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# **Failure to Prosecute Police Misconduct Breeds a Systematic Tolerance of Police Brutality**

By Sabrina Worthy<sup>1</sup>

*“Who will protect us when the ones we call for help are the same people who are gunning us down” – Unknown.*

## **Introduction**

In this era, when you turn on the news, read a news article, or use social media, it is highly likely that you may come across some sort of story on police misconduct in America.<sup>2</sup> As of November 16, 2015, so far about 1,000 people have been killed by the United States police.<sup>3</sup> Sadly, this number is increasing at a steady rate. On average police kill about three people per day.<sup>4</sup>

This article will be using information from “The Counted” database as well as similar sites, since no United States government agency maintains a similar listing.<sup>5</sup> In a speech addressed by then United States Attorney General Eric Holder, he called for “better reporting of data on incidents of both shootings of police officers and use of force by the

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<sup>1</sup> The author is currently a 3rd year law student at Seton Hall Law.

<sup>2</sup> By “police misconduct” in this article I will be referring to instances in which police officers demonstrated some level of excessive force that resulted in serious injury or death of an individual.

<sup>3</sup> The Guardian’s statistics include “deaths after the police use of a Taser, deaths caused by police vehicles and deaths following altercations in police custody, as well as those killed when officers open fire.” Jon Swaine and Oliver Laughland, *The Counted: Number of People Killed by US Police in 2015 at 1,000 after Oakland Shooting*, *The Guardian* (November 16, 2015, 11:22), <http://www.theguardian.com/us-news/2015/nov/16/the-counted-killed-by-police-1000>. The Guardian is a site that released an ongoing project called “The Counted,” a “continuously updated, interactive database of police killings in the United States.” *Id.*

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

<sup>5</sup> The Bureau of Justice Statistics (BJS) implemented the Arrest-Related Deaths (ARD) program which was “an annual national census of persons who died either during the process of arrest or while in the custody of state or local law enforcement personnel.” *Arrest-Related Deaths*, Bureau of Justice Statistics (page last revised on December 4, 2015), <http://www.bjs.gov/index.cfm?ty=tp&tid=82>. The BJS conducted an assessment of the validity and reliability of the ARD data. *Id.* The results indicated that the “ARD program did not sufficiently identify a census of arrest-related deaths and that the data collection likely did not capture all reportable deaths in the process of arrest.” *Id.* Therefore, on March 31, 2014, BJS suspended data collection and publication of the ARD data until further notice. *Id.*

police.”<sup>6</sup> He recognized the system in place was ineffective and unreliable. Holder stated that since the “annual figures on the number of ‘justifiable homicides’ by law enforcement and officers killed or assaulted – is voluntarily reported, not all police departments participate, causing the figures to be incomplete.”<sup>7</sup> To say the “figures were incomplete” was put nicely. Frankly, the numbers were grossly unreported. This sparked many activist groups and organized protests to bring attention to the issue.

For instance, according to the Federal Bureau Investigation (“FBI”) database in 2014, approximately 444 people were killed and classified as a “justifiable homicide.”<sup>8</sup> According to the FBI database, a justifiable homicide is the “killing of a felon by a law enforcement officer in the line of duty.”<sup>9</sup> The database offers no category for recordings of people who were not felons. Some of the highly publicized killings by police in 2014 are not included in the figure such as, the police involved deaths of Eric Garner, Tamir Rice and John Crawford.<sup>10</sup> In fact, many police departments refused to participate in the

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<sup>6</sup> U.S. Department of Justice, Office of Public Affairs, *Attorney General Holder Urges Improved Data Reporting on Both Shootings of Police Officers and Use of Force by the Police* (January 15, 2015), <http://www.justice.gov/opa/pr/attorney-general-holder-urges-improved-data-reporting-both-shootings-police-officers-and-use>.

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

<sup>8</sup> United States Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2014*, [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded\\_homicide\\_data\\_table\\_14\\_justifiable\\_homicide\\_by\\_weapon\\_law\\_enforcement\\_2010-2014.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2010-2014.xls).

<sup>9</sup> *Id.*

<sup>10</sup> Aaron Morrison, *Police Killings FBI Statistics: Tamir Rice, Eric Garner Among Officer-Caused Homicides Missing In Federal Data From 2014*, *International Business Times* (October 10, 2015, 11:45), <http://www.ibtimes.com/police-killings-fbi-statistics-tamir-rice-eric-garner-among-officer-caused-homicides-2142280>. On July 17, 2014, Eric Garner, an unarmed black male, died as of result of being put in a chokehold by an NYPD officer. Associated Press, *Federal Charges Sought in Eric Garner’s Chokehold Death*, *New York Post* (July 18, 2015, 3:55pm), <http://nypost.com/2015/07/18/federal-charges-sought-in-eric-garners-chokehold-death/>. During the attack he can be heard saying “I can’t breathe” which started the “I can’t breathe” protest. On November 22, 2014, Tamir Rice, a twelve year old black male, was fatally shot by police in the park. Erik Ortiz, *Tamir Rice Shooting: One Year After Cleveland Boy Was Killed, Case Drags On*, *NBC News* (November 22, 2015, 5:22 A.M.), <http://www.nbcnews.com/news/us-news/tamir-rice-shooting-one-year-after-cleveland-boy-was-killed-n467031>. Tamir was said to have a toy pellet gun. *Id.* Similarly, on August 5, 2014, John Crawford, a twenty-two year old black male was fatally

data report.<sup>11</sup> Thus, it is safe to say that the “444 people killed” statistic is inaccurate.<sup>12</sup> The New York Police Department (“NYPD”), “the nation’s largest force at over 13,500 officers, has submitted only one report in 2006 and has since not submit any data for the past decade.”<sup>13</sup> With this in mind, it is not shocking that “only 224 of 18,000 law enforcement agencies around the United States (“U.S.”) reported a fatal shooting by their officers to the FBI in 2014.”<sup>14</sup>

FBI senior official, Stephen Fischer, stated he was not surprised by the findings. He responded in an e-mail that “exclusions were inevitable because the program remained voluntary... and [We] have no way of knowing how many incidents may have been omitted.”<sup>15</sup> James Comey, the FBI director, stated “It is unacceptable that the Washington Post and the Guardian newspaper from the United Kingdom (“U.K.”) are becoming the lead source of information about violent encounters between [US] police and civilians.”<sup>16</sup> The government is under pressure to make changes to the recording system. But the real change lies within holding these officers accountable.

