

LEGAL SUPPORT FOR VICTIM COMPENSATION FUNDS FOR POLICE VIOLENCE VICTIMS

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“Opposing crime victim compensation is rather like attempting to put together forceful and compelling arguments against compassion, mercy, and decency.”—Daniel McGillis & Patricia Smith, Nat’l Inst. of Justice, Compensating Victims of Crime: An Analysis of American Programs (1983)

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INTRODUCTION

In 2016, Philando Castile was one of 962 U.S. civilians who were killed by police.¹ Police Officer Jeronimo Yanez followed Castile's car and pulled him over for a broken taillight.² Castile was not alone in the car, his girlfriend Diamond Reynolds was in the passenger seat and her four-year-old daughter was in the back seat.³ Forty seconds into the stop, Officer Yanez shot at Castile seven times.⁴ As a licensed gun-owner, Castile had told the officer that he possessed a firearm, and when Yanez requested identification Castile reached for his wallet.⁵ Yanez later testified that he feared for his life because he thought Castile was reaching for a gun.⁶ Yanez was charged, tried, and acquitted of second-degree manslaughter and intentional discharge of a firearm that endangers safety.⁷

Castile was legally innocent of any criminal act, and he was within his constitutional rights to own a gun. Yet under the law a jury could acquit Officer Yanez as long as Yanez subjectively feared for his own safety, regardless of the reality.⁸ The vast majority of police who assault and kill civilians are never charged nor tried: an estimated 98.3 percent.⁹

¹ See *Fatal Force*, WASH. POST (Jan. 22, 2020), <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [<https://perma.cc/U9L9-C43C>].

² Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 396 (2018).

³ *Id.*

⁴ *Id.* at 397.

⁵ Donald F. Tibbs, *Racial Profiling in the Era of Black De-Constitutionalism*, 23 WASH. & LEE J. C.R. & SOC. JUST. 181, 183 (2016) ("Philando responded that his license and registration were in his wallet, but that he 'had a pistol on him because he was licensed to carry.' Apparently Officer Yanez said, 'don't move,' and as Philando was putting his hands up in the standard pose of surrender, Officer Yanez shot him four times." (footnote omitted)).

⁶ See Gonzales Rose, *supra* note 2, at 397–98 ("At trial, the primary issue in regards to the manslaughter charge was whether Officer Yanez was truly afraid for his life. The only admissible evidence put forth to prove Yanez was reasonably afraid for his life was his own testimony and an expert witness who testified that, from Yanez's account, it was likely he had seen a gun since Yanez reported seeing Castile's hand form into a C-shape. Yanez's testimony was contradicted by Castile's final words, Reynolds's eyewitness testimony, and the dash-cam video." (footnotes omitted)).

⁷ KARE-TV, *Minnesota Officer Acquitted of Manslaughter in Shooting Philando Castile During Traffic Stop*, USA TODAY (June 16, 2017, 6:32 PM), <https://www.usatoday.com/story/news/nation/2017/06/16/minn-officer-acquitted-philando-castile-shooting/102927488/> [<https://perma.cc/8FCQ-JYUB>].

⁸ Gonzales Rose, *supra* note 2, at 398 ("It is likely Yanez lied on the stand that Castile had reached for his firearm. At trial, Yanez testified that he actually saw Castile's gun. Immediately after the shooting, however, Yanez admitted that he had not seen the firearm. As captured by the dash-cam video, within minutes of the shooting, Yanez was questioned by a responding officer and made statements clearly indicating that he had not seen the gun.

Victim compensation funds (“VCFs”) exist to help victims and their families during a traumatic time of crisis.¹⁰ VCFs cover funeral expenses, medical expenses, and mental health treatment at a critical time.¹¹ Yet to be eligible for victim compensation funds, the victim often must provide a police report that identifies the assailant as the perpetrator and the harmed party as the victim.¹²

If Castile had been shot and killed by a civilian, then his family, Reynolds, and her daughter would all be identified as victims and eligible for victim compensation funds under Minnesota’s state victim compensation statute.¹³ Even without a criminal conviction of the perpetrator, Reynolds and Castile’s family could apply for compensation within three years of the shooting.¹⁴ Indeed, even if law enforcement did not even further investigate the shooting, they would still qualify as victims.¹⁵

But when the shooter is a police officer, then victims do not have police reports that identify them as victims. Instead, law enforcement can identify these witnesses and subjects of violence as contributory, an identification that protects police officers from liability.¹⁶ During Castile’s death, because his girlfriend Reynolds was live-filming the police behavior, the officers handcuffed and arrested her.¹⁷ That false arrest would have disqualified her for victim compensation funds at her time of most need.¹⁸ She did not have a police report

Specifically, Yanez said ‘I don’t know where the gun was, he didn’t tell me where the fucking gun was, and then it was just getting hinky, he gave, he was just staring ahead, and then I was getting fucking nervous[.]’” (footnote omitted).

⁹ *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> [<https://mappingpoliceviolence.org/>].

¹⁰ See *Victim Compensation*, OFF. FOR VICTIMS OF CRIMES (May 28, 2020), <https://ovc.ojp.gov/topics/victim-compensation> [<https://perma.cc/9WK9-8PCK>]; Christen Smith, *Slow Death: Is the Trauma of Police Violence Killing Black Women?*, THE CONVERSATION (July 11, 2016 9:58 PM), <https://theconversation.com/slow-death-is-the-trauma-of-police-violence-killing-black-women-62264> [<https://perma.cc/6N2V-PT5D>].

¹¹ *Victim Compensation*, *supra* note 10.

¹² *Victim Compensation*, *supra* note 10.

¹³ MINN. STAT. § 611A.53(1) (2020).

¹⁴ *Id.* § 611A.53(2) (Subdivision 2, Section 5 requires an application within three years of injury or death.).

¹⁵ *Id.* (Subdivision 2, Section 5 expressly states an application is not void even if there is a “failure of a law enforcement agency [in] provid[ing] information or assistance to a potential claimant.”).

¹⁶ See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 79–80 (2020).

¹⁷ See Tibbs, *supra* note 5, at 184 (“During the video, Diamond is removed from the car and ordered to get on her knees. The sounds of her being handcuffed are audibly transmitted.” (footnote omitted)).

¹⁸ A year later, Reynolds reached a settlement with the city for false arrest. Mitch Smith, *Philando Castile’s Girlfriend, Diamond Reynolds, Reaches \$800,000 Settlement*, N.Y. TIMES (Nov 29, 2017), <https://www.nytimes.com/2017/11/29/us/philando-castile-diamond-reynolds-settlement.html> [<https://perma.cc/6RHX-J9TM>].

that identified her as a victim; instead, she was labeled as a perpetrator.¹⁹ Likewise, Officer Yanez identified Castile as contributory to his own death by his own physical movements.²⁰ Castile would not qualify as a victim for VCFs. Thus the families of victims of police violence, like Castile's family, must use their own resources or resort to GoFundMe pages for funeral and proper burial services.²¹

VCFs should not automatically disqualify victims of police shootings and their families. Legislatures and prosecutors can amend the VCF requirements to allow victims of police violence to apply and be considered for funds. A review of whether to grant funds is individualized, but victims of police violence must first be permitted to even apply for consideration. Victims of police shootings are first and foremost victims. A legally innocent civilian who has been shot by the government is a victim, particularly in a deadly shooting where the government imposed the sentence of death without any process.

