage sales, [and] concerts....”<sup>396</sup> Essentially, we should encourage officers to do other work in their precinct, so when they arrive, they are not always showing up to strip people of their liberty.<sup>397</sup> If you know and respect, and perhaps even love and cherish, the people you serve, you are less likely to utilize the unconscious part of your brain and shoot when faced with a perceived threat.<sup>398</sup> Likewise, precincts should make more of an effort to recruit and hire officers who live, and grew up in, the communities they serve.<sup>399</sup>

Redistributing police budgets to assess situations with more informed responses, and focusing on community policing, are two healing-centric models of reform. In conjunction with these suggestions, we propose that officers must face consequences for their actions. With an understanding of pervasive and systemic racism in U.S. culture, this alone will not alleviate the disproportionate death of Black people at the hands of police, but it will reaffirm the importance and severity of law enforcement’s actions. Healing strategies are settling and calming, making any change more effective, but fear of monetary loss changes systems, re-wires institutions, and motivates change.

At present, individual officers sued for civil rights violations almost never pay the cost of their own defense.<sup>400</sup> Officers “are virtually always indemnified,”<sup>401</sup> even when the court concludes they utilized excessive force.<sup>402</sup> When the court finds that an officer broke the law, and the state—

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<sup>396</sup> *Id.* at 278-79.

<sup>397</sup> *Id.* at 115, “A high percentage of cops who work in large American cities live in the suburbs and have little off-duty contact with the residents of the neighborhoods where they work.”

<sup>398</sup> *Id.* at 8, “Trauma is the body’s protective response to an event—or a series of events—that it perceives as potentially dangerous. This perception may be accurate, inaccurate or entirely imaginary.... When our non-thinking brain senses danger, our ‘fight, flee, or freeze’ instincts are invoked.” From this foundation, we are less likely to feel fear and, thus, unthinkingly fire a weapon; if we know and recognize the individual on the other side of the weapon as human. *See also* Kendi, *supra* note 165, at 212 (“Fear is kind of like race—a mirage. ‘Fear is not real. It is a product of our imagination.’”).

<sup>399</sup> *See* The Daily Podcast: ‘Who Replaces Me?’: *An Update*, NY TIMES (Dec. 30, 2020).

<sup>400</sup> Reinwald, *supra* note 260, at 676.

<sup>401</sup> *See* Joanna C. Schwartz, *Police Indemnification*, 89 NYU L. REV. 885, 890 (2014). “Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over \$3.9 million awarded in punitive damages. And officers in the thirty-seven small and mid-sized jurisdictions in my study never contributed to settlements or judgments in lawsuits brought against them.” *Id.*

<sup>402</sup> *See id.* at 890.

and taxpayers—shield him from paying the penalty, we are directly subsidizing his conduct. This is a state-sanctioned and state-funded assault on Black communities.<sup>403</sup>

In addition, it is increasingly difficult to fire police officers, even those who engage in knowing and admitted misconduct.<sup>404</sup> In a particularly egregious case, an officer “challenged a handcuffed man to a fight for a chance to be released,” appealed his firing, and won his job back, twice.<sup>405</sup> Police union contracts directly undermine the local chief’s authority to ensure a safe and secure group of individuals to serve and protect. When law enforcement officers make serious mistakes, they must be reprimanded or fired accordingly.

Until a real change in the way police departments operate occurs, it is imperative to create effective deterrents to abusive practices. All instances of potentially excessive force, and especially police-involved killings, should be investigated and prosecuted by disinterested officials—ones who do not work with these same officers on a daily basis. In addition, police unions should be required to pay, or at least contribute to judgments and settlements, in civil rights cases against officers.

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This list of potential responses to curb the use of excessive force in policing, particularly against Black people, is by no means exhaustive, nor is it intended to be. However, when we examine the history of qualified immunity—a racially charged doctrine that strips officers of accountability and undermines the efficacy of policies to eliminate discrimination—we must advance reform that directly combats this history. Identifying the problem is one aspect, but identifying pertinent, affordable, and workable solutions is another.

