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Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases

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NEARSIGHTED AND COLORBLIND: THE PERSPECTIVE PROBLEMS OF POLICE DEADLY FORCE CASES

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ABSTRACT

In dealing with the recently publicized instances of police officers' use of deadly force, some reform efforts have been focused on the entities that are central to the successful prosecutions of police—the prosecutor and the grand jury. Some have suggested special, independent prosecutors for these cases so that the process of deciding whether to seek charges against police officers remains untainted by the necessary cooperative relationship between the police department and the prosecutor's office. Others have urged more transparency in the grand jury process so that the public can scrutinize a prosecutor's efforts in presenting evidence for an indictment. Still others would like to change the grand jury process entirely—by allowing defense attorneys to participate or giving individual grand jurors more control over the proceedings. While there is merit to all of these approaches, this Article maintains that so long as the legal standard only allows for the prosecution of police when the officers are "unreasonable" in using force, which focuses on a moment of the suspect-victim's "dangerousness," there will not be much change in the success of prosecuting police for the use of deadly force. The persistent problem at the core of prosecuting police for the use of deadly force is that society has not developed norms of acceptable police conduct, and to the extent that any norms do exist in societal views of appropriate law enforcement, they are built upon a foundation of racial biases that all in society unfortunately share. The answer to this dilemma, then, cannot solely focus on removing the conflicted prosecutor or granting more autonomy to the grand jury. To truly curb police misconduct, at least part of the solution must require a shift in perspective. It requires correcting the nearsighted view of reasonable police behavior so that the focus includes norms of conduct taken before an officer gets to the point of making a decision to kill. Further, the solution also requires correcting the colorblind view of deadly force cases by confronting the existence and persistence of racial bias in views on dangerousness and criminality. Prosecutors and grand jurors have roles to play in properly bringing charges against officers that have acted outside of their appropriate roles. But, until those appropriate police roles are normalized and racial bias is confronted, even the most well meaning prosecutor and the most searching grand jury may have difficulty reaching a just result in police deadly force cases.

CONTENTS

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I. INTRODUCTION

It makes perfect sense that during an historic period in which the United States is paying heightened attention to police officers' use of deadly force, reform efforts would be focused on the entities that are central to the successful prosecutions of police—the prosecutor and the grand jury. Some have suggested special, independent prosecutors for these cases so that the process of deciding whether to seek charges against police officers remains untainted by the necessary cooperative relationship between the police department and the prosecutor's office. Others have urged more transparency in the grand jury process so that the public can scrutinize a prosecutor's efforts in presenting evidence for an indictment. Still others would like to change the grand jury process entirely—by allowing a defense attorney to participate or by giving individual grand jurors more control over the proceedings. While there is merit to all of these approaches, this Article maintains that so long as the legal standard only allows for the prosecution of police when the officers are "unreasonable" in using force, which focuses on a moment of the suspect-victim's "dangerousness," there will not be much change in the success of prosecuting police for the use of deadly force.

The persistent problem at the core of prosecuting police for the use of deadly force is that we, as a society, have not developed norms of acceptable police conduct, and to the extent that any norms do exist in our societal views of appropriate law enforcement, they are built upon a foundation of racial biases that all in society unfortunately share. The answer to this dilemma, then, cannot solely focus on removing the conflicted prosecutor or granting more autonomy to the grand jury. To truly curb police misconduct, at least part of the solution must require a shift in perspective. It requires correcting the nearsighted view of reasonable police behavior so that the focus includes norms of conduct taken before an officer gets to the point of making a decision to kill. Further, the solution also requires correcting the colorblind view of deadly force cases by confronting the existence and persistence of racial bias in views on dangerousness and criminality.

II. THE NEARSIGHTEDNESS OF THE REASONABLENESS STANDARD FOR POLICE USE OF FORCE

One of the biggest obstacles in prosecuting police officers is the reasonableness standard used in the deadly force analysis. Several others have criticized the reasonableness standard. Some say that the standard can lead to disparate outcomes.[1] Others say that it is arbitrarily applied.[2] What one set of prosecutors or

[1] Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da (comparing number of deadly police shootings with cases brought and officers convicted under reasonableness standard).

[2] *See, e.g.*, Victor E. Kappeler, Ph.D, *How Objective is the "Objective Reasonableness" Standard in Police Brutality Cases?*, E. KY. U. POLICE STUD. (Dec. 10, 2013), http://plsonline.eku.edu/insidelook/how-objective-%E2%80%9Cobjective-reasonableness%E2%80%9D-standard-police-brutality-cases.

grand jurors may think was a reasonable use of force, another group may think is unreasonable. Of course, a disparity in outcomes is always a potential problem whenever discretion is employed in a situation—reasonable minds tend to disagree on what actions were actually appropriate. For that reason, this Article does not argue that the biggest difficulty with the deadly force standard is simply that it is a reasonableness standard. Rather, this Article argues that the main weakness with the deadly force standard is that applying the standard depends on a nearsighted view of police interactions with individuals and assumes police behavior norms that society simply does not have.

Merriam-Webster dictionary describes "norm" as, "A principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior."[3] In order to know whether an officer has acted reasonably, one must consider how reasonable officers respond to a similar situation. In other words, this analysis must identify the norms of the group that regulate acceptable behavior. The problem is that there does not yet exist such a shared set of norms. Therefore, instead of examining the overall reasonableness of an officer's engagement with an individual, the law only calls for an assessment of the moment when the officer used deadly force. The problematic nature of this nearsighted approach to reasonableness becomes more evident after taking a closer look at the development of the reasonableness standard for police use of deadly force cases.

In the 1985 case of *Tennessee v. Garner*, the Supreme Court considered "the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon."[4] In that case, two police officers were dispatched to investigate an ongoing home invasion.[5] One of the officers spotted the suspect, Edward Garner, fleeing across the backyard of the targeted home.[6] Although the officer testified that he was "reasonably sure" that Garner did not have a weapon, the officer shot Garner in the back of the head as he began to climb over a fence.[7] The officer explained that he felt convinced that if he did not shoot, Garner would escape.[8] Garner died at the hospital.[9] The Court, analyzing the claim of excessive force using the Fourth Amendment, held that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[10] In this particular case, the Court determined that the deadly force was unreasonable because the officer did not have probable cause to believe that the

[3] *Norm*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/norm (last visited Feb. 24, 2017).

[4] Tennessee v. Garner, 471 U.S. 1, 3 (1985).

[5] *Id.*

[6] *Id.* at 4.

[7] *Id.* at 3-4 ("In using deadly force to prevent the escape, [the officer] was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that '[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.'").

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.* at 3.

unarmed Garner posed any danger to officers or the public.[11] The Court did not, however, condemn the use of deadly force altogether. But, it did at least seem to be creating a norm of police behavior that was different from the then-existing common law.

The common law of the time allowed for police to use any amount of force—even deadly force—to apprehend a feeling felon.[12] The *Garner* Court clearly established a new rule: "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[13] Of course, to apply that rule, there must be a shared understanding of what it means for a suspect to be "nondangerous." The Court, however, expressed what could have been adopted as norms, or expectations, of police reasonableness during seizures or people. In discussing fleeing suspects, the Court expressed the applicable values this way:

> It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.[14]

With these words, the Court established that preventing escape is not more important than preserving the life of the suspect. Deadly force, then, is reserved solely for the immediately dangerous suspect. Of course, the focus of today's disputes in police use of force cases is whether a suspect, even an unarmed one, *appeared* immediately dangerous to an officer. The current situation is the result of how the Supreme Court developed—or failed to develop—the norms against the use of deadly force following *Garner*.

When thinking about whether a police officer's actions are reasonable, an important consideration is what police officers ideally should do in a situation. This is the normative stance that the Supreme Court took in *Garner*—the Court thought about how it wanted police to behave and decided that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[15] In coming to this decision, the Court looked at the norms and practices of policing at the time and determined:

> The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases.[16]

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[11] *Id.* at 21.

[12] *Id.* at 12.

[13] *Id.* at 11.

[14] *Id.*

[15] *Id.* at 11.

[16] *Id.* at 10-11.

