

## **POLICE BRUTALITY AND STATE-SANCTIONED VIOLENCE IN 21<sup>ST</sup> CENTURY AMERICA**

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### **I. INTRODUCTION**

America is often referred to as the “land of the free” and a global leader in democracy and human rights.<sup>1</sup> It is the land of enormous prosperity, a place where millions of people have fought and struggled to come searching for opportunity, the “American Dream,” and relief from political, economic, and violent oppression. America is, at the same time, the nation whose leaders committed genocide against the Native population, dispossessed them of their land, disenfranchised Native Americans, considered them savages, broke treaties with Native American tribes, and forcibly took Native American children from their families.<sup>2</sup> America was built on the foundation of a brutal race-based form of chattel slavery and oppression that exploited Black people. Black people were torn from their families, considered property and 3/5ths of a human being,<sup>3</sup> and codified the perceived inhumanity and inferiority of Black people (and others) into the law.<sup>4</sup> The bloodiest war in America’s history was fought over the issue of slavery.<sup>5</sup> Black people were beaten, brutalized, lynched, bombed, and killed when they fought for access to basic civil rights. Despite this, Black communities were able to thrive notwithstanding the oppression. However, thriving black communities in the mid to late 20<sup>th</sup> century were often violently

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<sup>1</sup> Jonathan Turley, *10 Reason Why America is No Longer the Land of the Free*, WASHINGTON POST (Jan. 13 2012), [https://www.washingtonpost.com/opinions/is-the-united-states-still-the-land-of-the-free/2012/01/04/gIQAvcd1wP\\_story.html?noredirect=on&utm\\_term=.1a081a72d9a4](https://www.washingtonpost.com/opinions/is-the-united-states-still-the-land-of-the-free/2012/01/04/gIQAvcd1wP_story.html?noredirect=on&utm_term=.1a081a72d9a4).

<sup>2</sup> “*Cultural Genocide*” and *Native American Children*, EQUAL JUSTICE INITIATIVE, <https://eji.org/history-racial-injustice-cultural-genocide>.

<sup>3</sup> Kamala Kelker, *Electoral College is a Vestige of Slavery, Say Some Constitutional Scholars*, PBS (Nov. 6 2016), <https://www.pbs.org/newshour/politics/electoral-college-slavery-constitution>.

<sup>4</sup> Richard Rothstein, *The Color of Law, a Forgotten History of How the Government Segregated America*, ECONOMIC POLICY INSTITUTE (2017), <https://www.epi.org/publication/the-color-of-law-a-forgotten-history-of-how-our-government-segregated-america/>.

<sup>5</sup> Daniel Nasaw, *Who, What, Why: How Many Soldiers Died in the U.S. Civil War*, BRITISH BROADCASTING CORPORATION (Apr. 4 2012), <https://www.bbc.com/news/magazine-17604991>.

subjugated through reprisals and mass acts of racial terrorism.<sup>6</sup> The white majority perpetrators of mass violence and terrorism against Black people were often allowed to go with impunity: the actors unpunished, unscathed, and tacitly given state approval.<sup>7</sup> America, while existing as a “superpower,” a land of metaphorical milk and honey, also exists as an incredibly complicated place where black people and people of color must contend with various forms of systemic racism and oppression.

This Note examines state violence and state-sanctioned violence in America from a historical and contemporary perspective. It discusses the persistence of white supremacy, specifically, how white supremacy has been cemented into American institutions and has often manifested as state or state-sanctioned violence enacted against black people. Acts of violence (sexual, physical, and deadly) committed by both white people who were subsequently not held accountable, as well as acts of violence committed by law enforcement against minorities when unpunished serve to bolster the devaluation of black life, in addition to a system that often limits people of color to a permanent underclass.

The Note argues that the state and its actors perpetuate violence against Black people and other people of color. The progress marked through rights gained from the abolition of slavery, the 13<sup>th</sup> Amendment, the civil rights movement of the '60s, and related movements have had a limited effect on equalizing the status and rights of black people and people of color in this country. Further, the Note argues the various forms of white supremacy and white supremacist terrorism in the United States have merely changed forms or have stayed the same.

The 14<sup>th</sup> amendment to the U.S. Constitution was intended to codify and guarantee the equal protection of the law for all.

No state shall make or enforce any law which shall  
abridge the privileges or immunities of citizens of the

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<sup>6</sup> *White Mobs Attack Chicago's Black Communities*, EQUAL JUSTICE INITIATIVE (July 31, 2019), <https://calendar.eji.org/racial-injustice/jul/31>; *This Day in History Jan 1 1923: Rosewood Massacre*, ZINN EDUCATION PROJECT, <https://www.zinnedproject.org/news/tdih/rosewood-massacre/>.

<sup>7</sup> *New York Draft Riots*, HISTORY.COM (Oct. 27, 2009), <https://www.history.com/topics/american-civil-war/draft-riots>.

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United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>8</sup>

Additionally, the 13th Amendment to the U.S. Constitution is crucial in understanding mass incarceration and the over-policing of Black and Brown communities. The 13<sup>th</sup> amendment provides that

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.<sup>9</sup>

The exception found in the 13<sup>th</sup> Amendment of the U.S. Constitution, which allows for slavery or involuntary servitude, is one of the drivers of mass incarceration.<sup>10</sup> “The United States has less than 5% of the world’s population but nearly 25% of its prisoners.”<sup>11</sup> Black people and people of color are also disproportionately targeted by the criminal justice system, overrepresented in the prison population,<sup>12</sup> face harsher consequences than whites for committing the same crime,<sup>13</sup> and are exploited by the prison industrial complex.<sup>14</sup> The constitutional guarantee of equal protection in the 14<sup>th</sup> Amendment currently exists solely as a platitude. It is not a right extended to the majority of people of color due to systematic racism, implicit biases of those who hold institutional power, and the fact that systemic inequalities taint the American legal system.<sup>15</sup>

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<sup>8</sup> U.S. CONST. Amend. XIV.

<sup>9</sup> U.S. CONST. Amend. XIII.

<sup>10</sup> *Prison Labor and the Thirteenth Amendment*, EQUAL JUSTICE INSTITUTE (Feb. 1, 2016), <https://eji.org/news/history-racial-injustice-prison-labor/>.

<sup>11</sup> James Cullen, *The United States is (very) Slowly Reducing Incarceration*, BRENNAN CENTER FOR JUSTICE (Jan. 18, 2017), <https://www.brennancenter.org/blog/united-states-very-slowly-reducing-incarceration>.

<sup>12</sup> *Criminal Justice Fact Sheet*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, <https://www.naacp.org/criminal-justice-fact-sheet/>.

<sup>13</sup> *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/>.

<sup>14</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

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

Black people and people of color in the U.S., when killed, receive less media attention.<sup>16</sup> When accused of murdering a white person, Black people, on average, face harsher consequences than white people who are accused of murdering a black person.<sup>17</sup> These systemic racial inequities are fruits from a poison tree of a system built to protect the status and interests of white people, even those who do not support a racially discriminatory political, economic, and social system. As fact after fact, and case after case has shown, America is built on a foundation of dehumanization and exploitation of people of color. This foundation of hate, discrimination, and second-class citizen status is deeply connected to the disproportionate rate of police assaults, killings, and murders of Black people.<sup>18</sup> The law protects perpetrators of violence against Black people.<sup>19</sup> Police, who unjustifiably use violence against Black and Brown people, are acting under the color of law and thus need to be held accountable for violations of the constitutional rights of Black People.<sup>20</sup> The laws that help perpetuate police brutality must be changed to secure and effectuate the promise of fundamental constitutional rights of Black and Brown people in the United States.

The economic and social realities of Black people and people of color in housing, education, employment, and other sectors, is a symptom of decades of social policy and divestment from Black and Brown communities. Economic inequality, in and of itself is violence that is many furthered by state action and policies. People of color and Black people disproportionately experience poverty.<sup>21</sup> The Economic Policy Institute writes that “the [B]lack poverty rate remains more

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<sup>16</sup> Tara McKelvey, *Cleveland Abductions: Do White Victims Get More Attention?*, BBC (May 9, 2013), <https://www.bbc.com/news/magazine-22441124>.

