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RACIAL PROFILING-SEPARATE AND UNEQUAL KEEPING THE MINORITIES IN LINE-THE ROLE OF LAW ENFORCEMENT IN AMERICA

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I. INTRODUCTION

“The dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average reasonable person.”¹ “This

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1. Tracey Maclin, *“Black and Blue Encounters” – Some Preliminary Thoughts About*

applies to black men of all economic strata, regardless of their . . . education, . . . job status or place in the community.”² During the recent highly publicized traffic stop, caught on the officer’s in-car camera,³ a Dallas policeman, Robert Powell, refused to allow Texans⁴ running back Ryan Moats and his family to reach the bedside of a dying family member.⁵ The officer threatened Moats with arrest for running a traffic light.⁶ Filled with grief, Moats’ wife and aunt rushed into the hospital despite the fact the officer had his gun pulled.⁷ Distressed, Moats and his father-in-law tried to explain the urgency of the matter, but the officer utilized immoral discretion and continued to detain them in the hospital emergency parking lot.⁸ A nurse and hospital security guards also confirmed the player’s story to Officer Powell.⁹

*“You really want to go through this right now?” Moats said. “My mother-in-law is dying, right now.”*¹⁰

*“Shut your mouth,” Officer Powell said at one point.*¹¹ *“You can cooperate and settle down, or I can just take you to jail for running a red light.”*¹²

A storm of outrage gathered over the Dallas police department;¹³ Powell was first placed on an administrative leave, but then later resigned.¹⁴ Dallas Police Chief David Kunkle called a news conference and apologized for the behavior of Officer Powell and chastised him for lack of compassion, discretion and common sense.¹⁵ “Moats, in an

Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250 (1991).

2. *Id.* at 253.

3. See Steve Thompson & Tanya Eiserer, *Dallas police chief apologizes for conduct of officer who drew gun on NFL player outside hospital*, THE DALLAS MORNING NEWS, Mar. 27, 2009, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/032609dnmetcopstop.3e9c080.html>.

4. See Houston Texans, <http://www.houstontexans.com>, (last visited Dec. 10, 2010). The Houston Texans are a professional American football team which plays in the National Football League. *Id.*

5. See David Barron, *Officer faces rebuke in handling of RB Moats*, HOUSTON CHRONICLE, Mar. 27, 2009, <http://www.chron.com/disp/story.mpl/front/6343765.html>.

6. See Thompson & Eiserer, *supra* note 3.

7. See Barron, *supra* note 5.

8. See *id.*

9. See *id.*

10. *Id.* (emphasis added).

11. *Id.* (emphasis added).

12. *Id.* (emphasis added).

13. See Thompson & Eiserer, *supra* note 3.

14. See Barron, *supra* note 5.

15. See *id.*

interview with a Dallas radio station, said the officer's intransigence robbed him and his father-in-law of irreplaceable moments in a time of grief that morphed, after the officer pulled a weapon on Moats and his wife, into moments of confusion and terror."¹⁶

"The broader notion of [good and fair] policing still survives in the American constitutional doctrine of police powers, in which the Supreme Court explicitly treats policing as encompassing the tasks of governance,"¹⁷ however, "[p]olicing is inherently political because social control is a core and contested task of governance."¹⁸ Although, the law stands at the center of modern American life,¹⁹

for . . . years, there has been, through the courts and the streets a dreary procession of citizens with [unjustified charges], broken heads, and bruised bodies against few of whom was violence needed to effect an arrest."²⁰ "Many of them had done nothing to deserve an arrest."²¹ "In a majority of such cases, no complaint was made."²² "[However], [i]f the victim [did] complain, his charge is generally dismissed; the police are practically above the law."²³

Many victims, along with the police that brutalize them, mistakenly believe that "[t]here is more law at the end of a policeman's nightstick than in a decision of the Supreme Court."²⁴

This article will explore the history of modern policing and examine police brutality at the early stages of the implementation of law enforcements in this country. Also, this article will address whether race, gender, sexual orientation, religion, or ethnicity contributes to higher incidents of police brutality and review common misconceptions by the public about police brutality and retaliation against citizens who report police brutality. This article will define the term qualified immunity and

16. *Id.*

17. WILLIAM LYONS, *THE POLITICS OF COMMUNITY POLICING* 36 (Martha Minow, et al. eds., 1999).

18. *Id.*

19. See American Bar Foundation, *The Cambridge History of Law in America Volume 2, The Long Nineteenth Century (1789–1920)*, (2008), available at <http://www.americanbarfoundation.org/publications/163>.

20. Albert J. Reiss, Jr., *Police Brutality – Answers to Key Questions, in Social Problems and Public Policy: Deviance and Liberty* 343 (1974). This statement was published in 1903 by Hon. Frank Moss, a former police commissioner of New York City. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Henry F. Woods, *American Sayings: Famous Phrases, Slogans and Aphorisms* 214 (1949). A quote Alexander "Clubber" Williams, former NYPD police chief, may have originated. *Id.*

highlight its application towards police officials and district attorneys, while also analyzing highly publicized cases and their dispositions. Lastly, this article will address possible solutions to combating the problem of police brutality, which has plagued American society, leaving victims and many others exposed to this uprising endemic.

II. THE HISTORY OF POLICING AND THE MODERN TREND

The eras of American Policing are often described in terms of three historical periods; the Political Era (1840-1920) describes the close ties that developed between the police and urban political leaders.²⁵ “In many cities, the police appeared to work for the mayor or the political party in power rather than for the citizens in general.”²⁶

In the Professional Era, (1920-1970) “policing was greatly influenced by the Progressive reform movement in the early twentieth century.”²⁷ The progressives were mostly upper-middle class, educated Americans. One of their goals was the removal of political influences, such as party politics and patronage on government. “[T]hey envisioned professional law enforcement officials who would use modern technology to benefit the entire society, not just . . . local politicians.”²⁸

During the Community Era, (1970-Present) “there were calls for movement away from the overriding crime-fighting focus and toward greater emphasis on maintaining order and providing services to the community.”²⁹

As the decline of community life and the concentration of power in state and corporate bureaucracies intersect with increasingly inescapable violence on urban streets and in our homes, it is not surprising that our concerns about community, democracy, and public safety have joined forces in a reform like community policing.³⁰

Yet, despite our nation’s move towards a community-based service, police brutality, which law enforcement officials have defined as the use of excessive physical force or verbal assault and psychological intimidation,³¹

25. See GEORGE F. COLE, ET. AL., *THE CRIMINAL JUSTICE SYSTEM, POLITICS AND POLICIES* 103, 104 (8th ed. 2002).

26. *Id.* at 103.

27. *Id.* at 104.

28. *Id.*

29. *Id.* at 105.

30. LYONS, *supra* note 17, at xiii.

31. See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 *HASTINGS L.J.* 677, 684–86 (1996); see also Stop Police Brutality, *Ohio Federal Agent Shoots Unarmed Woman in the Neck*, Policebrutality.Info, <http://www.policebrutality.info/2009/03/ohio-federal-agent-shoots-unarmed-women.html> (last

“is one of the most serious, enduring, and divisive human rights violations in the United States.”³² “The problem is nationwide, and its nature is institutionalized.”³³ Police brutality may include false arrest,³⁴ retaliation,³⁵ intimidation,³⁶ racial profiling,³⁷ secret surveillance,³⁸ sexual abuse,³⁹ and corruption of police officers.⁴⁰

Over the last several years, police brutality in the U.S. and across its borders has gradually increased.⁴¹ Moreover, the issues of race, language barriers, and gender closely shadow reoccurring incidents.⁴² In addition, the injustices suffered by victims of racial discrimination are well known. “Historically, racism has been defined as the belief that race is the primary determinant of human capacities.”⁴³ In effect, racism suggests “that individuals should be treated differently according to their racial designation.”⁴⁴

[T]he very fact that most victims of police brutality are members of poor and minority communities should be cause for concern, and contributes to the perception that the police are more likely to engage in force when dealing with a minority suspect than when dealing with a non-minority suspect.⁴⁵

“Capital flight, corporate downsizing, redlining, and various other routine corporate practices weaken” the resilience of local communities and

visited Dec. 10, 2010).

32. ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 1 (Cynthia Brown ed., 1998).

33. *Id.*

34. See, e.g., Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L.R. 815, 824 (1999).

35. See Freeman, *supra* note 31, at 699–700.

36. See *id.* at 685–86.

37. See ACLU, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES, June 29, 2009, available at http://www.aclu.org/human-rights_racial-justice/persistence-racial-and-ethnic-profiling-united-states.

38. See generally ACLU, FIGHTING POLICE ABUSE: A COMMUNITY ACTION MANUAL 18–19, Dec. 1, 1997, available at http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/fighting-police-abuse-community-ac.

39. See Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. SOC. JUST. 175, 219–20 (2008).

40. See Rob Yale, *Searching for the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1845 (1997).

41. See generally Stephen Lendman, *Police Brutality in America*, THE BALTIMORE NEWS NETWORK, July 13, 2010 available at <http://baltimorechronicle.com/2010/071310Lendman.html>.

42. See generally Ritchie & Mogul, *supra* note 39, at 216–20.

43. ANNE MARIE MOONEY COTTER, RACE MATTERS: AN INTERNATIONAL LEGAL ANALYSIS OF RACE DISCRIMINATION 7 (2006).

44. See *id.* at 7–8.

45. Bennet Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 845–46 (2008).

low-income communities' capacity to respond to changes in their environment.⁴⁶ They lack the resources, "like social capital-resources, that allow responses to crime that also preserve and protect our children [and] families . . . from various unaccountable powers" that sadly, plague poor communities.⁴⁷ "Like most of us, . . . [but] unlike economists, police do not make their choices by a rational calculation of comparative economic values."⁴⁸ Furthermore, "[d]espite the social and economic progress of African-Americans over the past fifty years, Americans continue to live in a country where racial . . . [inequity] is the norm."⁴⁹ "The dominant belief about Blacks, upon which their legal rights, or lack thereof, were historically constructed, was the belief in their ontological inferiority."⁵⁰ "[In] Traditional Americanism, black people are [still] perceived as poor, lazy, lustful, ignorant, and prone to . . . criminal behavior."⁵¹

Today, many police officers still hold those faulty beliefs, demonstrated by the publicized street beating of Rodney King,⁵² the sodomizing of Abner Louima⁵³ in a police station house bathroom, and the

46. See LYONS, *supra* note 17, at 32.

47. *Id.*

48. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 91 (The Free Press, 1993).

49. KEVIN BROWN, *RACE AND EDUCATION IN THE POST-DESEGREGATION ERA FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION* 35 (Carolina Academic Press, 2005); see also Andrea A. Amoa, *Texas Issues a Formidable License to Kill: A Critical Analysis of the Joe Horn Shootings and the Castle Doctrine*, 33 T. MARSHALL L. REV. 293, 299 (2008).

50. See Amoa, *supra* note 49; see also BROWN, *supra* note 49.

51. BROWN *supra* note 49; see also Harvey Gee, *Book Review: Police Brutality and Citizen Complaints*, 4 CONN. PUB. INT. L.J. 49, 50 (2004). The vast majority of police minority interactions are routine instances of police abuse that often go unnoticed. See *id.* Often, young African American males have been targeted by law enforcement under the guise of investigative profiling. See *id.* Undoubtedly, police brutality has shaped the history of African Americans and the criminal justice system. See *id.*

52. See Madison Gray, *The L.A. Riots: 15 Years After Rodney*, TIME, Apr. 27, 2007, available at

http://www.time.com/time/specials/2007/la_riot/article/0,28804,1614117_1614084_1614831,00.html. Rodney King was detected speeding by the California Highway Patrol. *Id.* Fearing that his probation for a robbery offense would be revoked because of the traffic violation, King led the CHP on a high-speed chase. *Id.* By the time he was caught and ordered to exit his vehicle, several L.A.P.D. squad cars had arrived on the scene. *Id.* A struggle ensued, and some of the officers quickly decided that King was resisting arrest. *Id.* Sergeant Stacey Koon fired two shots into King with a TASER gun, and after that failed to subdue him, the officers beat him mercilessly with their batons. *Id.*

53. See Leonard Greene and Stefanie Cohen, *Louima's Haunted High Life 10 years Later*, N.Y. POST, July 30, 2007,

http://www.nypost.com/seven/07302007/news/regionalnews/louimas_haunted_high_life_10_years_later_regionalnews_leonard_green. Abner Louima—the New York-based Haitian immigrant who was tortured by white cops in a police station bathroom in 1997—was arrested Aug. 9, 1997, outside a Brooklyn nightclub after he was mistaken for a man who scuffled with police called to

killing of Amadou Diallo.⁵⁴

Sean Bell,⁵⁵ which a police spokesman referred to as aberrational, simply illustrates the widespread police brutality and harassment in minority neighborhoods.⁵⁶ The sheer violence and horror of these crimes creates a wide public outrage, which often can lead to mass activism.⁵⁷ However, police officers are rarely indicted, tried, or convicted.⁵⁸