This Essay provides legal support for extending consideration for VCFs to victims of police use of force. VCFs are capped in amount, and thus are more tangibly helpful for non-deadly use of force compensation where the medical and concomitant bills could be covered by \$50,000 or less.²² VCFs are not a solution to police violence, but they are a pathway to making victims whole who are most likely to be abused without recourse.

While this Essay also advocates that victims of deadly force be eligible for compensation through VCFs, the practical reality is that victims of non-deadly force are less likely to recover from Section 1983 litigation, and more likely to have their lives, jobs, and families disrupted without any ongoing support. While this Essay references data on police deadly use of force, more broadly occurring excessive use of force is more difficult to track. Yet our society has a support mechanism to support these victims of violence through VCFs and should apply it for victims of excessive police violence.

¹⁹ See Tibbs, *supra* note 5, at 183–184.

²⁰ See *id.*, at 183–184; see also Transcript of Officer Jeronimo Yanez at 12–14, *Minnesota v. Yanez*, No. 62-CR-16-8110, 2017 WL 2624798 (Minn. Dist. Ct. June 16, 2017).

²¹ See, e.g., Alexandra Chaidez, *GoFundMe Launched for Family of Mekhi James, Toddler Fatally Shot in Austin*, BLOCK CLUB CHI. (June 29, 2020, 4:00 PM), <https://blockclubchicago.org/2020/06/29/gofundme-launched-for-family-of-mekhi-james-toddler-fatally-shot-in-austin-this-month/> [<https://perma.cc/9C2B-D4M9>]; Justin Boggs, *GoFundMe Pages Raising Money for Police Shooting Victims' Families*, ABC (July 7, 2016, 1:38 PM), <https://www.abc15.com/news/national/gofundme-pages-raising-money-for-police-shooting-victims-families> [<https://perma.cc/MMD3-6EGP>].

²² *Costs Covered by the Crime Victims' Compensation Program*, KEN PAXTON ATT'Y GEN. OF TEX., <https://www.texasattorneygeneral.gov/crime-victims/crime-victims-compensation-program/costs-covered-crime-victims-compensation-program> [<https://perma.cc/3WYW-6SNL>].

I. POLICE DEADLY USE OF FORCE

In 2015, police officers fatally shot and killed 994 civilians.²³ In 2016, police officers fatally shot and killed 962 civilians.²⁴ In 2017, police officers fatally shot and killed 986 civilians.²⁵

Until 2015, no databases tracked police violence and shooting deaths.²⁶ That year, the Department of Justice agreed to track killings by police officers through completing forms every three months in order to tally the number of police killings.²⁷ The FBI began asking law enforcement for incident-based reports.²⁸ As demonstrated in the intervening years, law enforcement provided minimal—if any—information on these incidents.²⁹ Yet the FBI’s national catalogue continues to make data submission by law enforcement voluntary and unaudited.³⁰

The FBI categorizes police shootings of civilians as “justifiable homicides” committed by state and local police.³¹ The information about police shootings is frequently “based upon either a cursory media or police report that does not include demographic detail about the victims or officers, or even a detailed narrative of the incident.”³² Private databases such as mappingpoliceviolence.com and a tracking initiative launched in 2016 by the *Washington Post* are now recording these deaths.³³

²³ *2015 Database of Police Shootings*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> [<https://perma.cc/W982-24X4>].

²⁴ *See Fatal Force*, *supra* note 1.

²⁵ *2017 Database of Police Shootings*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> [<https://perma.cc/W982-24X4>].

²⁶ *See* Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 190 (2017) (“The only official, national effort to catalogue officer-involved shootings is the FBI’s tabulation of ‘justifiable homicides’ committed by state and local police. Data is submitted voluntarily, unaudited and threadbare.” (footnote omitted)).

²⁷ Charlie Savage, *Justice Department to Streamline Tracking of Police Killings*, N.Y. TIMES (Aug. 9, 2016), http://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html?_r=0 [<https://perma.cc/LKQ4-CYJ5>].

²⁸ *Id.*

²⁹ *See, e.g., id.*

³⁰ *See* Sekhon, *supra* note 26, at 190.

³¹ *Id.*

³² *Id.*

³³ *See Fatal Force*, *supra* note 1; PHILIP M. STINSON, SR. & CHLOE A. WENTZLOF, BOWLING GREEN ST. U. POLICE INTEGRITY RSCH. GRP., ON-DUTY SHOOTINGS: POLICE OFFICERS CHARGED WITH MURDER OR MANSLAUGHTER, 2005-2019, at 1, <https://www.bgsu.edu/content/dam/BGSU/health-and-human-services/document/Criminal-Justice-Program/policeintegritylostresearch/-9-On-Duty-Shootings-Police-Officers-Charged-with-Murder-or-Manslaughter.pdf> [<https://perma.cc/L56Q-RRHH>].

Of the 990 shooting deaths in 2015, almost half of the deceased were people of color.³⁴ Of the 990 deaths, just seventeen police officers were charged with any crime related to the shootings.³⁵ Overall between 2005 and 2019, nationally, the government brought on average roughly five prosecutions each year for deaths at the hands of police officers.³⁶

Between 2005 and 2009, thirty-five officers nationally received a conviction for their on-duty deadly shooting of a civilian.³⁷ Among those thirty-five convictions, “just 10 (28.6%) of those cases involved a victim who was actually armed with a dangerous weapon when they were shot and killed by the police,”³⁸ and in only three cases was the decedent armed with a gun.³⁹ Despite these facts, only four of those thirty-five officers were convicted of murder.⁴⁰

A. *Police Use of Force in Communities of Color*

The costs of policing are higher for policed people of color than policed white people.⁴¹ Most police officers are white, while the communities they police are more likely to be communities of color.⁴² Police responses in low-

³⁴ Hannah Walker, *Unspoken Immunity and Reimagined Justice: The Potential for Implementing Restorative Justice and Community Justice Models in Police-Related Shootings*, 37 PACE L. REV. 789, 790 (2017).

³⁵ *Id.* at 790–92.

³⁶ See STINSON & WENTZLOF, *supra* note 33, at 1.

³⁷ *Id.* (“15 by guilty plea, 20 by jury trial, and none convicted by a bench trial.”).

³⁸ *Id.* at 2.

³⁹ *Id.*

⁴⁰ *Id.* at 1 (“The 4 officers convicted of murder received incarceration sentences that ranged from 81 months to 192 months in prison, with an average length prison sentence of 150.75 months. As to the other officers, 9 were convicted of manslaughter, 4 were convicted of voluntary manslaughter, 5 were convicted of involuntary manslaughter, 2 were convicted of official misconduct, 2 were convicted of reckless homicide, 3 were convicted of negligent homicide, 5 were convicted of federal criminal deprivation of civil rights (including the four officers whose murder convictions were overturned), and one was convicted of reckless discharge of a firearm. The 18 officers convicted of manslaughter received incarceration sentences that ranged from zero months to 480 months in prison, with an average sentence of 78.5 months in prison.”).

⁴¹ Elias R. Feldman, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J.L. & SOC. PROBS. 89, 98–99 (2019).

