

## RIGHT TO LIFE: INTEREST-CONVERGENCE POLICING

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### ABSTRACT

*In the United States, police officers fatally shoot over one thousand people every year. A surprising few of these incidents are fully investigated. In fact, very few police officers are criminally prosecuted for, and are rarely found guilty of, homicide resulting from the unjustified use of lethal force. This Article contends that the lack of criminal prosecutions results mainly from leading United States Supreme Court decisions that establish the criminal liability standard for police use of lethal force. Ultimately, this standard discourages a full investigation of such incidents. While unintended, this produces negative consequences, including injustice for the victims and their families, danger and fear for future victims, and increased danger to police officers.*

*Using empiricism and normative principles, this Article seeks to re-direct the doctrinal approach for assessing the legality of police use of lethal force in non-custodial situations. Through a case study, it analyzes how some police officers used lethal force in an unjustified manner and initially got away with homicide. It posits that a constitutional right to life principle requires the lowering of the criminal liability standard for assessing police shootings. And it proposes federal legislation mandating the*

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*investigation and, where appropriate, the prosecution of all incidents of police officers' use of lethal force.*

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#### INTRODUCTION

In the United States, police officers fatally shoot nearly one thousand people every year—the victims are mostly white people yet a disproportionate number of the victims are Black people.<sup>1</sup> However, such

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1. See *The Counted: People Killed by Police in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Apr. 23, 2019) (tracking 1,146 people killed by police in 2015 and noting the rate of death for young Black men was five times higher than white men of the same age); see, e.g., Carma Hassan et al., *Family of Woman Killed by Minneapolis Police “Desperate” for Information*, CNN (July 18, 2017, 10:02 AM), <http://www.cnn.com/2017/07/17/us/minneapolis-woman-killed-by-police/index.html> (reporting that Justine Ruszczyk “Damond,” a forty-year-old, unarmed white woman was fatally shot by a Black, Minneapolis police officer on July 15, 2017); see also Ryan Gabrielson et al., *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outsize Risk for Young Black Males* (Oct. 10, 2014, 11:07 AM), <https://www.propublica.org/article/deadly-force-in-black-and-white>; Valerie Richardson,

incidents are seldom fully investigated and as a result, police officers are seldom prosecuted for, and rarely found guilty of, homicide resulting from the unjustified use of lethal force.<sup>2</sup> Nonetheless, these cases often result in expensive settlements of wrongful death claims.<sup>3</sup>

For incidents of police use of lethal force, the U.S. Supreme Court has formulated a legal standard to assess criminal culpability—one that requires a showing of both willful conduct and an unlawful seizure.<sup>4</sup> This

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*Police Kill More Whites than Blacks, but Minority Deaths Generate More Outrage: Analysis Contradicts Widespread Views about Racial Targets*, WASH. TIMES (Apr. 21, 2015) <http://m.washingtontimes.com/news/2015/apr/21/police-kill-more-whites-than-blacks-but-minority-d> (noting that Black men are 3.5 times more likely to be killed by police than white men, yet that police are less likely to kill Black suspects than white ones); Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed> (noting that unarmed Black men are seven times more likely than whites to die by police gunfire); *Fatal Force: 963 People Have Been Shot and Killed by Police in 2016*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited Apr. 23, 2019).

2. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> (“Among the thousands of fatal shootings at the hands of police since 2005, only 54 officers have been charged . . . Most were cleared or acquitted in the cases that have been resolved . . . When prosecutors pressed charges, The Post analysis found, there were typically other factors that made the case exceptional, including: a victim shot in the back, a video recording of the incident, incriminating testimony from other officers or allegations of a cover up. Forty-three cases involved at least one of these four factors. Nineteen cases involved at least two.”). Officers who are convicted or plead guilty tend to get an average of four years of jail time, and sometimes only weeks. *Id.*; see also Matt Ferner & Nick Wing, *Here’s How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), [http://www.huffingtonpost.com/entry/police-shooting-convictions\\_us\\_5695968ce4b086bc1cd5d0da](http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da) (noting that while police fatally shoot an average of around a thousand people each year, almost every single shooting was determined to be legal).

3. See, e.g., Elliott C. McLaughlin, *Ex-North Charleston Officer Indicted on Federal Charges in Walter Scott Death*, CNN (May 11, 2016, 4:56 PM), <http://www.cnn.com/2016/05/11/us/north-charleston-police-michael-slager-indicted-walter-scott-shooting> (reporting on the case of Walter Scott in North Charlton, who was shot while fleeing police, resulting in a \$6.5 million settlement); see also Nick Wing, *We Pay a Shocking Amount for Police Misconduct, and Cops Want Us to Accept It. We Shouldn’t*, HUFFINGTON POST (May 29, 2015 07:39 AM ET), <http://m.huffpost.com/us/entry/7423386>.

4. See *infra* Section I.B. (providing a discussion of the leading Supreme Court authorities on police use of lethal force cases); see also Brian Bowling & Andrew Conte, *Trib Investigation: Cops Often Let off Hook for Civil Rights Complaints*, TRIBLIVE (Mar. 12, 2016, 6:00 PM), <http://triblive.com/usworld/nation/9939487-74/police-rights-civil> (reporting federal prosecutors declined to pursue civil rights allegations against law enforcement officers ninety-six percent of the time from 1995 through 2015, after analyzing nearly three million federal records on how the Justice Department and its ninety-four U.S. Attorney offices that handled criminal complaints against law enforcement officers); see also *id.* (“The most frequent reasons cited for declining civil rights complaints involving officers: weak or

legal standard produces unintended, negative consequences—injustice for the victims and their families,<sup>5</sup> danger and fear for future victims,<sup>6</sup> and increased danger for police officers.<sup>7</sup> These consequences are reflective of highly-publicized, controversial police shootings of Black people.<sup>8</sup> The jurisprudence that allows rogue police officers to essentially get away with murder needs to be critically analyzed.

Two developments compel an assessment of the criminal legal standard for police use of lethal force. The first development is the U.S. Supreme Court's decision in *County of Los Angeles v. Mendez*,<sup>9</sup> in which the Court, in a unanimous decision, reiterated its standard for assessing police criminal liability in lethal force cases.<sup>10</sup> The second development is

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insufficient evidence, lack of criminal intent required under a 1945 Supreme Court ruling standard, and orders from the Justice Department.”). In 1945, the U.S. Supreme Court ruled, upholding the ability of federal prosecutors to charge local police for depriving someone of their civil rights, that prosecutors must prove that the police acted “willfully.” See *Screws v. United States*, 325 U.S. 91, 92–94, 113 (1945) (reversing a judgment affirming the conviction of local law enforcement officers who arrested a Black citizen for a state offense and wrongfully beat him to death); see also *Attorney General Holder to Call for Lower Bar in Civil Rights Prosecutions*, NBC NEWS (Feb. 27, 2016, 8:14 AM), <http://www.nbcnews.com/news/us-news/attorney-general-holder-call-lower-bar-civil-rights-prosecutions-n313856>; cf. Opinion, *Don't Lower Justice Standards*, COLUMBUS DISPATCH (Mar. 7, 2015, 10:05 AM), <http://www.dispatch.com/content/stories/editorials/2015/03/07/1-dont-lower-justice-standards.html>.

5. See, e.g., Holly Yan, *South Carolina Police Shooting Victim: Who was Walter Scott?*, CNN (Apr. 9, 2015, 9:55 PM), <http://www.cnn.com/2015/04/08/us/south-carolina-who-was-walter-scott/index.html> (reporting that Walter Scott's brother, Anthony Scott, said, “[Walter Scott] was outgoing—loved everybody . . . . When I saw that video for the first time, my family was deeply hurt that someone would gun down a human being in that way . . . . It's so tragic.”).

6. Racial profiling has a profoundly negative psychological impact on Black families, who fear for their safety and that of their family members and friends. See Chuck Henson, *Reflections on Ferguson: What's Wrong with Black People?*, 80 MO. L. REV. 1013, 1013–19 (2015).

7. See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), <http://elearning-courses.net/iacp/html/webinarResources/170926/FinalReport21stCenturyPolicing.pdf>; see also Julie Hirschfeld Davis, *Obama Calls for Changes in Policing After Task Force Report*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/us/politics/obama-calls-for-changes-in-policing-after-task-force-report.html> (reporting that President Obama said that requiring independent investigations when the police use lethal force, would be “controversial”).

8. See *supra* note 1; see also *infra* notes 51–53.

9. 137 S. Ct. 1539 (2017) (holding that the U.S. Court of Appeals for the 9th Circuit's “provocation” rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights).

10. *Id.*; see also *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016) (granting summary judgment for the respondent, a Houston police officer, who shot the

former U.S. Attorney General Jeff Sessions's policy to limit federal investigation of police shootings and to reduce the monitoring of troubled police departments.<sup>11</sup> This policy changed the Obama Administration's approach of promoting greater police accountability for the use of lethal force.<sup>12</sup>

Summarily, this Article focuses on the legal standard for criminally prosecuting a police officer for unjustified use of lethal force in non-custodial situations.<sup>13</sup> This Article proposes the adoption of a lower criminal liability standard, one based upon the fundamental right to life as protected from governmental deprivation, guaranteed by the Fifth and Fourteenth Amendments.<sup>14</sup> The Article also proposes to statutorily mandate a federal investigation when a police officer fatally shoots a person. Parenthetically, this proposal does not seek to change the mens

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petitioner in the back), *cert. denied*, 137 S. Ct. 1277 (2017) (Sotomayor & Ginsburg, JJ., dissenting) ("The question whether the officer used excessive force in shooting Salazar-Limon thus turns in large part on which man is telling the truth. Our legal system entrusts this decision to a jury sitting as finder of fact, not a judge reviewing a paper record."). See generally Debra Cassens Weiss, *Sotomayor Sees "Disturbing Trend" of Failing to Intervene on Behalf of Victims of Police Shootings*, A.B.A. J. (Apr. 24, 2017, 3:35 PM), [http://www.abajournal.com/news/article/sotomayor\\_sees\\_disturbing\\_trend\\_of\\_failing\\_to\\_intervene\\_on\\_behalf\\_of\\_victim/](http://www.abajournal.com/news/article/sotomayor_sees_disturbing_trend_of_failing_to_intervene_on_behalf_of_victim/).

11. John Byrne et al., *Concerns Mount over Chicago Cop Reform as Sessions Vows to "Pull Back"*, CHI. TRIB. (Mar. 1, 2017, 5:30 AM), <http://www.chicagotribune.com/news/local/politics/ct-emanuel-sessions-consent-decree-react-met-20170228-story.html>; Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), [https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html?\\_r=0](https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html?_r=0); Pete Williams, *AG Sessions Says DOJ to "Pull Back" on Police Department Civil Rights Suits*, NBC NEWS (Feb. 28, 2017, 1:52 PM), <http://www.nbcnews.com/news/us-news/ag-sessions-says-trump-administration-pull-back-police-department-civil-n726826>.

12. See *infra* notes 55, 57–58.

13. See generally U.S. Dept. of Justice, Att'y Gen. October 17, 1995 Memorandum on Resolution 14 (Attachment), Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (last updated Mar. 8, 2017) <https://www.justice.gov/archives/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1> (defining deadly force as the use of any force that is "likely to cause death or serious physical injury."). This Article focuses on non-custodial situations; this does not imply that its observations do not apply to custodial situations.

14. Such federal involvement in protecting certain rights is arguably mandated by the Fifth and Fourteenth Amendments to the U.S. Constitution, specifically, the rights to life, due process, and equal protection. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

rea elements required to prosecute a homicide under state laws,<sup>15</sup> nor does it seek to change the innocent until proven guilty principle of law.<sup>16</sup>

This Article's proposed solution adopts Dean Derrick Bell's Interest-Convergence Principle<sup>17</sup> to develop a win-win legal standard for investigating police use of lethal force. Its approach is expected to create a positive community-supportive environment, essential for effective policing. It will result in saving lives of innocent civilians while also saving the lives of police officers.

This Article is divided into three parts. Part I explains the legal obstacles to criminally prosecuting a police officer for unjustified use of lethal force. Part II is an empirical study of the federal prosecution of police officers for civilian homicides on the Danziger Bridge in New Orleans, Louisiana, following Hurricane Katrina in 2005.<sup>18</sup> Part III posits that a constitutional right to life principle requires the lowering of the criminal liability standard for assessing police shootings and proposes federal legislation regulating the criminal investigation and prosecution of police officers' use of lethal force.

Protecting and redressing police deprivation of the right to life is an important, but hardly an untouched, area of scholarship.<sup>19</sup> It benefits

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15. See generally PAUL H. ROBINSON ET AL., *CRIMINAL LAW: CASE STUDIES & CONTROVERSIES* (4th ed. 2017).

16. See *Coffin v. United States*, 156 U.S. 432, 460 (1895) (establishing the presumption of innocence of persons accused of crimes, noting “[t]he evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, make more apparent the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist.”).

17. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“Translated from judicial activities in racial cases before and after *Brown*, this principle of ‘interest convergence’ provides: The interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); see also Richard Delgado, *The Shadows and the Fire: Three Puzzles for Civil Rights Scholars*, 6 ALA. C.R. & C.L. L. REV. 21 (2014) (showing how Bell's interest-convergence principle also applies to legislative breakthroughs such as the 1964 Civil Rights Act). In lethal force matters, the interest of Blacks not to be shot by police converges with majority interest to the policing function which protects life, liberty, and property. Of course, the fact that these interests converge shows that they are not diametrically opposed.

18. See Zoey Akin, *Gangland: “The Police” The Necessity of a Federal Investigation for Every Officer Involved Killing of Civilians 4–9* (May 2, 2016) (unpublished comment) (on file with author). See generally MITCHELL F. CRUSTO, *INVOLUNTARY HEROES: HURRICANE KATRINA'S IMPACT ON CIVIL LIBERTIES* (2015); Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471 (2016).

19. See, e.g., Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987, 1011 (2015) (arguing that, despite the U.S. Supreme Court consistently ruling that the Fourth Amendment—and not the Eighth—applies to excessive force claims, a re-conceptualization of the use of fatal force—as punishment by police outside of the criminal justice system—shows that the Eighth Amendment should apply and would provide a more workable test);

greatly from other scholarship related to the topic including, but not limited to literature on: the right to life,<sup>20</sup> capital punishment,<sup>21</sup> police safety,<sup>22</sup> lethal force laws,<sup>23</sup> prosecutorial discretion,<sup>24</sup> police

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Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J. L. & POL'Y 1, 4 (2015) (“[I]ndividual instances of police deadly force against unarmed Black men are enabled by a legal jurisprudence of structural violence which provides no accountability for the societal marginalization and stigmatization of young Black men.”); Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 393 (2008) (“[T]he federal judiciary, as a consequence of a unique combination of the doctrinal features of § 1983 suits and the characteristics of contemporary police culture, has substantially relinquished its ability to oversee the police use of deadly force.”); Sarah Zwach, Comment, *Disproportionate Use on Deadly Force of Unarmed Minority Males: How Gender and Racial Perceptions Can Be Remedied*, 30 WIS. J.L. GENDER & SOC'Y 185, 187 (2015) (interpreting “the disproportionate use of lethal force on unarmed minority males through an analysis of gender role-theory, masculinity theory, historical racial propaganda, and unconscious racial bias”); see also CYNTHIA LEE ET AL., CRIMINAL PROCEDURE: CASES AND MATERIALS (2016), especially Chapter 13, Police Use of Deadly Force.

20. See G.A. Res. 2200A (XXI), U.N. Doc. A/6316, International Covenant on Civil and Political Rights Part III, art. 6, ¶ 1, at 53, (Dec. 20, 1966) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

21. See, e.g., Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1357–60, 1367–73 (2003).

22. See, e.g., Cynthia Lee, *Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 165–70 (2016) (suggesting that the need for police practices transcends race and proposes that police officers be required to engage in traditional martial arts training to calm their response to volatile situations).

23. See, e.g., Libor Jany, *Minneapolis Police Reveal Changes to Use-of-Force Policy*, STAR TRIB. (Aug. 9, 2016, 9:40 AM), <http://www.startribune.com/minneapolis-police-reveal-changes-to-use-of-force-policy/389509371/>.

24. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 464–78 (2004); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

misconduct,<sup>25</sup> shooter bias studies,<sup>26</sup> masculinity studies,<sup>27</sup> demilitarization of police,<sup>28</sup> racial profiling,<sup>29</sup> institutional racism,<sup>30</sup> unconscious bias,<sup>31</sup> gun violence,<sup>32</sup> mass incarceration,<sup>33</sup> war on drugs,<sup>34</sup>

25. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5, 128, 150–51, 180–81 (2009); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 *STAN. L. REV.* 1, 9 (2009); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 *BUFF. CRIM. L. REV.* 815, 842 n.138 (1999); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3207–09 (2014); Angela J. Davis, *Justice for Michael Brown Rests Almost Entirely in the Hands of This One Man*, *NEW REPUBLIC* (Aug. 18, 2014), <https://newrepublic.com/article/119123/ferguson-missouri-prosecutor-does-he-have-too-much-power>; Simone Weichselbaum, *The Problems with Policing the Police*, *TIME*, <http://time.com/police-shootings-justice-department-civil-rights-investigations/> (last visited Apr. 28, 2019).

26. See, e.g., Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 1314, 1314–29 (2002); Saul Miller, Kate Zielaskowski & E.Ashby Plant, *The Basis of Shooter Biases: Beyond Cultural Stereotypes*, 38 *PERSONALITY & SOC. PSYCHOL. BULL.* 1358 (2012) (finding that participants with strong beliefs about interpersonal threats were more likely to mistakenly shoot outgroup members than in-group members).

27. See, e.g., Frank Rudy Cooper, *America's Police Culture Has a Masculinity Problem*, *THE CONVERSATION* (Jul. 19, 2016, 6:07 AM), <https://theconversation.com/americas-police-culture-has-a-masculinity-problem-62666>.

28. See, e.g., RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2013) (arguing that militarization has produced police forces inconsistent with the principles of a free society); see also WHO DO YOU SERVE, WHO DO YOU PROTECT? *POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES* (Maya Schenwar et al. eds., 2016) (exploring alternatives to the police for keeping communities safe).

29. See, e.g., End Racial Profiling Act, H.R. 1933, 114th Cong. (2015) (as introduced, Apr. 22, 2015); CYNTHIA LEE ET AL., *supra* note 19, at ch. 9 (Racial Profiling); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 *HARV. C.R.-C.L. L. REV.* 159, 167–73 (identifying racial profiling as a factor in police shootings); Zach Newman, *"Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 *HASTINGS CONST. L.Q.* 117 (2015).

30. See, e.g., Lewis R. Katz, *Whren at Twenty: Systematic Racial Bias and the Criminal Justice System*, 66 *CASE W. RES. L. REV.* 923 (2016).

31. See, e.g., Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 *N.C. L. REV.* 1555, 1569–79 (2013); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 *OHIO ST. J. CRIM. L.* 115, 120–21 (2016).

32. See, e.g., Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 *IND. L.J.* 151 (2015).

33. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 *GEO. L.J.* 1531, 1538 (2016) (positing that the imprisonment of African American men is but one means by which society removes minority populations from mainstream life).

34. See Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 *J. GENDER RACE & JUST.* 381, 391 (2002).



the role of the grand jury,<sup>35</sup> reform of the criminal justice system,<sup>36</sup> decriminalization initiatives,<sup>37</sup> the right to defend,<sup>38</sup> the right to bear arms,<sup>39</sup> civil liberties,<sup>40</sup> civil rights,<sup>41</sup> and Hurricane Katrina.<sup>42</sup> This Article builds upon these scholarly sources by adopting Dean Derrick Bell's Interest-Convergence Principle to propose federal legislation mandating the federal investigation of police officers' use of lethal force cases. Next, we look at police use of lethal force and explore the legal obstacles to the investigation and prosecution of police lethal shootings.

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35. See Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 296–97 (1994); see also Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 410 (2017) (recommending reforms of the grand jury system for cases involving police use of lethal force).

36. See Ivana Dukanovic, Note, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911, 913 (2016); see also Michele L. Jawando & Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, CTR. FOR AM. PROGRESS 2 (Dec. 18, 2014, 12:48 PM), <https://www.americanprogress.org/issues/courts/reports/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>.

37. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1062 (2015).

38. See Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 401–07 (2007) (providing state constitutional provisions that expressly state that the right to defend life is a constitutional right, either as inalienable, inherent, natural or God-given).

39. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1448 (2009).

40. See N.Y. CIVIL LIBERTIES UNION, UNDERSTANDING CIVIL LIBERTIES: A GUIDE FOR THE PERPLEXED 9 (3d ed. 2010); see also L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144–46 (2012) (identifying a reasonableness problem in the low hit rates of stop-and-frisks and the judgment of suspiciousness); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154 (2016) (discussing how diminishing the vigor of the Equal Protection Clause by the Supreme Court diluted the protections for minority groups).

41. See SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA xv (2015).

42. D'ANN R. PENNER & KEITH C. FERDINAND, OVERCOMING KATRINA, AFRICAN AMERICAN VOICES FROM THE CRESCENT CITY AND BEYOND xx–xxiii, xxv (2009) (detailing the black perspective of New Orleans by Hurricane Katrina survivors to explore race relations in the twenty-first century); BILL QUIGLEY, STORMS STILL RAGING: KATRINA, NEW ORLEANS AND SOCIAL JUSTICE (2008); Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1179 (2011).

## I. LETHAL FORCE

A. *Under Pressure*

Any criminal legal standard for police use of lethal force must be viewed within the context of policing. In performing their duties, police officers sometimes put their lives at risk.<sup>43</sup> They may operate in a stressful environment, making split-second decisions under pressure that sometimes lead to wrong decisions.<sup>44</sup> In some unfortunate circumstances, they use lethal force.<sup>45</sup> If and when a police officer fatally shoots a person, the officer's internal affairs division or civilian review board automatically investigates to determine whether the shooting was

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43. See *FBI Releases 2014 Preliminary Statistics for Law Enforcement Officers Killed in the Line of Duty*, FBI (May 11, 2015), [https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty?utm\\_campaign=emailImmediate&utm\\_medium=email&utm\\_source=national-press-releases&utm\\_content=428743](https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty?utm_campaign=emailImmediate&utm_medium=email&utm_source=national-press-releases&utm_content=428743) (reporting that in 2014, ninety-five police officers died in the line of duty—forty-six of the fifty-one felonious deaths resulted from shootings. “By circumstance, 11 officers died . . . as a result of answering disturbance calls. . . . Ten officers were conducting traffic pursuits or stops, eight . . . as a result of ambushes . . . and six officers were investigating suspicious persons or circumstances. Five officers . . . were performing investigative activities, four while they were engaged in tactical situations, three officers were handling persons with mental illness, and one officer was slain during a drug-related matter. Three officers were killed while attempting other arrests.”); Shaun King, *The Number of Police Officers Shot and Killed is Down this Year, and Half Killed are Black*, DAILY KOS (Sept. 2, 2015, 7:38 AM), <http://m.dailykos.com/story/2015/9/2/1417623/-To-be-clear-the-number-of-police-officers-shot-killed-is-down-this-year-and-1-2-killed-are-Black> (reporting that in 2015, “[a] total of 26 police officers have been shot and killed in the line of duty.”). In response to recent, horrific, vigilante shootings of police officers, some jurisdictions have enacted “Blue Lives Matter” legislation. See generally Tess Owen, *Attacking a Cop in Louisiana will be a Hate Crime if Gov. Signs ‘Blue Lives Matter’ Bill*, VICE NEWS (May 22, 2016, 4:05 PM), <https://news.vice.com/article/louisiana-police-officer-attack-hate-crime-blue-lives-matter-bill> (discussing proposed hate crime legislation which would grant police officers status as a protected class). See also Victoria M. Massie, *Louisiana’s Blue Lives Matter Law Protects Police Under Hate Crime Law. Here’s How.*, VOX (Aug. 1, 2016, 11:07 AM), <https://www.vox.com/2016/7/15/12188478/blue-lives-matter-law>.