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shot at Walmart while holding the store’s BB gun. Radley Balko, *Mass shooting hysteria and the death of John Crawford*, The Washington Post (September 25, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/09/25/mass-shooting-hysteria-and-the-death-of-john-crawford/>.

<sup>11</sup> In a press conference by U.S. Attorney General Lynch she stated, “The reporting is voluntary and not all police departments participate, causing the figures to be incomplete.” U.S. Department of Justice, Office of Public Affairs, *Attorney General Lynch: Use-of-Force Data is Vital for Transparency and Accountability* (October 5, 2015), <http://www.justice.gov/opa/pr/attorney-general-lynchuse-force-data-vital-transparency-and-accountability>.

<sup>12</sup> For example, between 2004 and 2014, not a single police department in Florida, reported police-involved homicide. Jon Swaine and Oliver Laughland, *The Counted: Garner and Tamir Rice among those missing from FBI record of police killings*, The Guardian (October 15, 2015, 8:42 A.M.), <http://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>.

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

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

<sup>15</sup> See U.S. Department of Justice, *supra* note 11.

<sup>16</sup> Mark Tran, *The Counted*, FBI chief: ‘unacceptable’ that Guardian has better data on police violence, The Guardian (October 8, 2015, 9:49), <http://www.theguardian.com/us-news/2015/oct/08/fbi-chief-says-ridiculous-guardian-washington-post-better-information-police-shootings>.

The numbers are alarming and astonishing. African-American males are more than twice as likely to be unarmed when killed during encounters with police.<sup>17</sup> For instance, as of June 1, 2015, 464 people were killed by police and of those 102 were unarmed.<sup>18</sup> Out of the 102, 32% were African-Americans compared to 15% of white people killed.<sup>19</sup> The number at quick glance may not seem as disproportionate. However, given that Blacks make up only 13% of the U.S. population and Whites make up 77% of the population, it is a significant disparity.<sup>20</sup>

This paper will discuss the root of the problem with use of excessive force is the lack of disciplinary action taken from the onset. Majority of police officers that are in the news for killing unarmed persons have a long history of documented abuse and misconduct. For instance, the sad and infamous police shooting of Laquan McDonald, a seventeen year old who was shot sixteen times by a white officer, named Jason Van Dyke.<sup>21</sup> Prior to Officer Dyke's encounter with the young teen, Officer Dyke had eighteen complaints filed against him.<sup>22</sup> The complaints included allegations of excessive force and racial slurs.<sup>23</sup> He was never disciplined.<sup>24</sup> Failure to discipline or hold officers accountable

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<sup>17</sup> Jon Swaine and Oliver Laughland, *Black American Killed by Police Twice as likely to be Unarmed as White People*, The Guardian (June 1, 2015, 8:38), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

<sup>18</sup> Of the 464 people, 95% were male. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates (last revised December 2, 2015, 11:15 EST), <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>21</sup> Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, The New York Times (November 18, 2015), [http://mobile.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html?referer=http://www.nytimes.com/interactive/2015/11/18/us/chicago-police-complaints.html?\\_r=1](http://mobile.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html?referer=http://www.nytimes.com/interactive/2015/11/18/us/chicago-police-complaints.html?_r=1).

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

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

<sup>24</sup> *Id.*

for their actions gives off the message that police officers are “untouchable” or “above the law.”

This paper will first address that police brutality is largely ignored within police departments. Second, it will discuss the challenges of prosecuting police officers. Lastly, this paper will demonstrate that the best solution to curb the problem of police brutality is accountability – at all stages of misconduct.

#### **A. Police Brutality is Generally Ignored In Police Departments**

Police brutality is defined as the use of excessive force by police when dealing with civilians.<sup>25</sup> “Excessive use of force” means a force, usually in the physical form, that goes well beyond what would be necessary in order to handle a situation.<sup>26</sup> Police brutality is pervasive and yet few officers are disciplined, suspended or convicted. The problem lies within police departments for failure to discipline officers’ misconduct.

For instance, the Chicago Police Department (“CPD”), the nation’s second largest department, is under serious heat for rarely penalizing officers for civilian complaints.<sup>27</sup> Officer Jerome Finnigan was with the CPD for eighteen years and had sixty-eight citizen complaints against him.<sup>28</sup> The complaints alleged use of excessive force and that he conducted illegal searches.<sup>29</sup> He was never disciplined.<sup>30</sup> In 2011, he was fired from the police department after he admitted to robbing criminal suspects and ordered a murder hit on a fellow officer who he believed would turn him in.<sup>31</sup> Finnigan was sentenced to twelve

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<sup>25</sup> S. Danilina, *What is Police Brutality?*, The Law Dictionary (2nd. Ed.), <http://thelawdictionary.org/article/what-is-police-brutality/>.

<sup>26</sup> *Id.*

<sup>27</sup> *See Williams, supra* note 21.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

years in prison.<sup>32</sup> Before the court, Finnigan testified that “my bosses knew what I was doing out there, and it went on and on,”<sup>33</sup> ... “And this wasn’t the exception to the rule... This was the rule.”<sup>34</sup> The reality is there are plenty of “Finnigan” types at police departments nationwide who routinely go undisciplined.

The abuses of the Chicago Police Department have been making news headlines. The release of a police dash cam video showed a white male officer firing sixteen shots at unarmed, Laquan McDonald, an African American teen has stunned the world.<sup>35</sup> On October 20, 2014, seventeen year old, Laquan McDonald was walking down the middle of Pulaski Road in Chicago and was stopped by police.<sup>36</sup> The two officers exited the patrol car with guns drawn.<sup>37</sup> Within six seconds from exiting the car, Officer Jason Van Dyke began rapidly firing shots into the young teen’s body causing him to fall to the asphalt.<sup>38</sup> Van Dyke continued to shoot while McDonald lay lifeless on the ground.<sup>39</sup> He fired “sixteen shots emptying his pistol and then reloaded it to continue but was stopped by his fellow officer from firing it.”<sup>40</sup> One would think that upon the police chief viewing the dash cam footage, he would reprimand Van Dyke almost immediately. No, this was not the case. The footage is graphic and clearly shows in my opinion, a cold-blooded murderer hiding

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Annie Sweeney and Jason Meisner, *A moment-by-moment account of what the Laquan McDonald video shows*, Chicago Tribune (November 25, 2015, 6:00A.M.), <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-release-laquan-mcdonald-20151124-story.html>.

