
DAMAGES TO DETER POLICE SHOOTINGS

W. Kip Viscusi*

Scott Jeffrey**

Many fatal shootings by police are not warranted. These shootings impose losses on the victims and their families and reflect the failure of existing administrative and legal restraints to deter these unwarranted shootings. This Article proposes a revamping of existing incentives to both provide more adequate compensation to the victims' families and to establish levels of deterrence that are sufficient to curtail unjust fatalities. There are legal criteria for what level of force is "reasonable," but determining reasonableness in practice may be difficult. Practical guidance such as the "21-foot rule" for the threat to warrant a shooting is often problematic. The extent to which there is a problem of wrongful deaths resulting from police shootings is difficult to ascertain based on governmental statistics, which understate the total level of these killings. The Washington Post's Fatal Force dataset of on-duty fatal police shootings seeks to rectify this informational gap, providing a list of almost 1,000 fatal police shootings annually since 2015. This inventory also provides facts from public reports of the shootings, including how the shooting conforms to pertinent legal criteria of whether the victim was armed or fleeing the scene. Even if the police shooting was not warranted, there may be both legal and practical barriers to obtaining compensation for the victim's estate from the municipality. Some of the relatively high-profile cases have received compensation in line with compensation levels in wrongful death cases generally. But except for some very rare exceptions, the compensation amount in wrongful police shooting cases is well below the value that the government places on reducing mortality risks through government regulations. As a result, the compensation falls short of the levels needed to provide adequate deterrence to reduce these killings. To provide sufficient incentives, this Article proposes that the total level of damages for police shootings be consistent with the value of a statistical life used by government agencies when monetizing mortality risk reductions for government regulations. This value is now in the \$10 million range per expected fatality. Such amounts are too high from the standpoint of setting conventional compensatory damages

* University Distinguished Professor of Law, Economics, and Management, Vanderbilt Law School, 131 21st Ave. South, Nashville, TN 37203. kip.viscusi@vanderbilt.edu.

** Vanderbilt Law School, Ph.D. Program in Law and Economics. scott.b.jeffrey@vanderbilt.edu.
The authors would like to thank the *University of Illinois Law Review* for their careful and thoughtful improvements to this Article.

levels, but they provide a pertinent reference point for setting punitive damages and the total level of damages needed to establish appropriate levels of deterrence. The proposed trigger for such award levels is when the officer has displayed a callous disregard for the rights of others or if other punitive damages criteria are met. In the absence of such punitive damage awards, monetizing the expected risks that can be prevented through improved police practices can be accomplished by using the value of a statistical life to guide police practices. Unlike the current low level of settlements and awards for police shootings, this approach provides appropriate guidance to municipalities to monetize fatality risks and to undertake benefit-cost analyses of policies to reduce unreasonable police shootings. There have been recent calls for more benefit-cost analyses of policing, including the use of force, although calculating the costs to the victims from police use of force have served as a barrier to such analyses. This Article overcomes this barrier by using the value of a statistical life as an empirically validated measure of the most direct cost of fatal use of force. This approach provides the basis for calculating the first monetized estimate of the cost of police shootings. Further, this Article calculates the aggregate monetized value for the loss of life from all police shootings from 2015 to 2018, which totals \$39.3 billion. If the shootings are restricted to those in which the victim was either unarmed or fleeing, the total mortality cost totals \$12.1 billion. Of this amount, the total mortality cost is \$2.55 billion for all unarmed victims, and \$1.14 for victims who were both fleeing and unarmed. Disincentivizing these shootings is a critical step for courts to deter police shootings and promote effective policing.

TABLE OF CONTENTS

| | | |
|------|-----------------------------------------------------------------------------------------------------|-----|
| I. | INTRODUCTION | 743 |
| II. | WHEN CAN A POLICE OFFICER KILL YOU? | 752 |
| | A. <i>The Reasonable Use of Force</i> | 753 |
| | B. <i>Misperceptions Regarding the Reasonable Use of Force</i> | 759 |
| | C. <i>Legal Difficulties for Deterrents to Police Shootings</i> | 761 |
| III. | GOVERNMENTAL ESTIMATES OF POLICE USE OF FORCE | 764 |
| IV. | <i>THE WASHINGTON POST'S FATAL FORCE DATABASE</i> | 768 |
| | A. <i>The Washington Post's Fatal Force Database</i> | 768 |
| | B. <i>Characteristics of Shootings in the Fatal Force Database</i> | 771 |
| V. | HOW MUCH ARE PAYOUTS FOR WRONGFUL DEATH CLAIMS? | 772 |
| | A. <i>Overall Statistics of Payouts After Wrongful Deaths</i> | 772 |
| | B. <i>The Civil Justice Survey of State Courts Data</i> | 776 |
| | C. <i>Wrongful Death Payouts in Police Shootings with</i> <i>Prominent Media Coverage</i> | 779 |
| VI. | HOW SHOULD DAMAGES BE SET? WRONGFUL DEATH COMPENSATION AND THE VALUE OF A STATISTICAL LIFE | 784 |
| | A. <i>Using the Value of a Statistical Life to Monetize</i> <i>Police Killings</i> | 785 |

| | | |
|--------|--------------------------------------------------------------------------------------|-----|
| No. 3] | DAMAGES TO DETER POLICE SHOOTINGS | 743 |
| | <i>B. The Aggregate Cost of Police Shootings</i> | 789 |
| | <i>C. Achieving Deterrence Through Making Government Pay</i> | 790 |
| VII. | FIXING THE SYSTEM: BENEFIT-COST ANALYSIS OF POLICE TACTICS AND USE OF FORCE | 793 |
| VIII. | CONCLUSION: TOWARD EFFECTIVE DETERRENCE OF POLICE SHOOTINGS | 796 |
| | APPENDIX TABLE 1: SOURCES FOR POLICE SHOOTING VICTIMS IN TABLES 6 & 7 | 798 |

I. INTRODUCTION

Damages awards and out-of-court settlements after police shootings have a twofold purpose. These payouts serve both to compensate the victims and to provide financial incentives to deter such police shootings in the future.¹ This Article examines the prevalence of such fatal police shootings,² the preponderance of black males among the victims of these shootings, and the level of compensation that the families of these victims receive. There is substantial variability in the treatment of these incidents, as some deaths are accorded very low compensation amounts, while others receive compensation more in line with typical wrongful death awards.³ More important from the standpoint of providing financial incentives for deterrence is that the level of these financial sanctions almost invariably is below the financial amount that the government believes is appropriate to spend to reduce mortality risks through government regulations.⁴ The current level of such values assigned to each expected death averted by government regulations is about \$10 million, which this Article uses as the financial reference point for the appropriate level of damages to deter fatalities from police shootings.⁵ We will refer to this value as the “optimal deterrence amount.”⁶

This Article proposes that the current financial incentives shortfall be rectified and that payouts be aligned with how the federal government monetizes expected fatalities that are prevented by government policies.⁷ The courts should award damages that establish effective deterrence levels to establish incentives

1. Eleanor Lumsden, *How Much Is Police Brutality Costing America?*, 40 U. HAW. L. REV. 142, 160 (2017); Rashawn Ray, *How Can We Enhance Police Accountability in the United States*, BROOKINGS (Aug. 25, 2020), <https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/> [<https://perma.cc/V6F7-RQFR>].

2. We refer to incidents where on-duty police officers or deputy sheriffs shoot and kill someone as a “fatal police shooting,” or a “fatal shooting by police.” Fatal police shootings do not refer to incidents where police officers are fatally shot.

3. See, e.g., Ray, *supra* note 1 (discussing large settlements paid by major U.S. cities for police misconduct cases); Timothy Williams & Mitch Smith, *\$16 Million vs. \$4: In Fatal Police Shootings, Payouts Vary Widely*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/police-shootings-payouts.html> [<https://perma.cc/8NHQ-RMLA>] (contrasting between payout sizes and noting wide disparities).

4. W. KIP VISCUSI, PRICING LIVES: GUIDEPOSTS FOR A SAFER SOCIETY 23–45 (2018).

5. *Id.* at 28; see also W. Kip Viscusi & Joseph E. Adley, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 23 (2003).

6. See VISCUSI, *supra* note 4, at 18, 199–204.

7. *Infra* Part VI.

to avert such killings in situations in which the behavior by the police is malicious, reckless, or displays a callous disregard for the well-being of the deceased.⁸ While many potential police reforms are available for legislators to enact, this Article suggests a role for the judiciary to encourage local governments to adopt the most effective reforms while providing more adequate compensation to families of victims.⁹

The highly variable and usually inadequate payouts after wrongful killings by police are exemplified by the following examples. For both settlements and court awards, the financial sanctions for wrongful killings fall short of the optimal deterrence amount except in rare instances of very prominent deaths.¹⁰ We consider first two cases involving out-of-court settlements, and then address two cases that led to trial verdicts.¹¹ To the extent that the financial awards have generated adequate incentives to deter future police killings, it is largely because of idiosyncratic aspects of cases in which the publicity they generated led to public outrage that fostered large payments, as opposed to any distinctive nature of that particular homicide.¹²

A best-case scenario for disincentivizing police after such killings is that of an Australian woman killed in Minneapolis after she summoned the police for a neighborhood disturbance. On the night of July 15, 2017, Justine Damond¹³ was home alone since her fiancé was traveling. She called 9-1-1 twice in eight minutes to report a possible assault in the alley behind her residence.¹⁴ Two Minneapolis Police Department officers responded to the calls, investigated the claim, and cleared the area as safe after finding no suspects or signs of an assault.¹⁵ As Officers Noor and Harrity prepared to leave, they drove through an alley with their vehicle's lights turned off.¹⁶ Both officers claim that they heard a loud sound, and that immediately afterward, Ms. Damond appeared at the driver's side window.¹⁷ Both officers reached for their guns in response.¹⁸ Officer Harrity initially struggled to remove his gun from his holster and did not fire; however, Officer Noor, sitting in the passenger's seat, reached one arm across the chest of his partner to make space for his other arm to point his gun at

8. *Infra* Part VI.

9. *See infra* Part V.

10. *See generally infra* Part IV.

11. *Infra* text accompanying notes 13–53, 68–92.

12. *See, e.g., infra* text accompanying notes 33–37.

13. Jared Goyette & Austl. Associated Press, *Australian Justine Damond Shot Dead by US Police in Minneapolis*, *GUARDIAN* (July 16, 2017, 8:37 PM), <https://www.theguardian.com/us-news/2017/jul/17/australian-woman-justine-damond-shot-dead-by-us-police-in-minneapolis> [<https://perma.cc/HM62-S7T4>].

14. Mitch Smith, *A 911 Call, an Unarmed Woman and a Single Shot: The Mystery of a Police Shooting*, *N.Y. TIMES* (Apr. 13, 2019), <https://www.nytimes.com/2019/04/13/us/mohamed-noor-trial-minneapolis.html> [<https://perma.cc/T5WQ-MFL2>].

15. *Id.*

16. *Id.*

17. *See id.*

18. Tasneem Nashrulla, *A Former Minnesota Cop Dramatically Testified About the Moment He Shot and Killed an Unarmed Australian Woman*, *BUZZFEED NEWS* (Apr. 26, 2019, 1:47 PM), <https://www.buzzfeednews.com/article/tasneemnashrulla/mohamed-noor-testimony-murder-trial-minnesota-australia> [<https://perma.cc/9Y YK-H3WE>].

Ms. Damond.¹⁹ Officer Noor fired once through the driver's side open window, striking Ms. Damond in the chest.²⁰ She died twenty minutes later.²¹

There is no audio or video of the shooting, as the officers both had their body cameras switched off.²² However, it is undisputed that Ms. Damond was unarmed, and Officer Noor testified that he did not see her hands or any object in her hands, although he still believed his partner feared for his life and that his partner viewed Ms. Damond as a threat.²³ During trial, a prosecutor asked Officer Noor, "So her whole . . . her whole blonde hair, pink T-shirt, and all, that was a threat to you?"²⁴

Officer Noor replied, "That's how . . . I relied on my training."²⁵

The killing generated substantial adverse international publicity for Minneapolis and for the United States generally.²⁶ Within a week of the killing, the Chief of Police resigned at the Mayor's request.²⁷ Mayor Betsy Hodges was voted out of office later that year, in part due to outcry over this shooting.²⁸ Later, the city of Minneapolis agreed to a \$20 million settlement with the victim's family.²⁹ Officer Noor, a Somali-American, resigned from the police force upon being criminally charged.³⁰ On April 30, 2019, Noor was convicted of third-degree

19. *Id.*

20. Smith, *supra* note 14.

21. *Justine Damond Shooting: A Timeline of the Night*, STAR TRIB. (May 1, 2019, 10:25 AM), <https://www.startribune.com/justine-damond-a-timeline/477443943/> [<https://perma.cc/3S44-29NY>].

22. Saphora Smith, *Australian Woman Shot Dead by Minneapolis Police Officer After Calling 911 Herself*, NBC NEWS (July 17, 2017, 6:10 PM), https://www.nbcnews.com/news/us-news/australian-woman-shot-dead-minneapolis-police-officers-after-calling-911-n783581_ [<https://perma.cc/RNT7-KXGQ>].

23. Nashrulla, *supra* note 18.

24. *Id.*

25. *Id.*

26. *E.g.*, *Australian Woman Justine Damond Killed in Police Shooting in Minneapolis*, SYDNEY MORNING HERALD (July 17, 2017, 12:45 PM), <https://www.smh.com.au/world/australian-woman-killed-in-police-shooting-in-minneapolis-reports-20170717-gxchas.html> [<https://perma.cc/E9YL-7FJY>]; Goyette & Austl. Associated Press, *supra* note 13.

27. Mitch Smith, *Minneapolis Police Chief Forced Out After Fatal Shooting of Australian Woman*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/us/minneapolis-police-chief-resigns-days-after-officer-fatally-shot-a-woman.html> [<https://perma.cc/2P3M-W73J>].

28. Erin Golden, *In Mayor Betsy Hodges' Re-Election Loss, Minneapolis Voters Were 'Looking for Something Different'*, STAR TRIB. (Nov. 11, 2017, 3:17 PM), <http://www.startribune.com/in-mayor-betsy-hodges-re-election-loss-minneapolis-voters-were-looking-for-something-different/456732693/> [<https://perma.cc/3GDF-LEJR>].

29. Andy Mannix, *Minneapolis Agrees to Pay \$20 Million in Death of Justine Ruzczyk Damond*, STAR TRIB. (May 4, 2019, 2:35 PM), <http://www.startribune.com/minneapolis-agrees-to-pay-20-million-in-fatal-police-shooting-of-justine-ruzczyk-damond/509438812/> [<https://perma.cc/VG5M-RT4X>].

30. Libor Jany, *Minneapolis Police Officer Mohamed Noor Turns Himself in on Murder, Manslaughter Charges in Justine Damond Killing*, STAR TRIB. (Mar. 21, 2018, 12:55 PM), <http://www.startribune.com/minneapolis-police-officer-mohamed-noor-turns-himself-in-on-charges-in-justine-damond-killing/477405923/> [<https://perma.cc/PN8T-TK46>].

murder and second-degree manslaughter.³¹ The charges brought a sentence of 12.5 years in prison.³²

The financial and criminal sanctions were unusually high relative to other such police shootings.³³ While the publicity and the public outrage regarding the killing was unusual, the circumstances of the Justine Damond incident were not markedly different from other police killings.³⁴ Other victims have also been unarmed and were killed without posing a fatal threat to the police.³⁵ But the fact that the victim was a white female, rather than a black male, and that the officer was a black Muslim immigrant, are distinctive among other police shootings.³⁶ These differences were highlighted by many commentators as driving the disparity in the financial payout and an officer conviction between the shooting of Damond and other fatal police shootings.³⁷

The extent of the variability in the sanctions imposed by out-of-court settlement amounts is exemplified by considering another incident in Minnesota. On July 6, 2016, Philando Castile, a black male school cafeteria worker, was pulled over for a traffic stop by a St. Anthony, Minnesota, police officer.³⁸ The Officer Yanez pulled over the car—containing Castile, his fiancée, and their four-year-old daughter—after he radioed to another officer that “[t]he two occupants just look like people that were involved in a robbery.”³⁹ Officer Yanez positioned himself at the driver’s side window, explaining to Castile that he was pulled over because of a brake light issue, while his backup, Officer Kauser, approached the passenger’s window.⁴⁰ Officer Yanez asked for identification and

31. Mitch Smith, *Minneapolis Police Officer Convicted of Murder in Shooting of Australian Woman*, N.Y. TIMES (Apr. 30, 2019), <https://www.nytimes.com/2019/04/30/us/minneapolis-police-noor-verdict.html> [<https://perma.cc/2CML-KMVN>].

32. Matt Furber & Mitch Smith, *Somali-American Police Officer Sentenced to 12.5 Years in Death of Minneapolis Woman*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/us/minneapolis-police-sentencing-mohamed-noor.html> [<https://perma.cc/U3HR-BCVM>].

33. *See id.*

34. John Eligon, *A Black Officer, a White Woman, a Rare Murder Conviction. Is It ‘Hypocrisy’ or Justice?*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/us/mohamed-noor-guilty.html> [<https://perma.cc/7MN4-T5NE>].

35. E.g., Timothy Williams & Mitch Smith, *\$16 Million vs. \$4: In Fatal Police Shootings, Payouts Vary Widely*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/police-shootings-payouts.html> [<https://perma.cc/6YYW-URWT>].

36. Eligon, *supra* note 34.

37. *See id.*; Mannix, *supra* note 29; Joey Jackson, Opinion, *Mohamed Noor's Sentence Raises Uncomfortable Questions About Race*, CNN (June 8, 2019, 9:07 AM), <https://www.cnn.com/2019/05/03/opinions/mohamed-noor-conviction-justine-ruszczyk-death-raises-questions-jackson/index.html> [<https://perma.cc/KXS7-QL7U>].

38. *See* Melissa Chan, *Philando Castile Was a Role Model to Hundreds of Kids, Colleagues Say*, TIME (July 7, 2019, 2:47 PM), <https://time.com/4397086/minnesota-shooting-philando-castile-role-model-school/> [<https://perma.cc/PK9W-9Y8K>] (discussing the life and death of Mr. Castile).

39. Andy Mannix, *Police Audio: Officer Stopped Philando Castile on Robbery Suspicion*, STAR TRIB. (July 12, 2016, 7:55 PM), <http://www.startribune.com/police-audio-officer-stopped-philando-castile-on-robbery-suspicion/386344001/#1> [<http://perma.cc/T8LZ-SERS>].

40. *See, e.g., id.*; Alex Johnson, *Minnesota Officers in Fatal Shooting of Philando Castile Identified*, NBC NEWS (July 7, 2016, 10:44 PM), <https://www.nbcnews.com/news/us-news/minnesota-officers-fatal-shooting-philando-castile-identified-n605701> [<https://perma.cc/TW63-6D3D>].

proof of insurance, which Castile provided.⁴¹ A few seconds later, Castile calmly stated to Officer Yanez, “Sir, I have to tell you that I do have a firearm on me.”⁴² Officer Yanez interrupted Castile to say, “OK,” and put his hand on his gun before telling Castile, “[D]on’t reach for it, then . . . don’t pull it out.”⁴³ Castile and his fiancée both assured the officer that Castile was not reaching for the gun.⁴⁴ Officer Yanez began to raise his voice as he issued the same command, reaching his left hand into the vehicle, and with his right hand pulling his own gun out of his holster.⁴⁵ Officer Yanez then fired seven shots into the vehicle, five of which struck Castile.⁴⁶

Dash cam footage from Officer Yanez’s car shows that just twelve seconds elapsed from the moment Castile informed Officer Yanez that he had a gun to the moment of the shooting.⁴⁷ In addition to the dash cam footage that captured the shooting, Castile’s fiancée started a Facebook Live video immediately after the shooting that received over 2.5 million views in under 24 hours.⁴⁸

All of the added attention to this fatal shooting did not result in an inflated payout or a conviction.⁴⁹ The family of Philando Castile settled with the city for just under \$3 million, while Officer Yanez was acquitted of second-degree manslaughter charges.⁵⁰

Both deaths were unnecessary, at the hands of police officers in Minnesota, settled by the families of the decedents with their respective cities, but resulted in vastly different outcomes. The family of Justine Damond received \$20 million, while the family of Philando Castile received \$3 million.⁵¹ The officer who killed Ms. Damond was sentenced to 12.5 years in prison;⁵² the officer who killed Mr. Castile was acquitted of all charges.⁵³

When prominent police shootings result in a payout to the family of the victim, that compensation usually occurs via settlement rather than after a jury

41. Matt DeLong & Dave Braunger, *Breaking Down the Dashcam: The Philando Castile Shooting Timeline*, STAR TRIB. (June 21, 2017, 10:48 AM), <https://www.startribune.com/castile-shooting-timeline/429678313/> [<https://perma.cc/5E96-CM2T>].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Associated Press, *Police Officer Who Shot Philando Castile ‘Did What He Had to Do,’ Lawyer Claims*, GUARDIAN (June 12, 2017, 5:01 PM), <https://www.theguardian.com/us-news/2017/jun/12/philando-castile-shooting-jeronimo-yanez-trial> [<https://perma.cc/V7E9-2UX9>].

47. DeLong & Braunger, *supra* note 41.

48. Andrea Peterson, *Why the Philando Castile Police-Shooting Video Disappeared from Facebook—Then Came Back*, WASH. POST (July 7, 2016, 11:53 AM), <https://www.washingtonpost.com/news/the-switch/wp/2016/07/07/why-facebook-took-down-the-philando-castile-shooting-video-then-put-it-back-up/> [<https://perma.cc/T9SR-JH8K>].

49. Compare Mannix, *supra* note 29 (noting Minneapolis agreed to a \$20 million payout to Ms. Damond’s family), with Mitch Smith, *Philando Castile Family Reaches \$3Million Settlement*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html> [<https://perma.cc/N9VW-38LQ>] (noting Philando Castile’s family received a mere \$3 million payout).

