2021

That is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform

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THAT IS ENOUGH PUNISHMENT: SITUATING DEFUNDING THE POLICE WITHIN ANTIRACIST SENTENCING REFORM

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[†] The Authors would like to dedicate this Article to Breonna Taylor and the other numerous Black lives that have been lost to violence at the hands of police officers. It is their sincere hope that this moment generates genuine systemic change that truly embraces the value of Black lives by protecting them from state-sanctioned terror.

INTRODUCTION: UNDERSTANDING CALLS TO DEFUND THE POLICE

During the summer of 2020, the police killings of George Floyd, Breonna Taylor, and others created a movement that unearthed a reality that Black people in the United States have always been aware of: systemic racism, in the form of police brutality, is alive and well. While the blatant brutality of George Floyd's murder at the hands of police is the flame,[1] the spark was ignited long ago. One need only review the record of recent years — the killings of Eric Garner, Michael Brown, Tamir Rice, Antwon Rose, Alton Sterling, Philando Castile, Breonna Taylor, and countless other souls have led to this particular season of widespread protests and organized demands for

1. *See* Oliver Holmes, *George Floyd Killing Sparks Protests Across US: At a Glance Guide*, GUARDIAN (May 30, 2020, 6:58 AM), https://www.theguardian.com/us-news/2020/may/30/george-floyd-protests-latest-at-a-glance-white-house [https://perma.cc/FHH5-L93D]. For an understanding of how George Floyd was killed, see Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/S8JE-T8E4].

change.[2] This is a historical moment of tremendous civil unrest, deemed by many as a revived Civil Rights Movement.[3]

While various reform-seeking legislative measures have been in process for the past several years, this particular moment is different and calls for a different response. Protests and demonstrations erupted on stages large and small, drawing attention to social justice issues.[4] From schools to small businesses to large corporations, institutions across the country issued statements pledging themselves and their finances to antiracism work.[5] As the focus turns from necessary protest to tangible progress, what remains unanswered is how best to proceed. Professor Ibram X. Kendi described antiracism as "a radical choice in the face of this history, requiring a radical reorientation of our consciousness."[6] One such "radical choice" is defunding the police.

Police defunding can follow many models, but two have emerged most prominently among activists and scholars. Under one, jurisdictions completely disband entire police departments, offering leaders the opportunity to begin afresh and draft community-led public safety prototypes that do not include police at all.[7] Under the other,

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2. *See* Alia Chughtai, *Know Their Names: Black People Killed by the Police in the US*, AL JAZEERA (Oct. 21, 2020), https://interactive.aljazeera.com/aje/2020/know-their-names/index.html [https://perma.cc/C5TX-GBNW]; Holmes, *supra* note 1.

3. *See* Valerie Strauss, *This Is My Generation's Civil Rights Movement*, WASH. POST (June 6, 2020, 6:00 AM), https://www.washingtonpost.com/education/2020/06/06/this-is-my-generations-civil-rights-movement/ [https://perma.cc/8BZG-24CS].

4. *See, e.g.*, Marc J. Spears, *'Black Lives Matter, People': How the NBA's Social Justice Efforts Dominated the Season*, UNDEFEATED (Oct. 12, 2020), https://theundefeated.com/features/how-the-nba-social-justice-efforts-dominated-the-season/ [https://perma.cc/W3QG-FAL3].

5. For a list of large businesses making such pledges, see Nivedita Balu & Aishwarya Venugopal, *Factbox: Corporations Pledge $1.7 Billion to Address Racism, Injustice*, REUTERS (June 9, 2020, 9:48 PM), https://www.reuters.com/article/uk-minneapolis-police-pledges-factbox/factbox-corporations-pledge-1-7-billion-to-address-racism-injustice-idUKKBN23H06S [https://perma.cc/SE77-KG65]. For an example of what educational institutions are doing, see *Law Deans Anti-Racism Clearinghouse Project*, ASS'N AM. L. SCHS., https://www.aals.org/antiracist-clearinghouse/ [https://perma.cc/T8PL-7FAU] (last visited Feb. 15, 2021).

6. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 23 (2019).

7. *See* Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html [https://perma.cc/D43B-ECVX]; Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html [https://perma.cc/HR6J-JWNU].

police departments' coffers are divested, to varying degrees, and funds are reallocated to various social services to reduce, but not wholly eliminate, police contact with the community.[8] While different, these models have been described as analogous, as both seek to shift sole responsibility for public safety away from police departments.[9]

Regardless of the ultimate design, the fundamental idea behind defunding the police is that the United States' system of policing is systemically racist and eradicating that racism requires dismantling. Diversion of police funding, which is often the most expensive line item of large cities' budgets,[10] would shift focus "away from surveillance and punishment, and toward fostering equitable, healthy, and safe communities."[11] Funding would instead be diverted to, among other things, strengthen crisis care capacity and hire and train social service workers, with the hope of decreasing negative interactions with police and bettering community relations.[12] In essence, the modern call to defund the police is actually "a call to reinvent our criminal justice system to better honor our national pledge of equal justice under the law."[13]

While there has been increased support for police reform and recognition of systemic racism throughout the country, the particular call to defund the police has created considerable controversy and has not reached widespread consensus.[14] Although the long-held belief in police "super powers" is crumbling,[15] the majority of Americans do not

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8. *See* Andrew, *supra* note 7; Searcey, *supra* note 7.

9. *See* Andrew, *supra* note 7.

10. *See* Carl Sullivan & Carla Baranauckas, *Here's How Much Money Goes to Police Departments in Largest Cities Across the U.S.*, USA TODAY (June 26, 2020, 7:00 AM), https://www.usatoday.com/story/money/2020/06/26/how-much-money-goes-to-police-departments-in-americas-largest-cities/112004904/ [https://perma.cc/Z8CX-BZ3P].

11. Annie Lowrey, *Defund the Police*, ATLANTIC (June 5, 2020), https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/ [https://perma.cc/HUX3-ZB8M].

12. *See* Sean Collins, *The Financial Case for Defunding the Police*, VOX (Sept. 23, 2020, 7:16 AM), https://www.vox.com/the-highlight/21430892/defund-the-police-funding-abolish-george-floyd-breonna-taylor-daniel-prude [https://perma.cc/CUZ4-LGX5].

13. Steven L. Hostetler & Andre B. Gammage, *OK Boomers, What's Going On?*, 64 RES GESTAE 19, 27 (2020).

14. *See* Nicole Goodkind, *The Vast Majority of Americans Don't Want to Defund the Police*, FORTUNE (July 9, 2020, 2:58 PM), https://fortune.com/2020/07/09/defund-the-police-poll-most-americans-oppose-defunding-police-departments/ [https://perma.cc/N363-V2J5].

15. *See* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1451 (2016).

support wholesale defunding and instead advocate for specific reforms;[16] 35% of participants in a 2020 Pew study recorded that the police use the correct amount of force in every situation, compared to 45% in 2016.[17] Likewise, the share of people who believe police treat racial and ethnic groups equally dropped from 47% in 2016 to 34% in 2020, and the share of those who thought the justice system should hold officers accountable when misconduct occurs rose to 44% in 2020, compared to 31% in 2016.[18] A 2018 poll found that two-thirds of people in the United States support banning chokeholds.[19]

Most Americans do support disciplining police misconduct and lessening protections against legal action.[20] Seventy-four percent of Americans believe that police violence against the public is a problem, and 42% believe it is a major problem.[21] Nevertheless, only 25% of Americans endorse decreased spending on police forces.[22] In many ways, polling reveals a public misunderstanding of what defunding the police actually means. Polls indicate that people balk at the term "defund the police" but appear more open if directly asked if they support shifting money allocated to police toward specific social services.[23]

This Article argues that discomfort with defunding the police is misplaced. Understanding policing as a form of punishment clarifies

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16. *See Poll: Voters Oppose 'Defund the Police' but Back Major Reforms*, POLITICO (June 17, 2020, 4:30 AM), https://www.politico.com/news/2020/06/17/poll-voters-defund-police-reforms-324774 [https://perma.cc/2YAM-Y4ZQ].

17. *See Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020) [hereinafter *Power to Sue Police Officers*], https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/C2BA-KCSU].

18. *See id.*

19. *See* HENRY J. KAISER FAM. FOUND., KFF HEALTH TRACKING POLL — JUNE 2020 (2020), http://files.kff.org/attachment/Topline-KFF-Health-Tracking-Poll-June-2020.pdf [https://perma.cc/9G4N-7MLH].

20. Two-thirds of Pew respondents and three-quarters of Kaiser participants responded affirmatively. *See id.*; *Power to Sue Police Officers*, *supra* note 17.

21. *See* HENRY J. KAISER FAM. FOUND., *supra* note 19.

22. *See Power to Sue Police Officers*, *supra* note 17.

23. *See* Giovanni Russonello, *Have Americans Warmed to Calls to 'Defund the Police'?*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/07/03/us/politics/polling-defund-the-police.html [https://perma.cc/B9VE-NLKD].

how reforming policing — including defunding the police — fits within the broader, more widely accepted sentencing reforms that have taken place in recent years. The Supreme Court has refused to recognize policing as punishment, and several scholars have commented on the Court's failure to do so.[24] Adding to this conversation, this Article asserts that policing is punishment and demonstrates that policing reform is rightly situated within discussions of overall sentencing reform. Sentencing reform supported on both sides of the political aisle recognizes that jurisdictions have spent money on incarceration but have not actually accomplished punishment goals. When resources are re-directed to support legitimate punitive goals better, then not only are resources saved but also systemic racism can be addressed.

As it stands, purposeless punishment[25] only serves to support institutional bias. The same is true for retaining the current system of policing. Once one understands that the current policing model in the United States facilitates purposeless punishment, its only remaining plausible objective is to sustain a system of racial oppression. To truly begin eradicating racism in policing, it is imperative to place policing reform in the broader context of sentencing reform and begin approaching all forms of punishment with an antiracist lens.

Part I of this Article addresses the racist roots of policing in the United States and explores how racism is evident in police funding structures. It explains the racial trauma associated with policing practices and argues that defunding and restructuring policing is necessary for rebuilding a shattered democracy. Part II confronts the Supreme Court's traditional Fourth Amendment analysis of excessive force claims against police officers to reveal the failures of that approach, examining the cases of Breonna Taylor, Michael Brown, and other Black people who have been killed by the police. Through these tragic cases, the inadequacy of treating police use of force only under a Fourth Amendment seizure analysis is strikingly evident. Part III

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24. For a description of the Court's error in not recognizing that the use of force by police can be a form of punishment, see Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L.Q. 3, 36–50 (2020). *See also* Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987 (2015) [hereinafter Jefferson Exum, *Death Penalty on the Streets*].

25. The term "purposeless punishment" is meant to refer to punishment that does not serve any of the recognized penological goals: incapacitation, incarceration, rehabilitation, deterrence, or retribution. For a discussion of how sentencing laws often lead to purposeless punishment, see Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014) [hereinafter Jefferson Exum, *Forget Sentencing Equality*].

develops the argument that the courts should treat certain actions by police as punishment subject to Eighth Amendment protection. Part IV connects this punishment view of policing to sentencing reform efforts to support the view that reforming policing fits within the punishment reform context. Because recent sentencing reforms have not adequately addressed systemic racism, Part V ends this Article by discussing the flaws in sentencing reform and the work that still needs to be done to address racism in all types of state-imposed punishment — including policing.

I. POLICING IN THE UNITED STATES: SYSTEMIC RACISM, RACIAL TRAUMA, AND THE NEED TO REBUILD DEMOCRACY

It is no secret that U.S. policing is systemically racist. The U.S. policing model is to target discriminatorily, surveil persistently, prosecute fervently, and punish vigorously. This includes using deadly force against individuals through a variety of means, but most frequently by shooting.[26] In 2019, police officers fatally shot 999 people.[27] Unsurprisingly, the bulk of the oppressive effects of this "punitive and primitive,"[28] heavy-handed approach to criminal justice is borne by Black people.[29]

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26. "Lethal force includes shooting of firearms, chokehold, strangulation, stun guns aka Tasers, shooting rubber bullets, attack dogs, the injection of ketamine, aggravated assault, simple battery, no-knock raids, and failing to come to a person's aid in a timely manner." Crusto, *supra* note 24, at 6 n.21; *see also The Counted: People Killed by Police in the US*, GUARDIAN [hereinafter *The Counted*], https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database [https://perma.cc/RWS8-B596] (last visited Jan. 13, 2021); MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org [https://perma.cc/6ESQ-3HPN] (last visited Jan. 13, 2021) (providing a database of the forms of officer-caused death, the majority of which are from gun violence).

27. *See Fatal Force: 999 People Were Shot and Killed by Police in 2019*, WASH. POST (Aug. 10, 2020) [hereinafter *Fatal Force*], https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/ [https://perma.cc/6G2K-SBWZ].

28. *See* Hostetler & Gammage, *supra* note 13, at 27.

29. *See The Counted*, *supra* note 26; *Law Enforcement and Violence: The Divide Between Black and White Americans*, ASSOCIATED PRESS & NORC [hereinafter *Law Enforcement and Violence*], https://apnorc.org/projects/law-enforcement-and-violence-the-divide-between-black-and-white-americans/ [https://perma.cc/XD7Z-QWKF] (last visited Feb. 3, 2021); *see also* Ryan Gabrielson, Eric Sagara & Ryann Grochowski Jones, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), https://www.propublica.org/article/deadly-force-in-black-and-white [https://perma.cc/SE75-W39A].

A. U.S. Policing Is Systemically Racist

Police officers kill Black people at more than twice the rate of white people.[30] These racially disparate outcomes are no surprise given the roots of policing in the United States. Proponents of police defunding rely, in part, on U.S. policing's origin story and historical ties to slavery in arguing for a complete overhaul of policing.[31]

i. The Racist Roots of Policing

It is well-documented that modern policing's ancestry lies in slave patrols.[32] During slavery, "[t]he use of race as a 'free-floating proxy' for criminality" was a necessary social control and manipulation tool and indispensable in upholding "the de facto and de jure unequal social relationships arising out of slavery."[33] In short, "[p]olice have long been the face of oppression to Black people."[34] Policing in the South was forged from slave patrols, while policing in non-slave states emerged as an effort to control and regulate the lives of free Blacks whom they considered dangerous.[35] In the South, slave patrols, whose power derived from restrictive slave codes, wielded unlimited authority over Black bodies.[36] Their tasks were to "terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules."[37] As a result, "[s]ince America's founding, this assumption of dangerousness subjected free Blacks to constant scrutiny and invasion of privacy by white authorities."[38] Professor William Carter, Jr. acknowledged the racist underbelly of policing in labeling modern-day racial profiling as a "'badge and incident' of slavery."[39] He wrote of the stigma of

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30. *See, e.g.*, *The Counted*, *supra* note 26; Gabrielson et al., *supra* note 29; *Law Enforcement and Violence*, *supra* note 29.