44. See Press Release, U.S. Dep’t of Justice, Department of Justice Releases Report on Officer Safety and Wellness (Oct. 27, 2015), <https://www.justice.gov/opa/pr/department-justice-releases-report-officer-safety-and-wellness>; see, e.g., Steve Visser, *Baton Rouge Shooting: 3 Officers Dead; Shooter Was Missouri Man, Sources Say*, CNN (Jul. 18, 2016, 7:15 PM), <http://www.cnn.com/2016/07/17/us/baton-route-police-shooting/index.html> (reporting high-profile shootings of three officers who died in Baton Rouge on July 17, 2016); see also *Sniper Ambush Kills 5 Officers, Injures 7 in Dallas Following Peaceful Protest*, NBC DFW (Jul. 8, 2016, 7:13 PM), <http://www.nbcdfw.com/news/local/Protests-in-Dallas-Over-Alton-Sterling-Death-385784431.html>.

45. See generally *supra* note 1.

justified.<sup>46</sup> Most often, the investigation concludes that the fatal shooting in question was justified, mainly relying on the testimony of the police officer who actually did the shooting.<sup>47</sup> When a fatal shooting appears to be unjustified, the local prosecutor must decide whether there is a case to pursue for criminal culpability under the legal standard in effect.

Currently, the legal standard for prosecuting police officers' use of lethal force gives great latitude to police officers to do their jobs, providing them with broad immunity.<sup>48</sup> Police officers are permitted to use lethal force when the officer reasonably believes that such force is necessary to protect their own life or the life of a third person from imminent harm.<sup>49</sup> The law also recognizes that officers sometimes encounter criminals with superior firepower and/or alternative

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46. Naomi Creason, *Police Departments Often Investigate Themselves in Non-Lethal Use-of-Force Incidents*, THE SENTINEL (Apr. 19, 2015), [http://cumberlink.com/news/local/police-departments-often-investigate-themselves-in-non-lethal-use-of/article\\_5af2e65d-ff32-5451-9c52-adaa7eb758f2.html](http://cumberlink.com/news/local/police-departments-often-investigate-themselves-in-non-lethal-use-of/article_5af2e65d-ff32-5451-9c52-adaa7eb758f2.html). See Sheila McLaughlin, *What Happens When Officers Use Deadly Force?*, USA TODAY (Feb. 21, 2014, 2:49 PM), <https://www.usatoday.com/story/news/nation/2014/02/21/police-deadly-force-accountability/5697611/>.

47. Benjamin Wallace-Wells, *Police Shootings, Race, and the Fear Defense*, NEW YORKER (July 12, 2016), <https://www.newyorker.com/news/benjamin-wallace-wells/police-shootings-race-and-the-fear-defense>. See generally Creason, *supra* note 46.

48. See *Police Use of Force*, NAT'L INST. JUST., <https://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx> (last modified Nov. 29, 2016).

49. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force."); see, e.g., Pauline Repard, *22 Recent Police Shootings Ruled Justified*, SAN DIEGO UNION-TRIB. (June 6, 2015, 5:09 PM), <http://www.sandiegouniontribune.com/news/2015/jun/06/police-shootings-reviewed-justified-reviews/>; see also Homer F. Broome, *Foreword to DEP'T OF JUSTICE LAW ENF'T ASSISTANCE ADMIN., A COMMUNITY CONCERN: POLICE USE OF DEADLY FORCE v* (1979) <https://www.ncjrs.gov/pdffiles1/Digitization/132789NCJRS.pdf> ("Officers have an affirmative duty to use that degree of force necessary to protect human life; however, deadly force is not justified merely to protect property interest.").

weaponry.<sup>50</sup> On the other hand, when the use of lethal force is unjustified, a police officer violates both state and federal laws.<sup>51</sup>

Controversial police shootings of Black men, women, and children have recently been widely publicized, raising public awareness of police use of lethal force.<sup>52</sup> The disproportionate number of young Black men

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50. See generally Megan Cassidy, *Suspects Shot by Phoenix-Area Police Usually Armed*, USA TODAY (Dec. 15, 2014, 2:15 PM), <http://www.usatoday.com/story/news/nation/2014/12/15/phoenix-police-shootings-armed-suspects/20428647/> (noting that in majority of officer-involved shootings incidents, at least one suspect carried a gun). See also Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 616, 617 n.21 (2016) (noting that “very real threats remain” to police officers, despite the “decrease in the total average number of armed assaults, unarmed assaults, and felonious killings” of police officers between 1985 and 2014). In order to defend themselves and others against dangerous criminals, police officers are permitted to use lethal force.

51. See, e.g., 18 U.S.C. §242 (1996); see generally Chad Flanders & Joseph C. Welling, *Police Use of Deadly Force: State Statutes 30 Years after Garner*, 35 ST LOUIS UNIV. L. J. 109 (2016).

52. See Mic, *23 Ways You Could Be Killed If You Are Black in America*, YOUTUBE (July 13, 2016), [https://www.youtube.com/watch?v=U\\_VaNH4CLO](https://www.youtube.com/watch?v=U_VaNH4CLO) (showing video of the faces of many black victims of police shootings and celebrities calling for change); Brittany Spanos, *Beyoncé, Rihanna, Alicia Keys: How to Get Killed While Black*, ROLLING STONE (July 13, 2016, 9:22 PM), <https://www.rollingstone.com/music/music-news/beyonce-rihanna-alicia-keys-how-to-get-killed-while-black-81976/> (showing video of the faces of many black victims of police shootings and celebrities calling for change); see also Richard Pérez-Peña, *Fatal Police Shootings: Accounts Since Ferguson*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html>. Suspicious police fatal shootings of Blacks include some but not all, as follows (note that some of these cases were actually prosecuted thanks to public pressure and the Obama Administration Justice Department’s policies): see, e.g., Larry Buchanan et al., *Q&A What Happened in Ferguson?*, N.Y. TIMES, [http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0) (last updated Aug. 10, 2015) (Michael Brown killed in Ferguson, Missouri, 2014); Doug Criss, *Who Was Jordan Edwards? Teen Killed by Police Called a Good Student Athlete*, CNN (May 3, 2017), <http://www.cnn.com/2017/05/02/us/jordan-edwards-shooting-trnd/> (Jordan Edwards killed in Balch Springs-Dallas, Texas, 2017); Richard Fausset & Alan Blinder, *Charlotte Officer “Justified” in Fatal Shooting of Keith Scott*, N.Y. TIMES (Nov. 30, 2016), [https://www.nytimes.com/2016/11/30/us/charlotte-officer-acted-lawfully-in-fatal-shooting-of-keith-scott.html?\\_r=0](https://www.nytimes.com/2016/11/30/us/charlotte-officer-acted-lawfully-in-fatal-shooting-of-keith-scott.html?_r=0) (Keith Lamont Scott killed in Charlotte, North Carolina, 2016); Alan Feuer & Matt Apuzzo, *With Prosecutors at Odds, U.S. Inquiry Into Eric Garner’s Death Drags On*, N.Y. TIMES (July 11, 2016), [https://www.nytimes.com/2016/07/12/nyregion/with-prosecutors-at-odds-us-inquiry-into-eric-garners-death-drags-on.html?\\_r=0](https://www.nytimes.com/2016/07/12/nyregion/with-prosecutors-at-odds-us-inquiry-into-eric-garners-death-drags-on.html?_r=0) (Eric Garner killed in Staten Island, New York, 2014); Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <http://www.gq.com/story/tamir-rice-story> (Tamir Rice killed in Cleveland, Ohio, 2014); Rosa Flores & Catherine E. Shoichet, *Philando Castile Shooting: What Happened When Filming Stopped?*, CNN (July 13, 2016, 10:16 PM), <https://www.cnn.com/2016/07/13/us/police-shootings-investigations/index.html> (Philando Castile killed in St. Paul, Minnesota, 2016); see also Richard Gonzalez, *Minnesota Police Officer in Philando Castile Shooting Case Pleads Not Guilty*, NPR (Feb. 27, 2017,

who have been shot by police defies logic.<sup>53</sup> This raises grave concerns over police brutality, racial animus, transparency, due process, equal

6:33 PM), <http://www.npr.org/sections/thetwo-way/2017/02/27/517573012/minnesota-police-officer-in-philando-castile-shooting-case-pleads-not-guilty>; Steven Hoffer, *Atlanta Police Officer Charged with Murder in the Shooting of Unarmed Black Man*, HUFFINGTON POST (July 16, 2016, 11:07 AM), [http://www.huffingtonpost.com/entry/devaris-caine-rogers-shooting\\_us\\_578a31b7e4b03fc3ee511549](http://www.huffingtonpost.com/entry/devaris-caine-rogers-shooting_us_578a31b7e4b03fc3ee511549) (Devaris Caine Rogers killed in Atlanta, Georgia, 2016); Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video and the Fallout*, CHI. TRIB. (Oct. 20, 2017, 2:54 PM), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html> (Laquan McDonald killed in Chicago, Illinois, 2015); Alex Johnson, *Cop Fired After Indictment in Killing of Virginia Teen William Chapman*, NBC NEWS (Sept. 3, 2015), <http://www.nbcnews.com/news/us-news/cop-charged-murder-killing-virginia-teen-william-chapman-n421252> (William Chapman II killed in Portsmouth, Virginia, 2015); Jaweed Kaleem & Joseph Tanfani, *Department of Justice Won't File Charge Against Baton Rouge Police Officers in Alton Sterling's Death*, L.A. TIMES (May 2, 2017, 6:30 PM), <http://www.latimes.com/nation/la-na-doj-alton-sterling-2017-story.html> (Alton Sterling killed in Baton Rouge, Louisiana, 2016); Matt Kesler, *Mississippi Grand Jury Indicts Ex-Police Officer in Killing of Ricky Ball*, THE GUARDIAN (Sept. 9, 2016, 12:44 PM), <https://www.theguardian.com/us-news/2016/sep/09/ricky-ball-shooting-mississippi-jury-indicts-police-officer-canyon-boykin> (Ricky Ball killed in Columbus, Mississippi, 2015); Oliver Laughland, *Former South Carolina Officer Pleads Guilty in Walter Scott Killing*, THE GUARDIAN (May 2, 2017, 10:20 AM), <https://www.theguardian.com/us-news/2017/may/02/walter-scott-shooting-police-michael-slager-pleads-guilty> (Walter Scott killed in North Charleston, South Carolina, 2015); Christopher Mathias, *NYPD Officer Shoots and Kills Unarmed Man in Brooklyn*, HUFFINGTON POST, [http://www.huffingtonpost.com/2014/11/21/akai-gurley-nypd-shooting-dead\\_n\\_6199428.html](http://www.huffingtonpost.com/2014/11/21/akai-gurley-nypd-shooting-dead_n_6199428.html) (last updated Dec. 6, 2017) (Akai Gurley killed in New York City, New York, 2014); Associated Press, *A Look at High-Profile Police Shootings of Black People*, WASHINGTON TIMES (May 18, 2017), <http://www.washingtontimes.com/news/2017/may/18/a-look-at-high-profile-police-shootings-of-black-p/> (Eric Harris killed in Tulsa, Oklahoma, 2015); *Editorial: Rekia Boyd Shooting was "Beyond Reckless," So Cop Got a Pass*, CHI. TRIB. (Apr. 22, 2015, 6:03 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-cop-verdict-servin-edit-0423-20150422-story.html> (Rekia Boyd killed in Chicago, Illinois, 2012); *Federal Officials Close Review into the Death of Jeremy McDole*, U.S. DEP'T JUST. (Jan. 6, 2017), <https://www.justice.gov/usao-de/pr/federal-officials-close-review-death-jeremy-mcdole> (Jeremy McDole killed in Wilmington, Delaware, 2015); *What We Know about the Death of Jamar Clark*, STAR TRIB. (Mar. 30, 2016, 6:05 PM), <http://www.startribune.com/what-we-know-about-the-death-of-jamar-clark/353199331/> (Jamar Clark killed in Minneapolis, Minnesota, 2015).

53. While Black men make up six percent of the population, they accounted for thirty-four percent of police shootings in 2016. See Julia Craven, *More Than 250 Black People Were Killed by Police in 2016 [Updated] Too Many*, HUFFINGTON POST (July 7, 2016, 9:45 AM), [http://www.huffingtonpost.com/entry/black-people-killed-by-police-america\\_us\\_577da633e4b0c590f7e7fb17](http://www.huffingtonpost.com/entry/black-people-killed-by-police-america_us_577da633e4b0c590f7e7fb17); Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. TIMES (July 7, 2016), [http://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html?\\_r=0](http://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html?_r=0); *Law Enforcement and Violence: The Divide Between Black and White Americans*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFFAIRS RES.,

protection, and prosecutorial discretion—reflected in the #BlackLivesMatter movement.<sup>54</sup> Investigations of police shootings have received heightened attention following the local investigation of the Michael Brown shooting in Ferguson, Missouri.<sup>55</sup> The prosecution's handling of that case resulted in rioting, many people being injured, property damage, and a greater racial divide.<sup>56</sup> This and other controversial police shooting cases heightened the call for federal involvement in such matters.<sup>57</sup>

In response to these controversies, the Obama Administration conducted several federal investigations of police departments' policies and practices. These investigations concluded that the use of excessive lethal force was prevalent in some police departments along with patterns of civil rights violations.<sup>58</sup> Based on these findings, the Obama

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<http://www.apnorc.org/projects/Pages/HTML%20Reports/law-enforcement-and-violence-the-divide-between-black-and-white-americans0803-9759.aspx>.

54. See Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), <http://thefeministwire.com/2014/10/blacklivesmatter-2/> (reporting that the Black Lives Matter Movement began in 2013, with the use of the hashtag #BlackLivesMatter on social media, after the acquittal of George Zimmerman in the shooting death of Black teen Trayvon Martin. "When we say Black Lives Matter, we are talking about the ways in which Black people are deprived of our basic human rights and dignity. It is an acknowledgement Black poverty and genocide is state violence. . . . And the fact is that the lives of Black people—not ALL people—exist within these conditions is consequence of state violence."); see also *We Demand National Change to Protect Citizens and Communities from Police Violence and Misconduct*, CHANGE.ORG, <https://www.change.org/p/u-s-senate-we-demand-national-change-to-protect-citizens-and-communities-from-police-violence-and-misconduct> (last visited Apr. 28, 2019) (on-line petition).

55. See FINAL REPORT ON THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1, *supra* note 7; see also AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 1–3 (2015), [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf) (noting that U.S. law does not comply with international standards which limit police use of lethal force to instances necessary to protect against the threat of death or serious injury); Davis, *supra* note 7 (reporting that "[President] Obama said that . . . requiring independent investigations when the police use lethal force, would be 'controversial'").

56. See INST. FOR INTERGOVERNMENTAL RESEARCH, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI 61 (2015), <http://ric-zai-inc.com/Publications/cops-p317-pub.pdf>; see also Bill Quigley, *Baton Rouge: "Put Those Damn Weapons Down!"*, HUFFINGTON POST (July 12, 2016, 6:17 PM), [http://www.huffingtonpost.com/entry/baton-rouge-put-those-damn-weapons-down\\_us\\_57856aeee4b0e7c8734f0639](http://www.huffingtonpost.com/entry/baton-rouge-put-those-damn-weapons-down_us_57856aeee4b0e7c8734f0639).

57. See *supra* notes 22, 23, 25, 26, 28–32, 34–36, 40, 41.

58. See U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 23 (2017), <https://www.justice.gov/opa/file/925846/download> (finding Chicago police officers have a pattern of using excessive force). See generally U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMUNITY POLICING REPORT 2015-2016 3 (2017), <https://www.justice.gov/opa/press-release/file/925431/download>; Matt Stroud & Mira

Administration sued several local police departments and negotiated consent decrees to ensure police accountability.<sup>59</sup> Relative to the use of lethal force, former U.S. Attorney General Eric Holder recommended lowering the legal standard to promote the full investigation of, and when appropriate, the criminal prosecution of police officers who use lethal force in an unjustifiable manner.<sup>60</sup>

Federal investigations of police departments' lethal force policies and practices ended with the change in presidential leadership. In April 2017, then-U.S. Attorney General Jeff Sessions delivered on President Donald Trump's campaign promise not to monitor troubled police departments, stating, "in recent years, . . . law enforcement as a whole has been unfairly maligned and blamed for the crimes and unacceptable deeds of a few bad actors."<sup>61</sup> The Trump Administration's policy to reduce federal investigations of police misconduct will likely erase years of positive police reforms.<sup>62</sup> Assuming that not all police officers' use of lethal force is justified, there is a dire need to question the legal standard, the

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Rojanasakul, *A "Pattern or Practice" of Violence in America*, BLOOMBERG (May 27, 2015), <https://www.bloomberg.com/graphics/2015-doj-and-police-violence/>.

59. See Jerry Abramson, *10 Cities Making Real Progress Since the Launch of the 21st Century Policing Task Force*, WHITE HOUSE (May 18, 2015, 7:26 PM), <https://www.whitehouse.gov/blog/2015/05/18/10-cities-making-real-progress-launch-21st-century-policing-task-force>; *Accomplishments Under the Leadership of Attorney General Eric Holder*, U.S. DEP'T JUST. (Jan. 18, 2017), <https://www.justice.gov/archives/doj/accomplishments-under-leadership-attorney-general-eric-holder> ("Since 2009, the Department has opened more than 20 investigations state and local law enforcement agencies regarding civil patterns or practices in violation of the Constitution or federal law; is enforcing 15 agreements and is involved in five pieces of litigation to ensure police accountability. This is the largest number of law enforcement agencies being reviewed at any one time in the history of the Department."); cf. Sarah Wheaton & Ben Schreckinger, *Police Union Accuses White House of Politicizing Cop Safety, Obama Administration Has Announced Plan to Restrict Police Forces' Access to Military Gear*, POLITICO (May 18, 2015, 6:00 AM), <http://www.politico.com/story/2015/05/white-house-limiting-military-equipment-for-police-118041> (noting opposition to the Obama Administration's proposed changes from the nation's largest police union).

60. See Mike Allen, *Holder's Parting Shot: It's Too Hard to Bring Civil Rights Cases*, POLITICO (Feb. 27, 2015, 7:00 AM), <http://www.politico.com/story/2015/02/eric-holder-civil-rights-interview-mike-allen-115575>; Kelly Cohen, *Holder: "Standard is Too High" in Federal Civil Rights Cases*, WASH. EXAMINER (Feb. 27, 2015, 7:48 AM), <http://www.washingtonexaminer.com/holder-standard-is-too-high-in-federal-civil-rights-cases/article/2560811>; *Attorney General Holder to Call for Lower Bar in Civil Rights Prosecutions*, *supra* note 4.

61. U.S. Dept. of Justice, Justice News, Attorney General Jeff Sessions Delivers Keynote Remarks at the International Association of Chiefs of Police Division Midyear Conference (last updated Apr. 11, 2017) <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-keynote-remarks-international-association-chiefs>.

62. See *supra* note 11 and accompanying text.

investigatory process, and the lack of the prosecution of incidents of police use of lethal force.

*B. Legal Standard*

When it comes to investigating and prosecuting police lethal force cases, there are two major obstacles.<sup>63</sup> The first deals with local control of such matters.<sup>64</sup> The second deals with the legal standard for holding a police officer criminally liable for a lethal shooting.<sup>65</sup> This Article focuses on the second obstacle which is the legal standard for conviction. This follows a brief discussion of the local control obstacle.

As to the first obstacle, it is clear that in most incidents of police use of lethal force, local governments have control.<sup>66</sup> At first glance, it seems that federal involvement in these matters is arguably constitutionally and statutorily mandated, as the Constitution clearly provides for protection of life against governmental infringement without due process.<sup>67</sup> The U.S. Department of Justice (hereinafter “Justice Department”) has the statutory authority to investigate alleged violations of civil rights.<sup>68</sup> So, why is it that police officers seldom face

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63. See *infra* Section III.B.2. for a detailed discussion of the relevant provisions of the Civil Rights Act of 1964. Under state and federal law, including all provisions of the Civil Rights Act, Sections 241, 242, and 1983, it is difficult for the prosecution to succeed in such claims, if the investigation ever gets to that stage. This is in part due to the fact that police are immune from lawsuit for the performance of their jobs unless they injure a person through willful, unreasonable conduct. The duty to exercise due process does not generally create liability. Where there is willful police conduct that violated a person’s constitutional rights, civil rights provision may apply to remedy the harm.

64. See Flanders & Welling, *supra* note 51, at 110.

65. See, e.g., Manny Fernandez, *North Charleston Police Shooting Not Justified, Experts Say*, N.Y. TIMES (Apr. 9, 2015), [http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html?\\_r=2](http://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html?_r=2); Eric Tucker, *When Can Police Use Lethal Force Against a Fleeing Suspect?*, PBS NEWS HOUR (Apr. 8, 2015, 4:17 PM), <http://www.pbs.org/newshour/rundown/can-police-use-lethal-force-fleeing-suspect/>.

66. See Flanders & Welling, *supra* note 51, at 111. Most lethal force incidents result from local police officers’ discharge of their firearms. In the rare case of a federal marshal or U.S. armed forces officer using lethal force against a civilian, a different review procedure would take place.

67. See *supra* note 14.

68. See 18 U.S.C. § 242 (1996) (“Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime.]”); see also 42 U.S.C. § 1983 (1996) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in



federal criminal charges for using lethal force?<sup>69</sup> One reason is the application of the principles of comity and federalism that give local prosecutors jurisdiction to prosecute fatal shootings pursuant to local or state laws.<sup>70</sup> As local prosecutors work closely with and rely on the cooperation of police officers in prosecuting other criminal matters, they arguably face unresolvable conflicts of interest in investigating and prosecuting police for alleged misconduct.<sup>71</sup> While there are significant issues related to the first obstacle, as noted, that is beyond the scope of this Article. That takes the discussion to the focus of this Article—the legal standard for police accountability.

The second and, for purposes of this Article, more relevant obstacle to prosecuting police officers for using unjustified lethal force is the legal standard for police conduct. That is, when is the use of lethal force unjustified and therefore subject to criminal liability? The U.S. Supreme Court has struggled with a legal standard on when to hold a police officer criminally liable for the use of lethal force.<sup>72</sup> Its decisions attempt to balance the need to empower police officers to effectively and safely perform their duties while at the same time protecting the lives of innocent civilians.

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such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."); 34 U.S.C. § 12601 (2018) ("It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. . . . Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.").

69. See *supra* note 2; *Police Avoided Federal Civil Rights Charges in 96% of Cases over 20 Years—Report*, RT (Mar. 15, 2016), <https://www.rt.com/usa/335602-police-civil-right-charges/> ("Based on analysis of nearly 3 million records from the US Department of Justice's National Caseload Data, the Pittsburgh Tribune-Review found that the 94 US Attorney offices declined 12,703 referrals of potential civil rights violations made by the FBI and other agencies out of a total of 13,233 complaints."); cf. Marc Debbaudt, *Legislation Calling for Independent Police Prosecutor is Unnecessary*, L.A. ASS'N DEPUTY DISTRICT ATTORNEYS (June 9, 2015), <https://www.laadda.com/legislation-calling-for-independent-police-prosecutor-is-unnecessary/>; Eric Lichtblau, *Bush Sees U.S. as Meddling in Local Police Affairs*, L.A. TIMES (June 1, 2000), <http://articles.latimes.com/2000/jun/01/news/mn-36333>.