<sup>17</sup> David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, J. CRIM. LAW AND CRIMINOL., <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6378&context=jclc>; German Lopez & Javier Zarracina, *Study: Black people are 7 times more likely than white people to be wrongly convicted of murder*, VOX (May 7, 2017), <https://www.vox.com/policy-and-politics/2017/3/7/14834454/exoneration-innocence-prison-racism>.

<sup>18</sup> Samuel Sinyangwe, *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/>.

<sup>19</sup> *Qualified Immunity*, EQUAL JUSTICE INITIATIVE, <https://eji.org/issues/qualified-immunity/>; Sinyangwe, *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> *The Population of Poverty USA*, POVERTY USA, <https://www.povertyusa.org/facts>.

than twice as high as the white poverty rate.”<sup>22</sup>

## II. A BRIEF HISTORY OF RACIAL OPPRESSION IN THE UNITED STATES

American children, from an early age, learn about Christopher Columbus, and other settlers and colonizers who either “discovered” or founded the United States of America.<sup>23</sup> What is often not reflected or taught in the historical narrative is the brutality of the early settlers and founders of the U.S.<sup>24</sup> For example, the very idea that someone acting under the crown of Spain or England, had a God-given right to claim land in the “new world” by any means, including brutality, violence, and biological warfare should be acknowledged and sharply scrutinized, at the very least.<sup>25</sup> The original U.S. Constitution endowed only property-owning white men with the right to vote and other rights outlined in the Constitution.<sup>26</sup> The dispossession of land inhabited and rightfully belonging to various native populations, to the brutal slavery in Continental U.S. and the Americas is often vastly downplayed in the retelling of the history of America. The centuries of racialized chattel slavery in the U.S. has been misrepresented in textbooks, that for example, refer to “happy slaves”<sup>27</sup> who were treated well by their masters.<sup>28</sup> Even the terminology “slave” perpetuates the

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<sup>22</sup> Elise Gold & Jessica Scheider, *Poverty Persists 50 Years After the Poor People’s Campaign*, ECONOMIC POLICY INSTITUTE (May 17, 2018), <https://www.epi.org/publication/poverty-persists-50-years-after-the-poor-peoples-campaign-Black-poverty-rates-are-more-than-twice-as-high-as-white-poverty-rates/>.

<sup>23</sup> David Cutler, *Teaching Kids about Thanksgiving or Columbus? They Deserve the Real Story*, PBS (Nov. 15, 2017), <https://www.pbs.org/newshour/education/teaching-kids-about-thanksgiving-or-columbus-they-deserve-the-real-story>.

<sup>24</sup> Ron Rosenbaum, *The Shocking Savagery of America’s Early History*, SMITHSONIAN MAGAZINE (Mar. 2013), <https://www.smithsonianmag.com/history/the-shocking-savagery-of-americas-early-history-22739301/>.

<sup>25</sup> *The Doctrine of Discovery, 1493*, GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-now/spotlight-primary-source/doctrine-discovery-1493>.

<sup>26</sup> *Elections...the American Way*, THE LIBRARY OF CONGRESS, <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/founders-and-the-vote.html>.

<sup>27</sup> Rex Springston, *Happy Slaves? The Peculiar Story of Three Virginia School Textbooks*, RICHMOND TIMES DISPATCH (Apr. 14, 2018), [https://www.richmond.com/discover-richmond/happy-slaves-the-peculiar-story-of-three-virginia-school-textbooks/article\\_47e79d49-eac8-575d-ac9d-1c6fce52328f.html](https://www.richmond.com/discover-richmond/happy-slaves-the-peculiar-story-of-three-virginia-school-textbooks/article_47e79d49-eac8-575d-ac9d-1c6fce52328f.html).

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

dehumanization of enslaved African peoples.<sup>29</sup>

The willful ignorance towards the myriad ways in which Black people, Latinos, and Native Americans were and are still disenfranchised, exploited, and excluded, from housing, denied access to equal education,<sup>30</sup> subjected to segregation in almost every facet of life, racially profiled, disproportionately targeted by both law enforcement for humiliating and baseless stops (often for minor offenses) is often ignored by many mainstream institutions. The savage and bloody acts of white terrorism, from the 1921 Tulsa Race Massacre of the Black community who lived in “Black Wall Street” Greenwood district in Tulsa, Oklahoma to the Catcher riots, to the 1923 Rosewood Massacre, are just a few examples of how the U.S. government has sanctioned the racial violence and terrorism of white perpetrators.<sup>31</sup> The Rosewood Massacre, in which white mobs terrorized Black residents with impunity, is a telling example of how violence that has been inflicted by white individuals and mobs has often gone unprosecuted by the government, which allows these types of race-based violent incidents to continue.<sup>32</sup> When examining present-day American society, it has often been demonstrated that protests against racial injustice have resulted in Black people and others being killed and brutalized.<sup>33</sup> The violence Black people have been subjected to for daring to demand basic constitutional rights and some form of the American dream cannot be ignored.<sup>34</sup> Black people continue to be

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<sup>29</sup> Katy Waldman, *Slave or Enslaved Person, It's not Just an Academic Debate for Historians of American Slavery*, SLATE, (May 19, 2015), <https://slate.com/human-interest/2015/05/historians-debate-whether-to-use-the-term-slave-or-enslaved-person.html>.

<sup>30</sup> *Five Things to Know: HBCU Edition*, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE BLOG, <https://nmaahc.si.edu/blog/five-things-know-hbcu-edition>; *History of Black Education*, KENYON COLLEGE DEPARTMENT OF AMERICAN STUDIES, <https://www2.kenyon.edu/Depts/Amerstud/Blackhistoryatkenyon/Individual%20Pages/History%20of%20Black%20Education.htm>.

<sup>31</sup> Jennifer Rae Taylor, *A History of Tolerance for Violence has Laid the Groundwork for Injustice Today*, AMERICAN BAR ASSOCIATION (May 16, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/Black-to-the-future/tolerance-for-violence/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/Black-to-the-future/tolerance-for-violence/).

<sup>32</sup> *Rosewood Massacre*, HISTORY (June 8, 2020), <https://www.history.com/topics/early-20th-century-us/rosewood-massacre>.

<sup>33</sup> *USA: The World is Watching: Mass Violations by U.S. Police of Black Lives Matter Protesters' Rights*, AMNESTY INTERNATIONAL (Aug. 4, 2020), <https://www.amnesty.org/en/documents/amr51/2807/2020/en/>.

<sup>34</sup> Nellie Gilles, *Meet the Last Surviving Witness to the Tulsa Race Riot of 1921*, NPR (May 31, 2018), <https://www.npr.org/sections/codeswitch/2018/05/31/615546965/meet-the-last-surviving-witness-to-the-tulsa-race-riot-of-1921>.

treated as second class citizens and are disproportionately affected by state violence and state-sanctioned violence that has existed historically and continues to the present day.<sup>35</sup>

State-sanctioned violence can be understood as violence perpetrated and perpetuated by state actors.<sup>36</sup> It is also violence (physical and economic among other forms) that is sanctioned through the legal system.<sup>37</sup> It can take the form of governmental actors condoning or leaving unpunished the actions of white supremacists.<sup>38</sup> After slavery, American students learned about Reconstruction and the progress that was made as an attempt to put Black people and other minorities on equal footing with white people. Many white people benefited and still benefit from the social structures, including laws, that benefit and favor whites.<sup>39</sup> Reconstruction was followed by a powerful backlash against the racial progress that was made, predominantly perpetrated by people in southern states.<sup>40</sup> The KKK and other white vigilante groups terrorized black people and minorities while they largely escaped any form of accountability.<sup>41</sup> According to the Equal Justice Initiative, “[m]ore than 4400 African American men, women, and children were hanged, burned alive, shot, drowned, and beaten to death by white mobs between 1877 and 1950. Millions more fled the South as refugees from racial terrorism, profoundly impacting the entire nation.”<sup>42</sup>

In many cases, government officials and other state actors turned a blind eye to these acts of white supremacist violence or outright condoned them, such as the black Wall Street massacre and

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<sup>35</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, *supra* note 14; Sinyangwe *supra* note 18.

