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Prosecuting the Police: How America's Criminal Justice System Has Failed Breonna Taylor and Other People of Color

BY

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A THESIS SUBMITTED TO
THE FACULTY OF THE DEPARTMENT OF PUBLIC POLICY AND LAW
IN CANDIDACY FOR THE BACCALAUREATE DEGREE
WITH HONORS IN PUBLIC POLICY AND LAW
HARTFORD, CONNECTICUT
MAY 2021

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Acknowledgements

Professor Falk

For making this project possible. I am beyond grateful for your constant encouragement and guidance in advising this thesis. You have played such an important role in inspiring me to go to law school and I could not thank you enough. You have made such a positive impact on my education and experience here at Trinity College and I will forever be grateful for that.

Professor Fulco

For inspiring me to become a Public Policy and Law major and pursuing a career in law. I truly cannot thank you enough. Having you as my advisor has been instrumental in my development as a person. I am forever grateful for your influence and inspiration and for helping me find this passion I never knew I had. You have greatly impacted my life for the better.

My Family

For encouraging me to go to Trinity College four years ago. If it were not for all of you, I would not be where I am today. I cannot thank you all enough for the constant support in pursuing my dreams. Everything that I am today is because of you.

My Friends

For shaping the person that I am today. Thank you for being my backbone and keeping me on my feet. Thank you for inspiring me every single day. My life would not be complete without you.

Abstract

Using the Breonna Taylor case as an example, this thesis will investigate the ways that certain practices and policies in America's criminal justice system have allowed discriminatory policing to flourish. People of color in America disproportionately experience acts of violence from police officers, and more often than not, there is no justice for these victims. The practices and policies that have been put into place to combat racial injustices in America have been ineffective because of the principles that govern our system. The way that America's criminal justice system operates is inherently discriminatory and the need for reform is urgent.

Chapter 1: Introduction and Purpose

Breonna Taylor

On March 13, 2020, Louisville police officers used a battering ram to enter the apartment of a 26-year-old emergency room technician, Breonna Taylor, and her boyfriend Kenneth Walker. Louisville police had been investigating two men who they believed were selling drugs out of a house that was far from Breonna Taylor's apartment. However, a judge had signed a warrant allowing the police to search the home of Breonna Taylor because the police said they believed that one of the men had used her apartment to receive packages. Both Ms. Taylor and Mr. Walker had been in bed but woke up when they heard a loud banging at the door. Walker said both he and Taylor called out, asking who was at the door. Mr. Walker later told the police that he feared it was Ms. Taylor's ex-boyfriend trying to break in. After the police broke the door off its hinges, Mr. Walker fired his gun once, striking Sergeant Mattingly in a thigh. In response to Mr. Walker's shot, the police fired several shots into the home, hitting Breonna Taylor five times. One of the three officers on the scene, Detective Brett Hankison, who has since been fired, blindly fired 10 rounds into the apartment.¹

Kenneth Walker told investigators that Breonna Taylor coughed and struggled to breathe for at least five minutes after she was shot. An ambulance on standby outside the apartment had been told to leave about an hour before the raid. Officers later called an ambulance back to the scene while providing aid to their colleague who was shot in the thigh. Breonna Taylor was given no medical attention from the officers. Her boyfriend had called 911 and it wasn't until about five minutes after the shooting that emergency personnel realized that Breonna was

¹ Richard A. Oppel Jr., Nicholas Bogel-Burroughs, and Derrick Bryson Taylor, "What To Know About Breonna Taylor's Death - The New York Times," *The New York Times*, October 23, 2020, <https://www.nytimes.com/article/breonna-taylor-police.html>.

seriously wounded. On a recorded call to 911, Mr. Walker is quoted saying, “I don’t know what’s happening. Someone kicked in the door and shot my girlfriend.”² Dispatch logs show that Breonna Taylor received no medical attention for more than 20 minutes after she was struck. However, the Jefferson County coroner told *The Courier Journal* that she had most likely died less than a minute after she was shot and could not have been saved.³ While the police department had received court approval for a “no-knock” entry, the orders were changed before the raid to “knock and announce,” meaning that the police must identify themselves upon entry. The officers have said that they did announce themselves, but Kenneth Walker said he did not hear anything. No drugs were found in the apartment. Breonna Taylor’s ex-boyfriend, whose alleged packages led the police to her door that night, was arrested on August 27 in possession of drugs. He told *The Courier Journal* “the police are trying to make it out to be my fault and turning the whole community out here, making it look like I brought this to Breonna’s door.”⁴ Breonna Taylor’s mother, Tamika Palmer, said that her daughter had big dreams and planned a lifelong career in health care after serving as an E.M.T. She said that “Breonna was starting to live her best life.”⁵

The wrongful death of Breonna Taylor led to wide-scale demonstrations in the following months as the case continued to draw attention. A grand jury indicted former Louisville police officer Brett Hankison in September for three counts of “wanton endangerment in the first degree” for his actions during the raid. He pleaded not guilty, no charges were announced against the other two officers who fired shots, and no one was charged for directly causing the death of

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

Breonna Taylor.⁶ Under Kentucky law, a person commits wanton endangerment when he or she “wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person,” and does so “under circumstances manifesting extreme indifference to the value of human life.”⁷ But the charges against Mr. Hankison are not for killing Breonna Taylor. Instead, Kentucky attorney general, Daniel Cameron said that because none of his shots were known to have struck Breonna Taylor, Hankison was charged by the grand jury because the shots he fired had passed through Ms. Taylor’s apartment walls into a neighboring apartment, endangering three people there. Mr. Hankison is charged with one count for each of the neighboring apartment’s occupants: a pregnant woman, her husband, and their 5-year-old child, who were asleep. None of these individuals were hit by the shots of Mr. Hankinson.⁸ Attorney General Daniel Cameron did not give the jurors the option of murder charges against the officers involved.

The police’s incident report listed Breonna Taylor’s injuries as “none,” even though she had been shot several times. The report also indicated that officers had not forced their way into the apartment although they had used a battering ram to break the door open. Ms. Taylor’s family expressed their outrage in that the police conducted the raid in the middle of the night. The Taylor family’s lawyers say that the police had already located the main suspect in the investigation by the time they had burst into the apartment. But they “then proceeded to spray gunfire into the residence with a total disregard for the value of human life,” according to a wrongful-death lawsuit filed by Ms. Taylor’s mother.⁹ There was no body camera footage from

⁶ Ibid.

⁷ Nicholas Bogel-Burroughs, “Breonna Taylor Case: What Does ‘Wanton Endangerment’ Mean? - The New York Times,” *The New York Times*, September 23, 2020, <https://www.nytimes.com/2020/09/23/us/wanton-endangerment.html>.

⁸ Ibid.

⁹ Richard A. Oppel Jr., Nicholas Bogel-Burroughs, and Derrick Bryson Taylor, “What To Know About Breonna Taylor’s Death - The New York Times.”

the raid. Prosecutors have dismissed the charges against Mr. Walker, and some legal experts believe that the fact that prosecutors dropped charges after a grand jury indictment suggested that they may have doubts about the version of events told by the police.¹⁰ Regardless of the countless discrepancies in the case of Breonna Taylor, justice has not been served. It is an unfortunate fact that justice for people of color in America who experience violence from police is often never served. America's justice system is built on practices and policies that shield officers from liability and prevent justice for the victims. Because of the racial disparities and biases in policing, people of color experience the effects of police misconduct far more frequently.

Racial Biases in Policing

“Racism is an ideology, or belief system, designed to justify and rationalize racial and ethnic inequality” and “discrimination, most basically, is behavior aimed at denying members of particular ethnic groups’ equal access to societal rewards.”¹¹ Police brutality is defined as “the use of excessive physical force or verbal assault and psychological intimidation” and it is “one of the most serious, enduring, and divisive human rights violations in the United States.”¹² Blacks are more likely to be victims of police brutality than Whites. “Since the time that Africans were forcibly brought to America, they have been the victims of racist and discriminatory practices that have been spurred and/or substantiated by those who create and enforce the law.”¹³ About 12% of the United States population is Black. However, in 2011, Black Americans made up 30%

¹⁰ Ibid.

¹¹ Cassandra Chaney and Ray V. Robertson, “Racism and Police Brutality in America” (Springer Science+Business Medi, January 12, 2013).

¹² April Walker, "Racial Profiling-Separate and Unequal Keeping the Minorities in Line - The Role of Law Enforcement in America," St. Thomas Law Review 23, no. 4 (Summer 2011): 579-580

¹³ Ibid.

of persons arrested for a property offense and 38% of persons arrested for a violent offense.¹⁴

Scholarly research has revealed that a significant portion of such disparities in policing may be attributed to implicit racial biases. Implicit racial bias is the unconscious associations humans make about racial groups.¹⁵ Officers often make fast decisions with imperfect information, activating these biases to fill in missing information and allow individuals to make decisions in the limited time they have.

Research related to police brutality has revealed that Blacks are more likely than Whites to make complaints regarding police brutality, to be stopped while operating a motorized vehicle, and to underreport how often they are stopped due to higher social desirability factors.¹⁶ Data on traffic stops demonstrates the influence of racial bias on law enforcement practices and arrest rates. In the U.S. Department of Justice’s report on “Contacts Between Police and the Public” released in 2011, “the Bureau of Justice Statistics found that while White, Black, and Hispanic drivers were stopped at similar rates nationwide, Black drivers were three times as likely to be searched during a stop as White drivers and twice as likely as Hispanic drivers.”¹⁷ Black drivers were also twice as likely to experience the use or threat of violent force from police officers than both White and Hispanic drivers. Stanford University carried out a study titled *A large-scale analysis of racial disparities in police stops across the United States*. This study compiled and analyzed a dataset detailing over 60 million state patrol stops conducted in 20 U.S. states between 2011 and 2015. Their study found that Black drivers are stopped more often than White drivers and among stopped drivers—and after controlling for age, gender, time, and location—

¹⁴ “Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System” (The Sentencing Project, August 31, 2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-United-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/>.

¹⁵ Ibid.

¹⁶ Cassandra Chaney and Ray V. Robertson, “Racism and Police Brutality in America.”

¹⁷ “Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System.”

Blacks are more likely to be ticketed, searched, and arrested than white drivers. They also found evidence that the bar for searching Black and Hispanic drivers is lower than for searching White drivers.¹⁸ Subconscious racial associations influence the way officers perform their jobs.

Research has shown that the vast majority of Americans of all races implicitly associate Black Americans with adjectives such as “dangerous,” “aggressive,” “violent,” and “criminal.”¹⁹ There is an implicit racial association of Black Americans with dangerous or aggressive behavior that increases police officers’ willingness to employ violent force against them. This violent force can sometimes turn out deadly.²⁰ Black males in particular are often portrayed to be aggressive and criminal, causing police to be more likely to view Black men as a threat. Because police officers particularly view Black males as potential perpetrators, this racial bias often leads to acts of violence against them. This false illustration of Black men is used to justify the disproportionate use of deadly force.²¹ African American males are 6 times more likely to be incarcerated than White males and 2.5 times more likely than Hispanic males. If current trends continue, 1 in every 3 Black American males born today can expect to go to prison in his lifetime compared to 1 in every 17 White males.²²

The effects of racial bias are particularly well demonstrated in the area of drug law enforcement, which is important to note when analyzing the case of Breonna Taylor. Between 1980 and 2000, the U.S. Black drug arrest rate rose from 6.5 to 29.1 per 1,000 persons. During the same time period, the White drug arrest rate increased from 3.5 to 4.6 per 1,000 persons. However, the disparity between the increase in Black and White drug arrests does not correspond

¹⁸ Emma Pierson et al., “A Large-Scale Analysis of Racial Disparities in Police Stops across the United States” (Stanford University, 2020).

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

to any significant disparity in Black drug activity. In 2012, the National Institute on Drug Abuse published a study that analyzed the drug usage among secondary school students in the United States from the years 1975 to 2011. The study found that White students were slightly more likely to have abused an illegal substance within the past month than Black students. Yet Black youth were arrested for drug crimes at rates more than double those of White youth.²³ In 2016, 92 percent of all people arrested for marijuana offenses were arrested for possession. In the same year, Alabama spent an estimated \$22 million enforcing the prohibition against marijuana possession. A study from Alabama Appleseed Center for Law & Justice revealed that Blacks were approximately four times as likely as White people to be arrested for marijuana possession and five times as likely to be arrested for felony possession. Black people were also 4.2 times more likely to be arrested for distribution and/or sale than White people in Alabama. These racial disparities exist despite evidence revealing that White and Black people use marijuana at roughly the same rate.²⁴

Racial profiling in recent times is often centered around the “stop and frisk” tactic employed by the New York Police Department. African Americans constitute 25% of New York City’s population, yet between 2010 and 2012, 52% of those stopped by the NYPD during “stop and frisk” were Black. White New Yorkers are 44% of the city’s population, but only 9% of those stopped were White.²⁵ Despite these statistics, Blacks were slightly less likely than Whites to be caught with weapons or drugs. The New York Police Department often argues that racial minorities tend to be clustered in neighborhoods designated as “high crime areas” to justify racial

²³ Ibid.

²⁴ Leah Nelson, Frank Knaack, and Will Tucker, “Alabama’s War on Marijuana: Assessing the Fiscal and Human Toll of Criminalization” (Alabama Appleseed Center for Law & Justice, 2018), https://www.alabamaappleseed.org/wp-content/uploads/2018/10/COM_Decriminalization-of-Marijuana_WEB-FINAL.pdf.

