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How to Get Away with Murder: When a White Male Police Officer Kills a Young Black Person

Mitchell F. Crusto*

Abstract

Systemic racism in policing allows police officers, in particular white men, to continue to perpetuate the violent killings of Black people. This violence is not accidental. Rather it is intentional and allowed to continue due to a failure by the Supreme Court to hold police officers accountable. This Article explains how the doctrines of qualified immunity, willful intent, and objective reasonableness, as condoned by the Court, allow police officers to “get away with murder.”

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* J.D. Yale, M.A. Oxford; the Henry F. Bonura, Jr. Distinguished Professor of Law, Loyola University New Orleans College of Law. Special thanks to the John Mercer Langston Black Law Professors Organization and to Loyola law graduates Jillian Morrison and LaTreshia Hamilton. This Article reflects the author’s constitutionally-based support for the sanctity of Black lives. See Mitchell F. Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L.Q. 3 (2020) (arguing a Fifth and Fourteenth Amendments’ “right to life” rationale for protecting Black lives); Mitchell F. Crusto, *Right to Life: Interest-Convergence Policing*, 71 RUTGERS L. REV. 63 (2018) (arguing an Eighth Amendment, “capital punishment” jurisprudence rationale for prohibiting police use of lethal force).

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INTRODUCTION

Every day, millions of Americans fear for their safety due solely to the color of their skin.¹ Throughout this country, Black people are constantly subjected to acts of state-sanctioned terror when encountering the police because of systemic racism in policing. Customary, but flawed, police practices such as the use of lethal force, no-knock warrants, racial profiling, and stop-and-frisk programs are to blame.² This over-policing of Black people and other racial minorities³ often results in tragedy—the needless killing of innocent Black people followed by a failure to hold the police officers who killed them accountable.⁴ Recently, the United States faced an important

1. See Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS POLITICS (June 5, 2020, 12:00 PM), <https://perma.cc/U6UJ-JFML>; Amanda Graham et al., *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15:5 VICTIMS & OFFENDERS 549 (2020), <https://perma.cc/7FGV-9S2P> (reporting on a nationwide study that found that Black people are five times more likely to fear police brutality than white people).

2. See Terry Gross, *Policing Is An 'Avatar of American Racism,' Marshall Project Journalist Says*, NAT'L PUB. RADIO: FRESH AIR (June 10, 2020, 2:09 PM), <https://perma.cc/XY2J-A3YG> (noting that this modern American model of policing is “a relatively recent phenomenon”).

3. See Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, PROC. NAT'L ACAD. SCIS. (Aug. 20, 2019), <https://perma.cc/L6SV-ARYV>

Police violence is a leading cause of death for young men in the United States. . . . Black women and men and American Indian and Alaska Native women and men are significantly more likely than white women and men to be killed by police. Latino men are also more likely to be killed by police than are white men.

4. See Brittany Spanos, *Beyoncé, Rihanna, Alicia Keys: How to Get Killed While Black*, ROLLING STONE (July 13, 2016, 9:22 PM), <https://perma.cc/7P38-9VMF> (reporting on Mic's video that shows the faces of many Black victims of police shootings and features prominent Black celebrities calling for change).

test of systemic racism—the criminal trial of Derek Chauvin, the Minnesota police officer who killed George Floyd.⁵ While Chauvin was found guilty, the conviction and sentencing of an obvious abuser of police authority⁶ does not end the Black Lives Matter movement. It is obvious that some members of Congress believe that the crisis in policing has come to an end, as they have stalled⁷ the enactment of the George Floyd Justice in Policing Act of 2021.⁸

This Article argues that the struggle to protect the innocent lives of Black people does not end with the conviction of Derek Chauvin. This Article first describes how the United States Supreme Court has developed legal doctrines that effectively exonerate police officers who kill Black people. It then urges the nation to pressure Congress to enact police reform now. Furthermore, this Article recommends a front-end,

5. See Amudalat Ajasa et al., *Everything Is Riding on the Outcome: Minneapolis Braces for Chauvin Trial*, THE GUARDIAN (Mar. 28, 2021, 3:25 PM), <https://perma.cc/E429-NHED> (outlining the details of George Floyd's death and the charges against Derek Chauvin before Chauvin's trial).

