ABSTRACT

I Can't Breathe: A History of Excessive Force and Race

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This thesis analyzes how and within what context the Supreme Court of the United States has interpreted excessive force and police brutality since 1968, when *Terry v. Ohio* was decided, and the ramifications that these decisions have had on police encounters and practices until the present day. I specifically examine how these precedents and their implementation have contributed to the growing culture of mistrust between minority groups and law enforcement officials especially in the current "Black Lives Matter" era. By evaluating Department of Justice reports, the Center for Policing Equity reports, and court documents, I conclude that minorities are often disproportionately the targets of unjustified discrimination and excessive force while law enforcement officials frequently receive acquittals or are not charged at all for their actions. In order to remedy this issue, I evaluate the merits of substantive due process and suggest that by applying substantive due process to excessive force cases, policing practices would improve and instances of excessive force, particularly directed toward minorities, would decrease.

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I CAN'T BREATHE: A HISTORY OF EXCESSIVE FORCE AND RACE

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INTRODUCTION

It seems as though the 24-hour news cycle is constantly reporting on a breaking police shooting. More specifically, it seems that it is reporting on an encounter involving a police officer shooting or using excessive force on an African American. These controversial confrontations have come under increased scrutiny and condemnation in recent years, spawning huge and powerful movements such as Black Lives Matter. Gaining national recognition during the protests following the deaths of Michael Brown and Eric Garner, this movement is an outcome of years of heightened tensions and mistrust between law enforcement and minority groups that has resulted in police officers using a disproportionate amount of excessive force on minorities. This disproportionate use of force has ensued partly because of unfair policing practices that have been acceptable due to Supreme Court rulings on excessive force cases and their framings within a procedural due process context. By adjudicating these cases within a substantive due process context and holding officers to a more stringent standard, however, law enforcement would be likely to reform unfair policing practices, and thus decrease the number of controversial instances of excessive force.

CHAPTER ONE

The Cases

In recent years law enforcement has received renewed criticisms thanks to both highly publicized instances of alleged police brutality, such as the fatal shootings of Michael Brown and Philando Castile, and a strengthened civilian vigilance. Many of these instances inevitably end up in court, where officers are rarely convicted. Throughout the years, beginning in 1968 for this paper's purposes, the Supreme Court has emphasized the importance of objectivity in these types of cases, essentially ignoring the intent of the officer in question and looking only at the facts of the specific moment of the altercation. The Court has had to balance the legal doctrines of procedural and substantive due process. Procedural due process is a constitutional requirement which demands that when a citizen is denied life, liberty, or property interest, he or she is guaranteed certain rights, such as receiving adequate notice and obtaining a fair judge and counsel.[1] In other words, procedural due process pertains to the certain steps that a government must follow. Substantive due process, on the other hand, asks whether such a deprivation by the government is sufficiently and substantively justified regardless of whether certain steps were followed, and whether the procedures themselves are unfair.[2]

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[1]Legal Information Institute, "Procedural Due Process," *law.cornell.edu,* https://www.law.cornell.edu/wex/procedural_due_process (accessed November 20, 2018).

[2]Chemerinsky, Erwin, "Substantive Due Process," *Touro Law Review,* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty_scholarship (accessed November 20, 2018_.

This legal doctrine has long been a controversial topic in American jurisprudence, and the Supreme Court, in cases involving police brutality, have favored framing such cases within the procedural due process doctrine. This procedural due process interpretation, and the decisions made in these cases that emphasize objectivity and reasonableness, have made it significantly more difficult for a plaintiff to receive a favorable outcome in court, as law enforcement officers have been given much more leniency with respect to excessive use of force.

This chapter outlines and examines the history of police brutality cases. They are divided into four specific and relevant sections— excessive and deadly force cases, qualified immunity cases, provocation doctrine cases, and race cases— so that one can see how the cases build upon other cases with a similar main focus. The excessive and deadly forces cases simply concerned instances when law enforcement allegedly used excessive force deemed unnecessary and unconstitutional. The qualified immunity case determined when an officer was entitled to qualified immunity, or the immunity from going to trial, so that he or she may perform his or her job.[3] The provocation doctrine cases determined whether the provocation doctrine, which essentially states that an officer would not receive qualified immunity after engaging in excessive force when he or she provoked behavior that required the use of excessive force, was constitutional. Finally this chapter studies cases in which the Supreme Court determined if law enforcement officers were allowed to stop someone on the basis of race and if the subjective intent of a law enforcement officer could be acknowledged and examined in court.

[3]Legal Information Institute, "Qualified Immunity," *law.cornell.edu,* https://www.law.cornell.edu/wex/qualified_immunity (accessed September 27, 2018).

Excessive and Deadly Force Cases

Terry v. Ohio

Terry v. Ohio is the first Supreme Court case that must be noted when considering the history of excessive use of force by US police officers. Decided on June 10, 1968, it dealt with an altercation between three men, John W. Terry, Richard Chilton, and Carl Katz, and Clement Police Department Detective Martin McFadden. While McFadden was on patrol duty, he noticed Terry and Chilton taking turns walking past a store window and subsequently meeting up on a corner twelve times. Katz joined them on the corner once. McFadden, believing that the three men were planning on robbing the store, approached them, patted Terry down on the outside of his clothing, discovered a hidden gun, and proceeded to remove Terry's jacket from his person in order to obtain the gun. McFadden subjected Chilton and Katz to the same outer "frisk" and, having felt a gun on Chilton but not Katz, only subjected Chilton to an additional search in order to obtain his gun.[4]

The defense attempted to suppress the guns found by McFadden as evidence, arguing that they were inadmissible because they had been obtained during a search and seizure which violated the defendants' Fourth Amendment rights. However, the trial court was not swayed and found Terry and Chilton guilty, a ruling which the appellate court upheld. The Supreme Court affirmed that the using the guns as evidence was admissible since no infringement of Fourth Amendment rights had occurred. The

[4]Terry v. Ohio, 392 U.S. 1 (1967).

majority argued that although the "stop and frisk" could be categorized as a "search and seizure," it did not necessarily violate any constitutional rights. They claimed that since the search and seizure had been based on reasonable suspicion, it was constitutional. The court defined reasonable suspicion as something which was based on more than a hunch and "good faith." According to the Supreme Court, to determine if an officer actually had reasonable suspicion, courts had to ask whether a reasonable officer would have made the same conclusion with the facts first available.[5] Reasonable suspicion is a lower standard of evidence for law enforcement officials than probable cause, which states that an officer must have sufficient facts and a reasonable basis to believe that a crime had been committed in order to make an arrest, conduct a search, or receive a warrant.[6] The Supreme Court also stated that whether a search and seizure violated one's constitutional rights was contingent on whether the government's interest, namely the safety of the officer and nearby public, outweighed a defendant's personal freedom. The court also stressed the importance of the scope of the search, distinguishing between a full search based on probable cause and a minimal search based on reasonable suspicion.[7] They held that, since a reasonable person would be suspicious that the defendants were dangerous to the public, and since McFadden limited his search to the scope of the suspicion and facts, the encroachment on the defendants' personal freedom was warranted and the guns as evidence admissible.[8]

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[5]Ibid.

[6]Legal Information Institute, "Probable Cause," *law.cornell.edu,* https://www.law.cornell.edu/wex/probable_cause (accessed October 1, 2018).

[7]Terry v. Ohio, 392 U.S. 1 (1967).

[8]Ibid.

Although the case determined what was to be considered a reasonable search and seizure based on objective facts, it suggested that the exclusionary rule, which prohibits the use of illegally obtained evidence in trial, was not a proper deterrent to police brutality.[9] However, the court did not offer a remedy for the police abuses that would still be inevitable, a problem that has still been left unanswered by the court as a result of framing the cases in procedural due process terms. It also emphasized the importance of objectivity, rather than subjectivity, in police use of force cases, a common theme throughout all of these cases. These two characteristics of the case are still up for debate in police brutality cases, and the precedent and reasoning from this case influenced subsequent cases.