⁴² See BUREAU OF JUST. STATS., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES (EXECUTIVE SUMMARY) 1 (2015), https://www.bjs.gov/content/pub/pdf/lpd13ppp_sum.pdf [<https://perma.cc/MNP8-DK5A>] (finding that in 2013, 27 percent of police officers were members of minority groups, whereas 73 percent were white); see also Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter than the People They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/?arc404=true> [<https://perma.cc/D6GE-SV5Q>]. See generally GOVERNING, DIVERSITY ON THE FORCE: WHERE POLICE DON’T MIRROR COMMUNITIES (2015), <http://images.centerdigitaled.com/documents/policediversityreport.pdf> [<https://perma.cc/63TX-CA6Z>].

income communities of color are more likely to be violent.⁴³ For example, a DOJ investigation in 2017 uncovered that the Chicago Police Department (“CPD”) widely used unnecessary and unreasonable force against people of color.⁴⁴ According to the report,

The uses of excessive force we identified were not aberrational. Our holistic review of this information, combined with our investigation of CPD’s training, supervision, accountability, and other systems, give us reasonable cause to believe that the unreasonable force we identified amounts to a pattern or practice of unlawful conduct.⁴⁵

The CPD would routinely shoot and kill individuals running from the police, individuals who posed no harm, and who frequently were Black.⁴⁶ Running from the police is not sufficient under the law to signal danger, nor guilt of a crime, such that officers could impose the ultimate sentence our government can impose—the death penalty.⁴⁷ Yet the DOJ report found that internal police protocols and reviews repeatedly failed to produce accountability for individual police officers using deadly force against civilians. Instead the internal review routinely accepted statements by CPD police officers that the victims were dangerous, even when controverted by video, eyewitness evidence, or physical evidence.⁴⁸ Notably, between one-third to one-half of all individuals killed by police nationally have a disability.⁴⁹

Police pulled over Castile forty-six times for traffic stops between July 2002 and July 2016, leading to traffic tickets, fines and fees.⁵⁰ “Only six of those times [were] for offenses that an officer could have observed prior to the stop.”⁵¹ Yet when Castile was shot and dying, police calling in for backup said, “[o]ne adult female being taken into custody. Driver at gunpoint. Juvenile fe-

⁴³ See Amanda Howerton, *Police Response to Crime: Differences in the Application of Law by Race*, 4 J. ETHNICITY CRIM. JUST. 51, 51 (2006) (finding that “police exert more effort when victims are white,” in terms of response time to crime scenes, and “more follow-up effort after the crime has occurred”).

⁴⁴ U.S. DEP’T OF JUST. C.R. DIV. & U.S. ATTORNEY’S OFF. N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 15 (2017), <http://www.justice.gov/opa/file/925846/download> [<https://perma.cc/Y4AK-PDYB>] (“The pattern or practice of unreasonable force [which includes fatal shootings], coupled with the recurrence of unaddressed racially discriminatory conduct by officers further erodes community trust and police effectiveness.”).

⁴⁵ *Id.* at 25.

⁴⁶ *Id.* at 21, 25.

⁴⁷ *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

⁴⁸ U.S. DEP’T OF JUST. C.R. DIV. & U.S. ATTORNEY’S OFF. N. DIST. OF ILL., *supra* note 44, at 56.

⁴⁹ DAVID M. PERRY & LAWRENCE CARTER-LONG, RUDERMAN FAM. FOUND., THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 1, (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf [<https://perma.cc/84SJ-P4U4>].

⁵⁰ Elise C. Boddie, *Ordinariness As Equality*, 93 IND. L.J. 57, 59–60 (2018); *see also* Tibbs, *supra* note 5, at 186 (“One reporter commented that ‘either Philando is the worst driver in the world or a prime example of racial profiling.’”).

⁵¹ Boddie, *supra* note 50, at 59.

male, child, is with another officer. We need a couple of other squads to block off intersections.”⁵² Police officers made no mention of Castile’s critical condition.⁵³

In 2016, Black civilians accounted for 24 percent of police violence victims, despite that they are only 13 percent of the national population.⁵⁴ Low income communities of color generally do not receive police help when they most need it—even while they are concomitantly constantly surveilled by police, abused by police, and arrested for petty crimes.⁵⁵

II. HOW INTERNATIONAL LAW LABELS POLICE DEADLY VIOLENCE AS EXTRA-JUDICIAL KILLINGS

Congress has created a legal pathway for individuals in America to sue foreign nations for an extrajudicial killing, whether or not those individuals are U.S. citizens.⁵⁶ By contrast, the families of civilians who are killed by American police rarely will be compensated through our own civil rights statutes because of caselaw and institutional protections for American police. In 1991, President George H.W. Bush signed the Torture Victim Protection Act, providing greater protections and remedies for victims of extrajudicial killings by foreign governments, than victims of our own governments through Section 1983 remedies.⁵⁷

⁵² See Tibbs, *supra* note 5, at 184 (“After announcing it was a ‘Code Three,’ which requires an emergency response, meaning blue lights and sirens, additional police officers rush to the scene. . . . One officer reports, ‘[o]ne adult female being taken into custody (meaning Diamond). Driver at gunpoint (meaning Philando). Juvenile female, child, is with another officer. We need a couple of other squads to block off intersections.’ No mention of the fact that Philando is shot and dying. Another officer calls in, ‘All officers are good. One suspect that needs medics.’” (quoting Andy Mannix, *Police Audio: Officer Stopped Philando Castile on Robbery Suspicion*, STAR TRIB. (July 12, 2016 10:31 AM), <https://www.startribune.com/police-audio-officer-stopped-philando-castile-on-robbery-suspicion/386344001/> [https://perma.cc/4BYA-QB3T])).

⁵³ See *id.*

⁵⁴ See Wesley Lowery, *Aren’t More White People than Black People Killed by Police? Yes, but No.*, WASH. POST (July 11, 2016, 3:41 AM), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/> [https://perma.cc/F943-YQBR].

⁵⁵ See Felicia A. Reid, *A Matter of Due Regard: Police Misconduct, the New York State Courts, and the Emptiness of Theoretical Justice*, 80 ALB. L. REV. 1103, 1104 (2017); see also David Kennedy, *Reading Los Angeles: Black Communities: Overpoliced for Petty Crimes, Ignored for Major Ones*, L.A. TIMES (Apr. 10, 2015, 6:36 PM), <https://www.latimes.com/opinion/bookclub/la-reading-los-angeles-kennedy-ghettoside-20150404-story.html> [https://perma.cc/UTQ9-RH9D]; Runa Rajagopal, *Building Justice: How Segregation Enables Over-Policing of Communities of Color*, CITY LIMITS (Sept. 26, 2016), <https://www.citylimits.org/2016/09/26/how-segregated-housing-enables-over-policing-of-low-income-communities-of-color/> [https://perma.cc/7Q9C-JVWK].

⁵⁶ See Torture Victim Protection Act of 1991, 28 U.S.C. § 1350(2)(a) (2019).

⁵⁷ *Id.*; see also *Torture Victim Protection Act*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/> [https://perma.cc/V5F

International law condemns extrajudicial killings, and also enshrines rights to non-discrimination.⁵⁸ Article 2.2 of the UNESCO Declaration on Race and Racial Prejudice finds that “[r]acism includes . . . structural arrangements and institutionalized practices resulting in racial inequality . . . it is reflected in discriminatory provisions in legislation . . . *it hinders the development of its victims* . . . it is contrary to the fundamental principles of international law.”⁵⁹ Police shootings and police practices of use of force against people of color, in particular Black and Indigenous people of color, are prohibited under international law.⁶⁰

In 2014, Lesley McSpadden and Michael Brown Sr., the parents of Michael Brown, looked internationally for a response and remedy to American police violence.⁶¹ A police officer killed their Black son in Ferguson, Missouri, sparking national protests to police violence against Black people.⁶² Michael’s parents spoke to the United Nations Committee Against Torture, naming police brutality in America as “extrajudicial killings,” violence that is not government sanctioned.⁶³ Extrajudicial killings in international law are perpetrated by the military or by police.⁶⁴ Human rights law prohibits governments from depriving citizens of life arbitrarily.⁶⁵ The UN Convention Against Torture (“CAT”) addresses police violence, and Michael Brown’s parents testified before the Committee Against Torture which implements the CAT.⁶⁶

Naming and identifying deadly American police violence as extrajudicial killings recognizes that the State is culpable for imposing a death sentence on a

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⁵⁸ See American Convention on Human Rights art. 1, 4, Nov. 22, 1969, B-32, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> [<https://perma.cc/HWD3-WQYQ>].