50. See Smith, *supra* note 49.

51. Compare Mannix, *supra* note 29, with Smith, *supra* note 49.

52. Furber & Smith, *supra* note at 32.

53. Smith, *supra* note 49.

verdict.⁵⁴ This emphasis on out-of-court settlements is consistent with tort liability cases generally.⁵⁵ The criteria applied in litigation are nevertheless relevant in that they define the expectations of the parties regarding the plaintiff's prospects of success and the likely award.⁵⁶ These expectations in turn affect how much the plaintiffs require to settle the case and what the defendants are willing to offer to resolve the case.⁵⁷

Some of the pertinent criteria applied by the courts for police shootings are specific to the particular context and the legal discretion that police officers have to fire their weapons.⁵⁸ When families in these prominent cases do take police to court for wrongful death claims, the prosecution must first convince the jury that it was unreasonable that the police officer shot his⁵⁹ gun.⁶⁰ This Article explores some of the criteria of what is unreasonable below.⁶¹ If the jury finds the police liable, any award that the jury hands down must survive the judge's discretion, including the reversal of decisions due to considerations including: the judge's belief that the award is excessive,⁶² special interrogatories that use the words of the jury against their own wishes,⁶³ the judge's interpretation of qualified immunity,⁶⁴ and a lack of proof that the decedent survived long enough after the gunshot to warrant any pain and suffering damages.⁶⁵ Court payouts for fatal police shootings have been overturned at least as far as ten years removed from

54. See, e.g., *id.* (noting Ms. Damond's \$20 million award came through settlement); see also Lauren Hodges, *Cleveland to Pay \$6 Million to Settle Tamir Rice Suit*, NPR (Apr. 25, 2016, 11:26 AM), <https://www.npr.org/sections/thetwo-way/2016/04/25/475583746/cleveland-to-pay-6-million-to-settle-tamir-rice-law-suit> [<https://perma.cc/RVZ7-2NBX>] (discussing Cleveland's \$6 million settlement to Tamir Rice's family); Nicole Chavez & Christina Carrega, *Breonna Taylor Settlement Is Among Largest Payouts Linked to a Police Shooting*, CNN (Sept. 16, 2020, 5:59 PM), <https://www.cbs58.com/news/breonna-taylor-settlement-is-among-largest-payouts-linked-to-a-police-shooting> [<https://perma.cc/4BT8-VR4P>] (noting Louisville reached a \$12 million settlement with Breonna Taylor's family).

55. See generally Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (assessing settlement mill law firms as a method of tort reform because they speed up settlements).

56. See Jonah Newman, *Chicago Police Use 'Cover Charges' to Justify Excessive Force*, CHI. REP. (Oct. 28, 2018), <https://www.chicagoreporter.com/chicago-police-use-cover-charges-to-justify-excessive-force/> [<https://perma.cc/2BGH-XVYS>].

57. See *id.*

58. *Id.*

59. In these cases, it is rarely a female police officer who shoots and kills someone. See Philip Matthew Stinson, *The Henry A. Wallace Police Crime Database*, BOWLING GREEN ST. U., <https://policecrime.bgsu.edu> (last visited Mar. 17, 2021) [<https://perma.cc/R33R-SXDZ>] (database that contains 9,819 nonfederal law enforcement officers charged with a crime over 2005–2015).

60. See Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/4KLZ-ZZJG>].

61. See discussion *infra* Parts II, V.

62. See *Ferguson v. City of New York*, 73 A.D.3d 649, 650–51 (N.Y. App. Div. 2010).

63. See Dan Hinkel, *Conflicting Verdict Favors Chicago Cop in Fatal Shooting as Trial Ends in Confusion*, CHI. TRIB. (June 28, 2018, 5:45 AM), <https://www.chicagotribune.com/news/breaking/ct-met-quintonio-legrier-police-shooting-trial-20180628-story.html> [<https://perma.cc/5VQ8-5PTB>].

64. Julia Jacobs, *Judge Rescinds \$38 Million Award to Family of Maryland Woman Shot by Police*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/us/korryn-gaines-shooting-verdict.html> [<https://perma.cc/3HTW-VFER>].

65. See *Ferguson*, 73 A.D.3d at 649–50.

the shooting.⁶⁶ Finally, the award will potentially face appeals from the city responsible for paying it, before the city will agree to disperse the award.⁶⁷

The following two examples address two prominent fatal police shootings that resulted in payouts not via settlement but by jury verdict. While the original compensatory jury verdicts were vastly different, the two cases are tied together through two similarities in that the victims were black and both awards were overturned by judges.

On January 14, 2014, St. Lucie County sheriff's deputy Christopher Newman responded to a noise complaint.⁶⁸ He and another deputy arrived at the home of Gregory Hill, a thirty-year-old black father of three, who was playing music in his garage with the door closed.⁶⁹ The two deputies knocked on the garage door, and Mr. Hill raised the garage door.⁷⁰ After seeing it was the police, Mr. Hill, intoxicated at the time, lowered the garage door back down.⁷¹ Deputy Newman then fired through the door four times, striking Mr. Hill twice in the abdomen and once in the head.⁷² The incident took less than two minutes.⁷³ Four hours later, the police and a SWAT team entered the garage and found Mr. Hill dead.⁷⁴ The deputies claim Mr. Hill was holding an unloaded handgun at the time, although this fact is disputed since it was found in his back pocket when the officers entered the garage.⁷⁵

Mr. Hill's mother filed a wrongful death lawsuit⁷⁶ and in 2018, a jury awarded \$4 to Mr. Hill's family.⁷⁷ Specifically, the award was \$1 for funeral expenses, and \$1 for each of Mr. Hill's three children.⁷⁸ The award was so small partly because the jury found that Mr. Hill was mostly responsible for his own death.⁷⁹ Furthermore, the jurors were asked to compare the negligence of each party for Mr. Hill's death, and since the jurors decided that the deputies were only 1% at fault for Mr. Hill's death, the \$4 award was reduced to four cents.⁸⁰ This award was later reduced to nothing.⁸¹

66. *See id.*

67. *See generally id.*

68. P.R. Lockhart, *A Black Man Was Fatally Shot by Law Enforcement. A Federal Jury Gave His Family \$4*, VOX (May 31, 2018, 6:00 PM), <https://www.vox.com/identities/2018/5/31/17414344/gregory-vaughn-hill-jr-police-shooting-florida-4-dollar-settlement> [<https://perma.cc/6S JW-6BR3>].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Matt Stevens, *Jury Leaves \$4 to Family of Man Killed by Sheriff's Deputy, Along with Many Questions*, N.Y. TIMES (May 30, 2018), <https://www.nytimes.com/2018/05/30/us/gregory-hill-verdict-florida.html> [<https://perma.cc/Y94A-LWE8>].

74. Lockhart, *supra* note 68.

75. Stevens, *supra* note 73.

76. Lockhart, *supra* note 68.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

On August 1, 2016, three officers from the Baltimore County Police Department arrived at the home of twenty-three-year-old Korryn Gaines to serve her an arrest warrant for a traffic violation.⁸² After knocking and receiving no response, the officers got a key from the landlord and entered Ms. Gaines' apartment and found Ms. Gaines sitting on the floor and pointing a gun at the officers.⁸³ The officers fled and tried negotiating with her, but police say Ms. Gaines repeatedly refused to surrender during the six-hour standoff.⁸⁴ While the involved officers were not wearing body cameras, Ms. Gaines began recording parts of the standoff and posting her videos to Instagram.⁸⁵

Police report that eventually Ms. Gaines threatened the officers and aimed a shotgun at them.⁸⁶ The officers then shot and killed Ms. Gaines and injured her five-year-old son.⁸⁷ The family of Ms. Gaines filed a wrongful death lawsuit in 2016, and the jury found that the first shot fired by the officers was not reasonable and thus violated her and her son's civil rights.⁸⁸ The family received \$38.2 million in compensatory damages from the jury, though only \$300,000 of which was for the estate of Ms. Gaines.⁸⁹ A judge later overruled that jury award, however, finding that the officer had qualified immunity and thus was protected from civil liability.⁹⁰ The judge removed all parts of the award, including the \$7,000 for funeral expenses.⁹¹ The family stated they will appeal this decision.⁹²

These four examples are not rare outliers.⁹³ Police shootings have been frequent and provided much of the impetus for the emergence of the Black Lives Matter movement in 2013.⁹⁴ This Article examines the dimensions of the problem, the considerations that govern whether damages payments are awarded, and the level of such payments. Part II examines the specific legal criteria for when the police are authorized to shoot people. Three major U.S. Supreme Court cases

82. Jamiles Lartey, *Black Woman Shot Dead by Police During Alleged Standoff While Holding Son*, GUARDIAN (Aug. 2, 2016, 11:15 AM), <https://www.theguardian.com/us-news/2016/aug/02/korryn-gaines-black-woman-killed-by-police-son-injured> [https://perma.cc/T938-4K2F].

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Rosalie Chan, *Baltimore Police Confirm Korryn Gaines' Son Was Shot by Officer*, TIME (Aug. 5, 2016, 6:33 PM), <https://time.com/4441752/baltimore-police-shooting-korryn-gaines-instagram/> [https://perma.cc/DN5N-VFR5].

88. Pamela Wood & Alison Knezevich, *Jury Awards More Than \$37M to Family of Korryn Gaines in Civil Case Against Baltimore County*, BALT. SUN (Feb. 16, 2018, 4:45 PM), <https://www.baltimoresun.com/maryland/baltimore-county/bs-md-co-korryn-gaines-civil-deliberate-20180216-story.html> [https://perma.cc/U9RL-8DRD].

89. *Id.*

90. Alison Knezevich, *Judge Overturns \$38M Verdict in Lawsuit over Baltimore County Police Killing of Korryn Gaines*, BALT. SUN (Feb. 15, 2019, 8:05 PM), <https://www.baltimoresun.com/maryland/baltimore-county/bs-md-co-gaines-overturned-20190215-story.html> [https://perma.cc/6HEY-YTYE].

91. See Jacobs, *supra* note 64.

92. *Id.*

93. *Police in the U.S. Killed 164 Black People in the First 8 Months of 2020. These Are Their Names. (Part 1: January–April)*, CBS NEWS (Sept. 10, 2020, 4:39 PM), <https://www.cbsnews.com/pictures/black-people-killed-by-police-in-the-u-s-in-2020/> [https://perma.cc/CK4H-ZC7E].

94. *6 Years Strong*, BLACK LIVES MATTER, <https://blacklivesmatter.com/six-years-strong/> (last visited Mar. 17, 2021) [https://perma.cc/67X2-VAXR].

have created a legal doctrine that provides little specific guidance for when police may use force, and how much force is reasonable to use.⁹⁵ Without guidance on these core ideas, police have installed bright-line rules of their own that are often problematic, yet courts still rely on the perspective of police officers when determining what is reasonable.⁹⁶ We analyze the limits of payouts, specifically how qualified immunity and payouts from municipalities rather than individuals influence litigation surrounding fatal police shootings.⁹⁷ Based on the clear need for oversight of fatal police shootings, Part III considers the prevalence of these killings based on government datasets. Available data sources indicate that even though the number of these killings is substantial, there is no definitive governmental dataset that purports to keep a comprehensive annual record of these incidents. Part IV introduces *The Washington Post's* fatal police shootings dataset: a comprehensive data collection effort on fatal police shootings that compiles public reporting surrounding the circumstances of each shooting.⁹⁸ *The Washington Post's* dataset reveals nearly 1,000 fatal police shootings each year from 2015–2018, with black victims being over-represented compared to their share of the population.⁹⁹ Part V examines the size of wrongful death awards for police shootings compared to other wrongful death claims. When payouts occur for wrongful death claims in fatal police shootings, the settlement or jury verdict amounts are highly variable, often below even a reasonable compensatory damages amount, and almost invariably short of the magnitude needed to create effective incentives for deterrence.¹⁰⁰ Part VI examines the principles used to set these awards and contrasts them with the approach for deterrence-based measures known as the value of a statistical life. The economic value of the mortality costs for unwarranted killings by police over the 2015–2018 period ranges from \$1 billion to \$12 billion, depending on the criteria that are applied in determining which shootings are included in the assessment.¹⁰¹ If all deaths resulting from police shootings are included, the cost rises to \$39 billion.¹⁰² Further, we discuss the deterrent effect on police officers of higher payouts from governments.¹⁰³ Although there may be limits on the extent to which damages awards can be increased to foster adequate levels of deterrence, the economic principles for valuing mortality risks can serve as the framework for municipalities to undertake benefit-cost analyses of policies to promote responsible police behavior.¹⁰⁴ Part VII outlines how these policy reforms fit into the current climate of benefit-cost analyses for policing methods. Costs to the public of police use of force have been difficult to quantify, but using the value of a statistical life allows

95. See discussion *infra* Section I.A.

96. See discussion *infra* Section I.A.

97. See discussion *infra* Section I.C.

98. See discussion *infra* Part III.

99. See discussion *infra* Section III.A.

100. See discussion *infra* Part IV.

101. See discussion *infra* Section IV.B.

102. See discussion *infra* Section IV.B.

103. See discussion *infra* Part IV.

104. See discussion *infra* Part VI.

for empirically measuring the cost of the lives of victims of fatal force.¹⁰⁵ Part VIII discusses how to create more effective deterrence for unwarranted police shootings.

II. WHEN CAN A POLICE OFFICER KILL YOU?

A police officer can legally kill you when the force that the officer uses is “reasonable” under the Fourth Amendment.¹⁰⁶ There are some objective legal criteria that determine the reasonableness of the force used by a police officer.¹⁰⁷ These criteria are based on different characteristics of the police interaction, such as the severity of the possible crime and whether the suspect posed a significant immediate threat, was armed, or fleeing the scene.¹⁰⁸ Additional concerns that go beyond a police-centric benefit-cost approach also include consideration of the well-being of the victim.¹⁰⁹ Despite efforts to clarify what is reasonable force, however, there remains an important element of judgment involved in assessing what is reasonable. Attempts by the courts to broadly define reasonable use of force have created vacuums of clear guidance for which actions are permissible when.¹¹⁰ These vacuums are often filled by police themselves, allowing police the chance to greatly expand the realm of which of their own actions are reasonable and thus constitutionally permitted.¹¹¹ Some police officers revert to bright-line—yet deeply problematic—rules of thumb, such as justifiable, unlimited use of force if a suspect is fleeing, or if an armed person is within twenty-one feet.¹¹²

Whether the family of the victim of a police shooting has a basis for a wrongful death claim also depends on the circumstances of the shooting.¹¹³ This assessment is not based entirely on case-specific subjective judgments but rather draws on specific legal criteria that protect government officials and municipalities from liability.¹¹⁴ Qualified immunity and the *Monell* doctrine provide individual officers and municipalities protections from liability, respectively.¹¹⁵

105. See discussion *infra* Part VI.

106. See *Graham v. Connor*, 490 U.S. 386, 388 (1989).

107. Victor E. Kappeler, *How Objective Is the “Objective Reasonableness” Standard in Police Brutality Cases?*, E. KY. UNIV. (Dec. 10, 2013), <https://plsonline.eku.edu/insideloook/how-objective-“objective-reasonableness”-standard-police-brutality-cases#> [<https://perma.cc/QF5Q-7CAW>].

108. *Id.*

109. See *Overview of Police Use of Force*, NAT’L INST. JUST. (Mar. 5, 2020), <https://nij.ojp.gov/topics/articles/overview-police-use-force> [<https://perma.cc/5WNE-9FC4>] (noting police should ensure injured individuals receive medical attention).

110. See *id.*

111. See *id.*

112. See Von Kliem, *The 21-Foot “Rule” is Back in the News!*, FORCE SCI. INST. (Sept. 12, 2019), <https://www.forcescience.org/2019/09/the-21-foot-rule-is-back-in-the-news/> [<https://perma.cc/J92Y-PRE2>] (regarding the 21-foot principle); cf. Paul Bergman, *How Much Force Officers Can Use During Arrest*, NOLO (Sept. 27, 2013), <https://www.nolo.com/legal-encyclopedia/how-much-force-can-officers-during-arrest.html> [<https://perma.cc/6CHK-F3TN>].

113. *Wrongful Death by Police*, FINDLAW (Dec. 3, 2018), <https://www.findlaw.com/injury/torts-and-personal-injuries/wrongful-death-by-police.html> [<https://perma.cc/ZQ4Y-745E>].

114. *Id.*

115. See *id.* (mentioning qualified immunity extended to public employees); Orion De Nevers, *A Dubious Legal Doctrine Protects Cities from Lawsuits Over Police Brutality*, SLATE (June 2, 2020), <https://slate.com/>

These doctrines make receiving payouts from even unreasonable use of force at the hands of police officers more difficult.¹¹⁶

Defining reasonability for police use of force has been an ongoing, contradictory process for the courts.¹¹⁷ This Part discusses the legal grounding for when police officers can kill by reviewing three U.S. Supreme Court cases on use of force. In the absence of clear guidance from these cases and other court rulings, police officers have expanded their permission to kill with their own bright-line rules.¹¹⁸ Finally, doctrines that limit liability for police shootings essentially impede deterrence, yielding greater permission for police officers to kill.¹¹⁹

A. *The Reasonable Use of Force*

Three U.S. Supreme Court cases since the 1980s have shaped guidelines on reasonable use of force by police officers, including factors that define reasonability such as whether a suspect is unarmed and whether the suspect is fleeing.¹²⁰ These two specific factors have been present in the analysis of all three cases—first as part of a bright-line rule prohibiting lethal force against unarmed, fleeing suspects, then as just two factors among others to analyze holistically, for all uses of force.¹²¹ Understanding how the Court defines reasonable force informs how lower courts, juries, and officers decide which uses of force are permitted.¹²²

The level of violence that a police officer inflicts should be justified based on the threat level from the suspect,¹²³ as several of the above examples reflect, however, the use of force often exceeds the threat level.¹²⁴ In these cases, individuals can bring civil suits under 42 U.S.C. § 1983, which holds officers acting under the color of law liable for depriving others of their civil rights.¹²⁵ The landscape of civil lawsuits involving police violence centers around 42 U.S.C. § 1983, or what is often termed Section 1983.¹²⁶

news-and-politics/2020/06/monell-supreme-court-qualified-immunity.html [https://perma.cc/VGR5-CZYB] (regarding municipal protections through *Monell*).

116. De Nevers, *supra* note 115.

117. See *Overview of Police Use of Force*, *supra* note 109 (stating there is no agreed-upon definition of use of force).

118. Jason Wells, *How Police Officers Are Trained in the Use of Force*, HUFFPOST (July 18, 2017, 1:54 PM), https://www.huffpost.com/entry/how-police-officers-are-trained-in-the-use-of-force_b_5966921ce4b0524d8fa7faa0 [https://perma.cc/3FCK-KWHL].

119. Michael C. Dorf, *Would Eliminating Qualified Immunity Substantially Deter Police Misconduct?*, VERDICT: JUSTIA (June 10, 2020), <https://verdict.justia.com/2020/06/10/would-eliminating-qualified-immunity-substantially-deter-police-misconduct> [https://perma.cc/CD8Q-4VWW].

120. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008).

121. *Id.* at 1128–36.

122. See *id.* at 1128.

123. *Overview of Police Use of Force*, *supra* note 109.

124. Amir Vera, *Should Police Use of Force Be Regulated? The Answer Isn't Simple, and That's a Problem*, CNN (Sept. 30, 2018, 11:50 AM), <https://www.cnn.com/2018/09/30/us/police-use-of-force-legislation/index.html> [https://perma.cc/3SW5-AK3C].

125. 42 U.S.C. § 1983.

126. See *Monroe v. Pape*, 365 U.S. 167, 168–69 (1961). This case set the precedent for obtaining relief via § 1983 for constitutional rights violations at the hands of police officers.

In the 1985 *Tennessee v. Garner* case—a formative § 1983 case—the Supreme Court established that police officers may not use lethal force on an unarmed fleeing suspect.¹²⁷ The officer, Elton Hymon, saw that fifteen-year-old Edward Garner was fleeing a robbery and was “reasonably sure” and “figured” that Garner was unarmed.¹²⁸ Officer Hymon believed that he could not catch the eighth grader as Garner started to scale a fence.¹²⁹ After calling out to the child to stop, Hymon shot Garner in the back of the head, leading to his death a few hours later.¹³⁰ The father of Edward Garner sued the officer and others under § 1983.¹³¹

In *Garner*, the Supreme Court ruled that deadly force may not be used to apprehend a suspect that does not pose a significant threat to others.¹³² Determining whether the police officer’s seizure attempt was reasonable requires understanding the “totality of the circumstances.”¹³³ Considering the costs and benefits of a general case of lethal use of force, the “suspect’s fundamental interest in his own life” is weighed against the government’s own interest in promoting law and justice.¹³⁴ The court found that when a suspect is unarmed, the individual’s interest in their life outweighs the government’s interest to protect other members of society from an unarmed suspect.¹³⁵ This decision established a bright-line rule that lower courts used in cases of varying factual backgrounds: killing a fleeing unarmed suspect is not justified.¹³⁶

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 . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.¹³⁷

This bright-line rule is helpful because whether the suspect is unarmed and whether the suspect is fleeing are usually non-disputable questions.¹³⁸ The Court

127. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

128. *Id.* at 3.

129. *Id.* at 4.

130. *Id.*

131. *Id.* at 5.

132. *Id.* at 3.

133. *Id.* at 8–9.

134. *Id.*

135. *Id.* at 10.

136. See, e.g., *Eberhardinger v. City of York*, 782 F. App’x 180, 186 (3d Cir. 2019); *Lytle v. Bexar County*, 560 F.3d 404, 417 (5th Cir. 2009) (“It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.”); *Kirby v. Duva*, 530 F.3d 475, 483 (6th Cir. 2008) (“[D]eadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone.”); *Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999).

137. *Garner*, 471 U.S. at 11.

138. See generally *Bright-Line Rule*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/bright-line_rule [<https://perma.cc/UNM2-UMHC>] (defining bright line-rule).

correctly determined that cases that differ based on these observable facts warrant different analyses.¹³⁹

What qualifies as dangerous or as an immediate threat, however, can be open to interpretation in many cases.¹⁴⁰ If the officer has probable cause that the suspect is a threat to officers or to others, the *Garner* decision establishes that it is constitutional for police to use lethal force.¹⁴¹ Making this determination requires wading into the analysis of which uses of force are reasonable in non-dangerous situations.¹⁴² Another landmark U.S. Supreme Court case on police use of force, *Graham v. Connor*, created factors for determining “reasonableness” for use of force broadly.¹⁴³ But these factors today are overshadowed by the stress placed on analyzing the “totality of the circumstances,” and by the notion that the use of force should not be judged by hindsight of laypeople, but rather by the perspective of a reasonable officer at the time of the use of force.¹⁴⁴

The 1989 Supreme Court case of *Graham* considered broader instances of police use of force in contexts other than police shootings, but which nevertheless have implications for police shootings.¹⁴⁵ Diabetic Dethorne Graham asked a friend to drive him to a convenience store to buy orange juice to prevent the onset of an insulin reaction.¹⁴⁶ After noticing the long line in the store, Graham quickly left, which Officer Connor found to be suspicious.¹⁴⁷ Connor stopped Graham’s car, and in the process of trying to figure out the situation, Connor and other officers injured Graham and prevented him from receiving care for his insulin reaction.¹⁴⁸ Graham passed out momentarily from a lack of insulin, which the officers interpreted as a sign that Graham was drunk.¹⁴⁹ At one point, Graham reached for his wallet to show an officer his diabetic card, but the officer slammed Graham’s head onto the police car.¹⁵⁰ By the end of the interaction, the police officers broke Graham’s foot, caused cuts on his wrist, bruised his forehead, and injured his shoulder.¹⁵¹ Graham sued the police officers under Section 1983.¹⁵²

The Court ruled that use of force claims are to be analyzed under the Fourth Amendment’s “objective reasonableness” standard for searches and seizures.¹⁵³ While the thrust of *Graham* was analyzing use of force under the Fourth Amend-

139. See, e.g., Geoffrey P. Alpert & William C. Smith, *How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 490–91 (1994).