31. *See* Andrew, *supra* note 7.

32. *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combatting Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 56–57 (2004); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200, 206 (2020).

33. Carter, Jr., *supra* note 32, at 56–57.

34. Hasbrouck, *supra* note 32, at 210.

35. *See id.* at 206.

36. *See id.*

37. *Id.*

38. *Id.* at 208.

39. *See* Carter, Jr., *supra* note 32, at 86 n.358 (quoting Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 851 n.295 (1998)).

dangerousness and criminality that, incident to slavery's legacy, automatically attaches to Blackness. The stain is permanent, burdensome, and cannot be overcome by "high personal achievement," "education," "wealth," or "personal appearance."[40] In his words, "racial profiling is a modern manifestation of the historical presumption, still lingering from slavery, that African Americans are congenital criminals rightfully subject to constant suspicion because of their skin color."[41] He further wrote:

> [T]he legally enforced stereotype of black criminality has a particularly injurious effect on African Americans, given their history of enduring legally enforced and officially sanctioned enslavement, apartheid and mistreatment. The image in the collective white mind of blacks (particularly black men) as congenital criminals is perhaps the most deeply entrenched stereotype pervading the black-white relationship in America. The pervasiveness of this assumption reveals that it rests upon deeply rooted historical attitudes and is not simply the result of individual racial bias. . . .
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> This stigma remains one that African Americans cannot escape, regardless of their individual circumstances.[42]

Professor Carter identified that the "pervasive and indiscriminate" stigma of criminality associated with Blackness is no accident. Rather, it is the living legacy of slavery and its progeny — systemic racism. The entrenched racism that anchors the foundations of policing must be unearthed and wholly dismantled. Identifying some underlying core contributions to the bloating of police budgets is integral to understanding the urgent call to defund.

ii. Police Funding Is Systemically Racist

Like the genesis of policing itself, the justification for exorbitant spending on police budgets is also steeped in racism. Scholars note that the rise in federal aid to police departments was not coincidental. An examination of racial threat theory demonstrates this. Racial threat theory posits that "[l]ocal increases in racial minority populations are thought to pose threats to the political standing, economic power, and physical safety of white citizens, who respond by lobbying local government for increased social control."[43] Such lobbying has resulted

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40. *Id.* at 25.
41. *Id.* at 56.
42. *Id.* at 24–25.
43. Robert Vargas & Philip McHarris, *Race and State in City Police Spending Growth: 1980 to 2010*, 3 SOCIO. RACE & ETHNICITY 96, 96 (2017).

in increased spending on police budgets. Per racial threat theory, white people understand the growth of communities of color as potentially threatening to their interests and respond by urging for increased crime controls.[44] Recent studies demonstrate the systemic nature of racial threat and spending and suggest that "racial threat operates not only through how local governments socially control racial minorities but also through relationships between local and federal government that help cities afford such social control efforts."[45]

The efforts to advance the Violent Crime Control and Law Enforcement Act of 1994 (Clinton Crime Bill), a "well-documented" failure,[46] is one example of this. For the past 20 years, the Clinton Crime Bill has been responsible for boosting police budgets and keeping city police departments afloat during times of financial distress. [47] The Clinton Crime Bill established the Office of Community Oriented Police Services (COPS), which allocated grants of varying sizes to municipalities to purchase equipment, move officers from desk duty to the streets, and create community policing programs.[48] The Clinton Crime Bill is also credited with injecting over $8 billion into budget coffers to hire more police officers.[49] Today, it is known as one of the major drivers of mass incarceration.[50]

Supporters of the Clinton Crime Bill utilized racialized language emphasizing inherent Black criminality to justify passage and urge support,[51] including "references to fear of Black crime in the wake of racially motivated riots in Los Angeles and New York" and a call "to 'restore order in society.'"[52] This type of pressure from national leaders often "trigger[s] local feelings of threat in the majority population."[53] Here, the result was the construction of more jails and prisons and the passage of a myriad of laws that significantly increased

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44. *See id.* at 97.

45. *Id.* at 105.

46. *See* ED CHUNG, BETSY PEARL & LEA HUN, CTR. FOR AM. PROGRESS, THE 1994 CRIME BILL CONTINUES TO UNDERCUT JUSTICE REFORM — HERE'S HOW TO STOP IT 1 (2019), https://cdn.americanprogress.org/content/uploads/2019/03/29084647/CrimeBill-PublicSafety-brief-final.pdf [https://perma.cc/757H-GVKF].

47. The other source of funding is emergency preparedness funds from the Department of Homeland Security. *See* Vargas & McHarris, *supra* note 43, at 98.

48. *See id.* at 99.

49. *See id.* at 98–99.

50. *See* CHUNG ET AL., *supra* note 46, at 1.

51. *See* Vargas & McHarris, *supra* note 43, at 99.

52. *Id.* (internal citations omitted).

53. *Id.*

incarceration lengths and extinguished opportunities for early release.[54] The Clinton Crime Bill cost taxpayers an overwhelming sum of money[55] and ushered in an era of discriminatory, ineffective, and inefficient punishment of Black men.[56]

Like the Clinton Crime Bill, the current pro-America (and pro-white) atmosphere, whose fire has been stoked by a president,[57] motivates racial threat, particularly perceived threats to white financial or political interests.[58] Racial threat theory offers that white perceptions of communities of colors' encroachment upon white economic resources lead to initiatives aimed at preserving the white status quo and white economic dominance, even in the form of increased police spending.[59]

The result of this fear-based police spending over time is unsustainable costs to state and local governments. In 35 of the 50 most populous U.S. cities, police department appropriations generally account for the largest budget allotment; local annual police budgets can range from $100 million to over $5 billion, often outsizing social services spending.[60] For example, in New Orleans, police spending accounts for 17% of the city budget — approximately $194 million[61] — compared with $56 million budgeted for community development.[62] Chicago's 2020 budget predicted police budget expenditures of $2 billion, 15% of the city budget.[63] In 2017, state and local government spending across the United States totaled $114 billion on police forces alone.[64]

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54. *See* CHUNG ET AL., *supra* note 46, at 1.

55. *See id.*

56. *See id.*

57. *See, e.g.*, Jeff Maskovsky, *Towards the Anthropology of White Nationalist Postracialism*, 7 HAU 433, 433 (2017); Joe Hagan & Emily Jane Fox, *"Nationalism Will Run Roughshod over Democracy": What Can Nazi Germany Tell Us About Trump's GOP?*, VANITY FAIR (Sept. 18, 2020), https://www.vanityfair.com/news/2020/09/what-can-nazi-germany-tell-us-about-trumps-gop [https://perma.cc/L68R-DA6W]; Clarence Page, *Trump Wants to Be Called a 'Nationalist,' but by Which Meaning?*, CHI. TRIB. (Oct. 24, 2018, 7:35 PM), https://www.chicagotribune.com/columns/clarence-page/ct-perspec-page-trump-charles-degaulle-nationalist-globalism-davos-1025-20181024-story.html [https://perma.cc/5GWE-N8PD].

58. *See* Vargas & McHarris, *supra* note 43, at 97.

59. *See id.*

60. *See* Sullivan & Baranauckas, *supra* note 10.

61. *See id.*

62. *See id.*

63. *See* Collins, *supra* note 12.

64. *See id.*

Increased police spending does not equal safer streets. In 2018, police officers arrested or killed 62% of murder suspects[65] and closed 53% of aggravated assault cases, 30% of robbery cases, and 33% of rape cases.[66] Despite increased spending, these rates of solved crimes, known as clearance rates, have remained roughly identical for decades.[67] Rather than spending resources to reduce crime, governments have been wasting resources on perpetuating racial trauma.

B. Policing and Racial Trauma

U.S. policing, with its focus on racial profiling and racially biased enforcement strategies,[68] regularly inflicts trauma on Black people and "undermines effective policing."[69] As a result of racial profiling, Black people deemed criminals experience "fear, anxiety, humiliation, anger, resentment, and cynicism."[70] In addition to these more well-documented destructive repercussions of police misconduct and racial profiling, the perpetual trauma that Black people suffer at the hands of the police provides another justification for a complete revamping of the police system. The trauma that Black people in the United States endure should be viewed as punishment that warrants Eighth Amendment protection.

This Article uses the term "cultural trauma" to describe the traumatic stress and mental and psychological impact that Black people suffer as a result of the relentless effects of systemic oppression, discrimination, and racism.[71] Cultural trauma is a socially permitted phenomenon that "occur[s] when groups endure horrific events that

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65. *Id.*

66. *Id.*

67. *See id.*

68. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 589–90 (S.D.N.Y. 2013) (finding that the New York City Police Department was liable for a consistent practice of racial profiling as well as unconstitutional stops); Darius Charney, *Stop-and-Frisk Report: NYPD Racial Bias Persists*, CTR. FOR CONST. RTS. (Dec. 16, 2019), https://ccrjustice.org/home/press-center/press-releases/stop-and-frisk-report-nypd-racial-bias-persists [https://perma.cc/5CSA-ZLF9].

69. *See* Carter, Jr., *supra* note 32, at 24.

70. S. 989, 107th Cong. (2001).

71. *See* Thema Bryant-Davis, *Healing Requires Recognition: The Case for Race-Based Traumatic Stress*, 35 COUNSELING PSYCH. 135, 135 (2007); Robert T. Carter et al., *Race-Based Traumatic Stress, Racial Identity Statuses, and Psychological Functioning: An Exploratory Investigation*, 48 PRO. PSYCH. 30, 30 (2017).

forever change their consciousness and identity."[72] In encountering cultural trauma, members of a group are collectively subjected to an atrocious, disturbing event that permanently scars group consciousness, "marking their memories forever and changing their future identity in fundamental and irrevocable ways."[73] Due to the United States' burdensome and overwhelming history of discrimination against minority groups, communities of color often experience shared trauma, transmitted collectively and intergenerationally over time.[74] This is especially true for Black people in the United States, who endure routine, systemic oppression and "chronic exposure to racism" daily.[75]

Cultural trauma is birthed from monumental historical events that affect entire communities, such as "the enslavement of African Americans; the displacement, murder, and loss of culture and land of American Indians; the murder and torture of Jews in the Holocaust; war; famine; mass incarceration; and forced separation from one's family."[76] It requires a collective, disruptive memory that, in turn, forms the group's identity. For Black people, that shared, disruptive memory is slavery. While slavery was officially abolished in the United States with the passage and subsequent ratification of the Thirteenth Amendment in 1868, its memory endures through continued discrimination, degradation, humiliation, and oppression.

While the vestiges of slavery and its progeny Jim Crow survive in the form of institutionalized racism at every level of U.S. society, the actual memory of slavery remains as the major force that unifies Black people as a racial group.[77] In this way, it is the collective remembrance of slavery, not its experience, bolstered by slavery's permanent legacy of oppression, which produces cultural trauma in the Black community.[78] Thus, Black people are doomed to coexist daily with discrimination

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72. Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 335 (2016).

73. *Id.* at 336.

74. *See* Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 N.Y.U. L. REV. 766, 796 (2020).

75. *See id.* (citing Kenneth V. Hardy, *Healing the Hidden Wounds of Racial Trauma*, 22 RECLAIMING CHILD. & YOUTH 24, 25 (2013)).

76. *Id.*

77. *See* Onwuachi-Willig, *supra* note 72, at 339. "It [is] the remembrance or memory of slavery — 'traumatic in retrospect' . . . that serve[s] as a foundation for uniting the racial group." *Id.*

78. *See id.*

and perpetually "primed for a traumatic response."[79] Research even suggests that continual exposure to such trauma can affect DNA structure, "adding a potential biological link to the mix,"[80] such that cultural trauma "come[s] to reside in the flesh [of Black people] as forms of memory reactivated and articulated at moments of collective spectatorship."[81]

Unlike other recognized traumas, cultural trauma often assumes a two-tiered posture, with one model appearing as more active or pronounced than the other. However, both models emerge routinely and are considered commonplace. In its more latent form, cultural trauma does not require physical stressors to reveal itself.[82] In its more active form, cultural trauma disrupts incessant background trauma, thereby augmenting the trauma narrative that Black people must navigate.

i. Background Cultural Trauma

For Black people, background cultural trauma acts as the backdrop to everyday life. It manifests as a "pattern of racist events . . . across the life domains of minority citizens . . . [that] requires ongoing coping and expenditures of psychic energy."[83] "It provides a more precise description of the psychological consequences of interpersonal or institutional traumas motivated by the devaluing of one's race," even in the absence of physical contact.[84] As a result of three centuries of slavery, succeeded by an additional one hundred years of legally sanctioned violence and segregation in the form of Jim Crow, Black people have consistently experienced racist stereotyping, wealth disparities, education inequities, residential segregation, police brutality, mass incarceration, and a host of other race-based

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79. Thema Bryant-Davis & Carlota Ocampo, *The Trauma of Racism: Implications for Counseling, Research, and Education*, 33 COUNSELING PSYCH. 574, 575 (2005).

80. Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 NEV. L.J. 227, 244 (2018).

81. Onwuachi-Willig, *supra* note 72, at 336.

82. *See* Bryant-Davis, *supra* note 71, at 137; Robert T. Carter, Katherine Kirkinis & Veronica E. Johnson, *Relationships Between Trauma Symptoms and Race-Based Traumatic Stress*, 26 AM. PSYCH. ASS'N 11, 16 (2020).

83. Thema Bryant-Davis & Carlota Ocampo, *Racist Incident-Based Trauma*, 33 COUNSELING PSYCH. 479, 483 (2005) [hereinafter Bryant-Davis & Ocampo, *Racist Incident-Based Trauma*].

84. Bryant-Davis, *supra* note 71, at 137.

indignities.[85] Due to the persistence of racism in the United States, Black people live against the backdrop of unceasing cultural trauma that is continually "aggravated, reinforced, and reintroduced."[86]

The aforementioned devaluing is implanted in the very fiber of our society in the form of deep-seated, systemic racism, which creates "daily minitraumas," derived from "out-group status and de facto segregation such as . . . being denied promotions, home mortgages, or business loans; being a target of a security guard; or being stopped in traffic."[87] Though appearing seemingly unrelated to race at first glance, these occurrences are far from racially ambiguous. These forms of racism are ingrained and coincide with societal and political structures that preserve the status quo, such as the police.[88] For Black people, coping with unwarranted, inexplicably incessant racism is a way of life. Though incredibly painful, it is, quite simply, ordinary. This type of present-day background cultural trauma slowly steeps into the consciousness of those who suffer it and does not possess the jolting suddenness that ordinarily marks trauma.[89] Though it originates from slavery, it currently arises and resides in familiar and habitual society-, community-, and government-sanctioned subordination, including racial profiling and police brutality.[90]

ii. Cultural Trauma from the Routine

The second, more active type of cultural trauma — cultural trauma from the routine — suggests that even though Black people live with background trauma, it is possible to experience increased traumatic episodes triggered by that which is expected or routine. Three elements must be present for cultural trauma from the routine to materialize:

> (1) [A]n established history or accumulation of the routine harm for the trauma group; (2) widespread media attention, usually based on preceding events, that brings regional, national, or international attention to the occurrence of the routine harm; and (3) public discourse . . . about the meaning of the routine harm, which consists

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85. *See* Robert T. Carter et al., *Racial Discrimination and Health Outcomes Among Racial/Ethnic Minorities: A Meta-Analytic Review*, 45 J. MULTICULTURAL COUNSELING & DEV. 232, 232–33 (2017).