⁵⁹ General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), *Declaration on Race and Racial Prejudice*, art. 2.2 (Nov. 27, 1978), http://portal.unesco.org/en/ev.php-URL_ID=13161&URL_DO=DO_TOPIC&URL_SECTION=201.html [<https://perma.cc/G838-NNPT>] (emphasis added).

⁶⁰ NAT’L CONF. OF BLACK LAWYERS ET AL., REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON SYSTEMIC RACIST POLICE VIOLENCE AGAINST PEOPLE OF AFRICAN DESCENT IN THE UNITED STATES 14–16 (2021).

⁶¹ See Josh Levs, *Michael Brown’s Parents Address U.N.: ‘We Need the World to Know,’* CNN (Nov. 12, 2014, 1:22 AM), <https://www.cnn.com/2014/11/11/us/ferguson-brown-parents-u-n/index.html> [<https://perma.cc/7B6X-P6MY>].

⁶² Annys Shin, *Recalling the Protests, Riots After Fatal Police Shooting of Michael Brown*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/lifestyle/magazine/recalling-the-protests-riots-after-fatal-police-shooting-of-michael-brown/2017/08/01/9992f044-5a8d-11e7-a9f6-7c3296387341_story.html [<https://perma.cc/L9R2-N528>].

⁶³ Levs, *supra* note 61.

⁶⁴ William Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 135–36 (2018).

⁶⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); see American Convention on Human Rights, *supra* note 58, art. 4.

⁶⁶ See Levs, *supra* note 61.

civilian without process, a sentence lacking legal sanction.⁶⁷ Just as under international law, Americans have the right to life in the preamble to our Constitution, and a due process right to be free from the arbitrary deprivation of life by the government.⁶⁸ Enforcement of those rights, however, is particularly tenuous in the context of police violence against civilians. Approximately 2 percent of police officers who perpetrate excessive use of force face any chastisement or repercussion.⁶⁹ As the UN Special Rapporteur on extrajudicial executions has said, “[i]ndividuals commit violations of the right to life not because they believe it is justifiable, but because they believe they will not be called on to justify themselves.”⁷⁰

According to the Committee Against Torture, “the frequent and recurrent shootings or fatal pursuits by the police of unarmed Black individuals” and “the alleged difficulties of holding police officers and their employers accountable for abuses” is deeply concerning.⁷¹ “[R]emedies for victims [under] international . . . law [would] include equal and effective access to justice; access to relevant information about the violations committed . . . ; and adequate, effective, and prompt reparation for the harm suffered.”⁷²

Inter-American case law has established that victims of human rights violations are entitled to adequate compensation for the harm caused. The compensation is calculated to include restitution, compensation, and rehabilitation of the victim, as well as a guarantee of non-repetition.⁷³ Furthermore, the relatives of the victim have recognized related human rights.⁷⁴

⁶⁷ Kate Kelly, *Extrajudicial Killings in the United States: The International Human Rights Perspective*, HUM. RTS. AT HOME BLOG (Dec. 10, 2017), https://lawprofessors.typepad.com/human_rights/2017/12/extrajudicial-killings-in-the-united-states-the-international-human-rights-perspective.html [<https://perma.cc/8JM6-YQMB>] (“Extrajudicial killings are, by definition, homicides carried out by state actors absent valid legal proceedings or adequate due process of law.”).

⁶⁸ See U.S. CONST. pmbl.; *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); G.A. Res. 39/46, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dec. 10, 1984).

⁶⁹ See *Police Violence Map*, *supra* note 9.

⁷⁰ Inter-Am. Comm’n H.R., *African Americans, Police Use of Force, and Human Rights in the United States*, OEA/Ser.L/V/II Doc. 135 (Nov. 26, 2018) (quoting Inter-Am. Comm’n H.R., *Chapter IV: The Use of Force* in ANNUAL REPORT 2015, para. 234 (Mar. 17, 2016)). “[T]he Special Rapporteur further has said, ‘[t]o function properly, the police need [...] appropriate mechanisms for accountability to be in place.’” *Id.* at 135–136 (quoting Inter-Am. Comm’n H.R., *Chapter IV: The Use of Force* in ANNUAL REPORT 2015, para. 234 (Mar. 17, 2016)).

⁷¹ *Id.* at 138 (quoting Comm. Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, CAT/C/USA/CO/3-5, para. 26 (Dec. 19, 2014)).

⁷² *Id.* at 143.

⁷³ *Id.* at 143–44.

⁷⁴ “The Inter-American Court has recognized the rights of next of kin to mental and moral integrity [and] the right to know the truth of what occurred to their loved ones.”⁷⁴ Inter-Am. Comm’n H.R., *Impunity for Killings by Police in the United States* (Dec. 7, 2017),

Under international law, the deceased, survivors, and their family members who suffered police violence are victims of torture. Under international law, they are entitled to compensation. These victims of human rights violations in our own country can be and should be compensated through our state-established structures of Victim Compensation Funds. Yet these victims frequently fail to qualify under the current standards enacted by states. This Essay focuses on making victims of police violence whole, through changing the qualification standards for American Victim Compensation Funds.

III. WHO IS A VICTIM?

The term “victim” as legally defined in criminal law refers to someone who has been harmed by criminal conduct.⁷⁵ In many, but not all states, the surviving family members and family members who witnessed the harm are victims eligible for recovery.⁷⁶ Victims of police violence and their families, however, are often blocked from eligibility.

In the context of “blaming the victim,” victims of police violence can be blamed for their own injuries when blame-shifting is in the interest of the surviving police officers.⁷⁷ These members of the government benefit from a finding that the victim was contributorily at fault.⁷⁸ Thus, a police officer report may not identify the decedent or harmed person as a victim. Without that identification as a victim by the police or prosecutor, the harmed person and their family will not qualify for victim compensation funds for mental health treatment, hospital bills, or funeral expenses.

A. *Victim Compensation Funds*

Victim compensation programs are a fairly recent phenomenon.⁷⁹ They arose out of the 1970s and 1980s movement recognizing victims’ rights under both federal and state constitutions.⁸⁰ Part of this movement focused on victim

https://www.aclu.org/sites/default/files/field_document/rfk_iachr_hearing_written_submission_rfkhr_final.pdf [<https://perma.cc/8K72-3K7D>]. Hence, “the United States’ failure to hold officers accountable for excessive use of force resulting in death constitutes a ‘violation of victims’ and their next of kin’s human rights.’” *Id.*

⁷⁵ Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1415 (1993).

⁷⁶ Jeffrey A. Parness et al., *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 838–39 (2010).

