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INTRODUCTION: PERCEPTIONS AND REALITIES

In these introductory comments, I present observations and
realities of the American political, racial, and social foundation as it
relates to police–community experiences, as well as the need for all
Americans, regardless of race, culture, and socioracial and
socioeconomic background, to know and understand each other better.
Notwithstanding our diversity, as a united people we have to speak
and think as the one, independent nation that the Founding Fathers
imagined. This must occur despite the truths and realities that have
resulted from their imperfect union, which was tainted by racial
discrimination and slavery.

As a Latino civil rights advocate and scholar, I never imagined
citing Glenn Beck in support of truth and reconciliation with regard to
volatile racial concerns facing our nation. Beck, whose notoriety
developed as a controversial right-wing commentator, recently
confessed that the United States is a divided nation, or as he stated,
“vastly two different countries.” As Beck conceded, his comments about a divided nation arose from the increase in gun violence. His observations about a national divide similarly apply to the immunity that juries and the justice system appear to grant police when they resort excessively to their firearms in shootings of unarmed persons. Shortly thereafter, former Secretary of State Condoleezza Rice also mentioned “a country divided”; except she expressly referred to the “ever widening gap between rich and poor” that causes the American Dream to appear far out of reach for many.

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2. See id.

3. In this Article, as in my book publication, LUPE S. SALINAS, U.S. LATINOS AND CRIMINAL INJUSTICE 26 (2015), I include within the United States Latino population American citizens, both native born or naturalized, permanent resident aliens, and undocumented persons within the nation’s jurisdiction; see also United States v. Otherson, 637 F.2d 1276, 1281 (9th Cir. 1980) (the term “inhabitant” in 18 U.S.C. § 242 includes aliens even though they are not authorized to be in the United States since the legislative history broadly protected “all persons within the jurisdiction of the United States.”).

A third subject simultaneously enters the national debate, and this topic focuses on the need to develop measures that will improve the accountability of police officers with regard to the wanton use of excessive force against unarmed persons. In March 2018, the Michigan State Law Review hosted a symposium entitled “Is It Time for Truth & Reconciliation in Post-Ferguson/Post-Charlottesville America?” The conference panelists addressed police–community relations issues in the minority communities primarily and disproportionately affected: African Americans, Latino Americans, and Native Americans. These three truth and reconciliation topics could keep the United States occupied for decades, but hopefully we can find a common thread by which our national leaders can guide our nation toward developing a solution.

Insofar as the issues related to injustice are concerned, I urge the inclusion of all recognizable ethnic and racial groups in the discussion related to truth and reconciliation. In that regard, the Michigan State Law Review conference organizers admirably presented panels and speakers that included our nation’s diversity. As a scholar in the field of Mexican–American and other Latino civil rights issues, my goal is to address the efforts in police and community relations from the Latino perspective. The history and personal characteristics within the Latino population dictates this approach.

African Americans, Mexican Americans and other Latinos, Native Americans, Asian Americans, and other ethnic minorities bring uniquely distinct backgrounds to the table, but one common denominator involves the social and, at times, de jure victimization by the majority Caucasian population at one time or another in our history in America. This Article is not written with the intent to stir up a racial diatribe. Instead, I urge open discussion as a means for all Americans to better understand each other. In this fashion, we Americans can really attain the status of the nation that has been respected around the world for all the wonderful characteristics of freedom, moral


6. The common thread where we can begin appears to be the racial divide in the United States.

7. See id.
principles, and qualities such as liberty, decency, integrity, conscience.

The desire to attain truth and reconciliation has lingered for decades. This desired goal has festered, and eventually, like a volcano, could erupt with the mounting pressure. The Black Lives Matter efforts, the volatile gun control issues, and the unauthorized entries of Central Americans and others to seek asylum agitate this nation’s political conservatives. Without a doubt, those who seek a fair and equitable solution to the uncontrolled use of deadly force in police–civilian encounters will confront resistance. The public at large instinctively supports police. In regard to all these issues, the courts, the prosecuting authorities, and legislators take a conservative approach, especially if these officials face an election.

Prosecutors regularly hear and observe distortions of the truth in regard to lives that are lost unnecessarily in confrontations between law enforcement officers and persons from all backgrounds, particularly as they relate to victims of color. As a former criminal civil rights prosecutor with the Department of Justice (DOJ), I realize that white officers also make deceptive claims in killings of Caucasian individuals with the hope that a grand jury will conclude that it was a so-called “righteous” or justifiable shooting.