Tennessee v. Garner

Tennessee v. Garner, argued in 1984 and decided in 1985, is a significant case concerning excessive use of force, as it held that a law enforcement officer could not use deadly force against a fleeing suspect unless he or she had probable cause to believe the suspect was a dangerous threat. The case saw the family of Edward Garner, an African-American teen, challenging a Tennessee statute that claimed “"[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.”[10] The law was used to defend the actions of Elton Hymon, a Memphis police officer. Hymon and Officer Leslie Wright had been dispatched to a house into which a prowler had allegedly entered. Once they reached the

[9]Ibid.

[10]Tennessee v. Garner, 471 U.S. 1 (1985).

house, Hymon heard a door close, saw Garner attempting to jump a fence, told him to stop, and shot him with deadly force after Garner disobeyed, even though Hymon was "reasonably sure" that Garner was unarmed. Garner's father filed a suit under 42 U.S.C. 1983,[11] claiming that the deadly shooting violated Garner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The Court of Appeals for the Sixth Circuit found Hymon to have acted in "good faith" within the parameters of the statute, but held that the Tennessee statute was unconstitutional, as it allowed too broad a use of deadly force when held to the "reasonable officer" standard.

The Supreme Court affirmed the Court of Appeals decision stating that a law enforcement officer could only use deadly force on a fleeing suspect if they had probable cause, not only reasonable suspicion, that the suspect was a significant and dangerous threat. It claimed that a "reasonable officer" could not justify using deadly force when they did not have probable cause of the suspect's danger because the governmental interests of preventing his or her escape did not outweigh the suspect's interest of life.[12] The court rejected that the threat of death was needed to prevent suspects from fleeing and claimed that law enforcement would not be hampered by the striking of the Tennessee statute.[13]

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[11]Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[12]Tennessee v. Garner, 471 U.S. 1 (1985).

[13]Ibid.

The court also denied the petitioner's argument that the statute was constitutional because common-law rule allowed for the use of deadly force against fleeing suspects. The court argued that, as there had been legal and technological changes since pre-colonial times, most notably the fact that most felonies were no longer punishable by death and the advancement of weapons, this common-law tradition could no longer be construed in the same way.[14] This substantive due process argument is perhaps the most important in the case, as it sets a precedent for similar arguments in today's excessive use of force cases so that law enforcement officials may be held more accountable.

Graham v. Connor

The next Supreme Court case that considered the use of excessive force by law enforcement was argued and decided in 1989. The case's petitioner was Dethorne Graham, a diabetic who had gone into a store for the purpose of purchasing orange juice to counteract an insulin reaction. He quickly left the store and entered his friend's car, in order to go to a friend's house, when he saw that the line to check out was too long. The defendant, a police officer named M.S. Connor, found Graham's behavior suspicious, followed the car, stopped the car, ordered the men to exit the vehicle, and handcuffed Graham, allegedly ignoring Graham and his friend when they tried to explain his diabetic condition. Eventually Connor learned that there had been no wrongdoing and released Graham. However, Graham filed suit under 42 U.S.C. 1983 and additionally claimed that Connor had used excessive force which violated Graham's 14th amendment rights to substantive due process of the law.

[14]Ibid.

The court rejected Graham's defense's claim that the excessive force allegation could be filed and analyzed under a violation of substantive due process. They claimed that the Court of Appeals for the Fourth Circuit, which had heard and decided the case, had made a procedural error in applying the *Johnson v. Glick* test to determine whether Connor was guilty of excessive force. The test required one to consider four factors—namely whether there was need for force, the relationship between the need and the actual amount used, the extent of the injury inflicted, and whether the force was applied in "good faith" or was applied "maliciously and sadistically."[15] The court instead argued that there was a better constitutional basis and explicit textual support for bolstering excessive force claims, namely the protections provided by the Fourth Amendment. The court claimed that procedural due process was more plainly embedded within the Constitution, in the Fifth and Fourteenth Amendments, than substantive due process, which is not specifically mentioned, and thus excessive use of force cases should be viewed in light of its doctrine.

Chief Justice Rehnquist, writing the majority opinion, drew on the implicit conclusions from *Tennessee v. Garner* and concluded that all excessive force claims against law enforcement were to be filed and analyzed under a Fourth Amendment violation and its reasonable standard. It cited *Terry v. Ohio* as precedent for deciding whether an action was reasonable at the time of the incident, notably commenting on the need to weigh a person's Fourth Amendment rights against the government interests and the safety of the near public in sometimes a split-second.[16] The court reaffirmed that the

[15]Graham v. Connor, 490 U.S. 386 (1989).

[16]Ibid.

reasonableness standard was to be completely objective, without any scrutiny of the intent or motivation of the officer. The Supreme Court then sent the case back to the lower court to be reconsidered under the new standard.

Three justices, Blackmun, Brennan, and Marshall concurred in the use of the Fourth Amendment as the standard in this particular case, but objected to the blanket statement that all excessive forces cases could not be tried under substantive due process claims, implicitly allowing for subjective intent and motivation to be considered in future cases. The majority decision firmly stated that excessive use of force claims should always be framed in procedural due process arguments without considering subjectivity of law enforcement officers, a precedent built upon in most subsequent cases. This case, especially the concurring opinion, is still significant today, as the standard to which courts try excessive force claims has gained much attention in recent years, as courts have tended to favor law enforcement officers.

Qualified Immunity

Saucier v. Katz

Saucier v. Katz, decided in 2001, considered when officers accused of using unconstitutional excessive force could be protected by qualified immunity, or "the immunity from having to go through the costs of a trial."[17] The case stemmed from an altercation between Donald Elliot Katz, a protestor at an event hosting Al Gore, and Donald Saucier, an on duty officer. Saucier grabbed Katz from behind and escorted him

[17]Legal Information Institute, "Qualified Immunity," *law.cornell.edu,* https://www.law.cornell.edu/wex/qualified_immunity (accessed September 27, 2018).

out of the area as Katz began to place a banner on a fence. Saucier requested summary judgment based on qualified immunity.

The Supreme Court established a two-pronged test to determine whether an officer was entitled to qualified immunity. First, one had to ask whether a constitutional right has been violated. If so, then one must ask whether the right was clearly established thus allowing the officer to know that his or her actions were unreasonable. The Court argued that not only was "not every push or shove… violat[ing] the Fourth Amendment," but there was no clearly established rule that prohibited the officer from escorting Katz from the scene. A concurring opinion by Justices Ginsburg, Stevens, and Breyer, however, rejected the use of the two-pronged system stating that if a constitutional right has been violated, the officer is not entitled to qualified immunity.[18] The two-pronged test was amended in *Pearson v. Callahan*, which eliminated the necessity of determining whether a constitutional right was violated, thus allowing for an easier avenue to grant qualified immunity to officers.[19] The Supreme Court's stance on qualified immunity and the lowered threshold for law enforcement officers to obtain it, which is grounded in procedural due process as opposed to substantive due process, is extremely important to the standards of excessive force cases, as it imposes a lower burden on law enforcement officers, making it difficult for plaintiffs to receive a favorable and fair verdict.

[18]Saucier v. Katz, 533 U.S. 194 (2001).

[19]Pearson v. Callahan, 555 U.S. 223 (2009).