⁷⁷ Sam Levin, *Killed by Police, Then Vilified: How America’s Prosecutors Blame Victims*, GUARDIAN (Mar. 21, 2019, 2:07 PM), <https://www.theguardian.com/us-news/2019/mar/20/us-police-killings-district-attorney-prosecutor-reports> [<https://perma.cc/RAX7-22SR>] (describing the practice where “District Attorneys have repeatedly engaged in what victims’ families describe as cruel and painful smears of the dead”).

⁷⁸ *Id.* (highlighting cases where “prosecutors assigned to investigate killings present irrelevant and inaccurate information about victims and their pasts while exonerating the police”).

⁷⁹ Dori A. Wind, *Texas’ BIG Secret: The Crime Victims’ Compensation Fund*, 64 TEX. BAR J. 363, 364 (2001).

⁸⁰ *See id.* at 364–65.

compensation programs and mandatory restitution, to ensure that victims were “made whole.”⁸¹ The victims’ rights movement led to more than thirty state constitutional amendments in the 1990s, each with a Victim Bill of Rights.⁸² These states paved the way for this movement to reach national levels, seeking an amendment to the federal constitution. The Final Report proposing a federal constitutional amendment in order to protect crime victims’ rights, stated, “[t]he guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen.”⁸³ In 2004, Congress passed the Crime Victims’ Rights Act.⁸⁴ While the federal constitution remains untouched, every state now enshrines and protects victims rights.⁸⁵

Victim Bill of Rights are controversial, particularly newer Marsy’s laws. The first Marsy’s Law was adopted by California such that

[t]he California state constitution now lists seventeen “personally held and enforceable rights” of crime victims, among which are: the right to protect private information from discovery; the right to refuse defense requests for discovery; the right to confer in advance with the prosecutor about the charges and any pre-trial disposition; the right to attend public proceedings; the right to be heard at proceedings regarding (among other subjects) the defendant’s plea, sentence, and pretrial release; the right to a speedy trial and a prompt and final conclusion of the case; the right to be notified of material events in the case; the right to restitution; and the right to be informed of the victim’s rights.⁸⁶

In the context of Victim Compensation Funds, police can claim victim status under Marsy’s Laws, as will be discussed later in this Essay.⁸⁷

⁸¹ Nat’l Crime Victim L. Inst., *Ensuring Full Restitution for Crime Victims: Polyvictims as a Case Study in Overcoming Causation Challenges*, VICTIM L. BULL., July 2013, at 2, <https://law.lclark.edu/live/files/15462-ensuring-full-restitution-for-crime> [<https://perma.cc/DU3C-H48G>].

⁸² Paul G. Cassell et. al., *Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 64 (2014) (“The measures were embodied in state statutes and, in more than thirty states, state constitutional “bills of rights” for crime victims.”); *see also* Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims’ Rights in Arizona*, 47 ARIZ. ST. L.J. 421 (2015).

⁸³ *See* Twist & Williams, *supra* note 82, at 422 (quoting PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982), <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/front.pdf> [<https://perma.cc/W9NK-BUMD>]).

⁸⁴ Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2019).

⁸⁵ *See* Cassell, *supra* note 82, at 98 (“[E]very state has adopted a statute that either enforces its constitutional amendment or creates independent statutory rights for crime victims. As a result, state legislatures and state employees have attempted to give victims a voice in the criminal justice process across the country.”).

⁸⁶ Lara Bazelon & Bruce A. Green, *Victims’ Rights from A Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 306 (2020).

⁸⁷ *See infra* Section IV.C.

Victim Compensation Funds themselves are far less controversial and frequently operate under the radar. They exist and function in every state and U.S. territory.⁸⁸

States created Victim Compensation Funds (VCF) to directly reimburse victims for losses and expenses related to the harm suffered, including funeral expenses, medical bills, counseling fees, and lost wages.⁸⁹ Regardless of federal, state, tribal, or military criminal jurisdiction, all victims of violent crime are eligible for state compensation programs.⁹⁰ However, state laws limit the amount of money that can be provided to an individual victim, and frequently victims of property crimes are ineligible for assistance.⁹¹

VCFs are funded through offenders' fees and fines, instead of through taxes.⁹² The proceeds from the fees and fines are "disbursed by state programs and boards."⁹³ In addition, about one-third of funding for victim compensation programs comes from the federal Victims of Crime Act fund.⁹⁴ In total, state programs and boards disburse nearly \$500 million in compensation to victims every year.⁹⁵

⁸⁸ Valena E. Beety, *Compensating Victims of Police Violence*, 70 EMORY L.J. ONLINE 47, 52 (2021); see also Njeri Mathis Rutledge, *Looking A Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 229–30 (2011).

⁸⁹ Vida B. Johnson, *When the Government Holds the Purse Strings but Not the Purse: Brady, Giglio, and Crime Victim Compensation Funds*, 38 N.Y.U. REV. L. & SOC. CHANGE 491, 493–95 (2014).

⁹⁰ 1 JOHN E. LEIGHTON, LITIGATING PREMISES SECURITY CASES, § 2:15 (West 2020).

⁹¹ *Id.*

⁹² *Id.*; see, e.g., ARIZ. REV. STAT. ANN. § 41–2407(A–B) (West, Westlaw through 2d Reg. Sess. 54th Leg.) (showing that in Arizona, fees are paid by all convicted criminal defendants, contributing to a fund administered by the Arizona Criminal Justice Commission).

⁹³ Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 2016 UTAH L. REV. 535, 559; see FLA. STAT. ANN. § 960.09 (West, Westlaw through 2020 2d Reg. Sess. 26th Leg.) ("The department shall have authority to allow, deny, controvert, and litigate claims . . . and to delegate to the Crime Victims' Services Office such authority."); IDAHO CODE ANN. § 72–1012 (West, Westlaw through 2020 2d Reg. Sess. 65th Leg.) ("An applicant for an award of compensation may apply in writing in a form that conforms substantially to that prescribed by the commission."); *Id.* § 72–1018(1) ("The commission shall award compensation benefits . . . if satisfied by a preponderance of the evidence that the requirements for compensation have been met."); R.I. GEN. LAWS ANN. § 12–25–18 (West, Westlaw through 2020 2d Reg. Sess.) ("The office [of the general treasurer] . . . shall designate a program administrator. . . . The administrator shall investigate each application for compensation, verify the information contained on the application and in all supporting documentation and award or deny compensation . . .").

⁹⁴ LEIGHTON, *supra* note 90.

⁹⁵ See Johnson, *supra* note 89 at 493–95.

IV. VICTIMS OF POLICE SHOOTINGS

A. *Why Police Shooting Victims Have Not Received Compensation Generally*

To qualify for compensation, each state has particular requirements of victims, yet many of these requirements are similar. Generally, programs do not require that the perpetrator be caught or convicted.⁹⁶ Many states likewise pay compensation to the dependents and family of victims of violent crime.⁹⁷ To qualify for consideration, victims must timely report the crime, timely file an application, have an expense not covered by insurance, and perhaps most importantly, act in a cooperative way with law enforcement and be “innocent” of any wrongdoing.⁹⁸ These latter requirements of cooperation with police and “innocence” of any wrongdoing are the requirements that currently bar victims of police violence from being considered for compensation.⁹⁹

Most frequently, police and victims’ advocates in prosecutors’ offices are the ones who refer victims to compensation fund programs.¹⁰⁰ Indeed, they usually have applications in police stations and prosecutors’ offices.¹⁰¹ To apply, police must identify the applicant as a victim (or a witness).¹⁰² Prosecutors likewise can play a key role, with victim advocates assisting with filling out the paperwork.¹⁰³

B. *Labeling Victims as Contributorily “At Fault” Rather than Innocent*

Most state programs consider whether the victim was participating in illegal conduct or activity, and then whether the activity is connected with the crime of violence against them.¹⁰⁴ This questioning of whether the victim deserved the violence imposed on them can lead to individual and arbitrary, or discriminatory, decision-making by reviewers.¹⁰⁵ For example, the requirement to cooperate with law enforcement, as well as the requirement of being an “innocent” victim, have prevented domestic violence victims from accessing compensation funds.¹⁰⁶

⁹⁶ LEIGHTON, *supra* note 90.