86. Sanders, *supra* note 80, at 243.

87. Bryant-Davis & Ocampo, *Racist Incident-Based Trauma*, *supra* note 83, at 483.

88. *See id.*

89. *See* Onwuachi-Willig, *supra* note 72, at 338.

90. *See id.* at 336.

> of public or official affirmation of the subordinated group's marginal status.[91]

When all three aforementioned factors converge, the ongoing, background cultural trauma narrative widens and works to publicly retraumatize the group in question such that they are reminded, by the exposed shame of highlighting their subordinated status, that they have not yet won society's respect nor any of its attendant rights and privileges.[92] The cultural trauma from the routine "reignites the subordinated group's consciousness of its second-class citizenship and punctuates its already existing distress and suffering, thereby causing such tensions and pains to boil over and lay a foundation for the development of a cultural trauma narrative."[93]

Black people face all three factors for creating cultural trauma from the routine. First, the history of discrimination against Black people in this country is robust and well-documented, and Black people have learned to cope with and have come to expect discrimination. Second, the killings of George Floyd, Breonna Taylor, and countless others at the hands of police have engendered incredible national media attention, reminding the entire country of the disregard that police have for Black lives.[94] These police-initiated killings also prompt us to recall that Black people, especially men, have been regarded, perpetually, as violent, criminal-minded, and amoral — worthy of being deemed guilty without process.[95] Such stereotypes are the remnants of slavery.[96] Third, the active movements to eliminate racism and bias in all its forms throughout the country, though aimed at alleviating oppression, simultaneously remind society of the subordinated position Black people hold in the United States.[97]

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91. *Id.* at 346.

92. *See id.* at 336–37.

93. *Id.* at 337.

94. *See* Laurin-Whitney Gottbrath, *In 2020, The Black Lives Matter Movement Shook the World*, AL JAZEERA (Dec. 31, 2020), https://www.aljazeera.com/features/2020/12/31/2020-the-year-black-lives-matter-shook-the-world [https://perma.cc/5LHS-32V3].

95. *See* Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 6 (2012).

96. *See* CalvinJohn Smiley & David Fakunle, *From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T. 350, 352 (2016).

97. At times, efforts to eliminate racism or the effects of racism come with failures that reminds us of the oppressed position that Blacks hold in the United States. *See, e.g.*, Tony Norman, *Tony Norman: Another Sticky Development at Allegheny County*

George Floyd's death disrupted the daily background cultural trauma that Black Americans face and thrusted it into the spotlight in a welcoming and highly retraumatizing way. The cultural trauma that Black Americans must suffer from the routine experience of police brutality is more than debilitating — it is, quite simply, exhausting.

The oppression that Black Americans face daily may be described as "a process of dehumanization that creates social and physical isolation, as well as lack of access and blocked opportunities in education, employment, health, and sociopolitical status."[98] Cultural trauma is a cognizable pain that, through targeted and deliberate measures, can be successfully interrupted.[99] It must be noted that the change sought is not only for an end to police brutality — that is but the impetus — the change sought is an appeal for the abolishment of institutionalized racism. That can begin with defunding the police as a part of reforming punishment as a whole. The integrity of the entire criminal justice system demands such change.

C. Rebuilding Democracy

In addition to the harm exacted on specific individuals and communities of color, racial profiling and police brutality also "damage[] law enforcement and the criminal justice system as a whole by undermining public confidence and trust in the police, the courts, and the criminal law."[100] Mistrust in the overall system is no trivial

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Common Pleas Court, PITTSBURGH POST-GAZETTE (Feb. 7, 2020, 12:00 AM), https://www.post-gazette.com/opinion/tony-norman/2020/02/07/Mark-Tranquilli-Juror-heroin-Black-History-Month-CMU-neighborhoods-Michigan-State-University/stories/202002070044 [https://perma.cc/PHJ9-63CQ] (Carnegie Melon University posted a map of Pittsburgh online for its prospective students that excluded all historically Black neighborhoods). In other instances, the effort to sanction racist behavior itself opens wounds caused by racism. *See, e.g.*, Anthony Conroy, *PA's Legislative Black Caucus Demands Investigation of Allegheny County Judge, Alleged Racist Comments*, PITTSBURGH POST-GAZETTE (Feb. 12, 2020, 12:37 PM), https://www.post-gazette.com/news/crime-courts/2020/02/12/PA-black-legislative-caucus-investigation-Allegheny-County-judge-Mark-Tranquilli-racist-comments/stories/202002120118 [https://perma.cc/C8W3-TERE].

98. Carter et al., *supra* note 85, at 232–33.

99. *See, e.g.*, Nia West-Bey, *Young Minds Matter: Historical and Cultural Trauma*, CTR. FOR L. & SOC. POL'Y (Oct. 9, 2019), https://www.clasp.org/blog/young-minds-matter-historical-and-cultural-trauma [https://perma.cc/X7FC-5DWR].

100. End Racial Profiling Act, S. 989 § 2(a)(9), 107th Cong. (2001). The Pennsylvania Legislative Black Caucus (PLBC) called for the State's Judicial Conduct Board to investigate racist comments allegedly made by Allegheny County Common Pleas Judge Mark Tranquilli, who was accused of repeatedly referring to a Black female juror as "Aunt Jemima." *See* Austin Davis, *PLBC Urges Judicial Conduct Review Board to Investigate Allegheny County Judge*, PAHOUSE.COM (Feb. 12, 2020),

matter, as the criminal justice system is rendered impotent when people become unconvinced of its efficacy.[101] As with all government systems, the criminal justice system must regard public perceptions of fairness and justice[102] to ensure "higher levels of cooperation and lower rates of recidivism."[103] People are simply less compliant with, and are more likely to rebel against, laws they perceive as unjust or "with the law generally when they perceive the criminal justice system as tolerating such injustice."[104] Unless the criminal justice system's outcomes and processes are deemed fair, the system is of little value.

According to scholars, "a criminal justice system derives practical value by generating societal perceptions of fair enforcement and adjudication."[105] These perceptions can be distilled into two distinct types: (1) legitimacy and (2) moral credibility.[106] Legitimacy requires that criminal processes are fairly, accurately, and uniformly executed.[107] Moral credibility demands fairness and equitable outcomes.[108] Legitimacy and moral credibility allow people to believe that the criminal justice system works and, for that reason, choose to behave lawfully.[109] The criminal justice system simply cannot function effectively if the general population refuses to believe in and conform to its laws.

The legitimacy theory suggests that people adapt their behavior to a system of criminal laws, policies, and programs because they believe that the process is fair.[110] The perception of fair process induces a commitment to fully participate in the system by adjusting one's

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https://www.pahouse.com/ADavis/InTheNews/NewsRelease/?id=112585 [https://perma.cc/Z77W-TD2U]. Recognizing the pain of racism, PLBC Chairman Representative Stephen Kinsey said, "[t]his chants back to a deep-rooted and pervasive problem in our criminal justice system, not only in our commonwealth, but across our nation, a system that disproportionately targets black and brown bodies." *Id.*

101. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012).

102. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1386 (2003).

103. Bowers & Robinson, *supra* note 101, at 253.

104. *Id.* at 262.

105. *Id.* at 211.

106. *See id.* at 211–19.

107. *See id.* at 215.

108. *See id.* at 218–19.

109. *See id.* at 211–18.

110. *See id.* at 214.

conduct to comport with the system's requirements.[111] Per legitimacy theory,

> citizens of a procedurally just state comport their behavior to the substantive dictates of the law not because the state exercises coercive power . . . but because they feel a normative commitment to the state. . . . [A]n individual . . . complies with the law not because he rationally calculates that it is in his best interest to do so but because he sees himself as a moral actor who divines that it is right to defer to legitimate authority.[112]

Fair process, then, leads to increased compliance with and belief in the law. The perception of justice does as well.

The moral credibility aspect of fair enforcement and adjudication contends that "[d]oing justice may be the most effective means of fighting crime."[113] While legitimacy contemplates the process aspect of criminal justice, moral credibility ponders the punishment facet of criminal justice.[114] Per moral credibility, the criminal justice system is rendered legitimate if it appeals to a community's shared intuitions of justice, but succumbs to invalidity if it does not.[115]

> Some of the system's power to gain compliance derives from its potential to stigmatize . . . . Yet a criminal law can stigmatize only if it has earned moral credibility with the community it governs. That is, for conviction to trigger community stigmatization, the law must have earned a reputation with the community for accurately reflecting the community's views on what deserves moral condemnation. A criminal law with liability and punishment rules that conflict with a community's shared intuitions of justice will undermine its moral credibility.[116]

As the public becomes more aware of the pervasive nature of police-initiated violence, support for reform increases. Several recent polls indicate that the American people support broad-based criminal justice reform. In one 2020 poll, approximately two-thirds of a large sampling of Democrats and Republicans reported support for

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111. *See id.* "People come to obey the law and cooperate with legal authorities because they perceive their institutions to operate fairly," such that "perceptions of procedural fairness facilitate a kind of normative, as opposed to purely instrumental, crime control." *Id.*

112. *Id.*

113. *Id.* at 216.

114. *See id.*

115. *See id.*

116. *Id.* at 217.

candidates who advocate criminal justice reform.[117] They also expressed overwhelming support for mandating body cameras, prohibiting no-knock warrants, and forbidding chokeholds when lethal force is not necessary; 88% supported mandatory investigations by the Department of Justice into the use of lethal force, and 82% supported the implementation of a national database on officer misconduct.[118] Yet another poll compared today's attitudes concerning police brutality to those from five years ago. It concluded that Americans are currently much more likely to agree that police violence is a serious problem for which police should be punished.[119] Likewise, in another poll, 84% of Black people and 63% of white people agreed that the police treat Black people less favorably than white people.[120] These statistics reveal that the time is ripe for reform. The legitimacy and moral credibility models suggest that reform is absolutely necessary but accomplishing police reform on such a grand scale is no easy task.[121] As Part II addresses, this is, at least in part, because of the Supreme Court's position regarding the reasonableness of police action.

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117. *See* Evan Mintz, *New Polling Finds Extraordinary Bipartisan Support for Policing Reforms*, ARNOLD VENTURES (Aug. 25, 2020), https://www.arnoldventures.org/stories/new-polling-finds-extraordinary-bipartisan-support-for-policing-reforms/ [https://perma.cc/5GSY-L2AY].

118. *See id.*

119. *See* Associated Press, *New Poll Shows 94% of Americans Back Criminal Justice Reform*, MARKETWATCH (June 23, 2020, 10:48 AM), https://www.marketwatch.com/story/new-poll-shows-94-of-americans-back-criminal-justice-reform-2020-06-23 [https://perma.cc/C6RU-VMAE].

120. *See* John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/ [https://perma.cc/J2BP-MWTX].

121. *See, e.g.*, Jesse Jackson, *Police Reform Was Never Going to Be Easy — But Now's the Time*, CHI.-SUN TIMES (June 8, 2020, 4:30 PM), https://chicago.suntimes.com/columnists/2020/6/8/21284553/police-reform-george-floyd-police-brutality-jesse-jackson-kamala-harris [https://perma.cc/9EZB-7SBK]; Amanda Taub, *Police the Public or Protect It? For a U.S. in Crisis, Hard Lessons from Other Countries*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/11/world/police-brutality-protests.html [https://perma.cc/U6QD-PQ3X]; Simone Weichselbaum & Nicole Lewis, *Support for Defunding the Police Department Is Growing. Here's Why It's Not a Silver Bullet*, MARSHALL PROJECT (June 9, 2020, 6:00 AM), https://www.themarshallproject.org/2020/06/09/support-for-defunding-the-police-department-is-growing-here-s-why-it-s-not-a-silver-bullet [https://perma.cc/MNK3-UU4Y].

II. AN UNREASONABLENESS VIEW OF POLICING

Despite national attention to police violence, there is still a prevalent misconception that policing and punishment are different issues. Much of this is because of the way policing has been characterized in the courts. The Supreme Court analyzes excessive police force claims under the Fourth Amendment's protection against unreasonable seizures.[122] But the actual consequences of police force — especially the use of deadly force by police — are often more akin to punishment than a simple seizure. While it may be that police officers have seized a person when they use force against them,[123] confining police force cases to the traditional Fourth Amendment analysis has unnecessarily limited appropriate methods of challenging police conduct. A closer look at the reasonableness standard applied to cases claiming unconstitutional policing reveals its extreme shortcomings.

A. The Traditional Fourth Amendment Reasonable Force Standard

To challenge a police officer's use of force as excessive, a plaintiff must claim their seizure by police officers was unreasonable under the Fourth Amendment. In the 1989 case *Graham v. Connor*, the Court held that "all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." [124] The reasonableness of police action is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[125] This "'reasonableness' inquiry . . . is an objective one," asking "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[126]

Graham reiterated the Court's position taken five years earlier in *Tennessee v. Garner*, which considered "the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon."[127] In *Garner*, two police officers were dispatched to

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122. *See* Graham v. Connor, 490 U.S. 386, 386 (1989).

123. A Fourth Amendment seizure occurs when an officer restrains the freedom of a person to walk away. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (citing Terry v. Ohio, 392 U.S. 1, 16 (1968)).

124. *Graham*, 490 U.S. at 395.

125. *Id.* at 396 (citing *Terry*, 392 U.S. at 20–22).

126. *Id.* at 397 (citing Scott v. United States, 437 U.S. 128, 137–39 (1978); *Terry*, 392 U.S. at 21).

127. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

investigate an ongoing home invasion.[128] One of the officers spied the suspect running across the backyard of the targeted home, apparently leaving the scene.[129] Although the officer was "reasonably sure" the suspect, Edward Garner, did not have a weapon, the officer still shot him in the back of the head as he was climbing over a fence.[130] The officer rationalized that he felt convinced that if he did not shoot Garner, then Garner would have escaped.[131] Garner died at the hospital.[132]

The Court, analyzing the claim of excessive force under the Fourth Amendment, held that "[deadly] 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 significant threat of death or serious physical injury to the officer or others."[133] In this particular case, the Court found the deadly force unreasonable because the officer did not have probable cause to believe that the unarmed Garner posed any danger to officers or the public.[134] The Court explained:

> [N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.[135]

Thus, the Court recognized the narrow circumstances in which killing a suspect is reasonable, thereby acknowledging that when police officers seize someone by killing them, they rob that person and society of an essential part of the criminal process — judicial determination of guilt and punishment. Though the Court has not recognized it, officers in this situation frustrate the judicial determination of guilt and punishment and impose on it their own.