<sup>36</sup> *Id.*

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

<sup>38</sup> Dan Good, *Cop emptied pistol, reloaded in Laquan McDonald shooting*, New York Daily News (November 24, 2015, 5:22 P.M.), <http://m.nydailynews.com/news/national/shot-laquan-mcdonald-emotionless-court-arrival-article-1.2445077>.

<sup>39</sup> *Id.*

<sup>40</sup> McDonald was shot sixteen times, “suffering wounds to the scalp, neck, left chest, right chest, left elbow, left forearm, right upper arm, right hand, right upper leg, left upper back and right lower back.” *Id.* Investigators stated that only two of the wounds can be linked to the time he was standing. *Id.*

behind a badge. Van Dyke was placed on desk duty.<sup>41</sup> He has a history of misconduct with eighteen civilian complaints filed against him alleging excessive force and misconduct.<sup>42</sup> The Chicago Police Department did not want the video to be released to the public and filed a motion to have the video sealed from the public citing that it was an ongoing investigation.<sup>43</sup> Unpersuaded, Cook County Judge Franklin Valderrama ruled that the police department had until November 25, 2015 to release the dash cam video.<sup>44</sup> It is questionable as to the departments' reason to wanting to hide the video from the public. But this fact only deepens the mistrust between the community and police department.

Moreover, the recent release of the police report severely contradicts the footage. Van Dyke falsely stated in his police report that "McDonald raised the knife over his chest and over his shoulder, pointing the knife at Van Dyke."<sup>45</sup> Van Dyke wrote "he believed McDonald was attempting to kill him."<sup>46</sup> His report continues stating "he backpedaled and shot his handgun to stop the attack. McDonald fell to the ground but continued to grasp the knife, refusing to let go of it...and tried to get up, all the while pointing the knife at Van Dyke..."<sup>47</sup> Van Dyke's fellow officers corroborated with his story filing falsely police reports mirroring Van Dyke's report.<sup>48</sup> Although, the officers were present at the time of the shooting, they did not give much thought to file fabricated reports. The officers

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

<sup>42</sup> *See Good, supra* note 38.

<sup>43</sup> *Id.*

<sup>44</sup> Carol Marin and Don Mosely, *Judge Orders Release of Video Showing Shooting Death of Chicago Teen*, NBC Chicago (November 19, 2015), <http://www.nbcchicago.com/news/local/Judge-to-Decide-on-Release-of-Laquan-McDonald-Video-351741261.html>. (Although, it is uncontested that McDonald was carrying a knife, the video does not show that he raised the knife nor pointed to the officer.)

<sup>45</sup> David March, *Case Supplementary Report*, Chicago Police Department (report date submitted March 5, 2015), <http://www.documentcloud.org/documents/2642136-McD-2.html>.

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

demonstrated a mentality to protect their own even if it's at the expense of their own credibility. After the release of the video, Van Dyke was fired and charged with first-degree.<sup>49</sup>

On December 7, 2015, U.S. Attorney General Loretta Lynch announced that the United States Department of Justice launched an investigation into the Chicago Police Department.<sup>50</sup> She mentioned the goal is to “investigate whether the Chicago Police Department has engaged in a pattern or practice of violations of the Constitution or federal law.”<sup>51</sup> “Specifically, we will examine a number of issues related to the Chicago Police Department's use the force, including its use of deadly force, racial, ethnic and other disparities in the use of force, and its accountability mechanisms.”<sup>52</sup>

Chicago Police Department has a long awful history of using excessive force. In so much that the “City of Chicago has become the first in the nation to create a reparations fund for victims of police torture, after the City Council unanimously approved the \$5.5 million package.”<sup>53</sup> The fund was created for victims that were abused and tortured in the 1970s until the early 1990s by former Chicago Police Cmdr. Jon Burge.<sup>54</sup> Burge led the torture of criminal suspects, mostly who were African American males for two decades,

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<sup>49</sup> Carol Marin and Don Mosely, *Officials Release Full Laquan McDonald Police Report*, NBC Chicago (December 4, 2015), <http://www.nbcchicago.com/investigations/Laquan-McDonald-Police-Report-Dashcam-360644211.html>.

<sup>50</sup> Charles Thomas and Anne Swaney, *US Dept. of Justice Investigating Chicago Police Department*, ABC Eyewitness News (December 7, 2015), <http://abc7chicago.com/news/us-dept-of-justice-investigating-cpd-1112453/>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> David Schaper, *Chicago Creates Reparations Fund For Victims Of Police Torture*, NPR News (Updated May 6, 2015, 1:43 P.M.), <http://www.npr.org/sections/thetwo-way/2015/05/06/404545064/chicago-set-to-create-reparation-fund-for-victims-of-police-torture>.

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

coercing dozens of confessions.<sup>55</sup> Burge and his crew of detectives used “electric shock, beatings, suffocation and even Russian roulette to coerce confessions out of suspects.”<sup>56</sup>

Many of the victims were put in prison on tainted evidence and coerced confessions.<sup>57</sup> The justice system had failed them terribly. Although, the reparations fund will compensate up to eighty victims and will provide them counseling, education and job training; it will never compensate the decades of time they lost behind bars.<sup>58</sup> In 1993, Burge was fired after the Chicago Police board investigation found evidence of torture.<sup>59</sup> But no criminal charges were filed for the acts of torture and it took nearly seventeen years before Burge was sentenced to four and half years for perjury and obstruction of justice.<sup>60</sup>

The Invisible Institute and the Mandel Legal Aid Clinic released “data of thousands of pages of officers’ names and brief descriptions of each civilian complaint against the Chicago police from March 2011 to September 2015.”<sup>61</sup> The data for 2015 reflects that “in more than 99 percent of the thousands of misconduct complaints against Chicago police officers, there has been no discipline.”<sup>62</sup> From 2011 to 2015, “97 percent of more than 28,500 citizen complaints resulted in no officer being punished, according to the files.”<sup>63</sup> Because police departments are not required to report statistics on complaints of police brutality and there is no system in place to “police the police.” Civilian complaints against

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> “Anthony Holmes served thirteen years in prison for a murder he says he did not commit and Darrell Cannon was arrested in 1983 and served twenty-four years in prison for murder.” *Id.*

<sup>58</sup> *Id.*

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

<sup>60</sup> Prosecution could not file criminal charges on the torture claims because the statute of limitations had run. *Id.*

<sup>61</sup> *Citizens’ Police Database Project*, Invisible Institute, <http://cpdb.co/data/DqvnGL/citizens-police-data-project>.