<sup>36</sup> Chiama Echebiri, *The Carceral State and White Supremacy, One and the Same, a Tale of State-Sanctioned Violence*, GEORGETOWN J. MCRP (Nov. 4, 2019), <https://www.law.georgetown.edu/mcrp-journal/blog/a-tale-of-state-sanctioned-violence/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Race – The Power of an Illusion*, PBS (2003), [https://www.pbs.org/race/000\\_About/002\\_04-background-03-02.htm](https://www.pbs.org/race/000_About/002_04-background-03-02.htm).

<sup>40</sup> *Southern Violence After Reconstruction*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/reconstruction-southern-violence-during-reconstruction/>.

<sup>41</sup> *Id.*

<sup>42</sup> *National Memorial for Peace and Justice*, NATIONAL MEMORIAL OF PEACE AND JUSTICE OF THE EQUAL JUSTICE INITIATIVE, <https://museumandmemorial.eji.org/>.

the massacre of Black people that took place in Redwood, Florida.<sup>43</sup> The foundation of the United States of America is white supremacy as it is embedded position in society and the law has remained but, in many ways, has only changed forms. The examples range from black codes and convict leasing, which essentially forced Blacks back into slavery-like positions for committing “minor infractions,” to segregation, vagrancy laws, Jim Crowism, and lynching.<sup>44</sup> In the present day, one of the modern-day versions of this historic oppression is expressed as state-sanctioned violence and police brutality. Police brutality disproportionately affects Black people and people of color, often persists and goes unpunished, unprosecuted, and continues to be one of the most prevalent forms of state violence.<sup>45</sup> One modern-day form of the historic oppression of Black people is the immunity given to law enforcement officials who brutalize and unjustifiably kill Black people.<sup>46</sup> The next section will document several recent examples of police brutality overwhelming targeting Black people in the United States of America.

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<sup>43</sup> Alexis Clark, *Tulsa’s ‘Black Wall Street’ Flourished as a Self-Contained Hub in Early 1900s*, HISTORY, <https://www.history.com/news/Black-wall-street-tulsa-race-massacre>.

<sup>44</sup> *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE, <https://lynchinginamerica.eji.org/report/>.

<sup>45</sup> Sinyangwe, *supra* note 18.

<sup>46</sup> Nina Totenberg, *Supreme Court Weighs Qualified Immunity for Police Accused of Misconduct*, NPR (June 8, 2020), <https://www.npr.org/2020/06/08/870165744/supreme-court-weighs-qualified-immunity-for-police-accused-of-misconduct>.



apartment.<sup>56</sup> Kenneth Chamberlain, an elderly veteran with mental health issues, who accidentally triggered his life alert was called a racial slur and then killed by a police officer.<sup>57</sup> Philando Castile, a school employee, who was pulled over in a routine traffic stop, was shot after telling officers he was not reaching for a gun as he reached for his wallet.<sup>58</sup> Tamar Rice, a twelve-year-old playing with a pellet gun who was shot and killed by a police officer within 2 seconds of the officer arriving at the scene, despite the 911 caller telling the dispatcher that Tamar Rice was likely playing with a toy gun.<sup>59</sup> Rekia Boyd, young woman was hanging out with her friends in a park near her home was shot in the head by a police officer and killed.<sup>60</sup> Sean Bell, a young Black man leaving his bachelor's party, unarmed, was shot by undercover officers over 50 times and killed.<sup>61</sup> These cases all involve Black people killed by police officers, who were subsequently acquitted of the charges against them or not charged at all.

Most recently, as a result of the senseless and horrific killing of George Floyd, much of the world has been shaken awake to the plight of Black people who are targeted most by law enforcement police brutality.<sup>62</sup> Black people are criminalized and dehumanized by the criminal justice system and are most likely to be killed as a result of police brutality.<sup>63</sup> On May 25<sup>th</sup>, 2020 George Floyd was brutally and senselessly killed by Minneapolis police Officers, who ignored his pleas that he could not breathe.<sup>64</sup> Mr. Floyd was arrested for allegedly using

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<sup>56</sup> Rose Hackman, *'She Was Only a Baby': Last Charge Dropped in Police Raid that Killed a Sleeping Detroit Child*, THE GUARDIAN (May 31, 2015), <https://www.theguardian.com/us-news/2015/jan/31/detroit-aiyana-stanley-jones-police-Officer-cleared>.

<sup>57</sup> *Kenneth Chamberlain*, DEMOCRACY NOW, [https://www.democracynow.org/topics/kenneth\\_chamberlain](https://www.democracynow.org/topics/kenneth_chamberlain).

<sup>58</sup> Heidi Glenn, *A Student Remembers Her School's 'Lunch Man,' Philando Castile*, NPR (July 6, 2018), <https://www.npr.org/2018/07/06/626094420/a-student-remembers-her-schools-lunch-man-philando-castile>.

<sup>59</sup> German Lopez, *Cleveland Just Fired the Cop Who Shot and Killed 12-year-old Tamar Rice More than 2 years ago*, VOX (May 30, 2017), <https://www.vox.com/identities/2017/5/30/15713254/cleveland-police-tamir-rice-timothy-loehmann>.

<sup>60</sup> Ray Sanchez, *Chicago Officer Who Shot Rekia Boyd Resigns*, CNN (May 18, 2016), <https://www.cnn.com/2016/05/18/us/rekia-boyd-shooting-Officer-resigns/index.html>.

<sup>61</sup> Michael Wilson, *3 Detectives Acquitted in Bell Shooting*, N.Y. TIMES (Apr. 26, 2008), <https://www.nytimes.com/2008/04/26/nyregion/26BELL.html>.

<sup>62</sup> Sinyangwe, *supra* note 18.

<sup>63</sup> *Id.*

<sup>64</sup> Lisette Voytko, *Like George Floyd, This Man Was Arrested For Using A Counterfeit Bill—But Says White Privilege Saved His Life*, FORBES (June 7, 2020), <https://www.forbes.com/sites/lisettevoytko/2020/06/07/like-george-floyd-this-man-was-arrested-for-using-a-counterfeit-bill-but-says-white-privilege-saved-his-life/#a1734b2366f4>.

a counterfeit bill.<sup>65</sup> Since cell-phone video footage of Mr. Floyd's killing has been released, protests have erupted all over the U.S. and the world.<sup>66</sup> The majority of the protests against police brutality and Mr. Floyd's killing have been peaceful.<sup>67</sup> Yet, the government has responded by tear-gassing, tasing, using physical force, and shooting protestors with rubber bullets, which can kill, maim, disable, and disfigure.<sup>68</sup> The federal and local governments have also responded by deploying National Guards and the military to bring "law and order."<sup>69</sup> Thousands of protesters have been injured by police and governments' response to peaceful protesters speaking out against the police brutality; which people have been subjected to because they exercise their right to free speech, assembly, and civil disobedience.<sup>70</sup>

The high-profile killings of people of color, predominantly Black Americans, have been discussed by the media and everyday people in America and across the world, in the years since Trayvon Martin's killing.<sup>71</sup> However, killings of Black people, and other people of color, is not a new phenomenon.<sup>72</sup> These types of racialized violence have always been part and parcel of the American experience for Black people and people of color.<sup>73</sup> Before the killing of Trayvon Martin, people such as Sean Bell, Amadou Diallo, and Oscar Grant became

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<sup>65</sup> *Id.*

<sup>66</sup> *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html>.

<sup>67</sup> Kevin Rector, *LAPD Reports Show that the Vast Majority of George Floyd Protests Were Peaceful*, L.A. TIMES (Oct. 23, 2020), <https://www.latimes.com/california/story/2020-10-23/lapd-most-george-floyd-protests-peaceful>.