My thesis conveys the message that United States Latinos are members of the “persons of color” category. Many of my light-complexioned Latino paisanos may not agree with me on this, but if they wanted to consider themselves publicly as white or especially “Caucasian,” they would have to contend with society’s perception of a Latino’s social status. The white status recognition that emerged in

10. Among several federal jurists that I had the honor of appearing before during my service as a federal criminal civil rights prosecutor, James De Anda and Filemon Vela had many things in common: Both intellectually sharp, unable to join an established Anglo-owned law firm after being licensed, and both Caucasian-appearing Mexican Americans with light-colored eyes. Vela uniquely had the distinction of twice being the victim of Border Patrol racial profiling during his travels
a late nineteenth century naturalization case provided a foundation for the contention that Mexican Latinos were members of the white race. But that is as far as the idea of white privilege for Mexican Latinos progressed for more than half a century.

This Article, to a significant extent, centers on issues that include America’s racial divide and police misconduct combined with the lack of accountability. It is a delicate issue that has to be addressed honestly. Admittedly, referring to lawless cops raises concerns that I lack respect for the difficult and dangerous work in which police officers engage. On the contrary, I am quite respectful of those officers who, on behalf of the public, face dangerous circumstances on a daily basis.

As a former elected state criminal court judge, I faced criticism from police organizations for my previous work as a civil rights prosecutor. My success in uncovering a conspiracy by Houston police officers led to their convictions for perjury and conspiracy to obstruct justice, an appointment as Special Assistant to the United States Attorney General in Washington D.C., and a movie production detailing my successful discovery of a planted firearm used to justify a police shooting. Objectively, any lawyer would and should be proud of these results. However, when I listed the Webster throwdown conspiracy to obstruct justice victory in my biographical details, the Houston police union’s political action committee complained about the reference to the misconduct case by lawless cops and endorsed my opponent. I lost my reelection, but I know I did the right thing.


12. See THE KILLING OF RANDY WEBSTER (CBS 1981) (portraying the story of a young man who is shot and killed during an arrest by Houston police. His father did not believe the police version of the incident and started digging around on his own).

13. In all modesty, only a few lawyers have had a movie made about their professional efforts. At least four Texas lawyers, primarily from Houston, have that distinguished note added to their resume. They include Houston attorneys Richard “Racehorse” Haynes, Dick DeGuerin, and Charles Foster.

14. On a different note, besides prosecuting lawless cops, I also did the right thing when I defended two young cops who were charged with violating the civil rights of a gentleman who called the police for help from an estranged and threatening son-in-law. See generally Walsweer v. Harris County, 796 S.W.2d 269 (Tex. App.
I know I did the right thing because I took an oath to uphold the law and the Constitution. Thus, when I investigated the Randy Webster shooting and discovered evidence of civil rights violations, perjury, and conspiracy to obstruct justice, what was I to do? The officers were convicted, and the federal judge granted them probation. They enjoyed their rights to due process of law while Webster did not. He was punished at the scene of his arrest, and other officers, along with the shooter, agreed to plant a throwdown.

After Webster exited the van, Dolan, another officer on the scene, never saw a gun in either of Webster’s raised hands when he submitted to the arrest. Dolan provided highly incriminating information against the shooter, Officer Mays. Keep in mind that in a police department, subordinate patrol officers work their way up to the ranks of Detective, Sergeant, Lieutenant, and then Captain. Dolan had

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15. See Killing of Randy Webster, supra note 12.
17. See id. at 644.
18. As used in this Article, the word “throwdown” is used to mean a fabrication of evidence to bolster the fraudulent justification of self-defense; it is a weapon that police officers, having killed or wounded an unarmed suspect, can put at his side to justify the shooting. This explains why the cops were convicted of an 18 USC § 371 conspiracy to defraud the United States in its investigative functions (by using a throwdown gun as a self-defense tactic). I handled the Randy Webster civil rights, perjury, and conspiracy to obstruct justice prosecution. The officers were convicted only of perjury and conspiracy to obstruct justice and placed on probation. See generally id. I use this signal (see generally) because the presiding federal judge criticized the prosecution and the witnesses severely. The judge criticized the immunized police witness and Dolan, the civilian cab driver witness who testified and also provided evidence of his three written statements. All three were prepared on the day of the shooting. In the statements, he provided his impression that the bullet would have entered the left side of the head and would have exited (assuming the bullet did not explode or fragment upon hitting the bone, as occurred) through the right temple. That is exactly what the Medical Examiner stated two years later in trial, fully corroborating Dolan, the lay witness! Webster v. City of Houston, 689 F.2d 1220, 1221 (5th Cir. 1982), vacated and remanded, 735 F.2d 838 (5th Cir. 1984) (en banc). Randy Webster, after being shot by a police officer, lay on a city street, dying, while Houston police officers debated whether to cover up their misdeeds by placing a throwdown gun at the victim’s side. Officers saw that Randy’s body lying by the van did not have a gun. Additionally, several Houston officers who had no involvement in the shooting engaged in discussions about the use of a throwdown. See id. at 1222.
to encounter Sgt. Dillon and Lt. Eikenhorst, two men quite familiar with the custom known as the Code of Silence.\textsuperscript{20} Fortunately, in all three statements he provided, Dolan remained firmly consistent.\textsuperscript{21} Notwithstanding the corroboration of Dolan’s testimony by both the physical evidence and the medical examiner, the federal judge issued a sentencing memorandum in which he criticized Dolan’s credibility.\textsuperscript{22} With all due respect, instead of federal judges who degrade witnesses to a horrible crime, we need more courageous people like Dolan to put their fears aside and step forward.