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128. *See id.*

129. *See id.* at 3–4.

130. *See id.* at 3.

> In using deadly force to prevent the escape, [the officer] was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

Id. at 4 (quoting TENN. CODE ANN. § 40-7-108 (1982)).

131. *See id.*

132. *See id.*

133. *Id.* at 3.

134. *See id.* at 21.

135. *Id.* at 9.

In *Garner*, the Supreme Court further discussed the limited effectiveness of deadly force to accomplish criminal justice goals:

> [W]e are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.[136]

Garner recognized the gravity of deadly force but failed to admit that the "mechanism" of criminal justice will not be set in motion when the police use deadly force because the intention of the officer is to impose punishment, rendering the mechanism unnecessary. The Court reiterated this reality-blind approach to police force in *Graham v. Connor*.

Graham v. Connor highlights the Court's failure to recognize the true punishment nature of policing. The plaintiff, Dethorne Graham, a Black man, suffered from Type 1 diabetes and felt the onset of an insulin reaction.[137] He asked a friend to drive him to a convenience store to buy orange juice to stabilize the reaction.[138] Once at the store, Graham went inside but quickly decided to leave after determining that the line was too long and asked his friend to drive him to another friend's house for assistance.[139] Officer Connor, also Black, observed Graham hurriedly leave the store, became suspicious, and pulled Graham over to investigate further.[140] Graham and his friend tried to explain that Berry was experiencing a "sugar reaction," but Officer Conner ordered the men to wait while he found whether anything had happened at the convenience store.[141] While Officer Connor was in his patrol car calling for backup, Graham exited the car, ran around it twice, and then sat on the curb and passed out for a short time.[142] Once backup arrived, the officers rolled the still unconscious Graham over on the sidewalk and cuffed his hands behind his back tightly.[143] One of the officers reportedly said, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F.

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136. *Id.* at 10 (footnotes omitted).
137. *See* Graham v. Connor, 490 U.S. 386, 386 (1989).
138. *See id.* at 388.
139. *See id.* at 388–89.
140. *See id.* at 389.
141. *See id.*
142. *See id.*
143. *See id.*

but drunk. Lock the S.B. up."[144] Several of the officers then lifted Graham up, carried him over to his friend's car, and placed him face down on its hood.[145] When Graham regained consciousness and asked the officers to check in his wallet for a diabetic sticker that he carried, an officer told him to "shut up" and shoved his face down against the hood of the car.[146] Four officers then grabbed Graham and threw him headfirst into a police cruiser.[147] Even when Graham's friend brought some orange juice to the car, the officers refused to let him have it.[148] Eventually, after receiving a report that Graham had done nothing wrong at the convenience store, the officers drove him home and let him go.[149]

Due to the police encounter, Graham suffered a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.[150] Rather than viewing the police action as punishment, the Court applied the traditional Fourth Amendment reasonableness standard.[151] The Supreme Court remanded the case, instructing the lower court to reconsider, in light of the proper Fourth Amendment standard, "whether the officers' actions [we]re 'objectively reasonable' in light of the facts and circumstances confronting them."[152] What this standard misses is just what an Eighth Amendment punishment analysis could have considered: the officers' cruelty in their treatment of Graham. The Supreme Court curtly dismissed the Eighth Amendment applicability, stating,

> [d]iffering standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances, and subjective concepts like "malice" and "sadism" have no proper place in that inquiry.[153]

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144. *Id.*
145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.* at 390.
151. *See id.* at 394–95.
152. *Id.* at 397.
153. *Id.* at 398–99.

By focusing the analysis on objective reasonableness, the Court diminishes the police-individual encounter to one that depends upon the inconsistent views of prosecutors or jurors about what is appropriate. A punishment approach to policing would allow for the legal standards of non-arbitrariness, proportionality, and respect for human dignity to have a more uniform application to police encounters where officers use force. This is not to say that police punishment would only be deemed unconstitutional if an individual can prove that the officer acted with subjective malice. However, a state's malice and sadism in allowing a certain level of unjustified and excessive punishment should certainly be relevant factors. By applying a traditional Fourth Amendment reasonableness analysis to excessive force claims, the Court has not effectively protected the individual's "fundamental interest" in their own lives.[154] Instead, it employed a standard that leads to inconsistent, and often unjust, outcomes. It only takes a survey of recent reports of killings by police officers for that failed protection to become apparent.

B. The Failures of the Reasonableness Standard

The death penalty on the streets[155] — when police officers kill an individual as punishment for that person's objectionable behavior — operates outside of the criminal justice system's procedural safeguards. Between 2005 and 2015, police officers fatally shot around 1,000 people each year, but only 54 officers faced criminal charges.[156] Judging police

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154. *See* Tennessee v. Garner, 471 U.S. 1, 9 (1985).

155. For further explanation of the concept of deadly police force being the death penalty on the streets, see Jefferson Exum, *Death Penalty on the Streets*, *supra* note 24. *See also* TEDx Talks, *The Death Penalty on the Street*, YOUTUBE (Oct. 10, 2014), https://www.youtube.com/watch?v=sq7eAEjJm6U [https://perma.cc/AQP7-VAHE].

156. *See* Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), https://www.huffpost.com/entry/police-shooting-convictions_n_5695968ce4b086bc1cd5d0da [https://perma.cc/29RN-3AX3]; Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/ [https://perma.cc/S5CB-EAUX]. Parenthetically, many of these cases result in expensive settlements of wrongful death claims. *See, e.g.*, Nick Wing, *We Pay a Shocking Amount for Police Misconduct, and Cops Want Us to Accept It. We Shouldn't*, HUFFINGTON POST (May 29, 2015, 7:39 AM), https://www.huffpost.com/entry/police-misconduct-settlements_n_7423386 [https://perma.cc/ML27-RD7M]. For a specific example of the rate of deadly police force compared to convictions, see Eric Levenson, *What Georgia Law Says About When Police Can Use Deadly Force*, CNN (June 15, 2020, 3:22 PM), https://www.cnn.com/2020/06/15/us/rayshard-brooks-force-law/index.html

use of force by its reasonableness, which is informed by police officers' discretionary judgment, has contributed to an unjust system. This is especially true for those who have lost their lives in police encounters when the use of non-fatal police tactics could have safely avoided that loss of life. The tragedies of Breonna Taylor, Michael Brown, and other unarmed individuals killed by police officers who went unpunished for their actions demonstrate the incompleteness of the reasonableness standard.

i. Breonna Taylor

On March 13, 2020, in Louisville, Kentucky, police killed Breonna Taylor, a 26-year Black woman, in her home.[157] Breonna, an emergency room technician, was asleep in her bed when she and her boyfriend were roused by a loud knocking on their apartment door at 12:40 AM.[158] She was killed by at least five of the more than 20 bullets fired by three white, plainclothes police officers who used a battering ram to force entry into her home pursuant to a no-knock warrant.[159] The Kentucky Attorney General did not present any charges for her death to the grand jury despite nationwide calls for #JusticeForBreonna.[160]

According to Breonna's boyfriend, Kenneth Walker, he and Breonna were in bed sleeping when they were startled awake by loud

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[https://perma.cc/MT5K-NQUK] ("From 2015 to 2020, police in Georgia have shot and killed 182 people, according to *The Washington Post*'s Fatal Force tracker. In that time, only one Georgia officer has been charged with murder.").

157. *See* Arian Campo-Flores & Sabrina Siddiqui, *Police Killing of Breonna Taylor Fuels Calls to End No-Knock Warrants*, WALL ST. J. (May 24, 2020, 11:00 AM), https://www.wsj.com/articles/police-killing-of-breonna-taylor-fuels-calls-to-end-no-knock-warrants-11590332400 [https://perma.cc/7EE7-D9B7]. Black women are victims of varying forms of police brutality, including fatal shootings, rape, and maiming. *See* Mary-Elizabeth Murphy, *Black Women Are the Victims of Police Violence, Too*, WASH. POST (July 24, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/07/24/police-violence-happens-against-women-too/ [https://perma.cc/M8EK-6TMX]. *See generally* KIMBERLÉ CRENSHAW ET AL., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2016).

158. *See* Tessa Duvall, *Fact Check 2.0: Debunking 9 Widely Shared Rumors in the Breonna Taylor Police Shooting*, LOUISVILLE COURIER J. (Jan. 8, 2021, 7:38 PM), https://www.courier-journal.com/story/news/crime/2020/06/16/breonna-taylor-fact-check-7-rumors-wrong/5326938002/ [https://perma.cc/NVJ6-7KSX].

159. *See id.*; Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/D849-4JH7].

160. *See* Duvall, *supra* note 158.

banging at the door.[161] They called out to ask who was at the door but only received more loud banging in response.[162] Frightened that an assailant was trying to break into the home, Kenneth grabbed his legally registered handgun, and he and Breonna began walking slowly toward the door.[163] Just as the couple emerged from the bedroom, officers barged into the apartment, knocking the door off its hinges with a battering ram.[164] Frightened and unable to see who was there in the dark, Kenneth fired a warning shot toward the floor.[165] While initial reports of the event stated that the shot struck one of the officers, Sergeant Jonathan Mattingly, in the thigh, the Kentucky State ballistics report casted doubt on it being Kenneth who shot Sergeant Mattingly.[166] What is undisputed, however, is that the four officers on the scene opened fire immediately following Kenneth's warning shot.[167] One of the officers, Detective Brett Hankison, went outside, behind the apartment building, and blindly shot ten rounds into the apartment through a window with drawn blinds.[168] An ambulance was called to the scene to render aid to Sergeant Mattingly, but Breonna was left coughing and struggling to breathe on the floor of her home for nearly five minutes before emergency aid was sent to her location.[169] And this was only after Kenneth, still unaware that it was the police who were in the apartment, called 911 and cried, "I don't know what's happening. Somebody kicked in the door and shot my girlfriend."[170] Aid did not arrive for Breonna for more than 20 minutes

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161. *See* The Daily, *The Killing of Breonna Taylor, Part 2*, N.Y. TIMES (Sept. 10, 2020) [hereinafter *New York Times Podcast, Part 2*], https://www.nytimes.com/2020/09/10/podcasts/the-daily/Breonna-Taylor.html [https://perma.cc/GN3F-CD56]; Oppel Jr. et al., *supra* note 159.

162. *See New York Times Podcast, Part 2*, *supra* note 161; Oppel Jr. et al., *supra* note 159.

163. *See New York Times Podcast, Part 2*, *supra* note 161; Oppel Jr. et al., *supra* note 159.

164. *See New York Times Podcast, Part 2*, *supra* note 161; Oppel Jr. et al., *supra* note 159.

165. *See* Andrew Wolfson, *Ballistics Report Doesn't Support Kentucky AG's Claim That Breonna Taylor's Boyfriend Shot Cop*, USA TODAY (Sept. 27, 2020), https://www.usatoday.com/story/news/nation/2020/09/27/ballistics-report-breonna-taylor-boyfriend-kenneth-walker-shot-louisville-cop/3554995001/ [https://perma.cc/JK3H-W8TP].

166. *See id.*

167. *See New York Times Podcast, Part 2*, *supra* note 161; Oppel Jr. et al., *supra* note 159.

168. *See New York Times Podcast, Part 2*, *supra* note 161; Oppel Jr. et al., *supra* note 159.

169. *See* Oppel Jr. et al., *supra* note 159.

170. *New York Times Podcast, Part 2*, *supra* note 161.

after the officers' bullets struck her.[171] Breonna was already deceased by that time.[172] Police never found drugs in her apartment.[173]

The outcome in Breonna's case lets us know that in the U.S. policing system, it is considered reasonable for the police to kill someone in their own home when all they are doing is peacefully sleeping. Though the underlying facts leading up to Breonna's death are contested, the Louisville Metro Police Department (LMPD) claimed it believed a former boyfriend of Breonna had used her apartment to receive packages of illegal drugs.[174] Breonna was no longer in a relationship with that man, but officers were able to procure a warrant to search her apartment, which she shared with her sister and niece (who were not at home that night).[175] LMPD had initially procured a no-knock warrant to enter the home, but those orders had been changed before the raid to require the officers to knock and announce their presence when they executed the warrant.[176] Either way, the officers claimed they knocked and announced their presence several times before forcibly opening the door when they received no response.[177] However, Kenneth and several others who lived in the apartment building said the police never announced themselves.[178]

Breonna Taylor's tragic killing received national attention during the summer 2020 protests.[179] The troubling details about the night she was killed raised serious questions about the truthfulness of the officers involved and the trustworthiness of the system that has supported and protected them. For instance, the officers' incident report chronicling that night contained multiple inaccuracies. It listed that Breonna had no injuries, even though she had been shot several times and died on the scene.[180] The report indicated the officers had not forced their way into the apartment despite using a battering ram to break Breonna's

171. *See* Oppel Jr. et al., *supra* note 159.

172. *See id.*

173. *See id.*

174. *See id.*

175. For a thorough account of the situation, see *New York Times Podcast, Part 2*, *supra* note 161. *See also* The Daily, *The Killing of Breonna Taylor, Part 1*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/09/podcasts/the-daily/breonna-taylor.html [https://perma.cc/L5A3-STDY].

176. *See* Oppel Jr. et al., *supra* note 159.

177. *See id.*

178. *See New York Times Podcast, Part 2*, *supra* note 161; Oppel Jr. et al., *supra* note 159.

179. *See* Oppel Jr. et al., *supra* note 159.

180. *See id.*

door down.[181] There was no body camera footage from the shooting despite it occurring during an organized, pre-planned raid.[182]

Some have questioned why the officers received a warrant in the first place, especially since the police had already located the main suspect elsewhere by the time of the raid. And, of course, many had questioned why officers would choose to raid in the middle of the night when they apparently thought that Breonna lived alone at her apartment and did not suspect her of a violent crime.[183] Despite all of these questions, a jury will not have the opportunity to weigh the credibility of the officers' story in a criminal trial.

In September 2020 — six months after Breonna was killed and three months after protests erupted throughout the country decrying police violence against Black people — a Kentucky grand jury indicted Hankison on three counts of wanton endangerment in the first degree for "conduct which creates a substantial danger of death or serious physical injury to another person . . . under circumstances manifesting extreme indifference to the value of human life."[184] The charges were not for killing Breonna but for the shots he fired that tore through Breonna's apartment walls and entered a neighboring apartment, endangering the three people within that apartment.[185] Those individuals were not shot.[186] So, instead of any officers facing charges for their actions that led to Breonna's death, only one officer faces a Class D felony, carrying a sentence of only up to five years in prison, for shots that did not kill anyone.[187]

In an unprecedented move, a concerned grand juror filed a court motion requesting that the transcripts of the grand jury proceedings be released to the public,[188] accusing Kentucky Attorney General Daniel Cameron of using the grand jurors "as a shield to deflect accountability

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181. *See id.*

182. *See id.*

183. *See id.*; *see also* Duvall, *supra* note 158.