70. See generally Flanders & Welling, *supra* note 51.

71. See Levine, *supra* note 24, at 1465–70.

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

In the leading case of *Graham v. Connor*,<sup>73</sup> the Court established a legal standard that weighs in favor of the police and at the expense of the rights of the victim. In assessing police criminal liability in lethal force incidents, the Court utilized a Fourth Amendment “search and seizure” analysis and reasonableness test, in lieu of taking a Fourteenth Amendment and due process (right to life) analysis and a strict scrutiny test.<sup>74</sup> In doing so the *Graham* Court chose not to follow the Substantive Due Process approach.<sup>75</sup> The *Graham* Court expressly rejected the Due Process Clause in analyzing excessive force claims in favor of a seizure

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73. *Id.* Justice Blackmun, with whom Justices Brennan and Marshall joined, concurring in part and concurring in the judgment, stated,

I join the Court’s opinion insofar as it rules that the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context, and I concur in the judgment remanding the case to the Court of Appeals for reconsideration of the evidence under a reasonableness standard. In light of respondents’ concession, however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment rather than under a substantive due process standard. I also see no basis for the Court’s suggestion, *ante*, at 1871, that our decision in *Tennessee v. Garner*, 471 U.S. 1 (1985) . . . , implicitly so held. Nowhere in *Garner* is a substantive due process standard for evaluating the use of excessive force in a particular case discussed; there is no suggestion that such a standard was offered as an alternative and rejected.

*Id.* at 399–400 (Blackmun, Brennan & Marshall, J.J., concurring).

74. See generally Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. AND CRIMINOLOGY 481, 481–501 (1994); Jill I. Brown, *Defining “Reasonable” Police Conduct: Graham v. Connor and Excessive Force During Arrest*, 38 UCLA L. REV. 1257 (1991).

75. See *Graham*, 490 U.S. at 387. The *Graham* Court expressly rejected the Substantive Due Process approach established by the Second Circuit in *Johnson v. Glick*:

Fifteen years ago, in *Johnson v. Glick*, 481 F.2d 1028, cert. denied, 414 U.S. 1033 (1973) . . . , the Court of Appeals for the Second Circuit addressed a § 1983 damages claim filed by a pretrial detainee who claimed that a guard had assaulted him without justification. In evaluating the detainee’s claim, Judge Friendly applied neither the Fourth Amendment nor the Eighth, the two most textually obvious sources of constitutional protection against physically abusive governmental conduct. Instead, he looked to “substantive due process,” holding that “quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.” 481 F.2d, at 1032. As support for this proposition, he relied upon our decision in *Rochin v. California*, 342 U.S. 165 . . . (1952), which used the Due Process Clause to void a state criminal conviction based on evidence obtained by pumping the defendant’s stomach. 481 F.2d, at 1032–1033 . . . . We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard.

*Id.* at 392–93 (footnotes omitted). See generally J. Michael McGuinness, *Shootings by Police Officers are Analyzed Under Standards Based on Objective Reasonableness*, 72-SEP N.Y. ST. B.J. 17 (2000).

approach, “[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”<sup>76</sup> Chief Justice William Rehnquist, writing for the 6-3 majority stated: “[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”<sup>77</sup>

The *Graham* Court utilized a balancing test, weighing constitutional liberties of the individual against governmental interests.<sup>78</sup> The Court stated, “Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”<sup>79</sup> However, the Court then noted, “[b]ecause ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’” the test’s “proper application requires careful attention to the facts and circumstances of each particular case.”<sup>80</sup> The Court then outlined the following non-exhaustive list of factors for balancing an individual’s constitutional rights against a police officer’s authority to use lethal force. These factors include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>81</sup> The *Graham* Court directs investigators and prosecutors to focus on what the officer knew when lethal force was used, taking into account that police officers are often required to make high-pressure, split-second decisions.<sup>82</sup>

Furthermore, the *Graham* Court cautioned, “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>83</sup> The Court stated, “[a]s in other Fourth Amendment contexts. . . the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them,

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

77. *Id.*

78. *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

79. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 22–27 (1968)).

80. *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

81. *Id.* (citing *Garner*, 471 U.S. at 8–9).

82. *Id.* at 396–97.

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

without regard to their underlying intent or motivation.”<sup>84</sup> Therefore, under the *Graham* test, one needs to look at the use of lethal force circumstances from the mind’s eye of the police officer.<sup>85</sup> That is, “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.<sup>86</sup> For example, if a police officer reasonably believed his or her life, or the life of another, was being threatened at that time, then the officer is freed from liability for the use of lethal force.<sup>87</sup> This is consistent with the doctrine of qualified immunity, which protects officers from civil liability in instances where “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>88</sup>

Moreover, the *Graham* Court’s decision appears consistent with the federal statutory standard for criminal liability for a police officer, which is also protective of police use of lethal force. Under the Federal Civil Rights Statutes, a prosecutor must prove that an officer acted “willfully,” and that he knew what he was about to do was wrong but he did it anyway.<sup>89</sup> In 1945, the U.S. Supreme Court in *Screws v. United States*,<sup>90</sup> interpreted “willfully” in a manner that continues to restrict the government’s ability to hold police officers accountable for the wrongful use of lethal force.<sup>91</sup> In combination, these two standards make it difficult to prosecute a rogue police officer criminally liable for wrongdoing. In addition, these standards broadly protect police officers against liability for intentional or negligent acts. As a result, these standards fail to serve as a disincentive for unprofessional conduct and, as such, are disrespectful of the sanctity of life and take the lives of innocent victims.

In using the Fourth Amendment search and seizure approach to assessing police lethal force cases, the *Graham* Court followed the dicta

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84. *Id.* at 397 (citing *Scott v. United States*, 436 U.S. 128, 137–39 (1978)).

85. *Id.* at 396.

86. *Id.* at 397.

87. *See infra* Section III.B.2. *See generally* 42 U.S.C. § 1983 (1996) (civil action for deprivation of rights).

88. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *See generally* Nicholas T. Davis & Philip B. Davis, *Qualified Immunity and Excessive Force: A Greater or Lesser Role for Juries?*, 47 N.M. L. REV. 291 (2017) (discussing in-depth the doctrine of qualified immunity); John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67 (2017).

89. *See generally* 18 U.S.C. § 242.

90. *See Screws v. United States*, 325 U.S. 91 (1945).

91. *Id.* 325 at 106–07; *see also* 18 U.S.C. § 242 (1996) (“Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].”).

of one Supreme Court decision, but ignored the same Court's decision that is more on point as to how that standard should be applied. In *Tennessee v. Garner*,<sup>92</sup> the Supreme Court stated that "[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."<sup>93</sup> Despite this doctrinal underpinning, the *Garner* Court struck down a Tennessee statute as unconstitutional, cautioning, "[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead."<sup>94</sup>

In subsequent lethal force cases, the Supreme Court has continued to apply the *Graham* Fourth Amendment rationale and objectively reasonable test.<sup>95</sup> In a relative recent decision, the Supreme Court reaffirmed its commitment to its *Graham* jurisprudence. In *County of Los Angeles v. Mendez*,<sup>96</sup> the Supreme Court, in a unanimous decision, reiterated its controversial standard for assessing police criminal liability in lethal force cases.<sup>97</sup> Rejecting the Ninth Circuit's "provocation rule,"<sup>98</sup> the Court upheld the standard set forth in *Graham* as the "settled and exclusive framework" for excessive force claims under the Fourth Amendment.<sup>99</sup>

In my opinion, in light of the Fifth and Fourteenth Amendment protections of life, the *Graham* decision's "balancing act" test for assessing criminal culpability is misguided. This is because the Court

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92. 471 U.S. 1, 7 (1985).

93. *Id.*

94. *Id.* at 11.

95. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73 (2015) (recognizing the objective standard as applicable for evaluating use of excessive force on a pretrial detainee and citing to the following non-exclusive *Graham* factors: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting"); see also *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020–21 (2014) (applying the "reasonableness standard" of the Fourth Amendment to conclude that officers were justified in using deadly force to end a high-speed car chase).

96. 137 S. Ct. 1539, 1543–44 (2017) (holding that the U.S. Court of Appeals for the 9th Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights).

97. *Id.* at 1548; see also *Whren v. United States*, 517 U.S. 806, 813 (1996) (barring courts from considering a police officer's subjective motivations for making police stops and conducting).

98. See *Mendez*, 137 S. Ct. at 1543. Under this rule, officers found to have acted reasonably on one Fourth Amendment claim could nevertheless be held liable for that action based on a separate Fourth Amendment violation that contributed to their need to use that force. *Id.*

99. *Id.* at 1546.

views all lethal force cases as search and seizures matters that are mildly protected by the Fourth Amendment<sup>100</sup> and not as a state taking of life that is strictly protected by the Due Process Clause of the Fourteenth Amendment, and contrary to a fundamental right to life principle.

We now transition from analyzing the legal standard obstacle in prosecuting allegations of wrongful use of lethal force to a case study of a rare federal prosecution of a police lethal force incident. This case study tests the real-world implications of the current legal standard for assessing a police officer's criminal culpability for the wrongful use of lethal force.

## II. DANZIGER

Part II provides a detailed account of police shooting innocent civilians on the Danziger Bridge in New Orleans following Hurricane Katrina and the consequential federal investigation. While the incident occurred in 2005, the case study extends over an eleven-year timespan. This part is divided into three sections: (A) an account of the shootings and the local investigations; (B) the federal investigation and prosecution of the police officers involved for alleged civil rights violations; and (C) lessons learned from the case study. The lessons learned from this case study evidence the need to lower the current legal standard for assessing criminal culpability for police use of lethal force.

### A. *Shootings and Investigations*

On August 30, 2005, Hurricane Katrina's storm surge decimated the city of New Orleans's flood level protection system,<sup>101</sup> flooding eighty

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100. See *Graham v. Connor*, 490 U.S. 386, 394 (1989) ("Where, as here, the excessive force claim arises in the context of an arrest . . . it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures.'").

101. See LeveesOrg, *The Katrina Myth; the Truth About a Thoroughly Unnatural Disaster*, LEEVES.ORG (Aug. 30 2008), [https://play.videogen.xyz/v/wln\\_iq5bc8k](https://play.videogen.xyz/v/wln_iq5bc8k) (arguing that the systematic failure of the city's levees caused the flooding of the city); *Hurricane Katrina Statistics Fast Facts*, CNN, <http://www.cnn.com/2013/08/23/us/hurricane-katrina-statistics-fast-facts/> (last updated Aug. 30, 2018, 4:21 PM); see also Dan Swenson, *Flash Flood: Hurricane Katrina's Inundation of New Orleans*, TIMES-PICAYUNE, <https://danswenson.com/paper/katrina.html> (depicting a series of interactive graphics showing the progression of the flooding of New Orleans, from August 29 through September 1, 2005, as well as the depth of the floodwaters by neighborhood); Ivor van Heerden, *How New Orleans Flooded*, PBS (Nov. 22, 2005), <http://www.pbs.org/wgbh/nova/earth/how-new-orleans-flooded.html> (describing the sequence of events through satellite photography).

percent of the city and creating a humanitarian crisis.<sup>102</sup> The people who were spared from the hurricane then needed to survive the floodwaters, which, in some places, were at a depth of eight feet or higher.<sup>103</sup> With this turn of events, survivors focused their attention on keeping their heads above water, moving to higher ground, and seeking fresh water and food, as they hoped that they would soon be rescued.<sup>104</sup> On national television, President George W. Bush described the horrors he saw from an aerial tour of New Orleans: people sitting on rooftops, waving flags, pleading to be evacuated by boat or helicopter.<sup>105</sup> Tragically, hundreds of people drowned.<sup>106</sup>

Social order began to break down.<sup>107</sup> The national news reported that some criminals were shooting at the police, showing news footage of police helicopters being fired upon.<sup>108</sup> Armed vigilantes took the law into

102. See HURRICANE KATRINA: AMERICA'S UNNATURAL DISASTER 186 (Jeremy I. Levitt & Matthew C. Whitaker eds., 2009); UNNATURAL DISASTER: THE NATION ON HURRICANE KATRINA (Betsy Reed ed., 2006) (viewing Katrina as "a social catastrophe directly caused by the government's callous indifference to the needs of the region's most vulnerable residents."). For a description of government responses to Hurricane Katrina, see S. REP. NO. 109-322 (2006); H.R. REP. NO. 109-377 (2006); FRANCES FRAGOS TOWNSEND ET AL., WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED (2006) [hereinafter WHITE HOUSE REPORT]; Willie Drye, *Hurricane Katrina: The Essential Timeline*, NAT'L GEOGRAPHIC (Sept. 14, 2005), <https://news.nationalgeographic.com/news/2005/09/weather-hurricane-katrina-timeline/>; Dallas Tonsager, *Five Years after Hurricanes Rita and Katrina, USDA Continues to Assist Gulf Residents*, WHITE HOUSE (Aug. 25, 2010, 6:13 PM), <http://www.whitehouse.gov/blog/2010/08/25/five-years-after-hurricanes-rita-and-katrina-usda-continues-assist-gulf-residents>.

103. FED. EMERGENCY MGMT. AGENCY, HURRICANE KATRINA IN THE GULF COAST: MITIGATION ASSESSMENT TEAM REPORT 8-1, 8-3 (2006), [http://www.fema.gov/media-library-data/20130726-1520-20490-4521/549\\_ch8.pdf](http://www.fema.gov/media-library-data/20130726-1520-20490-4521/549_ch8.pdf).

104. See Peter Berkowitz, "We Went into the Mall and Began 'Looting': A Letter on Race, Class, and Surviving the Hurricane," MONTHLY REV. (Sept. 9, 2005), <http://mrzine.monthlyreview.org/2005/berkowitz090905.html>.

105. See *Exclusive: Bush Says Focus Must be on People*, ABC NEWS (Sept. 1, 2005), <http://abcnews.go.com/GMA/HurricaneKatrina/story?id=1086311>.

106. See RICHARD D. KNOBB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA, 23-30 AUGUST 2005, AT 11-13 (last updated Sept. 14, 2011) (noting that 1,833 people died and that \$108 billion worth of property was damaged); Joan Brunkard et al., *Hurricane Katrina Deaths, Louisiana, 2005*, 2 DISASTER MED. & PUB. HEALTH PREPAREDNESS 215, 217 (2008) (providing a demographic breakdown of those killed by the hurricane).

107. See Elana DeLozier & Nina Kamp, *Hurricane Katrina Timeline*, BROOKINGS INSTITUTION 3, <http://archives.evergreen.edu/webpages/curricular/2005-2006/nola/katrinatimeline.pdf>; *Timeline Hurricane Katrina History 2005 New Orleans*, PEOPLE HIST., <http://www.thepeoplehistory.com/timelines/hurricanekatrina.html>.

108. See, e.g., David Carr, *More Horrible Than Truth: News Reports*, N.Y. TIMES (Sept. 19, 2005), <https://www.nytimes.com/2005/09/19/business/media/more-horrible-than-truth->

their own hands and shot at unarmed, innocent citizens.<sup>109</sup> Faced with real and imagined threats to public safety, law enforcement officers were under extreme stress.<sup>110</sup> The city's police department reported that two hundred officers had deserted their jobs and that two of these officers had committed suicide, which negatively impacted the government's ability to respond to the crisis.<sup>111</sup>

Many people who were still in New Orleans struggled to survive the floodwaters and chaotic conditions, without help from the government. One such family was the Bartholomew family, which included Leonard III, his wife, Susan, their seventeen-year-old daughter, Lesha, and their fourteen-year-old son, Leonard IV.<sup>112</sup> Another family was the Madison brothers.<sup>113</sup> Lance Madison was forty-nine years old and a Federal Express employee for twenty-five years.<sup>114</sup> He was accompanying his younger brother, Ronald, a forty-year-old, mentally disabled man.<sup>115</sup> Over the next several days, both families awaited rescue in the flooded city along with thousands of others.<sup>116</sup>

On Sunday, September 4, 2005, the sixth day of their survival, the Bartholomews and the Madisons were stranded in the flooded city, with

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news-reports.html; *The Situation Room* (CNN television broadcast Sept. 1, 2005), <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/sitroom.02.html>.

109. See A.C. Thompson, *Post-Katrina, White Vigilantes Shot African-Americans with Impunity*, PROPUBLICA (Dec. 19, 2008, 12:30 PM), <http://www.propublica.org/article/post-katrina-white-vigilantes-shot-african-americans-with-impunity> (“[C]onvinced that crime would arrive with the human exodus . . . [a] newly formed militia, a loose band of about 15 to 30 residents, most of them men, all of them white, was looking for thieves, outlaws or, as one member put it, anyone who simply ‘didn’t belong.’”); see also Brendan McCarthy & A.C. Thompson, *Federal Hate Crime Charges Filed in Katrina Shooting of African-Americans*, TIMES-PICAYUNE (July 16, 2010), [http://www.nola.com/crime/index.ssf/2010/07/federal\\_hate\\_crime\\_charges\\_fil.html](http://www.nola.com/crime/index.ssf/2010/07/federal_hate_crime_charges_fil.html); A.C. Thompson, *Katrina’s Hidden Race War*, NATION (Dec. 17, 2008), <http://www.thenation.com/article/katrinass-hidden-race-war>.

110. See Richard H. Weisler et al., Commentary, *Mental Health and Recovery in the Gulf Coast After Hurricanes Katrina and Rita*, 296 J. AM. MED. ASS’N 585, 585–86 (2006).

111. See Keith O’Brien, *Amid Horror, 2 Officers Commit Suicide*, BOS. GLOBE (Sept. 5, 2005), [http://www.boston.com/news/nation/articles/2005/09/05/amid\\_horror\\_2\\_officers\\_commit\\_suicide/](http://www.boston.com/news/nation/articles/2005/09/05/amid_horror_2_officers_commit_suicide/); Joseph B. Treaster, *Law Officers, Overwhelmed, Are Quitting the Force*, N.Y. TIMES (Sept. 4, 2005), <http://www.nytimes.com/2005/09/04/us/nationalspecial/law-officers-overwhelmed-are-quitting-the-force.html>.

112. See RONNIE GREENE, SHOTS ON THE BRIDGE: POLICE VIOLENCE AND COVER-UP IN THE WAKE OF KATRINA 20, 31–34 (2015).

113. *Id.* at 17.

114. See *id.*; John Burnett, *What Happened on New Orleans’ Danziger Bridge?*, NPR (Sept. 13, 2006, 1:28 AM), <http://www.npr.org/templates/story/story.php?storyId=6063982>.

115. See Burnett, *supra* note 114.

116. See GREENE, *supra* note 112, at 15–20.



no rescue in sight.<sup>117</sup> The two families were located in the Gentilly neighborhood of the city, on Chef Menteur Highway.<sup>118</sup> They were on opposite ends, approaching the seven-lane Danziger Bridge, which spans half a mile over the Industrial Canal.<sup>119</sup> The four Bartholomew family members were joined by their nineteen-year-old nephew, Jose Holmes, and his seventeen-year-old classmate, James B. Brissette, Jr., who had been separated from his mother in the storm's aftermath.<sup>120</sup> All of the survivors crossing the bridge were weary of their circumstances and hopeful that their nightmare was nearly over.<sup>121</sup>

However, the flooded city was not only a nightmare for its residents, but also for its first responders.<sup>122</sup> These public servants were torn between their official duty to protect the public and their personal responsibility to their families.<sup>123</sup> Some police officers left their posts in order to assist their families as they evacuated to safety.<sup>124</sup> Ultimately, both, first responders and civilians who stayed in the city, were undoubtedly concerned for their personal safety in this unchartered state of emergency.<sup>125</sup> While the storm's survivors were hopeful that first responders would rescue them, the first responders themselves were also at risk of harm.<sup>126</sup>

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117. See generally UNNATURAL DISASTER: THE NATION ON HURRICANE KATRINA, *supra* note 103; David D. Kirkpatrick & Scott Shane, *Ex-FEMA Chief Tells of Frustration and Chaos*, N.Y. TIMES (Sept. 15, 2005), [http://www.nytimes.com/2005/09/15/national/nationalspecial/15brown.html?adxnml=1&adxnmlx=1126803643-4cdGKNZ1Z5Rsk3GiPf/trg&\\_r=1&](http://www.nytimes.com/2005/09/15/national/nationalspecial/15brown.html?adxnml=1&adxnmlx=1126803643-4cdGKNZ1Z5Rsk3GiPf/trg&_r=1&); Robert Siegel, *U.S. Aid Effort Criticized in New Orleans*, NPR (Sept. 1, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4828771>; *Anderson Cooper 360 Special Edition: Hurricane Katrina*, (CNN television broadcast Sept. 1, 2005), <http://transcripts.cnn.com/TRANSCRIPTS/0509/01/acd.01.html>.

118. See Gwen Filosa, *Lawsuits Dispute Fatal Shooting*, TIMES-PICAYUNE (Sept. 14, 2006), [http://blog.nola.com/tpcrimearchive/2006/09/lawsuits\\_dispute\\_fatal\\_shootin.html](http://blog.nola.com/tpcrimearchive/2006/09/lawsuits_dispute_fatal_shootin.html).

119. Laura Maggi & Brendan McCarthy, *5 NOPD Officers Guilty in Post-Katrina Danziger Bridge Shootings, Cover-up*, TIMES-PICAYUNE (Aug. 5, 2011), [http://www.nola.com/crime/index.ssf/2011/08/danziger\\_bridge\\_verdict\\_do\\_not.html](http://www.nola.com/crime/index.ssf/2011/08/danziger_bridge_verdict_do_not.html). The Industrial Canal is a man-made canal linking Lake Pontchartrain with the man-made Mississippi-Gulf Outlet in the city's Lower Ninth Ward.

120. See GREENE, *supra* note 112, at 19–21. *But see* Complaint at ¶ 3, *Johnson v. City of New Orleans* (E.D. La. May 15, 2007) (No. 07-2882), 2007 WL 1654798 (stating that James Brissette was 19 at the time of his death).

121. See GREENE, *supra* note 112, at 20.

122. *Id.* at 20.

123. See *id.* at 12–14.

124. Kevin Johnson, *Katrina Made Police Choose Between Duty and Loved Ones*, USA TODAY (Feb. 20, 2006, 11:24 PM), [http://usatoday30.usatoday.com/news/nation/2006-02-20-neworleanspolice\\_x.htm](http://usatoday30.usatoday.com/news/nation/2006-02-20-neworleanspolice_x.htm).