²⁵ Emma Pierson et al., “A Large-Scale Analysis of Racial Disparities in Police Stops across the United States.”

disparity in stop rates, but this is invalid.²⁶ Reports focusing on policing in Chicago highlighted drug stings and asset forfeiture. These law enforcement strategies facilitate widespread targeting of low-income communities of color. Federal agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives arranged drug stings that set up fake drug stash houses and lured people into committing crimes. At least 91% of the time, agents targeted Black and Latinx people.²⁷ The “war on drugs” functions as a war on communities of color.

Police Brutality

Due to racial profiling and racial disparities in policing, Black Americans are disproportionately subjected to police brutality. “The rate of fatal police shootings among Black Americans was much higher than that for any other ethnicity, standing at 30 fatal shootings per million of the population as of June 2020.”²⁸ In the past year, 1,020 people have been shot and killed by police. Although about half of the people shot and killed by police are White, Black Americans are shot at a disproportionately higher rate because they account for less than 13 percent of the United States population, yet they are killed by police at more than twice the rate of White Americans. *The Washington Post* has compiled a database containing records of every fatal shooting in the United States by a police officer in the line of duty since January 1, 2015. They have recorded 5,850 people shot and killed by police since that date.²⁹

Sam Sanders, host of *It's Been A Minute* from NPR, discussed how as a Black mother of three Black boys, Kendra Young has to talk to them about the news in a very specific way. She

²⁶ Ibid.

²⁷ Wendy Sawyer, “Ten Key Facts about Policing: Highlights from Our Work,” *Prison Policy Initiative*, June 5, 2020, <https://www.prisonpolicy.org/blog/2020/06/05/policingfacts/>.

²⁸ Stephan A. Schwartz, “Police Brutality and Racism in America,” US National Library of Medicine National Institutes of Health, July 2, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7331505/>.

²⁹ “Police Shootings Database 2015-2020,” December 1, 2020, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

recalled a time when her kids wanted to go to the park. It was right around the time of Philando Castile and Alton Sterling. Her third son had just been born and there were many moments where she was holding him and, although she loved him immensely, she was crying because of the amount of fear and worry for whom she had just brought into the world. “Another Black son, and the burdens that I have to carry with that again.”³⁰ When the kids asked to go to the park, she had to tell them: “Don’t wear your hood. Don’t put your hands in your pocket. If you get stopped, don’t run. Put your hands up. Don’t make a lot of moves. Tell them your mother works for NPR,” and the list went on.³¹ She explained how there are different stages of “the talk” as the kids get older. First, you just don’t want them to draw attention to themselves enough for someone to call on them or for them to get stopped. Then, there comes the time to explain to them what to do if they do get stopped. Young spoke on how more recently, they watched “When They See Us” as a family, the series about the Central Park Five, and it was really hard for the kids to go through. The talk began to shift from what to do if you get stopped to what you do once you’re inside those walls. Lately, the conversation in her family has shifted more about what’s not fair. She explained to her kids, “This just isn’t fair, you guys. But this is the way the world is. This is the way America is right now. It’s the way it’s been for a long time. And I can’t lie to you, I don’t think it’s going to change in your lifetime. And it’s just not fair for us to have to live like this.”³²

Sam Sanders of NPR added in how “these conversations focus a lot on Black men killed by police. But we should note, as we’ve talked about in this conversation, when a Black man dies

³⁰ Sam Sanders and Kenya Young, “A Black Mother Reflects On Giving Her 3 Sons ‘The Talk’ ... Again And Again : NPR,” NPR, June 28, 2020, <https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again>.

³¹ Ibid.

³² Ibid.

at the hands of police, a little bit of some Black woman who nurtured him or mothered him or loved him dies, too. And I cannot help but continue to hear George Floyd as he was being choked to death. He called out for his mother twice.”³³ Black mothers should not have to worry if their child’s name will ever become a hashtag or if people will be posting their pictures in a remembrance over senseless racism.

Breonna Taylor, George Floyd, Rayshard Brooks, Daniel Prude, Atatiana Jefferson, Aura Rosser, Stephon Clark, Botham Jean, Philando Castille, and so many other victims of police brutality.³⁴ But why do these innocent individuals keep dying at the hands of our police? Why are these injustices able to continue? And why is there often no justice for these victims of police brutality? The practices and policies in which our justice system relies on have been ineffective in combating these racial injustices in America. The core doctrine of current equal protection analysis focuses on the specific and subjective intent of official actors. This devalues important evidence and undermines significant voices. Police discretion remains unchecked for the most part. Courts defer to supposed officer judgment and experience and that does not seem to be justified in many instances. There is a reflexive acceptance of police credibility in America.

Purpose of Thesis

Using the Breonna Taylor case as an example, this thesis will investigate the ways in which the practices and policies that America’s criminal justice system rely on shield officers from liability and prevent people of color from receiving justice. The subsequent chapters of this thesis will argue that America’s justice system fails people of color due to the discriminatory nature by which it operates. The foundations of our justice system disadvantage people of color

³³ Ibid.

³⁴ Alia Chughati, “Know Their Names: Black People Killed by the Police in the US,” accessed October 28, 2020, <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html>.

in America due to racial disparities in policing. Chapter 2 will discuss the “no-knock warrant.” No-knock warrants are inherently discriminatory and most often used in black communities. This chapter will discuss the discriminatory nature of the warrants and how it was a controversial aspect of the Breonna Taylor case. The overall legality of these warrants has been brought into question. Chapter 2 will also analyze the initial encounter in the case of Breonna Taylor and everything that went wrong, beginning with the warrant that was issued.

Chapter 3 will discuss the judicial doctrines that often shield officers from liability. Police officers are rarely charged with crimes because of certain policies and doctrines that our justice system relies on. In *Harlow v. Fitzgerald* (1982), the Supreme Court held that federal government officials are entitled to qualified immunity. The Court reasoned that there is a need to protect officials who are required to exercise discretion. This doctrine shields officers who act with their own discretion. Police are always able claim that they acted in a violent manner because they feared for their own or public safety. This chapter will argue that these doctrines are inherently discriminatory, and reform is urgent. Chapter 3 will also discuss the criminal proceedings of police officers who have been charged with a crime. There is a reluctance of certain government actors to prosecute police officers. State prosecutions have failed in securing justice for victims of police brutality. This chapter will discuss the grand jury process and the criminal proceedings of officers who are charged for their misconduct. Using the Breonna Taylor case as an example, this chapter will examine the faults in the grand jury process as well as the power that prosecutors have in these grand jury trails. Prosecutors have certain incentives not to suggest particular charges to the jury and to manipulate a case in a way that will benefit the officer in question. Prosecutors often work closely with police officers, creating a conflict of interest in maintaining their working relationships or their duty to prosecute police brutality. This

lack of accountability creates a lack of justice for victims of police brutality. There has been a great deal of controversy surrounding Daniel Cameron, the prosecutor in Breonna Taylor's case.

Chapter 4 will offer reform suggestions and solutions. This chapter will analyze the faults of the no-knock warrant, the grand jury process, the power possessed by prosecutors, and the doctrines of qualified immunity and discriminatory intent. Reform is necessary, and many states have already begun to take action. Connecticut and Colorado have been leaders in reform, and these chapters will analyze the policies that have been implemented by individual states. America's criminal justice system is systemically discriminatory, and reform is no longer up for debate. This thesis will clearly lay out the ways in which America's criminal justice system fails people of color due to the practices and policies that our criminal justice system relies on.

Chapter 2: The No-Knock Warrant

A no-knock warrant is “a search warrant authorizing police officers to enter certain premises without first knocking and announcing their presence or purpose prior to entering the premises.”³⁵ In a case where making police knock and announce themselves before entering may allow the suspect enough time to destroy evidence or would compromise the safety of the police or another individual, no-knock warrants are issued. According to the Department of Justice, “Although officers need not take affirmative steps to make an independent re-verification of the circumstances already recognized by a magistrate in issuing a no-knock warrant, such a warrant does not entitle officers to disregard reliable information clearly negating the existence of exigent circumstances when they actually receive such information before execution of the warrant.”³⁶

However, no-knock warrants are very controversial. No-knock warrants are intended to allow officers to maximize the element of surprise. This element of surprise provides a tactical advantage to the officer but can create a frantic situation for the homeowner. “It is surprising someone in their residence and all they can see is this dark figure with a gun coming down the hall, so is it the cops or is it a home invasion?”³⁷ With the increase in home invasion-style burglaries, particularly involving drug dealers, officers that do not properly identify themselves can be mistaken for burglars. When a no-knock warrant is served, law enforcement is allowed to enter without knocking or announcing first, but they must announce who they are as they pass

³⁵ “No-Knock Warrant | Wex | US Law | LII / Legal Information Institute,” Cornell Law School, accessed October 7, 2020, https://www.law.cornell.edu/wex/no-knock_warrant.

³⁶ Ibid.

³⁷ Jeannine Heinecke, “‘Knock, Knock.’ ‘Who’s There?’” *Law Enforcement Technology*, February 2007, <https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:4N5C-58T0-TXM4-F2HK-00000-00&context=1516831>.

through the building and upon contacting people within. “No-knock warrants are an essential piece of the tactical arsenal, but they must be used judiciously.”³⁸

No-knock warrants are a construction of the Nixon administration. The idea was to use them to show how tough the administration was on crime and drugs by letting cops kick down doors without announcing themselves first. They became widespread in the 1980s under the Reagan administration in police departments across the country as the war on drugs progressed. There were a lot of botched and mistaken drug raids across the country.³⁹ Municipal police and sheriffs’ departments used no-knock or quick knock warrants about 1,500 times in the early 1980s. By 2000, that number rose to about 40,000 times per year. In 2010, an estimated 60,000-70,000 no-knock or quick knock raids were conducted by local police annually.⁴⁰

In 1963, the Supreme Court decision *Ker v. California* set a precedent for forcible police entries involving narcotics. This case was brought to the Court out of concern that evidence could be destroyed. In 1995, the *Wilson v. Arkansas* ruling stated that police must “knock and announce” before executing a search warrant. However, this decision allowed for exceptions established in previous cases such as *Ker v. California*. In 1997, the decision in *Richard v. Wisconsin* allowed for no-knock searches when police have “a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”⁴¹ The decisions made in both *Wilson v. Arkansas* and *Richard v.*

³⁸ Ibid.

³⁹ Mary Louise Kelly and Radley Balko, “No-Knock Warrants: How Common They Are And Why Police Are Using Them : NPR,” NPR, June 12, 2020, <https://www.npr.org/2020/06/12/876293168/no-knock-warrants-how-common-they-are-and-why-police-are-using-them>.

⁴⁰ P. B. Kraska, “Militarization and Policing--Its Relevance to 21st Century Police,” *Policing* 1, no. 4 (November 7, 2007): 501–13, <https://doi.org/10.1093/policing/pam065>.

⁴¹ Candice Norwood, “The War on Drugs Gave Rise to ‘No-Knock’ Warrants. Breonna Taylor’s Death Could End Them | PBS NewsHour,” PBS, June 12, 2020, <https://www.pbs.org/newshour/politics/the-war-on-drugs-gave-rise-to-no-knock-warrants-breonna-taylors-death-could-end-them>.

Wisconsin allowed local and state judges a lot of discretion in determining what constitutes “reasonable suspicion.” Courts often support law enforcement when it comes to granting no-knock warrants. An analysis by the *Denver Post* found that judges only rejected five out of 163 no-knock warrant requests from Denver police in 2000. In an analysis done by the *Washington Post*, they found that in Little Rock, Arkansas between 2016 and 2018, judges approved 103 of 105 no-knock warrants requested by police.⁴²

The Use of the Warrant in the Breonna Taylor Encounter

A no-knock warrant was issued to search the apartment of Breonna Taylor. As often happens, Taylor’s boyfriend saw the police and thought they were intruders, firing his weapon in self-defense and causing the police to fire back. Legal experts have said that Louisville police’s decision to seek a no-knock warrant for Taylor’s apartment, allowing them to enter without announcing themselves as police, was a major failure that led to the death of Breonna Taylor.⁴³ In order to justify the no-knock warrant, police had told a judge that they were investigating Taylor’s ex-boyfriend for drug trafficking and believed that he was receiving packages of drugs at her home. According to a copy of the application for the search warrant, police said that they needed to enter without knocking because “these drug traffickers have a history of attempting to destroy evidence.”⁴⁴ The three officers in plain clothes were sent to Taylor’s apartment in the middle of the night. Taylor’s boyfriend has said that he heard only knocking, and then the door being broken down. He had a registered handgun and fired it once at what he believed to be intruders. Under what’s known as the Castle Doctrine, “those who are unlawfully attacked in

⁴² Ibid.

⁴³ David A. Fahrenthold, “In the Breonna Taylor Case, the No-Knock Policy Collided with the ‘Castle Doctrine’ to Tragic Results, - The Washington Post,” *The Washington Post*, September 24, 2020, https://www.washingtonpost.com/politics/breonna-taylor-castle-doctrine/2020/09/24/44e41eba-fe90-11ea-b555-4d71a9254f4b_story.html.

⁴⁴ Ibid.

their homes have no duty to retreat, because their homes offer them the safety and security that retreat is intended to provide.”⁴⁵ Homeowners may lawfully stand their ground or use whatever force necessary to protect themselves from death or bodily injury. Under Kentucky’s version of the Castle Doctrine, residents are allowed to use defensive force against someone “forcibly entering” their home. In a 911 call made by Kenneth Walker, he said, “I don’t know what is happening. Somebody kicked in the door and shot my girlfriend.”⁴⁶ The no-knock search warrant issued to search Breonna Taylor’s apartment in the middle of the night on March 13 has been criticized both locally and nationally.