184. Nicholas Bogel-Burroughs, *What Is 'Wanton Endangerment,' The Charge in Breonna Taylor's Case?*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/wanton-endangerment.html [https://perma.cc/59S7-VNZX].

185. *See id.*

186. *See id.*

187. *See id.*

188. *See Transcript: Grand Juror in Breonna Taylor Case Calls for Release of Proceeding Records, Transcripts Press Conference*, REV (Sept. 29, 2020), https://www.rev.com/blog/transcripts/transcript-grand-juror-in-breonna-taylor-case-calls-for-release-of-proceeding-records-transcripts-press-conference [https://perma.cc/5EYB-EX58].

and responsibility."[189] On October 2, 2020, approximately 15 hours of the grand jury proceeding audio recordings were released,[190] but they left more questions about the reasonableness of the officers' actions, and the raid in general, than answers. Though social commentary focused on whether officers were reasonable in opening fire once Kenneth shot Sergeant Mattingly, grand jurors were concerned about the beginning of the story. They raised several questions about whether Kenneth had been named in the search warrant (he was not) and what exactly the officers saw when they entered the apartment.[191] They also asked whether the officers involved were aware that the main suspect had already been apprehended.[192] The jurors wanted to know if the police had recovered drugs or money from the apartment and were told they had not.[193] In fact, they were informed that the police had not even searched the apartment for drugs during that raid.[194] The grand jurors asked whether there were diagrams of the scene and were told that there were none.[195] They asked why the officers' body cameras were not recording and were told by the questioned detective he did not know.[196] Grand jurors heard from at least two police officers involved that they knocked and announced their presence multiple times before forcing their way into the apartment.[197] However, it does not appear that grand jurors heard from Breonna's neighbors, though nearly a dozen of those neighbors have said they heard loud banging but never heard officers identify themselves as police.[198] Apparently, jurors were uncomfortable with how the raid unfolded from the very beginning. There were instances when the jurors seemed dubious of the videos and photographs they

189. Tessa Duvall, *Breonna Taylor Grand Juror Wants the Truth to Come Out. Why That Wish May Come True*, LOUISVILLE COURIER J. (Jan. 24, 2021, 7:52 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/29/breonna-taylor-case-grand-jurors-attorney-speaks-out-transcript-release/3571228001/ [https://perma.cc/M3KK-FCA9].

190. *See* Will Wright, Nicholas Bogel-Burroughs & John Eligon, *Breonna Taylor Grand Jury Audio Reveals Conflicting Accounts of Fatal Raid*, N.Y. TIMES (Dec. 29, 2020), https://www.nytimes.com/2020/10/02/us/breonna-taylor-grand-jury-audio-recording.html [https://perma.cc/3MFY-LVSD].

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*; *see also New York Times Podcast, Part 2*, *supra* note 161.

were being shown.[199] With all of these questions, what would have been very illuminating would be knowing how the jury was instructed on the applicable law. However, that information — which should have included some instructions on reasonableness — was not included in the released portions of the proceedings.

The tapes provide no clarity on how Cameron instructed the grand jurors to consider the other officers' actions. The released portions of the grand jury audio do not include any statements or recommendations from the prosecutors on which charges they believe should be levied against the officers.[200] In fact, Cameron has said that the jurors were told the two officers whose shots likely killed Breonna were justified in their actions.[201] The argument that those officers acted reasonably is that they returned fire only after Kenneth fired upon them, even though individuals are legally empowered to use a firearm to protect their home from intruders.

Ultimately, both the grand jury and a trial jury were robbed of the opportunity to actually consider the reasonableness of the other officers' actions in light of all of the circumstances of that night. In an unusual decision, a Kentucky judge allowed grand jurors in Breonna's case to speak publicly about the proceedings, ruling that such disclosure was in "the interest of all citizens to have confidence in the integrity of the justice system."[202] The two grand jurors who chose to make statements reported that prosecutors did not take their questions

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199. *See New York Times Podcast, Part 2*, *supra* note 161.

200. *See id.* (stating the complaining grand juror said that Cameron was deflecting blame by representing that the grand jurors decided not to indict the other officers for Breonna Taylor's death).

201. *See* Griff Witte & Mark Berman, *With Breonna Taylor Decision, Summer's Anguished Protests Get Fresh Impetus for the Fall*, WASH. POST (Sept. 23, 2020, 11:00 PM), https://www.washingtonpost.com/national/with-breonna-taylor-decision-summers-anguished-protests-get-fresh-impetus-for-the-fall/2020/09/23/1cd15f38-fddb-11ea-8d05-9beaaa91c71f_story.html [https://perma.cc/B6AR-5PHQ]. It is widely understood that prosecutors can secure indictments from grand jurors when they desire to do so. Therefore, if Cameron wanted the grand jury to indict the other officers, he almost certainly could have presented the facts and secured an indictment. *See* Dylan Stableford, *Extremely Rare for Grand Jury Not to Return Indictment, Statistics Show*, YAHOO NEWS (Nov. 25, 2014), https://news.yahoo.com/ferguson-federal-grand-jury-indictment-statistics-history-134942645.html [https://perma.cc/5ZCQ-N752]; *see also* Debra Cassens Weiss, *Grand Juries Almost Always Indict, Federal Stats Show; Is There a Shooting Exception for Cops?*, ABA J. (Nov. 26, 2014, 6:58 AM), https://www.abajournal.com/news/article/grand_juries_almost_always_indict_federal_stats_show_is_there_a_cop_shootin [https://perma.cc/U9TG-FXN4].

202. Anonymous Grand Juror #1 v. Commonwealth of Kentucky, No. 20-CI-005721 (Jefferson Cir. Ct. Oct. 20, 2020).

seriously and there was an "uproar" when the grand jurors realized the police officers would not be charged with Breonna Taylor's death.[203] As Grand Juror #1 stated, "[w]as justice . . . done? No, I feel that there was . . . quite a bit more that could have been done or should have been presented for us to deliberate on."[204] Despite this injustice, even if the grand jurors had been given the answers they sought and had been instructed appropriately, it is questionable whether the reasonableness standard would have led to justice for Breonna.

ii. Michael Brown

As previously explained, traditionally, in use of force cases, reasonableness is the default conclusion, even when the individual killed is unarmed and even when that individual was committing either no criminal offense, or an extremely minor one.[205] The story of Michael Brown further illustrates the consequences of a traditional Fourth Amendment reasonableness analysis. On August 9, 2014, Officer Darren Wilson shot and killed 18-year-old Michael Brown — an unarmed Black male — in Ferguson, Missouri.[206] Though in the weeks following the shooting, it was alleged that Michael had robbed a convenience store just before his encounter with Officer Wilson, Police Chief Tom Jackson reported after the shooting that Officer Wilson was not aware of the alleged robbery.[207] Rather, Officer Wilson first

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203. *See* Elizabeth Joseph, *Breonna Taylor Grand Jurors Say There Was an 'Uproar' When They Realized Officers Wouldn't Be Charged with Her Death*, CNN (Oct. 30, 2020, 5:18 PM), https://www.cnn.com/2020/10/29/us/breonna-taylor-grand-jurors/index.html [https://perma.cc/5G3D-8BZY].

204. *Id.*

205. *See supra* Part II.

206. *See* Monica Davey & Julia Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html [https://perma.cc/T5X7-KVCR]; *Timeline of Events in Shooting of Michael Brown in Ferguson*, ASSOCIATED PRESS (Aug. 8, 2019), https://apnews.com/article/9aa32033692547699a3b61da8fd1fc62 [https://perma.cc/PF28-QATE]. For a comprehensive explanation of the Michael Brown shooting, see Larry Buchanan et al., *Report: What Happened in Ferguson*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/interactive/2015/03/04/us/report-what-happened-in-ferguson.html [https://perma.cc/PVE9-3UPJ].

207. *See* Joe Millitzer & Vera Culley, *Chief Jackson: The Convenience Store Robbery and Michael Brown Shooting Not Connected*, FOX2NOW (Aug. 15, 2014, 2:56 PM), https://fox2now.com/news/live-updates-ferguson-police-chief-tom-jackson-speaks-at-a-press-conference [https://perma.cc/CR7N-JZ8F].

approached Michael for standing in the street and impeding traffic.[208] A number of witness accounts stated that Michael had his hands up in surrender when Officer Wilson fatally shot him.[209] Others claimed that just before Officer Wilson shot him, Michael wrestled Officer Wilson for his gun, ran away, and then came charging back at him in a rage.[210]

Officer Wilson's reasonability was never determined by a judge because no criminal charges were ever filed. However, the reasonableness analysis is embedded in the Missouri law presented to a St. Louis County grand jury which decided not to indict the officer.[211] Missouri Revised Statute Section 563.046 allows a law enforcement officer to use deadly force to effect the arrest or prevent the escape of a criminal suspect "[w]hen the officer reasonably believes that such use of deadly force is immediately necessary to effect the arrest . . . and also reasonably believes that the person to be arrested . . . [h]as committed or attempted to commit a felony."[212] The statute conflicts with the Supreme Court's directive on the use of deadly force in *Tennessee v. Garner*.[213] Therefore, the State of Missouri allows police officers to use deadly force to carry out an arrest or prevent a suspect's escape only when that officer "reasonably believes" that the suspect is attempting to flee using a deadly weapon or that the suspect "may endanger life or inflict serious physical injury unless arrested without delay."[214]

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208. In his grand jury testimony, Officer Wilson explained what caught his attention about Michael Brown:

> I see them walking down the middle of the street. And first thing that struck me was they're walking in the middle of the street. I had already seen a couple cars trying to pass, but they couldn't have traffic normal because they were in the middle, so one had to stop to let the car go around and then another car would come.

Transcript of Grand Jury at 207, Missouri v. Wilson (Sept. 16, 2014).

209. *See* Conor Friedersdorf, *Witnesses Saw Michael Brown Attacking — and Others Saw Him Giving Up*, ATLANTIC (Nov. 25, 2014), https://www.theatlantic.com/national/archive/2014/11/major-contradictions-in-eyewitness-accounts-of-michael-browns-death/383157/ [https://perma.cc/U9L2-TNA8].

210. *See id.*

211. *See* MO. REV. STAT. § 563.046.3(2) (2000); Ryan J. Reilly, *Ferguson Officer Darren Wilson Not Indicted in Michael Brown Shooting*, HUFFINGTON POST (Nov. 24, 2014, 9:25 PM), https://www.huffpost.com/entry/michael-brown-grand-jury_n_6159070 [https://perma.cc/R9U4-SLH3].

212. MO. REV. STAT. § 563.046.3(2).

213. 471 U.S. 1, 3 (1985) (concluding that deadly 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 significant threat of death or serious physical injury to the officer or others").

214. MAI-CR 3d 306.14.

The problem in the Darren Wilson case is that prosecutors gave the jurors both statements of the law at different times in the process.[215] In either iteration of the law, however, the reasonableness standard was present. Given the erroneous instruction, the confusion for the jury would have been with what Officer Wilson was required to reasonably believe — that deadly force was necessary to conduct the arrest of Michael, or that Michael was a threat to the officer or the public if Officer Wilson did not contain him. The grand jury was never asked whether Officer Wilson followed non-fatal encounter procedures before resorting to deadly force. This is, of course, because the law does not require such an inquiry. There is no consensus in the courts of law or public opinion on what constitutes reasonable force by a police officer. This disagreement regarding the reasonableness of Officer Wilson's actions sparked a national "Hands Up" movement against police violence that garnered international attention.[216] The phenomenon #BlackLivesMatter became not just a trending hashtag but a movement calling for a focus on human value in the police use of force debate.[217] On the other side of the wide divide was significant support for Officer Wilson in online support groups and donations of over $100,000 raised for him and his family.[218] This stark division is evidence of the reasonableness standard's inadequacy.

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215. For an explanation of the confused legal standard used in the Darren Wilson grand jury proceedings, see Letter from Sherrilyn A. Ifill, Dir.-Couns., NAACP Legal Def. Fund, to J. Maura McShane 3–6 (Jan. 5, 2015), http://www.naacpldf.org/document/ldf-open-letter-judge-maura-mcshane [https://perma.cc/PF6Y-LLXP].

216. *See, e.g.*, Callie Crossley, *Michael Brown, One Year Later: The Tragic Civil Rights Movement That Ignited a Movement*, WORLD (Aug. 9, 2015, 9:30 AM), https://www.pri.org/stories/2015-08-03/Michael-brown-one-year-later-tragic-civil-rights-moment-ignited-movement [https://perma.cc/H9VE-VPT2]; HANDSUPUNITED, http://www.handsupunited.org [https://perma.cc/7EPU-GED9] (last visited Oct. 2, 2015).

217. *See BLM Demands*, BLACK LIVES MATTER, https://blacklivesmatter.com/blm-demands/ [https://perma.cc/88TZ-CJGB] (last visited Feb. 16, 2021).

218. *See* Paige Lavender, *'Support Officer Darren Wilson' GoFundMe Raises over $137,000 for Cop Who Shot Michael Brown*, HUFFINGTON POST (Aug. 21, 2014, 2:08 PM), http://www.huffingtonpost.com/2014/08/21/darren-wilsongofundme_n_5698013.html [https://perma.cc/M8WG-63N2]; Julia Talanova, *Support Grows for Darren Wilson, Officer Who Shot Ferguson Teen Michael Brown*, CNN (Sept. 8, 2014, 7:11 AM), https://www.cnn.com/2014/08/19/us/ferguson-darren-wilson-support/index.html [https://perma.cc/D78C-TGCD].

iii. Amadou Diallo

Another famous case of a controversial police shooting is that of Amadou Diallo, who was killed by four New York City police officers in 1999.[219] Amadou was a 22-year-old West African immigrant with no criminal record.[220] The officers, who were in unmarked cars and dressed in street clothes, came upon Amadou as he stood unarmed at his apartment building entrance.[221] The officers testified that Amadou was acting suspiciously and that he did not yield to their commands to stop but instead ran inside the building when they approached.[222] Amadou was running into his own home. The officers claimed that they began firing upon him because they thought he was reaching for a gun.[223] Amadou was unarmed and reaching for his wallet. Officers fired 41 shots at him, and 19 of those hit him.[224] All of the officers involved in the shooting were charged with homicide then acquitted,[225] leaving many confused as to how a jury truly could have found the officers' actions to be reasonable. Despite the officers' claim of a mistaken belief that Amadou was reaching for a gun, 41 shots fired for a gun that was never seen can certainly be considered an unreasonable response.

iv. Aaron Campbell

The January 29, 2010, police shooting of 25-year-old Aaron Campbell in Portland, Oregon, ended in three conflicting results: (1) a grand jury declining to indict the officers, (2) internal discipline of the officers, and (3) a civil rights suit victory for Aaron's family.[226] In Aaron's case, police were called to check on the welfare of a suicidal,

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219. *See* Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html [https://perma.cc/TWS8-8LW7].