Today's problem is that, beyond what was discussed in *Garner* in the 1980's, there is no uniform, shared set of norms for police behavior. Policing is decentralized, and communities are not privy to, nor do they usually have input into, police training methods.[17] There is no widely accepted and shared set of rules regarding the use of force that police officers must follow in encounters with individuals.[18] This lack of norms was compounded by the development of the reasonableness standard that came four years after *Garner* in the 1989 case *Graham v. Connor*.[19]

In *Graham*, the Supreme Court explicitly held, "[*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[.]"[20] When a party claims excessive police force, determining the reasonableness of the police action will "be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[21] The Court has elaborated that this reasonableness inquiry "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[22] Ultimately, the reasonableness of a police officer's use of force will turn on the particular officer's point of view, judged against the actions of a "reasonable officer"—one who does not act with excessive force. And, of course, a reasonable officer only would use force against an immediately dangerous suspect. Therefore, the question for prosecutors and grand jurors to grapple with in deciding whether it is appropriate to indict a police officer is whether that particular officer was reasonable in his or her belief that the suspect was actually posing an immediate threat to the lives of officers or the public at the time that the officer took the suspect's life.

This may seem like an assessment that anyone could make. Any person should all be able to look at a situation and decide whether it was reasonable to think that a person was dangerous. However, there are two problems with this assessment. First, it focuses the moment of inquiry on just the instant when the officer decides to kill and asks one to consider how dangerous the alleged perpetrator appeared at that time. By not zooming out and assessing the entirety of the situation, beginning with the officer's decision to approach and method of engagement, the "reasonableness" assessment has gotten away from the norm advanced in *Garner*—that it is better for

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[17] William Francis Walsh et al., *Decentralized Police Organizations*, ENCYCLOPAEDIA BRITANNICA ONLINE (2017), https://www.britannica.com/topic/police/Decentralized-police-organizations. *See, e.g.*, Danika Worthington, *Community Calls for More Involvement and Greater Clarity in Denver Police Use-of-Force Policy*, DENVER POST (Jan. 28, 2017), http://www.denverpost.com/2017/01/28/denver-police-use-of-force/.

[18] *Police Use of Force*, NAT'L INST. JUST. (Nov. 29, 2016), https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx.

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

[20] *Id.* at 395 (emphasis in original).

[21] *Id.* at 396 (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).

[22] *Id.* at 397 (citing Scott v. United States, 437 U.S. 128, 137-39 (1978); *Terry*, 392 U.S. at 21).

an officer to let a suspect go free than to take that suspect's life. This nearsighted approach is at least part of the reason why there is such widespread disagreement and controversy when another news story breaks about a police officer killing someone. Was that person reaching for a gun or not? Could the officer have done something else? Did the person seem threatening? The entire focus is on a highly fact intensive moment of what was happening when the officer pulled the trigger rather than pulling back from the scene and discussing what the officer should have done. The second problem is that, when assessing the instantaneous moment when the officer decides to kill, the understanding of "dangerousness" is colored by individual biases regarding race, but the reasonableness inquiry makes no room for acknowledgement of that bias.

III. THE PROBLEMATIC COLORBLIND APPROACH TO REASONABLENESS

In *Tennessee v. Garner*, the Court never mentions the race of the victim of police deadly force. The decision tells the entire story about the use of force without any identifying descriptors. Perhaps one can argue that ignoring race is appropriate in a Supreme Court decision that is focused on when deadly force is appropriate rather than societal views on criminality. However, even if one thinks that the Supreme Court's blindness to race is excusable in this case, research indicates that race certainly plays into determinations of dangerousness—an assessment that the Court's standard of reasonableness requires.[23] Therefore, the story of who Garner was and whom officers saw when they approached Garner is important. The significance of race was not lost on the parties in the case. Both the Brief for the Appellant (the State of Tennessee) and the Brief of the Petitioner (the Memphis Police Department) describe the scene that the officer saw:

> As he approached the back corner of the house, the officer heard a rear door slam and saw with the aid of a flashlight, the figure of a black male crouching next to a fence thirty (30) to forty (40) feet away. The officer was unable to ascertain whether the man was armed.[24]

From the officer's point of view, he was approaching a black and possibly armed man. The potential racial bias that this description raises was not lost on the opposing side and was prominently featured in its briefs.

The Brief for the Appellee-Respondent (Garner's father) sets forth the scene in this manner:

> Edward Eugene Garner, a fifteen-year-old black, was shot and killed by a Memphis police officer on the night of October 3, 1974. He was an obvious juvenile; slender of build, he weighed between 85 and 100 pounds and stood only five feet and four inches high.[25]

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[23] *See Terry*, 392 U.S. at 30.

[24] Br. for the Appellant, Tennessee v. Garner, 471 U.S. 1 (1984) (No. 83-1035), 1984 WL 566018, at *3; *see also* Brief of Pet'rs, *Garner*, 471 U.S. 1 (No. 83-1070), 1984 WL 566026, at *4.

[25] Br. for Appellee-Resp't, *Garner*, 471 U.S. 1 (Nos. 83-1035, 83-1070), 1984 WL 566020, at *1.

A fuller picture of Edward Garner presents him as a slight, unarmed teenager who was running away with just about $10 worth of money and jewelry in his pocket.[26] With such a description of Garner, the "dangerousness" level drops significantly. Further, both the Appellee-Respondent and his Amicus Curiae, the Florida Chapter of the National Bar Association, recognized that when Garner's race was added to the picture, it was necessary to talk about racial discrimination in policing.[27]

In the Appellee-Respondent's brief, several pages are dedicated to what is titled "The Memphis Custom: Racial Discrimination."[28] The brief recounts proffered evidence regarding data on those killed by police officers in Memphis between 1969 and 1976 and discusses the conclusions drawn by expert,Dr. James J. Fyfe, a former New York Police Department lieutenant and training officer.[29] According to the Appellee-Respondent,

> [t]he data reveal that there are significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as the result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects. Between 1969 and 1976, blacks constituted 70.6% of those arrested for property crimes in Memphis but 88.4% of the property crime suspects shot at by the Memphis police. In contrast, the percentage of black violent crime suspects shot at by Memphis police was closely proportionate to their percentage in the violent crime arrest population: 85.4% and 83.1%, respectively.[30]

Dr. Fyfe analyzed this data to discern the racial disparities involved in the likelihood that a suspect of a certain race would be shot by police. His conclusions were stated as follows:

> [C]ontrolling for differential racial representation in the arrest population, black property crime suspects were more than twice as likely to be shot at than whites (4.33 per 1000 black property crime arrests; 1.81 per 1000 white property crime arrests), four times more likely to be wounded (.586 per 1000 blacks; .1113 per 1000 whites), and 40% more likely to be killed (.63 per 1000 blacks; .45 per 1000 whites).[31]

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[26] *Id.* at *9.

[27] *See id.* at *96-104; Br. of Amicus Curiae for the Resp't-Appellee, *Garner*, 471 U.S. 1 (Nos. 83-1035, 83-1070), 1984 WL 566023, at *2-13.

[28] Br. for Appellee-Resp't, *supra* note 25, at *21-31.

[29] *Id.* at *22-23. The Appellee-Respondent's brief also acknowledges that the district court rejected Dr. Fyfe's conclusions for failing to "specify the actual number of blacks arrested and/or convicted for alleged 'property crimes' as compared to whites during this period." *Id.* at *27. The Appellee-Respondent criticized the district court for basing this decision on "unsupportable considerations." *Id*. at *26.

[30] *Id.* at *23-24 (citing data collected and provided by the Memphis Police Department as defendant in Wiley v. Memphis Police Dept., No. C-73-8 (W.D. Tenn. June 30, 1975)).

[31] *Id.* at *24.

The Appellee-Respondent's brief goes on to explain that Dr. Fyfe also examined the types of situations that led to police shootings. Dr. Fyfe's findings were described in this manner:

> Dr. Fyfe's analysis of the shooting incidents between 1969 and 1976 described by the Memphis Police Department to the Civil Rights Commission showed a dramatic disparity between the situations in which whites were killed and those in which blacks were killed. Of the blacks shot, 50% were unarmed and nonassaultive, 23.1% assaultive but not armed with a gun, 26.9% assaultive and armed with a gun. Of the whites shot, only one (12.5%) was non-assaultive, two (25%) were assaultive but not armed with a gun, and five (62.5%) were armed with a gun.
>
> Based on this data, Dr. Fyfe concluded that, during the period in question, Memphis police were far more likely to shoot blacks than whites in non-threatening circumstances and that the great disparity in blacks shot by Memphis police officers is largely accounted for by the policy allowing the discretionary shooting of non-dangerous fleeing felony suspects. Between 1969 and 1976, Memphis police killed 2.6 unarmed, non-assaultive blacks for each armed, assaultive white.[32]

Dr. Fyfe's observations paint the picture of a police department acting out the type of bias that implicit bias scholars see at play throughout the various stages of the criminal justice process. Of course, what is underlying all of these observations is that race matters when discretion is at play in determining whether an individual is dangerous.