“All too often, racial minorities have been disadvantaged by criminal procedure rules that are race-neutral, as the rules have had a disproportionate effect on communities of color.”⁵⁹ “The chain of radicalized terror that spanned [during] slavery, lynching, and police whippings⁶⁰ remains unbroken as the brutalization of . . . [minorities] is routinely, [but unfortunately,] practiced in today’s criminal justice

break up a fight. *Id.* After being beaten in a squad car on the way to the 70th Precinct station house in Flatbush, Louima was hauled into a station bathroom, where an angry officer shoved a wooden stick from a plunger into his rectum. *Id.* He later received an \$8.75 million settlement, the largest settlement for a police brutality case. *Id.* A confession landed one of the officers thirty years in jail, but not before defense lawyers falsely claimed Louima suffered his injuries elsewhere during a gay sex encounter. *Id.* Three officers, Thomas Bruder, Thomas Wiese, and Charles Schwarz, were convicted of conspiracy and obstruction of justice, but had their convictions overturned by a federal appeals court. *Id.*

54. See Times Topics, *Amadou Diallo*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/d/amadou_diallo/index.html (last visited Sept. 25, 2010). In the killing of Amadou Diallo in 1999, Diallo was hit nineteen times out of forty-one shots. *Id.* All four officers, who were in plainclothes, said they approached Mr. Diallo because they thought he fit the description of a man wanted in a rape case. *Id.* They contended that when he [Diallo] pulled out his wallet to show identification, they mistook it for a gun. *Id.* The officers faced prosecution on second-degree murder and other charges but were acquitted by a jury in Albany, where the trial had been moved because of concerns over pretrial publicity. *Id.*

55. See Taylor Bennett, *End Police Brutality in the United States, Law Enforcement Crimes Committed in Minority Communities*, July 28, 2008, available at <http://www.suite101.com/content/ending-police-brutality-in-the-united-states-a61855>. In the 2007 Sean Bell Case, one Hispanic and two African-American men were shot at fifty times by undercover officers. *Id.* Sean Bell was killed, and his two friends were severely wounded. *Id.* The officers faced charges of manslaughter, reckless endangerment and assault and all three of the police officers were acquitted on all counts. *Id.*

56. See Dorothy Roberts, *Constructing A Criminal Justice System Free Of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUMAN RIGHTS L. REV. 261, 277 (2007).

57. See JILL NELSON, POLICE BRUTALITY, AN ANTHOLOGY 13 (Jill Nelson ed., 2000).

58. See *id.*

59. Harvey Gee, *Race and the American Criminal Justice System: Three Arguments About Criminal Law, Social Science, and Criminal Procedure*, 85 U. DET. MERCY L. REV. 115, 127 (2008).

60. See generally *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding evidence procured by the police from three black suspects in the murder of a white man was inadmissible due to the fact the police whipped, beat, and lynched one of the suspects in order to obtain his confession). The Supreme Court of Mississippi had affirmed the mere pretense of a trial, wholly devoid of due process, and was therefore overturned. *Id.*

system.”⁶¹ “Like lynchings and police whippings, contemporary police brutality is not an exception to [current] law.”⁶²

Nonetheless, “[c]urrent legal doctrine [seems to] condone police brutality and makes individual acts of abuse appear isolated, aberrational, and acceptable rather than part of a systematic pattern of official violence.⁶³ Thus, “[l]egal rules fragment instances of police brutality so as to obscure its systemic nature, while police supervisors, prosecutors and judges routinely turn a blind eye to its occurrence.”⁶⁴ Similarly, “[p]olice torture of suspects continues to be a tolerated means of confirming the presumed criminality of blacks [and minorities.]”⁶⁵ As a result, the cost of relying on the criminal justice system leaves no room for accountability for police misconduct and serious reform is needed.⁶⁶

“Some observers believe that abuses of force reaching the attention of the public and the media are only the tip of the iceberg.”⁶⁷ Moreover, excess force has had an adverse impact on relationships between the police and the communities that they serve.⁶⁸ The following is a brief list of publicized incidents of police brutality at its worst.

On June 4, 2008, Monica Emerson, a white woman and a former secret service agent was threatened with arrest after spilling water from her son’s sippy cup at Regan International Airport.⁶⁹ Emerson was detained, ordered to apologize and was forced to clean up the spilled water.⁷⁰

On January 1, 2008, while incarcerated in the Harris County jail, Clarence Freeman, a black man died at the hands of Detention Officer Nathan Hartfield.⁷¹ Hartfield applied an unpermitted choke hold on

61. See Roberts, *supra* note 56, at 279.

62. *Id.* at 278.

63. *Id.*

64. *Id.*

65. *Id.* at 277.

66. See *id.* at 282–284 (discussing how the criminal justice system works to preserve the historical racial hierarchy while excluding the actors in the criminal justice system from accountability for their roles in continuing this institutional bias).

67. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NAT’L INST. OF JUSTICE, NCJ-160113, National Data Collection on Police Use of Force (1996), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ndcopuof.pdf>.

68. See *id.*

69. See Cindy Loose & Del Quentin Wilber, *Sippy Cup Spill Sparks Tiff at National Airport*, THE WASH. POST, Sat. June 16, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501986.html>.

70. See Bill Adler, *Nightmare at Reagan National Airport: A Security Story to End all Security Stories*, NOWPUBLIC, June 14, 2007, http://www.nowpublic.com/nightmare_at_reagan_national_airport_a_security_story_to_end_all_security_stories.

71. See Gary Hunter, *Texas Prisoners Still Dying in Houston Jails, Among Other Problems*,

Freeman's neck which restricted his air flow.⁷² Freeman was placed on life support but died later in January, when the life support was removed.⁷³

On January 1st 2008, Judge April Walker, a black woman, was arrested for impersonating a public servant.⁷⁴ Judge Walker called 9-1-1 to report a disturbance in her neighborhood.⁷⁵ Police arrived and stormed her home accusing her of impersonating a public servant.⁷⁶ Although she provided the officers with her credentials, they still arrested her.⁷⁷ The charges were dismissed two days later.⁷⁸ The District Attorney's office later tried to have her indicted by a grand jury on resisting arrest charges but those charges were also dropped.⁷⁹

On October 14, 2007, a traveler arriving at the Vancouver International Airport died after being tasered by the Royal Canadian Mounted Police.⁸⁰ Robert Dziekanski who did not speak English had arrived at the airport 10 hours earlier.⁸¹ While awaiting the arrival of his mother, Mr. Dziekanski became upset and confused and was pummeled by The RCMP and tasered.⁸²

On November 21, 2006, Kathryn Johnston an eighty-eight year-old black woman from Atlanta was shot and killed after police raided her home.⁸³ Officers had secured a "no knock" warrant⁸⁴ which was secured

PRISON LEGAL NEWS, Vol.20 No.10 1, 1,Oct. 2009, <http://www.supermaxed.com/Legal-Resources/PLN-October-2009.pdf>.

72. *See id.*

73. *See id.*

74. *See* Brenda Sapino Jeffreys, Law Professor Files Civil Rights Suit Against County, Former Sheriff, TEX. LAWYER, Jan. 12, 2009, http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202427331847&slreturn=1&hbz_login=-1.

75. *See id.*

76. *See id.*

77. *See* Dale Lezon & Mike Tolson, Judge Cries Foul After Second Arrest This Year, She says Sheriff's Office targeting her; Officials say she interfered in son's case, THE HOUSTON CHRONICLE, July 4, 2008, <http://www.chron.com/disp/story.mpl/hotstories/5871336.html>.

78. *See* Jeffreys, *supra* note 74.

79. *See id.*

80. *See* Ian Austen, *After A Death, Use of Taser In Canada Is Debated*, N.Y. TIMES, Nov. 16, 2007, at A16 (describing Mr. Dziekanski's horrific experience and untimely death at the Vancouver Airport).

81. *See id.*

82. *See id.*

83. *See* Rhonda Cook, *Chain of Lies Led to Botched Raid; Feds Detail Woman's Death, Officers Plea*, THE ATLANTA JOURNAL-CONSTITUTION, Apr. 27, 2007, at 1D (detailing the ordeal that led to Ms. Johnston's death); *see also* Shaila Dewan & Brenda Goodwin, *Anger Undimmed in Atlanta At Killing of Aged Woman*, N.Y. TIMES, Nov. 29, 2006, at A22 (discussing the aftermath in Atlanta following Ms. Johnston's death).

84. *See* U.S. Legal, *No-Knock Warrant Law & Legal Definition*,

based on falsified information.⁸⁵ Johnston was shot six times.⁸⁶ Officers later planted illegal drugs in Johnston's home and attempted to get a confidential informant to lie about purchasing drugs from the elderly woman.⁸⁷

In 2002, Erik and Sean Ibarra, Hispanic individuals, were arrested on charges of resisting arrest and evading arrest after the Ibarra brothers videotaped a drug raid in their Houston neighborhood.⁸⁸ Officers destroyed the videotape.⁸⁹

III. DOES RACE, RELIGION, OR ETHNICITY INCREASE A PERSON'S CHANCE OF BECOMING A VICTIM OF POLICE BRUTALITY?

A. RACE/ETHNICITY AS A FACTOR

*That Justice is a blind goddess is a thing to which we blacks are wise: Her bandage hides two festering sores that once perhaps were eyes.*⁹⁰
- Langston Hughes

The role of race in criminal laws was a direct affront to blacks' freedom and dignity⁹¹ and in today's society many states continue to impose harsher penalties on blacks for assaults on whites, than on whites committing the same offenses.⁹² Race, class, and gender privilege, in a

<http://definitions.uslegal.com/n/no-knock-warrant/> (last visited Sept. 20, 2010). A no-knock warrant is defined as:

A no-knock warrant is a warrant issued by a judge who allows law enforcement to enter a premises without first knocking or identifying themselves as police. It is a warrant authorizing officers to enter certain premises to execute a warrant without first knocking or otherwise announcing their presence where circumstances (such as a known risk of serious harm to the officers or the likelihood that evidence of crime will be destroyed) justify such an entry.

Id.

85. See Cook, *supra* note 83, at 1D.

86. See *id.*

87. See *id.*

88. See Peggy O'Hare, *Ibarras Seek \$5 Million in Arrest Suit; Jurors Get First Look At Case Against Deputies, County*, THE HOUSTON CHRONICAL, Feb. 21, 2008, at B3 (discussing the lawsuit filed by the Ibarras in response to the arrest and destruction of the videotape).

89. See *id.*

90. LANGSTON HUGHES, *Justice*, reprinted in LANGSTON HUGHES, THE COLLECTED POEMS OF LANGSTON HUGHES 31 (Arnold Rampersand et al. eds., 2002) (emphasis added); see also N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1315 (2004) (quoting a poem written by Langston Hughes).

91. See Amoa, *supra* note 49, at 299 (discussing racial tensions and the use of the castle doctrine).

92. See Gee, *supra*, note 59 at 115-16; See generally Note, *Combating Racial Violence: A*

discourse that naturalizes oppression, veil the unspoken societal assumptions.⁹³ One assumption is that black and other minority men are the 'bad guys' and the police are the 'good guys,' and if the police killed someone "it must have been for a good reason."⁹⁴ The attitude that they must have done *something*,⁹⁵ "ingrained since slavery, is nurtured and manipulated by the police, who are quick to release the prior-arrest or medical record of their victims [in order to] somehow justif[y] being killed by the police."⁹⁶

For a host of reasons, crime perpetrators are often imagined as Black or Hispanic, while crime victims are imagined as being white.⁹⁷ In reality, four-fifths of violent crimes are intra-racial.⁹⁸ Whites are nearly six times more likely to be murdered by another white than by a minority.⁹⁹ Similarly, most victims of crimes committed by Black and Hispanic perpetrators are Black and Hispanic themselves.¹⁰⁰ But as one author has noted, police officers are not made upon graduation from the academy . . . all of the images that one is exposed to, that he/she reacts to, coupled with his/her own life experiences help shape the officer into what he/she is about to become.¹⁰¹ Further, "social scientists have demonstrated that there is a definite relationship between one's occupational environment and the way one interprets events; an occupation may be seen as a major badge of identity that an individual acts to protect as a facet of his or her self-esteem and person."¹⁰²

An indispensable key in understanding police motives, fears, aspirations, and the moral codes by which they judge themselves is to understand and acknowledge how the police learn to see the world around them and their place in it.¹⁰³ "Thus, entry requirements, training, and

Legislative Proposal, 101 HARV. L. REV. 1270, 1271 (1988) (proposing legislation that would punish interracial crime more severely than the same crime committed intraracially).

93. See Cary Clack, *Not Everyone Should Feel Guilty for the Sins of the Few*, SAN ANTONIO EXPRESS-NEWS, Oct. 28, 2002, at 1B (stating that most minorities feel guilty for the crimes committed by others of their race).

94. See NELSON, *supra*, note 57 at 13.

95. See *id.*

96. *Id.*

97. See Clack, *supra*, note 93 at 1B.

98. See *supra* notes 99–100 and accompanying text.

99. See John J. DiIulio, *Symposium: Shaping American Communities: Segregation, Housing & The Urban Poor: Comment on Douglas S. Massey's Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1275, 1277 (1995) (commenting on Douglas S. Massey's article about segregation and violent crime in America).