125. See generally Penner & Ferdinand, *supra* note 42, at xvii–xix.

126. See generally *id.*

The police officers, who decided to stay in the city under extreme conditions, faced certain danger.<sup>127</sup> These dangers included the noble task of rescuing people from the rooftops of their flooded homes.<sup>128</sup> The officers who remained in the flooded city quickly discovered the many challenges of working through the floodwaters.<sup>129</sup>

This was especially true for the police officers on duty near the Danziger Bridge. They faced extra-ordinary challenges—their police station, which held all of their equipment, flooded, as did their patrol cars.<sup>130</sup> Working out of their own makeshift police station and confiscated rental truck on little sleep, food, or clean water, these police officers awaited instructions from a now disoriented command center.<sup>131</sup> They were also aware of widespread reports of one officer having been shot in the head outside of a Circle K convenience store.<sup>132</sup> These officers who were faithful to their duties, and were now coping with the dire conditions, included Sergeants Kenneth Bowen and Robert Gisevius, along with Officers Robert Barrios, Robert Faulcon, Ignatius Hills, Michael Hunter, and Anthony Villavaso.<sup>133</sup>

Just before 9:00 a.m. on September 4, 2005, the sixth day of the flooding in New Orleans, the officers received a radio call from a fellow officer.<sup>134</sup> The call came from Officer Jennifer Dupree—a “108” call alerting the officers that fellow police officers were in danger and in need of immediate assistance.<sup>135</sup> In response to the distress call, the entire police detail jumped into the rental truck and sped west down U.S.

127. *See id.*

128. *See generally* PENNER & FERDINAND, *supra* note 42, at xvii–xxiii; *Hurricane Katrina New Orleans Rooftop Rescues*, YOUTUBE (Aug. 30, 2005), [www.youtube.com/watch?v=c4dIXMCZNNw](http://www.youtube.com/watch?v=c4dIXMCZNNw).

129. *See* Crusto, *State of Emergency*, *supra* note 18, at 488.

130. Laura Maggi, *Radio Call of Cops “Down” Summons Police to Danziger Bridge*, TIMES-PICAYUNE (Feb. 18, 2007), [http://www.nola.com/crime/index.ssf/2007/02/radio\\_call\\_of\\_cops\\_down\\_summon.html](http://www.nola.com/crime/index.ssf/2007/02/radio_call_of_cops_down_summon.html).

131. Laura Maggi, *Danziger Bridge Survivor Recalls His Brother, Shot and Bleeding, Asking Him to Tell Their Family He Loved Them*, TIMES-PICAYUNE (July 8, 2011), [http://www.nola.com/crime/index.ssf/2011/07/danziger\\_bridge\\_survivor\\_recal.html](http://www.nola.com/crime/index.ssf/2011/07/danziger_bridge_survivor_recal.html).

132. *See* GREENE, *supra* note 112, at 25; Gwen Filosa, *Hurricane Katrina Aftermath Shooting of Police Officer Described*, TIMES-PICAYUNE (Jan. 14, 2010), [http://www.nola.com/crime/index.ssf/2010/01/hurricane\\_katrina\\_aftermath\\_sh.html](http://www.nola.com/crime/index.ssf/2010/01/hurricane_katrina_aftermath_sh.html).

133. Mark Berman, *Former New Orleans Officers Plead Guilty for Danziger Bridge Shootings*, WASH. POST (Apr. 20, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/04/20/former-new-orleans-officers-plead-guilty-for-danziger-bridge-shootings/?utm\\_term=.d4cdeb2b0e9a](https://www.washingtonpost.com/news/post-nation/wp/2016/04/20/former-new-orleans-officers-plead-guilty-for-danziger-bridge-shootings/?utm_term=.d4cdeb2b0e9a).

134. *See* Maggi, *supra* note 130.

135. Michael Kunzelman, *Shootings Trial: Officer Says She 2 Saw Armed Men*, THE SAN DIEGO UNION-TRIB. (June 29, 2011, 12:41 PM), <http://www.sandiegouniontribune.com/sdut-shootings-trial-officer-says-she-2-saw-armed-men-2011jun29-story.html>.

Highway 90, toward the Danziger Bridge.<sup>136</sup> As the police officers approached the bridge, Officer Hunter fired a handgun in the air as a signal that police officers were on the way, as their truck had no siren.<sup>137</sup> He was also armed with an unauthorized AK-47 automatic rifle.<sup>138</sup>

The police officers in the rental company truck approached the Bartholomew family, who heard the police gunfire and started running up the bridge in fear that criminals were shooting at them.<sup>139</sup> Soon, they discovered that the people shooting at them were not criminals—they were police officers, expecting to assist fellow officers from hostile fire.<sup>140</sup> When the police officers saw the Bartholomew family, including their nephew Jose Holmes and his seventeen-year-old classmate, James B. Brissette, Jr., running, they stopped the truck on the bridge and got out.<sup>141</sup> Sergeant Gisevius then took out an assault rifle and open fired on all six unarmed members of the Bartholomew family.<sup>142</sup> Following that lead, Officer Hill jumped out of the back of the truck and also shot at the fleeing family.<sup>143</sup> Sergeant Gisevius and Officers Faulcon and Barrios continued driving toward the supposed suspects, while firing at them, to ensure that they were not a threat to the officers.<sup>144</sup>

The police officers' bullets struck every single member of the Bartholomew family, except for Leonard IV.<sup>145</sup> Wounded and dazed, some of the family members sought cover by climbing over the concrete median on the bridge, hoping to avoid further injury.<sup>146</sup> Stunned, their nineteen-year-old nephew, Jose Holmes, stopped to examine the wounds on his

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136. Maggi & McCarthy, *supra* note 119; Joe Rawley, *Officer Who Initiated Danziger Call Testifies*, WGNO (June 29, 2011, 6:08 PM), <http://wgno.com/2011/06/29/officer-who-initiated-danziger-call-testifies/>.

137. Complaint, *supra* note 120, at ¶ 27.

138. Michael Kunzelman, *Expert: Bullet from Body Matched to Officer's Gun*, SAN DIEGO UNION-TRIB. (July 13, 2011, 11:19 AM), <http://cnsnews.com/news/article/expert-bullet-body-matched-officers-gun>.

139. See Maggi & McCarthy, *supra* note 119.

140. See *id.*

141. *Id.*

142. See Johnson, *supra* note 124.

143. See Maggi, *supra* note 130.

144. See *id.*

145. Laura Maggi & Brendan McCarthy, *Judge in Danziger Case Sickened by "Raw Brutality of the Shooting and the Craven Lawlessness of the Cover-Up"*, TIMES-PICAYUNE (Apr. 8, 2010), <http://www.nola.com/crime/index.ssf/2010/04/judgesickenedbyrawbrutalit.html>

146. *Danziger Victim Said He Was Shot in Stomach as He Hid for Protection*, WWLTV (June 29, 2011), <http://www.wwltv.com/news/danziger-trial/Officer-I-never-said-officers-had-been-shot-at-Danziger-Bridge-124721004.html>.

stomach.<sup>147</sup> When the police officers reached him, they shot him two more times.<sup>148</sup>

Meanwhile, on the west end of the bridge, Lance and Ronald Madison heard gunshots and immediately began running away in search of safety.<sup>149</sup> When the approaching police officers saw the two men running, the officers pursued them.<sup>150</sup> At that point, Officer Faulcon leaned out of the window of the moving car and fired a shotgun into Ronald's back, which fatally wounded him.<sup>151</sup> Sergeant Bowen then got out of the police car and began to kick Ronald's injured body.<sup>152</sup> Officer Hunter confronted Sergeant Bowen, yelling at him to stop kicking Ronald.<sup>153</sup> Sergeant Bowen stopped and immediately apologized to Officer Hunter who then responded, "we aren't animals like them," referring to the dead suspect, mentally-handicapped Ronald Madison.<sup>154</sup>

Looking back for his brother and seeing him on the ground a few feet behind him, Lance turned around and ran back to help him.<sup>155</sup> Lance noticed that there were state police troopers ahead of him on the bridge and ran to them, seeking their help.<sup>156</sup> When the police saw Lance, they assumed that he was the suspect who had reportedly fired at the police officers.<sup>157</sup> Thus, they arrested him at gunpoint, handcuffed him, and accused him of shooting at them.<sup>158</sup> Cuffed, and kneeling on the hot pavement, Lance looked back at his brother and saw a police officer kicking Ronald's lifeless body.<sup>159</sup>

When the mayhem ended, nearly all members of the Bartholomew and Madison families were severely injured.<sup>160</sup> Four of the five members

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147. *Id.*

148. *Id.*

149. Times-Picayune Staff, *5 NOPD Officers Guilty in Post-Katrina Danziger Bridge Shootings, Cover-up*, TIMES-PICAYUNE (Aug. 5, 2011), [https://www.nola.com/crime/2011/08/danziger\\_bridge\\_verdict\\_do\\_not.html](https://www.nola.com/crime/2011/08/danziger_bridge_verdict_do_not.html).

150. *Id.*

151. See Guilty Plea of Robert Barrios at 2–3, *United States v. Barrios* (E.D. La. Apr. \_\_, 2010) (No. 10-103), [http://media.nola.com/crime\\_impact/other/robert%20barrios.pdf](http://media.nola.com/crime_impact/other/robert%20barrios.pdf).

152. See Berman, *supra* note 133.

153. See Complaint, *supra* note 121, at ¶¶ 25–29; Laura Maggi & Brendan McCarthy, *Danziger Bridge Gunfire by Cop Was a Message: 'Don't Mess with Us'*, TIMES-PICAYUNE (July 6, 2011), [https://www.nola.com/crime/index.ssf/2011/07/danziger\\_bridge\\_gunfire\\_by\\_cop.html](https://www.nola.com/crime/index.ssf/2011/07/danziger_bridge_gunfire_by_cop.html).

154. Maggi & McCarthy, *supra* note 145.

155. See Berman, *supra* note 133.

156. See *id.*

157. See *id.*

158. See Maggi & McCarthy, *supra* note 119.

159. See Maggi & McCarthy, *supra* note 145.

160. See *United States v. Lehrmann*, No. 10-cr-51, 2011 WL 4344582, at \*1 (E.D. La. Sept. 15, 2011).

of the Bartholomew family were shot by police gunfire.<sup>161</sup> The father, Leonard III, was shot in his left heel, his upper back, and above his right ear.<sup>162</sup> His wife, Susan, was shot in her left leg and in her right arm—which was nearly shot off and was eventually amputated.<sup>163</sup> Their daughter, Leshia, was shot in the stomach and back.<sup>164</sup> Their nephew, Jose Holmes, was shot in the abdomen, left arm, left hand, and left jaw.<sup>165</sup> The police also shot at and missed Leonard IV, but eventually apprehended him and slapped him in the face.<sup>166</sup> In addition to their physical injuries, the Bartholomew family was severely traumatized by the entire experience.<sup>167</sup>

Sadly, two of the victims died on the Danziger Bridge that day.<sup>168</sup> Seventeen-year-old James Brissette, Jose Holmes's classmate, died from multiple gunshot wounds to the back of his head, left arm, neck, right buttocks, right leg, and right elbow.<sup>169</sup> Forensic specialists later determined that James was “shot at least three . . . times while [lying] face-down on the ground.”<sup>170</sup> Among these shots was the fatal one to the back of his head.<sup>171</sup> In a separate shooting on the opposite end of the bridge, the mentally-disabled Ronald Madison was shot several times, including two shots to his shoulder and “a single shotgun blast to the back.”<sup>172</sup> He died on the roadway of the Danziger Bridge.<sup>173</sup>

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161. *Id.*

162. Press Release, Dep't of Justice, Five New Orleans Police Officers Sentenced on Civil Rights and Obstruction of Justice Violations in the Danziger Bridge Shooting Case (Apr. 4, 2012), <https://www.justice.gov/opa/pr/five-new-orleans-police-officers-sentenced-civil-rights-and-obstruction-justice-violations>.

163. *Id.*

164. *Id.*

165. *Id.*

166. See Laura Maggi & Brendan McCarthy, *On Danziger Bridge, Teenager Was Left “Really Alone and Sad” After His Family Was Shot*, TIMES-PICAYUNE (July 6, 2011), [https://www.nola.com/crime/index.ssf/2011/07/on\\_danziger\\_bridge\\_teenager\\_wa.html](https://www.nola.com/crime/index.ssf/2011/07/on_danziger_bridge_teenager_wa.html).

167. See Maggi & McCarthy, *supra* note 119.

168. See Press Release, *supra* note 162.

169. GREENE, *supra* note 112, at 34.

170. Brendan McCarthy & Laura Maggi, *Danziger Bridge Shooting Victim Killed by Shotgun Blast to Back of the Head, Shot Several Other Times, Pathologist Says*, TIMES-PICAYUNE (July 14, 2011), [http://www.nola.com/crime/index.ssf/2011/07/danziger\\_bridge\\_shooting\\_victi\\_2.html](http://www.nola.com/crime/index.ssf/2011/07/danziger_bridge_shooting_victi_2.html).

171. *Id.*

172. *Id.* See Jarvis DeBerry, *Lance Madison Joins Protest, Reveals His Anger at Danziger Sentences*, TIMES-PICAYUNE (May 3, 2016, 6:30 AM), [https://www.nola.com/crime/index.ssf/2016/05/lance\\_madison\\_danziger.html](https://www.nola.com/crime/index.ssf/2016/05/lance_madison_danziger.html).

173. McCarthy & Maggi, *supra* note 170.

Ronald Madison's brother, Lance, survived the bridge shootings without being shot or injured.<sup>174</sup> Nevertheless, he was arrested and jailed for allegedly shooting at the police officers.<sup>175</sup> On September 28, 2005, "wearing an orange prison jumpsuit," handcuffed, and shackled, Lance appeared before a state judge at Elayn Hunt Correctional Center.<sup>176</sup> There, he faced eight counts of attempted murder of the police officers on the Danziger Bridge.<sup>177</sup> If convicted, Lance would be imprisoned for the rest of his life.<sup>178</sup> The police officers' testimonies against Lance were consistent with their official police reports of the day's events.<sup>179</sup> These reports stated that the police officers acted in self-defense in shooting people on the Danziger Bridge, as they returned enemy shots fired against them.<sup>180</sup> The police officers claimed that, when they arrested Lance Madison, he was carrying a gun.<sup>181</sup> As a result, when the media first reported the Danziger Bridge shootings, they celebrated the police officers as heroes who diligently protected the city from criminals.<sup>182</sup>

With further official investigation, it became less clear that the shootings on the bridge were legal. In the months following the shootings, the New Orleans Police Department ("NOPD") conducted an internal investigation of the incident.<sup>183</sup> Visiting the scene shortly after the shootings, Lieutenant Michael Lohman, a supervisor assigned to investigate the incident, "concluded that the shootings were *not* legally justified."<sup>184</sup> Later, the investigation was reassigned to Detective Gerard

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174. Complaint at 1, *Madison v. City of New Orleans* (E.D. La. Sept. 1, 2006) (No. 06-5701), 2006 WL 2968944.

175. *Id.* at 5.

176. See Allen Johnson, Jr., *Unfinished Sentences*, NEW ORLEANS MAGAZINE (June 2012),

<http://www.myneworleans.com/New-Orleans-Magazine/June-2012/Unfinished-Sentences/index.php?>

177. See Burnett, *supra* note 114.

178. See Johnson, *supra* note 176.

179. See *United States v. Lehrmann*, No. 10-51, 2011 WL 4344582, at \*1-2 (E.D. La. Sept. 15, 2011); Burnett, *supra* note 114.

180. See Burnett, *supra* note 114; see also *Lehrmann*, 2011 WL 4344582, at \*1.

181. See Burnett, *supra* note 114; see also *Lehrmann*, 2011 WL 4344582, at \*1.

182. Christine Lagorio, *Indicted N.O. Cops Greeted as "Heroes"*, CBSNEWS (Jan. 3, 2007, 5:55 AM), <http://www.cbsnews.com/news/indicted-no-cops-greeted-as-heroes/>; *Indicted New Orleans Police Turn Themselves In*, NBC NEWS (Jan. 2, 2007, 5:29 PM), [http://www.nbcnews.com/id/16438637/ns/us\\_news-crime\\_and\\_courts/t/indicted-new-orleans-police-turn-themselves/#.V6-PV5MrJBw](http://www.nbcnews.com/id/16438637/ns/us_news-crime_and_courts/t/indicted-new-orleans-police-turn-themselves/#.V6-PV5MrJBw).

183. Brendan McCarthy, *Danziger Bridge Case Suggests Culture of Corruption at NOPD*, TIMES-PICAYUNE (Mar. 21, 2010), [http://www.nola.com/crime/index.ssf/2010/03/danziger\\_bridge\\_details.html](http://www.nola.com/crime/index.ssf/2010/03/danziger_bridge_details.html).

184. Laura Maggi, *Police Supervisor Encouraged Cover-Up, Knew Officer Planted Gun While Still on Danziger Bridge*, TIMES-PICAYUNE (Feb. 24, 2010),

Dugue who determined that the police officers' shootings *were* legally justified.<sup>185</sup> His finding was largely based on the police officers' discovery of a single firearm at the scene of the shootings, which supported the police officers' statements that they were returning enemy fire.<sup>186</sup> When the internal investigation found no wrongdoing on the part of the suspected police officers, they were all able to return to their normal duties, without delay or penalty.<sup>187</sup>

Over the next several months, Lance and Ronald's brother, Dr. Romell Madison joined other family members, as well as the Bartholomews and Holmes, in rallying significant community support for their family members' innocence.<sup>188</sup> As a result, in March 2006, the Orleans Parish District Attorney, Eddie Jordan, launched an independent investigation into the shootings.<sup>189</sup> On December 28, 2006, following a seven-month investigation, District Attorney Jordan announced the grand jury indictment of the "Danziger 7," namely Sergeants Kenneth Bowen and Robert Gisevius, and Officers Robert Barrios, Robert Faulcon, Ignatius Hills, Michael Hunter, and Anthony Villavaso.<sup>190</sup> In announcing the indictment, Jordan said, "We cannot allow our police officers to shoot and kill our citizens without justification like rabid dogs."<sup>191</sup>

In January 2007, the "Danziger 7" turned themselves into law enforcement authorities amidst crowds of people heralding them as apparent heroes.<sup>192</sup> While the state's case focused mainly on the events that took place on the Danziger Bridge,<sup>193</sup> the case was thrown out for

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[https://www.nola.com/crime/index.ssf/2010/02/police\\_investigator\\_encouraged.html](https://www.nola.com/crime/index.ssf/2010/02/police_investigator_encouraged.html) (emphasis added).

185. See Sarah Moughty, *Former NOPD Officers Testify About "Secret Meeting" to Determine Danziger Bridge Cover-Up*, PBS FRONTLINE (Jan. 27, 2012), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/law-disorder/former-nopd-officers-testify-about-secret-meeting-to-determine-danziger-bridge-cover-up/>.

186. See Burnett, *supra* note 114.

187. See Paul Harris, *Relatives Demand Justice as Police go on Trial over Katrina Killings*, THE GUARDIAN (Mar. 3, 2007, 9:23 PM), <https://www.theguardian.com/world/2007/mar/04/hurricanekatrina.usa>.

188. See Burnett, *supra* note 114; Harris, *supra* note 187.

189. See Laura Maggi, *Charges Rejected Against Danziger 7*, TIMES-PICAYUNE (Aug. 13, 2008), [http://www.nola.com/news/index.ssf/2008/08/charges\\_rejected\\_against\\_danzi.html](http://www.nola.com/news/index.ssf/2008/08/charges_rejected_against_danzi.html).

190. See *New Orleans Officers Charged with Murder*, NBC NEWS (Dec. 28, 2006, 10:41 PM), [http://www.nbcnews.com/id/16383539/ns/us\\_news-crime\\_and\\_courts/t/new-orleans-officers-charged-murder/#.W8IXR2hKg2w](http://www.nbcnews.com/id/16383539/ns/us_news-crime_and_courts/t/new-orleans-officers-charged-murder/#.W8IXR2hKg2w); *Indicted New Orleans Police Turn Themselves In*, *supra* note 182.

191. *New Orleans Police Indicted in Bridge Shootings*, CNN (Jan. 2, 2007, 11:10 AM), <http://www.cnn.com/2006/LAW/12/28/katrina.cops/>.

192. Lagorio, *supra* note 182.

193. Maggi & McCarthy, *supra* note 119.

prosecutorial misconduct in August 2008.<sup>194</sup> In dropping the charges against the officers, a state judge cited “defense arguments that prosecutors violated state law by divulging secret grand jury testimony to a police officer who was a witness in the case.”<sup>195</sup> The judge concluded that the district attorney’s office had tainted the case by using the grand jury testimony of officers to secure indictments.<sup>196</sup> As a result, the charges against the suspected police officers were dropped.<sup>197</sup> Fortunately for the innocent victims, this would not be the end of the matter.

### B. Federal Prosecution

On September 30, 2008, less than a month after the state judge’s dismissal of the case and three years after the shootings, there was a new development.<sup>198</sup> The Justice Department’s Civil Rights Division and the FBI announced its investigation of the Danziger Bridge shooting for possible civil rights violations and subsequent cover-ups.<sup>199</sup> The U.S. Attorney for the Eastern District of Louisiana, Jim Letten, stated that his office would take “as much time and resources as necessary” to resolve the case.<sup>200</sup> Almost a year later, in August 2009, the FBI seized the NOPD files relevant to the Danziger incident, including those belonging to Sergeants Kaufman and Dugue, who had investigated the shootings.<sup>201</sup>

Nearly a year and a half after initiating the investigation, the Justice Department received a major break.<sup>202</sup> In February 2010, Detective

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194. *See Charges Dismissed Against Police in Post-Katrina Shootings*, CNN (Aug. 13, 2008, 6:10 PM), <http://www.cnn.com/2008/CRIME/08/13/danziger.seven/>; *see also* *United States v. Bowen*, 969 F. Supp. 2d 546, 550 n.3 (E.D. La. 2013) (“The primary basis for the dismissal of the indictment was the order of defendant Kenneth Bowen to give testimony, over his assertion of his Constitutional rights, before the state grand jury on October 30, 2006, in exchange for immunity under La.C.Cr.P. Art. 439.1(C).”).

195. Mary Foster, *New Orleans Cops Cleared in Bridge Shooting*, DAILY HERALD (Aug. 13, 2008), [https://www.heraldextra.com/news/world/new-orleans-cops-cleared-in-bridge-shooting/article\\_9b8dcd28-db20-5d09-99e4-0bc7fc18cee3.html](https://www.heraldextra.com/news/world/new-orleans-cops-cleared-in-bridge-shooting/article_9b8dcd28-db20-5d09-99e4-0bc7fc18cee3.html).

196. *See id.*

197. *See Charges Dismissed Against Police in Post-Katrina Shootings*, *supra* note 194.

198. *Feds Take up Investigation of Cops in Post-Katrina Bridge Shooting Case*, FOX NEWS (Sept. 30, 2008), <https://www.foxnews.com/story/feds-take-up-investigation-of-cops-in-post-katrina-bridge-shooting-case>.

199. *Id.*

200. *Id.*

201. Brendan McCarthy, *FBI Seizes Police Files in Danziger Bridge Shootings*, TIMES-PICAYUNE (Aug. 7, 2009, 8:44 PM), [http://www.nola.com/crime/index.ssf/2009/08/fbi\\_seizes\\_police\\_files\\_in\\_bri.html](http://www.nola.com/crime/index.ssf/2009/08/fbi_seizes_police_files_in_bri.html).

202. *Ex-Police Officer Admits Role in Cover-Up of Louisiana Bridge Shooting*, CNN (Mar. 11, 2010, 1:48 PM), <http://www.cnn.com/2010/CRIME/03/11/nopd.shooting/index.html>.