My thesis focuses on a small percentage of police public servants who disregard their oath to protect the public and then join the rank and file of lawless cops. Once an officer reaches a point where he or she begins to hate the job or constantly criticizes the justice system that lets “criminals” go free,\textsuperscript{23} then it is time to seek counseling or to move on to another career. Otherwise, that frustrated, disgruntled person could become a lawless cop.

I admire those cops who serve the public; they are servants who deserve our full support. It was an honor to serve with many great cops as a state and federal prosecutor, especially those who courageously testified honestly, even if it meant their chief of police or their supervisor would probably be found guilty of a criminal violation.\textsuperscript{24} I particularly admire a sergeant I called at his home when I was a felony state prosecutor. When I expressed to him my difficulty in understanding his basis of finding probable cause to conduct a search, he honestly shared with me that he had acted on a mere hunch because he knew the accused from a prior heroin arrest, and he assumed the

\textsuperscript{20} See Blue Wall of Silence, WORDNET DICTIONARY, https://www.webster-dictionary.org/definition/blue%20wall%20of%20silence [https://perma.cc/Z7KN-6ZNJ]. The Code of Silence, known more specifically among police organizations as the “blue wall of silence,” connotes “the secrecy of police officers who lie or look the other way to protect other police officers.” \textit{Id}.

\textsuperscript{21} On the same early morning of the shooting, ranking officers subjected Dolan to intense and extensive questioning. Even though Dolan could not be privy to the autopsy results (they would not be available for several weeks), his description of where the officer’s gun was pointed, and the likely exit wound exactly matched the medical examiner’s report.

\textsuperscript{22} \textit{Mays}, 470 F. Supp. at 644 (“Dolan was probably not in the position he claims to have occupied and his testimony is to a degree suspect.”).


\textsuperscript{24} See generally United States v. Morales, 675 F.2d 772 (5th Cir. 1982) (convicting a Chief of Police who beat a handcuffed prisoner of perjury based on testimony).
man, having returned to the “free world,” also returned to his addictive habits.  

Other exemplary cops from my days in 1975 as a felony state prosecutor include Houston Officer Jim Kilty, a dedicated Narcotics Division police officer, and his partner J.J. Reyes. Kilty approached me in court one day to seek the dismissal of drug charges after he discovered exculpatory evidence. That conduct is exemplary of the oath to uphold justice. Shortly thereafter, during a drug bust, Officer J.J. Reyes was shot through the neck. Miraculously, the bullet did not cause much damage and Reyes was admirably back on the job the following week. Unfortunately, for law enforcement and for me as an admirer of an outstanding police officer, Officer Kilty was killed by a drug dealer during a subsequent raid. When the Houston police department began a recruitment campaign, billboards and bumper stickers displayed an image of Kilty’s badge number 1856. For me, this served as a constant reminder of a great officer who exemplified the slogan “The Badge Means You Care.”

I enjoy having a reputation as a person who seeks equality, or at least equity, where parity is politically incorrect. I admit that I am not shy about criticizing “my President,” whether or not it is the person for whom I voted. As a former jurist, I ran as a Democrat in the Texas

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25. This particular heroin charge was a third time charge that, in the applicable Texas law, mandated a life sentence. As a junior prosecutor, I felt obligated to write a lengthy essay to support my nolle prosequi to make sure I kept my job!