Breonna Taylor’s death is not the first case, nor will not be the last case, where gunfire occurred during the execution of no-knock warrants. In Houston in 2019, two people were killed, and five police officers injured during a no-knock raid on a home. Similar to the invasion of Breonna Taylor’s home, no drugs were found, and the search warrant had been based on false information provided by an officer.⁴⁷ In 2016, in Austin, Texas, officers were executing a no-knock warrant on a high school student who was living with his parents. According to records, the raid was necessary because the student was a “major drug dealer” who posed a substantial threat to officers.⁴⁸ Officers knocked down the front door and tossed a flash-bang grenade into the student’s bedroom and another into the upstairs hallway.⁴⁹ In 2014, police in Georgia threw a flash grenade into a room with a 19-month-old child. The child was put into a medically induced

⁴⁵ Catherine L. Carpenter, "Of the Enemy within, the Castle Doctrine, and Self-Defense," *Marquette Law Review* 86, no. 4 (Spring 2003): 653-700

⁴⁶ David A. Fahrenthold, “In the Breonna Taylor Case, the No-Knock Policy Collided with the ‘Castle Doctrine’ to Tragic Results, - The Washington Post,” *The Washington Post*, September 24, 2020, https://www.washingtonpost.com/politics/breonna-taylor-castle-doctrine/2020/09/24/44e41eba-fe90-11ea-b555-4d71a9254f4b_story.html.

⁴⁷ *Ibid*

⁴⁸ Jessica Pishko, “How A No-Knock Raid in Austin Turned Into a Lethal Shootout - The Appeal,” February 5, 2019, <https://theappeal.org/how-a-no-knock-raid-in-austin-turned-into-a-lethal-shootout/>.

⁴⁹ *Ibid*

coma as a result of his injuries. In 2010, a police officer raiding a Detroit apartment shot and killed a 7-year-old girl. Neither the Texas case nor the Georgia case resulted in criminal convictions for the officers involved.⁵⁰

Issues with the No-Knock Warrant

No-knock warrants are an unnecessarily aggressive and intrusive law enforcement practice. “Between 2010 and 2016, at least ninety-four people died during the execution of no-knock search warrants, thirteen of whom were police officers.”⁵¹ However, this number is likely even higher because in 2015, no state required police agencies to report incidents of forced entry, into private residents, nor did any state require police agencies to report what type of warrant was being executed. Of those raids not resulting in deaths, many more resulted in serious injuries. No-knock warrants are predominately used when police are searching for drugs because the general public strongly associates drugs with violence. Courts typically presume that officer safety is threatened in cases involving drugs, leading them to issue no-knock warrants in many of these cases. “A 2014 ACLU report analyzing more than 800 SWAT deployments involving no-knock and quick-knock entries, of which 62 percent were drug searches, determined that law enforcement found drugs in 35 percent of those drug searches and found nothing in 36 percent.” Because the federal government does not require police departments to report data about these incidents, it is unknown whether anything was seized in 29 percent of the raids.

There is a presumption in America that drugs and violence are directly related. However, this presumption is not supported by any empirical evidence. Due to this lack of empirical

⁵⁰ Candice Norwood, “The War on Drugs Gave Rise to ‘No-Knock’ Warrants. Breonna Taylor’s Death Could End Them | PBS NewsHour.”

⁵¹ Brian Dolan, “To Knock or Not to Knock: No-Knock Warrants and Confrontational Policing,” *St. John’s Law Review* 93, 2019, 201–32.

evidence relating drugs to violence, this suggest that the use of no-knock warrants is based on nothing more than strongly held assumptions, making it unclear whether they are actually necessary or serve their intended purpose. Fourth Amendment protections from unreasonable searches and seizures are at risk while there is a failure to explain why the continued use of no-knock warrants is necessary or even desirable. Our legal system is based on a presumption of innocence that is nonexistent under a no-knock warrant. No-knock warrants are essentially based on the presumption that if officers were to knock and announced themselves, that the suspect would refuse to comply with the search warrant, forcibly resist officers' entry, attempt to escape the home, or attempt to destroy evidence. A no-knock warrant does not give the individual in question the opportunity to comply with the law.

A. No-Knock Warrants, the Castle Doctrine, and the Second Amendment

No-knock raids often happen in the middle of the night when homeowners are asleep. The officers are dressed in dark, tactical gear entering a home with military-grade weapons without announcing themselves. This creates a dangerous situation for both the homeowners and the police officers. There is an increased militarization of America's state and local law enforcement, giving officers access to virtually any military grade weapon they could ask for. Sometimes the homeowners fire their weapons first, sometimes the police fire their weapons first, but sometimes, just the nature of the entry can cause injury or death to either party involved.⁵² One of the predominant reasons why no-knock raids can turn out deadly is because of the Castle Doctrine, allowing homeowners to use whatever force necessary to protect themselves during a home invasion. "State law simultaneously authorizes police to forcefully intrude into private residences without warning and allows homeowners to use force against a person or

⁵² Ibid.

persons they reasonably believe to be unlawful intruders committing a forcible felony.”⁵³ The Second Amendment also protects the right of individuals to keep guns in their homes for self-defense purposes. Around forty percent of Americans today either own a gun or live with someone who does. Nearly two thirds of gun owners say that personal protection is their main reason for owning a gun. There is a dangerous conflict created between no-knock warrants, the castle doctrine, and high rates of gun ownership in America. There is an inherent risk of harm any time officers enter a private residence without knocking and announcing themselves first. The way that no-knock warrants are executed increases the likelihood of a violent confrontation resulting in injury or death for either party. Time and time again, police officers startle homeowners in the middle of the night by banging down their doors and throwing flash grenades into their home, causing homeowners to respond violently, often resulting in a shootout.⁵⁴

B. Issuing No-Knock Warrants

No-knock warrants are intended to be issued in dangerous circumstances where ordering officers to knock and announce themselves before entering may allow the suspect enough time to destroy evidence or would compromise the safety of the police or another individual. These warrants are not meant to be authorized lightly; however, they are issued more routinely and far more easily than many believe. No-knock warrants are meant to be reserved for “the most serious criminal investigations,” but the average length of magisterial review of search warrant applications is approximately two minutes and forty-eight seconds, while some are approved in less than one minute.⁵⁵ Some magistrate judges give no-knock authorization even when police officers have not requested it. Most no-knock warrants are issued by state judges and magistrates

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

to state law enforcement. State courts hold search warrants to much less scrutiny than federal courts do. The level of ease at which no-knock warrants are issued helps to explain the instances in which the warrant is executed at the wrong address or at the right address, but the person that police are looking for had moved out months ago. No-knock warrants are not confined to the most serious of criminal investigations as they should be. In fact, the majority of them are issued in connection with low-level drug investigations. No-knock warrants are not even always used in the most serious of drug investigations. Many of these warrants are issued in connection with cases involving marijuana.⁵⁶ If no-knock warrants were held to a much higher scrutiny, mix-ups could be prevented and lives could be saved. The insufficient scrutiny that no-knock warrants are put under also helps to explain why there is evidence that nearly one-third of investigations turn up with either minimal quantities of drugs or none at all. No-knock warrants do not serve a legitimate purpose and do not have a place in law enforcement.⁵⁷

C. Fourth Amendment Concerns

There is also concern regarding no-knock warrant and an individual's right to privacy. The Fourth Amendment declares: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."⁵⁸ When police announce themselves before entering a home with a search warrant, this can give individuals a chance to redirect officers when they end up at the wrong home. Knocking and announcing

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ "Execution of Warrants :: Fourth Amendment -- Search and Seizure :: US Constitution Annotated :: Justia," Justia, accessed March 15, 2021, <https://law.justia.com/constitution/us/amendment-04/12-execution-of-warrants.html>.

before entering, or knocking and allowing the homeowner to answer the door, provides individuals with the opportunity to comply with the law, avoid property damage, and get dressed or get out of bed before police forcibly enter the home unannounced.⁵⁹ The knock and announce requirement not only protects homeowners from unreasonable searches and seizures, but it also protects officers from being mistaken for burglars or intruders.

D. Disproportionate Effects on Communities of Color

No-knock warrants are uniquely problematic in that they disproportionately effect people in communities of color. Multiple studies by the ACLU indicate that Black and Latino people are statistically more likely to be searched and arrested for drugs throughout the country. In 2014, an ACLU report found that 39 percent of the SWAT team searches affected black individuals, 11 percent affected Latinos, 20 percent affected white people. When looking at the no-knock raids that affected Black and Latino people, 68 percent were for drug investigations.⁶⁰ One individual who experienced a no-knock raid firsthand noted, “This is about race. You don’t see SWAT teams going into a white-collar community, throwing grenades into their homes.”⁶¹ No knock-warrants began as a tool for the War on Drugs. The War on Drugs has disproportionately impacted communities of color, and no-knock warrants still operate in this war. There is a disproportionate use of no-knock warrants against communities of color, with evidence that Black and White suspects who use weapons in self-defense during no-knock raids are treated differently by the legal system.⁶² Following the death of Breonna Taylor, findings by the *Louisville Courier Journal* showed that police in Louisville disproportionately targeted Black

⁵⁹ Brian Dolan, “To Knock or Not to Knock: No-Knock Warrants and Confrontational Policing.”

⁶⁰ Candice Norwood, “The War on Drugs Gave Rise to ‘No-Knock’ Warrants. Breonna Taylor’s Death Could End Them | PBS NewsHour.”

⁶¹ Brian Dolan, “To Knock or Not to Knock: No-Knock Warrants and Confrontational Policing.”

⁶² Ibid.

residents for no-knock search warrants. An analysis showed that from 2018-2020 for the no-knock warrants issued, eighty-two percent of the listed suspects were Black, and sixty-eight percent were for addresses in the West End, a section of Louisville with predominantly Black neighborhoods.⁶³

Chapter 2 Conclusion

According to the Department of Justice, “Although officers need not take affirmative steps to make an independent re-verification of the circumstances already recognized by a magistrate in issuing a no-knock warrant, such a warrant does not entitle officers to disregard reliable information clearly negating the existence of exigent circumstances when they actually receive such information before execution of the warrant.”⁶⁴ No-knock warrants are not confined to the most serious of criminal investigations as they should be and a majority of them are issued in connection with low-level drug investigations. The presumption that drugs and violence are directly related is deeply rooted in our society. No-knock warrants are an unnecessarily aggressive and intrusive law enforcement practice. No-knock warrants disproportionately effect people of color in America because they are most often used in low-income, communities of color. There is an extreme reliance on officer experience and safety concerns in deciding whether a warrant should be issued. The warrants are typically granted because an officer “believes” that most people who have drugs also have guns and that if they announced themselves before entering the property, they would be putting themselves in danger. During the execution of a no-knock warrant, both parties believe that they are in danger and shots are often fired. No-knock

⁶³ Matt Mencarini, Darcy Costello, and Tessa Duvall, “Louisville Police ‘no-Knock’ Warrants Mostly Targeted Black Residents,” USA Today, December 1, 2020, <https://www.usatoday.com/story/news/2020/12/01/louisville-police-no-knock-warrants-mostly-targeted-black-residents/6456241002/>.

⁶⁴ “No-Knock Warrant | Wex | US Law | LII / Legal Information Institute.”

warrants have led to far too many unnecessary deaths of both civilians and police officers. America must do better and the best way to ensure the safety of police officers and civilians, protect civilians' Fourth Amendment rights, and work to protect communities of color in America is to eliminate no-knock warrants entirely.

Chapter 3: Prosecuting the Police

In America, police too frequently cause bodily harm to or kill civilians, and often innocent ones. There is a reluctance of local governments to prosecute police misconduct. This reluctance empowers future misconduct as well as creates a distrust between law enforcement and communities. Police officers possess a discretionary power to use violence against a subject. Allowing police officers such judgment and discretion calls for accountability in order to discourage future abuses of power. However, as a direct result of the practices and policies America's criminal justice system relies on, there is a lack of accountability and police officers are held to a different standard of judgment.⁶⁵ Fellow government officials are often reluctant to pursue investigations and prosecute their comrades' misconduct. Prosecutors work closely with police and often find themselves in a conflict of interest when they are asked to prosecute an ally. Aside from the reluctance of prosecutors to pursue investigations, there are numerous judicial doctrines and policies that shield officers from any charges at all. All government officials are generally immune from suit over damages they cause. Because of the complexity of many government officials' roles, courts have found it necessary to shield these actors from liability when certain aspects of their job may conflict with existing case law in certain situations. These protections for police officers and other government officials have led to many conflicts and cases of injustice. It often happens that charges are never brought against officers because they may claim that they were acting in self-defense or that their actions were necessary in order to protect themselves. When charges are brought against a police officer, the incentives and powers of other government officials, such as prosecutors, usually work in favor of the officer. It is not

⁶⁵ John V. Jacobi, "Prosecuting Police Misconduct," Law Journal Library - HeinOnline.org, 2000, <https://heinonline.org/HOL/Page?handle=hein.journals/wlr2000&id=807&collection=journals&index=>.

often that a police officer is prosecuted to the fullest extent of that law, nor is it often that they are rightfully charged.⁶⁶

Judicial Doctrines that Shield Police Officers from Liability

In America's criminal justice system, when a police officer commits an act of injustice, judicial doctrines often shield them from any charges at all. Qualified immunity is "a judicially created doctrine shielding public officials who are performing discretionary functions from civil liability."⁶⁷ The Supreme Court has emphasized the important role the doctrine of qualified immunity plays in allowing law enforcement to make judgment calls in rapidly evolving situations. This doctrine acts as a shield for officers to use with their own discretion, which can end in violence. Police are always able claim that they acted in a violent manner because they feared for their own or public safety. Qualified immunity is the primary judicial doctrine that shields officers from liability. However, discriminatory intent is also important to acknowledge because qualified immunity depends upon whether or not a government official knowingly violated the law, which is virtually impossible to prove because of the discriminatory intent requirement. Discriminatory intent is "a central term in the judicial interpretation of constitutional clauses requiring the equal treatment of persons notwithstanding race, ethnicity, or religion."⁶⁸ The judiciary has yet to provide a single definition of discriminatory intent. Judges have a large measure of discretion in resolving constitutional discrimination cases with no consistent approach. Police officers are rarely charged with crimes because of the policies and

⁶⁶ Jonathan M. Hyman, "Qualified Immunity Reconsidered," Law Journal Library - HeinOnline.org, 1981 1980, https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/waynlr27&id=1428&men_tab=srchresults.