Jeffrey Lehrmann, the senior supervisor of the suspected officers, admitted that he had participated in a plot to cover up what actually happened on the Danziger Bridge.<sup>203</sup> Specifically, Detective Lehrmann confessed that he played a role in planting a gun on the victims, encouraging his colleagues to provide false stories about the events to “get the story straight,” and falsifying police reports.<sup>204</sup> He also testified that his supervisor, Sergeant Kaufman, carried around a “ham sandwich”—referencing an alleged NOPD subculture where untraceable guns are carried in sandwich bags to be planted as evidence to cover up police misconduct.<sup>205</sup> Furthermore, Detective Lehrmann stated that he had participated in the cover-up plot when he forged a police report of the incident to include *false* descriptions of citizens shooting at the officers.<sup>206</sup> Ultimately, he accepted a plea bargain and pled guilty to having knowledge of a crime and not reporting it.<sup>207</sup> As a result, he was sentenced to three years in federal prison for his role in the cover up.<sup>208</sup> This was the beginning of the end for the guilty police officers.<sup>209</sup>

On April 7, 2010, a second police officer, Officer Hunter, accepted a plea bargain in which he pled guilty to failing to report a crime and for obstruction of justice.<sup>210</sup> Most importantly, Officer Hunter’s testimony confirmed that the civilians who were killed and wounded on the Danziger Bridge did *not* possess any weapons, and that the police did not shoot in self-defense.<sup>211</sup> Despite his contribution to the government’s case, a federal judge sentenced Hunter to the maximum eight-year term in prison.<sup>212</sup>

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203. *Id.*

204. *Id.*

205. *Former Detective Describes Cover-Up, “Ham Sandwich”*, PBS FRONTLINE (July 12, 2011), <http://www.pbs.org/wgbh/pages/frontline/law-disorder/blog/2011/07/former-detective-describes-cover-up-ham-sandwich.html>.

206. *See* United States v. Lehrmann, No. 10-51, 2011 WL 4344582, at \*1 (E.D. La. Sept. 15, 2011).

207. *Id.* at \*3.

208. *Id.* at \*1.

209. *See* Laura Maggi & Brendan McCarthy, *Former Police Officer Pleads Guilty to Danziger Bridge Shooting Cover-Up of Stunning Breadth*, TIMES-PICAYUNE (Feb. 25, 2010), [http://www.nola.com/crime/index.ssf/2010/02/former\\_police\\_officer\\_pleads\\_g.html](http://www.nola.com/crime/index.ssf/2010/02/former_police_officer_pleads_g.html); Laura Maggi & Brendan McCarthy, *Second Former New Orleans Police Officer Charged in Danziger Bridge Cover-up*, TIMES-PICAYUNE (Mar. 10, 2010), [http://www.nola.com/crime/index.ssf/2010/03/second\\_former\\_new\\_orleans\\_poli.html](http://www.nola.com/crime/index.ssf/2010/03/second_former_new_orleans_poli.html).

210. United States v. Bowen, 969 F. Supp. 2d 546, 612 (E.D. La. 2013).

211. “*It Was Kind of Messed up That the Females Got Shot*”: Katrina Cover-Up Officer Tells How Police Fired at Unarmed and Wounded Civilians, DAILY MAIL (July 7, 2011, 5:38 PM), <http://www.dailymail.co.uk/news/article-2012152/Katrina-shootings-Cover-cop-Michael-Hunter-tells-police-fired-civilians.html>.

212. *Bowen*, 969 F. Supp. 2d at 612.

Soon, as more police officers negotiated pleas, the plot to cover up the police officers' misdeeds became transparent.<sup>213</sup> During the same month as Officer Hunter's testimony, Officer Barrios was charged with and pled guilty to conspiracy to obstruct justice.<sup>214</sup> Two months later, Officer Hills pled guilty to conspiracy to obstruct justice and misprision of a felony.<sup>215</sup> He also confessed that when he finally jumped out of the moving truck on the bridge, he saw a fleeing teenager, took two shots "out of fear," and missed.<sup>216</sup> More importantly, he admitted that he used false information in a report, to justify the arrest of Lance Madison.<sup>217</sup> As a result of their painstaking preparations and the many defendants-turned-witnesses for the prosecution, the federal government had sufficient evidence to take the remaining police officers to trial.<sup>218</sup>

On July 12, 2010, after two years of investigation, a federal grand jury, with a federal judge presiding, indicted six New Orleans police officers for shooting unarmed civilians on the Danziger Bridge and for covering up their unjustified attacks.<sup>219</sup> The named defendants were Officers Villavaso and Faulcon and Sergeants Gisevius, Bowen, Kaufman, and Dugue.<sup>220</sup>

In presenting their case, the federal prosecutors accused Sergeants Bowen and Gisevius, as well as Officer Villavaso, of being responsible for the unjustified killing of James Brissette.<sup>221</sup> Specifically, Officer Faulcon's testimony supported the prosecution's accusations. He stated that even after he stopped shooting, other officers, including Bowen, Gisevius, and Villavaso, continued to shoot although there was "no

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213. See Laura Maggi, *4th Former New Orleans Cop Pleads Guilty in Danziger Bridge Coverup*, TIMES-PICAYUNE (Apr. 28, 2010), [http://www.nola.com/crime/index.ssf/2010/04/4th\\_former\\_new\\_orleans\\_cop\\_ple.html](http://www.nola.com/crime/index.ssf/2010/04/4th_former_new_orleans_cop_ple.html).

214. Laura Maggi, *Former New Orleans Police Officer Robert Barrios Pleads Guilty in Danziger Coverup*, TIMES-PICAYUNE (Apr. 28, 2010), [http://www.nola.com/crime/index.ssf/2010/04/former\\_new\\_orleans\\_police\\_offi.html](http://www.nola.com/crime/index.ssf/2010/04/former_new_orleans_police_offi.html).

215. Press Release, U.S. Attorney's Office, Fifth New Orleans Police Officer Pleads Guilty in Danziger Bridge Case (June 4, 2010), <https://archives.fbi.gov/archives/neworleans/press-releases/2010/no060410.htm>.

216. *Danziger Witnesses Reveal Horrors, Turmoil*, LA. WEEKLY (July 12, 2011), <http://www.louisianaweekly.com/danziger-witnesses-reveal-horrors-turmoil/>.

217. See Press Release, U.S. Attorney's Office, *supra* note 215.

218. Brendan McCarthy & Laura Maggi, *Danziger Bridge Case Puts 5 New Orleans Cops on Trial in Post-Katrina Shootings, Cover-Up*, TIMES-PICAYUNE (June 19, 2009), [http://www.nola.com/crime/index.ssf/2011/06/danziger\\_bridge\\_case\\_puts\\_five.html](http://www.nola.com/crime/index.ssf/2011/06/danziger_bridge_case_puts_five.html).

219. See Indictment for Deprivation of Rights Under Color of Law, Use of a Weapon During Commission of a Crime of Violence, Conspiracy, Obstruction of Justice, and False Statements, United States v. Bowen, No. 10-204 (E.D. La. July 12, 2010), 2010 WL 2771476.

220. *Id.* ¶¶ 1–3.

221. Brendan McCarthy, *Three Cops Accused of Danziger Bridge Shooting Plead Innocent*, TIMES-PICAYUNE (July 14, 2010), [http://www.nola.com/crime/index.ssf/2010/07/three\\_cops\\_accused\\_of\\_danziger.html](http://www.nola.com/crime/index.ssf/2010/07/three_cops_accused_of_danziger.html).

apparent threat.”<sup>222</sup> He also confessed that none of the civilians ever fired or pointed weapons at the police officers on the bridge, and that the police never recovered any weapons.<sup>223</sup> Officer Faulcon’s testimony bolstered the government’s charges of conspiracy.<sup>224</sup> This is because Officer Faulcon testified that all of the police reports pertaining to the incident contained lies.<sup>225</sup> When asked if he agreed that there was a plot to cover up the facts in this case, Faulcon replied in open court, “based on what I learned now, yes.”<sup>226</sup>

The testimony of some of the offending police officers revealed a chilling side of the police officers’ actions. Officer Hunter, who had signed a statement describing the shooting in detail, delivered the following unsettling confession about the deadly shooting on the Danziger Bridge:<sup>227</sup>

At one point before [Hunter] got out of the truck, he saw an older black male raise his head above the barrier and he saw Sergeant [Gisevius] fire at the black male. The black male did not appear to have a weapon and did not threaten the officers. . . . While defendant [Hunter] was still on the passenger side of the truck, near the walkway, he saw several civilians, who appeared to be unarmed, injured, and subdued. Sergeant [Gisevius] suddenly leaned over the concrete barrier, held out his assault rifle [an AK-47], and, in a sweeping motion, fired repeatedly at the civilians lying wounded on the ground. The civilians were not trying to escape and were not doing anything that could be perceived as a threat.

As the car moved down the bridge, defendant [Hunter] saw three black males running away, near the bottom of the bridge. None of the civilians appeared to be armed or to be a threat to the

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222. Andrews Disaster Recovery Law Report Staff, *Victim’s Mother Sues Over Post-Katrina Police Shooting Death: Johnson v. City of New Orleans*, 1 No. 12 Andrews Disaster Recovery Law Report 10 (June 15, 2007).

223. See Press Release, U.S. Attorney’s Office, *supra* note 215.

224. See *id.*

225. See *id.*

226. *Id.*

227. Justin Elliott, *New Orleans Cop Explains How Police Gunned Down Unarmed Civilians in Post-Katrina Incident*, TALKING POINTS MEMO (Apr. 8, 2010, 5:47 AM), [http://tpmmuckraker.talkingpointsmemo.com/2010/04/new\\_orleans\\_cop\\_explains\\_how\\_police\\_gunned\\_down\\_ci.php](http://tpmmuckraker.talkingpointsmemo.com/2010/04/new_orleans_cop_explains_how_police_gunned_down_ci.php). In Officer Hunter’s original statement, the officer and sergeant he talked about were kept nameless, referred to only as “Officer A” and “Sergeant A.” *Id.* The names of these individuals have been inserted by cross-referencing later testimonies. *Id.*

officers. Two men, later identified as Lance and Ronald Madison, ran down the right side of the road, while a third, older man ran down the left side . . . At no time as Ronald Madison ran, did defendant [Hunter] see him turn toward the officers, reach into his waistband, or make any threatening gestures. As the unmarked LSP car pulled to a stop, Officer [Faulcon], without warning, fired a shotgun at Ronald Madison's back.

As Ronald Madison lay dying on the pavement, Sergeant [Gisevius] ran down the bridge toward Ronald and asked an officer if Ronald was "one of them." When the officer replied in the affirmative, Sergeant [Gisevius] began kicking or stomping Ronald Madison repeatedly . . . with as much force as he could muster.<sup>228</sup>

Relative to the death of James Brisette, Officer Hills testified that after waiting for the sound of gunshots to cease and for the truck to stop, he shot at a person who he later learned was a young, unarmed boy.<sup>229</sup> Officer Hills's testimony gave the impression that the shootings were an overreaction that occurred before the officers could properly assess whether there was a legitimate threat.<sup>230</sup> Most importantly, Officer Hills testified that the people on the bridge were *not* a threat, that he did *not* feel his life was in danger, and that the shooting was *not* justified.<sup>231</sup> Relative to the cover-up, Officer Hills admitted that Sergeant Kaufman dictated to him what to write in the initial police report regarding the Danziger incident.<sup>232</sup>

The police officers' testimonies were supported by the testimony of forensic pathologist Dr. Vincent Di Maio.<sup>233</sup> Dr. Di Maio testified that based on his analysis of the types of weapons used in the shootings, James Brisette was killed by a shotgun blast to the *back of the head*.<sup>234</sup> He noted that James was subsequently shot at least three more times while he laid face down on the ground.<sup>235</sup>

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228. *Id.*

229. *Id.*

230. See Brendan McCarthy & Laura Maggi, *Danziger Bridge Shooter Is the First to Testify Against His Colleagues*, *TIMES-PICAYUNE* (June 30, 2011), [http://www.nola.com/crime/index.ssf/2011/06/danziger\\_bridge\\_shooter\\_is\\_the.html](http://www.nola.com/crime/index.ssf/2011/06/danziger_bridge_shooter_is_the.html).

231. *Id.*

232. *See id.*

233. *See* McCarthy, *supra* note 170.

234. *See id.*; *see also* Edmund W. Lewis, *Mother of Danziger Victim Still Seeking Justice*, *THE LOUISIANA WEEKLY* (Aug. 29, 2011), <http://www.louisianaweekly.com/mother-of-danziger-victim-still-seeking-justice/>.

235. *See* Lewis, *supra* note 234.

In response to the prosecutor's case, the defense attorneys for the accused police officers painted a portrait of the desolate wasteland that remained in the wake of Hurricane Katrina, relying on testimony of officers, experts, and witnesses.<sup>236</sup> Officer Faulcon testified that conditions in the city after the storm resembled a "Third World country."<sup>237</sup> This reference was meant to help the police officers' case by arguing that social and physical conditions following the storm were so degraded that their actions might seem reasonable under the circumstances. In other words, that Hurricane Katrina was an excuse for their wrongful conduct.

Next, the defense counsel called Jennifer Dupree to the witness stand; she was the officer who had sent out the distress call that sparked the chain of events on the Danziger Bridge on September 4, 2005.<sup>238</sup> Officer Dupree testified that on the day of the incident, a group of rescue workers ran up to her, saying that they were being shot at.<sup>239</sup> From her position on Interstate 10, Officer Dupree said she saw four subjects running, two of which were armed and kept firing handguns in the direction of the police officers on the bridge.<sup>240</sup> She then sent a distress call that there were officers in danger and in need of assistance, which triggered the events that led to the shootings.<sup>241</sup>

Officer Dupree's testimony supported Officer Hunter's testimony that the police officers were responding to a female officer's distress call.<sup>242</sup> However, she could not identify the subjects who were allegedly shooting at the police, except that one was wearing a red shirt, another a black shirt, and a third was carrying a bag.<sup>243</sup> Nonetheless, the defense counsel used Officer Dupree's testimony to develop their theory during their closing argument.<sup>244</sup> They argued that what the indicted officers heard were a few broken words like "officers," "[t]hey're shooting at us,"

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236. See generally Brendan McCarthy, *Danziger Bridge Defense Paints Portrait of Justified Police Actions Amid Katrina Chaos*, TIMES-PICAYUNE (June 27, 2011), [http://www.nola.com/crime/index.ssf/2011/06/danziger\\_bridge\\_defense\\_paints.html](http://www.nola.com/crime/index.ssf/2011/06/danziger_bridge_defense_paints.html).

237. See Maggi & McCarthy, *supra* note 153.

238. Laura Maggi & Brendan McCarthy, *Danziger Bridge Police Shooting Survivor Says There Was No Warning or Provocation*, TIMES-PICAYUNE (June 29, 2011), [http://www.nola.com/crime/index.ssf/2011/06/danziger\\_bridge\\_police\\_shootin\\_1.html](http://www.nola.com/crime/index.ssf/2011/06/danziger_bridge_police_shootin_1.html).

239. Laura Maggi, *Testimony that Civilians had Guns on Danziger Bridge Could Be Used in Cops' Favor*, TIMES-PICAYUNE (Mar. 10, 2010), [http://www.nola.com/crime/index.ssf/2010/03/testimony\\_of\\_civilians\\_with\\_gu.html](http://www.nola.com/crime/index.ssf/2010/03/testimony_of_civilians_with_gu.html).

240. *Id.*

241. *Id.*

242. See *id.*

243. See Rawley, *supra* note 136.

244. See McCarthy, *supra* note 236.

and “down.”<sup>245</sup> Defense counsel pointed out that the indicted officers had been in the field for days with limited supplies, and that the distress call coupled with extreme stress led to the shootings.<sup>246</sup> They alleged that the distress call led the indicted officers to believe that they were entering a hostile zone in which their colleagues had been shot and potentially killed.<sup>247</sup>

Defense counsel asked the jury to consider the “disorder, chaos, and lawlessness” that consumed New Orleans after the storm as changing certain legal standards.<sup>248</sup> Officer Faulcon’s attorney, Paul Fleming, told the jury, “[t]hat doesn’t mean the rules change, but the perception changes. . . . What is considered reasonable gets looked at a little differently.”<sup>249</sup> The defense counsel argued that those officers already feared for their lives when they arrived at the bridge, like any reasonable person would, and were thus justified in their actions.<sup>250</sup> Fleming concluded, “[u]nfortunate and tragic does not mean unreasonable.”<sup>251</sup>

In response to the defense counsel’s closing argument, the federal prosecutors contended that it was the police officers, and not Hurricane Katrina, who were solely responsible for their wanton disregard for the law.<sup>252</sup> Regarding the police officers’ claim that they acted in self-defense out of fear of being shot at, a U.S. Assistant Attorney said “the only thing that James Brissette pointed at these officers was his back.”<sup>253</sup> The federal judge agreed with the prosecutors and emphasized that Hurricane Katrina was *no excuse* for the police department’s failure to collect evidence from the scene.<sup>254</sup> The court then cited specific instances

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245. Jordan Flaherty, *Post Katrina Racial Killings Trial Begins*, AL JAZEERA (July 4, 2011), <http://www.aljazeera.com/indepth/features/2011/07/2011738269853168.html>; see also Jervey Tervalon, *Katrina’s Bullets: Ronnie Greene on Police Violence*, L.A. REV. BOOKS (Aug. 28, 2015), <https://lareviewofbooks.org/article/katrinass-bullets-ronnie-greene-on-police-violence/#!>.

246. See McCarthy, *supra* note 236.

247. *Id.*

248. *Danziger Bridge Shooting Trial Guilty Verdicts Jury Finds Five Cops Guilty in Danziger Bridge Shootings, Cover-Up Sentencing Set for December 14*, LA. WEEKLY (Aug. 8, 2011), <http://www.louisianaweekly.com/danziger-bridge-shooting-trial-guilty-verdicts-jury-finds-five-cops-guilty-in-danziger-bridge-shootings-cover-up-sentencing-set-for-december-14/>.

249. *Id.*

250. See McCarthy, *supra* note 236.

251. See *Danziger Bridge Shooting Trial Guilty Verdicts Jury Finds Five Cops Guilty in Danziger Bridge Shootings, Cover-Up Sentencing Set for December 14*, *supra* note 248.

252. *Id.*

253. *Id.*

254. *Id.*

of corruption and evidence tampering, such as when Detective Lehrmann watched “as [a supervisor] kicked spent shell casings off the bridge.”<sup>255</sup>

After all of the parties’ legal counsel had finished their closing arguments, the judge instructed the jury as to their duty and the law.<sup>256</sup> On August 5, 2011, nearly six years after the shootings and after three days of deliberation, the jury found each of the accused police officers guilty of all twenty-five counts, inclusive of depriving of civil rights, using firearms to shoot innocent people, conspiring to obstruct justice, falsifying prosecution, planting a firearm, and making false statements to the FBI.<sup>257</sup>

Without the jurisdictional authority to bring murder charges, the federal government originally indicted the officers for violations under 18 U.S.C. §§ 241 and 242.<sup>258</sup> To prepare the jury for deliberations, the federal judge guided the jurors with several questions to determine if the elements of the crime had been met.<sup>259</sup> The first question the judge asked the jury to consider was whether the officers were acting under the color of the law.<sup>260</sup> The officers involved in the murders of James Brissette and Ronald Madison were always presumed to be acting under the color of the law, having sworn to the oath of office.<sup>261</sup> They were set up in the temporary police headquarters and responded to calls on the NOPD radio from their superiors within the police force.<sup>262</sup> All circumstances pointed to their acting as agents of the NOPD. Therefore, for both reasons, as agents/employees of the NOPD when the shootings occurred and as they took an oath to the profession, they were acting under color of the law.

The second inquiry posed to the jury was whether the police officers violated the civil rights of the people on the bridge.<sup>263</sup> Clearly, the tragic murder of those individuals was a blatant violation of the right to life guaranteed by the Fourth, Fifth, and Fourteenth Amendments.<sup>264</sup> That

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255. Allen Johnson Jr., *What Congress Wasn't Told*, NEW ORLEANS MAG. (May 2010), <http://www.myneworleans.com/New-Orleans-Magazine/May-2010/WHAT-CONGRESS-WASN-rsquoT-TOLD/>.

256. Jury Instructions, *United States v. Bowen*, No. 10-204 (E.D. La. Aug. 3, 2011), ECF No. 557.

257. *Danziger Bridge Shooting Trial Guilty Verdicts Jury Finds Five Cops Guilty in Danziger Bridge Shootings, Cover-Up Sentencing Set for December 14*, *supra* note 248.

258. Indictment, *supra* note 219.

259. *See* Jury Instructions, *supra* note 256.

260. *Id.*

261. *See* Indictment, *supra* note 219.

262. Maggi, *supra* note 130.

263. *See* Jury Instructions, *supra* note 256.

264. *See* Sun, *supra* note 42, at 1179 n.226 (“However, nothing in the relevant provisions suggests that the governor or any other official has the power to suspend constitutional rights or to circumvent normal criminal justice or judicial procedures. Indeed, the Louisiana statute specifically states that all actions taken pursuant to its provisions should be ‘in

raised the third question: whether the police officers acted willfully, “with specific intent” to do something the law forbids.<sup>265</sup> This third element, “specific intent,” was fulfilled because the victims were shot in the back while on the ground—making the firing upon and killing of these civilians both an intentional and willful deprivation of their right to be free from the use of unreasonable force by a law enforcement officer.<sup>266</sup>

That left the jury with the fourth inquiry—did the officers cause bodily harm?<sup>267</sup> Of the six victims in the Danziger shooting, two were killed and four were riddled with gunshot wounds.<sup>268</sup> Of the four gunshot victims, one suffered an amputation of her right arm as a direct result of the shootings.<sup>269</sup> Hence, the police officers on the Danziger Bridge violated the civil rights not only of the two people who were killed, but also of the other victims of the shootings who were injured.<sup>270</sup> The verdict of the case bolsters the conclusion that the victims were deprived of their constitutional rights when they were terrorized and shot on the Danziger Bridge.<sup>271</sup> In the end, the federal jury unanimously convicted all of the defendants, deciding that the police officers, acting on behalf of the city’s police department, willfully violated the civil rights of the victims on the Danziger Bridge.<sup>272</sup>

In summary, the jury found that the rogue New Orleans police officers violated their victims’ civil liberties in three ways. First, the police officers deprived their victims of their constitutional and civil rights to life by wrongfully shooting them. Second, they deprived their victims of their rights to liberty by falsely accusing them of a crime, wrongfully imprisoning one of them, and fabricating evidence (by planting a gun) against them.<sup>273</sup> Third, the officers deprived their victims

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accordance with the laws and constitutions of Louisiana and the United States.” (citing LA. STAT. ANN. § 29:7(B) (Supp. 2015)).

265. See Jury Instructions, *supra* note 25.

266. See Indictment, *supra* note 219.

267. See Jury Instructions, *supra* note 256.

268. See Indictment, *supra* note 219.

269. Angela A. Allen-Bell, *Bridge Over Troubled Waters and Passageway on a Journey to Justice: National Lessons Learned About Justice from Louisiana’s Response to Hurricane Katrina*, 46 CAL. W. L. REV. 241, 281 (2010).

270. Indictment, *supra* note 219.

271. *United States v. Bowen*, 799 F.3d 336, 340 (5th Cir. 2015).

272. See generally Brendan McCarthy, *Judge Imposes Stiff Sentences on 5 NOPD Officers Convicted in Danziger Shootings*, TIMES-PICAYUNE (Apr. 4, 2012, 11:00 PM), [http://www.nola.com/crime/index.ssf/2012/04/judge\\_imposes\\_sentences\\_on\\_5\\_n.html](http://www.nola.com/crime/index.ssf/2012/04/judge_imposes_sentences_on_5_n.html).