27. See Mitchel P. Roth & Tom Kennedy, Houston Blue: The Story of the Houston Police Department 257 (2012).

28. See id. Besides Kilty and Reyes, I had other cop heroes. After I joined the U.S. Attorney’s Office as a federal prosecutor in 1977, I obtained an indictment against lawless Houston (HPD) cops who engaged in a cover-up conspiracy of a fatal shooting. I naively continued my visits to the HPD basketball gym with officers and prosecutors as if nothing had changed in my life. During the games, my new cop hero noticed I was getting fouled frequently by one officer. Fortunately, Officer M. Hanna confronted the less friendly and larger cop and told him to quit fouling me on purpose. It worked, but eventually my work duties increased, and I wisely “retired” from the HPD basketball league.

29. To clarify, I am a loyal American citizen who believes we should all respect the Office of the President. This still allows for respectful criticism of the person in the office. I did not vote for Ronald Reagan, but as “our President,” he deserved protection from violence. I voted for Barack Obama, “our President,” but he
partisan elections not only due to gratitude for my governor but also because of my social values and beliefs. This does not restrict me in my praise for Republican presidents who display the courage to do the right thing for the nation, such as Dwight D. Eisenhower, who established the United States Commission on Civil Rights, and George H. W. Bush, the epitome of honesty and character.

The current executive branch of government, under the leadership of President Donald J. Trump, controls the policy decisions involving the rights of people and has made a number of decisions based on traditionally suspect classifications. In addition, disparate racial statistics permeate the nation’s indicators of not only success but also failure. Whites have the highest annual income average, exceeding that of Latinos and African Americans—the two largest minority groups in the nation. On the other hand, Latinos and African

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30. The late Gov. Mark W. White, a Democrat, appointed me to the bench in 1983. My attitudes regarding politics actually began to take shape during the Eisenhower Administration when I sold newspapers in 1958 on the streets of Galveston, Texas as a ten-year-old. My attitudes were affected by reading constantly about Ike playing golf while our economy suffered and later learning about the Kennedy charm, his civil rights advocacy, and then his appointment of a Mexican–American federal judge in Texas.

31. These include the racialization of immigration policy and enforcement, which include the description of Mexican immigrants as rapists and criminals and the efforts to eliminate or dismantle the Community Relations section of the DOJ, a program dedicated for half a century to resolving racial disputes in minority communities. See Ryan J. Reilly, Trump Budget Eliminates DOJ ‘Peacemaker’ Office Founded by Civil Rights Act, HUFFINGTON POST (Feb. 14, 2018), https://www.huffingtonpost.com/entry/community-relations-service-doj-trump-us_5a81f1ace4b061625973aebf [https://perma.cc/UR2A-4JYG]; Her’s Donald Trump’s Presidential Announcement Speech, TIME (June 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/CT3S-BK3N].

32. See NAZGOL GHANDNOOSH, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM 3-7 (2015).

Americans suffer higher unemployment and incarceration rates than persons of the Caucasian race.  

Another significant area in which America’s racial divide exists involves police–civilian fatal confrontations. Governor Huckabee of Arkansas asserted that police kill more whites than other groups. To some extent he is right, but the reality is that a greater proportional percentage of blacks and other minorities are killed in police–civilian confrontations.  

According to a Washington Post study, the United States has nearly 160 million more white people than black people, comprising roughly 62% of the United States population, but only 49% of those killed by police. On the other hand, African Americans, who account for 24% of police fatalities, represent only 13% of the United States population. As The Post noted, that means black Americans are 2.5 times more likely than white Americans to be shot and killed by police officers.  

What worries Latino and African–American communities is the appearance that officers “shoot first and ask questions later,” meaning that many react more apprehensively when dealing with a black or Latino person. Although the Black Lives Matter movement recently
gained both renewed popularity and notoriety, the historical fact is that African Americans, Native Americans, and Latinos, primarily those of Mexican descent, have suffered disproportionate violence at the hands of law enforcement since time immemorial.\textsuperscript{42}

The reflexive reaction to the Black Lives Matter activities that arose after the 2014 killing of unarmed Michael Brown in Ferguson, Missouri included outwardly mocking claims that White Lives Matter and Police Lives Matter!\textsuperscript{43} Objectively speaking, ALL Lives Matter! No one should die for merely being Black, White, Brown, Red, Yellow, Multicolored, or Blue!\textsuperscript{44} Yet, we should take a look at the factual realities of the use of force across the ethnic and racial spectrum.


\textsuperscript{43} See \textsc{Ophélie Eguienta}, \textsc{Twenty-First Century Police Brutality Against African Americans: The Case of Ferguson, Missouri, and the “Black Lives Matter” Movement} 78 (2017), http://dante.univ-tlse2.fr/4122/1/Eguienta__Oph%C3%A9lieM22017.pdf [https://perma.cc/5V2K-EC4M].