Provocation Doctrine

Billington v. Smith

Billington v. Smith, decided in 2002 by the U.S. Court of Appeals for the 9th Circuit, established the provocation doctrine as a legitimate check on the use of excessive force by law enforcement. The case stemmed from a chase and altercation between Detective David Smith and Ryan Hennessey. Smith pursued Hennessey's car after Hennessey had been driving recklessly and upon realizing that he was being chased, turned his lights off and sped away. Hennessey crashed into the curb and Smith approached the car to assess the situation. An altercation between the two men followed, with Hennessey allegedly attacking Smith, that resulted in Smith using deadly force against Hennessey. Smith was denied summary judgment by the district court based on qualified immunity because his "reckless tactics," such as not waiting for backup and his failure to use his baton or spray, created the situation in which excessive force had to be used.[20]

The Court of Appeals reversed the district court's ruling, arguing that in order for the provocation doctrine to be considered relevant, the provocation must be an independent Fourth Amendment violation subject to the reasonableness standard. The provocation must be intentional or reckless, rather than merely negligent. The Court thus deemed that Smith had not violated Hennessey's constitutional rights, nor had he unconstitutionally, recklessly, or intentionally provoked Hennessey into attacking him. Therefore, Smith was granted qualified immunity. This case is significant, as it set the limits to when the provocation doctrine can be relevant and highlighted the importance

[20]Billington v. Smith et al, 292 F. 3d 1177, 1189.

and controversy of considering the totality of circumstances standard. It also is significant as it argued, and set a precedent, that there is a situation in which the provocation doctrine would be relevant, a rationale that could be important for current excessive force cases.

Los Angeles v. Mendez

Los Angeles v. Mendez, decided in 2017, rejected the use of the provocation doctrine as had been utilized by the lower courts. The case dealt with a warrantless entry, knock-and-announce, and excessive force claims filed by Mendez and Garcia, two homeless people sleeping in a shack. Officers had been sent to the property to search for a separate parolee-at-large when they entered the shack and found Mendez holding a BB gun. The officers shot Mendez and Garcia without deadly force. Mendez and Garcia filed the three claims receiving damages for the first two claims. The District Court held that the officer's use of force was reasonable; however, it fell under the purview of the provocation doctrine, and the officers were therefore not entitled to qualified immunity, because the force was necessitated by the officers' actions. The officers had "intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law."[21]

The Supreme Court rejected the provocation doctrine, stating that it had no basis in the Fourth Amendment. The Court argued that it was an illogical expansion of totality of circumstances as it forces courts to look "back in time" before the violation occurred. Each Fourth Amendment claim had to be objectively considered separately without

[21]County of Los Angeles v. Mendez, 581 U.S. (2017).

relying on a causal link between two of them. The provocation doctrine, it was argued, relied too much on the subjective intent of the officers and thus did not follow the standard set out in previous cases, thus reinforcing the ideal of objectivity and procedural due process in excessive force claims and repudiating the ruling in *Billington v. Smith*.[22]

Race

United States v. Brignoni-Ponce

United States v. Brignoni-Ponce, decided in 1975, is a significant case concerning the questionability of law enforcement stopping a vehicle when the only grounds for suspicion is the driver's race. Felix Humberto Brignoni-Ponce, was stopped one night by United States Border Control in Southern California solely because of his suspected Mexican ethnicity. Once pulled over, the officers discovered that two passengers in Brignoni-Ponce's car were in the country illegally. The three occupants were arrested, two for illegally entering the country and Brignoni-Ponce for knowingly transporting those in the country illegally. At their first trial, the defendants argued that since they had been subjected to an illegal seizure as their Fourth Amendment rights had been violated, their statements and testimony revealing their guilt should have been inadmissible. The court denied the motion and they were found guilty.

The government argued that the Immigration and Nationality Act allowed them to stop and search any car without a warrant that they believed to be carrying undocumented immigrants based on their perceived ethnicity alone, if the stop in question was adjacent

[22]Ibid.

to the Mexican Border.[23] The Court conceded that the "roving patrol stops" were inherently constitutional and did not require a warrant, as they were supposedly limited in scope and imposed a minimal intrusion on the individual, much like the "stop and frisk" decided in *Terry v. Ohio.*[24] The Court, however, determined that an officer had to have reasonable suspicion based on more than just apparent ethnicity alone to stop and search a car and its occupants.[25] It was argued that there were simply too many naturalized citizens who were of Mexican ancestry that the likelihood that one was an undocumented immigrant was too small to reasonably justify stopping based on ethnicity alone.[26]

Although this case may seem like a victory against racial profiling when taken at face value, it actually allows for racial profiling, especially since examining the objective facts, not the subjective intent of law enforcement officers, has been the standard in excessive force and police brutality cases. Although the court argued that an officer could not stop on race alone, it stated that race could be a relevant factor for stopping someone. This is a slippery slope that inevitably still allows for some degree of racial profiling.[27] Additionally, the case stated that officers only had to have reasonable suspicion to pull someone over, rather than probable cause, thus giving officers greater discretion to make

[23]Section 287 (a) (1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 and Section 287 (a) (3) of the Act, 8 U. S. C. § 1357

[24]United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[25]Ibid.

[26]Ibid.

[27]Johnson, Kevin R., "How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering," *Georgetown Law Review* 98 (2010): 108.

a stop and giving them more protection in court, a common theme throughout all these cases.

Whren v. United States

Whren v. United States, decided in 1993, also answered the question of what were reasonable grounds for law enforcement to stop a vehicle. The case included two black men, James L. Brown, the driver, and Michael Whren, the passenger, who sat at a stop sign for about twenty seconds before speeding away after being approached by officers. The officers followed and pulled over Brown and Whren for the traffic violation, found a significant amount of drugs in the car, and thus Brown and Whren were charged. The defense attempted to suppress the drug evidence on the grounds that the officers used the traffic stop as a pretense to search the car for other criminal activity without probable cause because of the defendants' race. The motion was denied, and the defendants convicted.

The Court argued that, with probable cause, stopping someone for a traffic violation does not violate his or her Fourth Amendment rights. The Court argued that subjective intent of officers, such as if they stopped the defendants because of their race, was not relevant to Fourth Amendment violation claims and that the analysis must instead be framed in objective terms. They also argued that discrimination claims were to be filed under the Equal Protection Clause.[28]

This distinction is incredibly important, as it reinforces the demanded use of procedural due process and objectivity and thus sheds light on its shortcomings in the

[28]Whren v. United States, 517 U.S. 806 (1996).

justice system. If the courts cannot consider the subjective intent of law enforcement officers, judge the case within a substantive due process framework, and reprimand officers appropriately, minority groups will continue to be disproportionately targeted while courts dole out decisions favorable to law enforcement officers.

Conclusion

In conclusion, throughout the final decades of the 20th century, into as recently as 2017, the Supreme Court has consistently framed police brutality cases within the procedural due process doctrine. They have argued that the circumstances surrounding, but not immediately at hand during the altercation, such as the subjective intent of the officer, must not be considered in court. This type of extreme objectivity is more favorable to law enforcement officers than to victims of alleged excessive force and allows officers to discriminate, especially toward people of color.

CHAPTER TWO

Race and Excessive Force

In recent years, discussions of police brutality have been incontrovertibly linked to the subject of race. These discussions have caused quite a controversy with people normally either adhering roughly to a "Black Lives Matter" position, if they believe that African Americans are being unjustly targeted and stereotyped as a result of their race, or a "Blue Lives Matter" position, if they believe that the police officers are simply performing their duty of protecting themselves and the community. These current debates and seemingly mutually exclusive positions highlight the festering and rising tensions between minority groups and law enforcement officers that have been brewing for decades.

These tensions stem from the indisputable racial and ethnic inequalities that have plighted these minority groups since the formation of the country.[1] The 1950s and 1960s saw black and white Americans increasingly segregated, with blacks being relegated to the inner-city ghettos while affluent white families made the move to the suburbs.[2] These circumstances often led to the actualization of the American Dream by white Americans while the nearly unbreakable cycle of poverty and disadvantaged circumstances

[1]Malcolm D. Holmes and Brad W. Smith, Race and Police Brutality: Roots of an Urban Dilemma, (Albany: State University of New York Press, 2008), 4.

[2]Ibid.