273. Parenthetically, violent crimes such as murder, attempted murder, and assault with a deadly weapon are generally within the purview of state law. As such, the rogue police officers were subject to state laws in addition to federal civil rights laws. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 524 (2011).



of life and liberty by actively conspiring to cover up their own unlawful actions.

Each police officer involved in the Danziger Bridge shootings was sentenced to serve time in prison.<sup>274</sup> On April 4, 2012, a federal judge issued severe sentences against the rogue police officers found guilty of shooting innocent people.<sup>275</sup> Robert Faulcon was sentenced to sixty-five years in prison for fatally shooting Ronald Madison in the back with a shotgun.<sup>276</sup> Anthony Villavaso received thirty-eight years for fatally shooting James Brissette.<sup>277</sup> Kenneth Bowen was sentenced to serve forty years for firing an automatic weapon at the Bartholomews.<sup>278</sup> And Robert Gisevius received forty years for firing at and wounding members of the Bartholomew family.<sup>279</sup>

Relating to the cover-up and lesser offenses, the judge gave the maximum sentences under the law.<sup>280</sup> Specifically, Jeffrey Lehrmann received a three-year sentence associated with his participation in the cover-up.<sup>281</sup> Michael Hunter was sentenced to eight years in prison.<sup>282</sup> Robert Barrios was sentenced to five years.<sup>283</sup> Ignatius Hill was sentenced to six years and six months in prison.<sup>284</sup> And Arthur Kaufman received six years for his involvement in orchestrating the cover-up.<sup>285</sup> Parenthetically, some of the police officers involved in the shootings who had earlier (in June of 2010) been indicted and charged with civil rights violations had previously pled guilty (in 2011).<sup>286</sup>

With the truth about Lance Madison's innocence revealed, the state dropped all its charges against him.<sup>287</sup> The case was closed, but the same

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274. *Bowen*, 799 F.3d at 340.

275. *Id.* at 339; Campbell Robertson, *Officers Guilty of Shooting Six in New Orleans*, N.Y. TIMES (Aug. 5, 2011), [http://www.nytimes.com/2011/08/06/us/06danziger.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/06/us/06danziger.html?pagewanted=all&_r=0).

276. *United States v. Bowen*, 969 F. Supp. 2d 546, 550 n.5 (E.D. La. 2013).

277. *Id.*

278. *Id.* The charges against Bowen for kicking Madison were thrown out due to lack of evidence. *Id.*

279. *Id.*

280. *Id.* at 612–15.

281. *Id.* at 613.

282. *Id.* at 612.

283. *Id.* at 613.

284. *Id.*

285. *Id.* at 550 n.5; Margaret Cronin Fisk & Allen Johnson Jr., *New Orleans Police Get Decades in Prison in Katrina Killings*, BLOOMBERG (Apr. 4, 2012, 7:13 PM), <http://www.bloomberg.com/news/2012-04-04/new-orleans-police-may-face-life-sentences-over-katrina-deaths.html>.

286. *Bowen*, 969 F. Supp. 2d at 612–13.

287. Michael Kunzelman, *Danziger Bridge Cop Witness Links Officer to 2nd Katrina Shooting*, NOLA (July 7, 2011, 5:42 PM), [http://www.nola.com/crime/index.ssf/2011/07/danziger\\_bridge\\_cop\\_witness\\_li.html](http://www.nola.com/crime/index.ssf/2011/07/danziger_bridge_cop_witness_li.html).

cannot be said for the physical and emotional wounds that the Bartholomew, Holmes, and Madison families suffered.<sup>288</sup> James Brissette and Ronald Madison lost their lives as a result of the shootings.<sup>289</sup> Members of the Bartholomew family were seriously and permanently maimed. Lance Madison lost his liberty and spent time in prison.<sup>290</sup>

Despite the convictions of the rogue police officers, in a twist of fate, those found guilty in the Danziger Bridge shootings requested a new trial.<sup>291</sup> This was based on alleged improper online postings by two former assistant U.S. attorneys, who had anonymously commented on cases they were prosecuting.<sup>292</sup> A federal judge noted that due to the online postings, it was possible that the Danziger verdicts could be overturned.<sup>293</sup> In fact, on September 17, 2013, U.S. District Judge Kurt D. Engelhardt, in a 129-page ruling, threw out the convictions and granted a new trial based on prosecutorial misconduct.<sup>294</sup> In addition, the court found several other irregularities—that cooperating defendants called to testify for the government had lied, that some defense witnesses had been intimidated from testifying, and that there were inexplicably gross sentencing disparities resulting from the government's plea bargains and charging practices.<sup>295</sup> Despite the court's ruling, many believed that such prosecutorial indiscretion was an insufficient cause to order a new trial and expected the police officers to serve out their sentences.<sup>296</sup>

The next episode in the case can only be labelled as bizarre. The fate of the rogue police officers would be decided by a panel of the U.S. Fifth Circuit Court of Appeals.<sup>297</sup> To be clear, the police officers who had been tried and found guilty of civil rights violations for shooting unarmed, innocent Katrina survivors on the Danziger Bridge while covering up

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288. Victim Impact Statements, *Bowen*, 969 F. Supp. 2d 546 (E.D. La. 2013).

289. *Bowen*, 969 F. Supp. 2d at 551.

290. Kunzelman, *supra* note 287.

291. Brielyne Neumann, *The 21st Century Online Carnival Atmosphere: Ethical Issues Raised by Attorneys' Usage of Social Media*, 27 GEO. J. LEGAL ETHICS 747, 750 (2014).

292. *Id.* at 749–50.

293. Paul Murphy, *Danziger Judge Wants Independent Investigation into Online Commenting Scandal*, WWLTV (Nov. 27, 2012, 5:01 PM), <https://www.wwltv.com/article/news/danziger-judge-wants-independent-investigation-into-online-commenting-scandal/289-346604026>.

294. Order and Reasons, *United States v. Bowen*, 969 F. Supp. 2d 546 (E.D. La. 2013) (No. 10-240), [http://media.nola.com/crime\\_impact/other/judge%20filing%20re%20bowen%20et%20al.pdf](http://media.nola.com/crime_impact/other/judge%20filing%20re%20bowen%20et%20al.pdf) (granting defendants' motion for a new trial).

295. *United States v. Bowen*, 799 F.3d 336, 339–40 (5th Cir. 2015).

296. *No Justice in New Orleans Danziger Bridge Case*, WASH. POST (Sept. 21, 2013), [https://www.washingtonpost.com/opinions/no-justice-in-new-orleans-danziger-bridge-case/2013/09/21/e8977754-2239-11e3-b73caab60bf735d0\\_story.html?noredirect=on&utm\\_term=.d1a0ad72d019](https://www.washingtonpost.com/opinions/no-justice-in-new-orleans-danziger-bridge-case/2013/09/21/e8977754-2239-11e3-b73caab60bf735d0_story.html?noredirect=on&utm_term=.d1a0ad72d019).

297. *See Bowen*, 799 F.3d at 336.

their misdeeds were imprisoned and serving time. Yet, as previously noted, the federal judge threw out their convictions because of prosecutorial indiscretion. So, the fate of the police officers' incarceration was now in the hands of the appellate court. On August 18, 2015, a three-judge panel of the U.S. Fifth Circuit Court of Appeals affirmed in a 2-1 ruling that the convictions of the police officers should be vacated.<sup>298</sup>

On October 1, 2015, the government petitioned the U.S. Court of Appeals to rehear their petition en banc. The government asked the entire group of fifteen judges to affirm the convictions, arguing that the errors were legally harmless.<sup>299</sup> On February 23, 2016, the district court reported that the Fifth Circuit affirmed the district court decision to vacate the convictions and to order a new trial.<sup>300</sup> The motion for a rehearing was denied.<sup>301</sup>

With this new development, the federal government lost its convictions of the police officers and needed to weigh its options. Now the government had a decision to make, to retry the case or to negotiate a plea bargain. The government had spent many years and a considerable amount of money investigating and prosecuting these police officers.<sup>302</sup> To retry the case would cost more money and more valuable staff time, but there was justice to be done.<sup>303</sup> The newly-appointed U.S. Attorney for the Eastern District of Louisiana, Kenneth A. Polite, Jr., faced a set of no-win options.<sup>304</sup> He could expend more of the taxpayers' money to conduct a new, lengthy trial with stale evidence and cause further questioning of the integrity of his office. Or, he could accept the court's

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298. *Id.* at 360.

299. Petition of the United States for Rehearing En Banc, *United States v. Bowen*, No. 13-31018 (E.D. La. Oct. 1, 2015), ECF No. 00513216231; see John Simerman, *Government Makes Last-Ditch Plea to Restore New Orleans Officers' Convictions in Danziger Bridge Shootings, Hearing Is Sought to Reinstate Ex-Cops' Charges*, NEW ORLEANS ADVOCATE (Oct. 8, 2015, 2:55 AM), [http://www.theadvocate.com/new\\_orleans/news/article\\_aab8aa2a-3410-5e5c-8900-7adbe2ca55d3.html](http://www.theadvocate.com/new_orleans/news/article_aab8aa2a-3410-5e5c-8900-7adbe2ca55d3.html).

300. See *United States v. Bowen*, 813 F.3d 600, 601 (5th Cir. 2016) (reporting a straw poll of the appellate court judges where seven judges voted for and seven judges voted against granting the portion for a new trial, with one abstention).

301. *Id.*

302. See Andy Grimm, *A Decade After Danziger Bridge Shooting, Killings Still Cast a Shadow*, TIMES-PICAYUNE (Sept. 4, 2015, 3:41 PM), [http://www.nola.com/crime/index.ssf/2015/09/a\\_decade\\_after\\_shootings\\_danzi.html](http://www.nola.com/crime/index.ssf/2015/09/a_decade_after_shootings_danzi.html).

303. *Id.*

304. See *U.S. Attorney Kenneth A. Polite Delivers Remarks Following the Guilty Pleas and Sentencings of Five Former New Orleans Police Officers in the Danziger Bridge Shooting*, U. S. DEPT JUST. (Apr. 20, 2016), <https://www.justice.gov/usao-edla/pr/us-attorney-kenneth-polite-delivers-remarks-following-guilty-pleas-and-sentencings-five> (acknowledging the fact that a favorable outcome for all parties is unlikely to surface in such a situation).

vacating of the sentences, decide not to re-prosecute the case, and let the officers out of jail. Neither option would bring peace to the victims and their families or justice to the police officers.

The government settled for a measured form of justice that left neither side of the case completely satisfied. On April 20, 2016, the U.S. Attorney announced that there would not be a retrial because the government and the five officers, who were previously convicted in the case, negotiated a plea bargain.<sup>305</sup> Under the terms of the deal, the police officers' sentences would be dramatically reduced.<sup>306</sup> The four police officers who actually shot the civilians would now serve sentences ranging from seven to twelve years in prison—a great reduction from the original sentences that were handed down in 2012 which had ranged from thirty-eight to sixty-five years imprisonment.<sup>307</sup> The supervising officer who participated in the cover-up agreed to a reduced sentence of three years, less than half of his original six year sentence.<sup>308</sup> After conducting a hearing on the matter, the federal district judge accepted the terms of the deal.<sup>309</sup> As previously mentioned, several other police officers who were involved in the Danziger shootings pled guilty in 2011 to charges that included deprivation of civil rights, false prosecution, and obstruction of justice; however, these officers' sentences were not reduced.<sup>310</sup>

In commenting on the plea bargain, U.S. Attorney Polite noted that “serving as an officer is perhaps the most complex and difficult job in our society. At the same time, when individuals ignore their oath of office, and instead violate the civil rights of the public they are sworn to serve, they will be held accountable.”<sup>311</sup> There were critics from both sides who

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305. See Ken Daley & Emily Lane, *Danziger Bridge Officers Sentenced: 7 to 12 Years for Shooters, Cop in Cover-Up Gets 3*, TIMES-PICAYUNE (Apr. 20, 2016), [http://www.nola.com/crime/index.ssf/2016/04/danziger\\_bridge\\_officers\\_sente.html](http://www.nola.com/crime/index.ssf/2016/04/danziger_bridge_officers_sente.html) (last updated Apr. 21, 2016) (reporting that one remaining officer involved in the cover-up was not a part of the plea and may be re-tried); Ashley Fantz & Emanuella Grinberg, *Former New Orleans Officers Plead Guilty in Danziger Bridge Shootings*, CNN (Apr. 21, 2016, 8:25 AM), <https://www.cnn.com/2016/04/20/us/new-orleans-danziger-bridge-plea-deal/index.html>.

306. Daley & Lane, *supra* note 305.

307. *Id.*

308. *Id.*

309. Bill Chappell, *5 Former New Orleans Police Officers Plead Guilty Over Danziger Bridge Killings*, NPR (Apr. 20, 2016, 1:17 PM), <http://www.npr.org/sections/thetwo-way/2016/04/20/474973779/5-former-new-orleans-police-officers-enter-guilty-pleas-over-danziger-bridge-kil>.

310. *Id.*

311. U.S. Attorney Kenneth A. Polite *Delivers Remarks Following the Guilty Pleas and Sentencings of Five Former New Orleans Police Officers in the Danziger Bridge Shooting*, *supra* note 304.

questioned the plea deal.<sup>312</sup> Some critics found it disingenuous to equate the deal with police accountability, arguing that the plea deal was an insult to victims who deserved to have the crimes totally vindicated.<sup>313</sup> Others argued (and the judge agreed) that the officers should have been exonerated and the government reprimanded for overreaching and fabricating a case.<sup>314</sup> While the district court's acceptance of the plea bargain practically ended the Danziger Bridge shooting case, it did not silence the discussion on police misconduct in New Orleans following Hurricane Katrina.<sup>315</sup> In summary, the Danziger Bridge shootings raise serious questions about how to regulate police misconduct and provide some valuable lessons, especially relating to police use of lethal force, as presented next.

### C. Lessons

Incidents of questionable lethal force used by police occur nationwide all too often and are not limited to disaster situations, such as those following Hurricane Katrina.<sup>316</sup> Unfortunately, many of these incidents go unaddressed unless the federal government gets involved through a civil rights investigation.<sup>317</sup> The Danziger Bridge case is a positive anomaly in lethal force cases because it resulted in prosecution and punishment, which is a sad commentary on such cases in general. The Danziger case provides us with the following four lessons relating to the investigation and prosecution of a police officer who wrongfully uses lethal force.

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312. See Jarvis DeBerry, *Guilty Pleas Are Bittersweet End to Danziger Bridge Massacre Case*, TIMES-PICAYUNE (Apr. 21, 2016), [http://www.nola.com/crime/index.ssf/2016/04/danziger\\_guilty\\_pleas.html](http://www.nola.com/crime/index.ssf/2016/04/danziger_guilty_pleas.html); see also DeBerry, *supra* note 172. But see Ken Daley, *Danziger Bridge Officers Pleading Guilty, Face 7 to 12 Years for Shooting*, TIMES-PICAYUNE (Apr. 20, 2016), [http://www.nola.com/crime/index.ssf/2016/04/danziger\\_bridge\\_plea\\_agreement.html](http://www.nola.com/crime/index.ssf/2016/04/danziger_bridge_plea_agreement.html).

313. DeBerry, *Guilty Pleas Are Bittersweet End to Danziger Bridge Massacre Case*, *supra* note 312; DeBerry, *supra* note 172.

314. See Daley & Lane, *supra* note 305. The public comments and discussion following this article reveal the two varying viewpoints regarding the appropriateness of the reduced sentences. *Id.*

315. See, e.g., *United States v. Moore*, 708 F.3d 639, 643 (5th Cir. 2013); *United States v. McRae*, 702 F.3d 806, 810–11 (5th Cir. 2012); *United States v. Mitchell*, No. 10-284, 2012 WL 1118599, at \*1 (E.D. La. Apr. 3, 2012).

316. See AMNESTY INT'L, *supra* note 55, at 1–4; see also *McRae*, 702 F.3d, at 810–11; *Mitchell*, 2012 WL 1118599, at \*1.

317. See Lacks, *supra* note 19, at 401–06; see also John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 791–92 (2000) (discussing the role of federal prosecutors in cases of police misconduct).

### 1. Failure of Local Investigation and Prosecution

Lesson #1: *For a variety of reasons, local authorities may fail to effectively investigate and prosecute police officers' wrongful shootings of civilians, thus familial and community pressure may be needed to achieve a just outcome.*

The local law enforcement apparatus failed to discover the truth, initially having reported that the Danziger shootings were justified and later having failed to prosecute the wrongdoers due to a technicality. How did the federal government come to be involved in the investigation? It was the result of the persistence of the families of the victims and the continued insistence by the Black community.<sup>318</sup> One has to wonder what happens to innocent victims of police brutality who do not have persistent, influential, and financially capable family members to continuously push their cases and insist on their innocence. Without that pressure, the rogue police officers would not have been brought to justice. Worse, Lance Madison would still be in prison.<sup>319</sup>

### 2. The Legal Standard

Lesson #2: *The legal standard for justified use of lethal force should be narrowed, and courts should evaluate police lethal force incidents by the strict scrutiny standard.*<sup>320</sup>

The local police investigation of the Danziger shooting originally concluded that the shootings were justified because the officers were responding to being shot at by civilians.<sup>321</sup> As we now know, this finding was based upon a cover-up of the truth: The police had planted a gun at the crime scene.<sup>322</sup> As will be discussed later, the legal standard for assessing police accountability for the use of lethal force tilts in favor of

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318. *Some Justice at Last: But a Sorry Commentary on the State of Policing at the Time of Katrina*, THE ECONOMIST (Aug. 13, 2011), <http://www.economist.com/node/21525934> (reporting that the chief federal prosecutor noted, “[t]his case started with people getting framed, and those people have continued to work within that system, and they have been very patient and they put their trust in us, and that’s something that everyone on the government team took very, very seriously.”); Times-Picayune Staff, *Danziger Bridge Guilty Verdicts are Another Strike Against New Orleans Police*, TIMES-PICAYUNE (Aug. 5, 2011), [https://www.nola.com/crime/index.ssf/2011/08/danziger\\_jury\\_gives\\_new\\_orlean.html](https://www.nola.com/crime/index.ssf/2011/08/danziger_jury_gives_new_orlean.html).

319. DeBerry, *Guilty Pleas Are Bittersweet End to Danziger Bridge Massacre Case*, *supra* note 312.

320. For discussion of strict scrutiny and judicial standards of review, see *infra* Section III.A.

321. See Burnett, *supra* note 114.

322. See Berman, *supra* note 133.

granting immunity to the police.<sup>323</sup> If one views accountability from a pro-immunity perspective, the Danziger police officers might have gotten away with the unjustified killings. In that case, the defense counsel argued that the officers should be excused of their wrongdoings because of the chaos of the workplace, including unprecedented flooding and reports of widespread looting.<sup>324</sup> Fortunately, the federal judge presiding in the case did not accept this argument as a defense to the police misconduct.<sup>325</sup> Despite emergency conditions, the judge decided the shootings were not justified. To the contrary, difficult circumstances do not justify the indiscriminate taking of life.

### 3. Flaws in Federal Prosecution

Lesson #3: *The federal investigation and prosecution should be transparent, professional, and unbiased, and should yield just and fair results.*

Despite the need to hold rogue police officers accountable for misconduct, Danziger paints a dark picture of our legal system—that federal prosecution might be biased and tainted with injustices against the police officers. While the Danziger police officers’ actions were reckless and the cover-up and wrongful arrest of Lance Madison callous, they were entitled to a fair trial. Furthermore, some defended the police officers by arguing their actions were consistent with the Louisiana state government’s “state of emergency” directive to ensure the protection of property by shooting first and asking questions later, which is what they did.

### 4. Hard Time

Lesson #4: *Proven police officer misconduct for the wrongful use of lethal force should result in real jail time.*

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323. See discussion *infra* Section III.B.2.

324. Cf. *Feds Take up Investigation of Cops in Post-Katrina Bridge Shooting Case*, *supra* note 198.

325. See *Reynolds v. City of New Orleans*, Civil Action No. 05-4158 (E.D. La. Oct. 10, 2006) (granting summary judgment for defendants on the basis that forcing plaintiffs to evacuate pursuant to the mayor’s mandatory evacuation orders of August 28 and September 6 did not constitute a violation of plaintiffs’ constitutional rights), *aff’d*, 272 F. App’x 331 (5th Cir. 2008). Parenthetically, the federal courts should have critically questioned the constitutionality of Louisiana’s emergency statute as it applied to civil liberties—the federal court failed to see a constitutional question in a Katrina case that argued that the emergency order lasted too long and wrongfully prevented people from reentering New Orleans. *Id.*

Despite the arguable injustices due to prosecutorial indiscretions in Danziger, the rogue police officers served real time in prison. This has a direct and indirect impact on public safety. The direct effect is that it took rogue officers off of the streets. Indirectly, it serves as a warning to other would-be rogue officers that such wrongful behavior will be harshly prosecuted.

In summary, Danziger evidences the need for federal investigation of reported incidents of police officers' use of lethal force. We now move from the identification of the problems in the investigation and prosecution of lethal force incidents to proposing a statutory solution in the form of federal legislation, as provided in Part III.

### III. THE LIFE MATTERS INVESTIGATION ACT<sup>326</sup>

Utilizing the lessons learned from the Danziger Bridge case, it is herein proposed that Congress direct the Justice Department and the FBI to investigate and, where appropriate, to prosecute in the federal courts each and every incident in which a police officer uses lethal force. Parenthetically, this federal initiative is not exclusive of state, local, or organizational initiatives to achieve the same or similar goals.<sup>327</sup>

#### A. Proposed Statute

Recognizing the symbiotic relationship between the police and the community, a statutory solution seeks to achieve two interrelated goals: (1) to protect persons from the unjustified use of lethal force by police officers; and (2) to renew public confidence in the integrity of policing. To achieve these goals, it is proposed that Congress, the judiciary, and the Executive branches as well as state and local government adopt a legal standard of criminal culpability to promote the full and thorough investigation and, where appropriate, the prosecution of all incidents of police use of lethal force. The legislative solution is proposed herein as the Life Matters Investigation Act ("LMIA"), which provides as follows:

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326. This proposal reflects, in some parts, recommendations from others. See FINAL REPORT ON THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 7; AMNESTY INT'L, *supra* note 55. Cf. End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015) (seeking to end racial profiling and introduced in the House on April 22, 2015).

327. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (holding, *inter alia*, that a federal remedy exists for a violation of section 1983 even where a state remedy is available—that the intent of section 1983 was for concurrent jurisdiction to exist and state remedies need not be exhausted first).



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*RIGHT TO LIFE*

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WHEREAS, the right to life is fundamental and the United States Constitution mandates that the government protect that right from government deprivation without due process;

WHEREAS, incidents of police use of lethal force negatively impact the policing function, creating distrust between police and the communities they serve;

WHEREAS, existing federal legislation creates a federal crime when a state actor wrongfully takes the life of a citizen; and

WHEREAS, Section 5 of the Fourteenth Amendment gives Congress the authority to enact this legislation.<sup>328</sup>

THEREFORE, the following provisions are hereby enacted into law:

The Justice Department is hereby mandated to investigate each and every use of lethal force by local or state police officers, in non-custodial circumstances. This statute shall be subject to strict judicial scrutiny. The legal standard for assessing criminal liability shall be whether the police officer who used lethal force did so in self-defense and/or in response to imminent lethal harm to another. The police officer will be considered innocent until proven guilty. This statute does not change the mens rea element needed to prove a case of murder or involuntary manslaughter or other criminality under state or local laws.