Based on my forty years of working in areas that address police–community relations, I felt concerns that the absence of accountability could lead to retaliation against innocent persons.\textsuperscript{45} This uneasiness became reality when five Dallas police officers died during a retaliatory “payback,” as the Dallas police chief described the massacre.\textsuperscript{46} A heavily armed sniper, an African–American war veteran, “specifically set out to kill as many white officers as he could.”\textsuperscript{47}

In a democracy, as we enjoy in the United States, we at times learn the “truth” regarding our respective attitudes. Our experiences shape these views, both good and bad. We learn that people of all ethnic backgrounds cannot completely overcome their affinity to their cultural, political, and psychological past. All distinct races, nationalities, and religious groups that comprise the United States—and that includes whites—eventually have to engage in educational sessions to familiarize themselves with their neighbors.

As a nation, we continue to resist the recognition of our constitutionally based institutional racism. While these foundations and practices have been deleted by constitutional amendments, the passage of time has not led to a complete and genuine healing or reconciliation. People who adhere to the Biblical message of doing unto others as you would have them do unto you summarize this maxim by just deciding to “Do the right thing!”

However, when attitudes and social indicators continue to divide us along racial and socioeconomic lines, a more coordinated effort

\textsuperscript{45} See Olivia P. Tallet, \textit{A Saturday Walk Commemorates Historic Case of Police Brutality}, HOUS. CHRON. (May 6, 2018, 4:43 PM), https://www.chron.com/news/houston-texas/houston/article/A-walk-today-will-commemorate-a-historic-case-of-12889008.php [https://perma.cc/LKU9-R5FB] (stating that police brutality creates a cycle of violence in which officers who disregard the law, escape discipline, or otherwise evade being held accountable generate an anger that develops into violence against law enforcement, adding that society needs “chiefs of police department[s], district attorneys and other public officials that will not tolerate lawless police officers”).


\textsuperscript{47} See Fernandez, \textit{supra} note 46.
towards reconciliation is required. During World War II, minorities, primarily blacks and Latinos, believed that joining the military would show Caucasians that nonwhites earned their “stripes,” thus entitling nonwhites to respect and genuine equal opportunity. Much to their chagrin, they found the white leadership at the local level had not changed at all.48

Realistically, vestiges of historical, unconstitutional practices cannot be fully eliminated until all Americans come to the table and speak honestly about the truth and seek a reconciliation that leads to mutual respect among all Americans—persons who comprise diverse racial and ethnic groups, skin colors, cultures, religions, and political thoughts. It is time that we become that “One Nation” we praise in our Pledge of Allegiance.

“To escape from any dire situation requires that you accept two truths: the truth of how you got there and the truth of how you can get out.”49 The United States continually suffers through a democratic crisis in which legislators base their governmental decisions on the selfish political grounds of staying in office. Regardless of the group in power, neither Republicans nor Democrats want to lose. As a result, many tough decisions were made in Congress, such as neglecting a vote on acceptance of a residency policy for the Deferred Action for Childhood Arrivals (DACA) children of migrants—referred to popularly as Dreamers—while the two major parties jockey for political gain. No one wins outright, but the public suffers.

In Part I, I present the perceptions and the truths of the American political, racial, and social foundation as it relates to police–community experiences and the need for all Americans, regardless of race, culture, and socioeconomic background, to know and understand each other better, in all respects. In Part II, I provide an overview of

48. Returning World War II Mexican–American and other Latino veterans discovered that they had not earned respect from the racist community. See Clifton v. Puente, 218 S.W.2d 272, 272 (Tex. Civ. App. 1948) (detailing how court refusal to authorize sale of property to Mexican American violates equal protection); Patrick J. Carroll, Felix Longoria’s Wake 54-56 (2003) (stating that the leadership in Three Rivers, Texas refused to bury Felix Z. Longoria, a soldier who died in World War II, in the all-white city cemetery); Alonso S. Perales, Are We Good Neighbors? 156-57 (1974) (discussing how Texas Army hero Macario Garcia was refused service one month after President Truman granted him the Medal of Honor because the restaurant did not serve Mexicans).

the United States Latino socioracial experience and how it relates to social relations in general and police–community relations in particular. Part III looks at the ugly history of lawless cops and Latino victimization at both the federal and state levels. Part IV then reviews the unfortunate revictimization by the very system that is supposed to provide protections from abuse. Part V generally addresses the lack of accountability within the criminal justice system as it relates to minority rights in general and Latino rights in particular. I mention a few thoughts as to recommendations for a more accountable system of justice. A more thorough evaluation will have to be left for those experts that have the ability to reach the political policymakers and leaders in the law enforcement community. Part VI concludes with a “good ole peptalk,” one that seeks to encourage our uniquely diverse nation to commit to a more positive trust in one another. Our continued wellbeing as a strong nation calls for a coming together so that we can identify, locate, and remove pre-1860s American political thought in the Smithsonian Institution’s National Museum of American History.