The Florida Chapter of the National Bar Association's amicus brief in the *Garner* case also tracked these racial disparities in police officers' decisions to kill. As its first argument, the Florida Chapter stated, "The Racially Neutral Common Law Fleeing Felon Statute Which Confers Unlimited Discretion on Police Officers in Determining When a Non-Dangerous, Fleeing Felon Should Be Shot Is Racially Discriminatory as Applied."[33] The brief goes on to reiterate much of the data on police use of force that was given in the Appellee-Respondent's brief. However, the Florida Chapter also added national data on the racially discriminatory nature of police shootings. The brief explains:

> Nationwide data also show that a larger number of blacks become civilian fatalities at the hands of police than whites. Non-whites constituted between 47 and 50 percent of the fatally injured. Although blacks constituted approximately 10-11 percent of the total American population in 1964 and 1968, one study shows blacks constituted 28 percent of total arrests and 51 percent of total civilian deaths.[34]

Although the Florida Chapter set forth this argument in order to claim an Equal Protection violation, the Supreme Court does not address race at all in its *Garner* decision establishing the reasonableness standard for police officers' use of deadly

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[32] *Id.* at *25-26.

[33] Br. of Amicus Curiae for the Resp't-Appellee, *supra* note 27, at *2.

[34] *Id.* at *8.

force. The *Garner* Court attempts to establish the norm that an officer would be unreasonable in using deadly force against a fleeing, unarmed, nondangerous suspect. However, by failing to acknowledge the role that race may play in determining whether someone is dangerous, the Court ignored the fact that the same racial bias that plays into policing can infect the decisions made by prosecutors and grand jurors in assessing the reasonableness of police force. Implicit bias research instructs that all people should be aware of the role of unconscious racial bias on their perceptions.

A. Implicit Bias

Scholars and criminal justice activists have begun to study the effects of implicit bias in the criminal justice system. When discussing racial bias, implicit bias "describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways."[35] Using the Implicit Association Test,[36] researchers have concluded that the majority of Americans tested carry implicit negative attitudes toward blacks and associate blacks with negative stereotypes.[37] When applied to the criminal justice system, researchers have begun testing how implicit racial biases affect the decisions of police, prosecutors, judges, and jurors.[38] At any discretionary point in the criminal justice process, implicit bias has the opportunity to work to the disadvantage of black individuals.[39] This undoubtedly includes the point at which the criminal process often starts—an encounter with the police. Therefore, if officers, like the rest of society, carry an implicit bias against black individuals, it stands to reason that the officers will more often see such individuals as possible criminals. Thus, officers will be more on guard and prone to use violence against those individuals. In turn, when judging the officer faced with a black threat, police departments, prosecutors, jurors, and general society also often see the officer's actions as reasonable. This is because those persons, often subconsciously, buy into the story that the black person was a threat to the officer, often without even realizing that their implicit biases cause them to think this way. The racially-biased view of criminality and dangerousness is evident in the crime

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[35] Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012).

[36] The Implicit Association Test (IAT) comes in the form of an online test that "measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)." *About the IAT*, HARVARD.EDU, https://implicit.harvard.edu/implicit/iatdetails.html (last visited Mar. 12, 2017).

[37] *See* Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 101-02, 105 (2002); *see also* Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 359-63 (2007).

[38] *See* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 187-89 (2010); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195-96 (2009); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006-09 (2007); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007); Smith & Levinson, *supra* note 35, at 797.

[39] *See* Smith & Levinson, *supra* note 35, at 805-21.

statistics often touted to support law enforcement efforts focused in minority communities.

B. The Role of Statistics and Rhetoric

Statistics demonstrate that African Americans are overrepresented in the criminal justice system. A recent study by the Brennan Center for Justice revealed that blacks are more likely to be arrested in almost every city for almost every type of crime.[40] At least seventy police departments across the nation arrested black people at a rate ten times higher than non-black people.[41] African Americans make up 37% of the U.S. prison population and almost 36% of the jail population in the United States, far beyond their 13% of the national population.[42] While many blacks read into these numbers a level of unfairness in the criminal justice system, polls suggest that a majority of whites see the criminal justice system as largely fair concerning race.[43] A Gallup poll administered in 2013 showed that when asked if the American justice system is biased against black people, 68% of black Americans said yes, while 26% said no.[44] In contrast, whites' views of the criminal justice system were almost exactly the opposite—with only 25% of whites saying the system is biased and 69% saying there is no bias against blacks in the criminal justice system.[45] If the majority opinion is that the system is fair and not biased against blacks, then the only explanation for the racial disparities seen in arrest and incarceration rates is that blacks in fact commit more than their fair share of crime and are, thus, justly punished for it. In this way, such statistics feed into the rhetoric that blacks are more likely to be criminals, which fuels the implicit bias against them when determining whether they are dangerous. Research bears out the effects of these statistics.

Studies show that Americans over-attribute criminal activity to blacks. A 2014 study that the Sentencing Project conducted showed that when asked about burglaries, illegal drug sales, and juvenile crimes, whites overestimated the percentage of those crimes committed by African Americans by as much as 30%.[46] Across races, people overestimated black participation in violent crime by over 10%.[47] This perception stands even in the face of information that, if given more attention, cuts against assumptions of criminal behavior being a black community

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[40] JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 17 (2015).

[41] *Id.*

[42] *Id.* at 12 fig.1. See U.S. CENSUS BUREAU, *State & County QuickFacts*, https://www.census.gov/quickfacts/ (last visited Mar. 12, 2017), for U.S. demographic information.

[43] *See* Frank Newport, *Gulf Grows in Black-White Views of U.S. Justice System Bias*, GALLUP (July 22, 2013), http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx.

[44] *Id.*

[45] *Id.*

[46] NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES, 13-14 (2014).

[47] *Id.*

dilemma. For instance, when considering arrests, statistics show that African Americans are almost four times more likely to be arrested for selling drugs and almost three times more likely to be arrested for possessing drugs.[48] One could, and people often do, infer from this data that blacks must be the main sellers and users of illegal drugs.[49] However, a little-discussed statistic also shows that whites are actually more likely to sell drugs than other races and are equally likely to consume them.[50] Clearly, there is an issue with racial disparity in law enforcement practices rather than simply a problem of crime within the black community alone. The same racially disparate treatment appears when reviewing the statistics for incarceration rates. Research from various jurisdictions indicates that African Americans are also more likely to receive jail sentences when convicted of low-level offenses. For instance,

> [a] 2014 Vera Institute study of New York County found that 30 percent of African American defendants were sentenced to jail for misdemeanor offenses, compared to 20 percent of Hispanic defendants and 16 percent of white defendants. African Americans were 89 percent more likely to be jailed for misdemeanor "person offenses" (such as assault) and 85 percent more likely to be incarcerated for misdemeanor drug offenses compared to white defendants. Hispanic defendants were 32 percent more likely to be incarcerated for misdemeanor person offenses.[51]

Therefore, when comparing people who have been convicted of the same type of crime, it is evident that race is an unduly relevant factor in determining what length of sentence the individuals receive. The overall picture of criminality is skewed. Any attempt to reform the process for prosecuting police officers must deal with the persistence of this racial bias—whether implicit or consciously held. However, in developing the reasonableness standard applied to these cases, the Supreme Court ignored this ever-present racial dimension.

IV. CONCLUSION: CORRECTING THE PERCEPTION FOR POLICE PROSECUTIONS

Ideally, in presenting a case of alleged excessive police force to a grand jury, prosecutors should explain police norms. For example, prosecutors should explain how police are supposed to act and contrast that with how the police acted in the present case. Of course, prosecutors can only do this effectively if there are actually police norms to reference. In some situations, prosecutors can discuss police training protocols and use of force procedures. However, for such information to be useful in the reasonableness assessment, prosecutors would need to guide grand jurors to pull back from the moment of the decision to use of deadly force in order to look at the entire interaction between the officer and the victim. Prosecutors should prompt grand jurors to think about whether the officer could have avoided the situation

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[48] EAGLIN & SOLOMON, *supra* note 40, at 7.

[49] *Id.* at 10.