6. See Amy Forliti et al., *Chauvin Guilty of Murder and Manslaughter in Floyd's Death*, AP NEWS (Apr. 21, 2021), <https://perma.cc/J5TJ-33RW>; Tim Arango, *Derek Chauvin Is Sentenced to 22 and a Half Years for Murder of George Floyd*, N.Y. TIMES (June 25, 2021), <https://perma.cc/5Y6A-2Q7Z> (reporting on the 22-page memorandum issued by the sentencing judge, which stated that Chauvin not only failed to uphold the mission of the Minneapolis Police Department, but also failed to treat Floyd as a human being).

7. See Sarah D. Wire, *George Floyd's Death Sparked Calls for Police Reform. Why Hasn't Congress Acted?*, L.A. TIMES (Apr. 20, 2021, 6:45 AM), <https://perma.cc/8T5M-3NJD> (explaining that, despite Congress's promise to address problems in policing, its attention moved elsewhere after failing to pass legislation in the Senate); *Biden Asks Congress for Police Reform Bill by George Floyd Death Anniversary*, REUTERS (Apr. 28, 2021, 11:08 PM), <https://perma.cc/392D-ZDJX> (reporting that President Joe Biden called upon Congress to send him the bill by the one-year anniversary of Floyd's death, which was May 25, 2021).

8. H.R. 1280, 117th Cong. (2021). The bill enhances existing enforcement mechanisms to remedy violations by law enforcement, including: (1) lowering the criminal intent standard—from willful to knowing or reckless—to convict a law enforcement officer for misconduct in a federal prosecution; (2) limiting qualified immunity as a defense to liability in a private civil action against a law enforcement officer; and (3) granting administrative subpoena power to the Department of Justice (DOJ) in pattern-or-practice investigations. *Id.*

transformative solution to police killings of Black people: a total ban on the police use of lethal force.⁹

I. POLICE ARE KILLING BLACK PEOPLE

Police use of lethal force faced sharp criticism following widely-publicized, controversial police killings of Black people, including children.¹⁰ Police officers kill Black people at rates more than twice those of whites.¹¹ Statistics show that when police kill people, it is most likely a white male police officer who fatally shoots a young Black man.¹² Such police killings of Black people are modern-day “lynchings”— state-sanctioned executions that, under the pretext of administering justice but without trial, torture and kill Black people, terrorizing them, thereby maintaining white supremacy in the economic, social, and political spheres.¹³

Police killings of Black people occur throughout this country in routine, unexpected circumstances. It can happen in the dead of night, while asleep in the privacy of one’s home, which is exactly what happened to Breonna Taylor.¹⁴ Taylor was killed

9. “Lethal force” includes the use of firearms, chokeholds, strangulation, stun guns (a.k.a. Tasers), rubber bullets, and attack dogs; aggravated assault and simple battery; and the injection of ketamine. *See* Memorandum, Att’y Gen., U.S. Dep’t of Just., Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995), <https://perma.cc/42UC-ENV3> (last updated Mar. 8, 2017) (defining deadly force as the use of any force that is “likely to cause death or serious physical injury”).

10. *See* Timothy Williams, *Study Supports Suspicion That Police Are More Likely to Use Force on Blacks*, N.Y. TIMES (July 7, 2016), <https://perma.cc/27E3-WTL8>.

11. *See* Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, THE GUARDIAN (Dec. 31, 2015, 3:00 PM), <https://perma.cc/6JJS-ECF5> (noting the “rate of death for young [B]lack men was five times higher than white men of the same age” out of the 1,134 people killed by police in 2015).

12. David J. Johnson et al., *Officer Characteristics and Racial Disparities in Fatal Officer-Involved Shootings*, PROC. NAT’L ACAD. SCIS. (Aug. 6, 2019), <https://perma.cc/CX4N-3TXJ>.

13. Historically, the most commonly utilized form of lynching was noose-hanging a Black man from a tree. *See generally* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 148 (1956) (“Here, then, was the way to produce the perfect slave: . . . develop in him a paralyzing fear of white men . . .”).