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See $1.2M Settlement in Campbell Police Shooting*, KGW PORTLAND (Feb. 2, 2012, 5:38 AM) [hereinafter *$1.2M Settlement*], https://www.kgw.com/article/news/12m-settlement-in-campbell-police-shooting/283-414042077 [https://perma.cc/F7HV-UCXA]; *Aaron Campbell*, POLICE BUREAU, CITY OF PORTLAND, https://www.portlandoregon.gov/police/article/538235 [https://perma.cc/V878-RKGC] (last visited Feb. 7, 2021).

armed man.[227] In what has become a familiar scene in these fatal police force stories, officers claimed they believed Aaron was reaching for a gun when Officer Ron Frashour shot him, [228] but Aaron was unarmed.[229]

After declining to indict the officers, the grand jury members released a three-page letter to the District Attorney indicating their outrage with Officer Frashour's actions.[230] The grand jury members wrote:

> [W]e the grand jury determined that we could not indict Officer Ron Frashour on any criminal charge. That is not to say that we found him innocent, agreed with his decisions, or found that the police incident at Sandy Terrace was without flaw. What we found was that Officer Frashour's actions were consistent with the relevant laws and statutes regarding the use of deadly force by a police officer.[231]

According to the grand jurors' letter, the police incident involved "flawed police policies, incomplete or inappropriate training, incomplete communication, and other issues with the police effort."[232] The grand jury understood that the law allowing an officer to kill an individual if the officer "believed he or his fellow officers were in imminent danger" prohibited them from indicting Officer Frashour for killing Aaron, though they believed that "Aaron Campbell should not have died that day."[233]

The prevailing opinion amongst the grand jurors was that the officer did not act appropriately, yet because the reasonableness standard only focuses on the officer's belief, the result was no criminal liability. The internal discipline and civil award in Aaron's case also suggests faultiness in the traditional reasonableness approach to the use of force by police officers. An internal investigation by the Portland Police Department found that "it was not reasonable for Officer Frashour to believe that Aaron Campbell posed an immediate threat of death or serious physical injury, which is what bureau policy and training

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227. *See Aaron Campbell*, *supra* note 226.

228. *See id.*

229. *See $1.2M Settlement*, *supra* note 226.

230. *See* Letter from Multnomah Cnty. Grand Jury to Michael D. Schrunk, Dist. Att'y, Multnomah Cnty. (Feb. 10, 2010), https://www.scribd.com/document/27133490/Aaron-Campbell-Grand-Jury-Letter [https://perma.cc/GNE3-T6AR].

231. *Id.* at 1.

232. *Id.*

233. *Id.*

requires."[234] According to that investigation, "Campbell did not come out of the apartment with a weapon drawn or in view. His hands were clasped together on top of his head and remained there. He walked backward toward officers and followed commands to stop, walk slowly, and stop again."[235] All of this showed that, contrary to the grand jury conclusion, Officer Frashour's decision to kill Campbell was not based on a reasonable perception of a deadly threat, but instead on the officer being "so focused on his perception of Campbell as a threat with a gun" that he failed to follow proper use of force protocol instituted by his department.[236] The department report relayed several alternatives to deadly force that could have — and apparently should have — been used by the officer in this particular situation.[237]

As a result of the report, Portland's Mayor and Police Chief decided to fire Officer Frashour and suspend three other officers involved in the incident.[238] The Mayor's view of the incident led to the City of Portland agreeing to pay $1.2 million to Campbell's family to settle a civil rights suit.[239] These examples of results that are inconsistent with the criminal cases show that — outside of the criminal context — decision-makers find fault with the actions of police officers in these situations.[240] This disconnect with the criminal justice system reveals the shortcomings of the traditional reasonableness standard to reflect sentiments about what justice requires. Police force cases should be considered as more than simply a Fourth Amendment seizure that can

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234. PORTLAND POLICE BUREAU, INTERNAL INVESTIGATION: AARON MARCELL CAMPBELL 1 (2010), http://www.portlandonline.com/police/images/10-8352/UOFRB_report_Campbell.pdf [https://perma.cc/ELW6-ZY3U].

235. *Id.* at 1–2.

236. *See id.* at 2.

237. The report spoke of the use of a beanbag strike, as well as a K-9 option. *See id.* at 2.

238. *See Cop Fired, 3 Suspended for Campbell Shooting*, KGW PORTLAND (Nov. 17, 2010, 5:26 AM), https://www.kgw.com/article/news/cop-fired-3-suspended-for-campbell-shooting/283-89750064 [https://perma.cc/5T6T-GQGR].

239. *See* Maxine Bernstein, *Portland to Pay $1.2 Million to Settle Civil Rights Suit in Aaron Campbell Shooting*, OREGONIAN (Jan. 10, 2019), https://www.oregonlive.com/portland/2012/02/portland_to_pay_12_million_to.html [https://perma.cc/9GPZ-PF7B].

240. In Breonna Taylor's case, though the grand jury did not indict any officers for her death, her family was awarded a $12 million civil settlement from the City of Louisville. *See* Rukmini Callimachi, *Breonna Taylor's Family to Receive $12 Million Settlement from City of Louisville*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html [https://perma.cc/R6J4-ZD5A].

be handled with the traditional, officer point-of-view-focused reasonableness analysis. That standard fails to capture the full harm inflicted on individuals, families, and communities when police use extreme levels of force against individuals. This is especially true given the racist roots of policing, the racial trauma it inflicts, and the view of Black criminality that it perpetuates.

III. POLICING AS PUNISHMENT

The true consequences of police force — that individuals are penalized or executed for their perceived objectionable responses to a police encounter — demonstrate it is more akin to punishment than seizure. Rather than an unsatisfactory reasonableness analysis, the Supreme Court's Eighth Amendment death penalty analysis should govern. The same respect for human life that fuels the protections and guarantees given in the death penalty context can be incorporated into the reasonableness standard that now governs excessive force claims.

A. The Eighth Amendment and Human Dignity

In interpreting the Eighth Amendment Cruel and Unusual Punishment Clause, the Supreme Court has expressed the importance of human dignity[241] and that "the fundamental premise of the [Cruel and Unusual Punishment] Clause [is] that even the vilest criminal remains a human being possessed of common human dignity."[242] The Court's treatment of the death penalty provides a strong example of how the Supreme Court centers its Eighth Amendment jurisprudence on human dignity. In keeping with this concern, the Supreme Court has developed several limits on when the death penalty can be imposed through the court system. For instance, the death penalty must be proportionate to the crime of conviction, and death cannot be a mandatory punishment.[243]

Proportionality between the crime committed and the punishment imposed is one bedrock protection that the Supreme Court has read into the Cruel and Unusual Punishment Clause.[244] The Court deems punishment unconstitutionally excessive if it is "grossly out of

241. *See* Furman v. Georgia, 408 U.S. 238, 270 (1972) ("A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.").

242. *Id.* at 273.

243. *See* Gregg v. Georgia, 428 U.S. 153, 154 (1976); Woodson v. North Carolina, 428 U.S. 280, 280–81 (1976).

244. *See Gregg*, 428 U.S. at 154.

proportion to the severity of the crime,"[245] and has described the death penalty as "unique in its severity and irrevocability."[246] Due to this severity, the Court has limited the death penalty to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[247] For this reason, the Supreme Court has repeatedly declined to uphold the death penalty in situations where the defendant did not intentionally cause the death of another human.[248]

The Supreme Court has also shown respect for human dignity in the death penalty context by invalidating statutes that make death a mandatory penalty. In the 1976 case *Woodson v. North Carolina*, the Supreme Court explored the country's history of moving away from the mandatory imposition of such a final and severe sentence.[249] The Court quoted Chief Justice Warren Burger's dissent in *Furman v. Georgia*,[250] in which he said that the change from mandatory death sentences "was greeted by the Court as a humanizing development."[251] As the Court elegantly stated,

> process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[252]

The Supreme Court has acknowledged that just punishment sees people as individuals with value beyond their punishable actions. By allowing each defendant to be seen as a unique individual, possibly worthy of compassion, death penalty jurisprudence incorporates respect for human dignity into even the most severe and final sentence.

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245. Coker v. Georgia, 433 U.S. 584, 592 (1977).

246. *Id.* at 598 (quoting *Gregg*, 428 U.S. at 154).

247. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

248. *See, e.g.*, *id.* (holding that the death penalty is unconstitutional when applied to child rape); *Coker*, 433 U.S. at 584 (holding that the death penalty is unconstitutional when applied to adult rape).

249. *See* Woodson v. North Carolina, 428 U.S. 280, 298–99 (1976) (addressing the constitutionality of a North Carolina statute which states that certain deliberate and premeditated murders shall be punishable by death).

250. *See id.* at 297 (citing Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

251. *Id.* at 298 (citing *Furman*, 408 U.S. at 402).

252. *Id.* at 304.

The traditional Fourth Amendment reasonableness standard misses what the Eight Amendment captures — a concern for the human who is subject to police violence. Unfortunately, by limiting the Eighth Amendment to post-conviction punishment, the Supreme Court has foreclosed a victim of police violence from the human dignity protection that the Eight Amendment could provide.

B. Why the Eighth Amendment Should Apply to Policing

Although the Eighth Amendment purports to protect people from cruel treatment by state actors, the Supreme Court limits the Eighth Amendment Cruel and Unusual Punishment Clause to post-conviction punishment. In *Ingraham v. Wright*,[253] where parents challenged the constitutionality of corporal punishment in schools, the Court narrowly held that the Eighth Amendment's protection against cruel and unusual punishment was inapplicable to the corporal punishment of public school children.[254]

The Court's analysis discussed the Eighth Amendment's history, noting that its text covers topics associated with the criminal process, such as bails, fines, and punishment.[255] The Court reasoned that because "the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government," it was not meant to apply to sanctions unrelated to the criminal process, such as schoolchildren's discipline.[256]

Unlike corporal punishment in public schools, police investigation into criminal behavior is the starting point of the "criminal law function" of government.[257] The Supreme Court's recognition of such force as a Fourth Amendment seizure supports this view. A seizure occurs when, due to police actions and the circumstances at the scene, "a reasonable person would have believed that he was not free to

253. 430 U.S. 651 (1977).

254. *See id.* at 671. The corporal punishment in *Ingraham* "consisted of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick" and resulted in "no apparent physical injury to the student." *Id.* at 656–57. In the subsequent case, *Graham v. Connor*, the Supreme Court relied on *Ingraham* and concluded that the "Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" Graham v. Connor, 490 U.S. 386, 398–99 (1989) (citing *Ingraham*, 430 U.S. at 671 n.40).

255. *See Ingraham*, 430 U.S. at 664.

256. *See id.*

257. *See id.* (examining the Eighth Amendment's history and recognizing it does not apply to students punished in school settings).

leave."[258] The circumstances that might indicate a seizure are "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[259]

By adopting the *Ingraham* view of the Eighth Amendment in police force cases, the Supreme Court diminished its rationale that the Eighth Amendment was inapplicable. The *Ingraham* Court's observations that corporal punishment against students is not Eighth Amendment punishment reveals the *Graham* Court's blunder in concluding that *Ingraham* prohibits the Eighth Amendment's applicability to police force.

When a seizure occurs, it must be justified either by reasonable suspicion (for investigatory stops) or probable cause (for seizures amounting to the restrictiveness of an arrest).[260] The definitions of both reasonable suspicion and probable cause indicate a required connection between the seizure and criminal activity. Reasonable suspicion requires an officer to have articulable facts, "which lead[] him reasonably to conclude in light of his experience that criminal activity may be afoot."[261] Likewise, probable cause for an arrest requires officers to have "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[262] Thus, when officers seize a person using force — a seizure that requires some level of suspicion of criminal activity — there is a clear connection to the criminal process, a connection missing from corporal punishment in school.

Law enforcement officials' use of force to carry out criminal law investigatory power is a form of punishment. Criminal punishment is imposed upon a person as a response to that person's objectionable behavior — the violation of a particular jurisdiction's criminal statutes. Punishment is inflicted to deter criminal behavior, rehabilitate the criminal offender, incapacitate dangerous individuals, or express

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258. United States v. Mendenhall, 446 U.S. 544, 554–55 (1980).

259. *Id.*

260. *See* Navarette v. California, 572 U.S. 393, 397 (2014) ("The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.'" (quoting Alabama v. White, 496 U.S. 325, 330 (1990))); Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.").

261. Terry v. Ohio, 392 U.S. 1, 30 (1968).

262. Beck v. Ohio, 379 U.S. 89, 91 (1964).

society's desire for retribution against the lawbreaker.[263] When law enforcement officials seize individuals, it is because of some perceived criminal violation committed by that individual (which may or may not be a pretextual reason).

It is that perception of objectionable behavior — probable cause — that legally justifies seizure under the Fourth Amendment.[264] This means that an officer — or a magistrate in cases where a warrant is required — must determine a "fair probability" that the individual has committed a criminal offense before the arrest can be made.[265] In the case of Michael Brown, the alleged criminal offense was impeding traffic. And while Officer Wilson may have initially only needed reasonable suspicion to stop Michael from inquiring further, once deadly force was used, Michael's seizure was elevated to an arrest, which would require probable cause that he had committed an offense.[266] According to Officer Wilson, when deadly force was used, Michael's objectionable behavior threatened Officer Wilson's life, which could be categorized as a host of criminal offenses — from assault to attempted murder.[267] Thus, the deadly force used against Michael was in response to his perceived criminal behavior. In Officer Wilson's version of the story, lethal force was meant to deter Michael's life-threatening advance,[268] depicting Michael as an enraged monster untamable by any amount of negotiation.[269] The shots that took Michael's life were certainly meant to incapacitate him.[270] Officer Wilson's actions could only be justified by a belief that Michael's allegedly outrageously threatening behavior deserved retribution[271] or

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263. *See* ARTHUR W. CAMPBELL, LAWS OF SENTENCING 17 (2d ed. 1991).

264. *See Devenpeck*, 543 U.S. at 152.

265. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983).

266. *See* California v. Hodari D., 499 U.S. 621, 626 (1991) ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.").

267. In his grand jury testimony, Officer Wilson alleged that Michael punched him in the face, reached into his car, repeatedly swung at him, and grabbed his gun. *See* Transcript of Grand Jury, *supra* note 208, at 210, 212–15, 223.

268. In describing the first time he shot his gun while Michael was at his car, Officer Wilson explained thinking, "this guy is going to kill me if he gets ahold of this gun." *Id.* at 224.

269. At one point in his grand jury testimony, Officer Wilson said that he felt "like a five-year-old holding onto Hulk Hogan." *Id.* at 212. He also described Michael as "look[ing] like a demon." *Id.* at 225.