[50] *Id.* at 7.

[51] *Id.* at 18 (citing BESIKI L. KUTATELADZE & NANCY R. ANDILORO, VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY 199 (Jan. 31, 2014)).

leading to the use of force. As the gatekeepers of the criminal process, prosecutors and grand jurors should question the rules of engagement.

Those determining the appropriateness of an indictment should focus on when and how a police officer should de-escalate a high-pressure situation. Of course, with the current state of the law on reasonableness focused on this nearsighted, instant assessment of dangerousness, a farsighted approach is a difficult task for a prosecutor seeking an indictment of a police officer. Thus, this task of developing farsighted norms cannot be left to prosecutors and grand jurors alone. While prosecutors should inform grand jurors about existing police practices, it is the task of police departments, legislators, and the broader citizenry to express and implement expectations for proper police behavior. Until those norms are developed, there will always be disagreement about what police should have done. This disagreement will make a prosecutor's job of deciding whether to bring a case against an officer difficult and controversial and will often leave a grand jury's determination unsatisfying for many. Additionally, during conversations regarding appropriate police protocol in encounters with individuals, it is important not to ignore the imprint that racial bias leaves on any discretionary decisions.

Of course, the courts can do a better job of expanding the reasonableness standard to allow for a more farsighted view of police behavior. Assuming that the reasonableness standard continues to govern deadly force cases, the goal should be to reform policing in order to protect against the unnecessary loss of lives at the hands of officers. Achieving that goal will require taking on the loftier task of reforming societal perspectives on criminality. The current moment-focused assessment of dangerousness is even more reason that race and potential racial bias cannot be ignored in police prosecutions. Because all actors in the criminal justice system are subject to seeing through biased lenses, a colorblind approach to the reasonableness assessment offers an impaired view of these deadly force situations. Grand jurors should be educated on the racial disparities in police use of force in the department of the accused officer. Further, grand jurors should be informed about their potential biases, just as prosecutors and officers throughout the country are beginning to receive training on the role of implicit bias in their decision-making. Putting race on the table, rather than turning a blind eye to it, is the only way for grand jurors to contemplate the relevance of race in both the officer's decision to kill and the grand jurors' own decisions to view the suspect as dangerous. Correcting a colorblind vision also will help grand jurors to understand what is often cast as the evasive and uncooperative actions of the black victim of police violence.

Until there is a change in how society expects police officers to behave, the trend toward under-prosecuted use of force cases will continue. The consequences will be more society's fault than that of prosecutors, or even grand jurors. If society has not set farsighted expectations for police engagement to give meaning to the reasonableness standard, then there can be no expectation of consensus in any of these cases. Prosecutors and grand jurors have a role to play in properly bringing charges against officers that have acted outside of their appropriate roles. But, until those appropriate police roles are normalized and racial bias is confronted, even the most well meaning prosecutor and the most searching grand jury may have difficulty reaching a just result in police deadly force cases.

THE DUTY TO CHARGE IN POLICE USE OF EXCESSIVE FORCE CASES

REBECCA ROIPHE*

ABSTRACT

Responding to the problems of mass incarceration, racial disparities in justice, and wrongful convictions, scholars have focused on prosecutorial overcharging. They have, however, neglected to address undercharging—the failure to charge in entire classes of cases. Undercharging can similarly undermine the efficacy and legitimacy of the criminal justice system. While few have focused on this question in the domestic criminal law context, international law scholars have long recognized the social and structural cost for nascent democratic states when they fail to charge those responsible for the prior regime's human rights abuses. This sort of impunity threatens the rule of law and misses the opportunity to reinforce important democratic values. This Article draws on international law scholarship to argue that there is a duty to investigate and a limited duty to charge crimes that implicate core democratic principles of equality and fairness. Police use of excessive force against unarmed African-American suspects is just this sort of crime.

CONTENTS

I. INTRODUCTION

The United States is in the midst of what seems like an epidemic of police shootings of unarmed black men. Cell phone videos made by bystanders or friends of the victims animate the injustice. Black Lives Matter activists have mobilized the resulting anger into a powerful social movement. Amidst all of this unrest, very few of the involved police officers have been prosecuted.[1] Even fewer have been

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[1] One notable exception is a case in Charleston, which led to federal charges against the officer for shooting an unarmed black man in the back. Chris Dixon & Tamar Lewin, *South Carolina Officer Faces Federal Charges in Fatal Shooting*, N.Y. TIMES (May 11, 2016), http://www.nytimes.com/2016/05/12/us/south-carolina-officer-faces-federal-charges-in-fatal-shooting.html.

convicted and punished.[2] Highlighting the difficulty inherent in these cases, the Department of Justice ("DOJ") has reorganized its inquiry into the killing of Eric Garner in Staten Island.[3] In 2014, police officers approached Garner and accused him of selling loose cigarettes.[4] The officers then attempted to arrest Garner for his alleged conduct.[5] When Garner refused to submit, Officer Daniel Pantaleo used a chokehold to subdue him. Garner died after repeating "I can't breathe" to the officers surrounding him.[6] The entire incident was caught on video, spurring protests around the country. After a Staten Island grand jury refused to indict Pantaleo, the DOJ launched an investigation into a potential civil rights violation.[7] The investigatory team has subsequently split between the Federal Bureau of Investigation (FBI) agents and Brooklyn prosecutors—who do not believe charges are appropriate—and those within the Civil Rights Division—who disagree.[8]

The controversy over the Eric Garner case illustrates both how difficult it is to make decisions in these sensitive cases and the relative lack of guidance on when it is appropriate, or even necessary, to bring charges. Criminal justice scholars have examined and criticized prosecutors' tendency to overcharge, bringing too many charges against too many suspects.[9] However, few have looked at the question of when, if ever, a prosecutor must charge a case. There is no legal obligation for prosecutors to seek indictments, even when the evidence supports a conviction. Nevertheless, the question remains whether it would ever constitute an abuse of discretion to fail to bring charges. This Article argues that prosecutors must investigate and seek to indict in police shooting cases when there is sufficient evidence to support charges. It is an abuse of discretion to fail to do so because the

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[2] Three of the officers accused of killing Freddie Gray in Baltimore were acquitted, and the charges against the remaining officers were dismissed. Carolyn Sung & Catherine E. Shoichet, *Freddie Gray Case: Charges Dropped Against Remaining Officers*, CNN (July 27, 2016), http://www.cnn.com/2016/07/27/us/freddie-gray-verdict-baltimore-officers/.

[3] Matt Apuzzo et al., *Justice Dept. Shakes up Inquiry into Eric Garner Chokehold Case*, N.Y. TIMES (Oct. 24, 2016), http://www.nytimes.com/2016/10/25/nyregion/justice-dept-replaces-investigators-on-eric-garner-case.html.

[4] *Id.*

[5] Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html.

[6] Apuzzo et al., *supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING (2012); Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 704-05 (2014); Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L. J. 1259, 1279-81 (2011); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1711 (2010); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L. J. 1743, 1756-61 (2005); Tracey L Meares, *Rewards for Good Behavior: Influencing Prosecutors' Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 853-54 (1995); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1960-64 (1992); Albert Altschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968).

crime, which targets a minority group that the criminal justice system has historically neglected and abused, implicates basic democratic principles of equality and fairness.

While domestic criminal law scholars have not explored the question of undercharging, international law scholars have. As states around the world transition to democratic governments, many have debated the question of whether the new government has an obligation to prosecute the perpetrators of human rights abuses under the previous regime. Drawing on international literature, this Article argues that failing to charge a crime implicating fundamental democratic values, such as police shootings of unarmed African-American men, is an abuse of prosecutorial discretion. The inequality in treatment and racial disparity threaten the legitimacy of the system itself. This effect is compounded by the historical treatment of African-Americans in criminal courts.[10] International law scholars who study transitional justice have analyzed how the failure to charge can affect new democracies. Along with criminal prosecutions, they have sought alternatives to charging particular offenses, such as truth commissions, to reinforce those values without facing the practical problems of charging every individual who has committed the crime. Drawing on this robust literature, this Article argues that prosecutors have a duty to charge the most culpable offenders in police shooting cases and suggests some alternative mechanisms to supplement the criminal process when prosecution is inappropriate or practical.