100. See *id.*

101. See *id.*

102. See COLE, *supra* note 25, at 106.

103. See SKOLNICK & FYFE, *supra* note 48, at 92.

professional socialization produce . . . homogeneity of attitudes that guides the police in their daily work.”¹⁰⁴ Policing generates powerful distinctive ways of looking at the world, cognitive and behavioral responses, which when taken together, may be said to constitute, a “working personality.”¹⁰⁵

B. COMMISSION REPORT FINDINGS

The notion that police brutality of minorities is greater than compared to whites is not a new concept. Since the mid-1960s, there have been several United States Federal Commissions that have studied the trend.¹⁰⁶ Unfortunately, most of the findings in the Kerner Report,¹⁰⁷ a study published 40 years ago, in 1968, still holds true today.¹⁰⁸ However, according to Capers, “[t]heir findings were unambiguous and to the point: hostility between the police and minority communities was not only a contributing factor to urban unrest and violence, [but] in some places, it was the sole factor.”¹⁰⁹ As the Commission put it, “Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods.”¹¹⁰ “This belief is unquestionably one of the major reasons for intense Negro resentment against the police.”¹¹¹ “Even if the nation had somehow managed in the intervening decades to resolve its urban and racial challenges, this extraordinary document invites a historical reflection.”¹¹²

104. See COLE, *supra* note 25 at 106.

105. See *id.*

106. See COLLINS, *supra* note 32 at 40–41; see also TOM WICKER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 206 (The New York Times Ed., 1968) [hereinafter Kerner Report]; REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT viii (July 9, 1991) [hereinafter Christopher Commission Report].

107. See generally Kerner Report, *supra* note 106, at v-xxiii. The Kerner Report, is the 1968 report of a federal government commission that investigated urban riots in the United States. See *id.* The Kerner Report was released after seven months of investigation by the National Advisory Commission on Civil Disorders. See *id.* The Kerner Report took its name from the commission chairman, Illinois Governor Otto Kerner. President Lyndon B. Johnson appointed the commission on July 28, 1967, while rioting was still underway in Detroit, Michigan. See *id.* The long, hot summers since 1965 had brought riots in the black sections of many major cities, including Los Angeles (1965), Chicago (1966), and Newark (1967). Johnson charged the commission with analyzing the specific triggers for the riots, the deeper causes of the worsening racial climate of the time, and potential remedies. See *id.*

108. See COLLINS, *supra* note 32, at 40.

109. See Capers, *supra* note 45, at 864.

110. *Id.*

111. *Id.* (citing NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)).

112. RACE, POVERTY AND AMERICAN CITIES 5 (John Charles Boger & Judith Welch Wegner eds., 1996).

Furthermore, the Kerner Report findings revealed that the police represented the enforcers of white supremacy, racism, and oppression.¹¹³ In many cases this was more than just a perception, many police officers did, in reality, reflect and express those ideas.¹¹⁴ The Kerner Report also discussed the “double standard” of the American justice system, where there is one set of laws applicable to whites and another for ethnic minorities.¹¹⁵ The Report stated, “Our nation is moving toward two societies, one black, one white—separate and unequal. What white Americans have never fully understood — but what the Negro can never forget — is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintained it, and white society condones it.”¹¹⁶

After the infamous Rodney King case of 1991,¹¹⁷ another commission was formed to revisit the perception of police brutality in minority communities.¹¹⁸ Unlike the previous Kerner Report, this report included Latinos and Asian-Americans in accordance with the changing demographics of the United States.¹¹⁹ The Christopher Commission affirmed many of the findings of The Kerner Report; however, it delved further into the issue of police abuse against minorities.¹²⁰

One of the primary topics discussed is how members of minority communities view police misconduct as commonplace.¹²¹ The term

113. See Kerner Report, *supra* note 106, at 206. Wicker states:

To many Negroes police have come to symbolize white power, white racism, and white repression. And the fact is that many police do reflect and express these white ideas. The atmosphere of hostility and cynicism is reinforced by a widespread perception among Negroes of the existence of police brutality and corruption, and a “double standard” of justice and repression — one for Negroes and one for whites.

Id.

114. See COLLINS, *supra* note 32, at 2.

115. See Kerner Report, *supra* note 106, at 206 (exemplifying the “double standard”).

116. Jonathan Adams, *Race Riots Reexamined: Kerner Report 40 Years Later*, COLORLINES NEWS FOR ACTION,

http://www.racewire.org/archives/2008/03/race_riots_reexamined_kerner_r.html.

117. See *Flashback: Rodney King and the LA riots*, July 10, 2002, <http://news.bbc.co.uk/2/hi/americas/2119943.stm>.

118. See *id.* at 13; see also Laurie L. Levinson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 6 (2001).

119. See Christopher Commission Report, *supra* note 106, at viii. The Christopher Report revealed that:

The difficulties of policing in Los Angeles are compounded by its vast geographic area and the ethnic diversity of its population. The 1990 census reflects how enormous that diversity is: Latinos constitute 40% of the total population; Whites 37%; African-Americans 13%; and Asian/Pacific Islanders and others 10%.

Id.

120. See *id.* at 37.

121. See Michael Rowan, *Leaving No Stone Unturned: Using RICO As a Remedy for Police*

“misconduct” is described as abusive and derisive language against minorities as well as the use of unnecessary force police employed when dealing with these minorities.¹²² One practice, known as “proning out,” consists of placing individuals who are being questioned face down on the street pavement.¹²³ This practice, backed by the administration,¹²⁴ was used mostly in minority communities.¹²⁵

C. EXCESSIVE FORCE

“The policing of . . . [minority communities] in the United States initially took the form of occupation, surveillance, and pacification.”¹²⁶ “Even before formal police forces were established in cities at the end of the nineteenth century, people in power relied on ‘legal’ and extralegal violence and terrorism to pacify, discipline, and exploit communities of color.”¹²⁷ Thus, as discussed in the Christopher Commission, race still plays a central role in the police uses of excessive force.¹²⁸

Excessive force constitutes unreasonable or unnecessary force under a given set of circumstances.¹²⁹ “The chances of local criminal prosecution are slim, and of federal civil rights prosecution, even for strong cases, remote.”¹³⁰ “Although there is no way to determine with mathematic certainty how widespread incidents of police brutality are,”¹³¹ according to the United States.

Department of Justice, National Data Collection on Police Use of Force, the basic problem is the lack of routine, in national systems for collecting data, on incidents in which police use force during the normal course of duty and on the extent of excessive force.¹³²

Misconduct, 31 FLA. ST. U. L. REV. 231, 242 (2003).

122. See Timothy Maher, *Cops on the Make: Police Officers Using their Job, Power, and Authority to Pursue Their Personal Sexual Interests*, 2007 J. INST. JUST. INT’L STUD. 32 (2007) (defining “police misconduct”).

123. See COLLINS *supra*, note 32, at 40; see also *Cranford v. Underhill*, 03:06-CV-00111-LRH-GWF, 2008 U.S. Dist. LEXIS 57211, at *2 (D. Nev. July 26, 2008) (defining the term “proning out”).

124. See *Cranford* 2008 U.S. Dist. LEXIS 57211, at *22.

125. See Christopher Commission Report, *supra* note 106, at 75–76.

126. NELSON, *supra* note 57, at 25.

127. *Id.*

128. See COLLINS, *supra* note 32, at 41.

129. BLACK’S LAW DICTIONARY 294 (3rd pocket ed. 1996).

130. COLLINS, *supra* note 32, at 7.

131. See Capers, *supra* note 45, at 845.

132. See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 2, 3, available at <http://www.ncjrs.gov/pdffiles1/nij/176330-1.pdf> (last visited Dec. 10, 2010).

The difference between police treatment of whites and non-whites has been perceived by those adversely affected by the *mistreatment* and those not affected by it.¹³³ This different view of the police system was so significant that both former President Clinton and former Attorney General Janet Reno addressed the matter.¹³⁴ As former Attorney General Janet Reno later noted during a speech on police misconduct, “[T]he perception of too many Americans is that police officers cannot be trusted . . . especially in minority communities residents believe the police have used excessive force, that law enforcement is too aggressive, that law enforcement is biased, disrespectful, and unfair;’ this perception holds true of white and minority officers.”¹³⁵

But this is not simply a “perceived” difference. In a study conducted by the Commission, twenty-five percent of the 650 Los Angeles police officers surveyed also agreed that an “officer’s prejudice towards the suspect’s race may lead to the use of excessive force.”¹³⁶ In addition, “[p]olice decisions to harass, though generally perceived as overzealous enforcement, constitute another body of non-enforcement activities meriting investigation.”¹³⁷ “Harassment is the imposition by the police, acting under the color of law, of sanctions prior to conviction as a means of ultimate punishment, rather than . . . a device for the invocation if criminal proceedings.”¹³⁸ While the police do have the right to use force when dealing with a criminal suspect, most departments have precise and strict guidelines of when and under what circumstances that force can be applied.¹³⁹

In general, the amount of police force used should be minimal, in that the force used should only be necessary to achieve the particular purpose.¹⁴⁰ Most police departments employ a progression of stages through which officers can assess the appropriate force that should be administered.¹⁴¹ The New York Police Department categorizes these stages

133. See Capers, *supra* note 45.

134. See *id.* at 843.

135. See *id.* at 842.

136. See Christopher Commission Report, *supra* note 106, at 69. “Racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community. . . . An officer’s prejudice towards the suspect’s race may lead to the use of excessive force.” *Id.*

137. Cole, *supra* note 25, at 122.

138. *Id.*

139. See David Mangan, *Police Brutality: The Use of Excessive Force*, DRURY UNIVERSITY, 2000, <http://www.drury.edu/ess/irconf/DMangan.html>.

140. See *id.*

141. See *id.*

as follows: 1) verbal persuasion, 2) unarmed physical force, 3) force using non-lethal weapons, 4) force using impact weapons, and 5) deadly force.¹⁴² The problem of excessive force arises when officers do not follow these guidelines and use a level of force higher than that necessary for a given situation.¹⁴³ The police officer's own awareness that race plays a central role in how they deal with racial minorities is exacerbated by the policy of "racial profiling" prevalent in virtually all police departments in the United States.¹⁴⁴

D. RACIAL PROFILING

As with the use of excessive force, the pervasiveness of race-based profiling suggests over-enforcement, with respect to targets of profiling, and under-enforcement, in regards to the perpetrators of profiling.¹⁴⁵ Profiling also signals a responsiveness gap¹⁴⁶

Racial profiling is a complex, controversial, and multifaceted issue.¹⁴⁷ "There are many definitions of profiling, with federal agencies, states, local jurisdictions, and citizens all offering their own definitions; some are more comprehensive than others."¹⁴⁸ "Racial profiling may be defined as all law enforcement activities that are initiated solely on the basis of race, while another definition may focus only on the context of vehicle stops."¹⁴⁹ In general, racial profiling is the target of specific racial groups as suspects in criminal activities based on the assumption that certain racial groups are predisposed to commit certain crimes.¹⁵⁰

"Dedicated police officers and professional police practices have

142. *See id.*

143. *See generally* Amnesty Int'l, *Race, Rights and Police Brutality*, AI Index No. AMR 51/147/1999 (1999), available at <http://www.amnesty.org/en/library/asset/AMR51/147/1999/en/735f2b8c-e038-11dd-865ad728958ca30a/amr511471999en.pdf> (last visited Dec. 10, 2010).

144. *See* Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 725 (2004).

145. *See* Capers, *supra* note 45, at 851.

146. *Id.*

147. *See* GARRINE P. LANEY, *Racial Profiling: Issues and Federal Legislative Proposals and Options*, in RACIAL PROFILING: ISSUES, DATA, ANALYSES 3 (Steven J. Muffler ed., 2006); *see also* DEBORAH RAMIREZ, JACK MCDEVITT & AMY FARRELL, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, in RACIAL PROFILING: ISSUES, DATA, ANALYSES 60 (Steven J. Muffler ed., 2006).

148. LANEY, *supra* note 147, at 3.

149. *Id.*

150. *See* Capers, *supra* note 45, at 851 (Stating quite simply, that the law, for the most part, fails to protect individuals who are the victims of profiling and fails to ensure democratic policing.); *see also* Weatherspoon, *supra* note 144, at 728.

contributed to making our communities safer.”¹⁵¹ The majority of police officers are hard working public servants who perform a dangerous job with dedication and honor; however, the perception that some police officers are engaging in racial profiling has created resentment and distrust in police departments, this is particularly true in communities of color.¹⁵² Assertions that law enforcement personnel at all levels unfairly target certain racial and ethnic groups, particularly, but not exclusively for traffic stops and searches, have raised concerns about violations of the Constitution.¹⁵³

“So long as police claim targeting is not based on race alone, courts tend to treat the action as beyond the purview of the Equal Protection Clause.”¹⁵⁴ Additionally, it has been noted that “after *United States v. Armstrong*¹⁵⁵ the complainant must show not only a discriminatory effect but also discriminatory purpose to make out a claim of discriminatory enforcement.”¹⁵⁶ However, “this doctrinal requirement is, of course, unresponsive to the concerns raised by critical race scholars of unconscious racism and implicit biases.”¹⁵⁷

In addition, “racial minorities have been disadvantaged by criminal procedure rules that are race-neutral, as the rules have had a disproportionate effect on communities of color.”¹⁵⁸ “The Central Park Jogger case is but one example.”¹⁵⁹ In 1989, a white woman was viciously raped and beaten in New York’s Central Park.¹⁶⁰ After intense interrogations, “[f]ive teenagers, ranging in age from 14 to 16 years old, who . . . [were] implicated in a separate series of muggings, were questioned about the rape.”¹⁶¹ The boys were black and Latino; the victim was white.¹⁶² “Some say that things began to go wrong right there—that

151. DEBORAH RAMIREZ, JACK MCDEVITT & AMY FARRELL, *supra* note 147, at 60.

152. *See id.*

153. LANEY, *supra* note 147, at 1.

154. Capers, *supra* note 45, at 852.

155. 517 U.S. 456 (1996) (responding to an indictment on federal charges, respondents filed a motion for discovery or for dismissal, alleging that they were selected for prosecution because they were black).