14. *See* Arian Campo-Flores & Sabrina Siddiqui, *Louisville Metro Council Bans No-Knock Warrants*, WALL ST. J. (June 11, 2020, 8:54 PM),

by eight of the several rounds fired by three white male plainclothes police officers who used a battering ram to force open the door while raiding her home pursuant to a no-knock warrant.¹⁵ Tragedy can also happen in the light of day for the world to witness, such as in Minneapolis on May 25, 2020, when the media broadcast a cell phone video of four police officers detaining George Floyd, who was handcuffed and lying face down in the street.¹⁶ One white male officer continuously pressed his knee to Floyd's neck while Floyd repeatedly cried out, "I can't breathe."¹⁷ The chokehold lasted for about nine minutes, resulting in Floyd's death.¹⁸

Black people can be shot by police officers for falling asleep in the drive-thru of a fast-food restaurant. Such was the case in Atlanta on June 12, 2020, when Rayshard Brooks, a twenty-seven-year-old Black man, was shot and killed by a white male police officer.¹⁹ Brooks was shot twice in the back as he ran away from two police officers. His crime was "driving" while intoxicated, despite being asleep and parked in a Wendy's drive-thru.²⁰ Or, as in another tragedy, a Black person can be killed by police officers simply for walking home, as when the police killed a young, unarmed Black man in Aurora, Colorado, on August 24, 2019.²¹ Elijah McClain, a twenty-three-year-old Black man, was stopped by white police officers.²² One officer

<https://perma.cc/6P57-6QXS>. See generally KIMBERLÉ CRENSHAW ET AL., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2016) (discussing varying forms of systemic violence against Black women, including fatal shootings, rape, and maiming).

15. Campo-Flores & Siddiqui, *supra* note 14.

16. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://perma.cc/839J-PX9P> (last updated Nov. 1, 2021) (reconstructing the death of George Floyd, who was arrested for allegedly paying with a counterfeit \$20 bill).

17. *Id.*

18. Amy Forliti, *Prosecutors: Officer Was on Floyd's Neck for About 9 Minutes*, AP NEWS (Mar. 4, 2021), <https://perma.cc/588D-BKQP>.

19. See Helena Oliviero & Christian Boone, *Who Was Rayshard Brooks?*, ATLANTA J.-CONST. (June 14, 2020), <https://perma.cc/5JNK-98AU>.

20. *Id.*

21. See Stephanie Guerilus, *After Elijah McClain Was Killed by Police, a Petition Signed by More Than 2M Seeks Justice*, GRIO (June 24, 2020), <https://perma.cc/V58Y-UWCX>.

22. *Id.*

placed McClain into a carotid hold, cutting off the flow of oxygen to his brain.²³ Paramedics gave McClain ketamine to sedate him, and the officers held him down for fifteen minutes as McClain went into cardiac arrest. McClain was declared brain dead on August 30, 2019.²⁴

The police shooting of an eighteen-year-old Black man, Michael Brown Jr., in Ferguson, Missouri on August 9, 2014, followed by the acquittal of his shooter, white Ferguson police officer Darren Wilson, again made the world aware of the systemic racism in America's police forces.²⁵ Police killings of Black people tend to have psychological impacts on the community at large. These impacts are especially traumatic when the law fails to prosecute a police officer who commits egregious acts against vulnerable Black citizens. For example, on November 22, 2014, in Cleveland, Ohio, twenty-six-year-old white police officer Timothy Loehmann shot and killed Tamir Rice, a twelve-year-old, unarmed, Black child playing in a playground.²⁶ Loehmann was not indicted for his crime.²⁷

In addition to the terror that Black people face when interacting with police officers, they must also fear white people acting under the pretext of the law. For example, near Brunswick, Georgia on February 23, 2020, Ahmaud Arbery, a Black man, was jogging when two white men, claiming they acted as civilian law enforcement, shot and killed him.²⁸ Similarly, on February 26, 2012, in Sanford, Florida, a seventeen-year-old Black child named Trayvon Martin was

23. *Id.*

24. *Id.*

25. See Nicholas Cannariato, 'Hands Up, Don't Shoot' Examines What Led to Ferguson and Baltimore Protests, NAT'L PUB. RADIO (Aug. 1 2019, 1:59 PM), <https://perma.cc/H79Y-AF4Z>.

26. See Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://perma.cc/WVJ7-HASY>.

27. See Associated Press, *Grand Jury Declines to Indict Cleveland Officer in Fatal Shooting of 12-year-old Tamir Rice*, L.A. TIMES (Dec. 28, 2015, 3:00 PM), <https://perma.cc/C4PZ-2DPN>.