To make this argument, this Article first discusses the law governing prosecutorial discretion in charging decisions. Despite efforts to legislate in this area, prosecutors retain broad discretion. With the exception of a few instances in select jurisdictions, there is no legal duty to charge. Next, this Article reviews classic theoretical justifications for prosecution. The Article then looks to international law scholarship for principles to guide domestic prosecutorial decision-making. It concludes by bringing this all to bear on the question of how to handle the growing number of police shootings of unarmed black men.

This Article concludes that is an abuse of discretion not to charge the most culpable police officers, even when the evidence is imperfect or juries are unlikely to convict. It is an abuse of discretion not because there is some absolute right to accountability, but because the vast under-enforcement, especially in light of the historic treatment of African-Americans, undermines the value of equality fundamental to our democratic system. It weakens the legitimacy of the criminal justice system and, with it, democracy itself. Because individual prosecutions will not fully address this deficit, we should also turn to alternate mechanisms to reinforce the fundamental democratic values of fairness, equality, and transparency in the system.[11]

[10] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010); PAUL FINKELMAN, RACE AND CRIMINAL JUSTICE (1992).

[11] The model rule governing prosecutorial conduct is Model Rule of Professional Conduct 3.8. It imposes limits on when a prosecutor can charge and pursue a prosecution but imposes no affirmative obligation. MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2017).

II. PROSECUTORIAL DISCRETION

A. Governing Law

There is no legal or ethical duty to prosecute. In fact, the Rules of Professional Conduct focus more on imposing limits on prosecutors' charging decisions. Prosecutors cannot pursue charges that they know are not supported by probable cause.[12] The explanatory notes to the American Bar Association's Model Rules of Professional Conduct similarly emphasize the prosecutor's duty to refrain from aggressively seeking convictions by protecting the defendant's procedural rights and ensuring that there is sufficient evidence to convict.[13] In other words, the rules of professional ethics, like scholars and commentators, attempt to guard against overcharging. To that end, the rules articulate professional obligations that restrain prosecutors from pursuing convictions with too much zeal.

The American Bar Association's criminal justice section also publishes unenforceable guidelines or standards for prosecutors. Like the rules, the standards instruct prosecutors that their job is not just to pursue convictions and that sometimes restraint is in order.[14] The standards do urge prosecutors to investigate crimes if other agencies fail to do so,[15] and they state that prosecutors should not be deterred from prosecuting serious crimes by the fact that juries tend to acquit persons accused of similar acts.[16] By stating these obligations, the bar reminds prosecutors that part of their job is to pursue convictions against the guilty despite political obstacles and any difficulty in proving their cases. Notwithstanding these few reminders, professional standards emphasize obligations to avoid overcharging and give little guidance about when, if ever, prosecutors ought to pursue charges.[17] They state, for example, that prosecutors have broad discretion in determining if charges are appropriate[18] and need not prosecute a case even when the evidence supports it.[19] The standards, like the rules, warn prosecutors against mindlessly seeking convictions.[20] The professional guidelines do not establish or even hint at a duty to charge or a right of accountability.

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[12] *Id.*

[13] *Id.* at cmt. 1.

[14] CRIM. JUST. SEC. STANDARDS FOR PROSECUTION FUNCTION, Standard 3-1.2(c) (AM. BAR ASS'N 2017).

[15] *Id.* at Standard 3-3.1(a).

[16] *Id.* at Standard 3-3.9(e).

[17] *See generally id.*

[18] *Id.* at Standard 3-3.4(a).

[19] *Id.* at Standard 3-3.9(a), (b).

[20] *Id.* at Standard 3-3.6(c) (urging prosecutors to recommend that the grand jury not indict if he or she believes the evidence does not warrant it); *see also id.* at Standards 3-3.8 (urging prosecutors to consider noncriminal disposition in appropriate cases and noting that prosecutors should be familiar with social agencies that can divert cases from the criminal process), 3-3.9(d) (stating that in making the decision to charge, prosecutors should give no weight to personal or political advantage), 3-3.9(f) (stating that prosecutor should not seek charges greater than can be supported by the evidence and fairly reflect the crime).

Courts similarly shy away from invitations to regulate prosecutors' charging decisions. In doing so, case law acknowledges that the prosecutor has a quasi-judicial role with broad discretion to determine when charges are appropriate.[21] In *State v. Winne*, for instance, a New Jersey court dismissed an indictment against a prosecutor for failing to charge individuals with illegal gambling.[22] Amidst concerns about gambling and official corruption, a special prosecutor sought to indict the Bergen County District Attorney for failing to prosecute those involved in the criminal syndicate.[23] The court insisted that such a prosecution for nonfeasance of a public duty should only proceed if the state could prove evil motive.[24] Otherwise, the court reasoned, prosecutors would be fearful in declining to bring charges, which constitutes an essential part of their official discretion.[25] The court reasoned that a prosecutor could choose to commence or drop charges for a number of reasons.[26] It is the prosecutor's job to weigh countless factors in determining what justice requires.[27] Indicting the prosecutor for failing to pursue gambling cases would interfere with the administration of justice by injecting a fear of retribution into the prosecutors' determination, which ought to be motivated solely by the interests of justice.

In federal court, Federal Rule of Criminal Procedure 48(a) provides that the government can dismiss an indictment, information, or complaint "with leave of the court."[28] The Supreme Court declined to decide whether courts could deny prosecutors' uncontested motions to dismiss charges.[29] In doing so, it noted that a court's review is primarily designed to protect defendants from harassment, but there may also be a limited right to review prosecutors' decisions if they are clearly contrary to the public interest.[30] Most jurisdictions that have considered this

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[21] State v. Winne, 91 A.2d 65, 65 (N.J. Super. Ct. Law Div. 1952).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 79.

[26] *Id.* at 77.

[27] *Id.*

[28] FED. R. CRIM. P. 48(a).

[29] United States v. Gonzales, 58 F.3d 459, 461 (9th Cir. 1995).

[30] Rinaldi v. United States, 434 U.S. 22, 34 n.15 (1977). Most federal courts similarly restrict the courts' ability to deny the government's motion to dismiss an indictment to cases in which it is clearly in the public interest to do so. *See* United States v. Smith, 55 F.3d 157, 159 (5th Cir. 1995) (holding that the court must grant motions that are not motivated by bad faith); United States v. Ammidown, 497 F.2d 615, 620 (D.C. Cir. 1973) (stating that the primary purpose of Rule 48(a) is to protect a defendant from "harassment, through a prosecutor's charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution," but the court can also ask for an explanation of why the dismissal is in the public interest). The Seventh Circuit read the rule more narrowly to prohibit courts from denying an uncontested motion, even if the court found that the prosecution was acting in bad faith. *In re* United States, 345 F.3d 450, 453 (7th Cir. 2003); *see also* United States v. Jacobo-Zavala, 241 F.3d 1009, 1013 (8th Cir. 2001) (stating courts can only deny a motion to dismiss

particular issue refuse to allow courts to deny uncontested motions for dismissal except in extreme cases.[31] Like the court in *Winne*, federal courts recognize that prosecutors are better situated to evaluate the propriety of a criminal charge.[32] Separation of powers concerns mandate a narrow review of charging decisions.

In general, only the elected or appointed prosecutor can decide whether to bring charges.[33] Some states, however, have statutes allowing private citizens to petition courts or other officials to prosecute alleged criminal conduct. Concerned citizens used such a law in Ohio to request a grand jury investigation into Officer Timothy Loehmann for killing Tamir Rice, a twelve-year old African-American boy, who was shot while reaching for a toy gun.[34] Several other states provide some mechanism for citizens to initiate charges with approval of a court or other government officer,[35] but

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charges if "the government's motion is contrary to manifest public interest because it is not based in the prosecutor's good faith discharge of her duties"); *Gonzalez*, 58 F.3d at 462 (reserving the question of whether the district court can ever deny an uncontested motion and noting that if it does, it can only do so in "exceptional circumstances"); United States v. Welborn, 849 F.2d 980, 983 n.2 (5th Cir. 1988) (holding district courts may deny untested motions only "in extremely limited circumstances in extraordinary cases . . . when the prosecutor's actions clearly indicate a betrayal of the public interest").

[31] United States v. Cowan, 524 F.2d 504, 515 (5th Cir. 1975), *cert. denied*, Woodruff v. United States, 425 U.S. 971 (1976) (ruling that the federal court in Texas exceeded its authority by denying the Government's dismissal motion because the government had offered support for its decision, which was "not clearly contrary to the public interest").

[32] *Winne*, 91 A.2d at 72-84.