⁶⁷ Whitney K Novak, "Policing the Police: Qualified Immunity and Considerations for Congress," *Congressional Research Service*, June 25, 2020, 6.

⁶⁸ Aziz Huq, "Judging Discriminatory Intent," *Public Law and Legal Theory Working Papers* 662 (2017): 61.

doctrines that our justice system relies on. Given that these judicial doctrines largely ignore implicit bias, they are inherently discriminatory, and the need for reform is urgent.

A. The Discriminatory Intent Requirement

Washington v. Davis held that a “discriminatory racial purpose” was “necessary” to state an Equal Protection violation. Judges have a large measure of discretion when resolving constitutional discrimination cases.⁶⁹ In *Washington v Davis* (1976), the plaintiffs challenged a race-neutral testing program for the District of Columbia police force. The Court rejected this challenge and ruled that “the basic equal protection principle” is “that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”⁷⁰ Subsequent decisions reaffirmed this holding while also establishing discriminatory purpose, discriminatory intent, and discriminatory motive as interchangeable terms. An important aspect of *Washington v Davis* (1976) was the Court’s ruling that the discriminatory intent standard is a comprehensive account of what constitutes discrimination under the Equal Protection Clause. The Court held that only actions taken with discriminatory intent violate the Equal Protection Clause. In a subsequent decision, the Court held that “proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”⁷¹ The discriminatory intent standard requires that race play no role in government decisions. “The government decision maker must act as if she does not know the race of those affected by the decision; otherwise, she violates the discriminatory intent standard.”⁷² The

⁶⁹ Aziz Z. Huq, “What Is Discriminatory Intent?,” *Cornell Law Review*, 2018, https://heinonline.org/HOL/Page?handle=hein.journals/clqv103&div=31&g_sent=1&casa_token=_Yv3UbfjcmAAAA:flQcFDMRE7hDcC5_1uAErHeYITuIKSxu7pGxmlTvbY0ziAE2nUk2Y2ZH2-GjuiD847heehemcA&collection=journals.

⁷⁰ David A. Strauss, “Discriminatory Intent and the Taming of Brown,” *The University of Chicago Law Review* 56, no. 3 (1989): 935–1015.

⁷¹ *Ibid.*

⁷² *Ibid.*

discriminatory intent requirement often proves to be problematic because of unconscious racial biases. Officers often honestly believe that they are treating blacks and whites equally when in reality they are not. Many police officers who are consciously discriminating would not admit that their actions are in fact discriminatory. Subconscious racial associations influence the way officers perform their jobs. The discriminatory intent standard is not a satisfactory comprehensive account of discrimination and leaves too much room for judicial discretion. The inconsistent ways in which the discriminatory intent requirement is applied is consequential to constitutional guarantees. When there is such a reflexive acceptance of police credibility in America, the discriminatory intent requirement is inadequate.

B. Qualified Immunity

At the height of the American civil rights movement, qualified immunity was developed as a way to protect police officers and other officials from having to go to trial for their actions. The Supreme Court developed qualified immunity as part of its interpretation of the Civil Rights Act of 1871. That statute provides a cause of action for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws’ by any person acting ‘under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.’”⁷³ As applied to the conduct of police officers, Section 1983 of the Civil Rights Act of 1871 provides a legal remedy for individuals claiming that their constitutional rights were violated by state or local police acting pursuant to state or local law. The Supreme Court considered Section 1983 to be a “vital component . . . for vindicating cherished constitutional guarantees.”⁷⁴

⁷³ Novak, “Policing the Police: Qualified Immunity and Considerations for Congress.”

⁷⁴ Ibid.

Qualified immunity provides immunity from both civil damages and from having to defend liability altogether. The Supreme Court has held that plaintiffs cannot prevail in cases against government officials unless they show that officials violated clearly established rights. These clearly established rights include Fourth Amendment excessive force claims.⁷⁵ In *Pearson v. Callahan* (2009), the Court held that “qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”⁷⁶ Qualified immunity only applies to suits against government officials as individuals.

In *Harlow v. Fitzgerald* (1982), the Court held that “government officials whose special functions or constitutional status requires complete protection from suits for damages—including certain officials of the Executive Branch, such as prosecutors and similar officials, are entitled to the defense of absolute immunity. However, executive officials in general are usually entitled to only qualified or good faith immunity.”⁷⁷ The Court recognized that the common law afforded government officials some level of immunity to “shield them from undue interference with their duties and from potentially disabling threats of liability,” while distinguishing qualified immunity from absolute immunity.⁷⁸ This ruling was intended to protect officials who are required to exercise discretion. In *Harlow v. Fitzgerald* (1982), the Court also established a two-part test that the government officials trying to qualify for immunity must satisfy. Part one is that

⁷⁵ Jordan S. Rubin, Kimberly Strawbridge Robinson, and Porter Wells, “How the Law Shields Cops From Suit: Qualified Immunity Explained,” Bloomberg Law, June 5, 2020, <https://news.bloomberglaw.com/us-law-week/how-the-law-shields-cops-from-suit-qualified-immunity-explained>.

⁷⁶ “Qualified Immunity | Wex | US Law | LII / Legal Information Institute,” accessed March 30, 2021, https://www.law.cornell.edu/wex/qualified_immunity.

⁷⁷ “*Harlow v. Fitzgerald* :: 457 U.S. 800 (1982) :: Justia US Supreme Court Center,” accessed March 30, 2021, <https://supreme.justia.com/cases/federal/us/457/800/>.

⁷⁸ Novak, “Policing the Police: Qualified Immunity and Considerations for Congress.”

“the official must show that his position’s responsibilities had such a sensitive function that it requires absolute immunity.”⁷⁹ Part two is that “the official must demonstrate that he was discharging the protected function of the position when performing the function in question.”⁸⁰ The court ultimately held that petitioners were entitled to qualified immunity except for when they knew or reasonably should have known that their actions violated respondent’s constitutional rights or if their actions were taken with malicious intention to cause a deprivation of respondent’s clearly established rights.

When granting immunity, the court must decide whether a reasonable officer could have believed that their actions were in compliance with the Constitution.⁸¹ When performing discretionary functions, governmental petitioners are generally shielded from liability for civil damages as long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have had knowledge. The qualified immunity defense was constructed by the Supreme Court for the purpose of “shield [ing] [government actors] from undue interference with their duties and from potentially disabling threats of liability.”⁸²

Following *Harlow v. Fitzgerald* (1982), there has been a train of cases further defining qualified immunity and expanding the protection it affords government officials. In *Heien v. North Carolina* (2014), the Court held that the reasonable suspicion necessary to justify a stop may be based on a police officer’s reasonable mistake of law, drawing concern that this ruling would create an incentive for police to remain ignorant about the law. In the 2015 case of *Mullenix v. Luna* (2015), the Court’s description of the qualified immunity standard reads: “The

⁷⁹ “Qualified Immunity | Wex | US Law | LII / Legal Information Institute.”

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Kit Kinports, “The Supreme Court’s Quiet Expansion of Qualified Immunity,” *Minnesota Law Review Headnotes* 100, no. 1 (2016): 62–78.

doctrine of qualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ 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.’ ‘We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.’ ‘Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.’”⁸³ In the 2019 case of *City of Escondido, California v. Emmons* (2019), the Court reviewed a claim brought by a man who alleged police used excessive force in arresting him. The Court held that the officer was entitled to qualified immunity because the appropriate inquiry is not whether the officer violated the man’s clearly established rights, but whether clearly established law “prohibited the officers from stopping and taking down a man in these circumstances,” stressing the need to “identify a case where an officer under similar circumstances was held to violate the Fourth Amendment.”⁸⁴

From 2000 to 2016, the Court has issued eighteen opinions addressing the question of whether or not a particular constitutional right was clearly established. In sixteen of those eighteen cases, the Court found that the defendants were entitled to qualified immunity on the grounds that they did not violate a clearly established law. In deciding what constitutes a clearly established law, the Court has focused on the “generality at which the relevant legal rule is to be identified.”⁸⁵ The Court has emphasized that the clearly established right must be specifically defined and that “even minor differences between the case at hand and the case in which the relevant legal right claimed to be violated was first established, can immunize the defendant

⁸³ Ibid

⁸⁴ Novak, “Policing the Police: Qualified Immunity and Considerations for Congress.”

⁸⁵ Ibid

police officer.”⁸⁶ This approach affords even more protections to government officials and allows them to make “reasonable” mistakes of fact and law.

Activists have criticized qualified immunity as being one of the biggest problems with policing. The doctrine shields officers from being held accountable in cases of misconduct. Some scholars have argued that qualified immunity has no basis in the common law. Other criticisms of the doctrine focus more on its practical applications. In the majority of cases where officers are not charged with a crime, victims can try to pursue justice in the form of financial damages through lawsuits. However, qualified immunity can block them from obtaining relief. Even when victims do prevail, police officers are virtually always indemnified, meaning that even when they are found liable for their individual conduct, the city or county covers any and all monetary damages.⁸⁷ There is also concern that the level of specificity required to define a clearly established right or law has made it increasingly difficult for judges to rule against the government officials. Although the doctrine is intended to protect officers from suits for damages, in reality, qualified immunity allows officers to further abuse their powers. Due to racial profiling and racial disparities in policing, Black Americans are disproportionately subjected to police brutality. “The rate of fatal police shootings among Black Americans was much higher than that for any other ethnicity, standing at 30 fatal shootings per million of the population as of June 2020.”⁸⁸ Because Black Americans are killed by police at more than twice the rate of White Americans, these judicial doctrines have disproportionate negative effects on communities of color.⁸⁹

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Stephan A. Schwartz, “Police Brutality and Racism in America.”

⁸⁹ “Police Shootings Database 2015-2020.”

Police Officers on Trial

The federal criminal statute that enforces Constitutional limits on conduct by law enforcement officers is 18 United States Code Section 242. Section 242 reads: “Whoever, under color of any law, ...willfully subjects any person...to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].”⁹⁰ Section 242 is intended to “protect all persons in the United States in their civil rights and furnish the means of their vindication.”⁹¹ In order to prove a violation of Section 242, the government must prove each of the following elements beyond a reasonable doubt: “(1) that the defendant deprived a victim of a right protected by the Constitution or laws of the United States, (2) that the defendant acted willfully, and (3) that the defendant was acting under color of law.”⁹² A violation of Section 242 is a felony if “the defendant used, attempted to use, or threatened to use a dangerous weapon, explosive or fire; the victim suffered bodily injury; the defendant's actions included attempted murder, kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or the crime resulted in death. Otherwise, the violation is a misdemeanor.”⁹³ Establishing intent behind a Constitutional violation requires proof beyond a reasonable doubt that the law enforcement officer knew that what they were doing was against the law and decided to do it anyway. This means that even if the government can prove beyond a reasonable doubt that an individual’s Constitutional right was violated, Section 242 requires the government to prove that the law enforcement officer intended to “engage in the unlawful conduct and that he/she did so knowing that it was wrong or

⁹⁰ “LAW ENFORCEMENT MISCONDUCT” (United States Department of Justice, n.d.), <https://www.justice.gov/crt/law-enforcement-misconduct#iap>.

⁹¹ *Screws v. United States*, 325 U.S. 91, 98 (1945)

⁹² “LAW ENFORCEMENT MISCONDUCT.”

⁹³ *Ibid.*

unlawful.”⁹⁴ The U.S. Attorney’s Office represents the United States in federal cases that arise from federal law created by Congress. These cases are heard in federal courthouses throughout the country. State and local prosecutors, including district attorneys, county or city prosecutors, and the state attorney general’s office, represent the state for cases arising under state law, created by each state legislature.⁹⁵

The power to use force in situations calling for the exercise of individual judgment and discretion leads to abuses. The discretionary power possessed by police officers to use violence implies a need for accountability. “The failure to hold police accountable perverts the rule of law, makes citizens distrustful of authority, and encourages further lawlessness by police officers.”⁹⁶ The reluctance of local governments to prosecute police misconduct prevents justice from being served. The ability to prosecute police guilty of serious crimes serves the important social interests of “detering future lawlessness of police officers and assuring civilians that all are treated equally in the enforcement of criminal law.”⁹⁷ Unfortunately, criminal procedure is different for police officers and other government officials than it is for other suspects.

Human Rights Watch reviewed an analysis done by the Civil Rights Division of the Department of Justice of “performance measurement” for civil rights matters investigated during the year 1996. The analysis reviewed 10,129 civil rights complaints during that year. Of the 10,129 civil rights complaints, only 79 cases were filed in court, including both grand jury cases and “non- felonies not requiring Grand Jury approval.” Of the 79 cases that were filed, only 22 were “official misconduct” cases, some of them being police abuse cases.⁹⁸ Human Rights

⁹⁴ Ibid.