"spawned crime and social disorder" for many African Americans.[3] This apparent divide and seemingly differing treatment has led to a deep mistrust toward law enforcement officials by minority groups that in turn makes law enforcement increasingly distrustful of minority groups, thus creating a systemic cycle.[4]

What is more, the physical divide that separated, and still separates to a degree, white Americans and minority groups has caused the two groups to often have very different attitudes toward law enforcement officers. Minority groups' often negative relationship with law enforcement has fueled and increased the tensions connected with perceived police brutality and excessive use of force.[5] For example, in the now-infamous beating of Rodney King and the following riots in 1991 Los Angeles, many white Americans believed the police officers acted within their purview to subdue a dangerous black man, while the majority of African Americans argued that King had been completely brutalized while not fighting back and unable to defend himself. The controversy escalated when the four LAPD officers were acquitted by a nearly all-white jury after the trial had been moved from Los Angeles.[6] Race riots ensued that further divided the opinions of whites and blacks on police brutality: whites saw the riots as proof of the lawlessness of the minority group and the need for police force, while African Americans believed they were protesting an unfair criminal justice system.[7]

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[3]Ibid.

[4]Ibid., 1.

[5]Ibid.

[6]Ibid.

[7]Ibid., 2.

While one would be hard-pressed to find people who believe that police do not utilize use of force more within minority communities, those who fervently support law enforcement officials and those who perceive this type of force as excessive, brutal, and discriminatory have very different arguments for why this type of race-based policing exists.

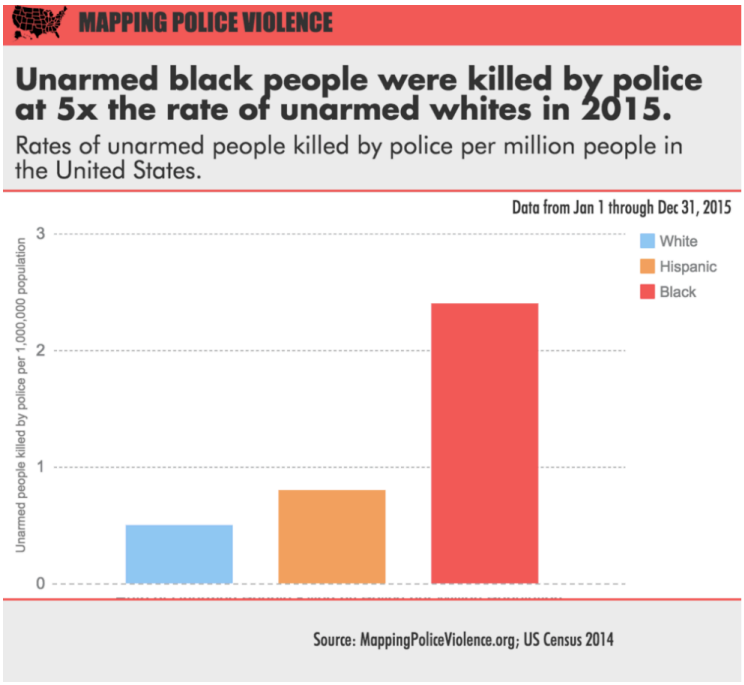
Those who defend police officers in the midst of alleged racially-charged shootings tend to adhere to the argument that this use of force was not merely necessary to maintain law and order, but justified and defensible on account of the fact that minorities, more specifically black men, commit a disproportionate number of violent crimes.[8] This view, heralded by conservative writers such as David French, argue that although black men are much more likely to be victims of police violence, this fact is unproblematic and not worthy of massive social movements because black men commit disproportionate amounts of violent crimes.[9] French argues that the fact that 564 of 965 people that were fatally shot by police in 2015 were armed as sufficient evidence that these people were criminals and were justifiably killed. More interestingly, French claims that the fact that white police officers killing unarmed black men represents only four percent of fatal police shootings proves that the Black Lives Matter movement and the outrage over police brutality are unnecessarily inflamed by the media coverage. This view was summarized by former Los Angeles Police Department chief Bernard Parks when he said, “It's not the fault of the police when they stop minority males or put them

[8]U.S. Department of Justice, *Homicide Trends in the United States* (November 2011).

[9]David French, “The Numbers Are In: Black Lives Matter Is Wrong About Police,” last modified December 29, 2015, https://www.nationalreview.com/2015/12/black-lives-matter-wrong-police-shootings/

in jail. It's the fault of the minority males for committing the crime. In my mind, it is not a great revelation that, if officers are looking for criminal activity, they're going to look at the kind of people who are listed on crime reports."[10]

This view, however, makes several assumptions and discounts the fact that 42%, nearly half, of those fatally shot by police officers were unarmed, chalking it up instead to a tragic accident that is collateral damage and part of the job. In fact, in 2015, law enforcement officials killed at least 104 unarmed black people. At least one in three black people killed by law enforcement officials in 2015 were unarmed, a rate of five times more than unarmed white people.[11]



[10]Amanda Geller, Jack Glaser, Phillip Atiba Goff, Tracey Lloyd, and Steven Raphael, *The Science of Justice: Race, Arrests, and Police Use of Force*, (Center for Police Equity, July 2016), 5.

[11]"2015 Police Violence Report," mappingpoliceviolence.org, last updated January 1, 2019.

Moreover, the debate in question is not whether the alleged victim was a previous criminal or currently engaged in criminal activity, but in what manner police officers treated unarmed and non-dangerous white and black victims differently when they came into contact with police officers. The argument set forth by French and others inadvertently proves the point that law enforcement excessive use of force is often racially motivated. Because of the statistic that proportionately black people commit more violent crimes than white people, they are policed more closely, and law enforcement officials are obviously more likely to jump to the conclusion that they are armed and dangerous— hence, a racially-charged bias. By assuming that the unarmed black men they come into contact with are armed, dangerous, and deserving of excessive force, law enforcement officers are engaging in police practices which are allowable under *United States v. Brignoni-Ponce,* which permits a degree of racial profiling and targeting.

The argument that a racially disparate crime rate justifies a racially disparate use of force rate was debunked by the Center for Policing Equity.[12] A report released in 2016 analyzed twelve different police agencies from across the country, with diverse demographics and population sizes, and data collected from 2010 through 2015.[13] The report measured criminality, which is often used as the justification for the racially disparate use of force and is hard to measure and define, by determining whether the incident in question led to an arrest.[14] As indicated by the table below, the analysis

[12]*The Science of Justice*, 26.

[13]Ibid., 10-11.

[14]Ibid., 9.

revealed that even when benchmarked on all arrests, there was still a greater likelihood that African Americans would be subject to use of force compared to their white counterparts.[15]

Table 4. Use of Force Rates per 1,000 Arrests*, by Citizen Race

Sample: 12 Department-Years (only most recent year for each department)

	Mean	Median	Minimum	Maximum
Black**	46	21	9	308
White**	36	15	5	255

*Arrest data were obtained from BJS and include all offenses.
**Use of Force data are for non-Hispanic Black and non-Hispanic White citizens, whereas arrest data are for all Black and all White citizens regardless of ethnicity.

Moreover, the report found that, when controlling for arrests and benchmarked to population, blacks received a mean use of force score, which was determined by a combinations of counts and severity of the force, 1.3 times higher than those of whites.[16] The report therefore demonstrates that law enforcement officials are more likely to use excessive force on black "criminals" than on white "criminals" thus showing that there

[15]Ibid., 18.