The following presents and briefly describes the six provisions of the LMIA:

1. Declares Right to Life as Fundamental

The LMIA declares that the right to life is a fundamental right, and that the Constitution protects every person from loss of life resulting from deprivation by the state, without due process.

2. Subject to Strict Judicial Scrutiny

The LMIA requires that all laws, policies, and practices which permit the use of lethal force be subject to strict scrutiny judicial review, as the right to life is fundamental. This level of judicial review applies to laws and policies, practices, and individual acts.

3. Establishes a Federal Crime

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328. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

The LMIA congressionally establishes as a federal crime the use of unjustified lethal force by a police officer.

#### 4. Changes Legal Standard of Justification<sup>329</sup>

The LMIA amends the current legal test for what constitutes the justified use of lethal force by a police officer by limiting the use of lethal force to only two circumstances: self-defense and response to imminent lethal harm. It holds a police officer criminally liable for intentional, wanton, or grossly negligent shootings of people.<sup>330</sup> This new standard has two goals: (1) to reduce the number of incidents of unjustified use of lethal force by police; and (2) to hold police officers accountable for unjustified use of lethal force. To be clear, this standard does not mean that every incident of lethal force will result in a conviction, as every police officer is presumed innocent until proven guilty, even when a routine stop results in a lethal shooting.<sup>331</sup> This provision will be discussed in detail in the next section of this Article.

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329. Cf. U.S. Dept. of Justice, Att'y Gen. October 17, 1995 Memorandum on Resolution 14 (Attachment), Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (last updated March 8, 2017) <https://www.justice.gov/archives/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1>

The Department of Justice hereby establishes a uniform policy with respect to the use of deadly force in both custodial and non-custodial situations. . . . [T]he touchstone of the Department's policy regarding the use of deadly force is necessity. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time . . . .

Deadly force should never be used upon mere suspicion that a crime, no matter how serious, was committed, or simply upon the officer's determination that probable cause would support the arrest of the person being pursued or arrested for the commission of a crime. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

*Id.*; see also Olevia Boykin et al., Opinion, *A Better Standard for the Use of Deadly Force*, NY TIMES (Jan. 1, 2016), [http://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html?\\_r=0](http://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html?_r=0) (suggesting the adoption of a necessity rule—does not permit deadly force if non-deadly or less deadly alternatives are available and adequate to meet the threat).

330. The holding of a police officer criminally liable for a negligent shooting of a civilian is likened to manslaughter and is not currently available in the federal civil rights acts. Admittedly, it is a controversial proposal. See *Graham v. Connor*, 490 U.S. 386 (1989).

331. See, e.g., Flores & Shoichet, *supra* note 52; see also Crimesider Staff, *Philando Castile Case: Cop to be Tried in Minn. Traffic Stop Shooting*, CBS NEWS (Feb. 15, 2017, 6:17 PM), <https://www.cbsnews.com/news/philando-castile-case-cop-to-be-tried-in-minn-traffic-stop-shooting/> (reporting “a Minnesota judge . . . declined to dismiss charges against a police officer who shot and killed a black man during a . . . traffic stop, saying it's fair and reasonable for the case to go to trial” even when the driver was carrying a licensed firearm). Routine police stops are very important to the policing function. See, e.g., Hailey Branson-Potts, *After Oklahoma City Bombing, McVeigh's Arrest Almost Went Unnoticed*, L.A. TIMES

### 5. Broadens Federal Jurisdiction

The LMIA seeks to reaffirm or broaden federal authority to investigate local law enforcement infractions that result in death(s). As will be discussed in greater detail in the next section, the federal government is often both legally and functionally constrained from actively participating in the investigation and prosecution of police lethal force incidents.

### 6. Mandates Federal Involvement

The LMIA mandates the automatic federal investigation and, if appropriate, prosecution whenever a police officer shoots a person in non-custodial circumstances. This would ensure an independent, professional investigation and adjudication of all such matters. The LMIA responds to real and perceived conflicts of interest and inherent bias in local and state investigations and prosecution of police use of lethal force. Ultimately, this federal involvement adds more resources and would likely involve a more thorough investigatory process. It will hopefully renew public confidence in the justice system and in the policing function.

In summary, the LMIA seeks to reduce the number of unjustified police shootings, ensure independent investigation, and, where appropriate, result in the prosecution of unjustified police use of lethal force. Saving lives from unjustified government deprivation without due process is good public policy and is supported by several constitutional principles, as discussed in the next section. As the LMIA is controversial in the scope of its reach, the following section, III.B, presents the constitutional and policy arguments in favor of the proposed legislation. As will be described in greater detail, there are two key constitutional and policy arguments in support of adopting these statutory provisions. First, the LMIA reflects the constitutional and moral principle that the right to life is fundamental and that any state deprivation is subject to

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(Apr. 19, 2015, 3:00 AM), <http://www.latimes.com/nation/la-na-oklahoma-city-bombing-20150419-story.html> (reporting that during a routine police stop, police captured domestic terrorist Timothy McVeigh). Routine stops are dangerous to police officers, often resulting in police being shot and killed. *See, e.g.*, Sheldra Brigham, *Dash Cam Video Released of Oklahoma Officer Being Shot During Traffic Stop*, OKLAHOMA'S NEWS 4 (Jan. 3, 2017, 6:30 PM), <http://kfor.com/2017/01/03/dash-cam-video-released-of-oklahoma-officer-being-shot-during-traffic-stop/>; Emanuella Grinberg & Tony Marco, *San Antonio Officer Shot to Death during Traffic Stop*, CNN (Nov. 21, 2016, 12:04 PM), <http://www.cnn.com/2016/11/20/us/san-antonio-police-officer-killed/>; Jane Onyanga-Omara, *Police Officer, Suspect Shot in Texas Traffic Stop*, USA TODAY (Dec. 30, 2016, 7:02 AM), <http://www.usatoday.com/story/news/nation/2016/12/30/police-officer-suspect-shot-texas-traffic-stop/95991626/>. The Supreme Court has given police broad authority to strip-search an individual who have been arrested for any crime before admitting the individual to jail, even if there is no reason to suspect that the individual is carrying contraband. *See* *Florence v. Bd. of Chosen Freeholder*, 566 U.S. 318, 338–39 (2012).

strict judicial scrutiny. Second, the LMIA seeks to save lives by amending the legal standard for a police officer's use of lethal force by placing greater accountability on apparent police misconduct. Overall, the LMIA will enhance public confidence in law enforcement by addressing inherent anti-victim biases in the criminal justice system. The following section presents these two arguments in detail.

### *B. Arguments for LMIA*

Public policy supports the adoption of the LMIA to protect life and to avoid instances of unjustified use of lethal force by police officers. Illustrated by the Danziger Bridge case, the existing law relative to police use of lethal force has major deficiencies that the LMIA addresses.<sup>332</sup> The current lethal force law devalues life, unfairly protects rogue police officers, and promotes reckless or wanton shootings by police officers.<sup>333</sup> Equally problematic, the current law tilts the scales of justice and is weighted against the victim.<sup>334</sup>

To counteract these deficiencies, the LMIA reflects the constitutional principle that the right to life is fundamental relative to state deprivation and that such deprivation is prohibited if it is unjustified or without due process. The following analysis supports the thesis that where state actors wrongfully take a life, they violate the Constitution. This thesis is presented in two parts. First, it argues that the Constitution establishes a fundamental right to life against wrongful state deprivation. It does so by contending that the right to life was a founding principle of the U.S. Constitution, is expressly provided for in the Constitution, and has been recognized in U.S. Supreme Court decisions. Second, it argues that Supreme Court jurisprudence relating to police shooting cases misapplies constitutional principles and needs to be redirected to focus on the sanctity of life over the unintended protection of police misconduct.

#### 1. Fundamental Right to Life

First, the LMIA promotes the sanctity of life—recognizing that the right to life is fundamental and that any state deprivation without due process is unconstitutional. Parenthetically, while this principle might appear to be self-evident and uncontroversial, there is scarce Supreme Court case law to support it. Furthermore, when wrongful state

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332. See discussion *supra* Section II.

333. See discussion *supra* Section I.A.

334. See *Screws v. United States*, 325 U.S. 91, 91 (1945); *Bowling & Conte*, *supra* note 4.

deprivation goes unaddressed, great harm is done to law-abiding police officers, to the victims of these crimes, and to the policing function. Accordingly, unjustified use of lethal force by police officers is a wrongful infringement of the right to life and should be reviewed with strict judicial scrutiny. To be more explicit, while in criminal matters a police officer accused of an unjustified shooting of a person is innocent until proven guilty, the LMIA seeks to shift the burden of proof to the police officer who used lethal force to prove the force was factually justified, in response to a threat on his life or on the lives of others.

The thesis, developed herein, is that the right to life is fundamental as applied to protection against government infringement in the form of unjustified use of lethal force by police officers. As will be discussed in this section, this thesis is important, and not self-evident, for two reasons. First, to date, the Supreme Court has not expressly stated that there is a fundamental right to life that broadly applies across the constitutional spectrum.<sup>335</sup> Furthermore, the Court has not expressly stated that the right to life, relative to governmental infringement, is fundamental. Second, the U.S. Supreme Court, in establishing a legal standard for assessing the justification of police use of lethal force, has not adopted a right to life underpinning in its decisions.<sup>336</sup> As a result, the Court's jurisprudence diminishes life and fails to hold government actors criminally responsible for their wrongdoings.

Yet, there is textual, legal historical evidence and limited Supreme Court decisions that support the premise that the Constitution does, in fact, protect a fundamental right to life against wrongful state infringement. The following sources of authority present both textual and non-textual support for the thesis that the right to life, relative to governmental infringement, is fundamental<sup>337</sup>: (1) historical sources that

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335. See *infra* Section III.B.1.c. As there are many constitutional issues relating to the "right to life," such as those relating to abortion (right to privacy), euthanasia, and capital punishment, the following discussion does not focus on those important constitutional questions.

336. See discussion *infra* Section III.B.2.

337. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"); NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW (3d ed. 2005) (noting that the Supreme Court has extended fundamental rights to include the right to interstate travel, the right to parent one's children, protection on the high seas from pirates, the right to privacy, and the right to marriage); David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795 (1996); Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 2 (1989) (discussing three alternative sources

are the philosophical, legal, and moral underpinnings of the U.S. Constitution (hereinafter referred to as “founding principles”); (2) express provisions in the Constitution itself; and (3) U.S. Supreme Court decisions. These sources of evidence provide overwhelming authority for the proposition that the right to life is fundamental—when applied to governmental deprivation. Parenthetically, a fundamental right to life is also evidenced in international human rights principles and treaties adopted and ratified by the United States.<sup>338</sup>

*a. Founding Principles of the U.S. Constitution*

A brief legal history of the U.S. Constitution shows that the Founding Fathers believed that the right to life was fundamental relative to wrongful governmental infringement. The right to life is clearly recognized as fundamental in the most sacred statement of rights in U.S. history and uncontrovertibly, the cornerstone of our culture and value—the Declaration of Independence. On July 4, 1776, the Declaration, which was unanimously adopted by all thirteen colonies, proclaimed that *life* is a fundamental right: self-evident, inalienable, and endowed by the Creator.<sup>339</sup> Nearly two years earlier, on October 14, 1774,

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advanced for nontextual constitutional rights: history, natural rights, and the evolving consensus of society).

338. See, e.g., CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 56 (4th ed. 2006) (noting the European Court of Human Rights has ruled that under Article 2, states have three main duties: 1. a duty to refrain from unlawful killing; 2. a “duty to investigate suspicious deaths”; and 3. in certain circumstances, a positive duty to prevent foreseeable loss of life); *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 1 (1995); see also, AMNESTY INT’L, *supra* note 55, at 13 (“In its [UN’s] General Comment 6 on the right to life under the Covenant, the Committee stated that ‘The deprivation of life by the authorities of the State is a matter of the utmost gravity’ and that states must take measures to prevent arbitrary killing by their own security forces. All states must ensure compliance with international law and standards including the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials, Principle 9 of which states: ‘Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.’”).

339. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). See generally THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Bernard Bailyn, ed., 1993). Cf., European Convention on Human Rights art.

the First Continental Congress (the provisional government of the United States) also declared that citizens were “entitled to life.”<sup>340</sup> While conclusive evidence of the Founders’ belief that a limited right to life existed, there is more evidence that the Founders embraced this principle when they drafted the Constitution.

When drafting the Declaration and the Constitution, the Founders were undoubtedly aware that the English common law identified life as an inherent natural right, entitled to protection from wrongful governmental infringement—as explained in BLACKSTONE’S COMMENTARIES.<sup>341</sup> Blackstone noted that the “right of personal security” was composed of “uninterrupted enjoyment of . . . life” and that “[l]ife is the immediate gift of God, a right inherent by nature in every individual.”<sup>342</sup> He also emphasized that the government could not take a person’s life arbitrarily or without the express warrant of law.<sup>343</sup>

Furthermore, when drafting the Constitution, the Founders borrowed from various previously-established state constitutions that expressly provided that the right to life and/or the enjoyment of life was

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2, Nov. 4, 1950, E.T.S. No. 005 (protecting the right of every person to his or her life and imposing on the state, through its agents, to refrain from itself causing the deprivation of life and to investigate instances of alleged unjustified use of lethal force); *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. at 1–2; *OVEY & WHITE*, *supra* note 338 (noting the European Court of Human Rights has ruled that under Article 2, states have three main duties: 1. a duty to refrain from unlawful killing; 2. a duty to investigate suspicious deaths; and 3. in certain circumstances, a positive duty to prevent foreseeable loss of life).

340. DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (October 14, 1744) (enacted in response to the Intolerable Acts passed by the British Parliament) (“Resolved, N.C.D. 1. That they are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.”), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 398 (Charles C. Tansill ed., 1927), [http://avalon.law.yale.edu/18th\\_century/resolves.asp](http://avalon.law.yale.edu/18th_century/resolves.asp).

341. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*125.

342. *Id.* at \*129 (“The right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. 1. Life is the immediate gift of God, a right inherent by nature in every individual . . . . This natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority . . . .”).

343. *Id.* at \*129–30 (“The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law . . . . And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.”).

fundamental.<sup>344</sup> For example, in 1779, Founder and later President, John Adams, reported in the Massachusetts Constitution that “all men...have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives.”<sup>345</sup> Echoing almost verbatim, the Pennsylvania Declaration of Rights proclaimed “That all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty . . . .”<sup>346</sup> This was such a fundamental principle that the Founders did not believe it necessary to repeat it verbatim in the U.S. Constitution itself.

These proclamations were not empty rhetoric, but rather reflected the Founders’ personal beliefs that the right to life was fundamental. For example, Samuel Adams stated that “[a]mong the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property . . . .”<sup>347</sup> George Mason also expressed his belief in the right to life: “all men . . . when they enter into a state of society, [] they cannot, by any compact, deprive or divest their posterity; []namely, [] the enjoyment of life . . . .”<sup>348</sup> The Founders, including George Mason, who wrote the Virginia Declaration of Rights, were clearly influenced by the philosophies of John Locke. In 1689, Locke argued in his *Two Treatises of Government* that political society existed for the sake of protecting “property,” which he defined as a person’s “life, liberty, and estate.”<sup>349</sup> In *A Letter Concerning Toleration*, Locke elaborated on the relationship between the right to life and the limitations of government when he wrote that the magistrate’s power was limited to preserving a person’s “[c]ivil

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344. Many states’ constitutions have such a provision today. *See, e.g.*, V.A. CONST. art. I, § 1 (“[A]ll men . . . have certain inherent rights . . . namely, the enjoyment of life . . . .”); § 11 (“That no person shall be deprived of his life, liberty, or property without due process of law . . . .”).

345. MASS. CONST. pmbl. pt. 1, art. I (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting their property; in fine, that of seeking and obtaining their safety and happiness.”).

346. PA. CONST. of 1776, art. I (“I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”).

347. Samuel Adams, *Rights of the Colonists*, THE BOSTON PAMPHLET (1772), <http://www.revolutionary-war-and-beyond.com/rights-of-the-colonists-november-20-1772.html>.

348. GEORGE MASON, FINAL DRAFT OF THE VIRGINIA DECLARATION OF RIGHTS cl. 1 (1776).

349. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 87 (1689).



interests,” which he described as “life, liberty, health, and indolency of body; and the possession of outward things.”<sup>350</sup>

*b. Express Provisions Safeguarding the Right to Life*

So fundamental was the right to life that it, along with other such rights which the U.S. Supreme Court has deemed as fundamental over the years, is provided for in generality.<sup>351</sup> Yet, as will be discussed in detail later, while the Constitution does not expressly provide for the right to life, the Fourth Amendment comes close by protecting “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>352</sup> Later, the Fourteenth Amendment expressly provides that a state cannot deprive a person of life, without due process.<sup>353</sup>

Contemporary scholars must answer the question, if there was no fundamental right to life, why did the Founders expressly provide for constitutional safeguards to protect it? It appears clear that the right to life was fundamental in the minds of the Founding Fathers, so basic, so obvious a natural right that they did not expressly state it in a Preamble to the U.S. Constitution. Still, specific provisions in the U.S. Constitution seek to protect citizens’ lives from state deprivation, without due process.<sup>354</sup> Article I, Section 9, prohibits the federal and state governments from passing bills of attainder.<sup>355</sup> Article I, Section 10, prohibits the federal and state governments from passing *ex post facto* laws.<sup>356</sup> Amendment V expressly provides for the protection of life, *e.g.*

350. JOHN LOCKE, A LETTER CONCERNING TOLERATION 17 (1689).

351. *See supra* Section III.B.1.a.

352. U.S. CONST. amend. IV. Under the Fourth Amendment, the U.S. Supreme Court has evaluated whether police officers’ use of lethal force is an impermissible seizure. *See supra* Section III.B.1.

353. *Id.* amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

354. *See id.* art. I, § 9, cl. 3 (prohibiting the federal and state governments from passing bills of attainder). The Eighth Amendment has been used to challenge the death penalty as “cruel and unusual punishment.” *Id.* amend. VIII. And the Fourth Amendment has challenged police use of lethal force as an impermissible seizure. *Id.* amend. IV. *See* Paul Pauker, *The Constitution, Deprivation of Life, and Personhood*, AMERICAN THINKER (May 12, 2012), [http://www.americanthinker.com/articles/2012/05/the\\_constitution\\_deprivation\\_of\\_life\\_and\\_personhood.html](http://www.americanthinker.com/articles/2012/05/the_constitution_deprivation_of_life_and_personhood.html).

355. *See* U.S. CONST. art. I, § 9, cl. 3.

356. *See Id.* art. I, § 10, cl. 1.

the Grand Jury Clause (a person cannot be tried for an offense that carries the death penalty unless indicted by a grand jury) and the Double Jeopardy Clause (ordinarily, if a person has been tried and either acquitted or convicted and sentenced to imprisonment, the person cannot be tried again for the same offense and sentenced to death).<sup>357</sup> Furthermore, the Fifth and the Fourteenth Amendments' due process clauses, which apply to the federal and state governments, respectively, both provide two different types of protection: (1) procedural due process, which requires that before depriving a person of life, liberty, or property, the government must follow certain procedures; and (2) substantive due process, which requires that if depriving a person of life, liberty, or property, the government must have sufficient justification.<sup>358</sup>

Perhaps, the clearest constitutional provision protecting a person's life against state deprivation is found within the Fourteenth Amendment. To understand the purpose of this Amendment, we need to briefly review the legal history of the U.S. enslavement of people of African descent. It is abundantly clear that, prior to the Civil War, the Constitution protected the institution of enslavement and that Black people were not considered U.S. citizens.<sup>359</sup> Following the Civil War, the Reconstruction Amendments (13th, 14th, and 15th) sought to abolish legal enslavement and to establish and protect the citizenship rights of newly-freed Blacks. Realizing that Blacks needed federal protection, the Fourteenth Amendment provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process

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357. *See Id.* amend. V.

358. *Id.* amends. V, XIV.

359. Article 1, Section 2, Clause 3, or the Enumeration Clause or Three-Fifths Compromise, provided: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." *Id.* art. 1, § 2, cl. 3. The "other Persons" were enslaved persons of mainly of African descent. Article 1, Section 9, provided: "The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." *Id.* art 1, § 9. This was a reference to the importation of enslaved persons of African descent. Article IV, Section 2, Clause 3, or the Fugitive Slave Clause, required: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom Service or Labour may be due." *Id.* art. IV, § 2, cl. 3; *see also* *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that "a negro, whose ancestors were imported into [the U.S.], and sold as slaves," whether enslaved or free, was not and could not be a U.S. citizen).

of law. . . .”<sup>360</sup> After Reconstruction, when the Confederate leadership regained power in the South, southern legislatures enacted “black codes,” state-sanctioned, racially-based controls on the lives, liberty, and property rights of Black people.<sup>361</sup>

Over the years, the Supreme Court has diminished the reach of the Fourteenth Amendment, but more recently has expanded it to include fundamental rights. With the end of Reconstruction, the Supreme Court in the *Slaughter-House Cases*<sup>362</sup> effectively limited the application of the Fourteenth Amendment to the Constitution to the federal rights, such as the right to interstate travel, but not state rights such as intra-state travel. At the time, federal rights of citizenship were few, and so the cases effectively limited protection pertinent to a small minority of rights. Three years later, in *United States v. Cruikshank*,<sup>363</sup> the Supreme Court ruled that the First and Second Amendments do not apply to state governments, further restricting the reach of the Fourteenth Amendment. However, beginning in the 1920s, a series of Supreme Court decisions interpreted the Fourteenth Amendment to “incorporate” most portions of the Bill of Rights, making these portions, for the first time, enforceable against the state governments.<sup>364</sup> In the 1940s and 1960s, the Supreme Court issued a series of decisions incorporating several of the specific rights from the Bill of Rights, so as to be binding upon the States.<sup>365</sup> Civil liberties that are protected against both federal and state governments’ infringements are now analyzed under the auspices of “fundamentality.”<sup>366</sup> More recently, in 2010, the Supreme Court incorporated the Second Amendment’s right to bear arms into the

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360. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

361. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

362. 83 U.S. 36 (1872).

363. 92 U.S. 542 (1875).

364. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (expressly holding that States were bound to protect freedom of speech). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000). Under Selective Incorporation, the Court used the Fourteenth Amendment Due Process and Equal Protection Clauses to “incorporate” individual elements of the Bill of Rights against the states. *Id.*

365. *Id.*

366. See *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir.1990) (“The test usually articulated for determining fundamentality under the Due Process Clause is that the putative right must be ‘implicit in the concept of ordered liberty’, or ‘deeply rooted in this Nation’s history and tradition.’”) (internal references omitted).

protection against state actions.<sup>367</sup> If a right is deemed to be fundamental, any law, policy, practice or action that abridges such a right is assessed by the courts under the more exacting standard of strict scrutiny, instead of the less demanding rational basis test. When the victim of police misconduct is a racial minority or other protected class, such action is extremely suspect.<sup>368</sup>

As the Fourteenth Amendment expressly grants Congress the authority to guarantee the effectiveness of the Amendment, Congress is authorized to enact the LMIA.<sup>369</sup> Hence, relevant to the enactment of LMIA, any state action that wrongfully infringes on the fundamental right to life is suspect and must be viewed from a strict scrutiny judicial perspective.