⁹⁵ “FEDERAL AND STATE LEGAL SYSTEMS” (United States Department of Justice, n.d.), <https://www.justice.gov/usao/justice-101/faq>.

⁹⁶ John V. Jacobi, “Prosecuting Police Misconduct,” 2000.

⁹⁷ Ibid.

⁹⁸ Ibid.

Watch requested an explanation for the low rate of prosecution, and in response, Richard Roberts, chief of the Criminal Section of the Civil Rights Division, told them that “federal civil rights prosecutions are difficult due to the requirement of proof of the accused officer’s ‘specific intent’ to deprive an individual of his or her civil rights as distinguished, for example, from an intent simply to assault an individual.”⁹⁹ In 1995, the Division reported its reasons for 2,830 declined cases. Of these, 497 were categorized as having a “lack of evidence of criminal intent,” 482, as having “no federal offense evident,” and 778 as having “weak or insufficient admissible evidence.”¹⁰⁰ Modifications to the criminal civil rights laws would allow for a more active involvement by the Department of Justice in combating police brutality.

Often, incidents of police violence are against victims of color. In 1991, the NAACP held a series of six regional hearings “to provide a public platform for citizens, government officials, community leaders, law enforcement personnel, and related experts to detail whether and why they believe there continues to exist a wall of mistrust between African American communities and law-enforcement departments.”¹⁰¹ Results of the findings showed that “physical abuse by police officers is not unusual or aberrational.”¹⁰² Those who appeared at the hearings provided countless stories of excessive police violence.

Also, in 1991, the Christopher Commission was created in the wake of the Rodney King beating to conduct a full examination of the structure and operation of the Los Angeles Police Department. The commission found that there were “a significant number of officers in the Los Angeles Police Department who repetitively used excessive force against the public and

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

persistently ignored the written guidelines of the department regarding force.”¹⁰³ The Department failed to deal with a particular group of problem officers and often rewarded them with positive evaluations and promotions instead of disciplining them. One year after the Christopher Commission issued its report, another commission issued a separate report on the Los Angeles Sheriff’s Department. The Kolts Commission found multiple cases of excessive force that were appropriate for criminal prosecution or departmental discipline in Sheriff’s Department. None of these cases resulted in any action against the deputies. The commission found that there was “deeply disturbing evidence of excessive force and lax discipline” in the Los Angeles Sheriff’s Department.¹⁰⁴ In 1994, New York’s Mollen Commission reported on corruption and brutality in their police forces, finding that brutality was both widespread and generally accepted. Officers told the commission that it was “not uncommon to see unnecessary force used to administer an officer’s own brand of street justice: a nightstick to the ribs, a fist to the head, to demonstrate who was in charge of the crime-ridden streets they patrolled and to impose sanctions on those who ‘deserved it’ as officers, not juries, determined.”¹⁰⁵ Police officers are very unlikely to confess to their own misconduct or to report a fellow officer for misconduct. Police also lie under oath so often that the term, “testilying” has been coined for the practice. Although this practice is so common, one author wrote that “an officer is more likely to get struck by lightning than charged with perjury.”¹⁰⁶

Despite the countless instances and evidence of excessive violence by police officers, police have not been treated equally by state criminal law. Police are rarely prosecuted because fellow government officials are reluctant to pursue investigations of their colleagues’

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Kate Levine, “How We Prosecute the Police,” *Georgetown Law Journal* 104, no. 4 (April 2016): 745–76.

misconduct. Prosecutors find themselves in a conflict of interest when faced with an accusation of police misconduct. Prosecutors and police officers work closely and their ability to succeed in prosecuting routine crimes depends on the work and cooperation of police officers. When they are asked to prosecute one of their allies, prosecutors face “an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality.”¹⁰⁷ Because prosecutors are dependent upon police, many argue that it is impossible for them to impartially handle a case when a police officer is the defendant. While grand juries, petit juries, evidentiary review by trial judges, and review by appellate judges used to serve as checks that would limit prosecutorial power, those checks have essentially disappeared in the age of mass arrests and plea bargaining.¹⁰⁸ The idea that a prosecutor must find such extreme evidence to even consider charging an officer with a fatal crime illustrates the reluctance of prosecutors to charge their fellow law enforcement partners. The prosecutorial process for police officers threatens the legitimacy of criminal law by favoring insider suspects.¹⁰⁹

A. The Grand Jury Process

Grand juries are “the citizen-bodies tasked with determining whether a prosecutor has probable cause to go forward with charges against a criminal suspect.”¹¹⁰ The grand jury is an essential part of the criminal process; however, they are not tasked with deciding the guilt or punishment of a party. The prosecutor works with the grand jury to decide whether to bring

¹⁰⁷ John V. Jacobi, “Prosecuting Police Misconduct,” 2000.

¹⁰⁸ Kate Levine, “How We Prosecute the Police.”

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

criminal charges or an indictment against a potential defendant.¹¹¹ All states have provisions in their laws that allow for grand juries, but not all states use them. Courts often use preliminary hearings prior to criminal trials. Both grand juries and preliminary hearings are meant to determine whether there is enough evidence, or probable cause, to indict a criminal suspect. Preliminary hearings are typically open to the public and involve lawyers on both sides as well as a judge. Grand juries only involve the jurors and the prosecutor, giving the prosecutor a significant amount of power. In some states, a defense attorney may be permitted in the room only when his or her client has a right to and elects to testify. When this happens, the defense attorney is only allowed in the room for that portion of the presentation. Should the client testify, the defense attorney may not challenge questions asked of her client by a prosecutor. This includes questions about damning past arrests and convictions. Sometimes, a preliminary hearing may precede a grand jury.¹¹² The biggest difference between a preliminary hearing and a grand jury is the requirement that a defendant must request a preliminary hearing and the court may decline the request. In the grand jury process, the prosecutor explains the law to the jury and works with them to gather evidence and hear testimony. Grand juries do not need a unanimous decision from all members to indict. In order to indict, a supermajority of 2/3 or 3/4 agreement is required, depending on the jurisdiction. Even when a grand jury chooses not to indict, a prosecutor may still bring the defendant to trial if he or she thinks she has a strong enough case. Without a grand jury indictment, the prosecutor must demonstrate to the trial judge that he or she has enough evidence to continue with the case. With a grand jury indictment, the prosecutor is able to proceed directly to trial.¹¹³

¹¹¹ “How Does a Grand Jury Work? - FindLaw,” FindLaw, November 9, 2020, <https://www.findlaw.com/criminal/criminal-procedure/how-does-a-grand-jury-work.html>.

¹¹² Ibid.

¹¹³ Ibid.

There is no hearsay rule in the grand jury room, meaning that the grand jurors often do not hear from live witnesses or judge the credibility of the witnesses. There is no judge in the room, nor will a judge review a grand jury transcript. Federal law requires no presentation of exculpatory evidence to grand juries. States' rules vary. However most require only substantial exculpatory evidence to be presented. Because most states require only substantial exculpatory evidence to be presented, they rarely require witnesses who challenge the police's or complainant's version of events to testify. Critics of the grand jury believe that it should be abolished because "it merely rubber-stamps the prosecutor's prior investigatory decisions or charging determinations."¹¹⁴ Most critics agree that an inexperienced and untrained body of citizens is not suited to recognize unwarranted prosecutions in a proceeding at which they hear only the government's side of the case and depend entirely on the prosecutor for legal advice and direction. The grand jury completely depends on the prosecutor for all its information, advice, and direction. Laws are complex, and even the most assertive and educated grand juror will be intimidated by the authority of the prosecutor to some degree. A former federal grand juror explained: "We did not know how to stand up to the U.S. Attorney, we did not understand our rights and responsibilities, we did not feel qualified to question the government."¹¹⁵ The structure of the grand jury procedure creates opportunities for prosecutorial abuse of the grand jury's broad inquisitorial powers.¹¹⁶

There is a low indictment rates in cases involving excessive use of force by police officer. Prosecutors use the grand juries to perform some other function, depending on the prosecutor's motive. The prosecutor may use the grand jury as political cover. A prosecutor who does not

¹¹⁴ Peter Arenella, "Reforming the State Grand Jury System: A Model Grand Jury Act," *Rutgers Law Journal* 13, no. 1 (Fall 1981): 1-58.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

want to move forward can claim that the decision not to press charges was made by the grand jury in order to shield their reputation. The prosecutor may also use the grand jury to guide his or her exercise of prosecutorial discretion by obtaining feedback from the community about the strength of the case and whether charges are appropriate.¹¹⁷ Often in police lethal use of force cases, prosecutors treat the grand jury as a “rubber stamp” to automatically approve of charges upon which they have already decided. Other times, if a prosecutor does not want to indict the case, but also does not want to take responsibility for that decision, they will intentionally present a weak case to the grand jury, leading the grand jury to refuse to indict the case. The prosecutor thus will claim to the community that the decision of whether or not to indict the defendant rested with the grand jury.¹¹⁸ Historically, the independence of the grand jury from the prosecutor’s office was a critical aspect of the grand jury’s role to combat local government corruption. The grand jury’s ability to act effectively depended upon its independence of the prosecutor. The legitimacy of the grand jury suffers when prosecutors use the grand juries out of their own self-interest.¹¹⁹

Grand jury proceedings are almost always kept in strict confidence. This is to “prevent those under investigation from interfering with witnesses, to encourage witnesses to speak freely, to reduce the chance that a person about to be indicted will flee, and to protect innocent people who may be grand jury targets but are never indicted.”¹²⁰ Because of the strict confidence of grand jury transcripts, stories from actual grand jurors are rare.¹²¹ Although the secrecy of the grand

¹¹⁷ Ric Simmons, “The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury To Its Original Purpose,” *Cleveland State Law Review* 65, no. 4 (2017): 519–34.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ N’dea Yancey-Bragg, Ben Tobin, and Andrew Wolfson, “Breonna Taylor: Ben Crump Slams Decision, Call to Release Transcripts,” USA Today, September 25, 2020, <https://www.usatoday.com/story/news/nation/2020/09/25/breonna-taylor-family-ben-crump-slam-decision-release-transcripts/3530842001/>.

¹²¹ “How Does a Grand Jury Work? - FindLaw.”

jury process has been considered critical to the grand jury's independence, this secrecy purely contributes to the prosecutor's total control over the grand jury. The lack of transparency in the grand jury process encourages illegitimate uses of the grand jury and makes it difficult to evaluate whether the prosecutor is legitimately trying to obtain the grand jury's independent judgment.¹²²

Due to the enormous amount of attention surrounding the Breonna Taylor case, a judge ordered the grand jury recordings be filed as part of discovery during former police officer Brett Hankinson's hearing. These transcripts and records were released to the public after Kentucky Governor Andy Beshear pressed for disclosure. He said, "It's time for people to be able to see the basic information, facts and evidence, and to be able to come to their own conclusions about justice."¹²³ The typical reasons for grand jury secrecy did not apply in Breonna Taylor's case: "Everybody knows who the people are. Everyone knows what the issue is, and so there is a mismatch here between the reasons for secrecy and the secrecy itself. So that makes it particularly frustrating," said Andrew Leipold, a professor at the University of Illinois College of Law.¹²⁴ There was a lot of controversy surrounding the Kentucky Attorney General, Daniel Cameron, and whether or not the grand jurors were given all the information necessary to decide whether the police officers who shot and killed Breonna Taylor should have been charged for her death. The grand jury indicted former Officer Brett Hankison on three counts of wanton endangerment for firing bullets that went into apartment next to Breonna Taylor's. No indictment

¹²² Ric Simmons, "The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury To Its Original Purpose."

¹²³ Andrew Wolfson, "Breonna Taylor Facts: What Did Daniel Cameron Present to Grand Jury?," USA Today, September 26, 2020, <https://www.usatoday.com/story/news/nation/2020/09/26/breonna-taylor-decision-unanswered-questions-daniel-cameron-grand-jury/3548920001/>.

¹²⁴ Alanna Durkin Richer, "AP Explains: Powerful Grand Juries Stay Shrouded in Secrecy," AP News, September 24, 2020, <https://apnews.com/article/breonna-taylor-shootings-police-juries-courts-ae8527aa406ea4c7dd35fac4f7203f66>.

was returned against Sergeant Jonathan Mattingly or Detective Myles Cosgrove, both of whom fired the bullets that struck and killed Breonna in her home that night.¹²⁵ Because the prosecutor has essentially exclusive access to and control over the grand jury, grand juries have become almost entirely dependent on prosecutors. This circumstance was indisputable in Breonna Taylor’s case.

B. The Grand Jury in the Breonna Taylor Case

Following the grand jury decision not to charge any officer with the fatal shooting of Breonna Taylor, Ben Crump, one of the attorneys for the family, questioned what evidence Kentucky Attorney General Daniel Cameron presented to the jury. Crump called the decision part of a “pattern of the blatant disrespect and marginalization of Black people, but especially Black women.” He went on to say, “There seems to be two justice systems in America: One for Black America, and one for white America.”¹²⁶ The crowds burst into chants of “release the transcripts.”¹²⁷ The grand jury indicted former Louisville officer Brett Hankison on wanton endangerment charges for firing shots into Breonna Taylor’s apartment and the neighboring apartment where three people were present. In Kentucky, wanton endangerment is a Class D felony. The Kentucky statute reads that “a person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.”¹²⁸ Daniel Cameron has said that Brett Hankison was charged with

¹²⁵ Andrew Wolfson, “Breonna Taylor Facts: What Did Daniel Cameron Present to Grand Jury?”

¹²⁶ N’dea Yancey-Bragg, Ben Tobin, and Andrew Wolfson, “Breonna Taylor: Ben Crump Slams Decision, Call to Release Transcripts.”

¹²⁷ Ibid.