140. *Id.*

141. See *Garner*, 471 U.S. at 11.

142. See Harmon, *supra* note 120, at 1140.

143. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

144. *Id.*

145. See *id.* at 396–97.

146. *Id.* at 388.

147. *Id.* at 389.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 390.

152. *Id.*

153. See *id.* at 397.

ment's "objective reasonableness" standard, the opinion in *Graham* briefly grappled with the test of what force is reasonable.¹⁵⁴ *Graham* described that the "proper application" of the use of force requires analysis of "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."¹⁵⁵ These factors developed in *Graham* were to be considered on balance in future instances of police use of force.¹⁵⁶ With this generality, *Graham* has been widely cited in cases that allege excessive police use of force.¹⁵⁷ However, *Graham* doesn't narrow the scope of government interests as a justification for use of force, and only mentions one such interest—making "an arrest or investigatory stop."¹⁵⁸

The objective reasonableness standard balances the individual's interests with the government's interests in a similar benefit-cost method as *Garner* did.¹⁵⁹ However, the Court offers no rule or instruction as to what constitutes reasonableness, allowing this test to be applied in all circumstances of police use of force, rather than the bright-line rule that was established in *Garner* for a specific instance of police use of force.¹⁶⁰ While the Court also balanced the interests of each party in *Garner*, weighing the government's interests against the individual's, this reasoning was used as a means to develop a bright-line rule.¹⁶¹ That rule then determined whether use of force was reasonable in that circumstance going forward.¹⁶² In contrast, the Court used a similar benefit-cost balancing in *Graham* as the primary analysis in determining whether the force for this one specific case was objectively reasonable.¹⁶³ Lower courts are then given little guidance on how to analyze whether a given use of force was a proper application, or whether it was unreasonable.¹⁶⁴

The Court also stated that the reasonableness of any use of force must be determined from the perspective of the officers on the scene, "rather than with the 20/20 vision of hindsight."¹⁶⁵ This approach gives police officers and their expert witnesses in litigation leeway in defining an "objective perspective" on reasonable use of force.¹⁶⁶ Furthermore, the reasonableness of the officer is only judged for the moment that force is used; actions that lead up to the moment force

154. *Id.*

155. *Id.* at 396.

156. *Id.*

157. A Westlaw search on November 2, 2020 found 25,983 cases that cite *Graham v. Connor*.

158. *See Graham*, 490 U.S. at 396.

159. *See id.*; *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

160. *Tennessee*, 471 U.S. at 11.

161. *Id.* at 8.

162. *Graham*, 490 U.S. at 396.

163. *Id.* ("Determining whether the force used to effect a particular seizure is 'reasonable' 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.") (emphasis added) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

164. *Id.* at 397.

165. *Id.* at 396.

166. *Id.*

is deployed are outside of the Fourth Amendment analysis.¹⁶⁷ Police officers can unilaterally create positions where use of force is reasonable in the moment, but reasonable officers could have avoided such a moment from occurring at all.¹⁶⁸ Critically analyzing the tactics that lead to police use of force deserves as much scrutiny as the use of force themselves.¹⁶⁹ As it currently stands, the Court's analysis of the "totality of the circumstances" is limited in scope both due to the focus from the officer's perspective and from beginning the analysis too late into the interaction.¹⁷⁰

The factors identified in *Graham*—the severity of the crime, if the suspect is a threat, if the suspect is resisting arrest, if the suspect is fleeing—are a starting point for understanding reasonable use of force.¹⁷¹ While application of these factors may not resolve whether the killing was warranted in all situations, they can be particularly helpful in indicating some classes of circumstances in which lethal force is not warranted, such as when an unarmed suspect is fleeing the scene, as in *Garner*.¹⁷² Yet without further direction on when these factors rule out excessive use of force, *Graham* has resulted in courts falling back onto analyzing each case based on "the totality of the circumstances."¹⁷³

The Supreme Court did not revisit the issue of reasonableness of police use of force for nearly two decades until deciding *Scott v. Harris*.¹⁷⁴ Victor Harris was speeding at seventy-three miles per hour in a zone with a speed limit of fifty when a deputy motioned for him to pull over.¹⁷⁵ Instead, Harris led multiple deputies on a six-minute chase, reaching speeds above eighty-five miles per hour on two-lane roads.¹⁷⁶ Deputy Timothy Scott attempted to perform a maneuver to end the chase, by bumping the back corner of Harris's car.¹⁷⁷ This maneuver sent Harris and his vehicle off the road and into an embankment.¹⁷⁸ The car crash left Harris a quadriplegic.¹⁷⁹ Harris sued Scott under Section 1983.¹⁸⁰ While lower courts dismissed the officer's motion for summary judgment, the Supreme Court reversed the decision.¹⁸¹ Eight Justices concluded from video evidence that Scott's actions did not violate the Fourth Amendment rights of Harris because

167. See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 223 (2017).

168. *Id.* at 218.

169. See *id.*; Alpert & Smith, *supra* note 139, at 493–97 (listing five categories of antecedents of police use of force: the organizational atmosphere of the agency, the situation, the environment, the participants and their relationships, and the sustained injuries).

170. Alpert & Smith, *supra* note 139, at 501.

171. See *Graham*, 490 U.S. at 396.

172. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

173. See *Graham*, 490 U.S. at 396.

174. See Harmon, *supra* note 120, at 1119–20.

175. *Scott v. Harris*, 550 U.S. 372, 374 (2007).

176. *Id.* at 374–75.

177. *Id.* at 375.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 376.

the Justices disagreed with the fact pattern of the lower courts.¹⁸² They instead believed that because Harris posed a risk to police and innocent bystanders during the high-speed chase, Scott's use of force was reasonable.¹⁸³

Referencing the previous two Supreme Court cases on use of force, the decision in *Scott* did not consider the facts of this case to be similar enough to that of *Garner*.¹⁸⁴ The *Garner* rule, which courts have found is "clearly established even in situations with diverse factual situations,"¹⁸⁵ could not help Harris, a fleeing suspect, driving over the speed limit, armed with only a car.¹⁸⁶ Indeed, the opinion of the Court, delivered by Justice Scalia, is that the attempt of Harris' team to apply the legal test developed in *Garner* is "admirable," but it is still necessary to "slosh our way through the factbound morass of 'reasonableness.'"¹⁸⁷ The Court distinguished the lethal force involved in shooting a gun from the force applied by ramming one car with another, and it deemed Harris dangerous in his flight, compared to the unarmed victim fleeing on foot in *Garner*.¹⁸⁸ The Court continued to discredit the arguments of Harris by reviewing *Garner* and upending years of precedent and understanding of *Garner* by claiming that *Garner* did not establish a rule: "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test" ¹⁸⁹ This further analysis of *Garner* recasts *Garner* from a bright-line rule to an application without re-emphasizing the benefit-cost analysis of weighing suspects' interest in their own lives against the government's interest in making the arrest. This analysis was contrary to decades of lower court rulings, and it weakened a well-defined rule for police use of force.¹⁹⁰ Instead, for each new case of police use of force, the Court suggested relying on a judicial interpretation of reasonableness.¹⁹¹

The Court in *Scott* considered the principles of *Graham*, that governmental interests ought to be weighed against the interests of the individual.¹⁹² But the *Graham* factors for analyzing police use of force to help balance these interests—the severity of the crime and whether the suspect was a threat, resisting arrest, or fleeing—were not explicitly cited.¹⁹³ The *Scott* Court did not apply the "clearly

182. *Id.* at 378–81.

183. *Id.*

184. *Id.* at 382–83.

185. *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005); *see also Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 417 (5th Cir. 2009).

186. *Scott*, 550 U.S. at 374–75, 382.

187. *Id.* at 383.

188. *See id.*

189. *Id.* at 382.

190. *See id.*

191. *See id.*

192. *Id.* at 383.

193. *See Harmon, supra* note 120, at 1136.

established” *Garner* rule, and in balancing the interests of the two parties, neglected to cite the specific factors that were established in *Graham* to weigh party interests.¹⁹⁴

The doctrine resulting from these three Supreme Court cases establishes that all police uses of force must be reasonable under the Fourth Amendment.¹⁹⁵ Courts recognize that this standard involves the weighing of a suspect’s rights against the government’s rights.¹⁹⁶ Beyond that, the Supreme Court has provided few practical rules for reasonable force; instead, it has only weighed in on a few applications of the test.¹⁹⁷ Now, courts must resort to analyzing the “totality of the circumstances” to establish, after the fact and from an officer’s perspective, whether the force was reasonable.¹⁹⁸ This leaves officers, and those who train officers, without clear guidance on what reasonable force looks like.¹⁹⁹

B. Misperceptions Regarding the Reasonable Use of Force

Misperceptions surrounding the reasonableness for fatal use of force abound, especially in the police community.²⁰⁰ There are several documented cases of police, in the immediate aftermath of a police shooting, defending the decision to use lethal force because the suspect was running.²⁰¹ One example from 2015 is an officer in Tulsa, Oklahoma, who detained Eric Harris after another officer shot the unarmed, fleeing Harris in the back.²⁰² An officer’s body camera captures Harris, dying, telling the police, “I’m losing my breath,” to which one officer replies, “Fuck your breath.”²⁰³ The officer kneeling Harris’s head into the concrete in the video reveals how the officer justifies the fatal shooting when he states, “You fucking ran. So shut the fuck up.”²⁰⁴ Notably, the officer who killed Harris was convicted of second-degree manslaughter and sentenced to serve four years in prison.²⁰⁵ Additionally, the killings of Samuel Dubose and Walter Scott feature officers who justify their decision, either at the time or later in court, because the shooting victim fled.²⁰⁶

194. *Id.*

195. *See id.* at 1140.

196. *See id.* at 1136.

197. *Id.* at 1130–31.

198. Alpert & Smith, *supra* note 139, at 501.

199. *Id.*

200. *See id.* at 496.

201. Nancy C. Marcus, From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform, 12 DUKE J. CONST. L. & PUB. POL’Y 53, 64–67, 78–80 (2016).

202. *Id.* at 64.

203. *Id.*

204. *Id.*

205. Corey Jones, *Robert Bates Released from Prison After Serving 1½ Years of a Four-Year Sentence for Killing Eric Harris*, TULSA WORLD (Jan. 27, 2021), https://www.tulsaworld.com/news/local/crime-and-courts/robert-bates-released-from-prison-after-serving-years-of-a/article_a6ea16be-d5eb-5b7b-9be2-dd10265cac5b.html [<https://perma.cc/N9GD-Y7NV>] (showing that Officer Robert Bates served 37% of that sentence before being released at the age of seventy-six).

206. Marcus, *supra* note 201, at 64–67, 78–80.

The application of the reasonableness test in *Garner* could have created a bright-line rule—one that would directly apply in these cases.²⁰⁷ While individual officers may not have Supreme Court cases on mind during these shootings, officer training could be tailored to comply with bright-line rules.²⁰⁸ Currently, predicting judicial interpretations of reasonable use of force from *Graham* and *Scott* creates ambiguity.²⁰⁹ Shooting to kill unarmed suspects because they are fleeing is a rule that eliminates the ambiguity for police officers.²¹⁰ But it is a misperception of what reasonable force is, and one that officers maintain.²¹¹

Officers often have another misperception regarding their use of lethal force, due to the so called 21-foot rule.²¹² The 21-foot rule was developed in 1983 by Salt Lake City Officer Dennis Tueller, who conducted a “rudimentary series of tests and concluded that an armed attacker who bolted toward an officer could clear twenty-one feet in the time it took most officers to draw, aim and fire their weapon.”²¹³ His article on the 21-foot rule was published in the magazine SWAT, where, after explaining the concept, he writes, “[i]t would be safe to say then that an armed attacker at 21 feet is well within your Danger Zone.”²¹⁴

Since its inception, the 21-foot rule has been informally taught as a bright-line rule to police officers to justify the use of lethal force when someone has an edged weapon and is nearby enough to an officer.²¹⁵ Instead of using the idea as a rule of thumb for maintaining a safe distance from armed suspects, the 21-foot rule has been cited to justify deadly force when preventative tactics could have deescalated the situation.²¹⁶ The Chief of the Washington D.C. Metropolitan Police Department, Cathy Lanier, noted at the May 7, 2015, Police Executive Reform Forum that the 21-foot rule was a “huge driver” for the “first decision that

207. See Harmon, *supra* note 120, at 1128, 1137.

208. See Mitchell W. Karsch, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 *FORDHAM L. REV.* 823, 827 (1990).

209. See Harmon, *supra* note 120, at 1184–1185.

210. Jason Lee Steorts, *When Should Cops Be Able to Use Deadly Force?*, *ATL.* (Aug. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/08/use-of-deadly-force-police/402181/> [<https://perma.cc/7AUQ-ZP57>].

211. Bergman, *supra* note 112.

212. Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, *N.Y. TIMES* (May 4, 2015), <https://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html> [<https://perma.cc/E88T-7U5G>].

213. *Id.*

214. Dennis Tueller, *How Close is Too Close?*, *POLICE POL'Y STUDS. COUNCIL*, http://www.theppsc.org/Staff_VIEWS/Tueller/How.Close.htm (last visited Mar. 17, 2021) [<https://perma.cc/7VEC-WMGE>].

215. POLICE EXEC. RSCH. F., *GUIDING PRINCIPLES ON USE OF FORCE 20* (2016) (“Although some have claimed that few officers today are formally trained in the ‘21-foot rule,’ many police chiefs have said that the 21-foot-rule continues to be disseminated informally. PERF’s research into recent incidents revealed examples of the “rule” being cited by officers or their attorneys to justify shootings of suspects with edged weapons.”); see also POLICE EXEC. RSCH. F., *RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 15* (2015).

216. During investigation of his 2015 fatal shooting of Fridoon Nehad in which Nehad was seventeen-feet away from the officer and holding a knife, San Diego Police Officer Neal Broward stated, “When I first came on, we would always use the 21-foot rule.” The investigation report is conflicted on whether the officer used deescalatory tactics such as verbal warnings. See Letter from Bonnie M. Dumanis, San Diego Dist. Att’y, to Shelly Zimmerman, San Diego Police Chief 5–6 (Nov. 9, 2015), <http://www.voiceofsandiego.org/wp-content/uploads/2015/11/Midway-OIS-Letter-FINAL-11-9-15.pdf> [<https://perma.cc/CS7X-V4EF>].

went wrong” and resulted in officers using force.²¹⁷ She continued: “A lot of our shootings involved people with mental health issues armed with a knife, up on a porch, 30 feet away. And instead of taking cover and waiting, the officers would approach and shoot, and then say, ‘Well, we were justified in shooting; the person was within 21 feet and had an edged weapon.’”²¹⁸

Police officers face many split-second decisions, some of which may result in life-or-death outcomes for themselves and others.²¹⁹ Just as Officer Noor “relied on his training” before killing Justine Damond, officers rely on their own training to make immediate decisions in these high-stakes moments.²²⁰ The lack of guidance on reasonable use of force has resulted in misperceptions abounding in police officer training.²²¹ Proper guidance from the courts should inform training to correct these misperceptions.

But even if these misperceptions are eliminated, police officers will still shoot and kill suspects. Often before reaching the question of whether the use of force was unreasonable, legal doctrines limiting liability present difficulties for victims or their families seeking to recover.

C. *Legal Difficulties for Deterrents to Police Shootings*

Wrongful death claims for police shootings are based on a standard theory of negligence with death as the injury.²²² However, there are many difficulties that families of decedents face in receiving a payout at all.

Reducing the chances of a payout for families of decedents is the fact that officers have qualified immunity.²²³ The status of qualified immunity protects officers “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²²⁴ The resulting landscape surrounding qualified immunity means that an officer cannot be tried for violating an individual’s constitutional rights unless it was “clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”²²⁵ When considered in the context of the Supreme Court rulings on police use of force, qualified immunity covers more and

217. POLICE EXEC. RSCH. F., RE-ENGINEERING TRAINING ON POLICE USE OF FORCE, *supra* note 215, at 17.

218. *Id.*

219. *See* Garrett & Stoughton, *supra* note 167, at 223.

220. Scott Johnson, *At the Noor Trial (19)*, POWERLINE (Apr. 30, 2019), <https://www.powerlineblog.com/archives/2019/04/at-the-noor-trial-19.php> [<https://perma.cc/4F2S-5Z8F>].

221. Fed. L. Enf’t Training Ctrs., *Use of Force—Myths and Realities Part I (MP3)*, FLETC, <https://www.fletc.gov/audio/use-force-myths-and-realities-part-i-mp3> (last visited Mar. 17, 2021) [<https://perma.cc/7RJ9-DG2U>].

222. *See, e.g.*, Page v. Amtrak, Inc., 168 F.Supp.3d 337, 342 (D. Me. 2016).

223. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) (discussing how qualified immunity’s wide application protects most officers from liability); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017) (discussing the Supreme Court’s apparent desire to curb lawsuits against police by use of qualified immunity doctrine).

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

225. Saucier v. Katz, 533 U.S. 194, 202 (2001).

more questionable actions from the police as conflicting doctrine makes predicting legality of police behavior more difficult.²²⁶ When the court finds that a police officer is not liable for his or her behavior because the officer is granted qualified immunity, recovering damages from officers, their supervisor, or the municipality, becomes nearly impossible.²²⁷

Further, trial courts bifurcate allegations against individual officers and municipalities in § 1983 cases.²²⁸ This structure stems from the 1986 Supreme Court ruling of *City of Los Angeles v. Heller*, where juries must first find that officers violated the plaintiff's constitutional rights before proceeding in trial against the municipality.²²⁹ This bifurcation narrows the scope of litigation to case-by-case factual claims as opposed to systemic issues that arise from the municipality's policies or customs.²³⁰ Due to the Court's ruling in *Monell v. Department of Social Services*, if the case does proceed against the municipality, the plaintiff must then show that the constitutional violation was due to the policies or customs of the municipality, and not simply because of an officer's actions.²³¹ This makes holding municipalities liable under § 1983 claims very difficult.²³²

While payouts to the victims' families in the form of jury awards or settlements are atypical, charges and convictions to the offending police officers are even rarer.²³³ The circumstances for each shooting are unique, and the legality of many killings may be unquestioned.²³⁴ However, the Black Lives Matter movement, aided by the diffusion throughout society of video recording, has challenged the legality of many fatal police shootings over the years.²³⁵ In the past fourteen years, only 104 nonfederal police officers have been arrested for manslaughter or murder.²³⁶ In thirty-six of these incidents, the police officers have been convicted, but only four officers were convicted of murder for an on-duty shooting, including Officer Noor mentioned at the beginning of this Article.²³⁷ The other police officers who have been convicted were convicted on

226. Harmon, *supra* note 120, at 1141.

227. *Id.*

228. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

229. *Id.*

230. See Garrett & Stoughton, *supra* note 167, at 239.

231. *Id.*

232. See *id.*; *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (finding that a plaintiff must show that training was "deliberately indifferent" to constitutional rights).

233. See, e.g., Smith, *supra* note 31.

234. See *Scott v. Harris*, 550 U.S. 372, 383 (2007).

235. Mark Hockstra & Carly Will Sloan, *Does Race Matter for Police Officer Use of Force? Evidence from 911 Calls 1* (Nat'l Bureau of Econ. Resch., Working Paper No. 26774, 2020).

236. Philip M. Stinson, *If Minnesota Officer Had Been White, Would He Have Been Convicted?*, USA TODAY (May 23, 2019, 6:44 PM), <https://www.usatoday.com/story/opinion/policing/spotlight/2019/05/23/officer-murder-minnesota/1145769001/> [<https://perma.cc/JWT2-AKUT>].

237. *Id.*

charges ranging from reckless discharge of a firearm up to manslaughter.²³⁸ Arrests and convictions of police officers are unlikely to serve as a primary means of creating deterrence of fatal police shootings.²³⁹

The choice of the Court to focus on analyzing “the totality of the circumstances” while also limiting analysis to specific police actions instead of tactics that lead up to use of force does not create clear guidance for officers.²⁴⁰ Further, the decision to “slosh” through the “factbound morass”²⁴¹ of each case prevents police departments from developing clear rules on acceptable uses of force.²⁴² With that absence, and with greater calls from the public to limit use of force, or at least properly define reasonable use of force, police officers have internalized their own set of rules.²⁴³ These rules may often violate Fourth Amendment rights, but they seem reasonable to officers, and thus courts give deference to their perspective.²⁴⁴ The result is a lack of guidance from the courts and the continuation of public confusion and anger towards police overuse of force incidents and their ensuing litigation.²⁴⁵

Positive empirical analysis about police behavior remains difficult to extend to normative conclusions under this lack of legal guidance.²⁴⁶ We concur with the benefit-cost reasoning in *Garner* that a fleeing and unarmed suspect values their life more so than the value to the state of the benefits from using lethal force to seize them.²⁴⁷ However, as we’ve seen in *Scott*, if the suspect’s flight is dangerous to others—by speeding through stoplights to avoid capture, for example—then the societal costs have been increased, leading the Court to alter its prior reasoning.²⁴⁸

Since the “factbound morass” of each case may be vast, documenting basic features of police interactions, fatal or otherwise, has become necessary to understand the scope of the problem of police violence.²⁴⁹ How often do police interact with citizens? How often does the confrontation end with a fatality? How many of these victims are unarmed and fleeing? The aftermath of these fatal cases is also worth analyzing. What happens in litigation after such a violation

238. *Id.*

239. Cf. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 846 (2012) (discussing the lack of deterrent effect from high-profile civil suits and damage awards after fatal police shootings).