I. The United States Latino Socioracial Experience

All Americans, of every ethnic background, must appreciate our nation’s social, political, and racial foundation from its inception to its current development. Latinos did not play a direct role at the time of arrival of Europeans at Plymouth Rock, but they did exist in other parts of what later became the United States as we know it today. The United States Latino population grew gradually, and, based on American foreign policy, it grew predictably. This is a fact that many non-Latinos today consider a threat or a justification for treating this population adversely. An overview of the following historical summary will hopefully explain the Latino–American existence and experience.

A. Mexico’s Revolution from Spain and the Texas Republic, 1820–1848

The Indian populations of present-day Mexico have histories that go back for many centuries. The Mayan and Aztec Indian

50. See Salinas, supra note 3, at 7-11. While the United States began as an English-speaking nation, as a result of American domestic and foreign policy, the United States today ranks as the world’s second largest Spanish-speaking population behind Mexico. See id. at 11.
51. See id.
civilizations existed well before the Spanish explorer Hernan Cortes arrived in 1519 and completed the conquest of Mexico in 1521. Spain then controlled the territory for 300 years until the Mexican natives revolted and gained independence in 1821 after a eleven-year effort. Spain then controlled the territory for 300 years until the Mexican natives revolted and gained independence in 1821 after a eleven-year effort. The newly established Mexican government wanted more people to reside in the northern part of the Empire as a safeguard against enemy attacks. This led to an immigration arrangement that encouraged Caucasians to migrate to what is today Texas. Eventually, the immigration plan backfired as cultural conflicts arose from the differences regarding race, language, and religion, as well as the Anglo migrants’ disregard for Mexico’s rules against slavery.

The conflicts prompted the majority Anglo population to demand independence from Mexico, and several leading Mexican officials in Texas joined in signing the Declaration of Independence from Mexico. After Mexicans won several battles, including the famous Battle of the Alamo in April 1836, the Anglo-led forces, inspired by the battle cry “Remember the Alamo,” defeated the Mexican troops at the Battle of San Jacinto, near what is today


54. This also led to eventual concession by the Mexican leadership. See SAMUEL HARMAN LOWRIE, CULTURE CONFLICT IN TEXAS 1821-1835 120-24 (1932) (discussing conflicts involved differences related to race, religion, language, and slavery); see also De León, supra note 53. Since the Mexican official for Texas-Coahuila viewed the provision addressing slavery as too ambiguous, he concluded that “[w]hat is not prohibited is to be understood as permitted.” In 1829 Mexican President Vicente Guerrero issued a decree barring slavery, but protests by leaders in Texas and Coahuila prompted Guerrero to exclude Texas from this decree. Id.

Houston, Texas.\textsuperscript{56} For the next nine years, Texas existed as an independent republic.

Simultaneously, the United States government, particularly under President James K. Polk, began to focus on the concept of “Manifest Destiny,” the idea that God ordained the United States to control the land from ocean to ocean.\textsuperscript{57} Not all American politicians supported this westward movement. Abraham Lincoln, then a member of Congress, objected vehemently to war in 1846, first demanding proof that American blood had been shed on American soil.\textsuperscript{58} John C. Calhoun, in the Senate, objected as well, except that his opposition centered primarily on the inclusion of racially inferior Mexicans.\textsuperscript{59} Calhoun observed that Spanish America began to fail as a power when it decided to treat “colored” people as equal to the white race, describing Mexicans as a “mongrel race” of people.\textsuperscript{60} A century later, similar views sadly persisted in the Southwest.

The border issue between the United States and Mexico triggered what became known as the United States–Mexico War, which lasted from 1846 to 1848.\textsuperscript{61} The superior American forces easily defeated the weak Mexican Army.\textsuperscript{62} Pursuant to the 1848 Treaty of Guadalupe Hidalgo, the Mexican government surrendered 500,000 square miles of the former Mexican empire,\textsuperscript{63} land that today comprises the southwestern part of the United States.\textsuperscript{64} An additional treaty provision, that those approximately 75,000 Mexicans who lived

\begin{footnotes}
\item[59.] See Foreigners in Their Native Land: Historical Roots of the Mexican Americans 137 (David J. Weber ed., 1973).
\item[60.] See id. The highly respected Calhoun stated, “Ours, sir, is the Government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing these colored races on an equality with the white race.” Id. at 135.
\item[62.] See id.
\item[64.] See U.S. Mexican War 1846-1848, supra note 61.
\end{footnotes}
in the conquered territory could remain and become citizens, opened the door to the gradual “Mexicanization” of the United States.65