<sup>68</sup> Liz Szabo, *What are Rubber Bullets? Weapons Used on George Floyd Protesters can Maim and Kill*, NBC NEWS (June 3, 2020), <https://www.nbcnews.com/health/health-news/what-are-rubber-bullets-weapons-used-george-floyd-protesters-can-n1223581>.

<sup>69</sup> Rick Sobey, *George Floyd Protests Continue Across the U.S., Donald Trump Calls for 'Law and Order'*, BOSTON HERALD (May 31, 2020), <https://www.bostonherald.com/2020/05/31/george-floyd-protests-continue-across-u-s-donald-trump-calls-for-law-order/>.

<sup>70</sup> Adam Gabbatt, *Protests about Police Brutality are Met With a Wave of Police Brutality Across the U.S.*, THE GUARDIAN (June 6, 2020), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd>.

<sup>71</sup> Trymaine Lee, *Analysis: Trayvon Martin's Death Still Fuels a Movement Five Years Later*, NBC NEWS (Feb. 26, 2017), <https://www.nbcnews.com/news/nbcblk/analysis-trayvon-martin-s-death-still-fuels-movement-five-years-n725646>.

<sup>72</sup> Zack Beauchamp, *What the Police Really Believe – Inside the distinctive, Largely Unknown Ideology of American Policing – And How it Justifies Racist Violence*, VOX (July 7, 2020), <https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd>.

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

household names for police brutality.<sup>74</sup> These names evoked the terror and pain that police killings, a form of state violence, has continued to have on Black and Latino communities. From children to the elderly, pregnant women, immigrants, and others, no one is immune from state violence, especially if one is a minority.<sup>75</sup> After Mike Brown was shot and killed in 2014, the issue of police brutality once again came to the forefront, sparking protests, outrage, and disillusion with law enforcement.<sup>76</sup> Conversations about racial profiling, the criminalization of Black people and Latinos, and police brutality need to be engaged in more frequently and not only when a new example of police brutality occurs.

#### IV. TRACKING THE NUMBER OF VICTIMS OF STATE-SANCTIONED VIOLENCE

A significant problem with finding solutions to the issue of police brutality is that there is no reliable federal database of police killings.<sup>77</sup> The scope of police brutality is difficult to understand because many police departments have not been required to track the number of encounters where law enforcement agents use excessive or deadly force.<sup>78</sup> The killing of 18-year-old Michael Brown in 2014 in many respects forced the world to pay attention to the issue of police brutality in the U.S. Media outlets such as *Washington Post* and *TheGuardian.com* maintain databases of killings committed by police officers.<sup>79</sup> “Mapping Police Violence” is a database that dives into the circumstances and background of people who were killed by police officers and law enforcement agents.<sup>80</sup> “Mapping Police Violence” compiles its information on known police killings and “arrest-related deaths” based on information from *FatalEncounters.org*, *the U.S. Police*

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<sup>74</sup> Nicole Johnson, *Bell Family Relieves Son’s Death at Hands of Police With George Floyd’s Death*, PIX 11 (June 1, 2020), <https://www.pix11.com/news/unrest-in-america/bell-family-relives-sons-death-at-hands-of-police-with-george-floyds-killing>.

<sup>75</sup> Sinyangwe, *supra* note 18.

<sup>76</sup> Ivette Feliciano, *Michael Brown’s Death Echoes on Six Years Later*, PBS (Aug. 9, 2020), <https://www.pbs.org/newshour/show/michael-browns-death-echoes-on-six-year-later>.

<sup>77</sup> German Lopez, *There is No Good Official Data on How Many People Are Killed By Police Each Year*, VOX (Nov. 14, 2018), <https://www.vox.com/identities/2016/8/13/17938206/police-shooting-killing-data>.

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

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

<sup>80</sup> Sinyangwe, *supra* note 18.

*Shootings Database*, and *KilledbyPolice.net*.<sup>81</sup> “Mapping Police Violence” defines police killing as instances in which a person dies as a result of being beaten, restrained, shot, pepper-sprayed, tasered, or otherwise harmed by police Officers on-duty or off-duty, intentional or accidental.<sup>82</sup>

According to data compiled by “Mapping Police Violence,” 1166 people were killed by police officers in 2018.<sup>83</sup> Further, there have only been 22 days in 2018 where American police officers did not kill someone.<sup>84</sup> According to “Mapping Police Violence,” one Black person was killed by the police every 38 hours in 2015.<sup>85</sup> Black people are three times more likely than White people to be killed by cops.<sup>86</sup> The police killed over 1100 people in 2017, 25% were Black victims, despite Black people accounting for only 13% of the United States population. Black people, who are killed by the police, are more likely than Whites to be unarmed.<sup>87</sup> For example, in 2015, 30% percent of Black people killed by police Officers were unarmed as opposed to 21% of White victims.<sup>88</sup>

Other databases on police killings, such as *Washington Post’s* police shootings database, stated 987 people were killed by the police in 2018.<sup>89</sup> *Washington Post* began tracking police killings in 2015.<sup>90</sup> *Washington Post* compiles data on victims of police killings that include the victims’ race, gender, whether the person was unarmed or armed, and whether mental health issues played any role in the incident.<sup>91</sup> According to the media outlet, *Washington Post* compiles the information used in the database from “news reports, law enforcement websites and social media, and by monitoring independent databases such as Killed by Police and Fatal

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<sup>81</sup>*About the Data*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/aboutthedata/>.

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

<sup>83</sup> Sinyangwe, *supra* note 18.

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

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

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Fatal Force*, WASHINGTON POST, [https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm\\_term=.b0b6e5bb7a51](https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.b0b6e5bb7a51).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

Encounters.”<sup>92</sup> The Center for Disease Control and Prevention (CDC) found that Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group.<sup>93</sup> The CDC also found that Native Americans are also more than three times as likely to be killed by police than White people.<sup>94</sup> Black men are most likely to be killed by the police.<sup>95</sup>

Over the life course, about 1 in every 1,000 black men can expect to be killed by police. Risk of being killed by police peaks between the ages of 20 y and 35 y for men and women and for all racial and ethnic groups. Black women and men and American Indian and Alaska Native women and men are significantly more likely than white women and men to be killed by police. Latino men are also more likely to be killed by police than are white men.<sup>96</sup>

According to “Mapping Police Violence,” in 2017 “Officers were charged with a crime in only 13 of the cases where a police officer killed someone, which is the equivalent of one percent of all police killings.”<sup>97</sup> For 9 out of the 13 cases where an officer was charged with a crime, there was video evidence predominantly in the form of bystander video or dashcam footage.<sup>98</sup> A study by the Treatment Advocacy Center found that people with an untreated serious mental illness are 16 times more likely to be killed by law enforcement than those who do not have an untreated serious mental illness.<sup>99</sup> Further, the study found that “individuals with untreated severe mental illness are involved in at least 1 in 4 and as many as half of all fatal police

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

<sup>93</sup> Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html>.

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

<sup>95</sup> Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States – by age, race-ethnicity, and sex*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Aug. 20, 2019), <https://www.pnas.org/content/116/34/16793>.

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

<sup>97</sup> Samuel Sinyangwe et. al., *The Police Violence Report* (2020), <https://policeviolencereport.org/>.