240. See Garrett & Stoughton, *supra* note 167, at 284.

241. *Scott v. Harris*, 500 U.S. 372, 383 (2007).

242. See Garrett & Stoughton, *supra* note 167, at 213.

243. *Id.*

244. Osagie K. Osabsogie, *The Bad-Apple Myth of Policing*, ATL. (Aug. 2, 2019), <https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832/> [<https://perma.cc/9UU8-DERF>].

245. *Id.*; Carri Karuhn, *Protesters Call for Probe in Killing of Homeless Man*, CHI. TRIB. (Mar. 20, 2000), <https://www.chicagotribune.com/news/ct-xpm-2000-03-20-0003200157-story.html> [<https://perma.cc/YP3P-YRXP>].

246. See generally Colin Loftin et al., *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976–1998*, 93 AM. J. PUB. HEALTH 1117, 1121 (2003) (analyzing the unreliability of justifiable homicide statistics produced by the two leading government reporting programs).

247. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

248. *Scott v. Harris*, 500 U.S. 372, 386 (2007).

249. *Id.* at 383.

of an individual's constitutional rights? Is the optimal amount of deterrence in place to limit these violations? These are all questions that this Article addresses either by providing an analysis of the issue or by indicating the path to developing an answer to these questions.

III. GOVERNMENTAL ESTIMATES OF POLICE USE OF FORCE

Police shootings that lead to fatalities receive substantial media attention relative to some other risks, such as auto accidents.²⁵⁰ Assessing the overall prevalence of police shootings has been hampered by the absence of reliable data. Governmental databases provide a partial, longer term perspective on police shootings.²⁵¹ The Centers for Disease Control has maintained the National Vital Statistics System, and the Bureau of Justice Statistics has maintained the Uniform Crime Reports system.²⁵² Each of these databases employs a different approach and provides evidence of frequent police shootings.²⁵³

Despite the policy prominence of police shootings in the media, governmental agencies do not maintain a comprehensive and precise tracking of the prevalence and circumstances of these shootings. At present, the Bureau of Justice Statistics and the Centers for Disease Control do monitor such deaths,²⁵⁴ the classifications of which are described below. Although this Article considers their data, their data series are not comprehensive and do not address the circumstances of the shootings. To fill this void, *The Washington Post* initiated a comprehensive assessment of fatal police shootings beginning in 2015.²⁵⁵ As the next Part will demonstrate, *The Washington Post* data indicate that the number of fatal police shootings is almost 1,000 per year.²⁵⁶ Over one-fourth of those fatalities involve situations that may have lacked a strong basis for such a shooting, such as victims who are unarmed and not fleeing the scene, victims who are unarmed

250. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 942 (2015).

251. Catherine Barber et al., *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics, and Supplementary Homicide Reports*, 106 AM. J. PUB. HEALTH 922, 922 (2016).

252. *Id.*

253. *Id.*

254. See *id.* Uniform Crime Reports (UCRs) are created and maintained by the Bureau of Justice Statistics in cooperation with the Federal Bureau of Investigation and are available for download here: <https://www.ucrdatatool.gov/> [<https://perma.cc/2HRF-V7NJ>]. The National Vital Statistics System is administered by the Centers for Disease Control and Prevention and is available here: <https://www.cdc.gov/nchs/nvss/index.htm> [<https://perma.cc/K6V3-KDNG>].

255. See Julie Tate et al., *Fatal Force*, WASH. POST [hereinafter WASH. POST Database], <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [(last visited Mar. 17, 2021) <https://perma.cc/4JWZ-XCFK>] (providing current updates to an ongoing database that tracks instances of killing by police officers).

256. *Id.*

but are fleeing, and victims who are armed and fleeing.²⁵⁷ In each of these instances, blacks comprise a disproportionate share of the victims.²⁵⁸ The data discussed below indicate that this high black representation is particularly likely when the use of fatal force is least warranted because the victim is unarmed.²⁵⁹

Given the prominence of police shootings in public discussions of police behavior and in providing the impetus for the Black Lives Matter movement, one would expect that government agencies would seek to identify the number of police killings, their demographic profile, and the circumstances under which the shootings occurred. Documenting such information could assist in designing and implementing police procedures to prevent unwarranted killings.²⁶⁰ In our review of the governmental data below, we find that the governmental efforts to track fatal police shootings are lacking both in terms of keeping track of the number of shootings and the nature of the incidents that led to the shootings.²⁶¹ Thus, the data fall short in terms of being able to assess which shootings are problematic and the frequency of these unwarranted fatalities.

Two longstanding databases for measuring fatalities from police use of force are the National Vital Statistics System (“NVSS”)—maintained by the Centers for Disease Control (“CDC”)—and the Supplementary Homicide Reports (“SHRs”)—maintained by the Federal Bureau of Investigation (“FBI”) in its Uniform Crime Reports system.²⁶² The NVSS tracks deaths by “legal intervention,” which refers to “deaths caused by law enforcement and other persons with legal authority to use deadly force, excluding legal executions.”²⁶³ The self-reported SHRs track “justifiable homicides,” which the FBI define as the “killing of a felon by a peace officer in the line of duty.”²⁶⁴ This definition for justifiable homicides appears to exclude killings of non-felons or innocent suspects, but regardless, the count of justifiable homicides in the SHRs remain the best way, relying on the FBI data, to track killings by the police.²⁶⁵

A snapshot of police shootings for the year 2016 from these two systems shows significant differences between these governmental databases. The SHRs

257. *Id.*

258. *Id.*

259. See WASH. POST Database, *supra* note 255; Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement*, 51 AM. J. PREVENTATIVE MED. S173, S173 (2016).

260. See WASH. POST DATABASE, *supra* note 255; *Fighting Police Abuse: A Community Action Manual*, AM. CIV. LIBERTIES UNION (Aug. 1997), <https://www.aclu.org/other/fighting-police-abuse-community-action-manual> [<https://perma.cc/U424-YRWV>].

261. See WASH. POST DATABASE, *supra* note 255.

262. Catherine Barber et al., *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics, and Supplementary Homicide Reports*, 106 AM. J. PUB. HEALTH 922, 922 (2016).

263. See Bridget H. Lyons et al., *Surveillance for Violent Deaths—National Violent Death Reporting System*, 17 States, 2013, 65 MMWR SURVEILLANCE SUMMARIES 1, 1 (2016); see also Howard E. Williams et al., *The Limitations of Government Databases for Analyzing Fatal Officer-Involved Shootings in the United States*, 20 CRIM. JUST. POL’Y REV. 201, 201–02 (2016).

264. Loftin et al., *supra* note 246, at 1118.

265. *Id.*; See *Services*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/services/cjis/ucr> (last visited Mar. 17, 2021) [<https://perma.cc/MZ6R-F4P2>].

report that there were 444 justifiable homicides in 2016.²⁶⁶ The NVSS reports 549 deaths by legal intervention that year.²⁶⁷ This discrepancy is larger than what has been typically found in previous studies.²⁶⁸ The difference between the two datasets, however, is only a minor problem compared to the finding that both governmental datasets dramatically undercount the number of fatalities at the hands of police.²⁶⁹ The datasets have been measured to undercount the true number of killings by the police by over 50%.²⁷⁰

A study of these two reporting databases over 1976 to 2013 identified different systematic reasons each database underreports fatal police shootings.²⁷¹ The NVSS underreports the number of fatal police shootings due to misclassification of homicides when a medical examiner or coroner does not describe police involvement in the death.²⁷² The SHRs underreports police shootings since it does not purport to be a comprehensive census of all such deaths but rather a survey that relies on voluntary participation of local law enforcement, who may fail to file any report at all and often omit homicides committed by law enforcement.²⁷³ A 2015 Bureau of Justice Statistics study found that these two systems provided unreliable measures of arrest-related deaths.²⁷⁴

The advantage of these governmental datasets is their longevity. Although these two reporting systems are less reliable than more modern databases, they extend back in time. The data include years as early as the 1960s for the SHRs and 1933 for the NVSS.²⁷⁵ Each of these datasets has undergone extensive revisions to their systematic data collection system over the years.²⁷⁶

266. See Expanded Homicide Data Table 14: Justified Homicide, 2017 *Crime in the United States*, FBI: UNIFORM CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/expanded-homicide-data-table-14.xls> (last visited Mar. 17, 2021) [<https://perma.cc/FTC2-8TLG>] (documenting 444 “justifiable homicides” by law enforcement in 2016).

267. See Deaths, Percent of Total Deaths and Rank Order for 113 Selected Causes of Death and Enterocolitis Due to Clostridium Difficile by Race & Hispanic Origin, and Sex, United States, 2016, Ctrs. Disease Control & Prevention 1, 3 (2016), https://www.cdc.gov/nchs/data/dvs/lcwk/lcwk6_hr_2016.pdf [<https://perma.cc/V89D-3QQG>] (documenting 549 deaths by “legal intervention” in 2016).

268. See Colin Loftin, David McDowall & Min Xie, *Underreporting of Homicides by Police in the United States, 1976–2013*, 21 HOMICIDE STUDS. 159, 164 (2017); Loftin et al., *supra* note 246, at 1118–21; Barber et al., *supra* note 262, at 925.

269. Barber et al., *supra* note 262, at 922.

270. *Id.*

271. Loftin, McDowall & Xie, *supra* note 268, at 159.

272. *Id.*

273. *Id.* at 159–60.

274. An arrest-related death as defined by the Bureau of Justice Statistics study is a civilian death that occurs during arrest or while in the custody of law enforcement, such as incarceration. See MICHAEL PLANTY ET AL., BUREAU OF JUST. STAT. & RSCH. TRIANGLE INST., ARREST-RELATED DEATHS PROGRAM: DATA QUALITY PROFILE, 16–17 (2015).

275. *Age-Adjusted Death Rates for Selected Causes, Death Registration States, 1900–32, and United States, 1933–98*, CTRS. DISEASE CONTROL & PREVENTION: NT'L VITAL STATS. SYS., <https://www.cdc.gov/nchs/nvss/mortality/hist293.htm> (last visited Mar. 17, 2021) [<https://perma.cc/N9ZG-3QDG>]; WENDY REGOECZI ET AL., BUREAU JUST. STAT., THE NATION'S TWO MEASURES OF HOMICIDE 1 <https://www.bjs.gov/content/pub/pdf/ntmh.pdf> [<https://perma.cc/39QA-DBNX>].

276. PLANTY ET AL., *supra* note 274.

The CDC established the National Violent Death Reporting System (“NVDRS”) in 2003.²⁷⁷ The NVDRS serves as a more accurate count of police shooting fatalities, which are counted in the database as legal interventions.²⁷⁸ Legal interventions are defined in the NVDRS as situations in which the “decedent was killed by a police officer or other peace officer (persons with specified legal authority to use deadly force), including military police, acting in the line of duty.”²⁷⁹ The NVDRS is compiled by abstractors at the state level who review the death certificate, the coroner’s report, and any police report to summarize several different recordable aspects of a violent death.²⁸⁰ The NVDRS started in only six states in 2003, and today covers forty states, with the intention to expand to all states.²⁸¹

In a comparison of the SHRs from the FBI, and the NVSS and NVDRS from the CDC, the SHRs captured 48% of 1,552 police homicides in sixteen states that were reported in the NVDRS at the time from 2005–2012.²⁸² The NVSS reported 58% of these homicides found in the NVDRS that covered 16 states at the time.²⁸³ Still, the NVDRS—while far more reflective of actual police homicide counts in the states that it measures than the SHRs or NVSS—is missing cases that are captured in *The Washington Post*’s fatal police shootings database, which is described in Part IV.²⁸⁴

The government does collect survey information on citizen interactions with the police through the Police-Public Contact Survey administered by the Bureau of Justice Statistics.²⁸⁵ These data are self-reported but provide further insight into police use of force, among other topics such as who initiated the contact, whether the officer improved the situation, and whether the officer behaved properly.²⁸⁶ In the 2015 *Contacts Between Police and the Public* report, the Bureau of Justice Statistics surveyed 70,959 respondents nationwide and extrapolated their findings to the age sixteen and older population of the United States.²⁸⁷ The Bureau of Justice Statistics finds that of the 53 million people with police contact in 2015, 1.8%, or nearly one million people, reported experiencing force during the police encounter.²⁸⁸ There are some demographic differences in

277. Lyons et al., *supra* note 263, at 2; Homicides and Suicides – National Violent Death Reporting System, United States, 2003-2004, Ctrs. Disease Control & Prevention (July 7, 2006), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5526a1.htm> [<https://perma.cc/YD7B-UA84>].

278. REGOECZI ET AL., *supra* note 275, at 4; Homicides and Suicides *supra* note 277.

279. Barber et al., *supra* note 262, at 923.

280. *Id.*

281. *NVDRS State Profiles: The Reach of NVDRS*, CTRS. DISEASE CONTROL & PREVENTION (Nov. 7, 2019), <https://www.cdc.gov/violenceprevention/datasources/nvdrs/stateprofiles.html> [<https://perma.cc/2UB6-KE7V>].

282. Barber et al., *supra* note 262, at 922.

283. *Id.*

284. *Id.*; see WASH. POST Database, *supra* note 255; *infra* Part III.

285. *Data Collection: Police-Public Contact Survey (PPCS)*, Bureau Just. Stats., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=251> (last visited Mar. 17, 2021) [<https://perma.cc/5EDC-GTGF>]; see ELIZABETH DAVIS ET AL., BUREAU JUST. STATS., *CONTACTS BETWEEN POLICE AND THE PUBLIC*, 2015 (2018).

286. See sources, *supra* note 285.

287. See DAVIS ET AL., *supra* note 285, at 20.

288. *Id.* at 16. Any police-contact refers to police-initiated contact or resident-initiated contact. Experienced Force includes threatening use of force, pushing or grabbing, handcuffing, hitting or kicking, using chemical or

the rate of nonlethal contact, as 2.7% of males who interacted with police experienced force compared to 0.9% of females, while 3.3% of black people with police interactions experienced force compared to 1.3% for white people.²⁸⁹

A nongovernmental, causal analysis of the effect of officer race on use of force found that white officers were 60% more likely to use force than black officers, and twice as likely to use gun force.²⁹⁰ The researchers used a universe of two million 9-1-1 calls in two cities, where dispatch calls do not allow officer discretion to attend the call or not.²⁹¹ With approximately randomly assigned 9-1-1 calls, white officers were observed using gun force in predominantly black neighborhoods at a rate five times that of black officers.²⁹²

While these figures relate primarily to nonlethal use of force, the findings from the Police-Public Contact Survey and the 9-1-1 call research bear out a similar story to the fatal shootings in *The Washington Post* database examined below: police use force against black people at much higher rates than against white people.²⁹³

IV. *THE WASHINGTON POST'S FATAL FORCE DATABASE*

The undercounting of fatal police shootings in the governmental databases is not an inherent problem of keeping track of the number of such deaths.²⁹⁴ Rather, the databases were not designed for the specific purpose of accounting for the number of deaths from police shootings throughout the country.²⁹⁵ *The Washington Post* launched a more comprehensive effort, which is explored in this Part and will provide the empirical basis for this Article's assessment of both the number of deaths from police shootings, the number of deaths involving different degrees of reasonableness of the shooting, and the monetized value of the mortality cost associated with the deaths.

A. *The Washington Post's Fatal Force Database*

In an effort to address the inadequacy of the data on fatalities resulting from police shootings, *The Washington Post* has collected data on every recorded fatal on-duty police shooting since January 1, 2015.²⁹⁶ The database only includes victims who were killed by shootings, or shootings and tasings, but not other manners of death at the hands of police officers.²⁹⁷ *The Post* gathers information by aggregating local news reports, police reports, other independent databases,

pepper spray, using an electroshock weapon, or pointing a gun, and does *not* include if the police only shouted at them, cursed at them, threatened to arrest them or threatened to give them a ticket.

289. *Id.* Both of these differences are statistically significant at the 95% confidence interval.

290. Hoekstra & Sloan, *supra* note 235.

291. *Id.* at 2.

292. *Id.* at 4.

293. *See id.*; *supra* Part III.

294. *See* WASH. POST Database, *supra* note 255.

295. *See id.*

296. *See id.*

297. *Id.*

as well as by conducting their own reporting on some cases.²⁹⁸ Information provided in the database includes name and demographic characteristics of the victim, date and location of shooting, how the victim was armed (if at all), whether the victim was attacking anyone, whether the victim was fleeing, if the officer was wearing a body camera, and whether the victim was experiencing a mental health crisis.²⁹⁹

This independent tracking of police lethal use of force and the contexts in which force is used is critical for understanding the scope of the problem. In each year since 2015, *The Washington Post* logs on average twice as many deaths from on-duty police shootings as both the FBI's SHRs and the CDC's NVSS.³⁰⁰ *The Washington Post* does not report data on deaths while incarcerated, off-duty shootings, or non-shooting deaths at the hands of police.³⁰¹

TABLE 1. FATAL POLICE SHOOTINGS FROM 2015 TO 2018 BY RACE/ETHNICITY

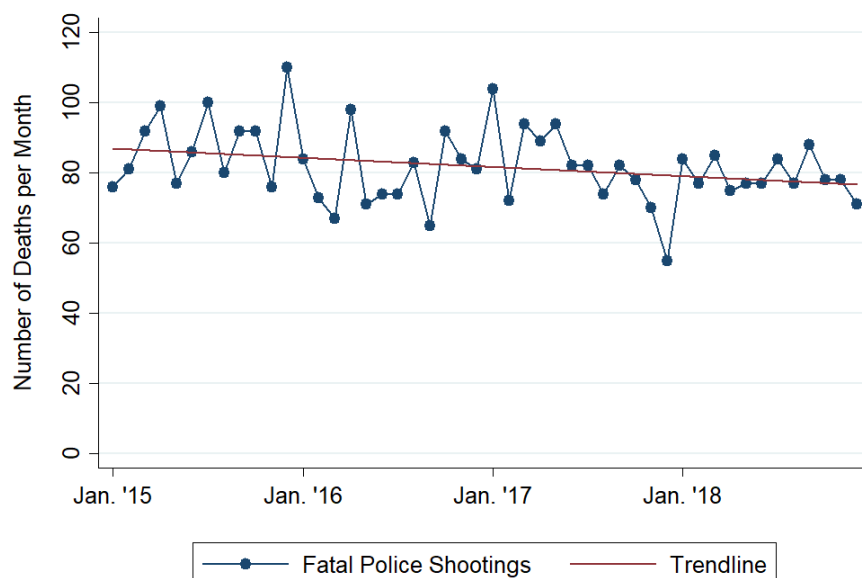
| | Total | White | Black | Hispanic | Other | Missing Race |
|------------------------------------------------------|-------|-------|-------|----------|-------|--------------|
| Total Fatal Police Shootings | | | | | | |
| Count | 3,934 | 1,873 | 944 | 675 | 164 | 278 |
| Percent | 100 | 48 | 24 | 17 | 4 | 7 |
| Victim Unarmed and Fleeing | | | | | | |
| Count | 114 | 41 | 48 | 21 | 3 | 1 |
| Percent | 100 | 36 | 42 | 18 | 3 | 1 |
| Victim Unarmed and Not Fleeing | | | | | | |
| Count | 141 | 65 | 45 | 25 | 6 | 0 |
| Percent | 100 | 46 | 32 | 18 | 4 | 0 |
| Victim Armed and Fleeing | | | | | | |
| Count | 955 | 409 | 264 | 185 | 34 | 63 |
| Percent | 100 | 43 | 28 | 19 | 4 | 7 |
| Victim Armed and Not Fleeing | | | | | | |
| Count | 2,356 | 1,200 | 491 | 373 | 106 | 186 |
| Percent | 100 | 51 | 21 | 16 | 4 | 8 |
| Victim's Armed or Fleeing Status Not Reported | | | | | | |
| Count | 368 | 158 | 96 | 71 | 15 | 28 |
| Percent | 100 | 43 | 26 | 19 | 4 | 8 |

Notes: Data come from *The Washington Post*'s Fatal Force database and cover the years 2015 to 2018. *The Post* collects this data from local news reporting, police reports, social media, and other independent police shooting databases. If the race/ethnicity of the victim is not reported or identified in any of *The Post*'s reporting, they are marked as "missing race." Two hundred forty-five victims have a missing armed status, 134 have a missing fleeing status, and 11 have both. A victim is recorded as "fleeing" by *The Post* if they fled on foot, in a vehicle, or otherwise. While 56% of "armed" victims are reported to have guns, the definition for "armed" extends to: toy weapons, flashlights, oars, pens, staplers, a claim to be armed, and unknown or undetermined weapons.

298. *Id.*299. *See id.*300. *Id.*301. *Id.*

Table 1 summarizes the Fatal Force database from *The Washington Post*. Police officers shot and killed at least 3,934 people in the United States from January 1, 2015 to December 31, 2018, nearly 1,000 shooting deaths from police a year, or 2.7 a day.³⁰² Overall, 95% of victims were male.³⁰³ The median age of a victim was 35, though the age of all victims ranges from six to ninety-one.³⁰⁴ Over these four years for which *The Washington Post* has complete annual data, each year has nearly the same number of police shooting fatalities.³⁰⁵ No month or season stands out as representing a particularly dangerous month with more shootings. Figure 1 plots the number of fatal police shootings per month over this four-year period. The distribution of fatal police shootings over the past four full years has been relatively uniform, with seventy to 100 fatal police shootings in most months.³⁰⁶ A simple linear regression analysis of the number of shootings in a month on time is plotted over this data to show a minor downward temporal trend in the number of fatal police shootings.³⁰⁷

FIGURE 1. FATAL POLICE SHOOTINGS 2015–2018



302. See Julie Tate, Jennifer Jenkins & Steven Rich, *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> (Aug. 10, 2020) [<https://perma.cc/F7MT-FFB5>] [hereinafter 2019 WASH. POST Database].

303. *Id.*; WASH. POST Database, *supra* note 255.