156. Capers, *supra* note 45, at 852–53.

157. *Id.* at 853.

158. Gee, *supra* note 59, at 127.

159. Capers, *supra* note 45, at 855.

160. *See generally* ‘Central Park Jogger’ Speaks Out, CNN.COM, Apr. 24, 2003, <http://www.cnn.com/2003/US/Northeast/04/23/central.park.jogger/>.

161. Elaine Cassel, *The False Confessions In The Central Park Jogger Case: How They Happened, and How to Stop Similar Injustices from Happening Again*, FIND LAW LEGAL NEWS AND COMMENT., Dec. 17, 2002, <http://writ.news.findlaw.com/cassel/20021217.html>.

162. *See id.*

the race factor trumped [the] search for the truth.”¹⁶³

As Capers noted, “[t]his is ostentatiously true in high profile cases where media attention also influences the allocation of police resources.”¹⁶⁴ “For example, Susan Brownmiller, in her analysis of newspaper coverage of rape, found that ‘although New York City police statistics showed that black women were more frequent victims of rape than white women, the favored victim in the tabloid headline . . . was young, white, middle class, and attractive.’”¹⁶⁵ The Central Park jogger case is a perfect example. “The idea of a roving gang of black boys brutally beating and raping a white woman fit the schema of the public’s fear of African-Americans,” despite the fact that the DNA recovered did not match any of the accused.¹⁶⁶

“This attention to white female victims of crime and comparative inattention to black female victims of crime only fuels the perception prevalent in poor and minority communities that, when it comes to receiving protection, minority victims simply are not as important as non-minority victims.”¹⁶⁷ “More significantly, just as increased media attention results in an increase in police resources, this under-attention by the media to crimes against minority victims translates into a reduced allocation of resources deployed to respond to such crimes.”¹⁶⁸ “This, in turn, increases the perception of undemocratic policing.”¹⁶⁹

Thirteen years later, DNA testing, along with another person’s confession, explicitly showed evidence that the five convicted suspects did not commit the crime.¹⁷⁰ In 2002, the convictions were dismissed.¹⁷¹ If, in

163. *Id.*

164. Capers, *supra* note 45, at 855.

165. *Id.*

166. Cassel, *supra* note 161.

167. Capers, *supra* note 45, at 855.

168. *Id.* at 856.

169. *Id.*

170. See African American Registry, *Central Park Jogger Case Dismissed!*, available at http://www.aaregistry.org/historic_events/view/central-park-jogger-case-dismissed. The site lists the defendants history concerning the Central Park arrest:

Here is a register of convictions and time served by the five defendants in the Central Park jogger case: Antron McCray: Arrested at age 14. Convicted as a juvenile of first-degree rape and robbery. Released in 1996 after serving six years. Kevin Richardson: Arrested at age 14. Convicted as a juvenile of second-degree attempted murder, first-degree sodomy, first-degree rape, and first-degree robbery. Released in 1997 after serving 6 1/2 years. Yusef Salaam: Arrested at age 14. Convicted as a juvenile of first-degree rape and robbery. Released in 1997 after serving 6 1/2 years. Raymond Santana: Arrested at age 14. Convicted as a juvenile of first-degree rape and robbery. Released in 1998 after serving nearly eight years. Incarcerated again in 1999 on charges of third-degree criminal possession of a controlled substance. Released July 26, 2003. Kharey Wise: Arrested at age 16. Convicted as an adult of

1989, the police had compared the DNA sample found at the Central Park crime scene to DNA evidence from a string of rapes on Manhattan's Upper East Side, they would have most likely realized the same man, Matias Reyes, had committed these rapes, including the Central Jogger case.¹⁷² Although Reyes is an African-American, the point is that the police almost immediately and solely centralized their efforts in establishing that there was more than one rapist, and that all those involved were African-American or minorities.¹⁷³ The police, in securing their suspects, coerced the young boys into confessing to the rape.¹⁷⁴

Experts say coerced confessions are far more common than one would expect.¹⁷⁵ "During lengthy interrogations, police often lead suspects to believe they have no other options but to confess."¹⁷⁶ The most vulnerable to such tactics are the young, and those with very low IQs.¹⁷⁷

E. PRE-TEXTUAL STOPS

"For years, members of the African-American and Hispanic communities have complained that they were victims of profiling"¹⁷⁸ and that they are targeted based on the presumption, and not on the probable cause, that they actually committed a particular offense.¹⁷⁹ For example, pre-textual stops are legal justifications of racial profiling.¹⁸⁰ "Many minorit[ies] . . . believe that the police are more likely to target them than

first-degree sexual abuse, first degree-assault, and first-degree riot. Released Aug. 12, 2002, after serving 11 1/2 years.

Id.

171. See Dakota Smith, *Suspect's DNA ignored in Central Park Jogger Case*, WOMEN'S ENEWS, Dec. 5, 2002, <http://www.womensenews.org/story/in-the-courts/021205/suspects-dna-ignored-in-central-park-jogger-case>.

172. See *id.*

173. See Alexandra Marks, *Why People Confess to Crimes They Didn't Do*, THE CHRISTIAN SCIENCE MONITOR, Dec. 5, 2002, <http://www.csmonitor.com/2002/1205/p02s01-usju.html>.

174. See *id.*

175. See *id.*

176. *Id.*

177. See *id.* One professor analyzed confessions as follows:

It's a reaction to a feeling of utter hopelessness and despair that virtually anything I say about my innocence is going to be ignored, and my only way out of this interrogation room is to accede to the interrogators' demands," says Steven Drizin, a professor at Chicago's Northwestern University School of Law and an expert on false confessions. "The whole purpose of police interrogation tactics is to convince a suspect that it is in his best interest to confess to a crime."

Id.

178. Laney, *supra* note 147, at 2.

179. See Weatherspoon, *supra* note 144, at 724.

180. See Capers, *supra* note 45, at 850.

their white [counter-parts] for pre-textual . . . stops”;¹⁸¹ a practice the Supreme Court gave its imprimatur to in *Whren v. United States*.¹⁸²

The police strategy is to find lawful grounds to stop the vehicle — a traffic violation was the pretext.¹⁸³ A pre-textual stop flows from an officer’s belief that criminal activity is afoot despite the absence of articulable suspicion.¹⁸⁴ “A pre-textual stop based on a racial profile stems, therefore, from a belief that stopping minorities will yield evidence of crime more often than stopping other motorists.”¹⁸⁵ Moreover, “[a]n arrest . . . is a serious personal intrusion regardless of whether the person seized is guilty or innocent.”¹⁸⁶ “A custodial arrest involves a search of the arrestee’s entire body, the contents of his pockets, and any containers found within his reach.”¹⁸⁷ “The arrestee may be led away in handcuffs and transported to the police station, fingerprinted and booked, then detained for up to forty-eight hours before a magistrate determines the validity of his detention.”¹⁸⁸ “Even if the case against such an arrestee is dismissed, or his case results in an acquittal, his arrest record may be maintained and disseminated, further damaging his reputation.”¹⁸⁹

“A person’s race, ethnicity, or national origin, may motivate police conduct.”¹⁹⁰ “The term “DWB” – Driving While Black – describes the phenomenon in which officers target persons based on race for traffic [violations] (or other) detentions, in order to follow up on hunches of criminal behavior.”¹⁹¹ “Although African-Americans have disproportionately suffered this procedure,”¹⁹² other groups have been or can be targeted, for example, women and Arabs.¹⁹³ Suppose that a law enforcement officer, post-September 11, 2001 (commonly referred to as 9-

181. *Id.* at 849.

182. 517 U.S. 806, 806 (1996) (holding that a driver could be legitimately stopped for a traffic offense, regardless of the severity of the offense).

183. *See id.* at 819 (stating that the officers had probable cause that the Petitioners had violated a traffic code, rendering the stop reasonable).

184. *See* Wesley M. Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1414 (2000).

185. *Id.*

186. *Id.* at 1458 (citing *United States v. Watson*, 423 U.S. 411, 428 (1976)) (Powell, J., concurring).

187. *Id.*; *see also* *New York v. Belton*, 453 U.S. 454, 460–61 (1981).

188. Oliver, *supra* note 184, at 1458.

189. *Id.*

190. JOSHUA DRESSLER and GEORGE C. THOMAS III, *CRIMINAL PROCEDURE, INVESTIGATING CRIME* 245, 250 (3rd ed., 2003).

191. *Id.*

192. *Id.*

193. *See id.*

11), decides to target all persons of apparent Arab ancestry, “just in case they are terrorists.” An officer may “put such persons under surveillance and use a minor traffic violation, such as the failure to use a seat belt, as a pretext for further investigation.”¹⁹⁴ “With the racial and ethnic makeup of the nation changing and after the terrorist attacks of September 11, 2001, other groups such as Arab Americans, Muslims, and Asian Americans, have joined the call for an end to racial profiling.”¹⁹⁵ This has been defined as the difference between Case probability and Class probability.¹⁹⁶

Case probability, when viewed in situations involving the police, is employed in instances where there are probable factors or background information that can reasonably be interpreted to point towards a specific racial group to find a criminal suspect.¹⁹⁷ For example, if a victim of a crime is attacked in a certain area and describes their assailant as a six-foot African-American male and the police begin questioning people that fit their profile based on their investigations, there is most likely probable cause for them to take this action.¹⁹⁸

In contrast, class probability occurs in situations where, based on statistics of certain minorities committing certain crimes, these racial minorities are targeted based solely on these statistics and not any evidence or probable cause that they have actually committed a crime.¹⁹⁹ An example of class probability occurs in situations where African-Americans and Latinos are targeted in “routine” traffic stops to search for illegal drugs and contraband solely based on their race and statistics that more of them are involved in distributing drugs, without any other reason for probable cause.²⁰⁰ The distinction between the two is important because in the first instance of case probability, there are certain factors that validate the police actions, whereas in the second instance no such factors exist.²⁰¹

However even in the instances where case probability is present, there is no guarantee that this will minimize the damages of racial profiling.²⁰² This notion is evidenced by the Stuart case that occurred in 1992, in

194. *Id.*

195. Laney, *supra* note 147, at 2.

196. See William Anderson & Gene Callahan, *The Roots of Racial Profiling: Why are police targeting minorities for traffic stops?*, REASON MAGAZINE, Aug.–Sept. 2001, available at <http://www.reason.com/news/show/28138.html>.

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *See* Anderson & Callahan, *supra* note 196.

Boston, Massachusetts.²⁰³ In this instance, a white man who murdered his pregnant wife, took advantage of the racist assumptions against African-American men, and used them to divert suspicion by claiming that his wife's assailant had been black.²⁰⁴ This resulted in the round-up and harassment of hundreds of African-American males and a public outcry when it was discovered that there was in fact no assailant and the husband murdered his own wife.²⁰⁵

The Stuart case spurred the creation of the St. Clair Commission in 1992, to take a closer look at the Boston Police Department.²⁰⁶ As with the Kerner Report and the Christopher Commission Report, the St. Clair Report also uncovered considerable inconsistencies in Boston's Police Department leadership and management.²⁰⁷ The problems highlighted by the St. Clair Commission are viewed by some as the "blueprint for police reform efforts in the city."²⁰⁸

F. RELIGION AS A FACTOR

The law enforcement's use of profiling reaches further than just the issue of race.²⁰⁹ Although freedom of religion is a fundamental right guaranteed in the Constitution, the events of 9-11 and America's "war on terrorism" have highlighted the problems faced by individuals who practice Islam or a religion outside of the cultural norm.²¹⁰ "A public convinced of

203. See Adrian Walker, *Turning Point*, THE BOSTON GLOBE, Jan. 6, 2005, http://www.boston.com/news/local/massachusetts/articles/2005/01/06/turning_point/.

204. See *id.*

205. See COLLINS, *supra* note 32, at 139; see also Walker, *supra* note 203.

206. See COLLINS, *supra* note 32, at 139–40.

207. *Id.* at 140.

Our study revealed an investigative and hearing process characterized by shoddy, halfhearted investigations, lengthy delays, and inadequate documentation and recordkeeping. The present Internal Affairs process is unfairly skewed against those bringing a complaint. Given the Internal Affairs Division's ("IAD") failure to routinely provide thorough and timely investigations of alleged misconduct, and the fact that the Department sustains less than 6% of complaints against officers, it is no surprise that the overwhelming majority of community residents we spoke to have little confidence in the Department's ability or willingness to police itself. The IAD reports to the Commissioner and its shortcomings adversely reflect on his performance.