<sup>62</sup> *Id.*

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

officers are not fully investigated and thus, facilitate the pattern of misconduct without fear of consequences. The absence of meaningful discipline creates an environment where police violence is tolerated.

For instance, the “Rampart” scandal became known as one of the most infamous cases of organized police misconduct in the Los Angeles Police Department (“LAPD”).<sup>64</sup> Numerous officers engaged in a wide variety of misconduct including the “shooting of unarmed suspects, the planting of evidence to justify those shootings, the preparation of false police reports to cover up the misconduct and the presentation of perjured testimony resulting in the false convictions and imprisonment of a number of innocent citizens.”<sup>65</sup> The scandal was exposed by former Officer Rafael Perez, an LAPD officer for ten years.<sup>66</sup> Officer Perez’s stated that there were seventy police officers involved in the misconduct.<sup>67</sup> The scandal resulted in over 100 criminal cases being overturned and 3,000 cases are said to be tainted.<sup>68</sup> Javier Ovando was one of the victims whom case was overturned.<sup>69</sup> Ovando was shot by Perez and his partner in the chest and head, rendering him a quadriplegic.<sup>70</sup> The officers created a phony report for his arrest.<sup>71</sup> He was arrested and charged with “several offenses, including two counts of assault on a police officer with a firearm.”<sup>72</sup> The

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<sup>64</sup> *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1014 (C.D. Cal. 2000).

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

<sup>66</sup> Renford Reese, *The Multiple Causes of the LAPD Rampart Scandal*, California State Polytechnic University, Pomona (2003); *see also* John Andrews, *More Los Angeles Police Department Violence and Frame-ups Exposed*, World Socialist Web Site (September 23, 1999), <http://www.wsws.org/en/articles/1999/09/lapd-s23.html>. (Perez pled guilty of stealing eight pounds of cocaine from an evidence locker, he later bargained for a reduced sentence by exposing the police department’s misconduct).

<sup>67</sup> *See Reese, supra* note 66.

<sup>68</sup> *Id.*

<sup>69</sup> Tina Daunt, *City to Pay Shooting Victim \$15 Million*, Los Angeles Times, (November 22, 2000), <http://articles.latimes.com/2000/nov/22/local/me-55707>.

<sup>70</sup> *See Andrews, supra* note 66.

<sup>71</sup> *Id.*

<sup>72</sup> *See Ovando*, 92 F. Supp. 2d at 1015.

trial court sentenced him to twenty-three years based on the testimony by LAPD officers.<sup>73</sup> Ovando served two and half years before his conviction was overturned. He was awarded a \$15 million settlement.<sup>74</sup> The shocking facts of this case are troubling. Many officers, practically the entire police department, were involved in the scandal. As a result, innocent people were sentenced to prison because of the officers' false testimony.

There needs to be a system in place in which a third party official oversees complaints of police use of excessive force. In most police departments, complaints of excessive force are investigated internally by the internal affairs division. Because the division is largely composed of cops it makes it impossible for internal affairs to be impartial.<sup>75</sup> In addition, if the culture of the police departments are relax on the rules of misconduct than internal investigations will be ineffective.<sup>76</sup> Furthermore, the public is left in the dark on internal investigations. The details of the process and whether disciplinary actions were imposed are confidential.<sup>77</sup> This process leaves the public untrusting of police conducting investigations on other police.

Police departments around the nation have been placed under a microscope as the number of fatal shootings of unarmed African-Americans is on the rise.<sup>78</sup> The shootings sparked a wave of protests which highlighted the "Black Lives Matter" movement. The

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

<sup>74</sup> *See Reese, supra* note 66.

<sup>75</sup> Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. S 1983 Is Ineffective in Deterring Police Brutality*, 44 *Hastings L.J.* 753, 788 (1993) ("Officers are generally more sympathetic to one another because of an unavoidable, subconscious bias.")

<sup>76</sup> *Id.* at 791 ("The effectiveness of internal investigations is influenced by the attitude of the upper ranks. The chief and the superior officers establish the level of violence that a department will tolerate. If there is no pressure from the upper ranks to conform with the rules, then internal affairs investigations become a sham.")

<sup>77</sup> *Id.* at 787 ("Details such as the discipline imposed on the officers is completely confidential...Departments claim to be bound by either California Penal Code section 832.7 or the 'Peace Officers Bill of Rights' or both to keep this information confidential.")

<sup>78</sup> *See supra* note 10.

movement became prevalent during the fatal shooting of Michael Brown. On August 9, 2014, in Ferguson, Missouri, an eighteen year old African American male named Michael Brown was shot six times by Darren Wilson, a white police officer.<sup>79</sup> Brown was unarmed.<sup>80</sup> His dead body remained in the street, uncovered, for a total of four hours.<sup>81</sup> On November 24, 2014, the St. Louis County prosecutor announced that a grand jury decided not to indict Wilson.<sup>82</sup> The announcement fueled more protests and riots to hold police officers accountable. In March, the Justice Department declared that “Ferguson had engaged in constitutional violations and required an overhaul of its criminal justice system.”<sup>83</sup>

The most challenging cases to prove excessive force are the ones where the suspect is killed. When the suspect dies, their testimony of what transpired dies with them and is never told unless an eye witness is present from the outset. But even then their version of what occurred will be different from the victim. However, when there is footage it sometimes can bring clarity. For instance, a bystander’s video camera captured the horrific shooting of Walter Scott. On April 4, 2014, police officer Michael Slager in North Charleston, South Carolina, pulled over Walter Scott for a broken brake light.<sup>84</sup> The police dash cam video captured parts of the stop. The dash cam video showed Officer Slager

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<sup>79</sup> Rachel Clarke, *What happened when Michael Brown met Darren Wilson*, CNN, (November 11, 2014), <http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline/>.