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

<sup>99</sup> *People With an Untreated Mental Illness are 16 Times More Likely to Be Killed By Law Enforcement*, TREATMENT ADVOCACY CENTER, <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement->.

shootings.”<sup>100</sup> The staggering numbers of victims of state violence show this issue disproportionately affects Black people, people of color, and the most marginalized in the United States.<sup>101</sup>

## V. HOW LEGAL STANDARDS FOR LAW ENFORCEMENT USE OF EXCESSIVE AND DEADLY FORCE EXACERBATE RACIAL INJUSTICE

The law is categorically adverse and detrimental to the pursuit of justice and equality, when police officers are not held accountable when they use excessive force or unjustifiable lethal force. Police officers often evade accountability by arguing that they perceived a threat to themselves or others.<sup>102</sup> The Supreme Court has addressed the controversial issue of when a police officer is justified in using excessive force or deadly force against an individual in many different cases over the years.<sup>103</sup> The Supreme Court has often ruled that an officer can justifiably kill in a broad range of circumstances.<sup>104</sup> *Tennessee v. Garner*, *Graham v. Connor*, and *Kisela v. Hughes*, are Supreme Court cases that deal with police use of excessive and deadly force.<sup>105</sup> These cases lay out the standard for the use of excessive or deadly force by law enforcement.<sup>106</sup> In recent cases of police brutality that have captured the outrage of many, police officers have often escaped accountability despite public outrage and video evidence.<sup>107</sup> Law enforcement officers have often escaped accountability based on their subjective accounts of what happened and on their testimony of feeling scared, threatened, and convinced of the victim's dangerous nature.<sup>108</sup> Despite the standard set out by the Supreme Court, law enforcement agents, who have killed predominantly unarmed people of

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<sup>100</sup> *Id.*

<sup>101</sup> Sinyangwe, *supra* note 18; Sinyangwe et. al., *supra* note 95.

<sup>102</sup> Martel A. Pipkins, 'I Feared for My Life': Law Enforcement's Appeal to Murderous Empathy, SAGE (2019), <https://journals.sagepub.com/doi/pdf/10.1177/2153368717697103>.

<sup>103</sup> Martin A. Schwartz, *How the Supreme Court Enables Police Excessive Force*, LAW.COM (June 5, 2020), <https://www.law.com/newyorklawjournal/2020/06/05/how-the-supreme-court-enables-police-excessive-force/>.

<sup>104</sup> Totenberg, *supra* note 46.

<sup>105</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

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

<sup>107</sup> Totenberg, *supra* note 46.

<sup>108</sup> Pipkins, *supra* note 102.

color, have been allowed to kill without any accountability.<sup>109</sup> Further, the application of the doctrine of qualified immunity can also become a barrier to holding officers' conduct for unreasonable and unlawful conduct.<sup>110</sup>

Over 30 years ago, in *Tennessee v. Garner*, the Supreme Court of the United States considered “the constitutionality of the use of deadly force to prevent the escape of an unarmed suspected felon.”<sup>111</sup> Cleamtee Garner, the decedent's father, brought the wrongful death action, under 42 U.S.C. §1983 (2020) against the city of Memphis, Tennessee, the mayor, the Memphis Police Department, and Officer Elton Hymon, the officer who shot and killed his son. Respondent alleged that his son's civil rights had been violated, specifically his son's 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments rights. Officer Hymon, shot respondent's son in the back of the head, killing him, after arriving at a house the respondent's son had allegedly burglarized.<sup>112</sup> The respondent's son had stolen \$10 and a purse from a house.<sup>113</sup> Officer Hymon arrived at the house that was allegedly burglarized and saw the respondent's son near the fence in the backyard.<sup>114</sup> He used his flashlight, and, according to his own words, believed the petitioner's son to be 17 or 18, of slight build, and unarmed.<sup>115</sup> Hymon yelled “Police, Halt,” and then shot the respondent's son in the back of his head.<sup>116</sup> Hymon argued that his actions were justifiable under a Tennessee statute authorizing the use of deadly force to prevent the escape of a suspect.<sup>117</sup> The “Tennessee statute provide[d] that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, ‘the Officer may use all the necessary means to effect the arrest.’”<sup>118</sup>

Concerning deadly force, the Supreme Court held that “such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a

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<sup>109</sup> Totenberg, *supra* note 46.

<sup>110</sup> *Id.*

<sup>111</sup> *Garner*, 471 U.S. at 1.

<sup>112</sup> *Id.* at 3-4.

<sup>113</sup> *Id.* at 3.

<sup>114</sup> *Id.* at 3-4.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> *Id.* at 4.

<sup>117</sup> *Id.* at 5.

<sup>118</sup> *Id.* at 10-11.

significant threat of death or serious physical injury to the officer or others.”<sup>119</sup> The Supreme Court also found that shooting a fleeing suspect constitutes a seizure and shooting a fleeing suspect who is not dangerous is unreasonable.<sup>120</sup> Thus, under the 4<sup>th</sup> Amendment of the U.S. Constitution, any statute allowing for such a police practice was unconstitutional at the time of this case.<sup>121</sup> In determining the holding, the Supreme Court utilized a balancing test that considered the totality of the circumstances.<sup>122</sup> The Court also referenced the fact that at the time, the majority of police departments prohibited the use of deadly force against nonviolent suspects.<sup>123</sup> The Court held that “the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.”<sup>124</sup>

The *Garner* Court determined that Hymon’s actions were not justified because the officer “could not have reasonably believed that Garner--young, slight, and unarmed” Garner posed any threat.”<sup>125</sup> The Court found that prohibiting an officer from using deadly force where a fleeing suspect is unarmed and not dangerous does not increase crime or make officers’ jobs harder.<sup>126</sup> The Court also stated that burglary, albeit a serious crime, does not justify using deadly force.<sup>127</sup> The Court found Hymon acted solely to stop Garner from fleeing.<sup>128</sup> The Tennessee statute was held to be unconstitutional.<sup>129</sup> The Court held that the 4<sup>th</sup> Amendment prohibits the use of deadly force to prevent the escape of a suspected felon.<sup>130</sup>

*Graham v. Connor* is another case where the Supreme Court of the United States considered when an officer is justified in their use of excessive force.<sup>131</sup> This case stems from a stop of Petitioner Dethorne Graham by Officer Connor. Graham, a diabetic, “felt the onset of an

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<sup>119</sup> *Id.* at 3.

<sup>120</sup> *Id.* at 21.

<sup>121</sup> *Id.* at 22.

<sup>122</sup> *Id.* at 8.

<sup>123</sup> *Id.* at 10.

<sup>124</sup> *Id.* at 11.

<sup>125</sup> *Id.* at 21.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 22.

<sup>128</sup> *Id.* at 21.

<sup>129</sup> *Id.* at 22.

<sup>130</sup> *Id.* at 21.

<sup>131</sup> *Connor*, 490 U.S. at 388.

insulin reaction”<sup>132</sup> asked a friend to take him to a store so that he could purchase orange juice.<sup>133</sup> Arriving at a store, Graham realized the line was too long and left.<sup>134</sup> Connor witnessed Graham’s speedy entry and exit out of the store suspected him of suspicious behavior and thus followed the Graham’s car and eventually stopped him.<sup>135</sup> Graham alleged that during the stop Officer Connor used physical force against him which caused Graham to suffer various injuries, including, “a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claim[ed] to have developed a loud ringing in his ear.”<sup>136</sup> Petitioner brought the action under 42 U.S.C. §1983 (2020) alleging the Officers violated their constitutional rights.<sup>137</sup> In the opinion, Justice Rehnquist writes, “[t]his case requires us to decide what constitutional standard governs a free citizen’s claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other ‘seizure’ of his person.”<sup>138</sup> The Court held that excessive force claims should be analyzed under the objective reasonableness standard of the 4<sup>th</sup> Amendment and not under a substantive due process standard.<sup>139</sup> The 4<sup>th</sup> Amendment grants the right to be secure against unreasonable searches and seizures.<sup>140</sup> The Court writes that “[a]s in other Fourth Amendment contexts, however, the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the Officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>141</sup> Essentially the Court held that excessive force claims should first specify the constitutional rights that have allegedly been violated, and then the claims should be analyzed under the objective reasonableness standard of the 4<sup>th</sup> Amendment.<sup>142</sup> The Court also wrote the test for reasonableness “requires careful attention to the facts and

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<sup>132</sup> *Id.*

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

<sup>134</sup> *Id.* at 388-389.

<sup>135</sup> *Id.* at 380.

<sup>136</sup> *Id.* at 390.

<sup>137</sup> *Id.* at 388.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> U.S. CONST. Amend. IV.

<sup>141</sup> *Connor*, 490 U.S. 386 at 397.