*c. U.S. Supreme Court Decisions Recognizing Life as Fundamental*

Another argument supporting the proposition that right to life is fundamental relative to state infringement is the Supreme Court's expansion of the rights it deems to be fundamental. Since 1925, the Court has expanded its list of unenumerated or fundamental rights, as civil liberties that are protected against both federal and state infringement. To establish when a right is fundamental, based on its past tests and formulations, the Court has looked to "history, legal traditions, and practices [to] provide the crucial 'guide-posts for responsible decision-making.'"<sup>370</sup>

Recently, the Supreme Court formulated a test for whether a right is fundamental in the landmark case of *Obergefell v. Hodges*.<sup>371</sup> In that case, the Court identified "four principles and traditions [that] demonstrate

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367. See *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010) (stating that the right to bear arms as a fundamental and individual right that will necessarily be subject to strict scrutiny by the courts).

368. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) and subsequent legislation/jurisprudence (U.S. federal anti-discrimination law protects groups of people with a common characteristic, from discrimination on the basis of that characteristic, including race, color, religion, national origin, and other such categories).

369. See U.S. CONST. amend. XIV, § 5.

370. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

371. 135 S. Ct. 2584, 2608 (2015) (holding the right to marry is fundamental as applied to same sex couples). "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution . . . it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect . . . guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements." *Id.* at 2598.

that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>372</sup> While two of these principles are specific to marriage, two are not. These principles provide a test to determine whether the right to life is also fundamental when applied to governmental infringement: (1) is the right to life inherent in the concept of individual autonomy; and (2) is the right to life a keystone of our social order?<sup>373</sup> As presented next, the answer to both questions is yes.

As evidenced above, the right to life, protected from wrongful government infringement, is a cornerstone of our social order, inherent to our concept of individual autonomy, and basis to our culture and traditions. In addition to the express provisions in the Constitution protecting the right to life, the U.S. Supreme Court has recognized the right to life in several, key cases. In *Ford v. Wainwright*,<sup>374</sup> where the Court held that the Constitution forbids the execution of the insane, it also expressly recognized the fundamental right to life, stating: “For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”<sup>375</sup>

In the context of high-speed police pursuits, the Court has rejected a Fourth Amendment approach and has instead undergone a Fourteenth Amendment right to life analysis. In *County of Sacramento v. Lewis*,<sup>376</sup> the parents of a motorcycle passenger killed in a high-speed police chase of a motorcyclist brought a Section 1983 claim (against the sheriff’s deputy who caused their son’s death) based on deprivation of their son’s substantive due process right to life.<sup>377</sup> While addressing a circuit split on the culpability level required to establish a Fourteenth Amendment violation in high-speed pursuit cases, the *Lewis* Court also specifically rejected a Fourth Amendment analysis.<sup>378</sup> Relying on *Graham v. Connor*, the Court explained that, under Section 1983, if a particular Constitutional Amendment “provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of

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372. *Id.* at 2599.

373. *Id.* at 2599, 2601.

374. 477 U.S. 399 (1986).

375. *Id.* at 409.

376. 523 U.S. 833 (1998).

377. *Id.* at 836–37.

378. The Court was presented with the question of whether deliberate or reckless indifference was enough to establish a Fourteenth Amendment violation, or whether the higher “shock the conscience” standard must be met. The Court held that the shock the conscience standard was applicable stating that “only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” *Id.* at 836.

substantive due process, must be the guide for analyzing these claims.”<sup>379</sup> But the Court reasoned that a police pursuit was neither a search nor a seizure and, therefore, does *not* fall under a Fourth Amendment analysis, but rather under the Fourteenth Amendment substantive due process right to life:

The Fourth Amendment covers only “searches and seizures,” neither of which took place here. No one suggests that there was a search, and our cases foreclose finding a seizure. We held in *California v. Hodari D.*, that a police pursuit in attempting to seize a person does not amount to a “seizure” within the meaning of the Fourth Amendment. And in *Brower v. County of Inyo*, we explained that “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.” We illustrated the point by saying that no Fourth Amendment seizure would take place where a “pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit,” but accidentally stopped the suspect by crashing into him. That is exactly this case.<sup>380</sup>

Thus, the Court reiterated a substantive due process right to life inherent in the Fourteenth Amendment, explaining that its prior cases have held the amendment to guarantee “more than fair process,” to include a “substantive sphere” which bars “certain government actions regardless of the fairness of the procedures used to implement them.”<sup>381</sup>

Sometimes, fundamental rights come into conflict with one another. In the case of *Roe v. Wade*,<sup>382</sup> the Court found that the right to privacy encompasses a woman’s decision of whether or not to terminate a pregnancy.<sup>383</sup> The Court recognized that if fetuses were considered persons under the Fourteenth Amendment, their right to life would be protected: “If this suggestion of personhood is established, the appellant’s

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379. *Id.* at 842.

380. *Id.* at 843–44 (citations omitted).

381. *Id.* at 840 (first quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); then *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

382. 410 U.S. 113 (1973).

383. *Id.* at 153–54.

case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."<sup>384</sup> Here, the Court identifies the right to life in a different context.

More on point with the use of lethal force, the Sixth Circuit United States Court of Appeals highlighted the Supreme Court's recognition of the fundamental right to life in *Garner v. Memphis Police Department*,<sup>385</sup> stating "[t]he right to life, expressly protected by the Constitution, has been recognized repeatedly by the Supreme Court as fundamental in the due process and equal protection contexts."<sup>386</sup>

These cases, taken together, indicate that the Supreme Court has recognized a fundamental right to life, to be protected against wrongful government infringement.

As presented above, the right to protection of life against state infringement meets the recent Supreme Court's criteria for what constitutes a fundamental right, as spelled out in *Obergefell* and other key fundamental rights decisions. Clearly, there is a constitutional basis for holding that there is a fundamental right to life that protects against wrongful governmental infringement. However, relative to right to life issues, in recent years, the Supreme Court has shied away from the Fourteenth Amendment's protection of the right to life. Relative to state's lawful infringement on life, the Eighth Amendment has been used to challenge the death penalty as "cruel and unusual" punishment.<sup>387</sup> Moreover, as already discussed, the Supreme Court has failed to use Fourteenth Amendment jurisprudence, but rather, has relied on the Fourth Amendment to assess police use of lethal force as an impermissible seizure.<sup>388</sup> This brings the discussion to the second support for the LMIA, that is, it reflects a needed change in the current Supreme Court jurisprudence relating to police shooting cases which misapplies constitutional principles and needs to be redirected to focus on the sanctity of life over the unintended protection of police misconduct.

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384. *Id.* at 156–57.

385. 710 F.2d 240, 246 (6th Cir. 1983), *aff'd*, Tennessee v. Garner, 471 U.S. 1 (1985).

386. *Id.* at 246–47 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (the fundamental rights 'to life, liberty and the pursuit of happiness'); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ('the fundamental human rights of life and liberty'); Roe v. Wade, 410 U.S. 113 (1973) (right to life protected by Fourteenth Amendment when fetus becomes viable)).

387. Attempts have been unsuccessful but execution of certain classifications of persons has been ruled unconstitutional. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 555, 578–79 (2005) (prohibiting the execution of minors); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting execution of mentally retarded criminals); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (prohibiting the death penalty for insane persons).

388. *See* discussion *infra* Section III.B.2.

## 2. Challenges Current Standard

Second, the LMIA responds to the following critique of the current doctrinal approach that the U.S. Supreme Court employs to assess the legality or justification of police use of lethal force. It argues that the Court's over-reliance on viewing these cases as "search and seizure" incidents under the Fourth Amendment is a misapplication that indirectly protects police misconduct. Contrary to past Court decisions, it is my contention that police unjustified use of lethal force is a wrongful infringement on the right to life and should be reviewed under the Fourteenth Amendment, with strict judicial scrutiny. Furthermore, according to the Fourteenth Amendment's Equal Protection Clause, heightened judicial scrutiny is especially appropriate when the intended victim of lethal force is a member of a protected class, such as a person who is a racial minority. This section reviews the constitutional and statutory protections of life against government infringement and shows how the Court has curtailed the investigation and prosecution of police use of lethal force incidents. Upon review, one must conclude that the current law relative to police use of lethal force is unacceptable as it often robs victims of police misconduct of the right to redress the taking of their lives.

As discussed, the right to life is fundamental and the Constitution provides for the protection of life against wrongful governmental intrusion. Pursuant to constitutionally granted authority, Congress has enacted legislation that serves to facilitate federal protection of the right to life against wrongful government actions. While there is no federal statute expressly governing the use of lethal force in the United States,<sup>389</sup> the Civil Rights Act of 1964 provides statutory provisions for criminal and civil actions against police misconduct.<sup>390</sup> To better understand the statutory protections, its specific provisions need explanation.

The Civil Rights Act provides for both criminal and civil liability for government actors who violate its provisions. For purposes of this Article, we are mainly concerned with the criminal liability aspects of the legislation. The Act provides federal jurisdiction over local or state infractions of people's civil rights, including the involvement of the Federal Bureau of Investigation, the Department of Justice, and the federal courts. It has resulted in some successful prosecutions for wrongful police use of lethal force, as described relative to the Danziger Bridge case. Under the Act, it is a criminal offense for an agent of the

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389. See AMNESTY INT'L, *supra* note 55, at 17.

390. See generally *Civil Rights Act of 1964*, HIST., <http://www.history.com/topics/black-history/civil-rights-act> (last updated Sept. 20, 2018).



government to *willfully* deprive someone of their life without due process.<sup>391</sup> As a result, anyone who, on behalf of the government, willfully deprives another of his constitutional right to life is criminally liable. The Code goes on to explain that if bodily injury results, the punishment for such an offense ranges, with up to ten years imprisonment.<sup>392</sup> If death results from the agent's actions, that agent may be "imprisoned for any term of years or for life, or both, or may be sentenced to death."<sup>393</sup> This statute makes clear that it is a federal crime for an agent acting on behalf of the government, such as a police officer, to intentionally kill a person, thereby depriving him or her of life without due process,<sup>394</sup> except if the life of the police officer or another is in danger. Additionally, the government can seek criminal liability against individual officers under 18 U.S.C. § 241 (conspiracy against rights).<sup>395</sup>

In *Screws v. United States*,<sup>396</sup> the U.S. Supreme Court greatly increased the government's (and its agents') immunity to liability for police misconduct. Under the Civil Rights Act, prosecutors must prove that an officer acted "willfully," and that he knew that what he was about to do was wrong but he did it anyway. In *Screws*, the U.S. Supreme Court narrowly construed the "willfully" language of the statute.<sup>397</sup> As previously noted, the narrowness of the Court's interpretation of the Act has been attributed to one of the reasons why the federal government (and likely state and local governments) has failed to investigate and prosecute allegations of wrongful police lethal force cases.<sup>398</sup> Relative to police use of lethal force, the provisions of the Civil Rights Act have been criticized as being ineffective and actually failing to result in

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391. 18 U.S.C. §242 (1996) ("This statute makes it a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S.").

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* §§ 241–242 (1996); see also *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP'T JUST., <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> (last updated Feb. 28, 2019).

396. 325 U.S. 91, 108–09 (1945).

397. *Id.* at 106–07. *Cf.* *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) (holding that a state government agency's failure to prevent child abuse by a custodial parent does not violate the child's right to liberty for the purposes of the Fourteenth Amendment); *County of Sacramento v. Lewis*, 523 U.S. 833, 855 (1989) (holding that a police officer does not violate Fourteenth Amendment substantive due process by causing death through reckless indifference to life in a high-speed chase aimed at apprehending a suspected offender).

398. See *Screws*, 325 U.S. at 91.

investigations and prosecutions.<sup>399</sup> Unfortunately, the data, as evidenced by a Justice Department report, shows that the current law fails to hold police officers accountable for wrongful use of lethal force.<sup>400</sup> Following the shootings of Trayvon Martin in 2012 and of Michael Brown in 2014, then-U.S. Attorney General Eric Holder called on Congress to lower the bar on the standard the Justice Department must meet to prosecute civil rights cases.<sup>401</sup> Under President Barack Obama, the Justice Department aggressively investigated police shootings.<sup>402</sup> What is clear is that, for various reasons, a police officer's actions performed in the line of duty are practically shielded from civil and criminal liability.<sup>403</sup>

Civil cases may be brought under 42 U.S.C. § 1983 and 42 U.S.C. § 14141. Claims under § 1983 can be filed *by citizens* for civil rights violations by persons acting under “color of law,” that is, police or other government officials.<sup>404</sup> Whereas § 14141 is a civil remedy available to the *government* against a law enforcement agency to correct “policies and practices that fostered the misconduct and, where appropriate, may require individual relief for the victim(s).”<sup>405</sup>

As the federal government is practically not investigating and prosecuting police use of lethal force, the local authorities have a duty to do so. The problem with that is that police departments and local prosecutors appear to be less likely to bring such investigations. This critique requires some background explanation. As the greater majority

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399. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 370 (2011).

400. See U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., FY 2014 PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION 20–21 (2014) (reporting that in cases brought in 2011, out of 10,000 complaints, only 224 officers were charged); Flanders & Welling, *supra* note 51.

401. See U.S. DEPT OF JUSTICE CIVIL RIGHTS DIV., *supra* note 400.

402. *Id.*

403. J. Michael McGuinness, *Law Enforcement Use of Force: Safe and Effective Policing Requires Retention of the Reasonable Belief Standard*, THE CHAMPION, May 2015 at 26, 27.

404. 42 U.S.C. § 1983 (1996) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”); Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 153 (1993); see also Barry C. Scheck, *Criminal Prosecution and Section 1983*, 16 Touro L. REV. 895 (2000).

405. 34 U.S.C. § 12601 (originally enacted as 42 U.S.C.A. § 14141); *Addressing Police Misconduct Laws Enforced by the Department of Justice*, *supra* note 395. This statute is the basis for the consent decrees between the Department of Justice and police departments across the country. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 14 (2009).

of such police lethal force incidents involve state and local (not federal) law enforcement officers, the use of lethal force is governed by individual state statutes and U.S. common law. In most states and under common law rules, police use of deadly force is lawful when the officer reasonably believes the subject poses a significant threat of serious bodily injury or death to themselves or others.<sup>406</sup> This also applies to prevent the escape of a fleeing felon when the officer believes escape would pose a significant threat of serious bodily injury or death to members of the public.<sup>407</sup> Some states have the use of deadly force statute included within a larger use of force statute; alternatively, some have it in a separate statute; while others list the statute as a “Justifiable Homicide” statute which applies to both law enforcement officers and private citizens.<sup>408</sup> However, several states and Washington, D.C., have failed to enact any statute on the use of lethal force.<sup>409</sup> None of the laws require that lethal force must be a last and only resort.<sup>410</sup>

As there is a death of prosecutions of police lethal force cases, we are compelled to reassess the Supreme Court decisions relative to these potential crimes. As previously discussed,<sup>411</sup> in key decisions, the U.S. Supreme Court has greatly hindered charges and claims against police officers for alleged wrongful actions. We continue with a review of the current Supreme Court jurisprudence on police lethal force cases and a discussion as to why the current doctrine is misguided.

As previously noted, the most recent, leading case in this area utilizes a Fourth Amendment “search and seizure” analysis and reasonableness test, in lieu of taking a Fourteenth Amendment “due process” (right to life) analysis and a strict scrutiny test.<sup>412</sup> It is my contention that the *Graham* decision and its “balancing act” doctrinal orientation to police lethal weapon cases is misguided. It views all lethal weapon cases as seizures, mildly protected by the Fourth Amendment<sup>413</sup> and not strictly protected by the Due Process Clause of the Fourteenth Amendment, under a fundamental right to life principle. This was a fatal

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406. See AMNESTY INT’L, *supra* note 55, at 2.

407. *Id.*

408. *Id.* at 2, 9, 21.

409. *Id.* at 2–3.

410. *Id.* at 21.

411. See *supra* Section I, Part B.

412. For a detailed discussion of the leading Supreme Court cases relating to the legal standard for prosecuting a police officer for use of lethal force in a non-custodial situation, see *supra* Section I.B.

413. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (“Where, as here, the excessive force claim arises in the context of an arrest . . . it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against unreasonable . . . seizures.’”).

constitutional misdirection and sets in motion a restrictive approach to judging police misconduct, unintentionally permitting wrongdoing to go unpunished. Viewing a police officer's lethal shooting of a person as the apprehension of a suspect and therefore a seizure under the Fourth Amendment fails to protect a person's right to life: it ignores other controlling principles of constitution law, and deprives the law of moral principles.

Under the current Supreme Court decisions, a police officer could legally shoot and kill an unarmed child if the officer reasonably believes (objectively assessed) that the child is a threat to the officer (or to another person). This would apply even where the child was thirty feet away from the officer and was walking away with his or her back facing the officer. These decisions are devoid of moral principles and disregard the sanctity of life. Unfortunately, it places the burden of proof on the (sometimes deceased) victim, to show that the officer's action was unjustified. A better approach, one based on "due process" and a fundamental right to life would place the burden on the police officer to prove, in a lethal shooting, that his or her action was justified. This does not undue the presumption of innocence because there is already a prima facie case of manslaughter.

Under the criminal statutes, the burden of proof is beyond a reasonable doubt.<sup>414</sup> By comparison, under the civil liability statutes, the standard is preponderance of evidence.<sup>415</sup> However, under both the civil and criminal statutes, the standard for assessing police use of lethal force is identical: "[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."<sup>416</sup> Therefore, when analyzing whether a life was wrongfully taken, as with other Fourth Amendment analysis, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced "against countervailing government interests."<sup>417</sup>

The *Graham* Court also applied the wrong standard of judicial review, using an intermediate balancing act, instead of a strict scrutiny standard. It wrongly confused what was at stake, that is, what the victim lost. While the Court clearly recognized the victim's loss of life, it equates the loss of life as a mere dysfunction of policing process, a seizure. That is, it wrongly treats all police stops as being custodial. Moreover, the intermediate test provides a prosecutor cover to avoid a thorough

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414. See generally W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 540–46 (2008).

415. *Id.*

416. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

417. *Id.* at 8.

investigation, which results in claims of police bias and victim anti-bias. It also results in public criticism of a failure to provide transparency in the investigation and prosecutorial process. That is, we do not know when a shooting is or is not justified until the completion of a thorough independent investigation and sometimes prosecution. The sheer fact that a state actor has taken a life, without due process, should be sufficient to warrant a federal investigation of the incident. The *Graham* Court unintentionally condones police shootings and provides a defense guidebook to protect such unfortunate incidences. Similarly, state statutes, although they vary considerably, take a parallel approach, resulting in a failure to provide federal investigations.<sup>418</sup> Under the LMIA, the *Graham* and *Screws* standards would be changed to allow for criminal prosecution for both willful as well as negligent actions by police that kill people.

By changing the doctrinal basis of judicial review of lethal force cases, the LMIA seeks to address inherent pro-police bias in the legal system and allegations of institutional racism against Black victims. There is a presumption of innocence, in blind support of police actions. When a police officer discharges his or her weapon resulting in a civilian's death, there is a case of the use of lethal force.<sup>419</sup> Typically, this matter is handled by local officials and is not reported to the federal or state governments.<sup>420</sup> Pursuant to typical policies and procedures, there is an internal investigation to determine whether the use of lethal force was justified or excessive.<sup>421</sup> If the use of lethal force is found to be justified, the matter usually ends with the results of the internal investigation.<sup>422</sup> If it is found to be excessive, the matter is referred to the local prosecutors for consideration.<sup>423</sup> If the prosecutor believes he or she can make a case, charges will be brought against the police officer.<sup>424</sup> This process raises the question of whether the criminal justice system is rigged to effectively protect all police officers' conduct, including the misconduct of rogue police.<sup>425</sup>

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418. See AMNESTY INT'L, *supra* note 55, at 2.

419. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1125 n.14 (2008).

420. *Id.* at 1127 n.22.

421. Robert M. Myers, *Code of Silence: Police Shootings and the Right to Remain Silent*, 26 GOLDEN GATE U. L. REV. 497, 505 (1996).

422. *Id.* at 505–06.

423. *Id.*

424. Even though prosecutors can often be reluctant toward charging police officers. *Id.* at 506; see also Akin, *supra* note 18, at 19.

425. See generally David A. Graham, *Most States Elect No Black Prosecutors*, THE ATLANTIC (July 7, 2015), [www.theatlantic.com/politics/archive/2015/07/american-prosecutors-are-incredible-whitedoes-it-matter/397847/](http://www.theatlantic.com/politics/archive/2015/07/american-prosecutors-are-incredible-whitedoes-it-matter/397847/).

Although the same use of force standard is applicable under both civil and criminal statutes, attaching criminal liability for police use of excessive force under 18 U.S.C § 242 is seemingly rare for two reasons. First, the burden of proof in criminal cases is much higher than it is in the corresponding civil cases. Second, in criminal cases, the government has the added burden of proving specific intent.<sup>426</sup> Under the LMIA, a federal investigation must be conducted even when the use of lethal force apparently resulted from a negligent act.

Hence, the LMIA strongly reflects the right to life as fundamental and protected against wrongful governmental acts. It supports the need for transparency in the investigation of police lethal force incidents. It also shifts the burden of proof for the taking of life to the police officer who used lethal force, and away from the victim. It serves to challenge the current Supreme Court's misguided reliance on viewing police lethal force cases in light of a Fourth Amendment seizure. It redirects the Court's jurisprudence to use strict scrutiny in these cases pursuant to the due process and right to life provisions of the Fourteenth Amendment.

The LMIA seeks to save lives by minimizing incidences of police unjustified use of lethal force and thereby improving the policing function. The LMIA represents a major change in federal involvement in the investigation and, where appropriate, the prosecution of alleged police misuse of lethal force. And it removes the restrictions that have resulted from past Supreme Court decisions relative to such matters. Clearly, there are many constitutional and policy reasons why such a change is both desirable and timely.

#### CONCLUSION

High-profile, controversial fatal shootings of civilians, especially young Black men, and the failures to investigate and, where appropriate, prosecute such incidents create distrust between the community and the police. Furthermore, the fact that these homicides go unaddressed raises a question about the morality and constitutionality of the legal standard for determining criminal culpability. To redress this matter, Congress should adopt the Life Matters Investigation Act (LMIA) and mandate federal investigations and, where appropriate, criminal prosecution of all fatalities resulting from police use of lethal force in noncustodial situations. In doing so, the law will achieve the vision of Dean Bell's Interest-Convergence Principle by addressing the interests of both

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426. Dane S. Ciolino, *The Mental Element of Louisiana Crimes: It Doesn't Matter What You Think*, 70 TUL. L. REV. 855, 888 n.143 (1996).

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disenfranchised communities and of police officers who need community support for effective policing.

The Constitution, public policy, and morality demand that whenever a police officer uses lethal force, the homicide must be investigated at the highest level. Clearly, the federal government, including the federal courts, has a solemn duty to act to protect a private citizen against all wrongful governmental invasions, especially the wrongful taking of an innocent person's life.<sup>427</sup> Requiring a thorough, federal investigation of police officer lethal shootings will serve to protect the right to life of all Americans, which is a fundamental, constitutional, and quintessential human right.

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427. See *Dombrowski v. Pfister*, 227 F. Supp. 556, 558 (E.D. La. 1964) (involving a civil rights criminal prosecution regarding segregation activities). Judge John Minor Wisdom, dissenting, argues: “[T]he crowning glory of American federalism . . . is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms . . . it makes federalism workable.” *Id.* at 570–71 (Wisdom, J., dissenting) (footnotes and emphasis omitted).