<sup>80</sup> *Id.*

<sup>81</sup> Julie Bosman and Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, The New York Times (August 23, 2014), <http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>.

<sup>82</sup> Anya van Wagendonk, *Grand Jury won’t Indict Officer in Michael Brown Death*, PBS News Hour (November 24, 2014, 10:06 P.M.), <http://www.pbs.org/newshour/rundown/grand-jury-decides-not-to-indict-darren-wilson-in-shooting-death-of-michael-brown/>.

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

<sup>84</sup> Michael S. Schmidt and Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, The New York Times (April 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

approaching the car, the two men talking and then Scott gets out of the car and runs.<sup>85</sup> Slager gives chase.<sup>86</sup> They run out of range of the dash cam.<sup>87</sup> Luckily, a bystander was able to record what occurred. Slager in his report testified “he had feared for his life because the man had taken his stun gun during the scuffle.”<sup>88</sup> However, the video captured by a nearby bystander drastically contradicts Slager’s statement. The video depicts Scott running from Slager and Slager firing eight shots as Scott fled.<sup>89</sup> When Scott falls to the ground after the last of eight shots, Slager picks something up off the ground and drops it near Scott’s lifeless body.<sup>90</sup> Scott was unarmed and died at the scene.<sup>91</sup> North Charleston police Chief Eddie Driggers after seeing the video immediately fired Slager.<sup>92</sup> Chief Driggers stated, “I have watched the video, and I was sickened by what I saw.”<sup>93</sup> On June 8, 2015, a grand jury indicted Slager for murder of Walter Scott.<sup>94</sup>

Chief Driggers’ statement humanized him. He watched the video and saw that his officer’s actions were wrong, morally wrong. Chief Driggers shared the same reaction as his community. This is a proper reaction when you witness a man being killed over a broken brake light. There was no threat; Scott was running away from Slager, not charging at him. But, if you ask Slager what occurred he would tell you that he feared for his life as he wrote in his report.<sup>95</sup> The unsettling truth is Slager believed he was going to get away

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

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

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

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

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

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

<sup>91</sup> Catherine E. Shoichet and Mayra Cuevas, *Walter Scott shooting case: Court documents reveal new details*, CNN (September 10, 2015), <http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/>.

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

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

<sup>94</sup> Dana Ford, *South Carolina ex-police officer indicted in Walter Scott killing*, CNN (June 8, 2015), <http://www.cnn.com/2015/06/08/us/south-carolina-slager-indictment-walter-scott/>.

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

with murder, he believed he was untouchable. He may have been right, without the bystander's video the only thing left would be Slager's story because Scott was dead.

This is a substantial part of the problem. Police officers' statements rarely get questioned or investigated for accuracy. There is no transparency in the investigation process and no disciplinary action. Police officers are confident that they can violate a person's civil liberties and simply file a report stating otherwise and the case is closed. No reprimand, loss of pay, demotion, suspension nor termination.

This past year there has been countless headlines titled "Unarmed black male fatally shot by police" or "Grand jury decided not to indict Officer John Doe." We need to combat the problem of impunity. First, there needs to be independent oversight monitoring officers' civil complaints and discipline accordingly. Second, in instances of unnecessary killing police officers need to see their day in court. Lastly, a reform on the internal department procedures and training is necessary.

### **B. The Challenges of Prosecuting Police Officers**

There are many challenges to overcome in order to bring suit against an officer. All too common, in majority of cases police officers do not suffer any repercussions for use of excessive force even in the most severe and brutal case. For instance, in 1999 Amadou Diallo was shot forty-one times and killed by New York City police officers after they claimed that he was reaching for a gun.<sup>96</sup> Mr. Diallo was unarmed.<sup>97</sup> The four officers were indicted for second degree murder but later acquitted.<sup>98</sup> Victims like Mr. Diallo, can bring

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<sup>96</sup> Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, NY Times (February 5, 1999), <http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html>.

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

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

claims under 42 U.S.C. § 1983 against police officers that use excessive force.<sup>99</sup> Section 1983 acts as a remedy to compensate victims but fails to deter police misconduct. The qualified immunity doctrine protects police officers from “civil liability for damages based upon the performance of discretionary functions if the official's acts were objectively reasonable in light of then clearly established law.”<sup>100</sup> A law is “clearly established” if it is a “violation of the federal constitutional or if there is controlling precedent.”<sup>101</sup> The officer must show that his conduct was “objectively reasonable.” For instance, if the law is unclear on an officer’s particular conduct than the officer is not put on notice and therefore, is immune from suit. The problem with qualified immunity is that cases rarely make it to trial. Because police officers are not financially liable to pay these judgments, essentially they go without direct consequence.

### ***Analyzing the “objective reasonableness” standard***

When police officers use deadly force it constitutes a seizure within the meaning of the Fourth Amendment.<sup>102</sup> The Supreme Court stated that “whenever an officer restrains

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<sup>99</sup> Section 1983 states:

“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.” 42 U.S.C. §1983.

<sup>100</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>101</sup> *Anderson v. Creighton*, 483 U.S. 635 (1987) (The Court defined “clearly established” as meaning that the “contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”).

<sup>102</sup>The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched,

the freedom of a person to walk away, he has seized that person and the Fourth Amendment requires that the seizure be reasonable.”<sup>103</sup> Notably, the Court has held that “apprehension by the use of deadly force is in no question a seizure subject to the reasonableness requirement of the Fourth Amendment.”<sup>104</sup> In addressing the constitutionality of police use of deadly force, the Supreme Court articulated the “objective reasonable standard” for analyzing police use of excessive force. In doing so, the Court views the facts in the underlying circumstances surrounding an officer’s use of force without relying on the benefit of hindsight.

In the leading case, *Tennessee v. Garner*, the Supreme Court held that laws authorizing police use of deadly force to apprehend fleeing, unarmed, non-violent suspects violate the Fourth Amendment.<sup>105</sup> In *Tennessee v. Garner*, Memphis police responded to a reported burglary, upon arriving to scene, a woman standing on her porch gestured toward the adjacent house.<sup>106</sup> The officer went behind the house and saw the suspect run across the backyard.<sup>107</sup> The officer called out “police, halt” when the suspect began to climb the fence, feared that he would escape – the officer shot the suspect, instantly killing him.”<sup>108</sup> Prior to the officer’s use of deadly force, he assessed the situation concluding that the suspect appeared to be unarmed and a seventeen or eighteen year old male.<sup>109</sup> In fact, the

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and the persons or things to be seized.” U.S. Const. Amend. IV; see also *Tennessee v. Garner*, 471 U.S. 1 (1984).