28. See Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Nov. 24, 2021), <https://perma.cc/GX2Q-F7HV>; see also Richard Fausset, *Three Men Sentenced to Life in Prison in Arbery Killing*, N.Y. TIMES (Jan. 7, 2022), <https://perma.cc/6YMQ-9NDE>.

killed by George Zimmerman, a white man and self-appointed “neighborhood watch coordinator.”²⁹

Police use of lethal force against Black people compels an examination of the legality and the morality of the practice. It raises disturbing questions about racial animus, systemic racism, and institutional racism against Black people.³⁰ However, more disturbing is that police officers who kill people, particularly Black people, are judged by a legal standard that makes those officers unaccountable for using lethal force. This raises the question: Under the United States Constitution, do Black lives matter?

II. HOW DO POLICE GET AWAY WITH KILLING BLACK PEOPLE?

The Constitution expressly safeguards the sanctity of life against governmental killings.³¹ Consequently, the United States Supreme Court has severely prohibited the Government’s right to take a person’s life, specifically vis-à-vis the Court’s death penalty jurisprudence, under the Cruel and Unusual Punishment Clause of the Eighth Amendment.³² However, both state and local governments still authorize police officers to use lethal force while policing, permitting a police officer to act as prosecutor, judge, jury, and executioner. A shocking statistic shows that police officers have fatally shot more people in the last eighteen months than the total number of people executed by the states via capital punishment in the last forty-four years.³³

Police officers who kill Black people are rarely prosecuted and convicted—while police officers fatally shot roughly one thousand people annually from 2005 to 2015, only fifty-four

29. See Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012, 10:48 AM), <https://perma.cc/5VPC-WNEV>.

30. *Id.*

31. See U.S. CONST. amend. V; *id.* amend. XIV, § 1 (“No state shall . . . deprive any person of life . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

32. See U.S. CONST. amend. VIII (“[C]ruel and unusual punishments [shall not be] inflicted.”).

33. *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (2020), <https://perma.cc/9KDM-F9A8>.

officers were charged with a crime during that same period.³⁴ Some state statistics are equally shocking; from 2015 to 2020, police in Georgia fatally shot 182 people, while only one Georgia officer was charged with murder.³⁵ Further, the few police officers who were convicted or pled guilty to a fatal shooting received an average of four years of jail time, and sometimes only weeks.³⁶ These startling facts raise the question, how do the policies and practices that authorize police officers to use lethal force pass constitutional scrutiny?

A careful analysis of the law provides a grim reason that accounts for this reality: the U.S. Supreme Court has adopted three doctrines—willful intent, qualified immunity, and objective reasonableness—that, when combined, grant police officers near-absolute immunity from criminal liability for homicides committed while policing.

First, the Court raised the bar for police culpability for homicide by requiring an intent to violate a victim’s civil rights. In 1945, in *Screws v. United States*,³⁷ the Court held that the Civil Rights Act required a showing of intent to violate federal rights, rather than just a generalized “bad purpose.”³⁸ As a result, to prevail in a civil rights case, the claimant must prove the defendant’s specific intent to deprive a victim of a constitutional or federal right.³⁹ Hence, due to *Screws*’ precedent, the current federal laws fail to promote federal investigations and prosecutions of wrongdoers when police officers use lethal force to kill Black people.

34. Matt Ferner & Nick Wing, *Here’s How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), <https://perma.cc/RN5S-S55G>; Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <https://perma.cc/QG5M-DZTT>. See U.S. DEP’T 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).

35. See, e.g., Eric Levenson, *What Georgia Law Says About When Police Can Use Deadly Force*, CNN (June 15, 2020, 3:22 PM), <https://perma.cc/37JM-467C> (“From 2015 to 2020, police in Georgia have shot and killed 182 people, according to The Washington Post’s Fatal Force tracker. In that time, only one Georgia officer has been charged with murder.”).

36. See Kindy & Kelly, *supra* note 35.

37. 325 U.S. 91 (1945).

38. *Id.* at 107.

39. *Id.* at 103.