Id.

208. See *id.*

209. See, e.g., KAREEM SHORA, NAT'L EXEC. DIR., AM.-ARAB ANTI-DISCRIMINATION COMM. FIGHTING ANTI-MUSLIM DISCRIMINATION (2008), available at www.csce.gov/index.cfm?Fuseaction=Files.Download&FileStore_id=1026 (discussing the prevalence of profiling Arabs and Muslims).

210. See Ellen Baker, *Flying While Arab: Racial Profiling and Air Travel Security*, 67 J. AIR L. & COMM. 1375, 1377 (2002) (examining the issue of racial and ethnic profiling of Arabs and

its vulnerability might well be willing to endure greater police intrusions in exchange for greater security.”²¹¹ Evidence of this problem is most visible in the increased profiling and prosecution of Muslims and Arabs in our airports.²¹² Echoing the sentiments of African-American men, who are arbitrarily stopped due to racial profiling while they are driving, or commonly known as “Driving While Black” (DWB), Arabs have experienced the term “Flying While Arab” (FWA) or “Flying While Muslim” (FWM).²¹³ According to a two-year study conducted by the Vera Institute of Justice,²¹⁴ “in the aftermath of 9-11, Arab-Americans have a greater fear of racial profiling and immigration enforcement than of falling victim to hate crimes.”²¹⁵

In examining discriminatory practice by law enforcement officials based on race or ethnicity, those based on religion muster a few notable distinctions. First, many view police overreaching against Muslims and Arabs as justified in order to secure our national borders against terrorist attacks.²¹⁶ This viewpoint is sanctioned by the recent acts of legislation passed since September 11, 2001, allowing for arbitrary searches and detention of, mostly male, Arab and Muslims during airport security checks with questionable or no probable cause.²¹⁷

Muslims in the context of air travel security); *see also* SHORA, *supra* note 209.

211. Sharon Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 85 (2003).

As fear of additional terrorist attacks gripped the nation and public anger over the acts grew worried citizens began to reconsider their prior opposition to racial profiling, and proposals that actively urged law enforcement agents to take an especially hard look at persons of Middle Eastern descent abounded.

Id. (citations omitted).

212. *See Baker, supra* note 210, at 1376.

213. *See id.* at 1375–76.

214. *See* THE VERA INSTITUTE OF JUSTICE, <http://www.vera.org/> (last visited Sept. 19, 2010) (stating that the Vera Institute is dedicated to combining “expertise in research, demonstration projects, and technical assistance to help leaders in government and civil society improve the systems people rely on for justice and safety”).

215. Andrea Elliot, *After 9/11, Arab-Americans Fear Police Acts, Study Finds*, N.Y. TIMES, June 12, 2006, at A1.

216. *See* Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 182–83 (2005).

217. *See* TED GOTTFRIED, *HOMELAND SECURITY VERSUS CONSTITUTIONAL RIGHTS*, 32–33 (2003).

Congress passed the Airport Security Federalization Act of 2001. It mandated that all airport screening personnel must be federal employees The act also ordered that cockpit doors be fortified and that video monitors be installed to alert pilots to terrorist activity in the passenger cabins.

Id.; *see also* Legomsky, *supra* note 216, at 165 (2005) (“Even if no link to, or knowledge of, terrorism was suspected, [Arabs and Muslims] were arrested[;] . . . the overwhelming majority [being] males, between the ages twenty-six and forty, from Arab or Muslim countries. About one-third were from Pakistan.”).

One such case involved a group of six Muslim imams who were passengers on a US Airways flight heading from Minnesota to Arizona in 2006.²¹⁸ Airport security was alerted when three of the men performed their evening prayers in the terminal before boarding the flight.²¹⁹ The six Muslim men were then removed from the plane, handcuffed, and questioned for several hours before being released.²²⁰ “Their luggage was also removed, rescreened, and checked with dogs.”²²¹ The FBI conducted interviews and everything checked out fine.²²²

After the incident, a spokesperson for the Minneapolis-St. Paul Metropolitan Airports Commission justified their department’s actions.²²³ They claimed that some witnesses reported that the men, who were speaking in both English and Arabic, were making anti-American statements, and that their behavior on the plane was peculiar.²²⁴ This behavior included entering the plane and not sitting together in their assigned seats. Also, one asked for a seat belt extender who did not appear to need one.²²⁵

Some may argue that these are simply precautionary measures and a necessary evil to protect American citizens.²²⁶ However, as is evident by the cases above, discrimination is not only against undocumented immigrants and visitors, but also against American born Muslims.²²⁷ These individuals, like other immigrant groups, may have only a historical connection with their countries of ethnic origin, and have the same civil

218. See Libby Sander, *6 Imams Removed From Flight for Behavior Deemed Suspicious*, N.Y. TIMES, Nov. 22, 2006, <http://www.nytimes.com/2006/11/22/us/22muslim.html>.

219. See *id.*

220. See *id.*

221. *Airline Checks Claim of ‘Muslim While Flying’ Discrimination*, CNN.COM, Nov. 21, 2006, <http://www.cnn.com/2006/US/11/21/passengers.removed/>.

222. See Sander, *supra* note 218.

223. See David Kupelian, *Flying Imams Rewarded for Ominous Airline “Stunt”?*, WORLDNETDAILY.COM, Oct. 21, 2009, <http://www.wnd.com/?pageId=113579>. Kupelian reported:

[O]fficials with the Metropolitan Airports Commission, which operates the Minneapolis–St. Paul International Airport . . . responded to the settlement through their general counsel, Tom Anderson, who said: Law-enforcement officials did what they believed was appropriate to ensure the safety of travelers based on the information available at the time. We will continue to be vigilant in maintaining the security of Minneapolis–St. Paul International Airport and the safety of travelers who use it.

Id.

224. See Sander, *supra* note 218.

225. *Id.*

226. GOTTFRIED, *supra* note 217, at 4.

227. See SHORA, *supra* note 209.

liberties guaranteed to other U.S. citizens.²²⁸ This type of discriminatory behavior is not limited to private citizens; government officials of Arab decent have also been subjected to discrimination.²²⁹

IV. DOES GENDER OR SEXUAL ORIENTATION INCREASE YOUR CHANCES OF BECOMING A VICTIM OF POLICE BRUTALITY?

A. LAW ENFORCEMENT VIOLENCE AGAINST WOMEN

“Sexism permeates the criminal justice system.”²³⁰ Women are not immune to incidents of police misconduct.²³¹ There have been numerous occurrences reported for violence by law enforcement against women ranging from unnecessary force, strip searches by male officers, and even rape of women while in police custody.²³² The race and religious affiliation of the women involved in these cases covers the entire spectrum.²³³

Take for instance, a 2002 case involving the Chicago Police

228. See BRIEFING ON CIVIL RIGHTS ISSUES FACING MUSLIMS AND ARABS AMERICANS IN INDIANA POST-SEPTEMBER 11, THE INDIANA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS (2002),

<http://www.law.umaryland.edu/marshall/usccr/documents/cr1200210.pdf>; see also *World Directory of Minorities: Arab and Other Middle Easter Americans*, MINORITY RIGHTS GROUP INTERNATIONAL, Sept. 27, 2009, <http://www.minorityrights.org/?lid=2614&tmpl=printpage>.

229. See, e.g., Mark Sherman, *Rep. Issa: I Was Profiling Victim*, WASH. POST, Oct. 26, 2001, http://www.washingtonpost.com/wp-srv/aponline/20011026/aponline175845_000.htm. Congressman Darrell Issa, the grandson of Lebanese immigrants, was barred from boarding an Air France flight to Paris to participate in a congressional investigating commission in the Middle East in October 2001. *Id.* Another case involved a Muslim U.S. Secret Service agent who is a member of President George W. Bush’s security detail. See Hussein Ibish, *Report on Hate Crimes and Discrimination Against Arab Americans: Post-September 11 Backlash* 20 (2003), available at <http://www.adc.org/PDF/hcr02.pdf>. After passing through airport security and boarding an American Airlines Flight from Baltimore to Dallas, he was asked to be removed from the plane by the captain. *Id.* His identity was checked several times by airplane personnel and the police while being detained. *Id.* He offered to have Secret Service confirm his identity, which was never done, and was subsequently entered into the American Airline computer system barring him from other flights. *Id.* The airport personnel would not even allow him to retrieve a jacket he left on the plane. *Id.*

230. BARBARA A. BROWN ET AL., *WOMEN’S RIGHTS AND THE LAW*, 45 (1977).

231. See MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 4 (2003).

232. See, e.g., U.N. COMM. AGAINST TORTURE, IN *THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE IN THE UNITED STATES* 20–23 (2006), available at http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/SHADOW_REPORT_TO_CAT_ON_POLICE_BRUTALITY_FINAL.pdf.

233. See *id.*

Department.²³⁴ Rachelle Jackson stopped to render medical aid to an officer after a car accident.²³⁵ While Jackson was rendering aid to the officer she informed the police officers who approached the scene that the injured officer's weapon had been stolen.²³⁶ When she was asked to go to the station for questioning, Jackson assumed it was regarding the accident; but once she arrived, she found out she was accused of theft.²³⁷

Jackson claims she was held for two days with little food or water and then violently coerced into signing a statement saying that she committed the crime.²³⁸ Jackson was charged and remained in jail for ten months awaiting trial.²³⁹ A circuit court judge later threw out the case, and Jackson was awarded \$7.9 million in a civil case for false arrest, malicious prosecution, coercive questioning and intentional infliction of emotional distress.²⁴⁰

In 1996, Hope Steffey, a Caucasian woman residing in Stark County, Ohio, was allegedly subjected to a demeaning strip search when at least six male and female officers forcibly removed all of Steffey's clothes, including her underwear and bra, while she lay face down on the ground and handcuffed.²⁴¹ The incident began when police arrived at the scene after Steffey's cousin placed a 911 call claiming Steffey had been assaulted by another woman.²⁴²

According to Steffey's federal lawsuit claim, when the police asked Steffey for her driver's license, she accidentally gave the officers her deceased sister's license, which she kept in her wallet as a memento.²⁴³ She was later charged with disorderly conduct and resisting arrest.²⁴⁴ Steffey claims that the officers left her naked in a cell for six hours and she was not allowed to use a phone or seek medical attention for her injuries,

234. *Chicago Woman Wins \$7.9 Million for Rescuing a Police Officer; Rochelle Jackson Rescued Officer From Burning Squad Car and Spent Over Ten Months in Jail*, SCI. LETTER, July 1, 2008, available at 2008 WLNR 12052196.

235. *Id.*

236. *Id.*

237. *Id.*

238. Johnson, *Woman was Falsely Accused and Jailed, for Helping a Injured Police Officer*, POLICE AMERICA BLOG (June 14, 2008), <http://police-america.blogspot.com/2008/06/woman-was-falsey-accused-and-jailed-for.html>

239. *See id.*

240. *Chicago Woman Wins \$7.9 Million for Rescuing a Police Officer*, *supra* note 234.

241. *See* Nancy Whitaker, *Stark County Sheriff, Deputies, Commissioners Named in Lawsuit by Woman Strip-searched*, THE-REVIEW.COM (Feb. 6, 2008), <http://www.the-review.com/news/article/3257791>.

242. *Id.*

243. *Id.*

244. *Id.*

including a cracked tooth, bulging disc, and bruises.²⁴⁵

Perhaps some of the most disturbing cases—those involving law enforcement officials' violence against women—arise when officers are accused of rape.²⁴⁶ A victim of rape under any circumstances will undoubtedly have residual emotional scars, and many rapes are not even reported to authorities.²⁴⁷ When combined with a rape by the very individuals that have sworn to serve and protect these women, the betrayal is even more heinous.

In 2006, a Bloomington, Illinois sergeant was accused of raping four women since 2002.²⁴⁸ Sergeant Jeff Pelo was investigated for the rapes

245. *Id.*

246. See Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 47 (2008) (demonstrating a police officer's attitude towards rape victims may also be a contributing factor towards a certain propensity to commit rape).

Campbell and Johnson conducted a multi-method study with police officers from a mid-sized city in the Midwest and officers from a large Midwestern university. One aspect of the study asked how police officers defined rape/sexual assault in their own words. Three "clusters" of definitions emerged from the results, with each cluster comprised of conceptually similar definitions. The first cluster offered by 31% of the sample, was named the 'Consent Definition of Rape.' This group defined rape in terms of penile penetration and lack of consent. However, consent was not part of the legal definition of rape in the state under study. Only 30% of this cluster mentioned the use of force, which was a defining feature of the state statute. The second cluster, given by 19% of the sample, was the 'Force Definition of Rape.' It defined rape in roughly the same terms currently comprising the legal definition of rape in the officer's state. These factors included penetration (84%), the use of force (95%), and the threat of force (58%). The third cluster, offered by the remaining 50% of the sample, provided a 'Mixed Definition of Rape.' This definition contained old and new legal components along with rape myths. The mixed definition focused around penile-vaginal penetration (42%), rape as sexual gratification (40%) and consent (51%). However, only penetration is currently part of the legal definition in this state. These officers attributed more blame to victims and were more conservative in their views about women, as measured by Spence et al. Revised Attitudes toward Women Scale. It is not known if these beliefs and opinions translated into actual behavioral responses in the treatment of rape cases and victims of rape.