Qualified immunity has developed so strongly only because of the unceasing and unpunished violence levied against Black people by police. Modern police practices and qualified immunity work in tandem to harm Black people. We cannot advance achievable reform that promotes attention to one without the other.

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<sup>403</sup> Many local governments cannot afford to pay settlements or judgments related to police brutality. Without sufficient liability insurance, governments can resort to bond-borrowing, requiring taxpayers to pay interest on police brutality judgments, as investors profit. Alyxandra Goodwin, *et al.*, *Police Brutality Bonds*, ACRE, <http://nathancummings.org/wp-content/uploads/PoliceBrutalityBonds-Jun2018-1.pdf>.

<sup>404</sup> Kimbriell Kelly, *et al.*, *Fired/Rehired: Police chiefs are often forced to put officers fired for misconduct back on the streets*, THE WASHINGTON POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/> (explaining of 37 departments analyzed, 1,881 officers were fired since 2006 and “of those officers, 451 successfully appealed and won their jobs back”).

<sup>405</sup> See Kelly, *supra* note 404.

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### 2. Judicial Reform

“A member of the Court is not a composite of juridical abstractions but a complex individual of flesh and blood.”<sup>406</sup> – H.N. Hirsch

The courts of this country, including the Supreme Court, are not immune from the consequences of history. Indeed, in many ways, our judicial system, which relies heavily on case law and precedent, may be the branch of government most prone to incorporate and perpetuate harmful racial stereotypes over time—intentionally or unintentionally, consciously or unconsciously. Absent widespread recognition of the enduring effects on our society of the evils of slavery, Jim Crow, and segregation, righting those wrongs completely, through the courts or otherwise, will not be possible. However, the legal community and the judiciary can play an important role in bringing about the necessary shift in public consciousness.

Our whitewashed history and tendency to idolize and idealize prominent historical figures, and to dismiss their prejudice or outright hatefulness as simply a product of their time,<sup>407</sup> normalizes inequality and promotes the idea of “American exceptionalism,” without requiring thoughtful or truthful examination.<sup>408</sup> So many U.S. students have been indoctrinated by “exceptionalist” propaganda in schools. We teach our children that racism is bad and the U.S. is good, therefore, the U.S. is not racist. This false binary leads to thinking patterns such as: white supremacy is very bad, I am good, therefore, I do not believe in or benefit from white supremacy; the law is colorblind, the law treats Black people worse than white people, therefore, Black people must be worse than white people; but, racism is bad, and I am not a white supremacist. These are all logical fallacies that allow the foundation of white supremacy in the United States to be upheld and reinforced by people who believe that they are colorblind.<sup>409</sup>

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<sup>406</sup> Hirsch *supra* note 100, at 211.

<sup>407</sup> See Ball, *et al.*, *supra* note 76 at 16 (explaining away Justice Black’s Klan membership because such organizations were “fact of life in the South”); *compare with id.* at 161 (“Senator Black’s secretary maintained a file labeled ‘Negro Propaganda,’ which contained letters from the NAACP and other [B]lack organizations asking for Black’s help in their struggle for racial justice.”)

<sup>408</sup> See Diangelo, *supra* note 310, at 61. “At the minimum, this idealization of the past is another example of white experiences and perceptions positioned as universal. How might this nostalgia sound to any person of color who is aware of this country’s history? The ability to erase this racial history and actually believe that the past was better than the present ‘for everybody’ has inculcated a false consciousness[.]” *Id.*

<sup>409</sup> See *id.* at 49. “This sort of racism makes for a very challenging dynamic in which whites are operating under the false assumption that we can’t simultaneously be good people and participate in racism, at the same time that we are dishonest about what we really think

Whitewashing history with an “exceptionalist” brush is particularly problematic in the context of understanding the justice system. The idea that because a person is a judge or a Justice they are inherently capable of completely “disinterested reason” and “objectivity” is not supported by fact or logic.<sup>410</sup> Recognizing that all of the actors within the justice system are human and fallible does not need to result in a lack of confidence in the legal system. Rather, it will help promote more thoughtful examination of precedent and stop the cycle of enshrining the personal passions and prejudices of individuals into the law.