⁹⁷ 21A AM. JUR. 2D, *Criminal Law* § 1053 (2020).

⁹⁸ LEIGHTON, *supra* note 90.

⁹⁹ Njeri Mathis Rutledge & Valena Beety, *Traumatized Witnesses and Victims of Police Violence Get Shut Out of Compensation Funds*, USA TODAY (May 4, 2021, 10:08 AM), <https://www.usatoday.com/story/opinion/2021/05/04/victim-compensation-funds-should-include-police-violence-witnesses-column/4923404001/> [<https://perma.cc/92PE-D75J>].

¹⁰⁰ Johnson, *supra* note 89, at 494–95.

¹⁰¹ *See id.*

¹⁰² *Id.* at 495.

¹⁰³ *Id.*

¹⁰⁴ *See* Rutledge, *supra* note 88, at 240–41.

¹⁰⁵ *Id.* at 242.

¹⁰⁶ *Id.* at 240.

Victims have to prove that they were not participating in illegal activity when they were harmed, and indeed, “[c]ontributory misconduct is the most frequent reason for denial of claims.”¹⁰⁷ “A research report funded by the DOJ concluded that 28 percent of denials across the states were due to contributory misconduct.”¹⁰⁸ Victims of human trafficking face this quandary of “contributory misconduct” in their dual role as simultaneously victim and defendant.¹⁰⁹ Human trafficking victims are often only identified as victims after they are “arrested and charged with a crime,” frequently prostitution.¹¹⁰ To be considered for compensation, victims must not be engaging in criminal conduct at the time they are victimized.¹¹¹ Thus these victims necessarily cannot establish their “innocence” that may be required to obtain compensation—even if they have been violently victimized.¹¹² The arrest disqualifies them.¹¹³ Georgia, for example, excludes victims who consented to “the events leading to the crime.”¹¹⁴ Experts note that “trafficking victims’ ‘unique injuries and criminal backgrounds [should] be recognized as indicators of their exploitation rather than barriers’ to compensation.”¹¹⁵

Some state courts have denied compensation if victims are intoxicated at the time of the crime.¹¹⁶ Other states deny funds if the victim has a prior conviction including drug possession.¹¹⁷ A past criminal record, or a history of substance use disorder, should play no role in automatically disqualifying a victim

¹⁰⁷ *Id.* at 241.

¹⁰⁸ *Id.* at 241 n.150.

¹⁰⁹ See Peters, *supra* note 93, at 538.

¹¹⁰ *Id.* (citing Amanda Peters, *Disparate Protections for American Human Trafficking Victims*, 61 CLEV. ST. L. REV. 1, 28 (2013)) (arrests of sex trafficking victims for prostitution).

¹¹¹ See Rutledge, *supra* note 88, at 241.

¹¹² Steven Seidenberg, *Of Human Bondage: Slavery Continues to Haunt the Modern World, but Efforts to Eradicate It Are Growing*, A.B.A. J., Apr. 2013, at 52, 56 (“We’ve been arresting the wrong people. We’ve been arresting the victims.” (quoting Norma Ramos, Executive Director of the Coalition Against Trafficking of Women)).

¹¹³ See Peters, *supra* note 93, at 562.

¹¹⁴ *Who Is Not Eligible for Crime Victims Compensation?*, GA. CRIME VICTIMS COMP. PROGRAM, CRIM. JUST. COORDINATING COUNCIL, <http://crimevictimscomp.ga.gov/faq/who-is-not-eligible-for-victims-compensation/> [https://perma.cc/2ZFA-K34X].

¹¹⁵ See Peters, *supra* note 93, at 563 (quoting SHARED HOPE INT’L, PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN 18 (2014), <http://sharedhope.org/wp-content/uploads/2014/11/2014%20Protected%20Innocence%20Challenge%20Report.pdf> [https://perma.cc/T2XB-XTVT]).

¹¹⁶ *Sims-Hearn v. Off. of Med. Exam’r, Cook*, 834 N.E.2d 505, 508 (Ill. App. Ct. 2005) (denying the mother of a deceased man compensation because the deceased had drugs in his system at the time of his death); *In re Barnes*, 34 Ill. Ct. Cl. 424, 425–26 (1980) (denying the claimant compensation, in part because he was intoxicated by alcohol and drugs when the crime was committed); KAN. ADMIN. REGS. § 20–2–8(3) (Supp. 2016) (stating that “contributory misconduct” which may diminish or disqualify a victim from receiving compensation, includes drug or alcohol intoxication).

¹¹⁷ See Rutledge, *supra* note 88, at 241–42; see also OHIO REV. CODE ANN. § 2743.60 (West, Westlaw through 2019–2020 Gen. Assemb.); Marilyn Tobocman & Diane Citrino, *Human Trafficking in Our Backyard: What Can Lawyers Do?*, 61 FED. LAW., April 2014, at 16, 17.

from receiving compensation because they do not negate the experience of harm and victimization.¹¹⁸ Professor Njeri Rutledge proposes that compensation boards must determine whether compensation funds are “a gift reserved for only the ‘deserving’ or whether they are a right stemming from some form of societal obligation to victims.”¹¹⁹

Because of victims’ rights statutes, states have adopted a societal obligation to victims, including victims of police violence. Victims of police violence should be able to apply and be considered for VCFs. Victim compensation boards can then conduct a case by case determination of whether the victim was engaged in related and relevant criminal and disqualifying behavior, if necessary. Currently, boards disqualify these victims because they are labeled by police as contributory, even for innocent behavior.¹²⁰ These allegations of threatening behavior are powerful and disqualifying when launched against a victim of police violence.

Even if the victim of police violence is similar to the trafficking victim by inhabiting a space as simultaneously victim and defendant, they should not face automatic disqualification. Because a victim is running from police and has a controlled substance does not mean police should unilaterally impose the death penalty on them. Likewise, possessing a controlled substance does not automatically mean they are not a victim, with a family that deserves the same financial assistance as other victims with funeral expenses.

Finally, victims maintain a presumption of innocence before being adjudicated as guilty or not guilty by our court system. Police cannot circumvent this determination by labeling the victim and then imposing our most severe punishment. To the extent police do so, victim compensation boards should consider these victims for compensation based on their rights and our societal obligations, rather than a discriminatory determination of “deserving.”

C. Victims of Crime Act Goals: Humanitarian Response to Victims Versus Promoting Law Enforcement

Promoting law enforcement was not the primary incentive for Congress to pass the federal Victims of Crime Act.¹²¹ Instead, the legislative history shows that the primary purpose was “to provide limited federal funding to the states with minimal bureaucratic ‘strings attached,’ for direct compensation and service programs to assist victims of crime, including victims of federal crime.”¹²² Indeed, the goal of compensation was to substantiate that society is responsive

¹¹⁸ Rutledge, *supra* note 88, at 241–42.