304. See WASH. POST Database, *supra* note 255.

305. See 2019 WASH. POST Database, *supra* note 302.

306. *Id.*

307. *Id.*

B. *Characteristics of Shootings in the Fatal Force Database*

Based on aggregated reports on each case, *The Washington Post* lists the circumstances of 63% of these fatal shootings as an attack in progress.³⁰⁸ The database reports 56% of victims were armed with a gun, 7% are explicitly listed as unarmed, another 11% are listed as “undetermined,” involving an “unknown weapon,” or have missing information on how, if at all, they were armed.³⁰⁹ Another 15% were armed with knives, while the remaining victims were armed with items including the following: a baseball bat, a machete, a toy weapon, a rake, a stapler, a rock, a vehicle, a garden tool, an air conditioner, and a cordless drill.³¹⁰

In 24% of cases, there was clear reporting that the shooting victim displayed signs of mental illness or was suffering a mental health crisis.³¹¹ This assessment includes after-the-fact statements that the family provided.³¹² In only 11% of cases were there reports that a police officer had a body camera turned on.³¹³ *The Washington Post* reports that about half of the nation’s 18,000 law enforcement agencies have some type of body camera program, although the requirements for when an officer must wear a camera or record an incident differ greatly between departments.³¹⁴ None of the governmental databases indicate whether the killing was recorded using a body camera.³¹⁵

Of those killed, 24% were black,³¹⁶ which is nearly twice the percentage of black people in the general population of the United States, 13.4%.³¹⁷ Of the 955 killings of persons who were armed and fleeing—on foot, in a vehicle, or otherwise—28% were black.³¹⁸ Of the 141 killings of unarmed people who were not fleeing over these four years, 32% were black, and of the 114 killings of victims who were unarmed and were fleeing, 42% were black.³¹⁹ This final category of data from *The Washington Post* highlights the most problematic of the police shootings. More unarmed and fleeing black people have been shot and

308. *Id.*

309. *Id.*

310. WASH. POST Database, *supra* note 255.

311. *Id.*

312. For example, Travis James Eckstein, twenty-three, was shot and killed after exchanging fire with U.S. Customs and Border Patrol officers at the San Ysidro port of entry, and his family and girlfriend described afterwards his recent bipolar diagnosis and ongoing depression. See Melissa Adan, *San Ysidro POE Gunman Suffered from Mental Illness: Family*, NBC SAN DIEGO (June 5, 2019, 8:57 PM), <https://www.nbcsandiego.com/news/local/Family-of-Suspected-San-Ysidro-Port-of-Entry-Gunman-Says-23-Year-Old-Suffered-From-Mental-Illness-510894551.html> [<https://perma.cc/U3N6-YM4Y>].

313. See WASH. POST Database, *supra* note 255.

314. Kimberly Kindy, *Some U.S. Police Departments Dump Body-Camera Programs amid High Costs*, WASH. POST (Jan. 21, 2019, 4:31 PM), https://www.washingtonpost.com/national/some-us-police-departments-dump-body-camera-programs-amid-high-costs/2019/01/21/991f0e66-03ad-11e9-b6a9-0aa5c2fcc9e4_story.html [<https://perma.cc/NX5E-AJ6D>].

315. *Id.*

316. See WASH. POST Database, *supra* note 255 (analysis includes the 372 victims with a missing race, or ethnicity, in the database).

317. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Mar. 17, 2021) [<https://perma.cc/9AJ9-NYZF>].

318. See WASH. POST Database, *supra* note 255.

319. *Id.*

killed by police than unarmed and fleeing white people despite the vast difference in their population shares.³²⁰ For the category in which the culpability of the victim may be least—those who were unarmed and fleeing—the share of black victims is 42%, higher than any other category.³²¹

Much of the recent media coverage of fatal police shootings surrounds black male victims, a category of victims the data show as overrepresented in all types of fatal police shootings.³²² The data throughout the rest of this Article primarily focuses on damages provided to families of victims of all races and ethnicities for several reasons. First, as a practical matter, the following datasets on jury awards and settlements do not distinguish based on race. But furthermore, optimal deterrence of fatal police shootings that police officers face should not depend on the victim's race. In the next Part, we consider statistics for payouts from wrongful deaths, compared to the subset of wrongful deaths by police, for both jury verdicts and settlements.

V. HOW MUCH ARE PAYOUTS FOR WRONGFUL DEATH CLAIMS?

To get an assessment of the adequacy of wrongful death settlements and awards after police shootings, it is useful to have a reference point for what such valuations are in other wrongful death contexts. This Part begins with a review of publicly compiled information on wrongful death cases generally as well as data from the Civil Justice Survey of State Courts. These databases provide both a general perspective as well as limited information on the small share of police shootings included in these samples. The final Section of this Part reports on the publicized settlement or jury award values for police shootings that have received prominent newspaper coverage.

A. Overall Statistics of Payouts After Wrongful Deaths

Compensation amounts in wrongful death cases consist of a variety of components based on the loss suffered by the survivors. A chief component of the financial loss suffered by the family is based on the lost income.³²³ The present value of this income loss includes the value of the lost earnings as well as the value of lost fringe benefits.³²⁴ There also are deductions from the consumption share for the deceased so as to identify the net financial loss to the survivors.³²⁵ Medical costs are in addition to this amount, as is the economic value of lost

320. See *id.*; *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Mar. 17, 2021) [<https://perma.cc/9AJ9-NYZF>].

321. See WASH. POST Database, *supra* note 255.

322. See Elliot C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <https://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html> [<https://perma.cc/Z3XU-DF26>]; Barber et al., *supra* note 262, at 924.

323. See Joseph E. Johnson, *Economic Valuation for Wrongful Death*, 6 CAMPBELL L. REV. 47, 49 (1984).

324. *Id.* at 56.

325. *Id.*

services.³²⁶ There also may be nonmonetary components, such as the pain and suffering of the deceased and the loss of consortium.³²⁷

Because the income loss is proportional to the income level of the deceased, the damages award tends to increase with the pre-death income level of the deceased.³²⁸ Many victims of police shootings may have relatively low income as they are sometimes unemployed or in low wage jobs.³²⁹ Racial discrimination that reduces the wage rate of black employees would be an additional contributory factor depressing award amounts for that average victim of police shootings.³³⁰ The overall ramification of police shooting victims having low wages is that the resulting low income levels will tend to depress the damages awards that they will receive and will consequently send a smaller financial signal to deter future killings.³³¹

Thomson Reuters collected data on wrongful death verdicts separately for males, females, and minors from March 2007 to March 2017 in their *Personal Injury Valuation Handbook* as part of their Jury Verdict Research Series.³³² This sample provides a perspective on wrongful death awards generally, not simply those wrongful deaths from police shootings.³³³ The data are useful in providing a reference point for assessing the likely role of wrongful death awards if they adhered to more general practices. The wrongful death cases represent a random sample from nationwide verdicts over the ten-year time period.³³⁴ The values reported are only from original compensatory jury verdicts for claims from individual plaintiffs of physical, mental, or emotional injury or trauma.³³⁵ These jury verdicts do not include settlements, defense verdicts, or arbitration awards.³³⁶ Billion-dollar awards are also excluded.³³⁷ The cases were gathered by independ-

326. *Id.* at 49, 57.

327. *Id.* at 49.

328. *See id.* at 62.

329. *Class and Racial Inequalities in Police Killings*, PEOPLE'S POL'Y PROJECT (June 23, 2020), <https://www.peoplespolicyproject.org/2020/06/23/class-and-racial-inequalities-in-police-killings/> [https://perma.cc/9TGF-YBCZ].

330. DARIELY RODRIGUEZ & HOPE KWIATKOWSKI, LAWS.' COMM. FOR C.R. UNDER L., HOW RACE, ETHNICITY, AND GENDER IMPACT YOUR LIFE'S WORTH: DISCRIMINATION IN CIVIL DAMAGE AWARDS 3 (2018), https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf [https://perma.cc/P5FX-T6NQ].

331. Kim Hayes, *How Your Race and Gender Could Impact Your Injury Settlement*, ENJURIS, <https://www.enjuris.com/blog/news/race-gender-injury-settlement/> [https://perma.cc/7V4J-3JCN].

332. *See* Thomson Reuters, *Basic Injury Values for Wrongful Death of Adult Males*, 4 PERSONAL INJURY VALUATION HANDBOOK 4.10.6–4.20.6 (2017); Thomson Reuters, *Basic Injury Values for Wrongful Death of Adult Females*, 4 PERSONAL INJURY VALUATION HANDBOOK 4.20.6–4.30.6 (2017); Thomson Reuters, *Basic Injury Values for Wrongful Death of Minors*, 4 PERSONAL INJURY VALUATION HANDBOOK 4.30.6–4.40.4 (2017).

333. *See generally* 4 THOMSON REUTERS, PERSONAL INJURY VALUATION HANDBOOKS (2017).

334. The *Personal Injury Valuation Handbook* states, "The cases are collected in an impartial manner, with an equal emphasis on the collection of plaintiff and defense verdicts and with no intentional bias towards extreme verdicts or geographic regions." *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

ent contractors and furnished by court clerks, legal reporters, attorneys, and media sources.³³⁸ The results were published in the *Personal Injury Valuation Handbook*.³³⁹ Thomson Reuters does not provide information on plaintiff or decedent race.³⁴⁰

TABLE 2. JURY AWARDS AND SETTLEMENTS FOR CLAIMS OF WRONGFUL DEATH FROM THOMSON REUTERS

| | Adult Males | Adult Females | Minor Males | Minor Females | Minors Overall |
|-----------------------------------|----------------|------------------|----------------|------------------|-------------------|
| A. Jury Awards (\$) | | | | | |
| Median | 969,457 | 845,994 | 830,250 | 1,297,826 | 1,000,000 |
| Mean | 2,578,526 | 3,203,989 | 2,114,800 | 3,862,696 | 2,761,522 |
| Awards of \$1,000,000+ | 50% | 46% | 44% | 62% | 51% |
| B. Settlement Process (\$) | | | | | |
| Settlement Amount - Median | 285,000 | 240,000 | 350,000 | 293,750 | 333,113 |
| Settlement Amount - Mean | 841,995 | 686,804 | 1,166,938 | 811,637 | 1,036,489 |
| Final Demand - Median | 1,000,000 | 1,500,000 | 325,000 | 7,000,000 | 1,500,000 |
| Final Offer - Median | 212,500 | 100,000 | 250,000 | 250,000 | 250,000 |

Notes: This table comes from data in the Thomson Reuters *Personal Injury Valuation Handbook*. The data span from March 2007 to March 2017 and exclude arbitration awards, defense verdicts and billion-dollar verdicts. Panel A contains original compensatory jury awards rendered to individual plaintiffs for claims of wrongful deaths, and Panel B contains settlement amounts over the same time period for claims of wrongful death. Thomson Reuters notes that “the availability of settlement data is limited and should be interpreted accordingly.”

The first two rows of Table 2 contain mean and median jury awards for wrongful death claims from individual plaintiffs over this ten-year period, excluding cases with no awards.³⁴¹ Table 2 also provides data on the percentage of awards greater than one million dollars, and on median final offers and demands during settlement negotiation in cases where this information is available.³⁴² The median award for adult men was \$969,457, while the median award for adult women was \$845,994. Throughout most summary statistics provided by Thomson Reuters, wrongful deaths to adult males tend to pay slightly more than wrongful deaths to adult females.³⁴³ The median jury award for wrongful deaths of minors is \$1,000,000—slightly higher than that of adult males.³⁴⁴ Broken down by sex, wrongful deaths to minor females receive larger awards than cases with wrongful deaths to minor males.³⁴⁵ As is common in award payment amounts, the mean award for each group is higher than the median award due to large awards that raise the mean value.³⁴⁶

338. *Id.*

339. *Id.*

340. *Id.*

341. *See supra* Table 2.

342. *See supra* Table 2. Thomson Reuters does not report the percentage of cases with information on settlement negotiations in their wrongful death jury verdict sample.

343. *See supra* Table 2.

344. *See supra* Table 2.

345. *See supra* Table 2.

346. *See supra* Table 2.

In addition to jury verdict awards, Thomson Reuters also provides statistics on settlement awards for wrongful death claims.³⁴⁷ Panel B of Table 2 reports the median and mean settlement amounts for wrongful death claims in their sample.³⁴⁸ The median settlement award for wrongful death claims of adult men is \$285,000, and \$240,000 for adult women.³⁴⁹ Minors have higher settlement amounts, and, as with the jury verdicts, mean settlement amounts are much higher than median settlement amounts across all groups.³⁵⁰

The statistics from Table 2 show that if a relatively average wrongful death claim wins a payout in court, then the payout will be around \$1 million.³⁵¹ Wrongful death claims and their payouts, however, vary greatly in terms of liability types. Table 3 draws on data from the Thomson Reuters *Personal Injury Valuation Handbook* and breaks down the frequency and payout amounts of different wrongful death claims by liability type.³⁵² Medical malpractice cases were the most common over this ten-year period, making up 27% of wrongful death claims for adult males and 44% for adult females.³⁵³ The median award was largest for both sexes in wrongful death cases for product liability, with wrongful death claims for males receiving median awards of \$1.8 million, while claims for females received \$1.9 million.³⁵⁴

Thomson Reuters reports that cases of police negligence make up 4% of their male wrongful death sample, where this share includes only claims which received compensatory jury verdict awards.³⁵⁵ The median award for these police negligence cases is \$787,500, which is below the median jury verdict award for all wrongful death cases for males in Table 2.³⁵⁶ Note that these are cases in which there were jury verdicts for the plaintiffs, which is a difficult challenge given the legal obstacles to making such claims.³⁵⁷

When considering wrongful death claims that ended in settlements, Table 3 reports the settlements by liability type. Once again, the most frequent settlement type is medical malpractice cases, with medical malpractice representing 20% of all settlements for wrongful deaths to males and 32% for wrongful death claims for females.³⁵⁸

347. Thomson Reuters does not report the number of settled cases these statistics represent. They provide the following disclaimer, "Please note that due to the confidentiality and privacy requirements of most settlement agreements, the availability of settlement data is limited and should be interpreted accordingly." Thomson Reuters, *supra* note 333.

348. *See supra* Table 2.

349. *See supra* Table 2.

350. *See supra* Table 2.

351. *See supra* Table 2.

352. *See infra* Table 3.

353. *See infra* Table 3.

354. *See infra* Table 3.

355. *See infra* Table 3.

356. Compare *supra* Table 2, with *infra* Table 3.

357. See Taylor Dolven, *Shot by Cops, Smeared in Court*, VICE NEWS (Oct. 30, 2017), https://news.vice.com/en_us/article/pazq57/police-shootings-rule-609 [<https://perma.cc/QV4Q-BKLR>].

358. *See infra* Table 3.

Police negligence claims also result in settlement and represent 6% of all settled wrongful death claims in this ten-year sample.³⁵⁹ The median settlement amount for wrongful death in these cases of police negligence is \$650,000, well above the median settlement amount for males across all types of liability, but below the median jury verdict award in cases of police negligence, \$787,500.³⁶⁰

B. The Civil Justice Survey of State Courts Data

Another source of data on wrongful death claims and payouts is the Civil Justice Survey of State Courts (“CJSSC”).³⁶¹ The CJSSC collects data on civil dispositions at the trial court level that conclude in a given year in large U.S. counties.³⁶² While the 2001 iteration sampled from cases in the seventy-five largest U.S. counties, the 2005 iteration sampled from 160 courts in 156 counties and was not restricted to the largest U.S. counties.³⁶³

Out of 16,910 civil cases across the 2001 and 2005 CJSSC datasets, 700, or 4%, have claims of wrongful death from all types of cases.³⁶⁴ Of these 700 wrongful death claims, 247, or 35%, received any compensatory damages, and only 16 received punitive damages.³⁶⁵ Among the 2001 and 2005 CJSSC wrongful death cases with any compensatory award, the median award was \$1,000,000.³⁶⁶

359. See *infra* Table 3.

360. See *infra* Table 3.

361. *Civil Justice Survey Data*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Civil-justice/Civil-Justice-Survey/Civil-Justice-Survey-Data.aspx> (last visited Mar. 17, 2021) [<https://perma.cc/9FG6-DTYT>].

362. *Id.*

363. *Id.*

364. See Thomas H. Cohen & Steven K. Smith, *BJIS Report: Civil Trial Cases and Verdicts in Large Counties, 2001*, in CIVIL JUSTICE SURVEY OF STATE COURTS, 2001 (2001).

365. See *infra* Table 4.

366. See *infra* Table 4.

TABLE 3. JURY AWARDS AND SETTLEMENTS FOR CLAIMS OF WRONGFUL DEATH BY LIABILITY TYPE

| | Jury Awards | | | | Settlements | | | |
|------------------------------|-------------|----------------|-----------|--------------|-------------|----------------|-----------|--------------|
| | Males | | Females | | Males | | Females | |
| | Frequency | Median Award | Frequency | Median Award | Frequency | Median Award | Frequency | Median Award |
| Medical Malpractice | 27% | 770,074 | 44% | 909,500 | 20% | 400,000 | 32% | 300,000 |
| Business Negligence | 22% | 1,076,042 | 19% | 609,028 | 20% | 250,000 | 26% | 150,000 |
| Products Liability | 15% | 1,799,398 | 6% | 1,900,000 | 7% | 114,050 | | |
| Truck Accidents | 5% | 1,705,625 | 3% | 1,350,000 | 3% | 841,524 | 4% | 1,100,000 |
| Cycle and Vehicle Collisions | 5% | 490,000 | | | 8% | 255,000 | | |
| Police Negligence | 4% | 787,500 | | | 6% | 650,000 | | |
| Vehicle Pedestrian Suits | 4% | 862,500 | 5% | 503,948 | 9% | 100,000 | 7% | 265,000 |
| Government Negligence | 3% | 698,374 | | | 6% | 450,000 | 4% | 500,000 |
| Premises Liability | 3% | 130,479 | | | 3% | 201,250 | 3% | 135,000 |
| Personal Negligence | 2% | 1,500,000 | | | | | | |
| Vehicle Passenger Suits | 2% | 94,339 | | | 5% | 100,000 | 6% | 113,750 |
| Head-on Collisions | | | | | 3% | 485,725 | | |
| Intersection Collisions | | | | | 2% | 270,000 | | |
| Other Vehicle Suits | 7% | 750,000 | 11% | 750,000 | 6% | 199,993 | 13% | 217,500 |
| Other Non-Vehicular Suits | 1% | 1,000,000 | 12% | 856,739 | 2% | 325,000 | 4% | 240,000 |

Notes: The left half of Table 3 contains original compensatory jury awards rendered to individual plaintiffs for claims of wrongful deaths broken down by the most frequently reported liability cases. Data come from the Thomson Reuters *Personal Injury Valuation Handbook*. The data span from March 2007 to March 2017 and exclude arbitration awards, defense verdicts and billion-dollar verdicts. The right half of the table contains data on settlement amounts by liability type over the same time period. Thomson Reuters notes that “the availability of settlement data is limited and should be interpreted accordingly.” Percentages may not add to 100% due to rounding.

TABLE 4. WRONGFUL DEATH JURY AWARDS IN THE 2001 & 2005 CJSSC

| | Without Law Enforcement Defendants | With Law Enforcement Defendants |
|------------------------------------------------|------------------------------------------|---------------------------------------|
| Compensatory Jury Award (\$ > 0) | | |
| Median | 1,000,000 | 1,056,000 |
| Mean | 3,644,428 | 1,826,657 |
| Sample Size | 240 | 7 |
| Punitive Damages (\$ > 0) | | |
| Median | 2,243,657 | - |
| Mean | 5,993,976 | - |
| Sample Size | 16 | 0 |
| Fees and Costs Awarded (\$ > 0) | | |
| Median | 8,215 | 8,478 |
| Mean | 32,409 | 8,478 |
| Sample Size | 65 | 1 |
| Final Award Post-Reductions (\$ > 0) | | |
| Median | 1,000,000 | 800,000 |
| Mean | 3,829,408 | 1,702,873 |
| Sample Size | 240 | 7 |

Notes: Wrongful death jury award data come from the 2001 and 2005 iterations of the Civil Justice Survey of State Courts. Only non-zero awards are reported above.

The CJSSC records the identity types of plaintiffs and defendants, and allows for searching through wrongful death claims where a named defendant is identified as law enforcement.³⁶⁷ Table 4 presents case details for such cases in the 2001 and 2005 CJSSC data.³⁶⁸ Only fifteen wrongful death claims where a defendant is law enforcement exist in the 2001 or 2005 CJSSC datasets, and seven of these cases resulted in any compensatory damages, a percentage slightly higher than the rate of receiving a compensatory award for wrongful deaths with any defendant.³⁶⁹ The median award in these seven cases was \$1,056,000, showing that, conditional on winning at trial, cases of wrongful death at the hands of law enforcement officers tend to pay out awards with a median level that is similar in magnitude to cases of wrongful death in general.³⁷⁰ However, the much lower mean compensatory jury verdict suggests that wrongful death claims against law enforcement that do receive an award are less likely to receive large compensatory jury awards, relative to wrongful death claims with non-law enforcement defendants.³⁷¹ Few cases in this dataset have minor awards for fees, or award reductions from judges, and none of these cases for wrongful death claims with law enforcement defendants have punitive damages.³⁷²

367. *Data Collection: Civil Justice Survey of State Courts (CJSSC)*, BUREAU OF JUST. STATS., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=242> (last visited Mar. 17, 2021) [<https://perma.cc/7EUA-L2AY>].

368. *See supra* Table 4.

369. *See supra* Table 4.

370. *See supra* Table 4.

371. *See supra* Table 4.

372. *See supra* Table 4.

C. *Wrongful Death Payouts in Police Shootings with Prominent Media Coverage*

Egregious cases of police use of force garner national attention, but it is still rare for families of the decedents to receive payouts.³⁷³ When cities do pay families of victims of police shootings, either through settlement or jury awards, there is often a great amount of media coverage.³⁷⁴ The payouts, and the series of appeals that inevitably follow, become news-worthy by themselves.³⁷⁵

Tables 5, 6, and 7 summarize and document sixty-three such cases of fatal police shootings that resulted in a payout over 1999–2017 and which received prominent media coverage.³⁷⁶ The median award in such high-profile cases is \$1.425 million—just under the amount that Michael Brown’s family received in a settlement after massive media coverage surrounding his fatal police shooting in Ferguson, Missouri.³⁷⁷ However, the range is quite large, spanning from \$4—the compensatory jury award to Gregory Hill’s family before the reduction to \$0³⁷⁸—to \$20 million—the settlement amount between the city of Minneapolis and the family of Justine Damond.³⁷⁹ The median jury verdict from this sample of high-profile jury verdicts is \$1,050,000, only \$6,000 below the median jury verdict from the CJSSC data for successful wrongful death claims against law enforcement defendants, \$1,056,000, seen in Table 4.³⁸⁰ The median settlement of these shootings with prominent media coverage, \$1,500,000, is higher than the median wrongful death award from general police negligence seen in Table 3, \$650,000.³⁸¹ We will show in Part VI that even this amount for high-profile shootings is still too low to promote effective deterrence of the risks of death from police shootings.