270. Officer Wilson described his last shot against Michael this way: "And then when it went into him, the demeanor on his face went blank, the aggression was gone, it was gone, I mean, I knew he stopped, the threat was stopped." *Id.* at 229.

271. In describing the fatal series of shots, Officer Wilson said, "I remember looking at my sites and firing, all I see is his head and that's what I shot." *Id.* at 229.

that rehabilitation would be futile.[272] Officer Wilson subjected Michael to a level of force that operated in the same manner as punishment, the same rationale evident in Breonna Taylor's case.

Rather than initiating the mechanism of criminal justice to rehabilitate or punish someone engaged in a drug crime by collecting evidence, bringing charges, and duly convicting that person, the police who entered Breonna's home acted as though they had already determined the guilt of everyone in that apartment.[273] Officers killed her when attempting to punish whomever fired at them, justified because they were threatened with deadly force, despite the fact that a person has the right to defend their home from intruders.[274] Their shots were intended to deter and incapacitate. And the fact that even before medical aid was rendered to Breonna, Kenneth was arrested for shooting at officers shows that officers viewed him as worthy of retribution. Rather than depending on a flimsy assessment of reasonableness, courts and the public should instead view certain aspects of policing as a form of control and punishment — especially over Black bodies.

IV. REFORMING POLICING IS REFORMING PUNISHMENT

Viewing the use of force by police officers as a form of punishment borrows valuable lessons from the sentencing reform movement and theories of punishment. The goals of federal punishment are expressed in 18 U.S.C. § 3553(a), which melds utilitarian and retributivist theories.[275] This hybrid approach purports to punish offenders for a larger societal benefit and justly penalize moral blameworthiness.[276] Among the governing principles of punishment enumerated in the statute are deterrence of specific offenders, incapacitation, crime prevention, distribution of just punishment, and effective offender

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272. Officer Wilson testified before the grand jury that as he fired a flurry of shots at Michael, the enraged suspect "looked like he was almost bulking up to run through the shots, like it was making him mad that I[] [was] shooting at him." *Id.* at 228.

273. To understand this presumption that Black people are punishable, which denies them their legally required presumption of innocence, see TEDx Talks, *#PresumedPunishable: Sentencing on the Streets*, YOUTUBE (Sept. 22, 2020), https://www.youtube.com/watch?v=moXsTCdhGQE [https://perma.cc/X2FH-H6CD].

274. *See Self Defense and "Stand Your Ground,"* NAT'L CONF. ST. LEGISLATURES (May 26, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/self-defense-and-stand-your-ground.aspx#:~:text=The%20common%20law%20principle%20of,and%20expanded%20by%20state%20legislatures [https://perma.cc/RV5G-H6GD].

275. *See* 18 U.S.C. § 3553(a).

276. *See id.*

rehabilitation.[277] Utilitarian and retributivist theories of punishment differ in their punishment goals.[278] The utilitarian theory of punishment aims to prevent or reduce future crime, while that of retribution is to ensure the offenders receive their "just desert."[279] Police-initiated punishment satisfies neither the goal of crime prevention nor the "eye for an eye" value.

While yet unfinished, inestimable work has been produced in the sentencing reform arena that may prove instructive in reimagining the police.[280] In some circles, sentencing reform scholars have relied upon retributive theories of punishment to urge the dismantling of the current sentencing scheme in the United States.[281] Others rely upon deterrence,[282] arguing that since it is punishment, police force should be informed by the proportionality requirements of retributive punishment and the crime prevention mandates of deterrence.

The utilitarian principle of deterrence is rooted in the proposition that punishment is necessary for society's general protection.[283] General deterrence hopes that the public crime prevention message invoked at sentencing will remain the same throughout the sentence, thus deterring others from committing crimes.[284] Specific deterrence posits that personalized punishment is necessary to prohibit future crimes of the offender.[285] Deterrence's goals are not realized in any way when punishment is police initiated.

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277. *See id.*

278. *See generally* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 1 (2008).

279. *See id.* at 9.

280. *See, e.g.*, PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 136–39 (2006); Jalila Jefferson-Bullock, *How Much Punishment Is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345 (2016) [hereinafter Jefferson-Bullock, *How Much Punishment Is Enough?*]; Jalila Jefferson-Bullock, *Let My People Go: A Call for the Swift Release of Elderly Federal Prisoners in the Wake of COVID-19*, 32 FED. SENT'G REP. 286 (2020); Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 77–78 (2014) [hereinafter Jefferson-Bullock, *The Time Is Ripe*]; Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937 (2018) [hereinafter Jefferson-Bullock, *Quelling the Silver Tsunami*].

281. *See* Jefferson-Bullock, *How Much Punishment Is Enough?*, *supra* note 280; Jefferson-Bullock, *The Time Is Ripe*, *supra* note 280, at 78; Jefferson-Bullock, *Quelling the Silver Tsunami*, *supra* note 280.

282. *See* Jefferson-Bullock, *How Much Punishment Is Enough?*, *supra* note 280; Jefferson-Bullock, *The Time Is Ripe*, *supra* note 280, at 81.

283. *See* ROBINSON, *supra* note 278, at 74.

284. *See* Jefferson-Bullock, *Quelling the Silver Tsunami*, *supra* note 280, at 972.

285. *See id.*

The concept of retribution insists that offenders be punished *fairly*, based solely on the extent of their moral blameworthiness. [286] Retribution's core justification is proportionality — that punishment will always be proportional to desert and, therefore, fair.[287] Desert falls into two separate, yet coincidental, categories: desert pragmatism and desert moralism.[288] Desert pragmatism, or empirical desert, adopts the "community's shared principles of justice" in assigning liability and, ultimately, punishment.[289] Desert moralism, or deontological desert, relies upon "abstract principles of moral right and goodness."[290] These "bottom-up" and "top-down" theories, respectively, are intended to work collaboratively to ensure overall justice so that "each offender receives the punishment deserved, no more, no less."[291] Viewing police force as punishment begs the question of whether it was apportioned fairly.

Proportionality is the cornerstone of retributive punishment theory.[292] It may be viewed as a "basic right" and a "fundamental principle of justice that emanates directly from the state's essential duty to protect the personal right[s] of its constituents."[293] In the context of criminal sentencing, proportionality requires a critical assessment of the degree of an offender's moral blameworthiness, succeeded by a reckoning of whether any proposed sentence is aligned therewith. [294] Modern egalitarian interpretations maintain that retributive punishment must value offender and victim dignity by determining the outer limits of punishment and constraining punishment to the "precise amount of suffering necessary to restore a just distribution of the burdens of the law."[295] Scholars suggest that

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286. *See* ROBINSON, *supra* note 278, at 136–40.

287. Desert may be categorized thusly: vengeful desert, deontological desert, and empirical desert. Each category apportions blameworthiness differently. Vengeful desert considers moral blameworthiness from the point of view of the victim. Deontological desert examines moral blameworthiness based on the views of moral philosophers. Empirical desert distributes moral blameworthiness according to the community's shared justice beliefs. *See id.*

288. *See* ROBINSON & CAHILL, *supra* note 280, at 19.

289. *See id.*

290. *Id.*

291. *Id.*

292. *See* Amit Bindal, *Rethinking Theoretical Foundations of Retributive Theory of Punishment*, 51 J. INDIAN L. INST. 307, 311 (2009).

293. Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 538 (2004).

294. *See id.*

295. Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1299–302 (2006).

proportionality must be assessed qualitatively and quantitatively, but its qualitative nature is more reliable.[296] Just as "it is difficult to know or control which particular details of an offender or offense inform a decision-maker's assessment of desert,"[297] it is also nearly impossible to measure how much punishment is enough.[298] Nevertheless, quantitative proportionality cannot be disregarded.

A. Retribution and Quantitative Proportionality

The retributive theory of punishment is grounded in perceptions of punishment as fair, which may include the moral philosopher's perceptions and those of the community. Scholars agree that desert is only effective if the general population is convinced of its fairness and proportionality.[299] For desert to function fairly, proportionality must be measurable — retribution requires punishment no more and no less than what is deserved, "solely because the offender deserves it."[300] Individual assessments are required for a punishment to survive retribution scrutiny.

Per retributive justice theory, once an offender no longer poses a threat to society, general deterrence considerations are no longer justified. But the reality is that "[t]he majority of offenses do not, in society's opinion, merit sentences as harsh as the death penalty or even life in prison," and result in the imposition of "much stiffer penalties

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296. *See id.* at 1327.

297. *Id.* at 1296 ("Racial bias, fear, [and] disgust . . . can shape desert assessments, but they do so under cover of a seemingly legitimate moral judgment.").

298. *See* ROBINSON, *supra* note 278, at 129; Jefferson-Bullock, *How Much Punishment Is Enough?*, *supra* note 280.

299. *See* ROBINSON, *supra* note 278, at 76.

> Deviating from a community's intuitions of justice can inspire resistance and subversion among participants — juries, judges, prosecutors, and offenders — where effective criminal justice depends upon acquiescence and cooperation. . . . Liability and punishment rules that deviate from a community's shared intuitions of justice undermine that reputation.
>
> The system's intentional and regular deviations from desert also undermine efficient crime control because they limit law's access to one of the most powerful forces for gaining compliance: social influence. The greatest power to gain compliance with society's rules of prescribed conduct may lie not in the threat of official criminal sanction but rather in the influence of the intertwined forces of social and individual moral control.

Id. at 77. In this context, proportionality is the cornerstone of fairness. Quantitative proportionality ponders the duration of a period of punishment to determine whether it is fair or deserved. *See* John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 89 (2010).

300. Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 282 (2005).

than were originally deemed appropriate by the legislature."[301] This rings true in the case of unreasonable police force, specifically deadly force.

Quantitative proportionality analysis focuses on time, asking whether the punishment is a sufficient duration. Per empirical desert, intuitions of justice and fairness do not align with the conversion of an encounter with police into a life sentence. Some scholars suggest that retribution can only be accurately measured by factoring in conditions that exist when the crime was committed.[302] In this way, retribution requires that the punishment accurately and only fits the crime. Current policing practices and the law used to sustain them support a quantitatively disproportionate punishment scheme. Retribution can be better understood, however, by focusing on its qualitative elements. An examination of Eighth Amendment proportionality is instructive in this area.

B. Retribution, the Eighth Amendment, and Qualitative Proportionality

The Eighth Amendment prohibition against cruel and unusual punishment has been interpreted to proscribe excessive or disproportionate punishments.[303] While retribution's definition is well-established, considerable scholarly commentary notes the Supreme Court's inability to craft a concrete interpretation of Eighth Amendment proportionality.[304] In response, some scholars suggest that Eighth Amendment proportionality is born of retributive proportionality and that the essential meanings of both are identical.[305] Professor John Stinneford suggested that the Court's confusion regarding Eighth Amendment proportionality can be remedied by looking to retributive proportionality[306] and acknowledging the distinction between punishment's justification and purpose.[307] Punishment's justification "gives the punishment the quality of justice"

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301. Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 3, 10 (2008).

302. *See* Jefferson-Bullock, *How Much Punishment Is Enough?*, *supra* note 280, at 390.

303. *See* Weems v. United States, 217 U.S. 349, 370 (1910).

304. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 904–06 (2011).

305. *See id.* at 965. According to Professor John Stinneford, "[t]he historical evidence demonstrates that the focus of the Cruel and Unusual Punishments Clause . . . was retributive rather than utilitarian." *Id.*

306. *See id.* at 967.

307. *See id.* at 962.

or "ensures that the offender gets his due."[308] At the same time, its purposes "are the good things we hope to achieve through it, without respect to what is due to the offender as a matter of justice."[309] Under this reasoning, "a punishment is permissible only to the *extent* that it is justified" but is disproportionate and, therefore, excessive if it exceeds the "bounds of justice."[310]

The assessment of whether punishment is within bounds and appropriately proportionate should focus on the qualitative[311] dignity interests inherent in Eighth Amendment jurisprudence. Dignity interests speak directly to the *type* of punishment imposed — in other words, the qualitative character from the punishment.[312]

When an offender is incarcerated after being adjudged guilty, qualitative proportionality review does not focus on time served but seeks to identify whether inmates' experiences of confinement are proportional to "the crime committed, the culpability of the offender, or both."[313] Qualitative proportionality, then, pertains to the means and conditions of punishment and does not contemplate the duration, but the *manner* in which one is punished.[314] A requirement that conditions of punishment must not offend human dignity[315] limits the government's power to punish.[316]

Certainly, police brutality offends human dignity:

> Police use of force should include base levels of verbal and physical restraint, non-lethal force, and lethal force; yet, instead, they are permitted and trained to use deadly or lethal force, including shooting and chokeholds, under said "justifiable" circumstances. Moreover, regardless of the official or unofficial restrictions and controversies on the use of lethal force, a police officer might and, often times does, violate those limitations. To this day, there are no methods to objectively control police brutality.[317]

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308. *Id.*

309. *Id.*

310. *Id.*

311. Scholars suggest that Eighth Amendment proportionality analyses disallow examination of the quantity of punishment, and instead courts must appraise only its qualitative value. *See generally id.* at 968–72.

312. *See* Castiglione, *supra* note 299, at 107–08.

313. *Id.* at 79.

314. *See id.*

315. Proportionality demands that punishments are not "violative of [the] inherent dignity [of] human beings." *Id.* at 99–100.

316. *See* Dubber, *supra* note 293, at 538.

317. Crusto, *supra* note 24, at 11–12 (footnotes omitted).

The consequence is qualitatively disproportionate punishment, which includes being "[h]andcuffed and pinned on [your] stomach by three police officers in a chokehold for nearly nine minutes" while crying out for your mother and attempting, in vain, to tell officers that you cannot breathe; being fatally shot while "[r]unning away from the police after a peaceful interrogation"; and being awakened after midnight by a police battering ram, shot indiscriminately, and denied immediate medical aid.[318] Such brutality is often inflicted upon people — like George Floyd and countless others[319] — publicly, augmenting the indignity. In the case of deadly force, police action is a "violent public spectacle of official homicide."[320] Police-inflicted punishment is degrading, destructive of dignity, and in violation of theories of retribution and Eighth Amendment qualitative proportionality.

C. Deterrence and Meaningfulness

Deterrence has long been criticized as a punishment tool because it lacks meaningfulness if its ultimate goal is crime prevention.[321] Deterrence-based sentences are premised on the notion that "criminal law formulations can influence conduct 'on the street.'"[322] However, if a potential offender cannot appreciate that his criminal conduct may be detected and that punishment will be severe or is not even aware of the punishment associated with his conduct, the punishment's expected deterrent effect is lost.

Professor Paul H. Robinson's work criticizes deterrence as a principle for distributing punishment and focuses on the misguided efforts of legislative drafters to prevent crime by creating laws supported solely by deterrence.[323] He suggested that deterrence-based punishment is grounded in three unpersuasive assumptions: (1) that criminal offenders know the law, (2) that criminal offenders "perceive the cost of violation [of the law] as greater than the perceived benefit," and (3) that criminal offenders "bring such knowledge to bear on

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318. *See id.* at 52 (footnotes omitted).