[16]Ibid., 25.

must be a racial bias toward black people in the representative sample of police departments used for the study.[17]

The Center for Police Equity is not the only organization that has released findings of minority racial bias in police practices. On January 13, 2017, the United States Department of Justice Civil Rights Division and the United States Attorney's Office Northern District of Illinois released findings from their investigation of the Chicago Police Department that began on December 7, 2015, after a video was released of a white police officer fatally shooting black teenager Laquan McDonald.[18] In addition to finding that the CPD exhibited a pattern of unreasonable deadly force and practices which habitually were not addressed and remedied,[19] the report acknowledged that there were "systematic deficiencies that disproportionately impact[ed] black and Latino communities."[20] For example, CPD law enforcement officials admitted to arresting those found with marijuana on the South Side, a predominantly minority neighborhood, at higher rates than those found with it in the North Side, a predominantly white neighborhood. The CPD claimed it was their "policing philosophy" to patrol minority neighborhoods more often and harshly, while one sergeant said "if you're Muslim, and

[17]The study also acknowledges that the police departments used as part of the study were varied and proportionally represented departments throughout the United States, and thus the results and statistics were nearly as accurate as was humanly possible.

[18]United States Department of Justice Civil Rights Division and United States Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department*, (January 13, 2017), 1.

[19]Ibid., 5.

[20]Ibid., 15.

18 to 24, and wearing white, yeah, I'm going to stop you. It's not called profiling, it's called being pro-active."[21]

This racial bias during arrests also extended to the use of excessive force. For example, Chicago is split roughly equal thirds black, Latino, and white. However, black individuals were subject to 76%, or 19,374, of the uses of force, as compared to whites, who represented only 8%, or 2,007, of the excessive force uses.[22] The DOJ argued that force was used on black communities nearly ten times as much as on white communities, and this stems from the CPD tolerating and fostering a culture of racially discriminatory conduct, including language and unconstitutional use of force. This environment, and the actions it foments, undermines the department's legitimacy and perpetuates a cycle that makes it difficult to initiate policing reforms.[23]

Confirming that these incidents are not relegated to one city and region, the Civil Rights Division of the Department of Justice also found evidence of extreme racial bias by the Baltimore City Police Department in a report released on August 10, 2016. This report claimed many of the same disturbing facts as the CPD report, including frequent instances of discrimination within the BPD, the fact that African Americans were the victims of 88 percent of non-deadly use of force, and a disproportionate number of police stops and arrests of African Americans benchmarked to their population in certain neighborhoods and actual criminal activity.[24] In fact, records show that booking officials

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[21]Ibid., 143-144.

[22]Ibid., 145.

[23]Ibid.

[24]United States Department of Justice Civil Rights Division, *Investigation of the Baltimore City Police Departmen*t, (August 10, 2016), 49,61.

dismissed a much higher proportion of African-American arrests under review than those of other racial backgrounds, suggesting that many of these arrests were unnecessary.[25] In addition to these findings, the DOJ found that the BPD's "zero tolerance" enforcement policy, which was in place until 2015 and encouraged officers to make frequent stops, searches, and arrests, disproportionately targeted and affected African Americans.[26] This policy regularly led to unconstitutional policing practices as well as situations in which law enforcement officials' language and demeanor necessitated use of force.[27] All in all, the DOJ's reports on their investigation of the CPD and the BPD show troubling discriminatory police practices that are likely more widespread and warrant the federal government's attention.

In conclusion, police brutality and excessive use of force are intimately connected with the subject of race, especially in the current climate. Although many argue that minorities are the subject of police force more than whites because they commit a disproportionate amount of crimes and not because of discrimination on law enforcement officials' part, reports by the Center for Policing Equity and the Department of Justice Civil Rights Division paint a different picture. Unfortunately, these racially discriminatory police practices have been sustained for so long in part thanks to the Supreme Court rulings discussed in Chapter One, which have emphasized the use of procedural due process in excessive force cases and will be discussed more fully in the next chapter.

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[25]Ibid., 47.

[26]Ibid.

[27]Ibid., 8.

CHAPTER 3

Where Are We Now?

There have been many high-profile cases recently involving law enforcement's use of force on African Americans that have been ruled favorably toward the law enforcement official in question. The defenses of these cases, although not decided by the Supreme Court, relied heavily on the precedents and doctrines set by the Supreme Court cases analyzed in Chapter One, thus contributing to the prevalence of racially discriminatory practices and use of force discussed in Chapter Two. These cases, similar in that they resulted in law enforcement officers using excessive force on two African Americans, each illustrate the flaws in the Supreme Court's rulings concerning racial targeting, the idea of totality of circumstances, and law enforcement officers' entitlement to qualified immunity.

The Shooting of Philando Castile

On July 6, 2016 in Falcon Heights, Minnesota, Officer Jeronimo Yanez pulled over a car allegedly because of a broken taillight with 32-year-old African American Philando Castile, his girlfriend Diamond Reynolds, and her four year old daughter inside. According to radio audio obtained after the shooting, however, the officers indicated that they were going to pull over the car because, "The two occupants just look like people that were involved in a robbery. The driver looks more like one of our suspects, just be

cause of the wide-set nose."[1] This audio suggests that the law enforcement officers initially pulled over Castile and his girlfriend as a result of the color of their skin.

After Castile and Reynolds were pulled over, Officer Yanez approached the driver's side of the car while his parter, Officer Joseph Kauser approached the passenger's side. Yanez asked for Castile's license and car insurance card, upon which Castile presented his insurance to Yanez. Castile then warned Yanez that he had a firearm on him leading Yanez to repeatedly command he not reach for it and pull it out. Castile emphatically stated that he was not pulling it out, instead reaching for his wallet which held his license that Yanez had also requested. Yanez quickly pulled out his own gun and fired seven shots into Castile, with two bullets hitting his heart.[2]

Castile later died from his wounds, restating in his dying breathes that he was not in fact reaching for the gun. The Minnesota Bureau of Criminal Apprehension began investigating the encounter and collecting evidence, and Officer Yanez was charged with second degree manslaughter and two counts of dangerous discharge of a firearm by Ramsey County Attorney John Choi. Choi argued that Yanez's defense for shooting Castile was unjustified since Yanez's expressed subjective fear of death was objectively unreasonable due to the facts of the case and the totality of circumstances. For example, Castile was not resisting, fleeing, or exhibiting criminal behavior or intent, was restricted by his own seat belt, and "volunteered in good faith that he had a firearm- beyond what

[1]Julia Jacobo and Enjoy Francis, "Cops May Have Thought Philando Castile Was a Robbery Suspect, Noting 'Wide-Set Nose," Dispatch Audio Indicates," *ABC News,* July 11, 2016.

[2]Matt DeLong and Dave Braunger, "Breaking Down the Dashcam: The Philando Castile Shooting Timeline," *StarTribune*, June 21, 2017.

the law requires."[3] Moreover, Officer Kauser did not reach or pull out his gun during the encounter, suggesting that he did not share the fear of death or harm that Yanez did.

Yanez was later acquitted of all charges in his trial by jury, leading to massive protests and his removal by the St. Anthony Police department for the good of the public.[4] Although it is debatable whether Officer Yanez's actions and use of force were constitutional and excessive under *Graham v. Connor* and *Tennessee v. Garner* and whether the police officer should have been convicted, the more interesting part of the case is the way in which it dealt, or rather did not deal, with the issue of Castile's race being a primary reason for his car stop by Officer Yanez. Although it was claimed that Yanez stopped Castile because of a broken taillight,[5] police audio from before the stop revealed that there was an obvious and misguided racial factor that played into the decision as well.[6] This arguably racist decision by Yanez was acceptable as a result of the Supreme Court cases *United States v. Brignoni-Ponce* and *Whren v. United States,* which explicitly allow for law enforcement officials to take race into account when stopping someone and do not consider the subjective intent of the officers. As seen by the protests that followed the shooting and acquittal,[7] this judicial interpretation of race and police use of force perpetuates the cycle of mistrust between the two communities and does not

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[3]John J. Choi, *Remarks As Prepared for Delivery Regarding the Hiring of a Special Prosecutor in the Philando Castile Case*, July 29, 2016.

[4]Mark Berman, "Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed From Police Force," *Washington Post,* June 17, 2017.