¹¹⁹ *Id.* at 246.

¹²⁰ *Id.*

¹²¹ See S. REP. NO. 98–497, at 1 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3607.

¹²² See *id.*

to victims.¹²³ At the time, scholars identified compensation victim funds as “a simple humanitarian response to a compelling human need.”¹²⁴

And yet police officer unions are currently, but so far unsuccessfully, arguing that police officers in police use of force cases are themselves the victims.¹²⁵ To that end, these officers and their union representatives are using legal mechanisms such as Marsy’s Law to affirmatively identify police as victims and to take advantage of the protections reserved for victims.¹²⁶ Most notably, police officers are asking for victim anonymity.¹²⁷

In a recent relevant Florida trial court decision, the court referred to the “unique public duty” of law enforcement officers that involves arresting people and grants some permission to use force.¹²⁸ This duty entails that the public has a vital right to evaluate police conduct, rather than allow on-duty officers and government representatives the ability to “act with virtual anonymity.”¹²⁹ The court held it “cannot interpret Marsy’s Law to shield police officers from public scrutiny of their official actions.”¹³⁰ In contrast, the Attorney General of North Dakota allowed a police officer to maintain his anonymity in a police shooting death under Marsy’s Law as a victim.¹³¹ Police officers are positioned and empowered to self-identify as victims in cases where they perpetrated violence and excessive force against civilians. And yet the civilians who die in police shootings and their families are harshly judged as to whether they are deserving of the status of victim and deserving of funds for funeral expenses.

¹²³ Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 69 (1985).

¹²⁴ DANIEL MCGILLIS & PATRICIA SMITH, NAT’L INST. OF JUST., COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS 5 (1983). “Opposing [crime victim compensation] is rather like attempting to put together forceful and compelling arguments against compassion, mercy, and decency.” *Id.* at 32.

¹²⁵ See Arielle Zionts, *Citing Marsy’s Law, State Won’t Release Name of Trooper Who Shot Man*, RAPID CITY J. (Oct. 19, 2018), https://rapidcityjournal.com/news/local/crime-and-courts/citing-marsy-s-law-state-won-t-release-name-of/article_910cf964-28f6-5328-bae7-554d67e1e999.html [<https://perma.cc/FPQ6-VNBM>].

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ Fla. Police Benevolent Ass’n v. City of Tallahassee, Fla., No. 2020 CA 1011 (Fla. 2d Cir. Ct. July 24, 2020), https://edca.1dca.org/DcaDocs/2020/2193/2020-2193_Notice_270195_Notice20of20Appeal20Filed.pdf [<https://perma.cc/9SB9-PETM>]. (“Finding that officers may avail themselves of ‘victim’ status under Marsy’s Law would create a situation in which officers could act with virtual anonymity . . . [and in which] law enforcement seeks to enforce its interpretation of a specific constitutional provision which has the practical effect of removing their actions from public scrutiny.”).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ April Baumgarten, *Marsy’s Law Often Invoked to Withhold Officers’ Names*, GRAND FORKS HERALD (July 22, 2018, 6:00 AM), <https://www.grandforksherald.com/news/crime-and-courts/4475423-marsys-law-often-invoked-withhold-officers-names> [<https://perma.cc/D6QW-BKG9>] (“Marsy’s law has become a noticeable reason for keeping the names of officers involved in shootings confidential until the investigation is complete.”).

D. Second Amendment Gun Rights and Police Perception of Danger

In a suburb of Phoenix in 2019, police shot and killed a fourteen-year-old boy who was running away from them carrying an Airsoft pellet gun.¹³² This is the same toy gun that twelve-year-old Tamir Rice had when he was shot and killed by police in Cleveland in 2015.¹³³ Similar to Tamir Rice, this boy was not guilty of any criminal offense, even though police argued they felt threatened and that their use of deadly force was justified.¹³⁴

Many victims of police violence are unarmed.¹³⁵ However, if a victim is armed, that is not a criminal act as long as the owner legally possesses the gun.¹³⁶ The Supreme Court in *D.C. v. Heller* established a personal right to bear arms, notably for purposes such as self-defense, under the Second Amendment.¹³⁷ Three in ten American adults legally own a gun, and 42 percent of Americans live in a household with a gun.¹³⁸ The number one reason gunowners possess and own guns is protection.¹³⁹

When a police officer sees a person with a gun, they may feel personally threatened and their responsive violence may meet the standard for non-accountability under law. However, that fear does not equate to the individual actually committing a crime, nor alone disqualify the victim from consideration for VCFs. At a minimum, the victim should qualify to apply, and then the board can evaluate on an individual case by case basis.

E. Innocent Until Proven Guilty

All suspects have the right to be tried by a jury before being convicted or sentenced. In police shootings, police officers substitute their own judgment,

¹³² Antonia Mejia & Astrid Galvan, *Tempe Police Show New Video of Fatally Shot 14-Year-Old Possessing Fake Gun*, 12 NEWS (Jan. 30, 2019, 10:55 PM), <https://www.12news.com/article/news/local/valley/tempe-police-show-new-video-of-fatally-shot-14-year-old-possessing-fake-gun/75-fd43c7dd-769b-4c42-bcf2-b2b56b7305b3> [<https://perma.cc/2XRB-KA9X>].

¹³³ Zola Ray, *This Is the Toy Gun That Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017, 2:56 PM), <https://www.newsweek.com/tamir-rice-police-brutality-toy-gun-720120> [<https://perma.cc/VJU7-Q32Q>].

¹³⁴ Mejia & Galvan, *supra* note 132.

¹³⁵ See *Police Violence Map*, *supra* note 9; Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Pattern*, NPR: MORNING EDITION (Jan. 25, 2021, 5:00 AM), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns> [<https://perma.cc/X2DY-EN9F>].

¹³⁶ See, e.g., U.S. CONST. amend. II; German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017, 4:15 PM), <https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video> [<https://perma.cc/NJV9-52M2>].

¹³⁷ *District of Columbia v. Heller*, 554 U.S. 570, 618 (2008).

¹³⁸ John Gramlich & Katherine Schaeffer, *7 Facts About Guns in the U.S.*, FACTTANK (Oct. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states/> [<https://perma.cc/9ZUN-V86C>].

¹³⁹ *Id.*

which can be flawed by racial bias, and impose a sentence on a civilian who is still legally innocent and protected by our Constitutional right to due process.¹⁴⁰ The lack of contextual details, and the perspective only of the shooting officer, frequently leads to internal absolution within the police department, and rarely results in a criminal charge against the officer by the local prosecutor.¹⁴¹

However, that lack of detail and consequent lack of criminal charge against the officer should not disqualify the victim and their family from compensation when the state took that person's life. Internal review is inherently centered on whether the police conduct was justified and justifiable after the fact.¹⁴² That review focuses on the subjective experience of the police officer, and their statements almost always highlight a narrative that the shooting was lawful.¹⁴³ Again, the evidence is frequently limited to the police officer's testimony of the incident, which generally supports a finding that the police officer is not culpable.¹⁴⁴

While this Essay will not fully engage with the extensive literature on qualified immunity, victims of police shootings frequently fail to prevail in civil rights actions for compensation.¹⁴⁵ Even if their constitutional rights are violated, qualified immunity protects officers and police departments from liability.¹⁴⁶ If an instance of violence does not have a prior case that "squarely" gov-

¹⁴⁰ See Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 302–03 (2018) ("Police violence disproportionately wielded against black Americans has been linked in part to the ways officers are trained, methods of identifying and engaging suspects, and uneven enforcement and punishment.").