<sup>142</sup> *Id.* at 388.

circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the Officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>143</sup> If this case serves as precedent, officers who shoot, kill, or use excessive force against civilians should face criminal charges if an objectively reasonable officer would not have deemed the suspect to be a threat to the officer or others.<sup>144</sup> Officers would then be required concrete credible testimony regarding the nature of the suspect’s behavior and why they did or did not consider them to be a danger.<sup>145</sup> In many ways, this case could afford individuals greater protection when interacting with law enforcement officials because an officer would not be able to subjectively claim a fear of the defendant.<sup>146</sup>

Laws that prevent officers from acting based on irrational fears or prejudice should be the standard used to assess an officer’s decision making and behavior in excessive and deadly force cases. However, a recent case takes away a level of protection that *Connor* afforded individuals.<sup>147</sup> In April 2018, the Supreme Court of the United States decided *Kisela v. Hughes*.<sup>148</sup> Amy Hughes brought an action against the Tucson Police Department for violation of her 4<sup>th</sup> Amendment rights related to an incident when a police Officer, Andrew Kisela, shot her outside of her residence.<sup>149</sup> A neighbor called the police and reported that someone was acting erratically and using a kitchen knife to cut down a tree.<sup>150</sup> When Officer Kisela (and eventually two other officers) arrived at the scene, they saw Hughes's roommate, Sharon Chadwick, who was standing outside of the residence and was separated from the officers by a chain-link fence.<sup>151</sup> Hughes subsequently came out of the residence holding a kitchen knife at her side.<sup>152</sup> Hughes walked closer to Chadwick, stopped no more than 6

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<sup>143</sup> *Id.* at 396.

<sup>144</sup> *Id.* at 397.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Hughes*, 138 S. Ct. at 1151.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1150.

<sup>150</sup> *Id.* at 1151.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

feet away, at which point the responding officers drew their guns.<sup>153</sup> The officers told Hughes, who had suffered from mental health issues, to drop the knife at least twice.<sup>154</sup> According to Hughes, Chadwick then told the officers and Hughes to “take it easy.”<sup>155</sup> Hughes “appeared calm but did not acknowledge the officers’ presence or drop the knife.”<sup>156</sup> Officer Kisela then crouched down and shot Hughes four times through the fence.<sup>157</sup> The officers argued that they all believed Hughes to subjectively pose a threat, specifically to Chadwick.<sup>158</sup> The Supreme Court held that an excessive force analysis under the 4<sup>th</sup> Amendment was not necessary, according to the doctrine of qualified immunity Kisela was entitled to.<sup>159</sup> The Court wrote that excessive force is an area of law that is heavily fact-dependent, “and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”<sup>160</sup> The Court went on to write, “[q]ualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”<sup>161</sup> “and that immunity protects all but the plainly incompetent or those who knowingly violate the law.”<sup>162</sup> The Court held that *Garner* and *Graham* did not establish clear authority as it relates to excessive force cases, outside an obvious case.<sup>163</sup> The Court in its opinion found “[t]his is far from an obvious case in which any competent Officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.”<sup>164</sup> The Court held that Officer Kisela’s actions were justified under the doctrine of qualified immunity.<sup>165</sup>

Justice Sotomayor’s dissent in *Kisela v. Hughes*, argues that this case allows officers to “shoot first and think later.”<sup>166</sup> She also

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1153.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1151.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1152.

<sup>160</sup> *Id.* at 1153.

<sup>161</sup> *Id.* at 1152.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1153.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1152.

<sup>166</sup> *Hughes*, 138 S. Ct. at 1162. (Sotomayor, J., dissenting).

argued that majority opinion ignored key facts as proffered by Hughes, whose account was to be considered in a light most favorable to her, as the case came to the Court on summary judgment.<sup>167</sup> Justice Sotomayor discussed how the majority opinion neglected to address: that the knife Hughes was holding was held face downwards and not pointed to Chadwick, that Hughes was not suspected of any crime, that the officers were responding to a check welfare call, that Hughes never raised the knife or threatened Chadwick.<sup>168</sup> Justice Sotomayor also wrote in her dissent that it was omitted from the opinion that Hughes may have not heard the officers' quick commands to drop the knife.<sup>169</sup> Chadwick also stated that she did not feel threatened by Hughes and that Hughes had never acted in a "threatening manner."<sup>170</sup> Justice Sotomayor, in her powerful dissent, writes that

"[t]he majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement Officers and the public. It tells Officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent."<sup>171</sup>

The above-referenced cases invoke the legal doctrine of qualified immunity. Qualified immunity shields police officers from civil liability where it is determined that they have not violated a "clearly established" constitutional rule or law.<sup>172</sup> The Supreme Court also addressed this doctrine in *Kisela*.<sup>173</sup> According to the Institute for Justice:

"Qualified immunity means that government officials cannot be held accountable for violating the Constitution

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<sup>167</sup> *Id.* at 1155.

<sup>168</sup> *Id.* at 1155-1156.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1162.

<sup>172</sup> Totenberg, *supra* note 46.

<sup>173</sup> *Hughes*, 138 S. Ct. at 1155-1156.

*Journal of Race, Gender, and Ethnicity*  
Volume 9 – May 2020

unless they violate a “clearly established” constitutional rule. In practice, that means that government officials can only be held liable if a federal court of appeals or the U.S. Supreme Court has already held that someone violated the Constitution by engaging in *precisely the same conduct* under *precisely the same circumstances*.”<sup>174</sup>

In many high-profile recent cases, officers were able to evade accountability by arguing that they perceived a threat. When Mike Brown was killed by Officer Wilson, Wilson characterized Michael Brown as a “demon” and “[...]a Hulk Hogan” like figure.<sup>175</sup> Wilson implied that Brown was immune to the bullets he shot into Brown that penetrated his body.<sup>176</sup> Furthermore, there have been many cases where unarmed people were killed by cops and yet still charges were not filed or there was no homicide conviction of the office in question. . On March 13, 2020, 26-year-old Breonna Taylor, an EMT, was shot and killed in her own home by Louisville Metro Police Department (“LMPD”) officers.<sup>177</sup> Breonna Taylor’s boyfriend believed that they were being subjected to a home invasion and subsequently shot a warning shot towards the ground with his licensed gun.<sup>178</sup> According to NAACP LDF, “[i]n response to Mr. Walker’s warning shot, LMPD officers Mattingly, Myles Cosgrove, and Brett Hankison discharged 32 rounds into the dark apartment, without identifying a target and without an ability to see where their bullets would land. Five of these rounds, fired by Sergeant Mattingly and Detective Cosgrove, and another projectile struck Ms. Taylor, with one causing her death. Of the remaining 27 rounds, former Detective Hankison fired 10.”<sup>179</sup>

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<sup>174</sup> *George Floyd and Beyond: How Qualified Immunity Enables Bad Policing*, INSTITUTE FOR JUSTICE (June 3, 2020), <https://ij.org/press-release/beyond-george-floyd-how-qualified-immunity-enables-bad-policing/>.

<sup>175</sup> Jamelle Bouie, *Michael Brown Wasn’t a Superhuman Demon*, SLATE (Nov. 26, 2014), <https://slate.com/news-and-politics/2014/11/darren-wilsons-racial-portrayal-of-michael-brown-as-a-superhuman-demon-the-ferguson-police-officers-account-is-a-common-projection-of-racial-fears.html>.

<sup>176</sup> *Id.*

<sup>177</sup> *Justice Denied: An Overview of the Grand Jury Proceedings in the Breonna Taylor Case*, NAACP LDF, [https://www.naacpldf.org/justice-denied-a-call-for-a-new-grand-jury-investigation-into-the-police-shooting-of-breonna-taylor/?gclid=CjwKCAiA1eKBBhBZEiwAX3gq12C4BHW6oszhV8cR38onV3eWt5ezAx1u\\_AVtcVZ7J0-3wLPXSWX0HBoCUIYQAvD\\_BwE](https://www.naacpldf.org/justice-denied-a-call-for-a-new-grand-jury-investigation-into-the-police-shooting-of-breonna-taylor/?gclid=CjwKCAiA1eKBBhBZEiwAX3gq12C4BHW6oszhV8cR38onV3eWt5ezAx1u_AVtcVZ7J0-3wLPXSWX0HBoCUIYQAvD_BwE).