Id.

247. See RAPE, ABUSE, & INCEST NATIONAL NETWORK, WHO ARE THE VICTIMS? BREAKDOWN BY GENDER AND AGE, available at <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Oct. 26, 2008). According to the Rape, Abuse & Incest National Network (RAINN), victims of sexual assault are three times more likely to suffer from depression, six times more likely to suffer from post traumatic stress disorder, thirteen times more likely to abuse alcohol, twenty-six times more likely to abuse drugs, and four times more likely to contemplate suicide. *Id.*; see also RAPE, ABUSE, & INCEST NATIONAL NETWORK, REPORTING RATES, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Oct. 26, 2008) (reporting that sixty percent of rapes are not reported to the police).

248. See Edith Brady-Lunny, *Defense Seeks 'Coolheaded Justice' In Sentence Reduction*, PANTAGRAPH NEWS, Sept. 15, 2008, <http://www.pantagraph.com/articles/2008/10/28/pelo/doc48cecedf2b2a2733445488.txt>. Sgt. Jeff

after he was already suspended for stalking a woman.²⁴⁹ His other charges included aggravated stalking and attempted residential burglary.²⁵⁰

Regular citizens are not the only ones who have reported sexual violence by police officers.²⁵¹ In Greensboro, North Carolina, an off-duty female police officer was sexually violated by three other officers in a city owned vehicle.²⁵² The victimized officer claims that the three officers offered her and a friend a ride home and, when they entered the vehicle the officers began assaulting them.²⁵³ The District Attorney did not file formal charges, citing a lack of evidence,²⁵⁴ however, only three months later the city manager recommended two of the three officers for termination, while the third remained on administrative leave.²⁵⁵

Police officers are not the only law enforcement officials that have been charged with sexual misconduct.²⁵⁶ In 1996, three U.S. servicemen were charged and convicted of raping a twelve year-old Japanese girl in Okinawa.²⁵⁷ The three servicemen were sentenced to up to seven years in a Japanese prison.²⁵⁸ Even with the permissive view of rape in Japanese culture, the lenient sentence created a mass outcry from the public and sparked months of protests against the continued U.S. military presence in Okinawa.²⁵⁹

Pelo was ultimately sentenced to 440 years in prison. *Id.* His attorneys are currently seeking a sentence reduction. *Id.*

249. See Edith Brady-Lunny, *Inside the Investigation: From Colleague to Prime Suspect*, PANTAGRAPH NEWS, Sept. 3, 2008, <http://www.pantagraph.com/articles/2008/10/28/pelo/doc48bdc18dc0eca617034942.txt>.

250. See Brady-Lunny, *Inside the Investigation: From Colleague to Prime Suspect*, *supra* note 249; see also Edith Brady-Lunny, *Defense Seeks 'Coolheaded Justice' In Sentence Reduction*, *supra* note 248.

251. See, e.g., Joe Killian, *Officers Won't Be Charged, DA Says*, NEWS-RECORD, May 10, 2008, <http://www.news-record.com/node/7210>.

252. See *id.*; see also Sonja Elmquist, *Police: Female Officer Alleges Sexual Assault By Fellow Officers*, NEWS-RECORD, Dec. 27, 2007, <http://www.news-record.com/node/10829>.

253. Elmquist, *supra* note 252.

254. Killian, *supra* note 251.

255. Elmquist, *supra* note 252.

256. See, e.g., Andrew Pollack, *3 US Servicemen Convicted of Rape of Okinawa Girl*, N.Y. TIMES, Mar. 7, 1996, <http://query.nytimes.com/gst/fullpage.html?res=9407E2DB1F39F934A35750C0A960958260>.

257. *Id.*

258. *Id.*

259. See *id.*; see also *Fury Over Japan Rape Gaffe*, BBC NEWS (June 27, 2003), <http://news.bbc.co.uk/1/hi/world/asia-pacific/3025240.stm>. Seiichi Ota, a senior Japanese politician, was quoted in 2003 as saying that "gang rape shows that people who do it are still vigorous, and that is ok." *Id.* Also, normal prison sentences in Japan for rape range from two to fifteen years; however it is unusual for a sentence to be more than five. *Id.*

B. VIOLENCE AGAINST THE GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED (GLBT)

Increased incidents of police brutality apply to any groups of people deemed to be “the other.”²⁶⁰ This standard also holds true for members of the gay, lesbian, bisexual, and transgendered (GLBT) communities.²⁶¹ The general idea is disturbingly summed up by a Los Angeles police officer quoted in the 1991 Christopher Commission Report, which states, “it’s easier to thump a faggot than an average Joe. Who cares?”²⁶²

In October 1998, a group of peaceful demonstrators participating in a New York City rally protesting the murder of Matthew Sheppard (a gay man who was killed in Wyoming by two men),²⁶³ asserted allegations of police brutality against the New York City Police Department.²⁶⁴ Although the NYC authorities denied any police misconduct, the attorneys for the rally participants submitted their numerous complaints to the Civilian Complaint Review Board relating to seventy incidents during and after the demonstration.²⁶⁵ The complaints listed several incidents of improper police behavior including: denial of HIV medication to some of those arrested, withholding access to food and water, denying use or access to toilets, and physical and verbal abuse (including homophobic epithets) by officers whom allegedly covered their badges.²⁶⁶

A lesbian woman from Athens, Georgia filed a civil lawsuit alleging that a former Gwinett County Officer raped her because of her sexual orientation.²⁶⁷ She alleged that the officer said that he was going to “teach her a lesson” and that the world “needed at least one less dyke and he was going to make sure that happened.”²⁶⁸ The officer was subsequently acquitted of the charges of rape, false imprisonment, aggravated assault with a deadly weapon, and aggravated assault with intent to rape.²⁶⁹ He was only convicted for violating his oath of office and received 2 years

260. See Amnesty Int’l, *supra* note 143, at 7.

261. See *id.* at 25–26.

262. WARREN CHRISTOPHER, INDEP. COMM’N ON THE LOS ANGELES POLICE DEP’T., REPORT OF THE INDEP. COMM’N ON THE LOS ANGELES POLICE DEP’T 91 (1999).

263. See Amnesty Int’l, *supra* note 143, at 25.

264. See *id.*

265. See *id.* at 25–26.

266. See *id.* at 26.

267. Amnesty Int’l, *Stonewalled – Still Demanding Respect: Police Abuse Against Lesbian, Gay, Bisexual and Transgender People in the USA*. AI Index No. AMR 51/001/2006, Mar. 23, 2006, available at <http://asiapacific.amnesty.org/library/index/engAMR510012006>.

268. *Id.*

269. *Id.*

probation.²⁷⁰

V. (THE CONSEQUENCES OF REPORTING POLICE BRUTALITY) RETALIATION BY POLICE OFFICERS FOR REPORTING POLICE BRUTALITY

From filing a complaint to pursuing legal recourse, the victim of police brutality is faced with unnecessary difficulties and, in some cases, concerted opposition from police officers and powerful police unions. Allegations of police abuse are rife in cities throughout the country and take many forms. Police, state, and federal authorities . . . [should] . . . be responsible for holding police officers accountable for abusive or arbitrary acts.²⁷¹

However, often the officers accused are left unpunished and one of the concerns of citizens who want to challenge police abuse of power is the fear of the officer's retaliation.²⁷²

"Additional barriers that prevent victims from obtaining relief in court are equally onerous."²⁷³ These barriers include: "evidentiary rulings, protective orders, judicial toleration of police perjury, and "the blue wall of silence" that favors the actions of police officers and provides absolute immunity from testifying against each other.²⁷⁴ This acceptance of not testifying against one another crosses over to the District Attorneys, who are hesitant to bring charges against the law enforcement officials who assist them daily on other criminal cases.²⁷⁵ However, in an attempt to deflect the government's failure in fulfilling their obligation to ensure individual's rights are protected, officials have pointed to civil remedies as the most effective avenue of redress.²⁷⁶

"Under 42 United States Code, section 1983,²⁷⁷ individuals may file

270. *Id.*

271. See Amnesty Int'l, *supra* note 143, at 33.

272. See Michael S. Vaughn, *Police Civil Liability and the First Amendment: Retaliation Against Citizens who Criticize and Challenge the Police*, 42 CRIME & DELINQUENCY 50, 50-51 (1996), available at <http://cad.sagepub.com>.

273. Symposium Dorothy E. Roberts, *Twenty Years After McCleskey v. Kemp: Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 278 (2007).

274. *Id.*

275. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466 (2004).

276. COLLINS, *supra* note 32, at 118.

277. 42 U.S.C. § 1983 (2009). 42 U.S.C. § 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 security by the

lawsuits against the offending officers, department or jurisdiction.”²⁷⁸ Further, “a victim of police abuse may not win a damage award following a judgment against a police department unless it can be shown that the injury was caused by a municipal ‘policy’ or ‘custom.’”²⁷⁹ However, section 1983,²⁸⁰ “which ostensibly provides a cause of action against state actors for civil rights deprivations, has repeatedly proven inadequate in addressing problems of police brutality.”²⁸¹ “In *Rizzo v. Goode*,²⁸² the Supreme Court held that future acts of police brutality, regardless of past pervasiveness, were too speculative to warrant injunctive relief—a holding the Court essentially reaffirmed in *City of Los Angeles v. Lyons*.²⁸³ “Municipalities themselves are normally immune from civil liability—absent evidence of deliberate indifference to the risk of brutality.”²⁸⁴

In the case that there is sufficient evidence to try the offending officer in court, the victim is faced with a new obstacle — the judge.²⁸⁵ Many judges view the officer’s word on the events that transpired as superior to that of the regular citizen.²⁸⁶ There is a general belief that most officers are telling the truth, and in absence of formidable evidence to the contrary, the officer’s version of the events usually triumphs.²⁸⁷ Moreover, the judges are not the only ones prejudiced by this opinion—the media also plays a powerful role in how successful a victim of police retaliation will be in his or her case.²⁸⁸ If the media reports the facts in an unfavorable light to the plaintiff, this has the power to sway public opinion against the plaintiff.²⁸⁹

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

278. COLLINS, *supra* note 32, at 118.

279. *Id.* at 119.

280. 42 U.S.C. § 1983 (2009).

281. Capers, *supra* note 45, at 848.

282. *Rizzo v. Goode*, 423 U.S. 362 (1976).

283. See *Rizzo*, 423 U.S. at 379–80; *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (holding lower court lacked jurisdiction to entertain Lyons’s claim for injunctive relief). Lyons sought to enjoin the Los Angeles officers from continuing to utilize the use of chokeholds. *Lyons*, 461 U.S. at 112. However, the Court overruled the lower court’s grant of relief because the prior use of chokeholds, including its use against Lyons, would not establish a real and immediate threat that police would again use a chokehold against Lyons personally. *Id.*; see also Capers, *supra* note 45, at 848.

284. Capers, *supra* note 45, at 848.

285. See Armacost, *supra* note 275, at 468.

286. See *id.*

287. See *id.*

288. See Steven Chermak et al, *Media Coverage of Police Misconduct and Attitudes Toward Police*, 29 POLICING: INT’L. J. POLICE STRATEGIES & MGMT. 261, 262 (2006), available at <http://www.emeraldinsight.com/1363-951X.htm>.

289. See Judge Peter D. O’Connell, *Pretrial, Publicity, Change of Venue, Public Opinion*

This could possibly lead to more retaliatory actions against the victims, not only from law enforcement officials, but from the general public as well.²⁹⁰ All of these factors combined with the costs and the heavy burden of proof placed on the victim results in their trepidation and reluctance to pursue these cases.²⁹¹

The Supreme Court has issued a ruling that attempts to set guidelines for courts to apply in cases where government retaliation punishes constitutionally protected rights.²⁹² The Court applies a three prong analysis.²⁹³ The first prong asks that the plaintiff show the alleged conduct was entitled to constitutional protection.²⁹⁴ The second prong requires the plaintiff to show that the protected right was a “substantial or motivating” factor in the agency’s decision.²⁹⁵ The Seventh Circuit Court of Appeals’ (while applying the *Mt. Healthy* three pronged test) ruling in *McClure v. Cywinski* held that plaintiffs are not required to show that the protected activity was the only or sole factor for the retaliatory action.²⁹⁶ Once the second prong is satisfied, the burden shifts from the plaintiff to the defendant.²⁹⁷

Under the third prong, the defendants must show “by a preponderance of the evidence that [they] would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.”²⁹⁸ Although the aforementioned cases deal with governmental agencies infringement on civilian’s rights, the same legal framework is also applicable to police civil liability as well.²⁹⁹

Polls a Theory of Procedural Justice, 65 U. DET. L. REV. 169, 181 (1988).

290. See Reader’s Digest, *Outrageous! Media’s Influence on Jury Trials*, READER’S DIGEST, <http://www.rd.com/your-america-inspiring-people-and-stories/media-influences-the-legal-system/article81290.html> (last visited Oct. 1, 2010).