[5]Pat Pheifer and Claude Peck , "Aftermath of Fatal Falcon Heights Officer-Involved Shooting Captured on Video". *StarTribune*, July 7, 2016.

[6]Jacobo, "Cops May Have Thought Philando Castile Was a Robbery Suspect."

[7]Jessica Goldstein, "Thousands Take to the Streets to Protest Philando Castile Shooting Verdict," *ThinkProgress,* June 17 2017.

actively encourage proactive progress that could lessen the frequency and high-stakes degree of negative interactions between the two groups.

The Shooting of Stephon Clark

The shooting of Stephon Clark, a 22 year old black man, occurred in Sacramento, California on March 18, 2018. Two Sacramento Police Department officers, Terrance Mercadal and Jared Robinet, were patrolling the neighborhood of Meadowview looking for a man who was allegedly breaking car windows in the neighborhood and carrying a tool bar. The officers found Clark, the man they believed to be the suspect of the car-breaking incident, on the front lawn of his grandmother's home. When the officers approached Clark, Clark began to flee around his grandmother's house into the back yard. The officers pursued Clark and began yelling, "Show me your hands! Gun!" In their testimony, the officers stated that they believed Clark was holding a gun when they fired twenty rounds at him.[8] After Clark fell, the officers realized that he held neither gun nor tool bar in his hand, but a white iPhone.[9]

After his death, the Sacramento Police Department began an investigation to determine whether Mercadal and Robinet should be charged for their role in the shooting. Nearly a year after the shooting, on March 2, 2019, the Sacramento Country District Attorney Anne Marie Schubert stated that the officers would not be charged in the shooting and death of Stephon Clark since they had probable cause to stop him and

[8]Barbara Marcolini, Chris Cirillo, and Christoph Koetl, "How Stephon Clark Was Killed by Police in his Backyard," *The New York Times,* March 23, 2018.

[9]Benjy Egel, Nashelly Chavez, and Anita Chabria,"Police Fired 20 Times at South Sacramento Man Fatally Shot While Holding a Cellphone". *The Sacramento Bee,* March 20, 2018.

therefore were justified in using deadly force against him.[10] This entitlement of qualified immunity, however, is complicated by the inconclusive evidence concerning where the bullets entered Clark's body. One autopsy report concluded that Clark had been shot once on the front of his left thigh, three times in his side, and three times in his back. Another report, however, claimed that Clark had been shot seven times in his back and once on his front thigh, which was allegedly shot after Clark had hit the ground.[11] Geoffrey Alpert, a criminology professor at the University of South Carolina, additionally pointed out that it was difficult to justify the officers' claim that Clark had a gun, since they had at the time believed that he was carrying the window-breaking tool bar in the same hand.[12]

Regardless of the shaky and conflicting evidence[13] concerning the case, it and the lack of charges filed against the officers, who were instead granted qualified immunity due to the low threshold established in *Saucier v. Katz* and reaffirmed in *Pearson v. Callahan*, reveal the serious flaws in the justice system; These rulings allow law enforcement officers to receive little to no repercussions when they make a fatal flaw.

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[10]Jose A. Del Real, "No Charges in Sacramento Police Shooting of Stephon Clark," *The New York Times,* March 2, 2019.

[11]Frances Robles, and Jose A. Del Real, "Stephon Clark Was Shot 8 Times From Behind or the Side, Family-Ordered Autopsy Finds". *The New York Times,* March 30, 2018.

[12]"Body Cam Video of Stephon Clark's Shooting Raises More Questions," *CBS Sacramento*, March 22, 2018.

[13]If the latter autopsy report and Alpert's defense are to be believed then Clark was actively running away from the officers who believed Clark to be carrying a tool bar that was not being used for deadly force. Under this standard, then the officers would have been violating Tennessee v. Garner, which stated that a law enforcement officer could not use deadly force against a fleeing suspect unless he or she had probable cause to believe the suspect was a dangerous threat. If Clark was running away from the scene as the second autopsy suggests, then his constitutional rights would have been violated, and the governmental interests of preventing his escape would not have outweighed his interests of life per the Supreme Court opinion. The officers would thus not be entitled to qualified immunity, would be held responsible for their actions, and would be charged with at least manslaughter.

The facts of the case still stand. Stephon Clark was killed on his grandmother's property when he did not have any weapon with which he could overpower two law enforcement officials.[14] Furthermore, even if Clark was the young man who was breaking the windows in the unoccupied cars— his family still denies that he was the young man and instead suggested that the police were mistaken[15]— that act alone did not give Mercadal and Robinet the probable cause that he was a dangerous threat to others that they needed in order to use deadly force.[16]

As seen in the shooting of Stephon Clark, the doctrine of qualified immunity is essentially "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."[17] Stephon Clark's case is not unique, either. Qualified immunity and its extremely low threshold allows law enforcement officials and departments to apply deadly force on individuals who later are discovered to be innocent of the alleged crimes and undeserving of losing their lives, to shoot first and think later, and suggests that officers can act without impunity. This, in turn, perpetuates the cycle of mistrust and animosity between the African American community and police departments discussed in Chapter Two.[18] Furthermore, by applying the doctrine of qualified immunity at such a low threshold, courts are not given the chance to rule on the underlying and shaky

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[14]Ray Sanchez, "The Man Shot and Killed by Sacramento Police Was Turning His Life Around, His Brother Says," *CNN*, March 23, 2018.

[15]Eric Levenson, Madison Park, and Darran Simon, "Sacramento Police Shot Stephon Clark holding Cell Phone in His Grandmother's Yard". *The Philadelphia Tribune,* March 22, 2018.

[16]Tennessee v. Garner, 471 U.S. 1 (1985).

[17]Kisela v. Hughes, 138 S. Ct. 1148 (2018).

[18]Joanna C. Schwartz, "The Case Against Qualified Immunity, *Notre Dame Law Review*, Vol. 93 no. 5 (August, 2018), 1817.

constitutional issues of excessive force that could force better policing practices for officers such as Mercadal and Robinet and in places such as Chicago and Baltimore.[19]

[19]Ibid., 1819.