¹²⁸ Ryan W. Miller and Ben Tobin, “Breonna Taylor Decision: What Is Wanton Endangerment Charge?,” USA Today, September 23, 2020, <https://www.usatoday.com/story/news/nation/2020/09/23/breonna-taylor-decision-what-wanton-endangerment-charge/3505886001/>.

wanton endangerment by the grand jury because the shots he fired had passed through Breonna Taylor’s apartment walls, endangering three people in the neighboring apartment. He is charged with one count for each of the neighboring apartment’s occupants: a pregnant woman, her husband and their 5-year-old child, who were asleep. None of them were hit by the shots.¹²⁹ In Kentucky, nine of the 12 jurors must agree there is enough evidence for the panel to issue an indictment.¹³⁰

An unidentified juror filed a motion asking for the judge to unseal the transcript and records from the Breonna Taylor case and requested to be able to speak freely about the case, “so that the truth may prevail.” The juror accused Cameron of “using the grand jurors as a shield to deflect accountability and responsibility.”¹³¹ The judge had ordered for the recordings to be released and Daniel Cameron filed a motion for a one-week extension to give his office time to redact the personal information of witnesses. Cameron’s office redacted 3 minutes and 50 seconds of audio from the recordings. The recordings are approximately 15 hours long and cover the grand jury’s sessions from September 21 through September 23. After Kentucky Governor Andy Beshear pressed for disclosure, the transcripts were released to the public. A statement from Daniel Cameron revealed that the only charge he recommended to the grand jury was wanton endangerment. But the motion filed by the unidentified juror noted that Daniel Cameron had previously made public statements saying that his team walked the grand jury “through every

¹²⁹ Nicholas Bogel-Burroughs, “Breonna Taylor Case: What Does ‘Wanton Endangerment’ Mean? - The New York Times.”

¹³⁰ Alanna Durkin Richer, “AP Explains: Powerful Grand Juries Stay Shrouded in Secrecy.”

¹³¹ Bridget Read and Angelina Chapin, “Breonna Taylor Grand Jury: What Really Happened?,” New York Magazine, October 27, 2020, <https://www.thecut.com/2020/10/breonna-taylor-grand-jury-what-really-happened.html>.

homicide offense, and also presented all of the information that was available to the grand jury.”¹³²

The grand jury transcripts include evidence and witness testimony presented to the jury, but they do not include jury deliberations or prosecutor recommendations. The recordings of officers’ accounts paint “a chaotic and confusing scene” of the night of Breonna Taylor’s death.¹³³ In the recordings, one detective said that officers had been briefed that Breonna Taylor might be at home with a small child because she sometimes looked after her sister’s goddaughter, but that it “wouldn’t be a problem.”¹³⁴ The recordings also include Hankinson’s court defense for his charges of wanton endangerment. He “believed there was someone in the apartment repeatedly shooting automatic-rifle fire, which he assumed was an AR15,” but no other officer has supported that claim.¹³⁵ The transcripts include Kenneth Walker reiterating his testimony that he and Breonna Taylor had been woken up in the middle of the night by someone pounding on their door and that no one had responded when they asked, “Who is it?”

One of the major issues with the grand jury process is that an inexperienced and untrained body of citizens is not suited to recognize unwarranted prosecutions in a proceeding at which they hear only the government’s side of the case and depend entirely on the prosecutor for legal advice and direction. The grand jury completely depends on the prosecutor for all its information, advice, and direction. Daniel Cameron’s statement that the jury “agreed” with his decision to solely charge Hankinson implied that jurors had been allowed to weigh the option of charging all three officers. But that’s not true. The unidentified juror who filed a motion asking

¹³² Minyvonne Burke et al., “Breonna Taylor Grand Jury Recordings Paint Chaotic, Confusing Scene,” NBC News, October 2, 2020, <https://www.nbcnews.com/news/us-news/grand-jury-recordings-released-breonna-taylor-case-n1241803>.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Bridget Read and Angelina Chapin, “Breonna Taylor Grand Jury: What Really Happened?”

for the judge to unseal the transcript “was unsettled by the fact that the grand jury was not given an option of charging the two officers at a time when the community has been roiled by demonstrations seeking their indictment. The 12-member panel was presented only with possible charges for Detective Brett Hankison.”¹³⁶ The office of Daniel Cameron has since admitted that he only recommended those charges be filed. Another juror has said that the grand jury explicitly asked about additional charges for all three of the officers and they were told that “there would be none because the prosecutors didn’t feel they could make them stick.”¹³⁷ Ben Crump, the Taylor family attorney, has asked about Cameron’s conduct during the proceedings. “Did he present any evidence on Breonna Taylor’s behalf?” “Or did he make a unilateral decision to put his thumb on the scales of justice to help try to exonerate and justify the killing of Breonna Taylor by these police officers?”¹³⁸

There is evidence that when prosecutors present police use of force cases to grand juries, they do so in a way that is different from most other case presentations to grand juries. In most ordinary criminal cases not involving police officers as suspects, grand jury presentations are brief, and few live witnesses are called. In several high-profile cases involving police officers, prosecutors have conducted what appeared to be “an extensive full-blown trial before the grand jury.”¹³⁹ Prosecutors have “called all potentially relevant fact witnesses to testify in person, commissioned multiple expert reports and called expert witnesses, staged and presented elaborate reconstructions, introduced voluminous documentary evidence, and focused extensively on possible defenses.”¹⁴⁰ In some cases, prosecutors have even allowed the suspect-

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Jonathan Witmer-Rich, “Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases,” *Cleveland State Law Review* 65, no. 4 (2017): 535–60.

¹⁴⁰ Ibid.

officers to testify before the grand jury without being subject to cross-examination. In America's criminal justice system, it is so difficult to hold police accountable for their actions. Prosecutors largely control the charging decision. They are able to make the decision in regard to when and whether or not criminal charges should be pursued and against whom.¹⁴¹

C. The Power of Prosecutors

“‘The American prosecutor rules the criminal justice system,’ exercising ‘almost limitless discretion’ and ‘virtually absolute power.’”¹⁴² The prosecutor is the most powerful figure in the criminal justice system. With this power comes the ability to exercise discretion. Prosecutors are able to decide whether to charge and what to charge the defendant. The prosecutor's ability to exercise discretion is their most important role and a fundamental aspect of America's criminal justice system. Prosecutorial power is understood either in terms of influence or in outcomes. They are able to control the actions that other people take and what happens to other people. This power can be understood as the ability to “get someone else to do something he or she would not otherwise do,” or as the ability to “modify others' states by providing or withholding resources or administering punishments.”¹⁴³ Prosecutors have the ability to influence or determine the outcome of criminal cases. They exercise “‘both executive and judicial power,’ playing ‘a quasi-magisterial role, somewhere between police officer and judge.’”¹⁴⁴ At the very core of prosecutorial power is the ability to convict people of crimes and the ability to coerce guilty pleas.

¹⁴¹ Ibid.

¹⁴² David Alan Sklansky, “The Nature and Function of Prosecutorial Power,” *Journal of Criminal Law and Criminology* 106, no. 3 (2016): 473–520.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

There are seventy-million people with criminal records in the United States, that is the same amount of people with a college degree. According to then-Attorney General Robert Jackson over seventy-five years ago: ““The prosecutor has more control over life, liberty, and reputation than any other person in America.””¹⁴⁵

Some prosecutors are promoted based on their success at obtaining convictions and district attorneys often run for reelection campaigning on their tough-on-crime stance. Economic and political incentives can cause prosecutors to convict an innocent, or guilty-but-harmless, suspect so that they don’t have a high acquittal rate or decline to prosecute a suspect who may later commit a more serious crime. When prosecutors present cases to a grand jury, they almost always get indictments for all the charges they seek to bring. Grand juries indict in such a significant number of cases because they hear only one curated and unchallenged version of events from the prosecutor.¹⁴⁶

Prosecutors and police often team up to pressure a person convicted of a misdemeanor to confess and plead guilty. “Prosecutors do not check their law enforcement partners by refusing to pursue cases where police have violated a suspect’s constitutional rights.”¹⁴⁷ There is evidence that when prosecutors present police use of force cases to grand juries, they do so in a way that is different from most other case presentations to grand juries. This evidence explains the generally high rate of indictments overall, but such a low rate of indictments in cases involving police officers. Although prosecutors work closely with law enforcement officers and see themselves as investigators and crime fighters, they are also like judges as they are trained in the law. “Because they pass back and forth between these two worlds, prosecutors are relied upon both to bring the

¹⁴⁵ Jeffery Bellin, “The Power of Prosecutors,” *New York University Law Review* 94, no. 2 (May 2019), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2946&context=facpubs>.

¹⁴⁶ Kate Levine, “How We Prosecute the Police.”

¹⁴⁷ *Ibid.*

police within the rule of law and to make the rule of law compatible with the realities of policing.”¹⁴⁸

Violent police officers and police misconduct cases are under-prosecuted by state prosecutors. Prosecutors face an inherent conflict of interest when investigating potential excessive force cases against police officers. Prosecutors work closely with police officers and depend on police cooperation for their own success. “This places pressure on prosecutors not to alienate local police by pursuing criminal charges against individual officers.”¹⁴⁹ Police officer organizations’ endorsements often will play a critical role in the elections of local prosecutors; leading prosecutors to seek approval from police officers. Police have significant control over prosecutors. Prosecutors rely on police testimony to win trials, and those trial wins are essential to earning promotions within the office. Prosecutors have also described an overt pressure to comply with a police culture of “silence and violence,” meaning that questioning an officer’s version of events was seen as a sign of “disrespect” to the officer. Prosecutors who questioned the legitimacy of a police report or the word of an officer could end up with damaged reputations among law enforcement and resistance from officers.¹⁵⁰ Prosecutors are often accustomed to giving credibility to claims by police officers rather than conflicting claims by suspects. They often side in favor of the police unless clear evidence contradicts the police officer’s account and supports the victims. The numerous aspects that create a conflict of interest for prosecutors makes them unlikely to investigate and pursue criminal charges against police officers in a

¹⁴⁸ David Alan Sklansky, “The Nature and Function of Prosecutorial Power.”

¹⁴⁹ Jonathan Witmer-Rich, “Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases.”

¹⁵⁰ Nicole Gonzalez Van Cleve and Somil Trivedi, “Why Prosecutors Keep Letting Police Get Away with Murder.,” Slate, June 5, 2020, <https://slate.com/news-and-politics/2020/06/why-prosecutors-keep-letting-police-get-away-with-murder.html>.

neutral manner.¹⁵¹ Prosecutors are very unlikely to pursue criminal charges against police officers for use of excessive force. Such prosecutions have historically been rare.

Human Rights Watch conducted a study of police misconduct in fourteen American cities between 1995 and 1998. The resulting report examined “common obstacles to accountability for police abuse” in those cities,” including the presence or absence in those cities of criminal prosecutions of violent police officers.”¹⁵² The study revealed a significant failure of state and local prosecutors to prosecute police misconduct in many large cities, including Chicago, Detroit, Indianapolis, New Orleans, Philadelphia, Portland, and San Francisco. Human Rights Watch concluded that “victims of abuse correctly perceive that criminal prosecution ... is rarely an option—except in highly publicized cases.”¹⁵³ These results serve as evidence that local authorities often fail to pursue prosecutions under state law in police use of force cases. In Hennepin County, Minnesota, from 2000 through 2016, none of the 43 police shootings resulted in charges. From 2005 to 2014 around 10,000 Americans were killed by police and only 153 officers were charged.¹⁵⁴

Prosecutors will routinely find what passes for probable cause in order to charge a suspect. Prosecutors also often overcharge, both in the form of multiple different charges arising out of the same offense or charging a suspect with more serious crimes than the evidence justifies. The practice of overcharging is adapted in order to use these extra charges as bargaining tools during plea negotiations. Charging power is one of the most important aspects of prosecutorial power. After an arrest is made, the decision of whether the individual will be

¹⁵¹ Jonathan Witmer-Rich, “Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases.”

¹⁵² John V. Jacobi, “Prosecuting Police Misconduct,” *Wisconsin Law Review* 4 (2000): 789–854.

¹⁵³ *Ibid.*

¹⁵⁴ Tom Jackman, “Charging Officers with Crimes Is Still Difficult for Prosecutors,” *The Washington Post*, May 29, 2020, <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/>.

charged formally is left to the prosecutor. He or she has an almost unlimited amount of discretion in determining whether a person will face criminal charges and what the charges may be. They are able to dismiss the case even if there is enough sufficient evidence to prove the case beyond a reasonable doubt. If the prosecutor decides to formally charge the individual, they have a wide range of discretion in determining what charges to bring and they are not required to justify their decisions to anyone beyond their immediate supervisors. There is no system of checks and balances to assure that these decisions are made judiciously.