373. See *infra* Tables 6–7.

374. Williams & Smith, *supra* note 3.

375. *Id.*

376. See, e.g., *id.*; Steven Rich, Derek Hawkins & Scott Higham, *Fatal Shootings by Police Lead to a Wide Range of Settlements for Families*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/graphics/investigations/police-shootings-civil-suits/> [https://perma.cc/T4AT-2YQ9]; Ryllie Danylko, *Tamir Rice Settlement: How Cleveland’s \$6 Million Payout Compares with Similar Cases in US*, CLEVELAND.COM (May 19, 2019), https://www.cleveland.com/metro/2016/04/how_the_tamir_rice_settlement.html [https://perma.cc/WHG8-GTK8].

377. See Williams & Smith, *supra* note 3.

378. See Stevens, *supra* note 73.

379. See Mannix, *supra* note 29.

380. See *supra* Table 4.

381. See *supra* Table 3.

TABLE 5. WRONGFUL DEATH PAYOUTS IN PROMINENT FATAL POLICE SHOOTINGS

| | Median Award | Minimum Award | Maximum Award | Sample Size |
|----------------------|--------------|---------------|---------------|-------------|
| All Cases | \$1,425,000 | \$4 | \$20,000,000 | 63 |
| Jury Verdicts | \$1,050,000 | \$4 | \$3,700,000 | 9 |
| Settlements | \$1,500,000 | \$7,500 | \$20,000,000 | 54 |
| Male | \$1,325,000 | \$4 | \$6,500,000 | 53 |
| Female | \$2,000,000 | \$300,000 | \$20,000,000 | 10 |
| Black | \$1,500,000 | \$4 | \$18,000,000 | 46 |
| Non-Black | \$1,100,000 | \$20,000 | \$20,000,000 | 17 |

Notes: This non-random sample of fatal police shootings that resulted in a jury award or settlement was compiled from the prominent cases found in Tables 6 and 7. All jury awards refer to the nominal value of original compensatory jury verdicts before award reductions. The names of the victims and details of the shooting, including the payouts, are listed in Tables 6 and 7. Sources are found in the appendix.

Only one of these nine high-profile shootings with a trial that received compensatory awards also distributed punitive damages.³⁸² That was for the 2000 shooting of Malcolm Ferguson, whose family received \$3.5 million in compensatory damages and \$7 million in punitive damages for a New York Police Department's drug bust gone wrong,³⁸³ though these awards were later reduced.³⁸⁴ While most of the victims of these prominent police shootings are male, when the victim is female, payouts can be much higher. Families of Malissa Williams and Tarika Wilson respectively settled for \$1.5 million and \$2.5 million³⁸⁵—in line with other prominent payouts³⁸⁶—while families of Bettie Jones, LaTanya Haggerty, and Justine Damond settled for \$16 million, \$18 million, and \$20 million respectively.³⁸⁷ Finally, black victims in this sample have a higher median award than nonblack victims.³⁸⁸ The difference in median awards may be due to greater media coverage of high payouts to black victims, leading to inclusion in this sample.³⁸⁹ Still, the median award to any group of victims in this sample is too low to promote effective deterrence, as we discuss in Part VI.

382. *Ferguson v. City of New York*, 901 N.Y.S.2d 609, 611 (N.Y. App. Div. 2010).

383. *See id.*; *Ferguson v City of New York \$10.5 Million Verdict*, BURNS & HARRIS, <https://burnsharris.com/verdicts-and-settlements/ferguson-v-city-of-new-york/> (last visited Mar. 17, 2021) [<https://perma.cc/8R88-P6VW>]; Andy Newman, *Drug Officer Kills Suspect in a Struggle*, N.Y. TIMES (Mar. 2, 2000), <https://www.nytimes.com/2000/03/02/nyregion/drug-officer-kills-suspect-in-a-struggle.html> [<https://perma.cc/YRJ6-NETT>].

384. *See Ferguson*, 901 N.Y.S.2d at 612.

385. Danylko, *supra* note 376.

386. *See supra* Table 5.

387. *See Williams & Smith, supra* note 3; *infra* Table 6; Mannix, *supra* note 29.

388. *See supra* Table 5.

389. *See id.*

Another source for payouts following prominent fatal police shootings is the Chicago Law Department's release of all city payouts from police misconduct from 2011 onwards.³⁹⁰ Most of these shootings occurred when the police officers were off duty.³⁹¹ Among fatal police shootings, thirty-one cases resulted in settlements or jury verdicts for the victim's estate, totaling \$54,287,712 paid out since 2011.³⁹² These range from a \$5,000 settlement to the estate of Claude Ellis Jr. after police officers allegedly entered his house without a warrant, beat him, and then shot him in the chest,³⁹³ to an \$8.5 million jury verdict for the death of Aaron Harrison, who was shot in the back while unarmed according to eyewitnesses.³⁹⁴ The average payout from a fatal police shooting in this Chicago database is over \$1.7 million, while the median payout is \$1 million.³⁹⁵

Only thirteen of these thirty-one shootings are classified as at the hands of an on-duty officer.³⁹⁶ Focusing on on-duty officers is a data restriction also used by *The Washington Post* in creating their database of fatal police shootings.³⁹⁷ When limited to payouts since 2011 from on-duty police in Chicago following fatal shootings, the average award is just over \$950,000, while the median award drops to \$350,000.³⁹⁸ Payouts after fatal shootings by police in Chicago are similar, if not lower, than payouts nationwide as seen in other datasets.³⁹⁹ A likely reason why the payment amounts in the Chicago police shootings are lower is that the Chicago database on fatal police shootings is a comprehensive listing that includes all settlements and court verdicts.⁴⁰⁰ In contrast, the awards for shootings that received prominent media attention may focus on shootings that are particularly egregious and likely to receive a larger award.⁴⁰¹

When families of the victims do win a payout in court, the award is often reduced, especially in these prominent cases.⁴⁰² The largest award of over \$38 million to the family of Korryn Gaines—\$300,000 of which was for her estate—was reduced to nothing two and a half years after her death when the judge found

390. Jonah Newman, *Settling for Misconduct: About This Project*, CHI. REP., <http://projects.chicagoreporter.com/settlements/about.html> (last visited Mar. 17, 2021) [<https://perma.cc/WEE5-8FML>] [hereinafter *About This Project*]; Jonah Newman, *Chicago Spent More Than \$113 Million on Police Misconduct Lawsuits in 2018*, CHI. REP. (Mar. 7, 2019), <https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/> [<https://perma.cc/VE8T-DUMM>].

391. Jonah Newman, *Settling for Misconduct*, CHI. REP., <http://projects.chicagoreporter.com/settlements/search/cases> (last visited Mar. 17, 2021) [<https://perma.cc/K3MU-9T93>] (filter by choosing "off-duty" in Officer Details).

392. *Id.*

393. Jonah Newman, *Settling for Misconduct, Case 12-CV-6451*, CHI. REP., <http://projects.chicagoreporter.com/settlements/case/12-cv-6451/> [<https://perma.cc/9PX4-J86M>] (last accessed Oct. 31, 2020).

394. Steve Schmadeke, *Family of Teen Slain by Police Awarded \$8.5M*, CHI. TRIB. (Aug. 19, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-08-19-ct-met-million-dollar-police-verdict-20130817-story.html> [<https://perma.cc/X5VF-PKNG>].

395. *See* Newman, *supra* note 391 (filter by choosing "killed by officer" in Outcome).

396. *Id.* (filter by choosing "killed by officer" in Outcome; then choosing "on duty" in Officer Details).

397. *See* WASH. POST Database, *supra* note 255.

398. *See* Newman, *supra* note 391.

399. *See infra* Table 7.

400. *See* Newman, *About This Project*, *supra* note 390.

401. *See infra* Table 6.

402. *See, e.g.,* *Ferguson v. City of New York*, 901 N.Y.S.2d 609, 612 (N.Y. App. Div. 2010).

that the officer should have been given qualified immunity and thus the civil rights of Gaines were not violated.⁴⁰³ The compensatory and punitive awards for the case of Malcolm Ferguson were reduced almost ten years after his fatal shooting.⁴⁰⁴ The court found that there was not sufficient proof that Ferguson was alive long enough to qualify for damages for pain and suffering, reducing the compensatory award from \$3 million to zero.⁴⁰⁵ The court affirmed that the officer's actions were wanton, reckless, or malicious, but that the \$7 million punitive damages award was excessive, and instead reduced that award to \$2.7 million.⁴⁰⁶

After winning an initial jury verdict of \$2.2 million, the family of Mohamed Bah received \$1.9 million seven years after the shooting of Bah, following a series of appeals.⁴⁰⁷ Following a jury award of just \$20,000 for the loss of life of forty-four-year-old James Ahern, the officer held liable in a civil trial filed for bankruptcy.⁴⁰⁸ An Arkansas bankruptcy court found the debt dischargeable, and the family of Ahern received nothing.⁴⁰⁹ After a Florida jury gave \$1 to each of Gregory Hill's three children and \$1 for his funeral expenses—for a total compensatory jury verdict of four dollars—the lawyer for the family of Gregory Hill told reporters he expected that the judge would reduce the nominal award to nothing.⁴¹⁰

403. Jacobs, *supra* note 64.

404. *Ferguson*, 901 N.Y.S.2d at 611–12.

405. *See id.* at 611.

406. *Id.* at 612.

407. Stephen Rex Brown, *NYC Agrees to Pay \$1.9 Million for NYPD Killing of Mohamed Bah*, N.Y. DAILY NEWS (Mar. 21, 2019, 6:01 AM), <https://www.nydailynews.com/new-york/ny-mohamed-bah-settlement-20190321-qw42dtzovsbhpadgsahoayjsu-story.html> [<https://www.perma.cc/HCD3-TBRW>].

408. *See Ahern v. Brackney (In re Brackney)*, Ch. 7 Case No. 5:12-bk-72111, Adv. No. 5:12-ap-07109, 2013 Bankr. LEXIS 958, at *11 (W.D. Ark. Mar. 14, 2013).

409. *Id.*

410. Lockhart, *supra* note 68.

TABLE 6: SAMPLE OF 54 SETTLEMENTS FOR PROMINENT FATAL POLICE SHOOTINGS

| Name | Age | Race | Sex | Date | Location of Shooting | Payout (\$) |
|--------------------|-----|----------|-----|------------|--------------------------|-------------|
| Justine Damond | 40 | White | F | 07/15/2017 | Minneapolis, MN | 20,000,000 |
| LaTanya Haggerty | 26 | Black | F | 06/04/1999 | Chicago, IL | 18,000,000 |
| Bettie Jones | 55 | Black | F | 12/26/2015 | Chicago, IL | 16,000,000 |
| Walter Scott | 50 | Black | M | 04/04/2015 | North Charleston, SC | 6,500,000 |
| Danroy Henry Jr. | 20 | Black | M | 10/17/2010 | Westchester, NY | 6,000,000 |
| Tamir Rice | 12 | Black | M | 11/23/2014 | Cleveland, OH | 6,000,000 |
| Eric Harris | 44 | Black | M | 04/02/2015 | Tulsa, OK | 6,000,000 |
| James Boyd | 38 | White | M | 03/16/2014 | Albuquerque, NM | 5,000,000 |
| Laquan McDonald | 17 | Black | M | 10/20/2014 | Chicago, IL | 5,000,000 |
| Kathryn Johnston | 92 | Black | F | 11/21/2006 | Atlanta, GA | 4,900,000 |
| Samuel Dubose | 43 | Black | M | 07/19/2015 | Cincinnati, OH | 4,800,000 |
| Flint Farmer | 29 | Black | M | 06/07/2011 | Chicago, IL | 4,100,000 |
| Ramarley Graham | 18 | Black | M | 02/02/2012 | New York, NY | 3,900,000 |
| Esau Castellanos | 31 | Hispanic | M | 03/16/2013 | Chicago, IL | 3,750,000 |
| Sean Bell | 23 | Black | M | 11/25/2006 | New York, NY | 3,250,000 |
| John Geer | 46 | White | M | 08/29/2013 | Springfield, VA | 3,000,000 |
| Amadou Diallo | 22 | Black | M | 02/04/1999 | New York, NY | 3,000,000 |
| Philando Castile | 32 | Black | M | 07/06/2016 | Falcon Heights, MN | 3,000,000 |
| Cedrik Chatman | 17 | Black | M | 01/07/2013 | Chicago, IL | 3,000,000 |
| Oscar Grant | 22 | Black | M | 01/01/2009 | Oakland, CA | 2,800,000 |
| Tarika Wilson | 26 | Black | F | 01/04/2008 | Lima, OH | 2,500,000 |
| Emil Mann | 45 | Nat. Am. | M | 04/01/2006 | Mahwah, NJ | 2,420,000 |
| Jonathan Ferrell | 24 | Black | M | 09/14/2013 | Charlotte, NC | 2,250,000 |
| Emmanuel Lopez | 23 | Hispanic | M | 09/16/2005 | Chicago, IL | 2,200,000 |
| Jashon Bryant | 18 | Black | M | 05/07/2005 | Hartford, CT | 1,600,000 |
| Timothy Russell | 43 | Black | M | 11/29/2012 | Cleveland, OH | 1,500,000 |
| Malissa Williams | 30 | Black | F | 11/29/2012 | Cleveland, OH | 1,500,000 |
| Michael Brown | 18 | Black | M | 08/09/2014 | Ferguson, MO | 1,500,000 |
| Danielle Willard | 21 | White | F | 11/02/2012 | West Valley City, UT | 1,425,000 |
| Anthony Smith | 24 | Black | M | 12/20/2011 | St. Louis, MO | 1,400,000 |
| Paul Childs | 15 | Black | M | 07/05/2003 | Denver, CO | 1,325,000 |
| Larry Jackson Jr. | 32 | Black | M | 07/26/2013 | Austin, TX | 1,300,000 |
| Ernest Satterwhite | 68 | Black | M | 02/09/2014 | North Augusta, GA | 1,200,000 |
| Yvette Smith | 47 | Black | F | 02/16/2014 | Bastrop County, TX | 1,200,000 |
| Jason Kemp | 31 | White | M | 07/20/2010 | Grand Junction, CO | 1,100,000 |
| Joseph Erin Hamley | 21 | White | M | 03/07/2006 | Tontitown, AR | 1,000,000 |
| Keith Vidal | 18 | White | M | 01/05/2014 | Boiling Springs Lake, NC | 1,000,000 |
| Ryan Rogers | 27 | Black | M | 03/20/2013 | Chicago, IL | 1,000,000 |
| Dakota Bright | 15 | Black | M | 11/08/2012 | Chicago, IL | 925,000 |
| Willie Miller | 25 | Black | M | 04/02/2010 | Chicago, IL | 750,000 |
| Niles Meservey | 51 | White | M | 06/10/2009 | Everett, WA | 500,000 |
| Bernard Bailey | 54 | Black | M | 05/02/2011 | Eutawville, SC | 400,000 |
| Bobby Stacy | 26 | White | M | 03/28/2010 | Southwest City, MO | 375,000 |
| Edward Lamont Hunt | 27 | Black | M | 01/30/2008 | Baltimore, MD | 375,000 |
| Patricia Ann Cook | 54 | White | F | 02/09/2012 | Culpeper, VA | 300,000 |
| Roy Glenn Jr. | 29 | Black | M | 02/22/2009 | Humboldt, TN | 209,000 |
| Rickey Childs | 16 | Black | M | 10/28/2016 | Chicago, IL | 100,000 |
| Warren Robinson | 16 | Black | M | 07/05/2014 | Chicago, IL | 100,000 |
| Tatioun Williams | 15 | Black | M | 05/25/2011 | Chicago, IL | 100,000 |
| Eric Williams | 40 | Black | M | 04/14/2005 | Detroit, MI | 85,000 |
| William Sheffield | 45 | White | M | 12/29/2005 | Society Hill, SC | 75,000 |
| Arthur Hutchinson | 40 | Black | M | 03/16/2000 | Chicago, IL | 60,000 |
| Angelo Miller | 17 | Black | M | 03/23/2007 | Cleveland, OH | 35,000 |
| Vincent Smith Jr. | 16 | Black | M | 01/15/2006 | Gary, IN | 7,500 |

Notes: This non-random sample of fatal police shootings that resulted in a settlement was compiled from prominent cases, and all cases are sourced in the appendix.

TABLE 7. SAMPLE OF 9 JURY VERDICTS FOR PROMINENT FATAL POLICE SHOOTINGS

| Name | Age | Race | Sex | Date of Shooting | Location of Shooting | Original Jury Verdict (\$) | Payout (\$) |
|---------------------|-----|-------|-----|------------------|----------------------|----------------------------|-------------|
| Prince Jones | 25 | Black | M | 9/1/2000 | Fairfax, VA | 3,700,000 | 3,700,000 |
| Malcolm Ferguson | 23 | Black | M | 3/1/2000 | Bronx, NY | 3,500,000 | 500,000 |
| Mohamed Bah | 28 | Black | M | 9/25/2012 | New York, NY | 2,200,000 | 1,900,000 |
| Alfontish Cockerham | 23 | Black | M | 06/20/2015 | Chicago, IL | 1,180,000 | 1,180,000 |
| Quintonio LeGrier | 19 | Black | M | 12/26/2015 | Chicago, IL | 1,050,000 | 0 |
| Zachary Snyder | 23 | White | M | 02/14/2008 | Cape Gir., MO | 1,000,000 | 1,000,000 |
| Korryn Gaines | 26 | Black | F | 08/01/2016 | Baltimore, MD | 300,000 | 0 |
| James Ahem | 47 | White | M | 01/20/2010 | Bella Vis., AK | 20,000 | 0 |
| Gregory Hill | 30 | Black | M | 01/14/2014 | Fort Pierce, FL | 4 | 0 |

Notes: This non-random sample of fatal police shootings that resulted in a jury award was compiled from prominent cases and are all sourced in the appendix. All jury awards refer to the nominal value of original compensatory jury verdicts before award reductions.

When Chicago Police Department Officer Robert Rialmo shot and killed both Bettie Jones, fifty-five, and Quintonio LeGrier, nineteen, on the night of December 26, 2015, the city settled with the family of Bettie Jones for \$16 million, but the case went to trial for the wrongful death claim regarding Quintonio LeGrier.⁴¹¹ In that case, the jury awarded \$1.05 million to the family of LeGrier, but moments after the award was announced, the judge described a special interrogatory that jurors signed.⁴¹² The interrogatory showed that the jury believed Rialmo had shot LeGrier due to a reasonable belief that LeGrier posed a threat to the officers the night of the shooting.⁴¹³ The judge then used the answer to that specific question to entirely wipe out the award the jury handed down.⁴¹⁴ During interviews afterwards, the jury foreman suggested that the jury believed the \$1.05 million award would be imposed.⁴¹⁵

These outcomes illustrate that among wrongful death claims that receive payouts, relatively large payouts in jury verdicts, nominal payouts in jury verdicts, and jury verdicts in general are often completely overturned.⁴¹⁶ Jury verdicts—which define settlement expectations—of wrongful death payouts from fatal police shootings are currently highly variable and unpredictable, weakening the deterrent effect from them.⁴¹⁷ This Article proposes strengthening this deterrent effect for fatal police shootings in a manner that will not deter police officers who operate within their legal capacity.

VI. HOW SHOULD DAMAGES BE SET? WRONGFUL DEATH COMPENSATION AND THE VALUE OF A STATISTICAL LIFE

The previous Parts summarized the criteria for determining whether police shootings are justified, the prevalence of these shootings, and the payouts from wrongful death claims. Here, we recognize the desire to reduce these egregious

411. See Williams & Smith, *supra* note 3.

412. Hinkel, *supra* note 63.

413. *Id.*

414. *Id.*

415. *Id.*

416. See *id.*

417. See *supra* Table 7.

fatal police shootings and propose establishing in such cases damages awards in line with the value of a statistical life (“VSL”). Using the VSL for damages awards will typically increase the overall amount that a municipality will pay out following these increasingly common incidents.⁴¹⁸ As we will demonstrate below, however, additional criteria may come into play that limit the circumstances under which a police officer or the municipality is liable for a damages award.⁴¹⁹ Finally, we address the effectiveness of deterring police behavior via municipal liability by reviewing a prior debate on attempts to monetize the cost of police shootings and discussing how our proposal achieves the goal of deterring unwarranted police shootings.⁴²⁰

A. *Using the Value of a Statistical Life to Monetize Police Killings*

If the objective of the damages award includes deterring future unwarranted police killings, then the conceptualization of the damages amount is different than simply providing compensation for the survivors’ financial loss. If the harm is tantamount to a monetary loss, then payment of damages equal to the financial loss will serve to make the victim “whole” and to deter future injuries.⁴²¹ If the harm involves loss of one’s life, however, then compensation for the financial loss associated with the wrongful death will fall short of the amount needed to establish adequate levels of deterrence.⁴²²

A well-established economics literature has developed the approach known as the VSL for setting the price needed to deter fatality risks.⁴²³ Consider a hypothetical situation in which there is a 1/10,000 probability of being killed. If a person is willing to pay \$900 to avoid this risk, then the VSL, or the value per unit risk, is $\$900/(1/10,000) = \9 million.⁴²⁴ Viewed somewhat differently, if there is a group of 10,000 people who each face a fatality risk of 1/10,000, then there will be one expected death to the group. If each person is willing to pay \$900 to eliminate this risk, then the total amount that could be raised to avoid the risk would be $\$900 \times 10,000 = \9 million.

While one could ask people how much they would be willing to pay to avoid fatality risks, a more reliable approach to ascertaining this value is to examine how much people are willing to pay in market contexts to reduce actual risks that they face. How much is it worth spending to obtain a safer car or to live in a safer neighborhood? Similarly, one could examine how much people require in compensation to incur risks, such as the amount that workers require to incur

418. See *supra* Table 4.

419. See *infra* Section VI.C.

420. See *infra* Section VI.C.

421. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 177–182 (2004).

422. W. Kip Viscusi, *Identifying the Legitimate Role of the Value of a Statistical Life in Legal Contexts*, 25 J. LEGAL ECON. 5, 6 (2019).

423. For a review of this literature, see W. Kip Viscusi, *The Value of Individual and Societal Risks to Life and Health*, in HANDBOOK OF THE ECONOMICS OF RISK AND UNCERTAINTY 385 (Mark J. Machina & W. Kip Viscusi eds., 2014); VISCUSI, *supra* note 4.