[33] In *Linda R.S. v. Richard D.*, the Supreme Court held that a mother did not have standing to compel a Texas prosecutor to bring charges against her husband for failure to pay support for her child who was born out of wedlock. Linda R.S. v. Richard D., 410 U.S. 614 (1973). The mother disagreed with the prosecutor who interpreted the statute to apply only to legitimate children. *Id.* at 614-16. In deciding the case, the Court noted that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619; *see also* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J. L. & PUB. POL'Y 357, 374 (1986) (explaining the history of private prosecution and noting that currently, "[c]ourts generally grant the public prosecutor the exclusive power to initiate criminal proceedings").

[34] OHIO REV. CODE ANN. § 2935.09(D) (LexisNexis 2017) provides:

> A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate.

This process was adopted in 2006 to replace an older process by which a private citizen could charge a crime directly without review by any government official. State v. Mbodji, 951 N.E.2d 1025, 1027 (Ohio 2011).

[35] GA. CODE § 17-4-40(b)(1) (2010) (allowing citizen to make a request for criminal process to begin); IDAHO STAT. tit. 19 § 501 (2016) (allowing citizen to apply to court for an arrest warrant); MD. STAT. § 2-607(c)(6) (2015) (allowing citizen to apply to a commissioner who may issue a summons or, under limited circumstances, an arrest warrant); MINN. STAT. §§ 388.12, 8.01 (2016) (allowing citizens to appear before grand juries, petition district courts, appoint special prosecutors, and ask the governor to direct the attorney general to commence prosecution.); N.C. GEN. STAT. § 15A-304 (2005) (allowing private citizen to seek arrest

most impose restrictions on private access to the criminal justice process.[36] The majority of jurisdictions vest discretion entirely with the prosecutor and forbid private initiation of criminal charges.[37]

The fact that the law largely leaves the charging decision to the prosecutor does not end the inquiry. Professional standards govern prosecutors' decisions, but they offer limited guidance about when and whom to charge. Theories of punishment provide a starting point for analyzing this question. Prosecutors should start with a goal in order to determine who to punish and what sort of penalty to seek. Theories about the purpose of criminal penalties also help set the groundwork for understanding the limits of punishment in the criminal justice system. While there are many variations, the three most important theories of criminal justice for the purposes of this Article are retribution, deterrence, and other consequentialist theories.

B. Justification

Generally, retributive theories of justice rest on the assumption that guilty people deserve to be punished.[38] The severity of the punishment ought to be proportional to

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warrant or summons); S.C. CODE § 22-5-110 (2011) (allowing private citizen to initiate a criminal case by requesting a magistrate to issue a summons); VA. STAT. § 19.2-72 (2016) (allowing private citizen complaints in writing). In Texas, private citizens can seek indictment directly from a grand jury. Douglas E. Baloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1142 (2007).

[36] Taliaferro v. Locke, 182 Cal. App. 2d 752, 757 (1960) (rejecting mandamus to compel the district attorney to initiate prosecution); State *ex rel.* Freed v. Cir. Ct. of Martin County, 14 N.E.2d 910 (Ind. 1938) (nullifying lower court's order forcing the prosecutor to approve an affidavit in support of a criminal charge); Lutz v. Commonwealth, 505 A.2d 1356, 1356-57 (Pa. Commw. Ct. 1986) (denying petition for a writ of mandamus compelling the attorney General to investigate and prosecute a District Attorney for fraud).

[37] Smith v. United States, No. 97-10025-PBS, 2013 WL 2154004, 2013 U.S. Dist. LEXIS 69778, at *1 (D. Mass. May 15, 2013) (holding that a private citizen cannot file a criminal complaint in federal court and there is no right to require the government to initiate criminal proceedings); Roberts v. State, 280 Ga. App. 672, 674 (2006) (stating that "neither an accused nor a third-party private citizen may prosecute a criminal matter on his or her own"); Santiage v. Clerk Mag. of Clinton Dist. Ct., No. 0600397, 2006 WL 2848120, 2006 Mass. Super. LEXIS 431, at *2 (Mass. Super. Ct. Sept. 21, 2006) (denying a writ of mandamus ordering the clerk to accept an application for a criminal complaint); State *ex rel.* Wild v. Otis, 257 N.W.2d 361, 385 (Minn. 1977) (allowing private access to grand juries and district courts to use other mechanisms to petition for prosecution but denying the citizen the right to prosecute a crime himself); State v. Czartorsky, No. a-4384-07T4, 2009 WL 1228442, 2009 N.J. Super. Unpub. LEXIS 1087, at *4 (N.J. Super. Ct. App. Div. 2009) (holding that a private citizen lacks standing to object to a lack of probable cause determination); Seeton v. Adams, 50 A.3d 268, 269-70 (Pa. Commw. Ct. 2012) (holding writ of mandamus cannot be used to correct the district attorney's allegedly mistaken view of a criminal statute); *In re* Richland County Mag.'s Ct., 389 S.C. 408, 414-15 (2010) (holding that a non-lawyer prosecuting a criminal misdemeanor charge engaged in the unauthorized practice of law and condemning the influence of private interests on public prosecution).

[38] MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 104-88 (1997); JOHN KLEINIG, PUNISHMENT AND DESERT 67 (1973).

the severity of the crime.[39] In turn, the gravity of the crime rests on the culpability of the wrongdoer and the harm to the victim.[40] Philosophers have posed retribution as a theory for punishment for some time. Immanuel Kant reasoned that retribution was a moral imperative.[41] More recently, Herbert Morris argued that retribution is justified because criminals are essentially free riders.[42] They benefit from the fact that everyone else in society has agreed not to commit crimes without adhering to that agreement themselves.[43] Unlike tort law, theories of retribution are concerned not with compensating a victim, but with righting a wrong.[44] In other words, retributive theories insist that punishment is a way of repairing a moral injury.[45]

Retributive theories of justice, at least in the absolute sense, support a right to accountability. In Morris' formulation, the victim and the rest of the public who have followed the rules have a moral right to see punishment for the person who abused the trust.[46] If the criminal justice system exists to mete out punishment for crimes, then mandatory charging makes sense. It follows, without too many logical steps, that if a wrongdoer deserves to be punished, the state has an obligation to do so.[47]

The strong retributive theory of justice does not offer much guidance to policy makers who face external constraints. It offers little to prosecutors who have limited budgets or concerns about the effect that prosecutions might have on the stability of the government or the rule of law.[48] Some scholars have modified retributivism by arguing that anyone guilty of a crime deserves punishment, but the moral duty gives way if it would result in some particularly bad result.[49] If the negative consequence of prosecution passes that threshold, then policy makers and prosecutors would be justified in forgoing punishment.[50] Others have conceded that retribution is not possible for every criminal act,[51] but is, on the whole, a social good. Therefore, the

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[39] Hugo Adam Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, *in* [XXVII: CRIMINAL JUSTICE] NOMOS 89, 102 (J. Roland Pennock & John W. Chapman eds., 1985).

[40] *Id.*

[41] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 100-03 (John Ladd trans., 1965) (1797).

[42] Herbert Morris, *Persons and Punishment,* 52 MONIST 475, 477 (1968), *reprinted in* PUNISHMENT AND REHABILITATION 74, 75-76 (Jeffrie G. Murphy ed., 3d ed. 1985).

[43] *Id.* at 477.

[44] Jean Hampton, *Correcting Harms vs. Righting Wrongs: The Goal of Retribution*, 39 U.C.L.A L. REV. 1659, 1663 (1992).

[45] *Id.* at 1665.

[46] Morris, *supra* note 42, at 477.

[47] ANDREW VON HIRSCH, DOING JUSTICE 51 (1976); JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 103 (1970).

[48] Michael Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 820 (2007).

[49] *Id.* at 830-31.

[50] MOORE, *supra* note 38, at 732-34.

[51] Cahill, *supra* note 48, at 828.

criminal justice system should maximize retribution while tending to other needs, such as budgetary restrictions.

Deterrence, a different rationale for criminal punishment, provides at least a theoretical basis for decisions and priorities driven by a limited budget and other concerns. Deterrence suggests that criminal actions are justified because they prevent future harms by imposing costs on illegal conduct.[52] Unlike retributivism, deterrence focuses on the consequences of prosecution rather than moral imperatives.[53] Thus, scholars argue that deterrence pushes policy makers and prosecutors to minimize social harm.[54] Criminal sanctions are valuable not because they impose punishment on the individual wrongdoer, but because they send a message to others. They impose a cost, which will presumably change the calculus of those contemplating similar anti-social acts in the future.