B. The Mexicanization of the United States, 1848–1941

Spanish Mexicans, officially the first official Latino population of the United States, actually lived in what is now the western and the southwestern United States decades before the first arrivals of non-Hispanic Europeans at Plymouth Rock in 1620.66 Notwithstanding, the eventual white governing majority in the southwest treated Mexicans as newcomers, subjected them to discriminatory abuses that included the “[g]reaser[]” label,67 and paved the road to an overt racially dominated existence during their first century in the United States.68

Once Mexicans became residents and citizens of the United States via the 1848 Treaty of Guadalupe Hidalgo,69 Anglo–American values and attitudes clashed with the new residents. The adoption of the predominantly mestizo and swarthy-complexioned Mexicans as American citizens created tensions. Regardless of the conquered population’s newly acquired citizenship, Anglos viewed them as just “Mexicans,” an overt view that endured for over 100 years.70 After the protective civil rights rulings of the Warren Court, the blatant racism

65. See Treaty of Guadalupe Hidalgo of Peace, Friendship, Limits and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922. In contrast, we will see the rapid Latinization of the United States after World War II.

66. See FOREIGNERS IN THEIR NATIVE LAND, supra note 59, at 14. (noting Spaniards in 1610 settled the Santa Fe, New Mexico area as well as St. Augustine, Florida area in 1565).

67. See STEVEN W. BENDER ET AL., EVERYDAY LAW FOR LATINO/AS 3 (2008) (detailing how the California Anti-Vagrancy Act of 1855, also known as the Greaser Act, described “Greasers” as the “issue of Spanish or Indian blood.”); LEONARD PITT, THE DECLINE OF THE CALIFORNOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890 53 (1966) (stating that regardless of when the Latino arrived in the territory or where he came from—whether Chile, Peru, or Mexico—all “the Spanish-speaking [Latinos] were lumped together as ‘interlopers’ and ‘greasers.’”)

68. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (stating that representation “shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).


70. See PERALES, supra note 48, at 156-57 (describing how just one month after President Harry S. Truman awarded Sgt. Macario Garcia the Congressional Medal of Honor for his bravery in Germany, a racist in Richmond, Texas told Garcia, wearing his military uniform, that the café did not serve “Mexicans”).
entered the covert stage when official excuses creatively justified Mexican–American school segregation and jury exclusions.\textsuperscript{71}

The 1848 Treaty’s grant of citizenship to the conquered resident Mexicans implicitly indicated they were deemed to be “white,” but their discriminatory treatment by society did not comport with that view.\textsuperscript{72} In 1897, a federal judge concluded that the Treaty, in conflict with the controlling federal naturalization statute, granted a form of white status to persons of Mexican descent, allowing them to become citizens.\textsuperscript{73} However, for more than a century, the governing white power structure maintained segregated Mexican schools, allegedly to “Americanize” the Latino children.\textsuperscript{74}

Nonetheless, evidence surfaced that the official language handicap claims served as a subterfuge for racial segregation of the Mexican-descent students.\textsuperscript{75} The evidence often proved that the authorities required even predominantly English-speaking Latinos to attend “Mexican” schools.\textsuperscript{76} In contrast, principals in Anglo schools accepted the placement of non-English speaking Bohemian and German children in those white schools, an indication of their intent to exclude only Mexican students from the “American” schools.\textsuperscript{77}


\textsuperscript{72} See Treaty of Guadalupe Hidalgo, \textit{supra} note 65.

\textsuperscript{73} See generally In re Rodriguez, 81 F. 337.


\textsuperscript{75} See generally Independent Sch. Dist. v. Salvatierra, 33 S.W.2d 790 (Tex. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931). The district superintendent agreed that: “Yes, it’s true, generally the best way to learn a language is to be associated with the people who speak that language.” \textit{Id.} at 793.

\textsuperscript{76} See generally Hernandez v. Driscoll Consol. Sch. Dist., 2 Race Rel. L. Rep 329 (S.D. Tex. 1957) (describing the school district’s actions in mandating attendance at a segregated Mexican school as blatant “racial discrimination” because the child could not speak any Spanish).