<sup>103</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

<sup>104</sup> *Tennessee v. Garner*, 471 U.S. 1, 7 (1984).

<sup>105</sup> *Id.* at 11 (1984).

<sup>106</sup> *Id.* at 1.

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

<sup>108</sup> *Id.* at 4.

<sup>109</sup> *Id.* at 3.

suspect was Edward Garner, a black, unarmed fifteen year old who weighed 100 or 110 pounds.<sup>110</sup> He had in his possession a measly ten dollars and a purse.<sup>111</sup>

Edward Garner's father brought a wrongful death action under the federal civil rights statute, 42 U.S.C. § 1983, seeking damages for violations of his son's constitutional rights.<sup>112</sup> At the time, Tennessee Code Annotated Section 40-7-108 (1982), provided: "after a police officer has given notice of an intent to arrest...and the suspect flees or forcibly resists, the officer may use or threaten to use force to effect the arrest."<sup>113</sup>

The Court found the law to be unconstitutional and held that the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."<sup>114</sup> The Court engaged in a balancing test to determine the constitutionality of a seizure. The Court balanced the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."<sup>115</sup> In addition, the Court will examine the "totality of the circumstances" to determine whether the particular seizure was justified.<sup>116</sup> For instance, if the suspect is armed, and pose a threat to the officers or the public, use of excessive force may be warranted.

For example in *Scott v. Harris*, the suspect was on a high-speed car chase with the police, and the deputy officer terminated the chase by applying his "push bumper to the rear of the vehicle, causing the car to crash and rendering the suspect a quadriplegic."<sup>117</sup>

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<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 1.

<sup>112</sup> *Id.* at 5.

<sup>113</sup> *Id.* at 4; *citing* Tenn. Code Ann. §40-7-108 (1982).

<sup>114</sup> *Id.* at 11.

<sup>115</sup> *Id.* at 8; *citing* *United States v. Place*, 462 U.S. 696,703 (1983).

<sup>116</sup> *Id.* at 9.

<sup>117</sup> *Scott v. Harris*, 550 U.S. 372, 375(2007).

The issue before the Court was whether the officer's use of excessive force violated the suspect's Fourth Amendment right in unreasonable seizure.<sup>118</sup> The Eleventh Circuit affirmed the lower court's decision finding that the officer's action constituted deadly force under the *Garner* framework and was unreasonable."<sup>119</sup> The Supreme Court found otherwise and overturned the decision.<sup>120</sup> The Court viewed the footage of the car chase and found that the officer used reasonable force within the Fourth Amendment. The Court disagreed with the Court of Appeals adopted facts that "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty..."<sup>121</sup>

In determining the reasonableness of the seizure, the Court balanced the government's interest against the individual's Fourth Amendment interest.<sup>122</sup> The Court found that by the suspect intentionally engaging in the high speed pursuit; he not only placed his own life in danger but innocent bystanders and the public in danger as well.<sup>123</sup> The Court held that when "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders that may result in the fleeing motorist at risk of serious injury or death it does not constitute a violation of the Fourth Amendment."<sup>124</sup>

*Scott v. Harris* illustrates the importance of taking into account the "totality of the circumstances" and the potential for threat of death or serious physical injury to the officer or the public. Unlike the suspect in *Scott v. Harris*, the suspect in *Garner* did not pose a threat to the officer or others. He was unarmed and non-dangerous. Although the officer

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<sup>118</sup> *Id.* at 374.

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

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

<sup>121</sup> *Id.* at 378.

<sup>122</sup> *Id.* at 383.

<sup>123</sup> *Id.* at 373.

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

violated Garner’s constitutional right by using deadly force, ultimately, he was dismissed from the suit because he was protected by the doctrine of qualified immunity.<sup>125</sup> Because the officer acted in good-faith relying on the Tennessee statute he was afforded qualified immunity.<sup>126</sup>

Next, in *Graham v. Connor*, the Supreme Court affirmatively held that claims alleging “law enforcement officials used excessive force is analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard, rather than under a substantive due process standard.”<sup>127</sup> Graham, a diabetic, was stopped by police upon the officer witnessing Graham enter the store and quickly exiting.<sup>128</sup> The officer ordered Graham and his friend out of the car.<sup>129</sup> Unbeknownst to the officer, “Graham felt the onset of an insulin reaction and entered the store to purchase orange juice but upon seeing the line he decided to go to a nearby friend’s house instead.”<sup>130</sup> Graham explained to the officers about his condition, which the officers ignored. During the encounter, Graham sustained injuries – “a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; also, he claimed to have developed a loud ringing in his ear.”<sup>131</sup> He brought suit under §1983.<sup>132</sup>

At trial, the District Court considered the following four factors for determining excessive force under § 1983: “(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) [w]hether the force was applied in a good faith effort to maintain and

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<sup>125</sup> See *Garner*, 471 U.S. at 5.

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

<sup>127</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

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

<sup>129</sup> *Id.* at 388.

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

<sup>131</sup> *Id.* at 390.

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

restore discipline or maliciously and sadistically for the very purpose of causing harm.”<sup>133</sup> The court determined the force used by the officers was appropriate and not “maliciously or sadistically for the very purpose of causing harm.”<sup>134</sup> The Supreme Court reversed and rejected the four factor framework.<sup>135</sup> The Court made clear that the standard is objective. However, the analysis leaves room for interpretation. Juries and judges have different perspectives and reasoning on their analysis of “reasonableness.” With no set definite framework courts find themselves with inconsistent verdicts.

The Supreme Court has made it evidently clear that police officers who use deadly force in apprehending a fleeing, unarmed suspect constitute deadly force. However, this does little to deter police officers from using deadly force. Police officers are without consequence under the qualified immunity doctrine.