Deterrence provides greater guidance to policy makers because it involves a formula, albeit a difficult one to calculate. Society ought to expend resources and calibrate punishments so as to produce the greatest social value. Expending resources on the investigation and prosecution of some crimes rather than others will inevitably produce more value.[55]

In addition to retribution and deterrence, criminal sanctions can serve to reinforce and communicate core values.[56] Like deterrence, the expressive function of the criminal law focuses on consequences of criminalization. Rather than calculating the social costs of wrongful acts, however, it measures the importance of social meaning and context.[57] One of the important functions of the criminal justice system is communicating and reinforcing shared social values.[58] Émile Durkeim argued that the penal system reinforces social solidarity by recognizing and broadcasting shared moral values.[59] Law-abiding citizens experience the exercise of criminal sanctions as a validation and formulation of their social role—the bonds that tie them together.[60] Those inclined to break the law may be immune to this social meaning but will nonetheless be deterred from future bad acts.[61] Of course, given the diversity of

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[52] Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV 413, 425 (1999) [hereinafter Kahan, *Secret Ambition*].

[53] *Id.* at 427.

[54] Cahill, *supra* note 48, at 817-18.

[55] Kahan, *Secret Ambition*, *supra* note 52, at 426-27.

[56] *Id.* at 420-25. For a discussion of the theories of criminal punishment, see generally DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY (1996).

[57] Kahan, *Secret Ambition*, *supra* note 52, at 419-20.

[58] FEINBERG, *supra* note 47, at 100; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 604 (1996) [hereinafter Kahan, *Alternative Sanctions*].

[59] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102-03, 105 (1933). Many have criticized Durkheim for his overly rosy view of social solidarity or "common consciousness." Most prominently, Michel Foucault developed an alternate view of punishment in which is both projects moral values of some and disciplines or forces others into compliance. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 89-90, 194 (Alan Sheridan trans., 1979).

[60] DURKHEIM, *supra* note 59, at 102.

[61] Kahan, *Alternative Sanctions*, *supra* note 58, at 604.

moral views, criminal law can also be a site of conflict and hegemonic proclamations about these norms.[62]

Scholars of transitional justice have emphasized this communicative value in arguing that retribution alone is a poor rationale for criminal prosecutions.[63] In most fledgling democracies, prosecuting everyone involved in human rights violations during a previous repressive regime is impossible. Doing so might undermine the strength and durability of the new government. Therefore, these scholars suggest that it is appropriate and necessary to single out some individuals for prosecution. In a democratic system, this approach broadcasts the values central to the new regime while simultaneously strengthening faith in the rule of law without toppling the precarious new democracy.

C. International Law

This Article draws on international law because, unlike scholars of domestic criminal law, international law scholars have thought deeply about the duty to charge individuals for criminal wrongdoing. In addition, given the frequency of police shootings of African-American men in the United States, police use of force shares some similarities with the human rights abuses that invite the attention of international law scholars. By drawing the parallel, however, this Article does not intend to make an equivalence. The atrocity of human rights violations in the Americas and elsewhere are incomparable both in brutality and scale to police shootings. The comparison is nonetheless useful.

David Luban has defined crimes against humanity as crimes that undermine the social and political nature of humankind.[64] People are naturally social creatures, but they need political organization in order to live together.[65] Crimes against humanity are, in Luban's terms, politics turned "cancerous."[66] The complete failure to prosecute is a social pathology that threatens the system itself.[67] While the scope and severity of police shootings of unarmed black men are not on the same scale as most international human rights violations, they also implicate our political organization. As they mount in number, they reflect a degeneration of the political world.[68] Professor Luban also notes that crimes against humanity tend to target individuals within a group precisely for their membership in that group.[69] Police shootings may be less consciously designed to terrorize a minority than many human rights

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[62] Kahan, *Secret Ambition*, *supra* note 52, at 421.

[63] David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* PHILOSOPHY OF INTERNATIONAL LAW 569, 576-77 (Samantha Besson & John Tasioulas eds., 2010).

[64] David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 160 (2004) [hereinafter Luban, *A Theory*].

[65] *Id.* at 90.

[66] *Id.*

[67] *Id.*; Ruti Teitel, *Transitional Justice and Judicial Activism—A Right to Accountability?*, 48 CORNELL INT'L L. J. 385, 395 (2015) [hereinafter Teitel, *Transitional Justice*].

[68] Luban, *A Theory*, *supra* note 64, at 94.

[69] *Id.* at 105.

violations, but that is the effect.[70] While police shootings lack the scope and savagery typical of crimes against humanity, they share many of the other features.[71] Part of the horror of human rights abuses is the impunity: the fact that the government tortured and abused citizens without accountability.[72] Ironically, the very fact that police shootings have gone unpunished creates a similarity to these international atrocities.

The theoretical question of whether there ought to be a duty to charge for human rights violations has preoccupied international law scholars. While scholars tend to disagree about the scope of the duty to charge, most argue that some form of justice and revelation of the truth about past crimes is essential to promote reconciliation and reinforce democratic values.[73] Diane Orentlicher, for instance, argues that there is an absolute duty to prosecute human rights violations of a prior regime.[74] She reasons that a regime that fails to prosecute undermines the authority of the law and jeopardizes the transition to democracy.[75] But drawing on retributive theories of justice, she also argues that atrocious crimes must be punished, especially those that single out racial, ethnic, or religious groups.[76] Victims and others in society enjoy a right to accountability.[77] Her view of the critical role criminal justice plays in building a democracy echoes the philosophy of the trials at Nuremburg where the highly publicized cases provided a public condemnation of the evils of Nazi Germany.[78]

Most scholars, however, argue for a more pragmatic approach, combining prosecutions with other mechanisms to help establish and affirm social norms. Jaime Malamud-Goti asserts that democratic governments are required to proceed against perpetrators of mass atrocities even at the risk of military rebellion but the failure to punish all wrongdoers is not a breach of moral duty.[79] Law is not merely a set of rules.[80] It is a vehicle for social change.[81] Deeply embedded, determined, and in turn

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[70] TA-NEHISI COATES, BETWEEN THE WORLD AND ME 81 (2015).

[71] Luban, *A Theory*, *supra* note 64, at 98-99 (arguing that crimes against humanity are characterized by an ugliness, state-sponorship, which makes them categorically worse than ordinary crimes).

[72] *Id.* at 117.

[73] Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 91-92 (2001); Teitel, *Transitional Justice*, *supra* note 67, at 404-05.

[74] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2540 (1991).

[75] *Id.* at 2543.

[76] *Id.* at 2594.

[77] *Id.* at 2580, 2613-14.

[78] Kristin Bohl, *Breaking the Rules of Transitional Justice,* 24 WISC. INT'L L. REV. 557, 558-59 n.8 (2006).

[79] Jaime Malamud-Goti, *Transition Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 5 (1990).

[80] Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 1, 17 (1967).

transformative, law itself plays an important role in the transition from totalitarian regimes to democratic governments.[82]

Some international law scholars argue that the rule of law requires prosecutions of prior regime abuses. For a set of complex reasons, full accountability is often impossible.[83] Evidence is lost.[84] The victims are dead or were so deeply incapacitated that they cannot recall details of their torture.[85] Those most responsible insulated themselves from detection by issuing orders and never directly participating in the atrocities.[86]

Even when the evidence does exist, it is often hard to judge individuals for embracing what was, at the time, the prevalent norm.[87] Individual perpetrators may have been following orders. They may have feared for their own lives if they did not. In Argentina, for example, the new democratic regime had to struggle with a law that provided a legal excuse for those who committed crimes because they were ordered to do so by superiors in the government or military.[88] Police in America share the racism that is endemic to our country. As scholars have pointed out, the criminal charges incorporate that racism by asking jurors to determine whether or not the police officer was reasonably afraid for his or her own safety—a doctrine whose meaning depends on social stereotypes about black men.[89]

Even if the new regime finds a way (and many have) to bring criminal cases against individuals, trials are not always ideal for memorializing complex events.[90] Rules of evidence, burdens of proof, and other procedural restrictions can undermine or mangle the truth in ways that break the narrative and make reconciliation more difficult. In guilty pleas and trials, unlike in truth commissions, defendants have incentives to deny the truth and undermine the credibility of the victim.[91] If the defendant pleads guilty, then the victim and witnesses do not have the chance to recount their story.