The Supreme Court is tasked with interpreting the Constitution and determining the boundaries of individual liberties and governmental power. Such has been the case since 1803, when the Court decided *Marbury v. Madison*.<sup>411</sup> Yet, the Justices of the Court, past and present, are the federal officials about whom the public generally knows the least. Surveys consistently indicate that people have a high degree of trust in the Supreme Court, but less than half of people surveyed believe the Justices put aside their personal opinions when deciding cases.<sup>412</sup> This blind trust is unusual and problematic when one considers that for the first 178 years of the Court’s existence, it was populated entirely by white men. Nearly 95% of the people who have ever had the opportunity to contribute to and shape U.S. constitutional law at the highest level have been white men.

In its history, since 1789, there have been 115 Justices of the Court.<sup>413</sup> Five have been women, two have been Black. The first of those Black Justices, Justice Marshall, was appointed in 1967; the second, Justice Clarence Thomas, took Justice Marshall’s seat on the Court when he retired in 1991. The Court has never had more than one Black Justice at a time, and for the last 30 years, the only Black person on the Court has been one of its most conservative members.<sup>414</sup> Justice Thomas’s wife, Ginni Thomas, a

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and do regarding people of color.” *Id.*

<sup>410</sup> One of the purported reasons for immunity for government officials is the recognition of the fact that they may err. However, absolute immunity for judges inoculates them from challenges regarding their prejudices.

<sup>411</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>412</sup> Sixty-eight percent of respondents trust the Court to “operate in the best interests of the American people.” In comparing survey results from 2013 to 2019, trust in the Court “among self-described conservatives[,] increased significantly from 50% to 73%.” *Most Americans trust the Supreme Court, but think it is ‘too mixed up in politics,’* ASSOCIATED PRESS (Oct. 16, 2019), <https://apnews.com/press-release/pr-prnewswire/ca162cc03b3261ff608ab7d8cfc31a25>.

<sup>413</sup> *The Court as an Institution*, SUPREME COURT OF THE UNITED STATES (Jan. 13, 2021), <https://www.supremecourt.gov/about/institution.aspx>.

<sup>414</sup> It will be interesting to see how the Court, specifically Justice Thomas, responds to challenges involving the Biden Administration, given that Biden and Justice Thomas have a

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white, conservative, lobbyist, frequently promotes conspiracy theories on social media and is an avid supporter of former President Trump.<sup>415</sup> The couple had dinner with the former President and the former First Lady while President Trump was in office and Justice Thomas was on the Bench.<sup>416</sup>

The ever-present ‘boomerang effect’ is illustrated by the fact that since the resignation of Chief Justice Warren in 1969, less than two years after Justice Marshall was seated, Republican presidents have successfully appointed 16 conservative Justices, while Democratic presidents appointed only four liberal ones.<sup>417</sup> Importantly, the Warren Court is widely credited with advancing civil rights.<sup>418</sup> The Burger, Rehnquist, and Roberts Courts, however, managed to claw back many of those advancements.<sup>419</sup>

The modern application of qualified immunity, a doctrine molded primarily by conservative white men, has created a legal framework in which the presumption of innocence does not attach until after a person has been arrested or charged with a crime. The Court’s jurisprudence provides more protection to individuals, and more definite instructions to police, in matters of criminal procedure that the Justices see as potentially applicable to themselves and their loved ones.<sup>420</sup> Anyone can be falsely accused of a crime. However, when it comes to defining excessive force, the Court has been entirely deferential to law enforcement. This desire not to “hamstring” or “tie the hands of” police is attributable to the fact that most of the Justices cannot fathom a situation in which police would shoot or tase them.<sup>421</sup> Why else can a Black person convicted of a crime challenge the fairness of their trial based

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particularly contemptuous history. See Devin Dwyer, *Justice Clarence Thomas rebukes Biden-led confirmation hearings in new film*, ABC NEWS (Nov. 28, 2019), <https://abcnews.go.com/Politics/justice-clarence-thomas-rebukes-biden-led-confirmation-hearings/story?id=67235780>.