319. *See* Shawn Hubler & Julie Bosman, *A Crisis That Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html [https://perma.cc/WM5U-FEVZ].

320. Crusto, *supra* note 24, at 58.

321. *See* ROBINSON & CAHILL, *supra* note 280, at 136.

322. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 969 (2003).

323. *See id.* at 953.

[their] conduct decision at the time of the offense."[324] All three of these assumptions are erroneous because "most people do not know the law," and even if they do, "a host of conditions . . . interfere with the rational calculation of self-interest by potential offenders."[325]

The false premise of deterrence extends to judges, who share the same delusion that their sentencing decisions deter criminal behavior and police-initiated punishment. When police, rather than the law, punish people who have not yet been charged with a crime, the response is not crime prevention, but outrage.[326] As in other instances, this type of punishment carries no deterrent effect, and, therefore, lacks genuine meaningfulness. Though sentencing reform is imperfect, the goals and approaches of recent sentencing reform efforts are instructive to police reform, and ultimately make a case for police defunding.

V. SENTENCING REFORM EFFORTS

Punishment has undergone drastic transformations since the founding of the Union.[327] Under colonial rule, beliefs in man's inherent depravity led to swift, harsh punishment.[328] After the Revolutionary War, scholars and theologians boasted of humans' redeemable qualities, and punishment began to shift towards a more rehabilitative scheme.[329] By the late 1800s, however, the near-exclusive purpose of punishment was rehabilitation with retribution and deterrence playing only incidental roles.[330]

A. Judicial Discretion and Sentencing

In the 1960s, rehabilitation came under great scrutiny, and throughout the 1970s and 1980s, leaders questioned its efficacy.[331] As a result, Congress initiated an extensive investigation into the state of

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324. *Id.*

325. *Id.* at 954–55.

326. *See George Floyd: Videos of Police Brutality During Protests Shock U.S.*, BBC NEWS (June 5, 2020), https://www.bbc.com/news/world-us-canada-52932611 [https://perma.cc/L9R3-7DHG]; Justin Carissimo, *Police Fatally Shoot Black Teen Sparking Protests in Waukegan, Illinois*, CBS NEWS (Oct. 23, 2020, 10:53 AM), https://www.cbsnews.com/news/waukegan-shooting-marcellis-stinnette-black-teen-police-illinois/ [https://perma.cc/6VR2-2HGN].

327. *See* Jefferson-Bullock, *The Time Is Ripe*, *supra* note 280, at 78.

328. *See id.*

329. *See id.*

330. *See id.*; *see also* United States v. Scroggins, 880 F.2d 1204, 1206–07 (11th Cir. 1989).

331. *See Scroggins*, 880 F.2d at 1207–08.

federal sentencing, ultimately concluding that "[w]e know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated."[332] In the name of sentencing reform, leaders rebelled against judges' unfettered discretion in sentencing, decrying that judges administered sentences arbitrarily and inconsistently, often for identical offenses.[333] Shunning rehabilitation models, the Comprehensive Crime Control Act of 1984 endorsed retribution and deterrence as the principal purposes of federal punishment.[334] Its sentencing provisions were included in the Sentencing Reform Act (SRA), which convey that the "primary focus of sentencing attention was no longer the offender, but rather the offense."[335]

The SRA transformed the country's punishment model from rehabilitative to retributive and deterrent.[336] It stripped judges of the sentencing authority they had exercised for years,[337] tying their hands to lengthy, determinate mandatory minimum sentencing, diluting their ability to consider offenders' unique circumstances. Realizing that judges were perhaps too constricted, the Supreme Court declared mandatory minimums advisory.[338] Rendering mandatory minimum sentences advisory in later years, however, did little to empower sentencing judges to reduce the imposition of excessively lengthy mandatory minimum criminal sentences.[339]

Guidelines formulation and application represent biased responses to the widely accepted problem of unfairness and inconsistency in

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332. *Id.* at 1207.

333. *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1027 (1991).

334. *See Scroggins*, 880 F.2d at 1208.

335. Sandra Shane-Dubow, *Introduction to Models of Sentencing Reform in the United States*, 20 LAW & POL'Y 231, 236 (1998). Indeed, the SRA's senate report described the existing state of punishment as "based largely on an outmoded rehabilitation model." United States. v. Blake, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000) (quoting S. REP. NO. 98-225, at 38 (1984)).

336. *See* Jordan Baker et al., A Solution to Prison Overcrowding and Recidivism: Global Positioning System Location of Parolees and Probationers 16 (2002) (Gemstone Program thesis, University of Maryland).

337. *See id.*

338. *See* United States v. Booker, 543 U.S. 220 (2005); *see also* Jelani Jefferson Exum, *Sentencing, Drugs, and Prisons: A Lesson from Ohio*, 42 UNIV. TOL. L. REV. 881 (2011) [hereinafter Jefferson Exum, *Sentencing, Drugs, and Prisons*]; Jefferson-Bullock, *The Time Is Ripe*, *supra* note 280, at 82.

339. *See* Baker et al., *supra* note 336, at 42 (addressing the "plummet[ing]" support of rehabilitative programs due to recidivism).

federal sentencing.[340] Since liberal and conservative sensibilities had already abandoned rehabilitation, the necessity of its demise needed only be gently confirmed.[341] The Commissioners based the Guidelines on the unsound psychological factor of "average current practice."[342] Today, sentencing reformers are stuck, attempting to slog through the mess and undo decades of damage resulting from lengthy mandatory minimum sentences.

The SRA's sentencing scheme failed to achieve the type of uniformity or fairness that reformers sought. Recent studies support the conclusion that lengthier sentences directly lead to increased recidivism rates, negatively affect efforts to rehabilitate prisoners, and are unfairly and undeservedly issued for most, if not all, of the examined offenses.[343] Leaders did not foresee the SRA's legacy of excessively long federal criminal sentences. The Sentencing Commission's legacy lingers today in the form of severe mandatory sentences, [344] limited parole opportunities, [345] and astoundingly increased numbers of incarcerated offenders.[346] "Unfortunately, in many respects the Guidelines are the product of crafters' creative imaginations and their biases."[347]

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340. *See* Francis T. Cullen, *Beyond Nothing Works*, 42 CRIME & JUST. 299, 326–27 (2013).

341. *See id.* at 327.

342. *See* Marvin E. Frankel, *The Quest for Equality in Sentencing*, 25 ISR. L. REV. 595, 604 (1991). Further, "by analysis of many thousands of cases, [the Commission] ascertained broadly . . . the existing ranges of sentences, the recurrent factors influencing actual sentences imposed, and the actual amounts of time served under incarcerative sentences." *Id.*

343. *See* Jefferson Exum, *Sentencing, Drugs, and Prisons*, *supra* note 338, at 882; Vitiello, *supra* note 333, at 1036.

344. *See Federal Mandatory Minimums*, FAMS. AGAINST MANDATORY MINIMUMS (2015), https://famm.org/wp-content/uploads/Chart-All-Fed-MMs.pdf [https://perma.cc/KRB7-LE58] (providing a chart that shows the various statutes, offenses, sentence lengths, and dates of enactment of federal mandatory minimums).

345. *See* Press Release, Just. Pol'y Inst., How to Safely Reduce Prison Population and Support People Returning to Their Communities 1 (June 2, 2010), http://www.justicepolicy.org/images/upload/10-06_FAC_ForImmediateRelease_PS-AC.pdf [https://perma.cc/MDX2-KBRL] ("Contributing to the total number of people incarcerated is the reluctance of parole boards to grant parole to all people who are eligible. Parole boards often face public scrutiny if someone they release commits a new offense.").

346. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-121, BUREAU OF PRISONS: OPPORTUNITIES EXIST TO ENHANCE THE TRANSPARENCY OF ANNUAL BUDGET JUSTIFICATIONS 1 (2013).

347. *See* Jefferson-Bullock, *How Much Punishment Is Enough?*, *supra* note 280, at 376.

B. Defunding: A Different View of Reform

Criminal sentencing's punitive nature and reliance on bias are not unique to sentencing schemes but are evident in other forms of punishment, especially police-initiated punishment.[348] Likewise, the dangerous myth of Black criminality, which guides police use of force, bespeaks centuries of ingrained, institutionally sanctioned discrimination and oppression.[349] Through various proposals, modern-day reformers seek to overhaul the entire system by eliminating bias, reintroducing the concept of rehabilitation, and prohibiting unreasonably lengthy criminal sentences.[350] Whether through the imposition of particular purpose sentencing or the inclusion of experimentalist theory in determining how much punishment is enough, current-day reforms pursue a total dismantling of the current system because it is so incredibly entrenched in inequality.[351]

The history of police use of force is no different. Modern-day sentencing reformers request that judges, constrained by objective, purpose-informed sentencing goals, make more individualized and informed sentencing decisions. These types of reforms require a complete and total shift in how criminal processes are viewed. Abolitionist democracy theory is instructive.

Abolitionist democracy is central to the concept of police defunding. In contrast to traditional reform efforts, proponents of abolitionist theory acknowledge the backdrop of oppression that is attached to every level of every institution in the United States and assert that "the very foundations of existing conceptions of legal justice are inadequate, compromised, limited in the ideas of justice exhorted, and corrupted

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348. *See supra* Part III.

349. *See supra* Part II.

350. *See* Jefferson-Bullock, *How Much Punishment Is Enough?*, *supra* note 280.

351. *See* Jefferson Exum, *Forget Sentencing Equality*, *supra* note 25. Despite the name of the article, the Author's argument was not against racial equality in sentencing. Instead, the article recognized that calling for racial equality in sentencing, particularly in the cocaine sentencing context, will not necessarily result in better sentencing. *See id.* at 130–43. Instead, if racial inequality in drug sentencing was remedied by sentencing the overwhelmingly Black crack cocaine defendants to the same sentences as powder cocaine defendants, the system would simply be left with cocaine defendants of all races getting a sentence that is not serving any purpose of sentencing and is contributing to ineffective mass incarceration. *See id.* at 122–30. This is because current cocaine sentencing does not deter drug offenses, rehabilitate offenders, or incarcerate only dangerous defendants, nor does it adequately reflect community sensibilities of just deserts or retribution. *See id.*

by inescapably vicious and inegalitarian institutional histories and cultures."[352]

Per abolitionist democracy theory, reform of any systemically racist system requires disruption of racist narratives.[353] The theory "calls for a constellation of democratic institutions and practices to displace policing and imprisonment while working to realize more equitable and fair conditions of collective life."[354]

> [T]he abolition of slavery was accomplished only in the negative sense. In order to achieve the *comprehensive* abolition of slavery — after the institution was rendered illegal and black people were released from their chains — new institutions should have been created to incorporate black people into the social order . . . .[355]

In the area of prison reform, abolitionist democracy efforts consist of "embrac[ing] both a negative or deconstructive project of dismantling penal systems and a positive project of world-building."[356] Such work involves "the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete."[357]

Akin to police defunding, abolitionist theory requires "a democratically informed effort to target the causes of interpersonal harm while ensuring peace and well-being, as well as the displacement of policing and imprisonment in connection with efforts to realize greater social and economic equality."[358] For each, the overarching goal is to overhaul unjust resource allocations, and "build local democratic power to reinvest public resources in projects that actually provide meaningful security, while simultaneously reducing the violent theft perpetrated daily by mainstream economic practices and institutions."[359]

Similar to discussions regarding sentencing reform, abolitionist democracy theory provides a framework that urges a complete overhaul of current police practices. In drawing from instances where

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352. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1637 (2019).

353. *See id.* at 1616.

354. *Id.* at 1618. Professor Allegra McLeod wrote: "Abolitionist organizers understand their work to be related to the historical struggles against slavery and its afterlives, against imperialism and its legacies," with the ultimate goal of "eliminat[ing] oppressive institutions and creat[ing] new forms of more just coexistence." *Id.* at 1617.

355. ANGELA Y. DAVIS, ABOLITION DEMOCRACY 95 (2005).

356. *Id.*

357. DAVIS, *supra* note 355, at 96.

358. *Id.* at 1619–20.

359. *Id.* at 1633.

the government declined to prosecute or juries neglected to convict officers for brutalizing people, abolitionists claim that even convictions would ultimately fail to produce equitable outcomes because they would neglect to change the "institutional and cultural dynamics responsible for the pervasive violence of policing."[360] In such cases, the problem is not that deserving, "isolated 'bad apple[s]'"[361] have not been appropriately punished, but that policing methods, systems, and processes that permit brutality as a regular occurrence remain intact. They continue to operate against "the backdrop of a status quo"[362] that is steeped in racism and inequality.[363] In the case of policing, abolitionist democracy theorists urge a complete reimagining of police functioning and practice. This model is critical in attempting to view punishment differently, such that genuine rebuilding can be realized.[364]

CONCLUSION: ANTIRACIST SENTENCING REFORM INCLUDES DEFUNDING THE POLICE

This unique moment, when there is increased public interest in being antiracist — "a radical choice in the face of this history, requiring a radical reorientation of our consciousness"[365] — presents an opportunity for reform. The face of U.S. history is fraught with using police force to control, oppress, and traumatize Black Americans.[366] Still today, police force is imposed in racially discriminatory ways that display the incidences and badges of policing's roots in slavery, and the police funding model supports and institutionalizes this racism.[367]

Defunding the police answers the antiracist call to radically reorient the public consciousness and faith in the entire criminal justice system, which has been undermined by the routine use of force against Black Americans. Legal standards for challenging the excessiveness of police force based on reasonableness reap unreasonable outcomes that reflect biased views of Black criminality. Reconceptualizing these aspects of policing as punishment situates the defund movement within the

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360. *Id.* at 1639.

361. *Id.* (quoting Mariame Kaba, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose/ [https://perma.cc/B7YE-B6YE]) (alteration in original).

362. *Id.* at 1640.

363. *See supra* Section I.A.

364. *See generally* McLeod, *supra* note 352.

365. KENDI, *supra* note 6, at 23.

366. *See* HUBERT WILLIAMS & PATRICK V. MURPHY, THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW (1990); Hasbrouck, *supra* note 32.

367. *See* Hasbrouck, *supra* note 32, at 216–19.

widely accepted sentencing reform movement and reorients policing as punishment outside of the protections of the criminal process. This reorientation recognizes that police-initiated punishment fails to fulfill the legitimate purposes of criminal punishment and is, therefore, in need of an entire overhaul.

True systemic change can only happen in conjunction with eradicating racism. The movement to defund the police is "a call to reinvent our criminal justice system to better honor our national pledge of equal justice under the law."[368] We can do this by calling policing what it is: punishment. We will no longer stand for a racist system of sentencing son the streets or in the courts.

368. Hostetler & Gammage, *supra* note 13, at 27.