291. See Charlene Muhammed, *The High Cost of Police Brutality*, NEW AMERICA MEDIA, Feb. 27, 2009, http://news.newamericamedia.org/news/view_article.html?article_id=c1fdb31f21e60db0bbcafd26de8071a1.

292. See *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

293. See *Doyle*, 429 U.S. at 287; see also Vaughn, *supra* note 272, at 51–60 (elaborating on the three prong analysis).

294. *Doyle*, 429 U.S. at 287.

295. *Id.*; see also *McClure v. Cywinski*, 686 F.2d 541, 545 (7th Cir. 1982); Vaughn, *supra* note 272, at 55.

296. See *McClure*, 686 F.2d at 545.

297. See *id.* at 545; see also Vaughn, *supra* note 272 at 57.

298. *Doyle*, 429 U.S. at 287; see also Vaughn, *supra* note 272 at 57.

299. See Vaughn, *supra* note 272, at 52–53.

Mt. Healthy is relevant to police civil liability because the legal justification and motivation of police behavior is critical in assessing the constitutionality of official police action. The case [law] . . . shows that officers must not retaliate against suspects who criticize the police or against citizens who express controversial but

VI. QUALIFIED IMMUNITY

There are “innumerable hurdles in identifying and documenting patterns of police brutality.”³⁰⁰ According to legal scholar Susan Bandes, “complaints are discouraged, confessions are not videotaped, record keeping is lax or nonexistent, records are sealed or expunged, patterns are not tracked, and police files are deemed undiscoverable.”³⁰¹ Perhaps one of the most difficult barriers to the prosecution of police officers who commit acts of brutality rests in the granting of “qualified immunity.”³⁰² Qualified immunity is defined as “immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.”³⁰³ The concept of qualified immunity was first introduced by the Supreme Court in the 1967 case of *Pierson v. Ray*.³⁰⁴ The Court further outlines the doctrine of qualified immunity in *Harlow v. Fitzgerald*.³⁰⁵

In *Harlow*, the Court held that “government officials are entitled to some form of immunity from suits for damages . . . public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”³⁰⁶ However, the immunity granted by the Court is not absolute.³⁰⁷ If the evidence presented shows that the public official “*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury,” he will lose the right to immunity.³⁰⁸

Therefore, based on the opinions of the Court, “[t]he resolution of immunity questions inherently requires a balance between the evils

protected ideas. [They] must not use a criminal investigation as a means of retaliation against citizens exercising their First Amendment rights . . . a right that meets with much consternation among police officers, but nonetheless a constitutional right that must be respected and observed.

Id.

300. See Roberts Symposium, *supra* note 273, at 278.

301. *Id.* (quoting Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1279 (1999)).

302. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 250 (2006).

303. BLACK'S LAW DICTIONARY 339 (3rd pocket ed. 1996).

304. See *Pierson v. Ray*, 386 U.S. 547, 553–58 (1967) (adopting the common law rule of immunity in the context of judges for police officers).

305. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

306. *Id.* at 806.

307. See *id.* at 813.

308. *Id.* at 815 (citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

inevitable in any available alternative;”³⁰⁹ however, the Court does not go so far as to establish specific guidelines for lower courts to make this determination.³¹⁰ The Court presents qualified immunity as “clearly established law . . . [that] should permit the resolution of many insubstantial claims on summary judgment.”³¹¹ However, determining what is reasonable in a given situation requires a close examination of the facts on a case-by-case basis and applying general legal principles to a particular context.³¹² This determination centers on the central question of whether qualified immunity should be granted, based upon a question of law, as the Court asserts in *Harlow*, or should each case be presented to a jury as a question of material facts?³¹³

VII. SELF-DEFENSE AND JUSTIFICATION

“In many states, police officers continue to rely on justification defenses, including self-defense and public authority defenses, to justify their use of force in state criminal and civil suits challenging their behavior.”³¹⁴ “Using deadly force to repel what is perceived as a threat, numerous factors such as: the amount of force used, race, jurisdiction, and place of altercation, and societal intolerance, play a vital role in determining what is considered justified when using deadly force.”³¹⁵

There are three themes to consider in defining that range of justification.³¹⁶

1. “Moral judgments about the relative worth of conflicting interests that [m]ay skew the balance of interests.”³¹⁷
2. “A requirement of imminent risk that restricts the number of cases in which a claim of defending the superior interest in acceptable.”³¹⁸
3. “Claims of justification should, in principal, consists of both

309. *See id.* at 813.

310. *See id.* at 816–19 (noting the ambiguities of the objective standard established in *Harlow*).

311. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

312. *See Chen, supra* note 302, at 262–63.

313. *See id.* at 262–64.

314. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1150 (citing *State v. Smith*, 807 A.2d 500, 507 (Conn. Ct. App. 2002)); *State v. Mantelli*, 42 P.3d 272, 275 (N.M. Ct. App. 2002) (noting examples of police officers relying on justification defenses).

315. GEORGE P. FLETCHER, *Justification: Theory*, in 3 THE ENCYCLOPEDIA OF CRIME AND JUSTICE 941, 947 (Sanford H. Kadish ed., 1983).

316. *Id.* at 944.

317. *Id.* at 945.

318. *Id.*

objective justifying circumstances and the actor's subjective awareness of and reliance on those circumstances."³¹⁹

"Adapting the common-law doctrines of justification to the constitutional doctrine of governing police uses of force affirms and strengthens these legal and historical connections between justification defenses and Fourth Amendment reasonableness, in light of the common underlying legal questions all interpersonal force raises."³²⁰ In order for one to efficiently analyze the theory of justification, there must be an understanding of "why these elements are necessary for a sound claim of justification."³²¹ A justification renders a nominal violation of the criminal law and therefore is exempt from criminal sanctions.³²² "Most significantly, because police officers are the instruments by which the state pursues its interests in law and order, threats to [the officers] often result in justified defensive force in excess of what would otherwise be required to serve the state's interests."³²³ Thus, "not every threat of harm to an officer directly threatens the state's interests in law and order."³²⁴

"[C]onstitutionally, permissible police uses of force must serve one or more of [the following] three interests: 1) law — assisting our institutions of criminal adjudication, most commonly by enabling a lawful arrest or facilitating an authorized search; 2) order — maintaining public safety by preventing or stopping disorderly conduct; and 3) self-defense — protecting the officer from physical harm."³²⁵ "Thus, in determining what constitutes constitutionally reasonable force, the 'totality of the circumstances' should include only circumstances that are relevant to these ends and the state's ability to achieve them, [but] only to the degree that they are relevant."³²⁶

"As a general rule, a defendant cannot be convicted of a crime for conduct that was reasonably regarded by the defendant as necessary to defend against what he reasonably perceived to be an unlawful and imminent attack upon his person."³²⁷ Conversely, the implication of a self-defense justification, can present problems when one must consider: 1) the

319. *Id.*

320. Harmon, *supra* note 314, at 1150.

321. See FLETCHER, *supra* note 315, at 945.

322. *Id.* at 941.

323. Harmon, *supra* note 314, at 1155.

324. *Id.*

325. *Id.* at 1158.

326. *Id.*

327. GEORGE E. DIX, *Justification: Self Defense*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 946, 946-947 (Sanford H. Kadish ed., 1983).

demand that the defendant's perception be 'reasonable,' 2) the requirement that the threatened attack be 'imminent,' and 3) the prohibition against using more force than reasonable to repel the attack.³²⁸ Nonetheless, "[t]hose who act in justifiable self-defense exercise a privilege and act in conformity with the law."³²⁹ The criminal justice system that invokes modern policing with self-defense to particular circumstances may be considered from at least three perspectives.³³⁰

1. Normative- "a body of legal rules expressing social values through prohibitions backed by penal sanctions against conduct viewed as seriously . . . harmful."³³¹
2. Administrative- "comprehends the official apparatus for enforcing criminal law, including the police and other . . . enforcement agencies, prosecutorial authorities, judiciary . . . and correctional facilities."³³²
3. Social System- "defining and responding to criminal conduct that involves all elements of society."³³³ The most prevailing element is race.³³⁴

"While defensive force by police officers is often viewed as self-defense, it is more accurately justified as derivative of the state's interests in law and order."³³⁵ "If allowing officers to defend themselves did not serve the state's interests, the state could simply demand that officers contract away, at least partially, their right to self-defense as a condition of employment, rather than recognize the right as justifying defensive force while on the job."³³⁶

VIII. SOLUTIONS FOR COMBATING POLICE BRUTALITY

"Damages are generally thought justified not because victims are uniquely deserving but in order to deter future violations. But this rationale immediately raises difficult empirical questions about the unintended deterrence of legitimate government activity by the threat of damages for

328. *Id.* at 947.

329. Fletcher, *supra* note 315, at 941.

330. GEOFFREY C. HAZARD, JR., *Criminal Justice System: Overview*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 450, 450 (Sanford H. Kadish ed., 1983).

331. *Id.*

332. *Id.*

333. *Id.*

334. See CANDACE KRUTTSCHNITT, *Criminal Justice System: Social Determinants*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 450, 470 (Sanford H. Kadish ed., 1983).

335. Harmon, *supra* note 314, at 1156.

336. *Id.*

unconstitutional conduct.”³³⁷

Making money damages freely available for all violations of constitutional rights, including newly declared or clarified constitutional prohibitions, would make such innovations more costly. By holding down the costs of new rights, qualified immunity helps to facilitate constitutional change. It also redistributes societal resources from older generations, who would benefit from payment for past harms, to younger citizens, who will benefit more from future reforms.³³⁸

“[F]or some purposes, money damages could be an effective means of vindicating constitutional rights; in others, money damages are—and likely will remain—out of reach.”³³⁹

In addition, certain scholars has noted that “it is self-evident that the Justice Department needs a more coherent and accessible approach to the collection and analysis of police abuse data.”³⁴⁰ “Of all the agencies that are conducting data gathering, not one has come up with an effective bench mark against which to compare the data.”³⁴¹ “Census polls are often utilized as a benchmark but are ineffective for determining demographics for profiling reasons; . . . [for example,] . . . race and or national origin are not reflected on a driver’s license.”³⁴² “Without essential information about the problem of police brutality, the Department cannot effectively combat [such brutality].”³⁴³

For example, in 1991, in response to the . . . [societal outrage] over the [Rodney King] beating in Los Angeles, the Justice Department compiled a report on “official misconduct” complaints between 1985 and 1990, with the purpose of determining “to what extent, if any, a pattern of police brutality by employees of law enforcement agencies is shown from the data maintained by the Civil Rights Division.”³⁴⁴

The report acknowledged that the data on official misconduct complaints received were severely limited.³⁴⁵ Therefore, a reorganization on how to collect data as a result of racial profiling needs to be

337. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1404 (2007).

338. *Id.*

339. *Id.* at 1406.

340. COLLINS, *supra* note 32, at 106.

341. DARIN D. FREDRICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION 66 (2002).

342. *Id.*

343. COLLINS, *supra* note 32, at 106

344. *Id.*

345. *Id.*

developed.³⁴⁶ “The data collected as a result of profiling suits in particular jurisdictions can be used to stop [discriminatory law enforcement] as well as raising Eighth and Fourteenth amendment challenges.”³⁴⁷

Next, in an effort to strike a balance between the interests of protecting individuals from improper police methods and promoting effective law enforcement, [creating] independently-operated review boards are one possibility. For example, Denver has established an Office of the Independent Monitor which conducts independent investigations of uniformed personnel including Denver’s Police, Sheriff, and Fire Departments, and makes recommendations about administrative and disciplinary actions.” The Citizen Oversight Board oversees the Office of the Independent Monitor, and is responsible for: 1) assessing whether the Office of the Independent Monitor is effectively performing its duties; 2) making recommendations regarding policy and training issues; . . . 4) directing the Monitor to monitor or review certain cases; and 5) addressing other issues of concern to the community and other interested stakeholders.³⁴⁸

Another solution “suggests revealing the racist underpinnings of the entire system, starting with police stops all the way through capital prosecutions”³⁴⁹ and that police misconduct should be viewed as a systematic problem instead of as isolated incidences.³⁵⁰ The increase in cases and complaints also supports this notion.³⁵¹ Once the departments, as well as the agencies overseeing the departments, acknowledge that the problems boils down to more than just a few “bad apples” effect practices can be implemented to prevent further corruption.³⁵² Once accepted as a systematic issue, the government will be in a position to implement programs to counteract the diseased mindset.³⁵³

346. See Miriam S. Gohara, *Commentary, Sounding the Echoes of Racial Injustice Beyond the Death Chamber: Proposed Strategies for Moving Past McCleskey*, 39 COLUM. HUM. RTS. L. REV. 124, 138–39 (2007) (discussing how data collection from racial profiling suits can be beneficial in revealing the problems with the criminal justice system).

347. *Id.*

348. Harvey Gee, *Race and the American Criminal Justice System: Three Arguments About Criminal Law, Social Science, and Criminal Procedure*, 85 U. DET. MERCY L. REV. 115, 122 (2008).

349. Gohara, *supra* note 346, at 138.

350. See RICHARD JEROME, *LONG ROAD TO JUSTICE: THE CIVIL RIGHTS DIVISION AT 50* 30 (2007), available at <http://www.civilrights.org/publications/reports/long-road/long-road-to-justice.pdf>.