<sup>415</sup> See Mark Joseph Stone, *Ginni Thomas, Wife of Clarence, Cheered on the Rally That Turned Into the Capitol Riot*, SLATE (Jan. 8, 2021).

<sup>416</sup> *Id.*

<sup>417</sup> *Supreme Court Nominations (1789-Present)*, UNITED STATES SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (Feb. 2, 2021).

<sup>418</sup> Chief Justice Warren, before coming to the Court, “was a member of a nativist, anti-Asian organization in California (the Native Sons of the Golden West) and, as California attorney general during World War II, he worked with military authorities in the 1942 relocation of Japanese Americans.” Ball, *et al.*, *supra* note 76, at 177.

<sup>419</sup> Including, civil rights cases involving the police, employment discrimination, and others.

<sup>420</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>421</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30 (1987) (describing Court’s “unceasing efforts to eradicate prejudice from our criminal justice system” and collecting cases aimed at fighting racial bias in jury selection and prosecutorial discretion).

on racial prejudice, but if no criminal charges materialize after a police encounter, they cannot argue under Section 1983 that race was a factor in the abuse?

The question is not: are the judiciary and justice system plagued by our history and societal norm of white supremacy? The question is: do we value, and strive for, true equality more than we detest admitting that we have been wrong or willfully ignorant? If the answer is yes, then we have a lot of work to do. That the problem is too big, too widespread, is no excuse to deny its existence or the extent of its impact. The legal community, especially judges and prosecutors, can set an example for the rest of our country's institutions by demanding a "Truth and Reconciliation in Law Commission" and supporting a reformation of the federal judicial system, including expanding the Court.

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When armed, white insurrectionists, storming the Capitol to disrupt a Joint Session of Congress, are met by law enforcement with less force than largely peaceful, largely Black protesters taking to the street to declare their personhood and humanity, it is well-past time to admit that there is a fundamental racial problem in U.S. law and law enforcement. The status quo is wildly unjust and to deny the depth of the problem is to accept that there will be no solution.<sup>422</sup>

Stakeholders in the legal community must work together with legislators to identify the myriad ways that the illusion of colorblindness impacts the way the law treats Black people.<sup>423</sup> We need to stop allowing the notions of federalism, separation of powers, states' rights, fear of frivolous litigation and administrative expedience, to justify the deprivation of fundamental rights and application of equal justice.<sup>424</sup>

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<sup>422</sup> See *id.* at 315-17 (rejecting reliance on comprehensive statistical analysis of Georgia's capital punishment regime, which showed significant racial disparities, as evidence of arbitrary and capricious, discriminatory punishment. "[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.... Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges.").

<sup>423</sup> See *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (April 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (describing stark racial disparities in policing, charging, pre-trial detention, sentencing, and collateral consequences).

<sup>424</sup> District courts screen *pro se* prisoners' civil rights complaints and must dismiss a prisoner's Section 1983 action if it determines the complaint "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(iii); 28 U.S.C. § 1915A(b); 42 U.S.C. § 1997e(c)(1). Courts are permitted, if not required, to assert qualified immunity on behalf of government defendants alleged to have violated constitutional rights.

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Any legislation aimed at correcting the injustice that the doctrine has permitted should anticipate arguments that will be made in an attempt to circumvent accountability. For instance, perhaps it may be a defense to Section 1983 liability that an officer acted in good faith and with probable cause. However, it must be firmly established that “good faith” cannot be determined as a matter of law by the judge using an “objective” standard; it must be reserved as a question for the jury. Further, it should be declared fear of frivolous lawsuits, as a matter of law, is an insufficient justification for curtailing civil rights protections. Finally, the section of the statute at issue in *Screws*, which criminalized conspiracies to deprive a person of their rights on account of their race should be reenacted and used to prosecute officers who lie to protect other officers or otherwise help to conceal misconduct.

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Although today’s Court is the most diverse it has ever been, still, a majority of the Justices are white, Ivy-league-educated men.<sup>425</sup> Moreover, point-in-time equality of access does not undo nearly 200 years of white-male homogeneity. Representation matters. The Court should be a reflection of the people. In its current form and capacity, it is not. If we want the “collective subjective” of the Court to be representative of a majority of the people, then it must be expanded. Adding Justices to the Court would reasonably reflect the vast change in population and demographics of the United States since its current capacity was set in 1869 during Reconstruction, and would make the Court less political and able to produce more consistent and workable precedent. The death of a single Justice should not result in doubt across the country about the longevity of fundamental rights for certain groups.