424. This calculation follows that in VISCUSI, *supra* note 4, at 29–30.

the risks they face on the job. Because of the substantial availability of employment data and occupational fatality data, a large literature has documented the VSL amounts implied by how much extra pay workers require to work on dangerous jobs.⁴²⁵ The average VSL found in these studies is about \$10 million, which we will use as our reference point for how much municipalities should be penalized per fatality to create optimal levels of deterrence.⁴²⁶ Similarly, municipalities can use this value in internal analyses to assess which policies to reduce police shootings based on the costs of these efforts and the monetized value of the reduction in mortality.

While this proposal to penalize government agencies using the VSL so as to incentivize their efforts to prevent fatal shootings by police is novel, the idea of using the VSL to set the price on mortality risks is a well-established governmental practice.⁴²⁷ There are more than 100 examples of regulatory impact analyses by federal agencies that have used the VSL to monetize fatality risks.⁴²⁸ In recent years, these values have generally been in the \$9–\$10 million range.⁴²⁹ For example, in these regulatory analyses, the Occupational Safety and Health Administration used a value of \$9.9 million in 2016, the Food and Drug Administration used a value of \$10.0 million in 2017, and the Environmental Protection Agency used a value of \$10.9 million in a regulatory analysis in 2018.⁴³⁰ Recent agency guidance has suggested agency-wide use of a VSL of \$9.6 million (in 2016 dollars) at the U.S. Department of Transportation,⁴³¹ \$9.7 million (in 2013 dollars) at the Environmental Protection Agency,⁴³² and \$9.6 million (in 2014 dollars) at the U.S. Department of Health and Human Services.⁴³³ The general magnitude of these figures in current dollars is about \$10 million, which this Article uses as its focal estimate.⁴³⁴ As applied by federal agencies, these are the values used to monetize how much it is worth to prevent one expected death that will occur with some small probability.⁴³⁵ They are not, for example, measures of how much a person would need to be compensated to accept the certainty of death.⁴³⁶

425. A partial listing of labor market studies estimating the VSL appears in W. Kip Viscusi, *Best Estimate Selection Bias in the Value of a Statistical Life*, 9 J. BENEFIT-COST ANALYSIS 205, 206 (2018).

426. *Id.* at 227; see also VISCUSI, *supra* note 4.

427. Viscusi, *supra* note 425.

428. W. Kip Viscusi, *Risk Guideposts for a Safer Society: Introduction and Overview*, 58 J. RISK & UNCERTAINTY 101, 109–11 (2019).

429. *Id.*

430. *Id.* at 111–13 (all figures are in 2017 dollars).

431. U.S. DEP'T OF TRANSP., GUIDANCE ON TREATMENT OF THE ECONOMIC VALUE OF A STATISTICAL LIFE (VSL) IN US DEPARTMENT OF TRANSPORTATION ANALYSES—2016 ADJUSTMENT (2016), <https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf> [<https://perma.cc/G2TD-RAAK>].

432. OFF. OF POL'Y, U.S. ENV'T. PROT. AGENCY, VALUING MORTALITY RISK REDUCTIONS FOR POLICY: A META-ANALYTIC APPROACH (2016).

433. OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDELINES FOR REGULATORY IMPACT ANALYSIS (2016).

434. See generally VISCUSI, *supra* note 4.

435. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003).

436. Viscusi, *supra* note 428, at 108.

How do the awards to victims of police shootings compare to this \$10 million figure that is necessary to create efficient levels of deterrence? If these awards are at a level that is sufficient to set a meaningful price on risks to life, then they should be in the same range that the federal government applies in assessing policies to reduce mortality risks. Previous results have indicated, however, that current payment levels fall considerably short.⁴³⁷ For the Thomson Reuters sample in Table 4, the median award for male fatalities involving police negligence was \$787,500, and the median settlement was \$650,000.⁴³⁸ The compensatory damages awards in cases with law enforcement defendants in the CJSSC data in Table 4 had a median value of \$1.056 million.⁴³⁹ The case studies drawn from the national media that were reported in Tables 6 and 7 are greater, as one would expect for highly publicized cases, but the payment amounts still are usually well below the government agencies' VSL.⁴⁴⁰ Three of the cases in the sample of 44 publicized settled cases in Table 6 had settlement amounts of at least \$10 million.⁴⁴¹ The highest payout in the sample of cases in Table 7 that went to trial is \$3.7 million.⁴⁴² While there was a jury award of \$38.2 million in one case, the trial judge reduced that award to zero.⁴⁴³

How great should the payments be? Setting the appropriate damages amount depends on the objective. If the only purpose is to compensate the decedent's family and not to deter future shootings, then conventional wrongful death awards are appropriate. In many of the cases discussed above, however, there is an evident shortfall in the procedures set in place to deter such shootings. Moreover, the nature of the fatality is different than that in other wrongful death situations.⁴⁴⁴ Most shootings by police are not the result of an unanticipated accident in which a gun goes off by accident.⁴⁴⁵ Rather, the police officer typically makes a conscious decision to fire the weapon at the victim.⁴⁴⁶ In some instances, police departments have been remiss, such as with respect to inadequate training or failure to enforce requirements that officers have their body cameras turned on in such situations.⁴⁴⁷

This Article proposes that, in situations in which deterrence of fatal killings by the police is a prominent concern and in which the objectives include more than simply compensating the victims, the total damages amount be based on the VSL. The mechanism for establishing these award amounts for deterrence purposes could be a punitive damages award. While it is unlikely that shootings by police officers are malicious, shooting someone who does not pose a substantial physical threat to the police does display a "willful or wanton disregard for the

437. *See supra* Table 4.

438. *See supra* Table 3.

439. *See supra* Table 4.

440. *See supra* Tables 6–7.

441. *See supra* Table 6.

442. *See supra* Table 7.

443. Jacobs, *supra* note 64.

444. Apuzzo, *supra* note 212.

445. *Id.*

446. *Id.*

447. *See* Kindy, *supra* note 314.

rights of others,” which also is a representative criterion that can trigger punitive damages awards.⁴⁴⁸ The sum of the compensatory damages award and the punitive damages award should equal the VSL to set the correct economic price for deterring shootings by police.⁴⁴⁹ This approach provides the jury with a sound rationale for why they should award punitive damages and how they should set the level of punitive damages. It consequently also eliminates much of the uncertainty that juries have in mapping their outrage with certain types of behavior into a dollar penalty amount.⁴⁵⁰

Juries may, of course, be reluctant to award punitive damages against the police.⁴⁵¹ For example, there were no punitive damages awards in the CJSSC data in Table 4.⁴⁵² However, it is sometimes possible to incorporate the VSL into compensatory damages amounts. The most common use of this practice is known as hedonic damages, whereby the VSL is used as a measure of the loss of enjoyment of life by the victim.⁴⁵³ Unfortunately, the VSL is not well-suited to the task of quantifying the loss of enjoyment of life in wrongful death cases, as it is a measure of how much should be spent to avert an expected death, not the value of the loss of enjoyment of life.⁴⁵⁴ Most state courts now prohibit the application of the VSL to monetize the loss of enjoyment of life.⁴⁵⁵ That prohibition has a sound economic basis. These limits, however, pertain to a specific application of the VSL that is quite different from our proposal, because our proposal is unrelated to valuing the lost enjoyment of life. Unfortunately, the prospects of making damages awards including the VSL are not bright, as juries are not generally permitted to award compensatory damages for deterrence.⁴⁵⁶ Given these limitations, the practical task is for the plaintiff’s attorney to motivate the rationale for punitive damages.

In the absence of the financial pressure exerted by litigation, municipalities nevertheless can undertake initiatives to prevent negligent police shootings.⁴⁵⁷ Such efforts impose costs in that they involve more careful screening of applicants, better police training, and increased monitoring of police behavior.⁴⁵⁸ How

448. *Jardel Co. v. Hughes*, 523 A.2d 518, 528 (Del. 1987).

449. *See, e.g., Ferguson v. City of New York*, 901 N.Y.S.2d 609, 609 (N.Y. App. Div. 2010).

450. CASS R. SUNSTEIN, ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 25–26 (2002).

451. *See id.* at 25.

452. *See supra* Table 4.

453. VISCUSI, *supra* note 4, at 204–210.

454. Thomas R. Ireland, *The Last of Hedonic Damages: Nevada, New Mexico, and Running a Bluff*, 16 J. LEGAL ECON. 91, 95 (2009).

455. *Id.* at 91; Thomas R. Ireland, *Recent Legal Decisions Regarding Hedonic Damages: An Update*, 13 J. FORENSIC ECON. 189, 200 (2000); Thomas R. Ireland, *Trends in Legal Decisions Involving Hedonic Damages from 2000 to 2012*, 19 J. LEGAL ECON. 61, 63 (2012).

456. *See, e.g.,* Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After Philip Morris v. Williams*, 10 J. CONST. L. 1147, 1179 nn.180–82, 1190 nn.210–11 (2008) (providing jury instructions in many states that demonstrate deterrence damages are appropriate for only punitive damages); Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCH., PUB. POL’Y, & L. 743, 744–45 (2000).

457. Chuck Wexler, *What It Will Take to Reduce Deadly Shootings by Police*, WASH. POST (Jan. 19, 2018, 10:36 AM), https://www.washingtonpost.com/outlook/what-it-will-take-to-reduce-deadly-shootings-by-police/2018/01/19/003df822-f65e-11e7-a9e3-ab18ce41436a_story.html [<https://perma.cc/EAD4-2BJR>].

458. *Id.*

much should the police allocate to these efforts to reduce such shootings? The pricing using the VSL indicates that this amount should be substantial. If the municipalities undertook a benefit-cost approach, then there would be a justification for large investments to reduce the current number of police shootings resulting in fatalities.

TABLE 8. MONETIZED VALUE OF FATALITIES FROM POLICE SHOOTINGS

| Category of Victim | Shooting Deaths 2015–2018 | Mortality Cost of Shootings (\$ billions) | |
|--------------------------------------|------------------------------|-------------------------------------------|--------------|
| | | 2015–2018 Period | Annual Costs |
| Unarmed and Fleeing | 114 | 1.14 | 0.285 |
| Unarmed and Not Fleeing | 141 | 1.41 | 0.353 |
| Armed and Fleeing | 955 | 9.55 | 2.388 |
| Armed and Not Fleeing | 2,356 | 23.56 | 5.890 |
| Armed or Fleeing Status Not Reported | 368 | 3.68 | 0.920 |
| All deaths | 3,934 | 39.34 | 9.835 |

Notes: Mortality costs are calculated by applying a \$10 million estimate for the value of a statistical life to records in the fatal police shooting database of *The Washington Post* in Table 1.

B. *The Aggregate Cost of Police Shootings*

To appreciate the magnitude of the stakes, consider Table 8, which applies the VSL to the number of deaths resulting from police shootings in the 2015–2018 period in Table 1.⁴⁵⁹ There are 114 deaths to those who are unarmed and fleeing, which when valued at \$10 million per fatality has a total mortality risk value of \$1.14 billion.⁴⁶⁰ If the loss of the 141 unarmed and not fleeing individuals is added to this amount, then there is an additional \$1.41 billion mortality cost, leading to a total value of the 255 deaths in the first two rows of Table 8 of \$2.55 billion.⁴⁶¹ If it is also desirable to prevent the killing of the 955 armed and fleeing victims, then there is an additional \$9.55 billion mortality cost.⁴⁶² The total number of deaths in three rows of Table 8 rises to 1,210, with an economic value of \$12.1 billion.⁴⁶³ Prevention of all 3,934 deaths included in Table 1 has a value of \$39.34 billion.⁴⁶⁴ Even based on annualized version of these calculations, the level of the mortality costs is substantial, ranging from \$285 million to \$9.8 billion.⁴⁶⁵ From a fiscal standpoint, allocating funds to avert fatalities from police shootings should be a prominent policy concern.

Should the municipality not undertake such a benefit-cost approach, it would nevertheless be possible for juries to assess whether governmental agencies have been negligent. The VSL serves as a reference point for how much

459. See *supra* Table 8.

460. See *supra* Table 8.

461. See *supra* Table 8.

462. See *supra* Table 8.

463. See *supra* Table 8.

464. See *supra* Table 1.

465. See *supra* Table 8.

should be spent per expected death averted.⁴⁶⁶ Suppose that over the past decade the municipality has had eight police shootings in the categories for which the shootings appear to have been unwarranted. Over that time period, the city should have been willing to spend \$80 million or \$8 million per year on efforts to avert these shootings based on a standard benefit-cost test.⁴⁶⁷ Examination of these expenditures in relationship to the VSL consequently provides additional guidance with respect to whether the public institutions have also been remiss, not simply the police officers involved.

C. *Achieving Deterrence Through Making Government Pay*

Proposals to incentive municipalities are not new, although this Article's proposed usage of the VSL to monetize the deaths is novel. The literature to date has included both advocates and opponents of attempting to incentivize governments.⁴⁶⁸ Two concerns arise with the proposed solution of deterring police shootings through larger damages awards to a municipality: the failure of police officers to be incentivized by municipal payments and the failure of government agencies to respond to financial incentives.⁴⁶⁹

These two concerns are central to Professor Daryl Levinson's argument against the effectiveness of "Making Government Pay"⁴⁷⁰ for constitutional tort remedies. The first concern is that police officers may not internalize the costs that they cause which the municipality ultimately pays for via a damages award.⁴⁷¹ When a municipality pays a victim's family for a police shooting, the police officer may face sanctions such as a suspension, negative publicity, or additional oversight.⁴⁷² In most cases, police officers do not face direct monetary penalties for their fatal shootings.⁴⁷³ Since they are the ones pulling the trigger, police officers may not change their behavior since they do not realize the cost nor would they internalize higher court-awarded damages.⁴⁷⁴ One might encounter similar claims that employees at large private organizations will not be incentivized by punitive damages against the firm or, for that matter, by any financial incentive affecting the firm.⁴⁷⁵ However, efficiently run firms will establish administrative structures to foster the institution's overall objectives, as would efficiently run government organizations.⁴⁷⁶

466. VISCUSI, *supra* note 4, at 216. This proposed test is analogous to the risk-utility test for products. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (AM. L. INST. 2012).

467. See VISCUSI, *supra* note 4.

468. See, e.g., *id.*

469. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000).

470. See *id.*

471. See, e.g., *id.* at 351.

472. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885 (2014).

473. See *id.* at 890 (revealing that individual officers contributed just 0.02% of the \$730 million in settlements and judgments in her five-year study of forty-four large jurisdictions).

474. See Levinson *supra* note 469, at 352.

475. See *id.* at 345–46.

476. See *id.* at 348.

The second concern is an extension of the first: even if the behavior of police officers could be influenced by municipalities, monetary damages may not influence a government in the same way they would influence a private firm or individual.⁴⁷⁷ Professor Levinson acknowledges that governments have budgets and that managers prefer to avoid damages payments, but he emphasizes that government actors respond to political incentives rather than market incentives.⁴⁷⁸ It is likely, however, that financial penalties on municipalities will lead to either higher taxes or budgetary cutbacks, either of which will impinge on the political incentives.⁴⁷⁹ Levinson further questions creating mechanisms for optimal deterrence in the field of constitutional tort litigation due to the difficulty to quantify costs and benefits that arise from police use of force.⁴⁸⁰ Our Article addresses the task of quantifying the benefits of reduced force by monetizing the reduced fatalities using the VSL.⁴⁸¹

The debate over the indirect deterrent effect continues with the response of Professor Gilles to Professor Levinson.⁴⁸² She addresses his critiques, finding that municipal liability claims specifically target political objectives, rather than solely economic objectives.⁴⁸³ Holding municipalities liable through *Monell* achieves political goals that produce deterrence.⁴⁸⁴ Since *Monell* requires a policy or custom of the municipality to lead to the constitutional injury before the municipality is held liable, claims against municipalities allow for the discovery of systemic faults that can be corrected.⁴⁸⁵ *Monell* claims draw out information regarding “deliberate indifference to police brutality . . . ‘repeater’ officers . . . and the attitudes of police officials towards important police disciplinary issues.”⁴⁸⁶ Bringing these systemic issues to light has been a goal not just of litigators but also of the general public.⁴⁸⁷ Several cities have created independent police oversight committees in response to police misconduct, especially fatal police shootings.⁴⁸⁸ Multiple independent databases have been created to track fatal police shootings, and police officer convictions.⁴⁸⁹ All of these responses draw publicity, attention, and oversight that are largely unwanted by police departments.⁴⁹⁰

477. See *id.* at 349.

478. See *id.* at 357.

479. See Schwartz, *supra* note 472, at 898.

480. See Levinson, *supra* note 469, at 367–73.

481. See *supra* Part IV.

482. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 848 (2000).

483. *Id.* at 849.

484. See *id.* at 863.

485. See *id.*

486. G. Flint Taylor, *A Litigator’s View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 748–49 (1999).

487. See *id.* at 772.

488. See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 849–52 (describing the changes that five large police jurisdictions took following lawsuits).

489. See, e.g., WASH. POST Database, *supra* note 255; Stinson, *supra* note 59.

490. See Gilles, *supra* note 482, at 860.

Municipalities will change their policies and customs following intense litigation surrounding constitutional tort claims under *Monell*.⁴⁹¹ How will this impact on policymakers change the behavior of street-level officers causing the constitutional tort claims and public outcry in the first place? If municipalities are in fact experiencing negative political outcomes through *Monell* or through higher damages, then the municipalities will be incentivized to reduce the police conduct that leads to these outcomes.⁴⁹² Higher damages will incentivize the most effective reforms on police use of force; one possible reform is smarter training on use of force.⁴⁹³

Additional police training in this area has actually improved police interactions with citizens. One bright-line rule, established in 1972 in New York City, prohibited the New York Police Department from the application of deadly force against people in a moving vehicle—unless the occupants were using deadly force other than the vehicle.⁴⁹⁴ This rule resulted in an immediate and dramatic reduction in police shootings, without harms to officer safety.⁴⁹⁵ Police departments of Boston, Chicago, Cincinnati, Denver, Philadelphia, and D.C. have all enacted a similar policy.⁴⁹⁶

Beyond bright-line rules against use of force, other methods of police reform have been effective.⁴⁹⁷ Chuck Wexler, the executive director of the Police Executive Research Forum, cites success in the city of Camden, New Jersey, when the police chief initiated reforms that aim to emphasize the “sanctity of life.”⁴⁹⁸ In 2013, the Camden Police Department was disbanded, and reimaged over the next few years, with fewer officers, lower pay, and a focus on community policing.⁴⁹⁹ After an incident in 2015 when a man entered a fast-food restaurant and threatened employees with a knife, the police, who were recorded on video,⁵⁰⁰ secured nearby areas and apprehended the man without injury.⁵⁰¹ Speaking to the impact of the new reform, the police chief said, “Six months ago, we would have shot that individual.”⁵⁰² This story is indicative of the overall effect of the reform. Wexler cites statistics that show that complaints alleging

491. *See id.*

492. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1148–49 (2016) (describing that this effect would be stronger for smaller police departments and ones that rely on insurance outside of the city).

493. *Id.* at 1195.

494. POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 44, 118 (2016).

495. *Id.* at 118.

496. *Id.* at 44.

497. Chuck Wexler, *What It Will Take to Reduce Deadly Shootings by Police*, WASH. POST, (Jan. 19, 2018, 10:36 AM), https://www.washingtonpost.com/outlook/what-it-will-take-to-reduce-deadly-shootings-by-police/2018/01/19/003df822-f65e-11e7-a9e3-ab18ce41436a_story.html [<https://perma.cc/EAD4-2BJR>].

498. *Id.*

499. Sarah Holder, *What Happened to Crime in Camden?*, CITYLAB, (Jan. 10, 2018, 6:18 AM), <https://www.citylab.com/equity/2018/01/what-happened-to-crime-in-camden/549542/> [<https://perma.cc/572P-4KW2>].

500. Video of the incident is available on YouTube at *Broadway & Mickle Man with a Knife Incident*, YOUTUBE (Nov. 24, 2015), https://www.youtube.com/watch?time_continue=4&v=YtVUMT9P8iw [<https://perma.cc/VAC4-2XDK>].

501. *Id.*

502. Wexler, *supra* note 497.

excessive force by police dropped from sixty-five in 2014 to fourteen in 2017.⁵⁰³ Different methods of training could work better for separate police departments, but higher damages awards for fatal police shootings would incentivize each municipality to better deter fatal shootings in the manner most effective for that police department.⁵⁰⁴

One final potential concern is that these damages awards would over-deter proper police responses to crime.⁵⁰⁵ The data in Table 1 from *The Washington Post* highlight that most fatal police shootings occur when victims are armed with a gun or attacking.⁵⁰⁶ Judges typically find that any constitutional rights violation in such a case falls under qualified immunity for the officer, and indeed these types of shootings rarely receive payouts of any kind.⁵⁰⁷ Because of the qualified immunity doctrine, police need not worry that their actions in these cases will be deterred.⁵⁰⁸ Qualified immunity is granted by courts when judges see police behavior, despite unconstitutionality, as “‘objectively reasonable’ in light of the totality of the circumstances.”⁵⁰⁹ This status is granted often, too. A study of all federal court cases in a two-year period found that 80% of qualified immunity claims were granted.⁵¹⁰ This Article’s proposed deterrence effect of raising damages awards is for fatal police shootings that are so egregious that they result in a payout in the first place. We are not concerned with over-detering the police shootings that courts already find to be “over-the-line” via damages awards. The police shootings that courts typically grant qualified immunity to will continue to be granted qualified immunity, resulting in no such over-deterrence effect on police behavior of which courts already approve.

VII. FIXING THE SYSTEM: BENEFIT-COST ANALYSIS OF POLICE TACTICS AND USE OF FORCE

Police tactics such as use of force should, like any other action, satisfy a properly conducted benefit-cost analysis. There are many broad benefits to policing, most notably safety, which is a valuable goal of any community.⁵¹¹ The costs of policing are many, including the monetary cost for the officers’ labor and their equipment, as well as the cost when officers coerce or use force on

503. *Id.*

504. See Schwartz, *supra* note 492, at 1195.

505. See Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 714 (2016) (discussing the threat of de-policing, or over-deterrence of police responses to crime, when implementing reforms to prevent police violence).

506. See *supra* Table 1.

507. See Gilles, *supra* note 482, at 850–51 (discussing judicial concern of over-detering vigorous policy activity and availing themselves of the qualified immunity standard).