***Lack of deterrence in police brutality because police officers are without consequence***

There is disconnect between what the Supreme Court has affirmatively held and the objectively reasonableness application. The root of the problem is the aftermath of the fatal shooting. The unarmed suspect is dead and the family is left grieving in hope of receiving justice. The problem is section 1983 acts solely as a remedy measure for victims but it does not deter abusive police behavior. In cases where the victims are awarded damages, it has no effect on police officers whatsoever. The awarded money comes from the state and not the officer’s own pocket.<sup>136</sup> Furthermore, the expense of litigating the case is painless for officers because it is covered by the city and a lawyer is appointed to their

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

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

<sup>135</sup> *Id.* at 397.

<sup>136</sup> Many states’ municipalities have indemnification laws to indemnify police officers regardless if the officer’s conduct were egregious or reckless. Joanna C. Schqwertz, *Police Indemnification*, 89 NYU L. Rev. 885 (2014).

defense.<sup>137</sup> The lack of deterrence contributes to the growing amount of cases of police brutality.<sup>138</sup> Police officers with charges of excessive force pending, hardly ever suffer any disciplinary action from the police department. Despite allegations of excessive force, officers return back in uniform and become repeated offenders. For instance, in the Rodney King trial two out of the four officers had histories of using excessive force.<sup>139</sup> Police officers use of excessive force becomes a pattern of violence.<sup>140</sup>

Officers tend to believe they can get away with it because there are no repercussions for their actions.<sup>141</sup> In one disturbing case, former Los Angeles Police Department (“LAPD”) officer Mark Fuhrman was recorded saying:

“I had 66 allegations of brutality . . . under color of authority, assault and battery . . . Torture, all kinds of stuff . . . Well, they know I did it. They know damn well I did it. There's nothing they could do . . . I mean, we could have murdered people and got [sic] away with it.”<sup>142</sup>

Officer Fuhrman is known for his part in the OJ Simpson trial. Fuhrman was charged with perjury for his testimony at trial. Fuhrman gave a taped interview in 1985 to Laura

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<sup>137</sup> See Patton, *supra* note 75, at 767-68 (“Many officers lose nothing as a result of being sued. It costs them nothing financially, it never results in discipline, it has no effect on promotion, and it does not affect the way officers are regarded by their peers and superiors.”).

<sup>138</sup> *Id.* at 768 (“Officers rarely show much concern, even in wrongful death suits, and uniformly approach suits with the attitude that they had a right to do what they did. . . Thus, the cycle continues: attorneys sue the same officers over and over, and the officers are back on the street the next day while the taxpayers bear the costs.”).

<sup>139</sup> *Officers Acquitted in Videotaped Rodney King Beating*, S.F. Chron. (Apr. 30, 1992) (noting that two out of the four officers who beat Rodney King had histories of using excessive force)

<sup>140</sup> See Patton, *supra* note 75, at 769 (“Officers have a pattern of escalation of violence; it starts with a little violence as a rookie, and then escalates because no one stops it early on.”)

<sup>141</sup> On October 24, 2014, Sgt. Michael Marcucilli, along with another officer, shot and wounded an emotionally disturbed man. Jonathan Bandler, *Mount Vernon: Sergeant in shooting has excessive-force past*, The Journal News (October 27, 2014), <http://www.lohud.com/story/news/local/2014/10/26/mount-vernon-police-shooting-emotionally-disturbed-anthony-smith-michael-marcucilli-excessive-force-lawsuits/17960517/>. Marcucilli has been on the force for nineteen years and named in three federal lawsuits for excessive force between 2008 and 2013. *Id.* In one incident the officer allegedly “strike a twelve year-old with a baton on the head.” *Id.* His misconduct has cost the city of Mount Vernon about \$930,000 in verdicts, settlements and legal fees. *Id.* Yet, he remains on the force. The city’s legal department stated that “he will be on a modified assignment.” *Id.*

<sup>142</sup> *People v. Simpson*, No. BA097211, 1995 WL 516132, at \*10-11 (Cal. Super. Ct. Aug. 22, 1995).

McKinney, an aspiring screenwriter working on a screenplay about female police officers.<sup>143</sup> The recorded tapes became known as the “Fuhrman tapes.” McKinney asked Fuhrman, “so you're allowed to just pick somebody up that you think doesn't belong in an area and arrest him?” He responded “...I don't know what the Supreme Court or the Superior Court says, and I don't really give a shit ... if I was pushed into saying why I did it, I'd say suspicion of burglary. I'd be able to correlate exactly what I said into a *reasonable probable cause for arrest*.”<sup>144</sup> This is disturbing because he was able to get away with it. No one questions the officer's conduct which reinforces the misconduct.

Generally, the typical victim of excessive force is a “young African-American or Latino male, from a poor neighborhood, often with a criminal record.”<sup>145</sup> Typically, the abuse occurs in urban areas where police officers frequently patrol.<sup>146</sup> The victims of police brutality do not make sympathetic plaintiffs; in fact some may have a criminal record.<sup>147</sup> This weakens the plaintiff's case because juries tend to infer if the suspect was violent in the past it may be likely that the suspect was violent on the day in question. Furthermore, because the police misconduct occurs in poor neighborhoods, the witnesses are generally friends, family or acquaintances of the victim.<sup>148</sup> The witness credibility is also attacked if witness shares a similar criminal history.<sup>149</sup> Sometimes, even when the courts and juries are confronted with the actual footage of the police misconduct they are still reluctant to find the officer guilty of excessive force. The problem is that juries, everyday people, do

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<sup>143</sup> *Id.* at \*1.

<sup>144</sup> *Id.* at \*8 (McKinney Transcript No. 1, pp. 33–34).

<sup>145</sup> See Patton, *supra* note 75, at 756-57( *citing* Telephone Interview with Frank Saunders, California-based expert witness and former police officer who has testified at over 500 trials. “A majority of the plaintiffs are minorities.”).

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

<sup>147</sup> *Id.* at 756.

<sup>148</sup> *Id.* at 757.

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

not want to believe that law enforcement, the same officer that has the duty to protect and serve, is capable of killing an innocent, unarmed citizen. Too often, officers can tell a scripted story how the suspect charged at them, reached for their gun or thought the suspect was armed. This cycle remains unchecked by the judicial system and police abuse continues to grow rapidly.