¹⁴¹ JAMES K. STEWART ET AL., COLLABORATIVE REFORM MODEL: A REVIEW OF OFFICER-INVOLVED SHOOTINGS IN THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT 13, 16, 19, 21–22, 26 (2013).

¹⁴² PETER FINN, CITIZEN REVIEW OF POLICE: APPROACHES AND IMPLEMENTATION 5, 47–48 (2001).

¹⁴³ See, e.g., Transcript of Officer Jeronimo Yanez at 12–14, *Minnesota v. Yanez*, No. 62-CR-16-8110, 2017 WL 2624798 (Minn. Dist. Ct. June 16, 2017).

¹⁴⁴ See *id.*; see, e.g., *Minnesota v. Yanez*, No. 62-CR-16-8110, 2017 WL 2624798 (Minn. Dist. Ct. June 16, 2017).

¹⁴⁵ Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1777 (2016) (arguing that the Supreme Court has curtailed the right to be free from excessive force, because its application of qualified immunity renders it "exceedingly difficult for victims of police brutality to overcome defendants' motions to dismiss or motions for summary judgment").

¹⁴⁶ Katherine Macfarlane, *Foreseeable Police Shootings*, 119 COLUM. L. REV. F. 283, 283–84 n.8 (2019) (citing the following Supreme Court cases: "*Kisela v. Hughes*, 138 S. Ct. 1148, 1150, 1154–55 (2018) (holding that an officer who shot a woman holding a kitchen knife was entitled to qualified immunity); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769, 1778 (2015) (holding that officers who shot a woman who suffered from schizoaffective disorder in her residence, a group home for individuals suffering from mental illness, were entitled to qualified immunity); *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014) (holding that officers who 'shot the driver of a fleeing vehicle to put an end to a dangerous car chase' were entitled to qualified immunity); *Brosseau v. Haugen*, 543 U.S. 194, 194–95, 198–99, 201 (2004) (holding that an officer who shot a fleeing suspect in the back may be entitled to qualified immunity because the officer's actions fell in the 'hazy border between

erns whether the officer's particular behavior in that specific incident was lawful, then the victim will not be compensated through a civil rights action.¹⁴⁷

The determination that the police officer is not culpable is separate from whether the deceased was committing a criminal act.¹⁴⁸ A police perception of danger is a lower threshold than affirmatively proving that the decedent committed a criminal act. Police records may label victims as dangerous, absolving a police officer for killing a person. However, that label alone, without evidence of crime, should not prevent victims from applying for VCFs.

V. OFFENDER FINES AND FEES FUND PAYMENT TO VICTIMS OF POLICE VIOLENCE

Cities currently pay settlements on disputes over police use of force, costs borne by taxpayers.¹⁴⁹ In 2014, the cities with the ten largest police departments paid \$248.7 million for settlements and court judgments.¹⁵⁰ Over five years, these cities had paid over a billion dollars in settling these cases.¹⁵¹

In contrast to civil lawsuits against police, victim compensation programs are funded by offender fines and fees, and by the federal Victims Of Crime Act, not taxpayers.¹⁵² The state collects fines ostensibly to finance security for civilians. Fines for compensation for victims of crime can be collected under a rights theory, that "governments have an obligation to protect the rights, property and physical welfare of its citizens" and compensate victims whose rights have not been protected.¹⁵³ The woman credited with proposing the first modern state-based victim compensation program, Margery Fry of Great Britain,

excessive and acceptable force' (internal quotation marks omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)))").

¹⁴⁷ *Id.* at 284.

¹⁴⁸ DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 9–11 (2015).

¹⁴⁹ See Steven Greenhut, *Strict Tort Liability for Police Misconduct*, R STREET (Nov. 13, 2019), <https://www.rstreet.org/2019/11/13/strict-tort-liability-for-police-misconduct/> [https://perma.cc/92AS-Z5WP] ("Although taxpayers assume the costs of these payouts, there is no indication that contemporary policing reforms are primarily motivated by taxpayer interest in limiting municipal spending.").

¹⁵⁰ See Feldman, *supra* note 41, at 113; see Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015, 10:30 PM), <https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> [https://perma.cc/GYL8-57DJ].

¹⁵¹ See Feldman, *supra* note 41, at 113.

¹⁵² See 34 U.S.C. §§ 20101(a)–(b)(1), 20102(a)(1) (West, Westlaw through Pub. L. 116–259); see also *State Links*, NAT'L ASS'N CRIME VICTIMS COMP. BDS., <http://nacvcb.org/index.asp?bid=8> [https://perma.cc/R6GM-2BBS].

¹⁵³ See Smith, *supra* note 123, at 61 n.53 (quoting VIOLENT CRIMES COMPENSATION BOARD, STATE OF NEW JERSEY ANNUAL REPORT (1982/1983) (introducing New Jersey Criminal Injuries Compensation Act)).

relied on a rights rationale when advocating for publicly financed victim compensation programs.¹⁵⁴

Yet many over-policed communities continue to experience a lack of safety and security, while simultaneously over-compensating to victims' funds due to higher rates of conviction and incarceration in over-policed communities.¹⁵⁵ The anomaly is that the civilians most likely to pay these fines and fees are also most likely to suffer police violence—without compensation.¹⁵⁶ That anomaly undermines the intended structure of fines and fees, which itself has been damningly criticized by other scholars.¹⁵⁷ In sum, if fines and fees continue to be collected of all convicted individuals in order to fund the VCF, and these individuals are more likely to live in communities that suffer police violence, at least they can be compensated for paying for the program and suffering the physical and life-threatening harms of police brutality. Then, at a minimum, the populations being surveilled and subjected to police violence can see the fines and fees of their convicted community members going to the victims of police violence in their neighborhoods.

It could be argued that compensation is provided under a welfare theory, to serve victims of violence who cannot afford care for their injuries. If the victim has insurance to cover the costs, insurance pays before the compensation fund. Indeed, some states require the victim to prove financial distress in order to receive compensation.¹⁵⁸ Again, if such is the case, victims of police violence and police shootings are more likely to be financially impoverished and unable to pay these basic costs to recover from physical and psychological harm. On any of these reasonings, VCFs should be accessible to victims of police violence.

CONCLUSION

In conclusion, victims of police violence should no longer be barred from consideration for VCFs. The requirements of police cooperation, and “innocence” of wrongdoing should be eliminated, allowing the state boards that distribute funds to determine applicability on a case by case basis. These funds could then help community members, and overpoliced communities, recover from police violence.

¹⁵⁴ See *id.*, at 62.

¹⁵⁵ See Lauren H. Hancock, Note, *Another Collateral Consequence: Kicking the Victim When She's Down*, 77 WASH. & LEE L. REV. 1319, 1345–47 (2021).

¹⁵⁶ See *id.* at 1333–35, 1362, 1364–65.

¹⁵⁷ See, e.g., Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779 (2015); Beth A. Colgan, *The Excessive Fines Clause: Challenging Modern Debtors' Prison*, 65 UCLA L. REV. 2, 6–8, 23, 17–18, 22–23 (2018).

¹⁵⁸ See, e.g., the Kansas Board that awards reparations only if the victim suffers financial distress. KAN. STAT. ANN. § 74–7305(d)(1)–(5) (West, Westlaw through 2020 Reg. Sess.).

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