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

<sup>179</sup> *Id.*

After a wave of protests regarding Taylor's killing, a stalled and political investigation process, only one of the involve officers, Brett Hankison, was convicted of wrongdoing related to Breonna Taylor's killing. Hankinson was charged with "wanton endangerment" for firing into a neighbor's apartment, and not for blindly shooting into Breonna Taylor's apartment and killing her, despite that she was not a suspect.<sup>180</sup> The shifting standards that the Supreme Court of the United States has set regarding the use of excessive and deadly force by police officers have important consequences on the way minorities live and experience the world. Precedent shows that despite the racist foundations of this country and the role the American legal system has played in entrenching and codifying systemic and unconscious racism, the law can and has taken steps to tackle the issue of police brutality.

## VI. COVERT FORMS OF STATE VIOLENCE

The United States has a long and enduring history of racial oppression that includes slavery, genocide, lynching, racist violent terrorism and contemporarily exists in both overt and covert forms. Racism affects every aspect of American society and can range from overt forms of systemic racism to racism that is expressed without conspicuous or easily provable racist intent. In *Brignoni-Ponce*, the Supreme Court considered the U.S. Border Patrol's authority to stop cars in areas near the Mexican border, specifically whether only stopping people who appeared to be of Mexican descent was lawful.<sup>181</sup> The Supreme Court upheld the Court of Appeals' holding that "the Fourth Amendment...forbids stopping a vehicle...unless the Officers have a 'founded suspicion' that the occupants are aliens illegally in the country."<sup>182</sup> This case highlights the racial profiling and disparate treatment Mexicans-Americans and Latinos have been subjected to in America. This case is an example of the continuing oppression Latinos and other people of color faced and continue to face in the country. Although the Court prohibited the discriminatory practice in 1975, there are many ways in which Latinos are discriminated against by

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<sup>180</sup> *Breonna Taylor: What Happened the Night of her Death?*, BBC (October 8, 2020), <https://www.bbc.com/news/world-us-canada-54210448>.

<sup>181</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

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

state actors or through conduct that the “state” has defended and justified.<sup>183</sup> Although this Note focuses on police brutality, other forms of oppression, such as the criminalization of Black people and people of color, the inhumane conditions detained immigrants are subjected to are deeply interconnected. Many citizens and residents of Latino descent are racially profiled and subjected to stops, searches, and seizures by the police for looking undocumented. Further, undocumented people have been subjected to monitoring, detention, and deportation for seemingly minor violations; such as running a red light.<sup>184</sup> The policies of the Immigration and Customs Enforcement, The Department of Homeland Security, and the U.S. Border Control perpetuates systematic racism against Latino and other immigrant populations through the countless examples of inhumane and discriminatory treatment of people targeted by agents of the U.S. government.<sup>185</sup> Immigrants have been demonized by politicians and media outlets, and this vilification perpetuates the cycle of state-sanctioned abuse against minority communities. People have been forced into detention centers on technicalities, or otherwise, have been subjected to inhumane conditions, such as not being able to shower, having to sleep on floors, physical abuse, sexual abuse, starvation, denial of medical care, separation from their children (and then not having their location known or disclosed by agents of the state).<sup>186</sup> Such occurrences are intertwined with state violence as United States’ immigration policies have historically benefitted white western Europeans over others, in terms of quotas and who are targeted for deportation.<sup>187</sup> In 2018, undocumented children, as young as five, were separated from their parents.<sup>188</sup> Many undocumented children were

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<sup>183</sup> *Brignoni-Ponce*, 422 U.S. at 873; Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018), <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Andrew Gumbel, ‘*They Were laughing at Us*’: *Immigrants Tell of Cruelty, Illness, and Filth in US Detention*, THE GUARDIAN (Sept. 12, 2018), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities>.

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

<sup>188</sup> Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, USA TODAY (July 2, 2018), <https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/>.

required to represent themselves in immigration court.<sup>189</sup> They were put into shelters with deplorable conditions or placed in foster homes where there have been allegations and evidence of abuse and mistreatment.<sup>190</sup> The outrage at these conditions are commendable; however, it is a demonstration of America's historical treatment and continuous mistreatment of people of color. During slavery, enslaved Africans routinely had their children forcefully taken away from them and sold to slave holders who would own the children as chattel and exploit them for personal gain.<sup>191</sup> Likewise, Native American children were also forcefully taken away from their families and forcibly stripped of their culture, language, land, rights, and more.<sup>192</sup>

During the candidacy and under the presidency of Donald Trump, Muslim bans were instituted, Muslims were demonized as potential terrorists, Mexicans were labeled rapists and criminals, and Black people were described by the President as living in dangerous neighborhoods where they kill each other. The systematic forms of oppression that Black people and people of color today face include employment and housing discrimination, being targeted by police for traffic stops and arrests, educational and health disparities, the wealth gap, and disproportionate rates of being targeted for police brutality, mass incarceration, and convictions.<sup>193</sup> Racial injustice in the United State is a reflection of the persistence of an intentionally stratified, racialized, hierarchical society. Systemic racism not only relegates Black and Brown people to second-class citizens it also forces Black and Brown people into the economic and social underclass as members of American society who are treated as if their lives do not matter.

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Barret Holmes Pitner, *We've Had Family Separation Before – It was Called Slavery & Jim Crow*, THE DAILY BEAST (June 30, 2018), <https://www.thedailybeast.com/weve-had-family-separation-before-it-was-called-slavery-and-jim-crow>.

<sup>192</sup> Ranjani Chakraborty, *How the U.S. Stole Thousands of Native American Children*, VOX (June 14, 2019), <https://www.vox.com/2019/10/14/20913408/us-stole-thousands-of-native-american-children>.

<sup>193</sup> *The Impact of Structural Racism on Black Americans*, CATALYST (Sept. 30, 2020), <https://www.catalyst.org/research/structural-racism-black-americans/>.

## VI. CONCLUSION

Individuals from politicians to community leaders, to ordinary people who care about police brutality, have protested, made demands, and proposed solutions to the enduring issue of police brutality in the United States.<sup>194</sup> Civilian complaint review boards, police departments' subjection to consent decrees, mandatory transparency of police officer misconduct records and implicit bias training, and psychological and mental health review and treatment for police officers, are just a few proposed solutions.<sup>195</sup> In New York, individuals outraged at police brutality have called for a complete repeal of Civil Rights Law 50-a, which shields police misconduct records from public view.<sup>196</sup> On June 12, 2020, New York Governor Cuomo signed several bills including a repeal of Civil Rights Law 50-a.<sup>197</sup> §50-a was a law that prohibited public disclosure of police disciplinary records.<sup>198</sup> One of the officers involved in the killing of Mr. Floyd, had 18 prior complaints against him, while another officer involved had 6 complaints against him at the time of Floyd's killing.<sup>199</sup> Requiring that police misconduct records are accessible to the public can reduce the number of officers who have a record of using excessive force against civilians.<sup>200</sup> Another key solution to ending police brutality is ending the doctrine of qualified immunity. Qualified immunity is "a judicial doctrine created by the Supreme Court that shields state actors from liability for their misconduct, even when they break the law."<sup>201</sup> This doctrine has been challenged in many courts and in various legislative bodies

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<sup>194</sup> Robin Levinson-King, *George Floyd Death: Seven Solutions to U.S. Police Problems*, BBC NEWS, <https://www.bbc.com/news/world-us-canada-52981634>.

<sup>195</sup> COPS Office, *The President's Task Force on 21<sup>st</sup> Century Policing Implementation Guide*, CENTER FOR POLICING EQUITY (2015), [https://policingequity.org/images/pdfs-doc/reports/TaskForce\\_FinalReport\\_ImplementationGuide.pdf](https://policingequity.org/images/pdfs-doc/reports/TaskForce_FinalReport_ImplementationGuide.pdf).