For example, the infamous video of Rodney King being severely beaten by five police officers while at least fifteen officers stood by.<sup>150</sup> In his complaint, King alleged that he suffered “eleven skull fractures, permanent brain damage, broken [bones and teeth], kidney damage [and] emotional and physical trauma.”<sup>151</sup> Remarkably, even with the viewing of the footage, the jury found none of the defendants guilty.<sup>152</sup> Officers Koon, Powell, Briseno, and Wind were tried in “state court on charges of assault with a deadly weapon and excessive use of force by a police officer.”<sup>153</sup> The officers were “acquitted of all charges, with the exception of one assault charge against Powell that resulted in a hung jury.”<sup>154</sup> The outcome of the case was appalling and astonishing. President George H.W. Bush addressed the nation:

“I spoke this morning to many leaders of the civil rights community. And they saw the video, as we all did. For 14 months they waited patiently, hopefully. They waited for the system to work. And when the verdict came in, they felt betrayed. Viewed from outside the trial, it was hard to understand how the verdict could possibly square with the video. Those civil rights leaders with whom I met were stunned. And so was I and so was Barbara and so were my kids.”<sup>155</sup>

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<sup>150</sup> *Allen v. City of Los Angeles*, No. CV 91-2497 JGD (TX), 1995 WL 433720, at \*1 (C.D. Cal. Jan. 13, 1995).

<sup>151</sup> *Id.* at \*3.

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

<sup>153</sup> *Koon v. United States*, 518 U.S. 81, 87 (1996).

<sup>154</sup> *Id.* at 88.

<sup>155</sup> President George Bush, Address to the Nation on the Civil Disturbances in Los Angeles, California, (May 1, 1992)

Three months after the acquittal, a federal grand jury indicted the four officers under 18 U.S.C. § 242, charging them with violating King's constitutional rights under color of law.<sup>156</sup> The jury convicted Koon and Powell but acquitted Wind and Briseno.<sup>157</sup> The two officers were each sentenced to two and half years.<sup>158</sup> Federal Judge Davies, in handing down his decision stated “the shocking but enigmatic videotape that seems to tell different stories to different audiences... The jury in a state trial found all four officers accused not guilty and the jury in the Federal trial found two of them guilty.”<sup>159</sup> Although, some people including King, were upset with the length of jail time received the fact that the officers were sentenced sent a powerful message going forward. However, it was short lived because it was a rare occurrence. Officers are rarely charged under 18 U.S.C. § 242.<sup>160</sup> Cases brought under section 242 are usually the most notorious cases of police brutality.<sup>161</sup>

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<sup>156</sup> See *Simpson*, 1995 WL 516132, at \*10-11.

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

<sup>158</sup> *Id.*; see also, Seth Mydans, *Sympathetic Judge Gives Officers 2 1/2 Years in Rodney King Beating*, The New York Times (August 5, 1993), <http://www.nytimes.com/1993/08/05/us/sympathetic-judge-gives-officers-2-1-2-years-in-rodney-king-beating.html>.

<sup>159</sup> See Mydans, *supra* note 158.

<sup>160</sup> Title 18 U.S.C. § 242 states:

“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnaping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.” 18 U.S.C. § 242

<sup>161</sup> For instance, the assault of Abner Louima in the bathroom of the 70th Precinct in Brooklyn, NY and the incident when NYPD fired forty-one shots into Amadou Diallo, an unarmed black male. Christopher Dunn, *Column: Police Killings of Unarmed Black Men: Why No Federal Prosecutions?* (New York Law Journal), New York Civil Liberties Union (December 4, 2014), <http://www.nyclu.org/oped/column-police-killings-of-unarmed-black-men-why-no-federal-prosecutions-new-york-law-journal>.

In *Screws v. United States*, the Supreme Court held that a conviction under 18 U.S.C. § 242 required “proof of the defendant's specific intent to engage in misconduct that violates the victim's constitutional rights.”<sup>162</sup> This is a difficult standard to prove. Federal prosecutors must prove a showing of “willful and intentional use of force to deprive the victim of a protected right under the Constitution.”<sup>163</sup> The federal statute makes it a crime to “deprive any person of their rights under color of law.”<sup>164</sup> Built into the statute is a range of imprisonment terms up to a life term, or the death penalty, depending on the crime and resulting injury.<sup>165</sup> Section 242 is rarely used in police brutality cases. One possible reason is the federal government leaves these matters to the state to handle. In cases where the federal government believes the state got it wrong they will intervene and bring forth charges. As seen in the Rodney King case. I propose that in police brutality cases, if the state prosecution fails to secure a conviction, than the federal government should intervene and prosecute officers under section 242.

### **C. Recommendations to Hold Police Officers Accountable**

One of the purposes of the justice system and creation of laws is to establish order. When an individual commits a crime that person is subject to disciplinary course of action whether it be in the form of a fine, sanction, or imprisonment. The system acts as a way to keep order, peace and deter. If we do not hold police officers in the same light it creates an imbalance in the system and skews it to being biased, prejudicial and unjust. If officers that

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<sup>162</sup> *Screws v. United States*, 325 U.S. 91 (1945).

<sup>163</sup> *Id.* at 101.

<sup>164</sup> 18 U.S.C. § 242.

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

use excessive force are subject to disciplinary action, not only will the use of excessive force will be used less frequently, it will uphold the integrity of our judicial system. Officers are not deterred from using excessive force because the lack of consequence. For instance, as mentioned previously some officers can have over sixty complaints of excessive force and go without repercussion or investigation. This is a huge issue. We are breeding police misconduct by failing to investigate. There needs to be reform and oversight. I propose the need for police departments to be subjected to oversight monitoring to thoroughly review officer's misconduct complaints.

In addition, I propose that the United States Justice Department become involve with the police department's handling of investigations. It should be require that police departments conduct a thorough investigation for repeated occurrences of excessive force. This can act as deterrence. In addition, the police departments should make these investigative reports available to the Justice Department. Further, there should be a separate, non-police entity, to conduct the investigation. Therefore, to eliminate any biases. In addition, the Department of Justice can enact a nationwide disciplinary action guideline for police departments to follow when an officer engages in misconduct. For instance, for an officer's first offense of misconduct, depending on the severity of the conduct, the guideline can implement more training. For repeated offenses, the guideline can have disciplinary action ranging from fine, sanction, suspension, demotion, or termination. I believe if officers are properly trained and subject to investigation with potential consequences it would create a system of accountability. And hopefully deter police misconduct.