351. See *id.* at 30–31.

352. See SAMUEL WALKER ET AL, *EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER 1* (2001), available at <https://wilenet.org/html/integration/instructctr/basicle/policing/ethics/instextrns/earlywarningsigns.pdf>.

353. See *id.*

Also, there should be stricter standards requiring individuals who want to join the force to submit to preliminary in depth psychological testing.³⁵⁴ These tests should be conducted by independent psychologists trained to identify reoccurring traits and behaviors present in those offending law enforcement personnel.³⁵⁵ This notion is not very different from the health screening, endurance tests, background checks, credit checks, or drug tests already implemented in a majority of departments across the country.

Of course, in order to identify the psychological traits, it is important to first conduct extensive investigations and research into the causes concerning law enforcement misconduct.³⁵⁶ The commissions formed in the past have resulted as a response to an incident that has already occurred.³⁵⁷ Thus, the reports issued have not been successful in re-evaluating changes in the American society on a consistent and periodic basis.³⁵⁸

Additionally, the commissions have been formed to research particular police departments instead of the system as a whole.³⁵⁹ While there may be problems unique in one city or state, they are not as clearly evident in another, as the cases have shown; the issue of police brutality is an epidemic that spans across various states even countries.³⁶⁰ Therefore, in order to effect long lasting changes, the federal and state governments should form a commission to look at the problem of police misconduct in

354. Joseph J. Murphy, *Current Practices in the Use of Psychological Testing by Police Agencies*, 63 J. CRIM. L. & CRIMINOLOGY 570, 570 (1972).

355. See *id.* at 575 (discussing the importance of psychologists conducting psychological examinations on potential police personnel in order to identify unstable behavioral traits).

356. See Sanja Kutnjak Ivkovic, *Police (Mis)Behavior: A Cross-Cultural Study of Corruption Seriousness*, 28 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 546, 547 (2005) (stating it would be beneficial to research law enforcement misconduct).

357. See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 20–21 (2003).

358. See *id.* at 21.

359. See Kavi Chavis Simmons, *Criminal Law: The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 497, 505–06 (2008). Amnesty International, a non-governmental organization that identifies human rights violations across countries, releases a report every year that discusses reoccurring issues concerning police misconduct in the United States. See Amnesty International, <http://www.amnesty.org> (last visited Dec. 15, 2010) (select "About Us" tab, and then select "Our Mission and Movement"). However, this is not a governmental mandate. *Id.*

360. See *Human Rights: Torture: A Worldwide Epidemic*, TIME, Apr. 16, 1984, available at <http://www.time.com/time/magazine/article/0,9171,954257,00.html>.

its entirety across the nation.³⁶¹

Once the initial reports are compiled, state and local officials should be held responsible for maintaining detailed records and issuing periodic reports providing “statistical data on shootings and other use of force, in-custody deaths and injuries.”³⁶² “They should also provide data on the number and type of complaints filed and on their disposition and outcome.”³⁶³ Periodic reporting would not only allow the departments to identify patterns of abuse, racial bias, and other discriminatory acts, but would also serve as a contribution to the national reporting system.³⁶⁴ This would help minimize the initial costs incurred in the nationwide reports as well as provide more up to date statistics.

Although properly maintained reporting can help combat future problems, an implementation of measures in dealing with existing problems also needs to be addressed.³⁶⁵ The most pressing of these matters is properly distributed governmental funds.³⁶⁶ First, law enforcement personnel should have mandatory training on use of force, minority issues, gender sensitivity, and how to deal with the mentally ill.³⁶⁷ Furthermore, district attorneys should be allotted additional funds to prosecute civil rights violations.³⁶⁸ At first glance, this may seem economically impractical, but in the long run, all of these measures implemented in conjunction with each other will result in greater benefits, particularly with the potential massive million-dollar settlements in civil rights cases.³⁶⁹

All police departments, while regulating the use of force, should severely restrict the use of dangerous restraint procedures such as hogtying,

361. See Amnesty Int'l, *supra* note 143, at 33.

The Administration should seek, and Congress provide, adequate funding to allow the Justice Department to fulfill its mandate under the Police Accountability Act provisions of the Violent Crime Control and Law Enforcement Act of 1994 to compile, publish and regularly analyze national data on police use of excessive force (including all fatal shootings and deaths in custody). Adequate resources should also be provided to allow the Justice Department to continue to pursue “pattern and practice” lawsuits against police departments engaging in widespread or systematic abuses.

Id.

362. *Id.*

363. *Id.*

364. See Walker, *supra* note 357, at 15; see also Amnesty Int'l, *supra* note 143, at 33.

365. See Amnesty Int'l, *supra* note 143, at 31.

366. See *id.* at 3.

367. *Id.* at 34.

368. *Id.* at 33.

369. See, e.g., *id.* at 10, 29 (discussing large civil settlements cities were required to play after incidents of excessive force and police brutality).

chokeholds, pepper spray, and use of canines.³⁷⁰ If these methods are employed, an independent investigative unit should also look into the circumstances surrounding why they were used.³⁷¹ The use of tasers and other electro-shock weapons should be suspended pending the outcome of a thorough investigation, by a governmental agency, regarding their short term and long term effects.³⁷²

[Also,] litigation strategies should be distributed through different layers of the justice system: cities, counties, states, and the federal government. They should include examination of each level of the criminal justice system, from stops and searches, misdemeanor cases, and bail practices all the way to capital prosecutions and sentences. These litigation strategies must include partners in social science, history, and people with thorough local knowledge of the relevant communities.³⁷³

In order to combat the issue of racial profiling, Congress should pass the Traffic Stops Statistics Act of 1999.³⁷⁴ This Bill, introduced in the Senate on April 15, 1999, provides for the collection of data on traffic stops for traffic violations by law enforcement officials.³⁷⁵ With the passing of this Bill, the Legislature's intent is to minimize the occurrence of racial profiling.³⁷⁶ In addition, this act should be expanded to include airports. Finally, police departments, and other law enforcement agencies should have a more transparent policy with regards to allowing citizens access to misconduct reports.³⁷⁷ This should also include a system whereupon citizens who filed complaints can track the progress and documentation surrounding the incident.³⁷⁸ This will better arm citizen protection groups with information to elicit effective policy changes.³⁷⁹ Additionally,

370. *See id.* at 34.

371. *See* Amnesty Int'l, *supra* note 143, at 34–35.

372. *Id.* at 34.

373. Gohara, *supra* note 346, at 141.

374. Traffic Stops Statistics Study Act of 1999, S. 821, 106th Cong. (1999).

375. *Id.* at S. 821 § 2(a).

376. *See* Introduction of Traffic Stops Statistics Study Act of 1999, 145 CONG. REC. E 673-74 (daily ed. Apr/ 15, 1999) (statement of Hon. John Conyers, Jr.) (identifying racial profiling during traffic stops as serious problem).

377. *See* Amnesty Int'l, *supra* note 143, at 33–35) (highlighting police abuses of civil rights on racial basis and police department transparency programs to counter these abuses in the United States).

378. *See id.* at 34–35.

379. *See id.* at 13, 34–35. The report states:

Police shootings resulting in death or injury are routinely reviewed by local prosecutors in many US jurisdictions to see whether criminal laws have been violated. However, few officers are criminally charged and little public information is given out if a case does not go to trial. Police administrative inquiries into officer-involved shootings are rarely open to public scrutiny and even decisions on whether or not a

transparency of information can also serve to improve the public's perception and trust of law enforcement agencies.³⁸⁰

IX. CONCLUSION

In January 2009, Barack Hussein Obama was elected as the first African-American President of the United States of America. With the election of an African-American as President, one would think that race relation in America has gotten better. But have they?

Just as this paper was in its final stages, with only its conclusion left to write, America was faced with, yet another race-related incident. Professor Henry Louis Gates, a renowned African-American scholar and Harvard University Professor, was arrested by the Cambridge Police Department, in his own home for disorderly conduct after his neighbor called the police, reporting a break-in.³⁸¹ The caller reported that she saw "two gentlemen trying to get in a house . . . they kind of had to barge in."³⁸² She was later asked by the 911 dispatcher whether the two men were "white, black, or Hispanic."³⁸³ The caller responded that one of the men looked "Hispanic, but I am not really sure."³⁸⁴ The caller never referred to the men as being 'black.'³⁸⁵ She only commented on the behavior of the two men, not about their race, until she was asked. Yet, the police report states that the caller observed two black males with backpacks on the porch.³⁸⁶

Although the charges against Professor Gates were subsequently dropped, the Cambridge Police Department has publically supported the arresting officer, insisting that his actions were correct under the circumstances.³⁸⁷ Needless to say, the very same police department made

shooting contravened policy are not always made public. Thus, systemic problems may remain hidden . . .

Id. at 13.

380. See generally Jenny Rachel Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny*, 45 CRIM. L. BULL. 1006 (2009).

381. Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES, July 20, 2009, available at <http://www.nytimes.com/2009/07/21/us/21gates.html>.

382. Transcript: 911 Call and Police Radio Dispatches in the Arrest of Henry Louis Gates Jr., ABCNews.com, July 27, 2009, <http://abcnews.go.com/Politics/story?id=8185376&page=1>.

383. *Id.*

384. *Id.*

385. *Id.*

386. Wayne Drash, *911 Caller in Gates Arrest Never Referred to 'Black Suspects'*, CNN.COM July 27, 2009, http://articles.cnn.com/2009-07-27/us/gates.arrest_1_police-commissioner-robert-haas-cambridge-police-department-police-officer?_s=PM:US.

387. Jonathan Saltzman and Erica Noonan, *Officer in Gates Case Says He Won't Apologize*,

no comment to Officer Justin Barrett's email message sent to a member of his National Guard and to the Boston Globe, that Professor Gates was a "jungle monkey."

When President Obama was first questioned about this incident in a public appearance, he stated that although he did not have full knowledge of the matter, the Cambridge police 'acted stupidly.'³⁸⁸ The President addressed this matter head on and rightfully so. But his honesty led to much criticism over the words he chose, that he later retracted his statement, at the same time, he refused to apologize to the police department.³⁸⁹ This was a perfect opportunity to address race relations in America, and who better to address it but the President of our country.

Interestingly, during a Black History Month speech, Attorney General Eric Holder, the nation's first African-America Attorney General, who was appointed by President Obama, called the United States a "Nation of Cowards" when it comes to race relations.³⁹⁰ Holder stated that "though this nation has proudly thought of itself as an ethnic melting pot, in things racial we have always been and I believe continue to be, in too many ways, essentially a nation of cowards."³⁹¹ "As Holder was addressing the Justice Department employees he went on to say,

'If we're going to ever make progress, we're going to have to have guts, we have to have determination, to be honest with each other.'"³⁹² "It also means we have to be able to accept criticisms where that is justified."³⁹³ Since Attorney General Holder's statements about race relations in America, the country has yet to hear or read anything regarding race relations. Did his comments alienate the general population and thus was silenced by the Obama administration for being too forthright and honest? Surely the Nation's top attorney should have weighed in on the arrest of Professor Henry Louis Gates.

BOSTON.COM, July 22, 2009,

http://boston.com/news/local/breaking_news/2009/07/officer_in_gate.html.

388. Foon Rhee, *Obama: Cambridge Police Acted 'Stupidly' in Gates Arrest*, BOSTON.COM, July 22, 2009, available at

http://www.boston.com/news/politics/politicalintelligence/2009/07/obama_cambridge.html.

389. See The Associated Press, *Obama Doesn't Regret 'Acted Stupidly' Remark About Henry Gates Jr. Arrest*, DAILYNEWS, July 24, 2009, available at

[http://www.nydailynews.com/news/politics/2009/07/23/2009-](http://www.nydailynews.com/news/politics/2009/07/23/2009-0723_obama_doesnt_regret_acted_stupidly_remark_compliments_sgt_james_crowley.html)

[0723_obama_doesnt_regret_acted_stupidly_remark_compliments_sgt_james_crowley.html](http://www.nydailynews.com/news/politics/2009/07/23/2009-0723_obama_doesnt_regret_acted_stupidly_remark_compliments_sgt_james_crowley.html).

390. Delvin Barrett, *Holder: U.S. is nation of cowards on racial matters*, BREITBART, http://www.breitbart.com/article.php?id=d96e53483&show_article=1 (last visited Dec. 10, 2010).

391. *Id.*

392. *Holder calls U.S. 'Nation of Cowards' on Race Matters*, FOXNEWS.COM, Feb. 18, 2009, <http://www.foxnews.com/politics/2009/02/18/holder-calls-nation-cowards-race-matters/>.

393. *Id.*

To those individuals who are outside looking in at America, it may be thought that race relations in the United States has improved, especially since society has changed over the years. Sadly, while society has had its changes, some things have remained constant. The incident with Professor Gates and the Cambridge Police Department has clearly demonstrated that race still plays a role in police practice, to this very day. Until a person is in Professor Gates' position or any of the other victims of police discrimination mentioned throughout this paper, one will never fully understand this police and racial abuse. But why should we wait until everyone becomes a victim, why not address the issue now, *today*? America was almost there in the wake of Professor Gates' arrest. We have witnessed over and over again, that police officers are trained to protect and serve the so-called majority and keep the minorities in line.