CHAPTER FOUR

In Defense of Substantive Due Process

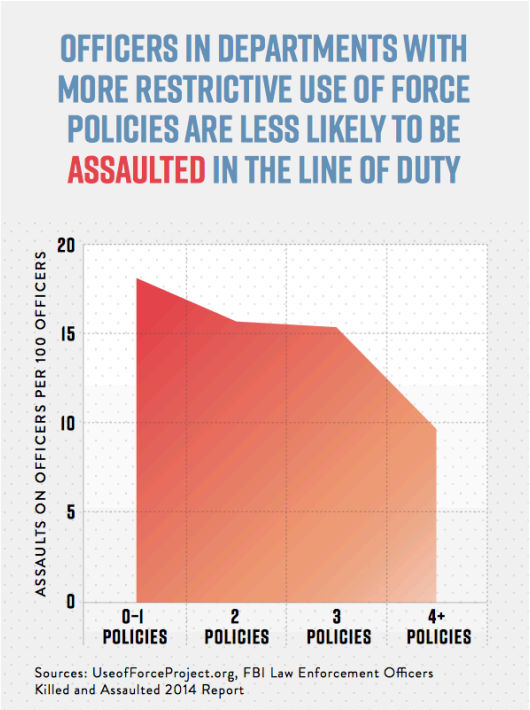
The Problem

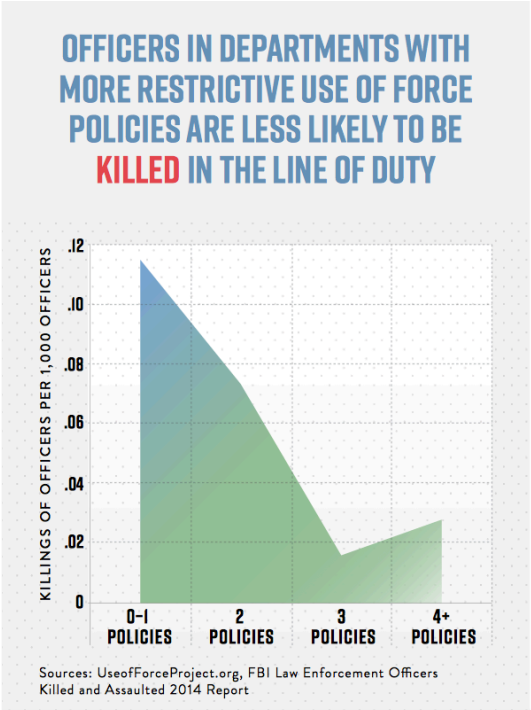
We live in a world of heightened social activism that has brought an increased awareness to excessive police force, especially when applied to African Americans and other minorities.[1] This has, in turn, often created a heightened cycle of mistrust between these communities and law enforcement officers, which is perpetuated by the precedents and doctrines established in Supreme Court cases. These allow for an unequal distribution of excessive and deadly force among minority groups and favor law enforcement officers in trial court. Currently, the seemingly easiest and most practical way to limit police excessive force claims is by ensuring that police departments have clear and meaningful limits against excessive force and protections against police violence. These could include requiring de-escalation tactics; requiring other officers to intervene and stop excessive force; and requiring officers to report each time they use force or threaten to use force.[2]

[1]"2015 Police Violence Report," mappingpoliceviolence.org, last updated January 1, 2019.

[2]DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie, and Brittany Packnett, "Police Use of Force Policy Analysis," *Police Use of Force Project*, (September 20, 2016).

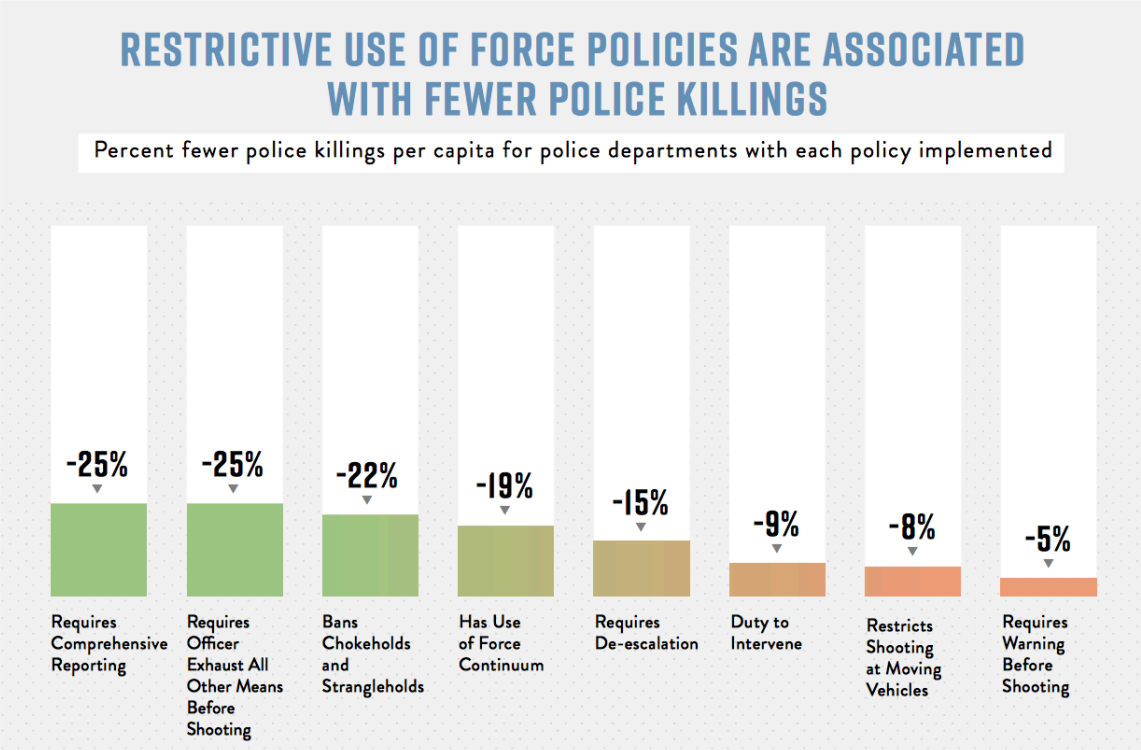
It has been found that officers in departments that have a more restrictive policy concerning use of force experience less violence on nearly all matrixes, including both fewer civilian and police killings and assaults.[3] However, none of the cities studied implemented all restrictions, and a majority implemented less than half.[4]





[3]Ibid.

[4]Ibid.



Although the masses can be a powerful force and the ever increasing protestors have caused many departments to reexamine their policing practices and training, departments are able to continue and advocate for police training and practices that inevitably lead to claims of excessive force because of the way excessive force has been interpreted by the Supreme Court. The emphasis on procedural due process unevenly favors law enforcement officials, often results in no charges for them, and gives them no incentive to alter their questionable methods. This unaccountability creates a never-ending cycle that becomes impossible to stop and prevents meaningful change from happening.

The Judicial (and Constitutional) Solution

The answer to this conundrum, though perhaps controversial, is the very doctrine that the majority opinion in *Graham v. Connor* struck down as unnecessary and the

wrong standard: substantive due process. Many justices, most notably "Originalists," tend to decry substantive due process calling it an "atrocity," an "oxymoron," "babble," and a "mere springboard for judicial lawmaking."[5] They argue that it is not explicitly supported by the Constitution and gives the judiciary branch an overreach of power that was not intended by the Framers of the Constitution. The doctrine, although not explicitly named, however, has a long history of usage. The Due Process Clause guarantees not only a process (i.e. procedural due process), but a "process of law," which treats its citizens in a lawful manner regardless of processes.[6] If the judicial system did not contain substantive due process, then the country could tend to lawlessness, as Daniel Webster suggested in *Dartmouth College v. Woodward* in 1819.[7] Grounded in ideas found as far back as the Magna Carta and the Founding Fathers' safe guard on government's ability to infringe upon our rights, substantive due process has extensive precedent that has, according to Columbia Law Professor Jamal Greene, only fairly recently been vilified.[8]

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[5]Josh Blackman and Ilya Shapiro, "Is Justice Scalia Abandoning Originalism," *DC Examiner*, March 9, 2010.

[6]No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[7]Every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature.

[8]Jamal Greene, "The Meming of Substantive Due Process," *University of Minnesota Law School Constitutional Commentary*, (2016), 255.

Moreover, the doctrine of substantive due process has great merit because it is inherently found in procedural due process. For example, procedural requirements have "clusters of substantive guarantees," such as the right to represented by a lawyer and the right to not testify against yourself. A procedural trial would not be lawful unless it contained these substantive rights. Therefore, as legal scholar Timothy Sandefur argues, in order to have true procedural due process, one must first, logically, be entitled to substantive due process and lawful treatment.[9]

One of the biggest critiques of substantive due process is that "normative elements" should not be introduced into the law, and that substantive due process allows "lawless judges" to impose their own policy preferences regardless of democratic rule. Although it could be possible to describe a judge's hypothetical act as arbitrary, the exact same could be said about a legislature acting lawlessly. If the judicial branch was unable to use substantive due process, then the legislative branch would certainly introduce "normative elements" into law.[10] This critique's logic is therefore on shaky ground and, if it is true, then it is true of the critics' solution as well.

How Substantive Due Process Applies to Excessive Use of Force

Now that it has been determined that substantive due process has legitimate legal basis, is found in the wording of the Constitution, and is necessarily present in procedural due process, it can be determined that judging excessive force cases through substantive

[9]Timothy Sander, "In Defense of Substantive Due Process, Or, The Promise of Lawful Rule," *Harvard Journal of Law and Public Policy*, Vol. 35 no.1 (2012).