International law scholarship offers insight into the problem of police shootings. The parallel shows how vital it is to enforce particular kinds of criminal laws. It highlights the structural cost to the democratic system of failing to do so. Police use

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[81] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 588-89 (2005).

[82] *See* Bohl, *supra* note 78, at 557.

[83] *See* Malamud-Goti, *supra* note 79, at 2.

[84] *See* MARTHA MINOW, VENGEANCE AND FORGIVENESS 45 (1998).

[85] *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY IN TIMES OF TRANSITION 1-2, 148-49 (2002).

[86] Kamali, *supra* note 73, at 132.

[87] *Id.* at 99.

[88] Malamud-Goti, *supra* note 79, at 2-3.

[89] *See generally* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 398-462 (1996) (analyzing how socially constructed stereotypes about blacks have shaped self-defense law).

[90] MINOW, *supra* note 84, at 47.

[91] Drumbl, *supra* note 81, at 593-95.

of unreasonable force against African-Americans qualifies as this type of crime because the failure to prosecute implicates fundamental democratic values. The failure to prosecute undermines the legitimacy and durability of our system as a whole. The scholarly debate about the role of criminal law enforcement in nascent democracies gives perspective on the potential role of the law, particularly of criminal trials, in the United States. Citizens crave retribution after periods of mass atrocity, but most scholars argue for a different justification for criminal law enforcement. Criminal justice may satisfy the desire and moral imperative of retribution, but most international law scholars agree that the law is more effective in communicating and inculcating a new set of values. Domestic criminal law has an important role to play in beginning to distance the country from its racist past, disentangling criminal law enforcement from its role in maintaining white supremacy.

III. HOW TO HANDLE THE CASE?

Failing to prosecute police for using unreasonable force against African-Americans has a corrosive effect on democracy. It deepens a distrust that has been breeding for generations.[92] As many scholars and activists have argued, the American criminal justice system was born and nurtured on racism.[93] It has remained a tool of racial domination while retaining the legitimating semblance of a color-blind system.[94] Like regimes in transition from repressive totalitarianism to democracy, our own system needs to shed the past. While, of course, this cannot be done in an instant, one step toward embracing a new set of values must involve prosecution of police brutality. High-profile cases can serve to both embrace and broadcast new values. The dysfunction in our system can, ironically, provide an opportunity to disavow the past and begin to introduce new values for the future.

Taking this progr2ess as the goal, it seems clear that there ought to be a limited duty to charge in police shooting cases. Prosecuting police for excessive use of force is difficult.[95] Cases are often hard to prove.[96] Prosecutors are often reluctant to charge police because the prosecutors work closely with the department and rely on officers to bring cases.[97] Even when it seems as if the proof is readily available and prosecutors do pursue the case, juries often fail to convict.[98] As with human rights abuses under totalitarian regimes, it is complicated to impose a new set of norms on

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[92] *See generally* COATES, *supra* note 70.

[93] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29-135 (1998); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1662-64 (1996).

[94] Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Though "Colorblind" Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 L. & SOC. INQUIRY 406, 407-08 (2015).

[95] Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA. L. REV. 1447, 1464-65 (2016).

[96] *Id.* at 1468.

[97] *Id.* at 1466-68.

[98] Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1145 (2008).

actors who were operating in an unjust system. The law governing use of force is unclear.[99] Racist perceptions can fuel excuses for justification, which juries may endorse.[100] To charge and prosecute every alleged case would not only be unjust, but could potentially compound the problem. The acquittals and dropped charges in the Freddie Gray case, for instance, did not transmit a message about racial equality and the criminal justice system.[101] In fact, it transmitted quite the opposite message.

It would be an abuse of discretion to fail to prosecute a police officer for shooting an unarmed black man if there is sufficient evidence to support the charge. Prosecutors have a duty to do justice.[102] Given the history of race and the criminal justice system—as well as the impact the failure to prosecute has had on African-American communities in particular and the criminal justice system in general—failure to charge in these sorts of cases amounts to an abdication of that duty.[103] Of course, even this new obligation leaves prosecutors in charge of determining whether sufficient evidence exists, but it imposes an additional burden on them in this class of cases. The duty implies an obligation to investigate.[104] It would be insufficient to conclude that a police shooting does not warrant charges unless the prosecutor has thoroughly investigated the case and determined that there is insufficient evidence to support criminal charges.[105] In other words, a prosecutor must investigate even when doing so would alienate the police department on which the prosecutor depends.[106]

Criminal prosecutions ought to serve a salutary function. Just as in the international context, these trials should expose racial injustice and bias in criminal law enforcement. The first step to purging racism is to admit in a public way that it exists. Ideally, a public trial can educate the populace and reinforce or even help forge new national values.[107] While victims and activists seek retribution, the desire

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[99] *Id.* at 1125-27.

[100] *See* KENNEDY, *supra* note 93, at 256-78.

[101] Sung & Shoichet, *supra* note 2.

[102] MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983); *see also* STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION r. 3-1.2(c) (AM. BAR ASS'N 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

[103] *See* KENNEDY, *supra* note 93.

[104] Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 (1996).

[105] While prosecutors rely on police and other agencies to investigate criminal wrongdoing, they have an affirmative obligation to investigate when other agencies fail to do so. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION r. 3-3.1(a) (AM. BAR ASS'N 1993). They are barred from discriminating on the basis of race or using any other improper considerations in exercising their discretion about whether or not to investigate. *Id.* at r. 3-3.1(b).

[106] *See* Levine, *supra* note 95, at 1444-45 (arguing that local district attorneys should not prosecute police). *But see* Bruce A. Green & Rebecca Roiphe, *Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 2, 6 (forthcoming 2017) (arguing that recusal or disqualification may not solve the problem because alternate prosecutors like Attorneys General and independent prosecutors may also suffer from conflicts of interest in this area).

[107] Kahan, *Secret Ambition*, *supra* note 52, at 421-22; *see also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.

for punishment is only a partial purpose of the criminal justice system. In addition, as international scholars have demonstrated, part of the purpose of the law in transitional moments is to reinforce a new set of values. Public prosecutions of police who can be proved guilty of using excessive force against African-Americans will offer a counter-narrative. If the criminal justice system in America tends to tell the story of dangerous black men plaguing society with brutal crimes, the prosecution of the police can offer a new narrative, just as the innocence movement has.[108]

Even if prosecutors were to charge every police shooting that the evidence supports, there are limits to the criminal law's capacity to serve an expressive function. Trials can be a valuable tool for articulating shared values, but they are often inadequate. State and federal governments should look to supplement these trials with a domestic version of "truth commissions."[109] As international law scholars have argued, these arenas offer a cathartic experience for victims while involving the entire community in a reevaluation of beliefs and core values.[110] A limited duty to prosecute should accommodate alternate mechanisms like truth commissions, which have proved effective in instilling new values.[111] They have the benefit of allowing a full narrative, which exceeds the scope of a criminal trial. Legislative hearings might serve this function on a smaller scale. In this setting, victims and activists could speak without the constraints of evidentiary rules. Moreover, police could participate without the fear of criminal punishment. This type of dialog is a necessary complement to prosecution in moving away from the racial injustice that has marred the criminal justice system and jeopardized the foundations of democracy. If the limited duty to prosecute in police use-of-force cases is seen as animated by a desire to deter criminal acts and create a new narrative, then it is consistent with other mechanisms, like truth commissions.[112]

IV. CONCLUSION

The duty to charge in police shooting cases derives from the expressive and deterrent value of criminal law. It is not, therefore, absolute. Unlike retributivism, these criminal justice theories cannot support a duty to charge every case. They do, however, point to the severe need to address this type of crime. They call on the criminal justice system to view this crime, which implicates the foundation of democracy, differently. Thus, there is an absolute duty to investigate police killings of unarmed black men, and there is a limited duty to charge when the evidence supports conviction.

Q. 1, 17 (1990) ("[C]riminal trials are and are intended to be richly symbolic and educational—that is part of their function in a society governed by the rule of law.").

[108] Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 52-53 (forthcoming 2017).

[109] *See* HAYNER, *supra* note 85 at 29; Ruth G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUMAN RTS. J. 69, 79-80 (2003) [hereinafter Teitel, *Genealogy*].

[110] Teitel, *Genealogy*, *supra* note 109, at 80.

[111] Teitel, *Transitional Justice*, *supra* note 67, at 404.

[112] *Id.*