There is also evidence suggesting that implicit racial biases influence prosecutors' decision making. Prosecutors' ability to exercise such discretion creates the opportunity for biased decision making that may contribute further to racial disparity. A study conducted in 1976 found that the probability of a black defendant being indicted for killing a white person was more than twice as high as the probability of a white defendant killing a black person. Prosecutors were also significantly more likely to upgrade cases to felony murder status in cases where the defendants were black than if they were white. A study conducted in 1993 in Los Angeles found that 95% of the 4,632 crack cocaine defendants prosecuted in California state court were black and 100% of the 42 crack cocaine defendants prosecuted in federal court were either black or other racial minorities.¹⁵⁵

The prosecutor is the most powerful figure in the criminal justice system. The prosecutor's ability to exercise discretion is their most important role and a fundamental aspect of America's criminal justice system. After an arrest is made, the prosecutor has complete control over the decision of whether the individual will be charged formally and with what charges. The American prosecutor is subject to much less accountability than other criminal

¹⁵⁵ "Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System."

justice officials. The role of prosecutors in America’ threatens the legitimacy of our system of justice.¹⁵⁶

Even in jurisdictions where grand juries bring charges through the indictment process, the prosecutor is in complete control at this stage.¹⁵⁷ This aspect of prosecutorial power was demonstrated in the Breonna Taylor case. An unidentified juror came forward expressing that Kentucky Attorney General Daniel Cameron only offered the jury an option of charging one of the officers with wanton endangerment. There was no option for the jury to consider any charges for the other two officers because the prosecutors claimed that they “didn’t feel they could make them stick.”¹⁵⁸

D. Daniel Cameron

Daniel Cameron took office in December as the state’s first Black attorney general. He is the first Republican to hold the position since 1948. He spoke at the Republican National Convention in August where he said, “even as anarchists mindlessly tear up American cities while attacking police and innocent bystanders, we Republicans do recognize those who work in good faith towards peace, justice and equality,” aligning himself with law enforcement.¹⁵⁹ Cameron is a rising Republican star and was listed by Trump as a possible Supreme Court nominee. In May, Attorney General Daniel Cameron took charge of Breonna Taylor’s case after a commonwealth’s attorney in Louisville recused himself.¹⁶⁰

¹⁵⁶ David Alan Sklansky, “The Nature and Function of Prosecutorial Power.”

¹⁵⁷ Angela J. Davis, “The Power and Discretion of the American Prosecutor,” *Droit et Cultures* 49 (2005): 55–66.

¹⁵⁸ Bridget Read and Angelina Chapin, “Breonna Taylor Grand Jury: What Really Happened?”

¹⁵⁹ Arian Campo-Flores, “Breonna Taylor Case Prosecutor Is Known as a Republican to Watch - WSJ,” *Wall Street Journal*, September 26, 2020, <https://www.wsj.com/articles/breonna-taylor-case-prosecutor-is-known-as-a-republican-to-watch-11601121600>.

¹⁶⁰ *Ibid.*

After Mr. Cameron’s office presented its case, the grand jury indicted former Louisville officer Brett Hankison on wanton endangerment charges for firing shots into Breonna Taylor’s apartment and the neighboring apartment where three people were present, but not from causing her death. The grand jury didn’t indict two other officers involved in the raid because there were no charges offered against them. Mr. Cameron’s reasoning for not bringing charges against the other two officers or charges that would make anyone directly responsible for the death of Breonna Taylor was that he said the officers acted in self-defense, responding to shots fired by Breonna Taylor’s boyfriend, Kenneth Walker. Police said they announced their presence before entering, but Mr. Walker believed that they were intruders. The three officers together fired 32 bullets, striking Breonna Taylor six times.¹⁶¹

In Attorney General Daniel Cameron’s assessment of the case, Breonna Taylor’s death was essentially collateral damage. Cameron said that what happened was a “tragedy,” but not a crime.¹⁶² Brett Hankison is the one cop who did not hit Taylor with any of the shots he fired, but he is the only one being prosecuted. The case brought by attorney general is more protective of Taylor’s neighbors than of Taylor herself. None of her neighbors were hurt by the raid, but Breonna Taylor was killed as a result.¹⁶³

Former federal prosecutor, professor at Georgetown University, and author of *Chokehold: Policing Black Men*, Paul Butler weighed in on the charge in Breonna Taylor’s death. “I would have charged all three officers with manslaughter. I think murder would be overcharging, because the officers did not have the intent to kill Taylor. Still, if three gang

¹⁶¹ Ibid.

¹⁶² Paul Butler, “The Police Officers Who Shot Breonna Taylor Should Have Been Charged with Manslaughter,” The Washington Post, September 24, 2020, <https://www.washingtonpost.com/opinions/2020/09/24/im-former-prosecutor-charge-breonna-taylors-death-is-pathetically-weak/>.

¹⁶³ Ibid.

members burst into an apartment, were met with gunfire by somebody in the home, and in response shot up the apartment complex and killed an innocent person, they would almost certainly be charged with homicide.”¹⁶⁴ It is no less of a crime when three cops are doing it as opposed to three gang members. Butler believes that self-defense is an issue, but it is one that a jury should decide because the officers continued to fire long after any threat ceased. “A neighbor called 911 to report gunfire, and 68 seconds into the call, you can still hear the shots. Further, under Kentucky law, you can’t claim self-defense if your actions placed innocent people in danger, as the police who killed Taylor obviously did.”¹⁶⁵

Paul Butler has said that many would have expected a conservative prosecutor to use this case as an opportunity to demonstrate his commitment to equal justice under the law. At the news conference announcing the decision in the Taylor case, Cameron was more critical of “celebrities, influencers and activists” than of the police who killed Taylor. He attacked the idea of “mob justice” by protesters but justified the shooting an innocent woman six times by police officers.

Mr. Cameron has faced criticism for his handling of the case. Racial-justice advocates believe that he favored the interests of law enforcement over those of Breonna Taylor’s family. Many critics have also questioned what evidence he presented to the grand jury. Daniel Cameron said, “My role as special prosecutor in this case is to set aside everything in pursuit of the truth,” he said in announcing the grand jury’s decision. “If we simply act on emotion or outrage, there is no justice.”¹⁶⁶

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

Before the transcripts of the grand-jury proceedings were released, a lawyer for Ms. Taylor’s family asked whether or not Daniel Cameron presented any evidence on Breonna Taylor’s behalf or if he made “a unilateral decision to put his thumb on the scales of justice to help try to exonerate...these police officers”¹⁶⁷ Another attorney for the Taylor family has said in a remark directed at Attorney General Cameron, “You can’t pawn this off on the grand jury if your office made that decision. Don’t tell us that the grand jury made this determination if it was truly your determination.”¹⁶⁸ A professor at the University of Louisville who taught Daniel Cameron in law school has expressed his belief that the public should be able to know how the attorney general or the grand jury made the determination that homicide charges were not justified for the officers. After the attorney general’s office declined an interview request, a spokeswoman said in an emailed response to questions that, “everyone is entitled to their opinion, but prosecutors and grand jury members are bound by the facts and by the law.”¹⁶⁹

Breonna Taylor’s mother, Tamika Palmer said that although Cameron had the power to help the city start healing from the tragic loss of her daughter, she knew he would “never do his job.” Tamika Palmer was “reassured Wednesday of why I have no faith in the legal system, in the police, in the law.” Her statement said that “they are not made to protect us Black and brown people.”¹⁷⁰ On January 22, 2021, three anonymous grand jurors from the case announced that they were filing a petition to impeach Daniel Cameron, accusing him breaching the public trust and failing to comply with his duties by misrepresenting the findings of the grand jury.¹⁷¹

¹⁶⁷ Ibid.

¹⁶⁸ N’dea Yancey-Bragg, Ben Tobin, and Andrew Wolfson, “Breonna Taylor: Ben Crump Slams Decision, Call to Release Transcripts.”

¹⁶⁹ Arian Campo-Flores, “Breonna Taylor Case Prosecutor Is Known as a Republican to Watch - WSJ.”

¹⁷⁰ N’dea Yancey-Bragg, Ben Tobin, and Andrew Wolfson, “Breonna Taylor: Ben Crump Slams Decision, Call to Release Transcripts.”

¹⁷¹ Tessa Duvall, “AG Cameron’s Attack of Breonna Taylor Grand Jurors ‘Is Unprofessional,’” Louisville Courier Journal, February 2, 2021, <https://www.courier-journal.com/story/news/local/breonna-taylor/2021/02/02/kentucky-attorney-general-daniel-cameron-attack-breonna-taylor-grand-jurors-is-unprofessional/4352773001/>.

Cameron responded to these claims saying that their effort was a “mockery” and that the grand jurors themselves were responsible for the lack of additional charges against more officers. Cameron's office wrote: “Simply put, the grand jury had the right and the power to ask for more evidence, and ultimately to bring any charge it deemed appropriate.”¹⁷² However, this demonstrates a problem with our system of justice. An inexperienced and untrained body of citizens is not suited to recognize unwarranted prosecutions or press for more charges in a proceeding at which they hear only the government’s side of the case and depend entirely on the prosecutor for legal advice and direction. The grand jury depends on the prosecutor for all its information, advice, and direction. Laws are complex, and even the most educated juror will be intimidated by the authority of the prosecutor to some degree. The grand jury process is flawed because the jurors are not often suited to decide such cases, especially when prosecutors are in such a powerful position to guide the jury in essentially any direction they wish.

Chapter 3 Conclusion

In America, police too frequently cause bodily harm to civilians or kill, and the problem is even worse when the victim of police violence has no involvement with the crime. Regardless of whether or not the suspect is guilty or innocent, police should not be killing any civilians and they must be held accountable for their actions. There is a reluctance of local governments to prosecute police misconduct. This reluctance empowers future misconduct as well as creates a distrust between law enforcement and communities. Aside from the reluctance of prosecutors to pursue investigations, there are numerous judicial doctrines and policies that shield officers from any charges at all. Government officials are generally immune from suit over damages they

¹⁷² Ibid.

cause. It is not often that a police officer is prosecuted to the fullest extent of that law, nor is it often that they are rightfully charged.¹⁷³

Studies done by the NAACP and Human Rights Watch provided evidence that police violence has a dramatically different effect on marginalized groups and people of color. The NAACP held hearings on race and police practices in six cities. Their conclusion regarding the relationship between race and police violence was that “It is impossible to study the police in this country without studying race. It is impossible to understand the police conduct in the Rodney King beating—or the daily incidents of police ‘use of force’—without understanding the history of police-minority relations. Those who claim that the verdict in the ‘first Rodney King case’ can be explained as one that was not racist, but ‘pro-police,’ should next try to separate land from sea. Can they really say where the one ends and the other begins?”¹⁷⁴ After a fourteen-city study, Human Rights Watch also concluded that “race continues to play a central role in police brutality in the United States.”¹⁷⁵

These communities disproportionately suffer from police violence. Due to racial profiling and racial disparities in policing, Black Americans are disproportionately subjected to police brutality. “The rate of fatal police shootings among Black Americans was much higher than that for any other ethnicity, standing at 30 fatal shootings per million of the population as of June 2020.”¹⁷⁶ In a country where police excessive force cases often go under prosecuted, this fact has detrimental effects on communities of color. Human Rights watch 1996 analysis reviewed 10,129 civil rights complaints during that year. Of the 10,129 civil rights complaints, only 79 cases were filed, including both grand jury cases and “non-felonies not requiring Grand Jury

¹⁷³ John V. Jacobi, “Prosecuting Police Misconduct,” 2000.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Stephan A. Schwartz, “Police Brutality and Racism in America.”

approval.”¹⁷⁷ Civilians in these communities who commit serious crimes are vigorously prosecuted while police officers who commit similar offenses within in these communities seem to do so without consequence.

There is a lack of accountability for police and a low indictment rate in cases involving excessive use of force by police officers. Government officials are held to a different standard of judgment. These affected communities of color are deprived of proper law enforcement, both through the behavior of some police officers and through the failure of the system in bringing violent police officers to justice. “The residents of these communities, then, are deprived of a fundamental right of citizenship: the right to ‘protection by government.’”¹⁷⁸ After analyzing the outcome of the Breonna Taylor case, it is evident that law enforcement officers are not held accountable for their actions and America’s criminal justice system continues to fail people of color.

¹⁷⁷ John V. Jacobi, “Prosecuting Police Misconduct,” 2000.

¹⁷⁸ *Ibid.*

Chapter 4: Reform Suggestions

America's criminal justice system fails people of color due to the discriminatory nature by which it operates. People of color in America disproportionately experience acts of violence from police officers and often there is no justice for these victims. The foundations of our justice system disadvantage people of color in America due to racial disparities in policing. The practices and policies that have been put into place to combat racial injustices in America have been ineffective because of the principles that govern our system. In order to combat these racial inequalities in our justice system, reform is urgent at both the state and federal level. Reform is a necessary step to preserving the integrity of our justice system, and many states have already begun to take action.

No-Knock Warrants

State legislatures must expressly prohibit the issuing of no-knock warrants. Both Florida and Oregon have already completely prohibited the use of no-knock warrants. No-knock warrants are not confined to the most serious of criminal investigations as they should be and a majority of them are issued in connection with low-level drug investigations. No-knock warrants are an unnecessarily aggressive and intrusive law enforcement practice. No-knock warrants disproportionately affect people of color in America because they are most often used in low-income, communities of color. During the execution of a no-knock warrant, both parties may believe that they are in danger and shots are often fired. No-knock warrants have led to far too many unnecessary deaths of both civilians and police officers.¹⁷⁹

Eliminating the use of no-knock warrants would ensure that police perform a complete and thorough assessment of the situation when they arrive on scene to execute a search warrant

¹⁷⁹ Brian Dolan, "To Knock or Not to Knock: No-Knock Warrants and Confrontational Policing."

before deciding whether or not to knock and announce their presence. States should also enact legislation requiring execution of search warrants during daylight hours. It has become a common practice to execute both knock-and-announce and no-knock search warrants at night, as seen in the Breonna Taylor case. Serving these warrants in the middle of the night creates a dangerous situation for both the homeowners and the police officers. With the increase in home invasion-style burglaries, particularly involving drug dealers, officers that do not properly identify themselves can be mistaken as burglars, especially in the middle of the night. Persons inside the home must have a legitimate opportunity to answer the door and comply with the lawful execution of the search warrant. America must do better and the best way to ensure the safety of police officers and civilians, protect civilians Fourth Amendment rights, and work to protect communities of color in America is to eliminate no-knock warrants entirely.