[10]Ibid.

due process terms would help foster better police practices and alleviate the need for officers to use excessive force.

Under the current interpretation of excessive use of force by the Supreme Court, law enforcements officials are able to play all roles of "Judge, Jury, and Executioner." Moreover, by judging cases in a procedural due process context, courts unfortunately give little to no guidance to law enforcement officials on what is exactly "reasonable" and Constitutional force, leaving police departments to decide for themselves and further muddy the waters.[11] Additionally, the Supreme Court's decisions and their current inclination toward strict procedural due process, such as rejecting the provocation doctrine, have displaced long-held concepts such totality of circumstances, have contradicted their previous decisions, and have given unconstitutional power to law enforcement officials.[12] The Supreme Court has argued, misguidedly, that extra deterrents, such as framing these cases in substantive due process terms and making it more difficult for law enforcement officials to use excessive force without being charged and reprimanded, are not necessary because the threat of charges and guilty verdicts is sufficient to deter police misconduct.[13]

This view, however, is misguided as seen by numerous statistics and DOJ reports concerning police oversight. These reveal a gross deficiency in the level of training officers receive regarding use of force.[14] Moreover, data from the Bureau of Justice

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[11]John P. Gross, "Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers," *Texas Journal on Civil Liberties & Civil Rights*, Vol. 21 no. 2 (Spring 2016), 161.

[12]County of Los Angeles v. Mendez, 581 U.S. (2017).

[13]Hudson v. Michigan, 547 U.S. 586 (2006).

[14]Gross, 167.

Statistics suggests that in conflicts from 2003-2009 that resulted in the death of either the suspect or the law enforcement official, 94-97 percent of the time, the suspect was the one who was shot and killed.[15] This is particularly concerning, since this percentage has remained relatively constant throughout the years, while violent crime has been down 20 percent from 2003-2014.[16] These statistics suggest that current deterrents for excessive use of force have not been successful, and law enforcement officials are engaging in a *shoot first, think later* mentality that may not be necessary or reasonable.

Therefore, in order to effectively deter police misconduct and preserve the lives and rights of the innocent, these cases should be judged using a substantive due process standard. This would allow for totality of circumstances, including the subjective intent of law enforcement officials, to be considered and would make it easier for officers to be charged for their actions and thus be held more accountable. As stated in Justice Blackmun's concurring opinion— although analyzing excessive force claims under a procedural due process standard would normally be acceptable, there are many cases where "not demonstrably unreasonable force under the Fourth Amendment" can and needs to be analyzed because of substantive due process concerns.[17]

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[15]Ibid., 177.

[16]Ibid.

[17]Graham v. Connor, 490 U.S. 386 (1989).

Comparing Canada

This solution has merit and has worked in limiting excessive force by law enforcement officials in neighboring Canada. Although Canada and the United States have their fair share of institutional differences, such as America's parallel judiciary system, they share many similarities, such as their federal systems and respective Supreme Courts, which both have jurisdiction over constitutional issues.[18] Moreover, Canadian courts have been willing to utilize American judicial precedents in their cases and when interpreting the Canadian Charter of Rights and Freedoms, essentially their equivalent of the Bill of Rights.[19] Therefore, it is reasonable to compare Canadian interpretations and applications of legal concepts, especially one such as substantive due process, an embedded American doctrine.

Whereas the Unites States has tended to favor a procedural approach when adjudicating excessive force cases, section 7 of the Charter names a substantive, or in their words a "fundamental justice," component.[20] The courts have heavily relied upon this doctrine when determining the degree of criminal fault and moral culpability.[21] In other words, Canadian law seeks to determine whether the person deprived of life was sufficiently at fault and deserving of force and whether the procedures themselves were

[18]Carles Boix and Susan C. Stokes, *The Oxford Handbook of Comparative Politics*, (Oxford: Oxford UP, 2007).

[19]Gerard V. La Forest, "The Use of American Precedents in Canadian Courts," *Maine Law Review*, Vol. 46 no. 2 (June 1994).

[20]Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[21]Victor V. Ramraj, "Four Models of Due Process," *I.CON*, Vol. 2 no 3, 2004, (Oxford University Press and New York University School of Law), 503.

substantively fair.[22] This type of approach typically allows for more grace for the victim in the court system, especially in cases dealing with police excessive force.

Canadian law enforcement has a relatively low deadly and excessive force rate. Although numbers are hard to determine completely due to underreporting, it is estimated that there were roughly 323 fatal police shootings in Canada from 2000-2017,[23] while United States law enforcement officials fatally shot 986 people in 2017 alone.[24] Adjusted for the difference in populations, the use of deadly force by police officers in the United States is roughly six times greater than the use of deadly force in Canada. Although there are surely several factors, including a greater percentage of civilian gun ownership in America[25] that contribute to this disparity, the application of fundamental justice when adjudicating excessive force cases compels Canadian law enforcement to use force more carefully, and in a more limited manner, than their U.S. counterparts.

Canadian judges' language often reflects the prioritization of substantive due process over procedural due process when determining whether to charge law enforcement officials with excessive force. For example, in a recent case from February 2019, a Toronto police officer was found guilty of "assault causing bodily harm" incurred during an arrest of a cyclist. Although the judge conceded that the officer followed procedure in arresting and handcuffing the cyclist, she argued that the force was

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[22]Ibid., 502.

[23]Jacques Marcoux and Katie Nicholson, "Deadly Force: Fatal Encounters with Police in Canada, 2000-2017," *CBC News*.

[24]"Fatal Force, 2017," *Washington Post*.

[25]Aaron Karp, "Estimating Global Civilian-Held Firearms Numbers," *Small Arms Survey*, June 2018.

excessive and essentially was not applied in good faith or in accordance with the totality of circumstances.[26] Moreover, in a recent Supreme Court of Canada case, the court acknowledged that excessive force claims are judged under the principle of fundamental justice while considering the totality of circumstances, including the behavior of the police.[27]

Although substantive due process is a controversial and hotly contested doctrine within today's American jurisprudence, analyzing excessive force cases under this doctrine, as opposed to procedural due process, would help deter police misconduct by making it easier for victims to file and win excessive force claims. Canada provides evidence that law enforcement in the US, under a similar approach, would likely reform and better their policing policies in order to avoid adjudication. This approach appears to achieve this goal in Canada and thus could be successful in the United States.

[26]The Canadian Press, "Police Officer Found Guilty of Assault After Breaking Cyclist's Shoulder During Arrest," *CBC News*, February 20, 2019.

[27]R. v. Nasogaluak, 2007 ABCA 339

CONCLUSION

In conclusion, the Supreme Court of the United States has historically judged excessive force cases under the procedural due process standard. It has argued that the subjective intent of the law enforcement official must not be considered, the totality of circumstances must be narrowed, and officers must meet a low threshold in order to obtain qualified immunity. These rulings have frequently allowed for racially-biased policing that rarely results in charges or convictions. By filing and judging excessive force cases under a substantive due process standard, rather than the procedural due process standard used today, law enforcement officials would be held to a higher standard of policing, since they would be more prone to charges and convictions. A substantive due process approach would allow the courts to consider the subjectivity of the officer and the broader totality of circumstances surrounding the encounter, as well as raise the threshold an officer must meet in order to obtain qualified immunity.

Therefore, the application of substantive due process would likely limit the frequency of racially-biased policing practices. By considering the subjective intent of an officer, which Department of Justice reports reveal are often purely racially-motivated, police departments would be compelled to reform discriminatory excessive force practices in order to avoid charges and convictions. Although a controversial doctrine, the legitimacy of substantive due process has been argued by legal scholars and Supreme Court judges, and would be a reasonable solution to deter police misconduct.

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