<sup>196</sup> Stephanie Wykstra, *The Fight For Transparency in Police Misconduct, Explained*, VOX (June 16, 2020), <https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Dakin Andone, Hollie Silverman & Melissa Alonso, *The Minneapolis Police Officer Who Knelt on George Floyd's Neck Had 18 Previous Complaints Against Him, Police Department Says*, CNN (May 29, 2020), <https://www.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html>.

<sup>200</sup> *Id.*

<sup>201</sup> *Qualified Immunity*, AMERICAN BAR ASSOCIATION (December 17, 2020), [https://www.americanbar.org/groups/public\\_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/](https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/).

throughout the United States.<sup>202</sup> The United States Supreme Court has refused to review several cases challenging qualified immunity.<sup>203</sup> Democrats in the U.S. Congress have proposed the comprehensive bill, the Justice in Policing Act of 2020.<sup>204</sup> The bill would “prohibit the use of chokeholds, lower legal standards to pursue criminal and civil penalties for police misconduct and ban no-knock warrants in drug-related cases. The plan would also create a national registry to track police misconduct.”<sup>205</sup> Only targeted local, state, and federal legislation that transforms how policing is conducted will begin to reduce the number of Black and Brown people killed by law enforcement. Policies, such as broken windows impose harsh penalties on individuals who commit minor infractions, individuals who are overwhelmingly Black and Brown.<sup>206</sup> Community oversight and shifting portions of the often bloated funding of police departments, departments that have in many cases been militarized, and instead adequately investing in marginalized communities needs are crucial to creating real change. The interconnection between historical and contemporaneous acts of racial terrorism is patently connected to other forms of racism that occur more often in the 21<sup>st</sup> century. Racism is the foundation of America. Police brutality predominantly affects Black people and people of color. However, it is an expression of the White supremacist foundations of this nation. While politicians denigrate Black people and immigrants as criminals and thugs, crimes against Black people and people of color often go ignored and these individuals and their families often never receive justice. Despite the racial progress made and the ways overt racism has been denounced, people of color are still depicted as dangerous and criminal. Part of the problem is the

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<sup>202</sup> *Id.*

<sup>203</sup> Debra Cassens Weiss, *Supreme Court Rejects Cases on Qualified Immunity Used to Shield Police Officers*, ABA J. (June 16, 2020), <https://www.abajournal.com/news/article/supreme-court-rejects-cases-on-qualified-immunity-used-to-shield-police-officers#:~:text=Supreme%20Court%20rejects%20cases%20on%20qualified%20immunity%20used%20to%20shield%20police%20Officers,-By%20Debra%20Cassens&text=Image%20from%20Shutterstock.com,.police%20Officers%20accused%20of%20misconduct.>

<sup>204</sup> Claudia Grisales, Susan Davis & Kelsey Snell, *Democrats Unveil Police Reform Legislation Amid Protests Nationwide*, NPR (June 8, 2020), <https://www.npr.org/2020/06/08/871625856/in-wake-of-protests-democrats-to-unveil-police-reform-legislation.>

<sup>205</sup> *Id.*

<sup>206</sup> Connor Friedersdorf, *Apply Broken-Windows Theory to the Police*, THE ATLANTIC (June 19, 2020), [https://www.theatlantic.com/ideas/archive/2020/06/apply-broken-windows-theory-police/613186/.](https://www.theatlantic.com/ideas/archive/2020/06/apply-broken-windows-theory-police/613186/)

enduring housing and school segregation in America. If Americans of different racial and ethnic backgrounds do not live and attend schools with one another, there are arguably fewer opportunities to combat prejudices against racial minorities.<sup>207</sup> These biases coupled with notions of White supremacy can lead to further entrenched discriminatory policies, laws, and practices.

In addition to systemic racism and oppression that perpetuate police brutality, media portrayal of Black people and people of color contribute to the criminalization of Black people and people of color. Media portrayal of people of color enables and perpetuates state-sanctioned violence. People of color are disproportionately depicted as perpetrators of crime rather than victims of crime. The media often reports drastically different framings of the same crime based on the race of the perpetrator.<sup>208</sup> American Progress writes that:

one study of late-night news outlets in New York City in 2014 found that the media reported on murder, theft, and assault cases in which black people were suspects at a rate that far outpaced their actual arrest rates for these crimes. The news media also vilifies black people by presenting black crime suspects as more threatening than their white counterparts. It does this in several ways, such as by showing the mug shots of black suspects more frequently than those of white suspects; depicting black suspects in police custody more often, and paying greater attention to cases where the victim is a stranger.<sup>209</sup>

American Progress also describes the similar ways in which Latinos are portrayed:

A study found that 66 percent of the time, news coverage between 1995 and 2004 showed Latinos in the context of

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<sup>207</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW* (Liveright 2017).

<sup>208</sup> *Race of Mass Shooters Influences How the Media Cover their Crime, New Study Shows*, THE CONVERSATION (July 27, 2018), <https://theconversation.com/race-of-mass-shooters-influences-how-the-media-cover-their-crimes-new-study-shows-100152>.

<sup>209</sup> Elizabeth Sun, *The Dangerous Racialization of Crime in U.S. News Media*, CENTER FOR AMERICAN PROGRESS (Aug. 29, 2018), <https://www.americanprogress.org/issues/criminal-justice/news/2018/08/29/455313/dangerous-racialization-crime-u-s-news-media/>.

either crime or immigration rather than in other contexts. More recent analysis confirms these findings. This treatment of Latinos as criminals and outsiders is especially concerning given that Latinos are otherwise rarely represented in the news media. A recent study found that between 2008 and 2014, stories focused on Latinos and issues concerning Latino communities composed just 0.78 percent of the coverage on national evening network news.<sup>210</sup>

The American Psychological Association published a study that showed that Black men are perceived as larger and more threatening than white men of the same height and weight.<sup>211</sup> John Paul Wilson, the lead author of the study, discussed his findings by writing: “Unarmed black men are disproportionately more likely to be shot and killed by police, and often these killings are accompanied by explanations that cite the physical size of the person shot.”<sup>212</sup> Wilson further stated that his “research suggests that these descriptions may reflect stereotypes of black males that do not seem to comport with reality.”<sup>213</sup> Wilson also found darker-skinned men with more stereotypical black features were subject to more biased size perceptions in the study.<sup>214</sup> Other studies have shown that black children are seen as less innocent than their white peers.<sup>215</sup> Depictions of racial minorities as criminal, immoral, dangerous, and the like have serious consequences for people of color. Combatting stereotypes that people have of Black people and people of color is a step towards reducing and eliminating police brutality and state-sanctioned violence. However, the law cannot legislate morality. Completely reforming police practices and procedures, and enacting pro-civilian legislation and legislation that targets bias and repeat

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<sup>210</sup> *Id.*

<sup>211</sup> *People See Black Men as Larger, More Threatening Than Same-Sized White Men*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Mar. 13, 2017), <https://www.apa.org/news/press/releases/2017/03/Black-men-threatening>.

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

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Jacqueline Howard, *Adults View Black Girls As ‘Less Innocent,’ New Report Says*, CNN (June 28, 2017), <https://www.cnn.com/2017/06/28/health/Black-girls-adultification-racial-bias-study/index.html>; *Black Boys as Older, Less Innocent Than Whites, Research Finds*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Mar. 6, 2014), <https://www.apa.org/news/press/releases/2014/03/Black-boys-older>.

offenders would lead to more justice. Further, as many have suggested, requiring officers to exhaust all other means before shooting would have an impact on reducing the number of police killings. Requiring that police engage in de-escalation tactics, broadening community policing, requiring warning shots, periodic implicit bias, and de-escalation training, ending policies such as broken windows, providing psychological services for police officers, and requiring civilian oversight boards are all steps that could lead to fewer incidents of police brutality and safer interactions between police officers and civilians, especially Black people and people of color. However, confronting and truly reckoning with the centuries of intentional and legal dehumanization and criminalization of Black people must occur to begin correcting historical wrongs and for the United States to begin on the path of providing Black people and people of color with real justice in this country.