The second doctrine was introduced in 1967. In *Pierson v. Ray*,⁴⁰ the Court introduced the doctrine of “qualified immunity,”⁴¹ which allows police officers to avoid personal liability when being sued for civil rights violations under § 1983.⁴² The Court restricted such liability so long as a police officer acted in “good faith” and believed that the law authorized his or her conduct.⁴³ In 1982, in *Harlow v. Fitzgerald*,⁴⁴ the Court held that an official, even when acting maliciously and violating a person’s constitutional rights, is *immune* from personal liability, unless the claimant could show that the right was “clearly established.”⁴⁵ Most importantly, in *Harlow*, the Court pronounced that qualified immunity had a *preemptive procedural* role, one that denied a claimant’s right to proceed in federal court.⁴⁶ In 1987, in *Anderson v. Creighton*,⁴⁷ the Court held that when an officer of the law conducts a search and violates the Fourth Amendment, that officer is entitled to qualified immunity if the officer proves that a reasonable officer could have believed that the search constitutionally complied with the Fourth Amendment.⁴⁸ One study concluded that qualified immunity “has become a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights.”⁴⁹

Lastly, police officers are protected by the Court’s doctrine of “objective reasonableness”—the rebuttable presumption that the officer believed at the time of the killing that his or another’s life was at risk. In 1985, with *Tennessee v. Garner*,⁵⁰ the Court

40. 386 U.S. 547 (1967).

41. *Id.* at 555.

42. *Id.*

43. *Id.*

44. 457 U.S. 800 (1982).

45. *Id.* at 818.

46. *Id.* at 457. In 2001, the Court held that a ruling on a qualified immunity defense must be made early in the trial court’s proceeding, because qualified immunity is a defense to stand trial, not merely a defense from liability. See *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

47. 483 U.S. 635 (1987).

48. *Id.*

49. See Andrew Chung et al., *Special Report: For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 6:03 AM), <https://perma.cc/3CZJ-X6MA>.

50. 471 U.S. 1 (1985).

found the use of deadly force to prevent escape was an unreasonable seizure under the Fourth Amendment, in the absence of probable cause that the fleeing suspect posed a physical danger.⁵¹ In doing so, the Court set forth instances in which an officer's use of deadly force is reasonable, based on "the totality of the circumstances," weighing the nature of the intrusion of the suspect's Fourth Amendment rights against the government interests that justified the intrusion.⁵² Four years later, in *Graham v. Connor*,⁵³ the Court held that the lower court had incorrectly applied a test that focused on an officer's subjective motivations.⁵⁴ Instead, the Court held that the standard should be whether a police officer used an *objectively unreasonable* amount of force under a Fourth Amendment "search and seizure" analysis.⁵⁵ In its decision, the *Graham* Court provided the basis for what constituted reasonableness, asserting that it applied to what is reasonable "under the circumstances."⁵⁶ The Court held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁵⁷ As such, the *Graham* Court's inquiry requires analyzing the totality of the circumstances from the officer's perspective.⁵⁸ As a result, the *Graham* decision is the prevailing standard for determining whether a police officer's use of force is excessive or justified—whether a police officer reasonably believed his or her life, or the life of another, was being threatened at that time.

Combined, the Court's adoption of the doctrines of willful intent, qualified immunity, and objective reasonableness makes it nearly impossible to successfully prosecute a police officer for

51. *Id.*

52. *Id.* at 9.

53. 490 U.S. 386 (1989).

54. *Id.* at 396.

55. *Id.* at 399.

56. *Id.* at 396.

57. *Id.*

58. *Id.*

using lethal force while policing.⁵⁹ Hence, the Court's current jurisprudence on police accountability creates unequal protection by tilting the scales of justice in favor of the perpetrator and against the victim, especially when the victim is Black. Such a lack of accountability of deadly force results in negative consequences—injustice for the victims and their families,⁶⁰ harm and fear for future victims,⁶¹ and increased risk for police officers.⁶²

CONCLUSION

As a result of Supreme Court doctrines, Black lives do *not* matter. By failing to hold police officers accountable for taking the lives of innocent people, the Supreme Court continues to support systemic racism. In respecting the sanctity of Black lives, this Article supports a ban on the police authority to use lethal force, except in true self-defense.

59. Tom Jackman & Devlin Barrett, *Charging Officers With Crimes Is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020), <https://perma.cc/U37S-URCV>.

60. *No Accountability for Police Shootings*, EQUAL JUST. INITIATIVE (Sept. 17, 2018), <https://perma.cc/XC56-62FH>.

61. See generally Maquita Peters, *Being Black in America: 'We Have a Place in This World Too'*, NAT'L PUB. RADIO (June 5, 2020, 5:04 AM), <https://perma.cc/SAM4-P6LB>.

62. Lawrence Rosenthal, *Police Violence Is Mostly Rooted in Fear. Ignoring That Makes Reform Harder.*, NBC NEWS (June 12, 2020, 4:30 AM), <https://perma.cc/S23H-HCF2>.