To those who consider expanding the Court a “radical”<sup>426</sup> proposal, we proffer that radical change is the only means to achieve true equality under the law and at the hands of those who enforce it. Indeed, expanding the Court may be the least radical means to achieve that result.<sup>427</sup> Constitutional law Professor Bruce Ledewitz recently wrote, “[a]ccording to the theory of Court-packing, we are not ruled by law, but by men and we must put our men—and

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Howell v. Young, 530 F. App’x 98, 100 (3d Cir. 2013); *See also* Greenberg v. Haggerty, Civ. A. No. 20-3822, 2020 WL 7227251 (E.D. Pa. Dec. 8, 2020) (granting preliminary injunction to prevent enactment of Pennsylvania Rule of Professional Responsibility for attorneys that would make it professional misconduct to manifest prejudice or bias in the practice of law).

<sup>425</sup> *See Current Members*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 16, 2021).

<sup>426</sup> *See* Bruce Ledewitz, *A Call for America’s Law Professors to Oppose Court-Packing*, 2019 PEPP. L. REV. 8 (2020).

<sup>427</sup> Calling for the drafting and ratification of a new constitution, one that includes true freedom for all in its body, not as an Amendment—would be a radical change.

women—on the Supreme Court in order to get the decisions we want.”<sup>428</sup> While this may be a reductionist characterization of our contention, given the current structure of the Court and temperature of U.S. politics, we believe that theory is largely correct.

Moreover, Professor Ledewitz argues that in the interest of protecting the fragile institutions of our democracy, Democrats should practice “forbearance” and refuse to consider a Court-packing proposal.<sup>429</sup> In Professor Ledewitz’s view, the failure of FDR’s Court-packing plan in 1937 was effectively an informal amendment to the Constitution and took the possibility “off the political table permanently.”<sup>430</sup> He laments that adding Justices would “undermine the rule of law and weaken judicial independence[,]” and describes other informal amendments “including changing the nature of federalism in Reconstruction, expanding the power of Congress in the New Deal, and expanding individual liberty in the Civil Rights revolution.”<sup>431</sup>

Further, Professor Ledewitz contends, expanding the Court is not necessary because the Court is not such a threat. In support, he points to cases like *Roe* and *Obergefell*, arguing, “overturning those cases only returns those issues to the political process.”<sup>432</sup> “Those issues”—a woman’s right to choose and the right to marry for same-sex couples—are fundamental rights. For millions of people, their possible reversal is very much a threat. Moreover, Professor Ledewitz’s article either assumes colorblindness in the law or ignores that the Court has, repeatedly throughout history, been a threat to Black people.

To argue that the Court must maintain its independence and remain removed from politics ignores that the Court is inherently political.<sup>433</sup> The

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<sup>428</sup> Ledewitz, *supra* note 426, at 12.

<sup>429</sup> *Id.* at 6, 9.

<sup>430</sup> *Id.* at 8.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* at 16.

<sup>433</sup> For example, J. Edgar Hoover “offered to help Nixon find material to support Gerald Ford’s impeachment charges against [Justice] Douglas.” Ball, *et al.*, *supra* note 76, at 147. “Chief Justice Hughes chose [Justice] Black to write some early cases brought to the Court by [B]lack petitioners and by the NAACP in a conscious effort to...rehabilitate him in the view of the liberal community.” *Id.* at 162. Moreover, Senator Ted Cruz and Chief Justice Roberts both clerked for Chief Justice Rehnquist. See Jason Horowitz, *As Supreme Court Clerk, Ted Cruz Made Death Penalty His Cause*, NY TIMES (Jan. 20, 2016), <https://www.nytimes.com/2016/01/21/us/politics/as-supreme-court-clerk-ted-cruz-made-death-penalty-his-cause.html>; *Current Members*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 16, 2021). Senator Josh Hawley clerked for Chief Justice Roberts. See Katherine Stewart, *The Roots of Josh Hawley’s Rage*, NY TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/>