Reforming Qualified Immunity

The doctrine of qualified immunity draws a very narrow definition of what it means for constitutional law to be clearly established and it favors the interests of defendants over those of plaintiffs. “The Supreme Court created qualified immunity based on a misunderstanding of common-law defenses in place when Section 1983 became law.”¹⁸⁰ The Court’s qualified immunity jurisprudence prevents government actors from being held accountable for their actions. The Supreme Court must abolish or extremely limit qualified immunity if they wish to see any changes made in America. If the Supreme Court fails to do so, lower courts and state legislatures can take action as well.¹⁸¹ The state of Colorado recently passed a reform law called the Law Enforcement Integrity and Accountability Act. Colorado Governor Jared Polis signed

¹⁸⁰ Joanna C. Schwartz, “The Case against Qualified Immunity,” *Notre Dame Law Review* 93, no. 5 (May 2018): 1797–1852.

¹⁸¹ *Ibid.*

into law Senate Bill 20–217. SB-217 ensures that police officers in Colorado will not be able to avoid liability for their misconduct due to qualified immunity. The law formally permits individuals to bring claims against police officers who violate their constitutional rights under Colorado law. SB-217 has been referred to as a “state analogue” to Section 1983. Section 1983 allows individuals whose rights are violated under the federal Constitution to bring a lawsuit for damages in federal court. Colorado’s the Law Enforcement Integrity and Accountability Act allows individuals whose rights are violated under the state constitution to bring a lawsuit for damages in state court. SB-217 will cover things such as excessive force claims and unlawful arrests. SB-217 also specifically provides that “qualified immunity is not a defense to liability pursuant to this section.”¹⁸² Colorado is the first state to specifically negate the availability of qualified immunity as a defense through legislation. Recently, multiple lower federal court decisions have acknowledged how qualified immunity functions more as absolute immunity and shields police officers from accountability.¹⁸³

The doctrine of qualified immunity has shielded police officers and other government employees from being held liable for their actions for decades. To ensure the integrity of our justice system and to restore the trust of the American people, liability is essential. More cops must face prison time or be successfully sued with money coming out of their own pockets. Nothing in our criminal justice system will change if there are no direct consequences for violent police officers.

¹⁸² Ilya Somin, “States Can Reform Qualified Immunity on Their Own – Reason.Com,” Reason, June 26, 2020, <https://reason.com/volokh/2020/06/26/states-can-reform-qualified-immunity-on-their-own/>.

¹⁸³ Ibid.

Prosecutorial Power and The Grand Jury

The functions of the prosecution are in great need of reform. Prosecutors have too much power and too much discretion. Much like police officers, prosecutors must be held more accountable to law. Prosecutors' discretion should be constrained by internally published guidelines and they should provide reasons for their decisions. There must be legitimate mechanisms of internal oversight and review. Prosecutors must exercise their powers more carefully and with more accountability.¹⁸⁴ The American prosecutor is subject to much less accountability than other criminal justice officials. "Prosecutors seem accountable neither to the electorate nor to the legal system, in part exactly because of the hybrid nature of their authority."¹⁸⁵ The prosecutor is the most powerful figure in the criminal justice system. Their ability to exercise discretion is their most important role and a fundamental aspect of America's criminal justice system, yet these functions are performed in private. More information about prosecutorial decision making must be publicly accessible as a mechanism for accountability. Legal remedies for victims of discriminatory treatment are inadequate because of the relationships between prosecutors and police officers. The electoral system also does not operate as an effective mechanism of accountability. The practices and policies used by prosecutors often produce unjust results.¹⁸⁶

Grand jury proceedings are also almost always kept in strict confidence. Although the secrecy of the grand jury process has been considered critical to the grand jury's independence, this secrecy purely contributes to the prosecutor's total control over the grand jury. Prosecutors are able to treat the grand jury as a "rubber stamp" to automatically approve of charges upon

¹⁸⁴ David Alan Sklansky, "The Nature and Function of Prosecutorial Power."

¹⁸⁵ *Ibid.*

¹⁸⁶ Angela J. Davis, "The Power and Discretion of the American Prosecutor."

which they have already decided. Other times, if a prosecutor does not want to indict the case, but also does not want to take responsibility for that decision, they will intentionally present a weak case to the grand jury, leading the grand jury to refuse to indict the case. The prosecutor is then able to claim to the community that the decision of whether or not to indict the defendant rested with the grand jury.¹⁸⁷ Historically, the independence of the grand jury from the prosecutor's office was a critical aspect of the grand jury's role to combat local government corruption. The grand jury's ability to act effectively depended upon its independence of the prosecutor. The legitimacy of the grand jury suffers when prosecutors use the grand juries to function out of their own self-interest.¹⁸⁸ The lack of transparency in the grand jury process encourages illegitimate uses of the grand jury and makes it difficult to evaluate whether the prosecutor is legitimately trying to obtain the grand jury's independent judgment.¹⁸⁹

There must be more transparency in the charging and plea-bargaining processes and the grand jury process. Prosecutors should inform their constituents of their practices and policies. The functions of both the prosecution and the grand jury are in great need of reform in order to preserve the integrity of our judicial system.

Training Against Racial Biases in Policing

The United States should develop and implement training designed to mitigate the influence of implicit racial bias for police officers, public defenders, prosecutors, judges, and jury members. Studies have repeatedly shown that it is possible to control for the effects of implicit racial bias on individual decision making. Although it "may be impossible in the current

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ric Simmons, "The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury To Its Original Purpose."

culture of the United States to ensure that individuals are cognitively colorblind, it is possible to train individuals to be behaviorally colorblind.”¹⁹⁰ The United States should work with political leaders and scholars to develop the most effective training programs to reduce the influence of implicit racial bias on our government officials. Laws may seem racially neutral on their face; however, they often represent great developments in the struggle against racism in the United States. Facially neutral laws have proven insufficient to eliminate racial bias and racial disparity in the criminal justice system since they are often applied in a racially disparate manner due to implicit racial bias. The practices and policies that have been put into place to combat racial injustices in America have been ineffective. Training designed to mitigate the influence of implicit racial bias for police officers, public defenders, prosecutors, judges, and jury members must be implemented.¹⁹¹

¹⁹⁰ “Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System.”

¹⁹¹ *Ibid.*

Chapter 5: Summary and Conclusions

Every three seconds a person is arrested in the United States. There are 10.3 million arrests a year, but only five percent of those arrests are for offenses involving violence. All other arrests are for non-violent offenses. In wealthy, white communities, police are often only present when responding to specific serious disruptions to the community. In communities of color, police are constantly intruding on people's everyday lives.¹⁹² About 12% of the United States population is Black. However, in 2011, Black Americans made up for 30% of persons arrested for a property offense and 38% of persons arrested for a violent offense.¹⁹³ Scholarly research has revealed that a significant portion of such disparities in policing may be attributed to implicit racial biases. Implicit racial bias is the unconscious associations humans make about racial groups.¹⁹⁴ Officers often make fast decisions with imperfect information, activating these biases to fill in missing information and allow individuals to make decisions in the limited time they have. Research related to police brutality has revealed that Blacks are more likely than Whites to make complaints regarding police brutality, to be stopped while operating a motorized vehicle, and to underreport how often they are stopped due to higher social desirability factors.¹⁹⁵

The effects of racial bias are particularly well demonstrated in the area of drug law enforcement. Marijuana is used at almost equal rates by Black and white people, yet Black people are still arrested at a rate that is almost four times that of white people. "Racialized policing is the best way to understand this disparity."¹⁹⁶ Between 1980 and 2000, the U.S. black

¹⁹² Anthony D. Romero, "Reimagining the Role of Police," American Civil Liberties Union, June 5, 2020, <https://www.aclu.org/news/criminal-law-reform/reimagining-the-role-of-police/>.

¹⁹³ "Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System."

¹⁹⁴ Ibid.

¹⁹⁵ Cassandra Chaney and Ray V. Robertson, "Racism and Police Brutality in America."

¹⁹⁶ Anthony D. Romero, "Reimagining the Role of Police."

drug arrest rate rose from 6.5 to 29.1 per 1,000 persons. During the same time period, the White drug arrest rate increased from 3.5 to 4.6 per 1,000 persons. However, the disparity between the increase in Black and white drug arrests does not correspond to any significant disparity in Black drug activity. A study from Alabama Appleseed Center for Law & Justice revealed that Blacks were approximately four times as likely as White people to be arrested for marijuana possession and five times as likely to be arrested for felony possession.¹⁹⁷

Because drug arrest rates are significantly higher in communities of color, no knock warrants also disproportionately effect Black Americans. The warrants are typically granted because an officer “believes” that most people who have drugs also have guns and that if they announced themselves before entering the property, they would be putting themselves in danger. There is a presumption in America that drugs and violence are directly related, however, this presumption is not supported by any empirical evidence. There is an extreme reliance on officer experience and safety concerns in deciding whether a warrant should be issued.¹⁹⁸

In America, police too frequently cause bodily harm to or kill civilians, and often innocent ones. There is a reluctance of local governments to prosecute police misconduct. This reluctance empowers future misconduct as well as creates a distrust between law enforcement and communities. Police officers possess a discretionary power to use violence against a subject. Allowing police officers such judgment and discretion calls for accountability in order to discourage future abuses of power. There is a lack of accountability for police officers and they are held to a different standard of judgment.¹⁹⁹ Prosecutors work closely with police and often

¹⁹⁷ Leah Nelson, Frank Knaack, and Will Tucker, “Alabama’s War on Marijuana: Assessing the Fiscal and Human Toll of Criminalization” (Alabama Appleseed Center for Law & Justice, 2018), https://www.alabamaappleseed.org/wp-content/uploads/2018/10/COM_Decriminalization-of-Marijuana_WEB-FINAL.pdf.

¹⁹⁸ Candice Norwood, “The War on Drugs Gave Rise to ‘No-Knock’ Warrants. Breonna Taylor’s Death Could End Them | PBS NewsHour.”

¹⁹⁹ John V. Jacobi, “Prosecuting Police Misconduct,” 2000.

find themselves in a conflict of interest when they are asked to prosecute an ally. Criminal procedure is different for police officers and other government officials than it is for other suspects. There is a low indictment rates in cases involving excessive use of force by police officer.

Aside from the reluctance of prosecutors to pursue investigations, there are numerous judicial doctrines and policies that shield officers from any charges at all. All government officials are generally immune from suit over damages they cause. Because of the complexity of many government officials' roles, courts have found it necessary to shield these actors from liability when certain aspects of their job may conflict with existing case law in certain situations.²⁰⁰ The doctrine of qualified immunity shields officers from being held accountable in cases of misconduct. Some scholars have argued that qualified immunity has no basis in the common law. Other criticisms of the doctrine focus more on its practical applications.²⁰¹ There is also concern that the level of specificity required to define a clearly established right or law has made it increasingly difficult for judges to rule against government officials. Qualified immunity allows officers to further abuse their powers.

The power of police officers to use force in situations calling for the exercise of individual judgment and discretion leads to abuses. Often, incidents of police violence are against victims of color. The discretionary power to use violence that police officers have implies a need for accountability. "The failure to hold police accountable perverts the rule of law, makes citizens distrustful of authority, and encourages further lawlessness by police officers."²⁰²

²⁰⁰ Jonathan M. Hyman, "Qualified Immunity Reconsidered."

²⁰¹ Ibid.

²⁰² John V. Jacobi, "Prosecuting Police Misconduct," 2000.

Over the past five years, police have killed an average of three people per day. Death at the hands of the police is particularly prominent for Black men. A 2019 study found that Black men have about a one in 1,000 chance of being killed by police.²⁰³ During the first few months of 2021, police have killed at least 23 Black Americans. There have been only seven murder convictions of officers for fatal police shootings since 2005, making the chances of a killing by the police leading to a murder conviction about one in 2,000.²⁰⁴ People of color in America disproportionately experience acts of violence from police officers. Breonna Taylor, George Floyd, Rayshard Brooks, Daniel Prude, Atatiana Jefferson, Aura Rosser, Stephon Clark, Botham Jean, Philando Castille, and so many other victims of police brutality.²⁰⁵ Innocent individuals continue to die at the hands of America's police officers without receiving any justice. The practices and policies that America's criminal justice system relies on have allowed discriminatory policing to flourish and have created obstacles to justice. The core doctrine of equal protection focuses on the specific and subjective intent of official actors. This devalues important evidence and undermines significant voices. Police discretion remains unchecked for the most part. Courts defer to supposed officer judgment and experience and that remains unjustified in many instances. There is a reflexive acceptance of police credibility in America. The way that America's criminal justice system operates is inherently discriminatory and the need for reform is urgent.

²⁰³ Fabiola Cineas and Sean Collins, "What Was Derek Chauvin Convicted of and Why It Matters - Vox," Vox, April 20, 2021, <https://www.vox.com/2021/4/20/22387556/derek-chauvin-verdict-guilty-murder-manslaughter>.

²⁰⁴ David Leonhardt, "The Morning: A Very Rare Conviction," The New York Times, April 21, 2021, https://messaging-custom-newsletters.nytimes.com/template/oakv2?campaign_id=9&emc=edit_nn_20210421&instance_id=29493&nl=the-morning&productCode=NN®i_id=109982538&segment_id=56000&te=1&uri=nyt%3A%2F%2Fnewsletter%2F46a8ca0b-45dd-5c99-a3d1-46e8ea7622b2&user_id=bd2f254951db0d7eff4f367733f2f848.

²⁰⁵ Alia Chughati, "Know Their Names: Black People Killed by the Police in the US."

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