508. See *id.*

509. *Id.*

510. See Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999).

511. Harmon, *supra* note 250, at 871.

subjects.⁵¹² When individuals are arrested, injured, frightened, or killed by police, police coercion creates a cost.⁵¹³ Ideally, police coercion is used only when the benefits to society outweigh the costs created by the coercion.⁵¹⁴

Many legal scholars see a glaring need to reform police use of force but differ in how to achieve that.⁵¹⁵ One path to reform police behavior centers around reinforcing the need of police officers to respect and uphold constitutional restrictions on use of force.⁵¹⁶ The Supreme Court established the bright-line rule in *Garner v. Tennessee* that it is unreasonable to seize a fleeing, unarmed suspect with deadly force.⁵¹⁷ Training officers and the public to better understand constitutional limitations on use of force set forth by courts could reduce costly fatal shootings.⁵¹⁸

Another proposed method to reform policing is a more rigorous benefit-cost analysis of police tactics.⁵¹⁹ Researchers and policymakers have sought out economic analyses of policing and crime since at least the late 1960s; empirical efforts took longer to answer this call.⁵²⁰ A 1999 review of situational crime prevention found only thirteen studies evaluating the effect on crime of an intervention technique, such as increased surveillance or installing silent alarms and additional street lights.⁵²¹ Yet even these studies had methodological shortcomings and were difficult to compare to one another.⁵²²

Recently, much more attention has been given to the effectiveness of policing.⁵²³ The Policing Project at New York University School of Law is a non-profit institution that partners with communities and police to ensure just and

512. *Id.* at 951.

513. *Id.* at 871.

514. *See id.*

515. *See* Rosenthal, *supra* note 505, at 679 (encouraging “hot-spot” policing tactics, and caps on disciplinary actions when police tell the truth regarding bad conduct); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792 (2012); Tracey Maclin, Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion, 72 ST. JOHN’S L. REV. 1271, 1279 (1998).

516. *See, e.g.*, Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 350 (2011); Marcus, *supra* note 201, at 54–55, 57; Maclin, *supra* note 515, at 1278.

517. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

518. *See supra* note 516 and sources cited.

519. *See* Harmon, *supra* note 515, at 792.

520. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968); John Roman & Graham Farrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities*, 14 CRIME PREVENTION STUD. 53, 54 (2002); Brandon C. Welsh & David P. Farrington, *Value for Money? A Review of the Costs and Benefits of Situational Crime Prevention*, 39 BRITISH J. CRIMINOLOGY 345, 346 (1999); President’s Comm’n on Law Enf’t & Admin. of Just., *The Challenge of Crime in a Free Society* 32 (1967).

521. *See* Welsh & Farrington, *supra* note 520, at 348–49 tbl.1.

522. *See* Roman & Farrell, *supra* note 520, at 54. For a more recent and rigorous study on the effectiveness of streetlights on crime, see Aaron Chalfin, Benjamin Hansen, Jason Lerner & Lucie Parker, *Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City* (Nat’l Bureau of Econ. Rsch., Working Paper No. 25798, 2019).

523. *See, e.g.*, Barry Friedman, *We Spend \$100 Billion on Policing. We Have No Idea What Works*, WASH. POST (Mar. 10, 2017, 1:49 PM), <https://www.washingtonpost.com/posteverything/wp/2017/03/10/we-spend-100-billion-on-policing-we-have-no-idea-what-works/> [https://perma.cc/R3UN-SFFR]; Harmon, *supra* note

effective policing, often through benefit-cost analyses of policing methods.⁵²⁴ One such method the Policing Project analyzed was traffic stops in Nashville, Tennessee.⁵²⁵ Their report found no effect of traffic stops on short-term crime or long-term crime.⁵²⁶ After comparing the lack of benefits on crime prevention against the certain resource costs to the police department and the social costs to communities (especially communities of color), the Policing Project recommended reducing traffic stops in favor of more cost-effective policing methods.⁵²⁷

For use of force, analyzing the effectiveness of police tactics is an area where benefit-cost analysis could help. Yet, despite recent interest in benefit-cost analyses of police use of force, few rigorous studies exist, because quantifying the costs and benefits is difficult.⁵²⁸ Using the VSL, we provide an empirically measured cost—the loss of the victim’s life—as just one direct cost of fatal use of force.

Other studies of police use of force focus on problems of whether reforms would be incorporated by police departments and whether courts are the best institutions to create reforms.⁵²⁹ A 2017 analysis of the use of force policies from department manuals across the fifty largest police agencies found that, while nearly half of the departments include police tactics such as de-escalation in their manuals, few require such tactics before using lethal force.⁵³⁰ Only eight of the fifty largest police departments have any guidance regarding emotionally disturbed persons.⁵³¹ Courts and regulatory bodies should incorporate analysis of whether police tactics leading up to a shooting, for example, are constitutionally reasonable, and not just whether the decision to shoot at the moment was reasonable.⁵³² To this end, greater scientific research on the effectiveness of police tactics is needed.

Finally, courts face difficulties in constraining improper police conduct solely through constitutional methods.⁵³³ There are an array of federal, state, and local laws that shape police behavior more so than constitutional laws can, and judges are often unaware of the “institutional structures, occupational norms,

515, at 874; Maria Ponomarenko & Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT COST ANALYSIS 305, 306 (2017).

524. *Our Mission*, NYU SCH. L.: POLICING PROJECT, <https://www.policingproject.org/our-mission>, (last visited Mar. 17, 2021) [<https://perma.cc/6GEM-23C4>].

525. *See generally* Policing Project at N.Y.U., *An Assessment of Traffic Stops and Policing Strategies in Nashville* (2018).

526. *Id.* at 9–10.

527. *Id.* at 3, 11–15.

528. *See* Harmon, *supra* note 515, at 793. Footnote 126 describes one study of aggregate costs yet calls for greater theoretical work on these policies.

529. U.S. COMM’N ON CIV. RTS., *POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES* 5 (2018).

530. *See* Garrett & Stoughton, *supra* note 167, at 219.

531. *Id.* at 283.

532. *Id.* at 303.

533. Harmon, *supra* note 515, at 763.

market pressures, political influences, and unconstitutional laws”⁵³⁴ when engaging with legal decisions on police conduct. Nonjudicial institutions often have greater influence on police conduct than the courts, in part due to Supreme Court decisions that allow deference to police when questioning their own conduct.⁵³⁵ Our proposal of courts allowing punitive damages for unwarranted police shootings is one method where the judiciary can play a greater role than nonjudicial institutions in creating effective deterrence. Police behavior should be shaped not only by what is constitutional but by what is effective and cost-efficient. Better research on the costs, benefits, and effectiveness of policing, as well as how to enforce such reforms, is necessary to achieve that goal.

VIII. CONCLUSION: TOWARD EFFECTIVE DETERRENCE OF POLICE SHOOTINGS

There are, of course, many situations in which police shootings are warranted.⁵³⁶ But too many police shootings are not justified.⁵³⁷ Fatal use of force against an unarmed, fleeing suspect is not justified under a constitutional test or a benefit-cost test.⁵³⁸ Black people are disproportionately victims of all fatal police shootings and comprise an even larger share of victims of unjust fatal police shootings.⁵³⁹ For a victim’s family to receive any payout from a court, the court must “slosh” through the “factbound morass” of how reasonable the officer’s use of force was.⁵⁴⁰

The “factbound morass” can be vast, but documentation of key factors from *Graham* can help.⁵⁴¹ Basic binary facts pertaining to the shooting—whether the victim was armed and whether the victim was fleeing—can inform much of the reasonability analysis.⁵⁴² Yet whether or not force is considered reasonable under a constitutional lens, fatal force imposes costs—primarily the victim’s life.⁵⁴³ These mortality costs on the victims should be treated as being just as consequential as the mortality risks that the government seeks to reduce in regulatory contexts. Police shootings impose hundreds of millions of dollars in mortality costs every year even under a very restrictive definition of determining which police shootings are not consistent with current legal guidelines.⁵⁴⁴ The broadest definition of police shootings results in an annual mortality cost to the victims of

534. *Id.* at 774.

535. *Id.* at 809.

536. See Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM. J. PREVENTATIVE MED. S173, S177 (2016).

537. See *id.* at S174–74.

538. See *supra* text accompanying notes 515–28.

539. See DeGue et. al, *supra* note 536, at S173, S182 tbl.8.

540. *Scott v. Harris*, 550 U.S. 372, 383 (2007).

541. See *id.*; see also *Graham v. Connor*, 490 U.S. 386, 393 (1989).

542. See *Graham*, 490 U.S. at 382–83 (explaining how *Garner* held unreasonable shooting an unarmed and fleeing victim).

543. See *supra* Table 1 (reporting the number of lives lost).

544. See *supra* Table 8 (monetizing value of fatalities from police shootings by category of victim).

almost \$10 billion.⁵⁴⁵ Even limiting the focus to victims who are unarmed and fleeing leads to an annual mortality costs of \$285 million.⁵⁴⁶

To establish meaningful incentives to deter police shootings, this Article proposes that there be recognition of the pertinent economic costs imposed by such killings. Standard wrongful death awards almost invariably fall short of the requisite economic costs of these deaths. Application of the value of a statistical life could serve to monetize these costs by providing a framework for setting punitive damages in situations where such damages are warranted. When court awards are sufficient, they in effect set the price for expected deaths that municipalities can prevent through more effective screening, training, and monitoring of the police. If the incentives provided by the legal system fall short, municipalities can nevertheless undertake assessments using the value of a statistical life to ascertain which policies should be adopted to reduce police killings. Monetizing these expected deaths does not devalue them but rather elevates them to receive the same weight as the government places on other fatality risks.

The media and national protests have rightfully brought attention to the injustice of many fatal police shootings. Many approaches for preventing such shootings exist. Directly disincentivizing fatal police shootings, and thereby incentivizing the most effective policing reforms, is one method for courts to play a role in reducing these injustices and promoting effective policing.

545. *See id.* (reporting all deaths' annual costs as \$9.835 billion).

546. *See id.*

APPENDIX TABLE 1:
SOURCES FOR POLICE SHOOTING VICTIMS IN TABLES 6 & 7

| Name | Payout (\$) |
|---------------------------------|-------------|
| Settlements | |
| Justine Damond ⁵⁴⁷ | 20,000,000 |
| LaTanya Haggerty ⁵⁴⁸ | 18,000,000 |
| Bettie Jones ⁵⁴⁹ | 16,000,000 |
| Walter Scott ⁵⁵⁰ | 6,500,000 |
| Danroy Henry Jr. ⁵⁵¹ | 6,000,000 |
| Tamir Rice ⁵⁵² | 6,000,000 |
| Eric Harris ⁵⁵³ | 6,000,000 |
| James Boyd ⁵⁵⁴ | 5,000,000 |
| Laquan McDonald ⁵⁵⁵ | 5,000,000 |
| Kathryn Johnston ⁵⁵⁶ | 4,900,000 |
| Samuel Dubose ⁵⁵⁷ | 4,850,000 |
| Flint Farmer ⁵⁵⁸ | 4,100,000 |
| Ramarley Graham ⁵⁵⁹ | 3,900,000 |
| Esau Castellanos ⁵⁶⁰ | 3,750,000 |
| Sean Bell ⁵⁶¹ | 3,250,000 |
| John Geer ⁵⁶² | 3,000,000 |

547. *Judge Approves \$20M Settlement for Justine Ruszczak Damond's Family*, CBS MINN. (June 25, 2019, 11:13 AM), <https://minnesota.cbslocal.com/2019/06/25/judge-approves-20m-settlement-for-justine-ruszczak-damonds-family/> [<https://perma.cc/EEP7-WK7T>].

548. Williams & Smith, *supra* note 3.

549. *Id.*

550. *Id.*

551. Danylko, *supra* note 376.

552. *Id.*

553. Corey Jones, *Tulsa County Settles Eric Harris Excessive Force Lawsuit for \$6 Million Days After Robert Bates Renews Appeal*, TULSA WORLD (Mar. 9, 2018), https://tulsaworld.com/news/local/crime-and-courts/tulsa-county-settles-eric-harris-excessive-force-lawsuit-for-6-million-days-after-robert-bates/article_3305adab-79c2-5fa9-8003-73207eb82424.html [<https://perma.cc/E92V-AX54>].

554. Rich, Hawkins & Higham, *supra* note 376.

555. Williams & Smith, *supra* note 3.

556. Rich, Hawkins & Higham, *supra* note 376.

557. Sheryl Gay Stolberg, *University of Cincinnati to Pay \$4.85 Million to Family of Man Killed by Officer*, N.Y. TIMES (Jan. 18, 2016), <https://www.nytimes.com/2016/01/19/us/university-of-cincinnati-to-pay-4-85-million-to-family-of-man-killed-by-officer.html> [<https://perma.cc/M328-REKC>].

558. Stacy St. Clair & Jeremy Gomer, *Chicago Set to Pay \$4.1 Million in Police Shooting*, CHI. TRIB. (Feb. 9, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-02-09-ct-met-chicago-cop-settlement-20130209-story.html> [<https://perma.cc/MFQ5-T3C6>].

559. Rich, Hawkins & Higham, *supra* note 376.

560. Ted Cox, *\$3.75M Settlement Approved for Fatal Police Shooting of Esau Castellanos*, DNAINFO (July 19, 2016, 4:06 PM), <https://www.dnainfo.com/chicago/20160719/downtown/375m-settlement-approved-for-fatal-police-shooting-of-esau-castellanos> [<https://perma.cc/UY8N-UH8C>].

561. Williams & Smith, *supra* note 3.

562. Rich, Hawkins & Higham, *supra* note 376.

| | |
|-----------------------------------|-----------|
| Amadou Diallo ⁵⁶³ | 3,000,000 |
| Philando Castile ⁵⁶⁴ | 3,000,000 |
| Cedrik Chatman ⁵⁶⁵ | 3,000,000 |
| Oscar Grant ⁵⁶⁶ | 2,800,000 |
| Tarika Wilson ⁵⁶⁷ | 2,500,000 |
| Emil Mann ⁵⁶⁸ | 2,420,000 |
| Jonathan Ferrell ⁵⁶⁹ | 2,250,000 |
| Emmanuel Lopez ⁵⁷⁰ | 2,200,000 |
| Jashon Bryant ⁵⁷¹ | 1,600,000 |
| Timothy Russell ⁵⁷² | 1,500,000 |
| Malissa Williams ⁵⁷³ | 1,500,000 |
| Michael Brown ⁵⁷⁴ | 1,500,000 |
| Danielle Willard ⁵⁷⁵ | 1,425,000 |
| Anthony Smith ⁵⁷⁶ | 1,400,000 |
| Paul Childs ⁵⁷⁷ | 1,325,000 |
| Larry Jackson Jr. ⁵⁷⁸ | 1,300,000 |
| Ernest Satterwhite ⁵⁷⁹ | 1,200,000 |
| Yvette Smith ⁵⁸⁰ | 1,200,000 |
| Jason Kemp ⁵⁸¹ | 1,100,000 |
| Joseph Erin Hamley ⁵⁸² | 1,000,000 |

563. Williams & Smith, *supra* note 3.

564. *Id.*

565. Fran Spielman, *\$3 Million Settlement to Family of Teen Shot by Chicago Police*, CHI. SUN TIMES (Dec. 9, 2016, 5:13 PM), <https://chicago.suntimes.com/2016/12/9/18334765/3-million-settlement-to-family-of-teen-shot-by-chicago-police> [<https://perma.cc/AEW6-VCC6>].

566. Williams & Smith, *supra* note 3.

567. Danylko, *supra* note 376.

568. Rich, Hawkins & Higham, *supra* note 376.

569. *Id.*

570. Justin Madden, *Chicago to Pay \$3.2 Million to Settle Two Fatal Police Shooting Cases*, REUTERS (May 18, 2016, 4:25 PM), <https://www.reuters.com/article/us-chicago-police-idUSKCN0Y92XD> [<https://perma.cc/VJ4B-R9AW>].

571. Rich, Hawkins & Higham, *supra* note 376.

572. Danylko, *supra* note 376.

573. *Id.*

574. Williams & Smith, *supra* note 3.

575. Rich, Hawkins & Higham, *supra* note 376.

576. Robert Patrick, *After Claims of Withheld Evidence, New \$500k Settlement for Family of Man Killed by Jason Stockley*, ST. LOUIS POST-DISPATCH (Dec. 7 2018), https://www.stltoday.com/news/local/crime-and-courts/after-claims-of-withheld-evidence-new-k-settlement-for-family/article_ba30e41e-93ec-574d-bc75-04dae117bea3.html [<https://perma.cc/8C9Q-DXT8>].

577. John Ingold, *Childs' Mom Takes the Stand*, DENVER POST (June 7, 2005, 6:22 AM), <https://www.denverpost.com/2005/06/07/childs-mom-takes-the-stand/> [<https://perma.cc/CK7Y-HUHT>].

578. Rich, Hawkins & Higham, *supra* note 376.

579. *Id.*

580. *Id.*

581. *Id.*

582. *Id.*

| | |
|-----------------------------------|-----------|
| Keith Vidal ⁵⁸³ | 1,000,000 |
| Ryan Rogers ⁵⁸⁴ | 1,000,000 |
| Dakota Bright ⁵⁸⁵ | 925,000 |
| Willie Miller ⁵⁸⁶ | 750,000 |
| Niles Meservey ⁵⁸⁷ | 500,000 |
| Bernard Bailey ⁵⁸⁸ | 400,000 |
| Bobby Stacy ⁵⁸⁹ | 375,000 |
| Edward Lamont Hunt ⁵⁹⁰ | 375,000 |
| Patricia Ann Cook ⁵⁹¹ | 300,000 |
| Roy Glenn Jr. ⁵⁹² | 209,000 |
| Rickey Childs ⁵⁹³ | 100,000 |
| Warren Robinson ⁵⁹⁴ | 100,000 |
| Tatioun Williams ⁵⁹⁵ | 100,000 |
| Eric Williams ⁵⁹⁶ | 85,000 |
| William Sheffield ⁵⁹⁷ | 75,000 |
| Arthur Hutchinson ⁵⁹⁸ | 60,000 |
| Angelo Miller ⁵⁹⁹ | 35,000 |
| Vincent Smith Jr. ⁶⁰⁰ | 7,500 |

583. F.T. Norton, *Civil Lawsuit Settled for \$1 Million in Case of Teen Killed by Police*, STAR NEWS ONLINE (Mar. 14, 2017, 9:13 AM), <https://www.starnewsonline.com/news/20170314/civil-lawsuit-settled-for-1-million-in-case-of-teen-killed-by-police> [https://perma.cc/VS2Y-2AB8].

584. Madden, *supra* note 570.

585. Jeremy Gerner, *Chicago Cop's 2012 Fatal Shooting of Teen 'Unprovoked' and 'Unwarranted': IPRA*, CHI. TRIB. (Aug. 11, 2017, 7:09 AM), <https://www.chicagotribune.com/news/breaking/ct-dakota-bright-chicago-police-shooting-unjustified-20170810-story.html> [https://perma.cc/VX49-7KJL].

586. Timothy McLaughlin, *Chicago to Pay \$4.75 Million in Police Misconduct Cases*, Reuters (Jan. 25, 2017, 6:25 PM), <https://www.reuters.com/article/us-chicago-police-idUSKBN15A01G> [https://perma.cc/5GUY-PV8T].

587. Rich, Hawkins & Higham, *supra* note 376.

588. *Id.*

589. *Id.*

590. *Id.*

591. *Id.*

592. *Id.*

593. *Case 13-CV-7541*, CHI REP.: SETTLING FOR MISCONDUCT, <http://projects.chicagoreporter.com/settlements/case/13-cv-7541/> (last visited Mar. 17, 2021) [https://perma.cc/QBX8-SRUC].

594. Carol Marin & Don Moseley, *City of Chicago Withholds Documents Involving Police Shooting of a Minor*, NBC 5 CHI. (Apr. 18, 2017, 6:25 PM), <https://www.nbcchicago.com/news/local/chicago-withholds-documents-involving-police-shooting-of-a-minor/12125/> [https://perma.cc/5X4A-PU85].

595. *Case 12-CV-4118*, CHI REP.: SETTLING FOR MISCONDUCT, <http://projects.chicagoreporter.com/settlements/case/12-cv-4118/> (last visited Mar. 17, 2021) [https://perma.cc/5YVD-TRLG].

596. Rich, Hawkins & Higham, *supra* note 376.

597. *Id.*

598. Chi. Rep., *Settling for Misconduct: Police Lawsuits in Chicago*, Case 00-L-5230 <http://projects.chicagoreporter.com/settlements/case/00-l-5230/> (last visited Mar. 17, 2021) [https://perma.cc/ABY9-JZEB]; Carri Karuhn, *Protesters Call for Probe in Killing of Homeless Man*, CHI. TRIB. (Mar. 20, 2000), <https://www.chicagotribune.com/news/ct-xpm-2000-03-20-0003200157-story.html> [https://perma.cc/YP3P-YRXP].

599. Danylko, *supra* note 376.

600. Rich, Hawkins & Higham, *supra* note 376.

| Jury Verdicts | |
|------------------------------------|-----------|
| Prince Jones ⁶⁰¹ | 3,700,000 |
| Mohamed Bah ⁶⁰² | 1,900,000 |
| Alfontish Cockerham ⁶⁰³ | 1,180,000 |
| Zachary Snyder ⁶⁰⁴ | 1,000,000 |
| Malcolm Ferguson ⁶⁰⁵ | 500,000 |
| James Ahern ⁶⁰⁶ | 0 |
| Quintonio LeGrier ⁶⁰⁷ | 0 |
| Gregory Hill ⁶⁰⁸ | *0 |
| Korryn Gaines ⁶⁰⁹ | *0 |

601. Ruben Castaneda, *Officer Liable in Student's Killing*, WASH. POST (Jan. 20, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/01/19/AR2006011902346.html> [<https://perma.cc/S2UG-TFXC>].

602. Stephen Rex Brown, *supra* note 407.

603. Eric Horng, *CPD Shooting Victim's Family Awarded \$1.18M in Wrongful Death Lawsuit*, ABC 7 CHI. (Dec. 13, 2018), [https://abc7chicago.com/cpd-shooting-victims-family-awarded-\\$118m-in-wrongful-death-lawsuit/4894319/](https://abc7chicago.com/cpd-shooting-victims-family-awarded-$118m-in-wrongful-death-lawsuit/4894319/) [<https://perma.cc/QS6P-65GE>].

604. Rich, Hawkins & Higham, *supra* note 376.

605. *Estate of Ferguson v. City of N.Y.*, 73 A.D.3d 649, 649–50 (N.Y. 2010).

606. *Ahern v. Brackney* (In re Brackney), No. 5:12-bk-72111, 2013 Bankr. LEXIS *958 (Bankr. W.D. Ark. Mar. 14, 2013).

607. Williams & Smith, *supra* note 3.

608. Stevens, *supra* note 73.

609. Jacobs, *supra* note 64.