### THE COLORBLINDNESS FALLACY

Justices are nominated by presidents and the Court cannot expand without congressional authority. Professor Ledewitz refers to *Marbury v. Madison* before stating “[t]he achievement of American constitutionalism is the rule of law rather than power.... I do not know to what extent we continue to believe that law is anything but power, but this would be the right time to find out.”<sup>434</sup> Yet, *Marbury*’s holding, that the Court can declare an Act of Congress unconstitutional, was a power grab by Chief Justice Marshall aimed at his cousin, then-President Thomas Jefferson.<sup>435</sup> The authors agree with Chief Justice Marshall in one respect, however, that the government of the United States “certainly cease[s] to deserve [] high appellation[] if the laws furnish no remedy for a vested legal right.”<sup>436</sup>

Justices Frankfurter, Black, Douglas, and Rutledge all supported FDR’s plan to “pack” the Court.<sup>437</sup> They felt the conservative nature of the Court was hindering its true purpose. Unfortunately, they were correct, and they each contributed to it in their own way, despite some of their intentions or true beliefs. A larger Court, full of justices from different backgrounds and different law schools, each bringing a different perspective, would be a monumental step toward eliminating the colorblindness fallacy from law. Political forbearance is easy to preach from the position of white academia; but, as Felix Frankfurter once wrote to Learned Hand, “the possible gain isn’t worth the cost of having five men without any reasonable probability they are qualified for the task, determine the course of social policy for the states and the nation.”<sup>438</sup>

### IV. CONCLUSION

White supremacy and anti-Blackness were embedded in the foundation of our democracy and, through generations, have been carefully preserved in our institutions and collective consciousness. No institution is immune, including the judiciary. Despite attempts to remedy race-based discrimination through constitutional Amendments and legislation, the United States has

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01/11/opinion/josh-hawley-religion-democracy.html.

<sup>434</sup> Ledewitz, *supra* note 428, at 18. *Marbury* was a case about power and the political nature of the Court. At the time he became Chief Justice, John Marshall was also the Secretary of State—he and his brother were the people who failed to deliver the commissions at issue in *Marbury*. *Marbury*’s lawyer, Charles Lee, was the uncle of Robert E. Lee. See Cliff Slogon and David McKean, *The Great Decision Jefferson, Adams, Marshall, and the Battle for the Supreme Court*, PUBLICAFFAIRS, at 170, 186 (2009).

<sup>435</sup> McKean, *et al.*, *supra* note 437, at 160-65.

<sup>436</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>437</sup> See Ball, *et al.*, *supra* note 76, at 72-73; Hirsch, *supra* note 100, at 122.

<sup>438</sup> Hirsch, *supra* note 100, at 132.

consistently failed to live up to its stated ideals, at the expense of Black lives. This collective failure has persisted and permeated, to a large extent, because of a collective refusal to admit the problem exists. Anti-Blackness is perpetuated on a societal and institutional level through coded language and a refusal to demand accountability at the expense of white comfort.

This societal dynamic in the United States is perhaps most visible in the context of police brutality and the disproportionate excessive use of force on Black bodies. Qualified immunity is a judicially created doctrine, which arose in response to legislative efforts to protect Black people, that encapsulates and furthers racial stereotypes and police unaccountability. Denying that qualified immunity was born from anti-Blackness does not erase that history. It does not alleviate the resultant suffering or offer an acceptable path forward.

We must work to understand and actively dismantle racist systems and patterns of thinking, and to change our societal norms. In acknowledging that racism is unavoidably engrained not just in our jurisprudence, but in our lives, we can stop reinforcing the fallacy that colorblindness is possible and notions of “reasonableness” and “objectivity” make the law “fair” or its application “just.” These concepts are disproven by modern social science. Institutions are operated and upheld by people, and laws are written, passed, and enforced by them. Therefore, if we truly value liberty, justice, and democracy, We the People must tell the truth. Our Constitution is not colorblind.