\textsuperscript{77} See PAUL SCHUSTER TAYLOR, AMERICAN-MEXICAN FRONTIER: NUECES COUNTY, TEXAS 224 (1934). Administrators also punished students who spoke Spanish at even the segregated schools, a process deemed essential to the “Americanization” of Latino children.
During the years leading to the 1930s repatriation efforts, millions of Mexicans and other Latinos entered the United States. In the years before the 1930s repatriation of persons of Mexican descent, the interests of business owners trumped the laws against unauthorized entries. Agricultural interests in general, and the cotton business interests in particular, encouraged the federal government to admit Mexican labor and even sponsored a $1,000 advertising campaign for the importation of cotton pickers because farmers wanted “cheap Mexican labor.”

However, with the nation’s economic collapse in 1929, anti-alien fervor increased. The federal government increased border patrols, and in 1928 Texas Congressman John Box unsuccessfully presented a racist bill that called for restrictions on Mexican immigration, stating that the same reasons that justified exclusion of “degraded people of Europe or Asia demand[ed] that the illiterate, unclean, peonized masses moving this way from Mexico” also be excluded. The bill also called for the protection of “American racial stock from further degradation or change through mongrelization,” adding that the Mexican peon is a mixture of “mediterranean-blooded Spanish peasant with low-grade Indians.” Alonso S. Perales, a Mexican–American civil rights leader, appeared before Congress in 1930 to respond to the nativist and degrading characterization of Mexicans by sponsors of the bill that stated “the Mexican people is an inferior and degenerate race.”

Perceptions and realities regarding Latino injustice generally hinge on the white majority’s stereotypical view of the population. The governing Anglo majority developed stereotypes about Mexican people: They are lazy, dirty, and “greaser[s]!” A more recent stereotype includes the belief that Latinos are all Mexicans and

80. John Box, Immigration Restriction, DIGITAL HIST. (1928), http://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smid=3&psid=594 [https://perma.cc/GXW4-7JQ8].
81. Id.
82. See Ripples of Hope: Great American Civil Rights Speeches 157 (Josh Gottheimer ed., 2003). Congressman Box of Texas pursued protection of American racial stock from further degradation through “mongrelization,” his description of the “Mexican peon” as the product of a Spanish peasant who had mixed with low-grade Indians.
“illegals” who need to go back to Mexico. Even speaking Spanish has become a sufficient indicator to raise suspicion of a Latino’s undocumented status.84

Over the years in Texas, state courts in both criminal and civil cases fixated on the “Mexican race” label and addressed the Mexican-descent American conspicuously. As early as 1846, the court made references to the “Mexican” race of the litigant. This lasted through at least 1952,85 the same year the Texas Court of Criminal Appeals ruled that Latin Americans were members of the white race, in order to justify their continued exclusion from juries.86 Only ten years earlier, the same court stated that the accused, a member of the “Mexican” race, grew up with the custom and habit of carrying and throwing knives.87 Appellate jurists joined in their depiction of Mexican–American society, with one civil appellate court noting the “disposition of the Mexican race to dicker and banter about always paying a little less than what they really owe.”88 The courts were not alone in their racial classifications. In 1930, the Census Bureau classified persons of Mexican descent as a race.89

While one’s ethnic status might be relevant to the disposition of a claim, such as a claim of discrimination, when the mention of a person’s immigration status arises in a trial primarily to prejudice the jury, that practice must be disallowed as a violation of due process.90


87. See Garcia, 162 S.W.2d at 715. In another case, the judge referred to the appellant convicted of sodomy as a “boy of Mexican descent” in circumstances where ethnicity had no relevance to the crime which can perhaps be described as an example of an “overt” implicit bias. Luevanos, 252 S.W.2d at 179.


89. U.S. CENSUS BUREAU, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, JUSTICE PRECINCT 6, VICTORIA COUNTY, TEXAS, ENUMERATION DIST. NO. 235–14, (April 28, 1930) (listing of census records that included my paternal grandparents, my U.S.-born father, and other family members while my grandfather Reyes Salinas worked as a sharecropper shortly before the family’s “self-deportation” to Nuevo Leon, Mexico in 1933) (copy on file with the author).

90. See, e.g., TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 245 (Tex. 2010) (holding that admission of undocumented immigration status “was harmful not only because its prejudice far outweighed any probative value, but also because it fostered
Worse, discriminatory stereotypes against Latinos continue to this day, as the United States Supreme Court discovered in 2017. The Court reversed a state sexual assault conviction because a juror during deliberation stated that “Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”

Following the Japanese attack on Pearl Harbor, the United States declared war and joined the Allied Forces. Beginning in 1942, soldiers of Mexican and Puerto Rican descent enlisted and displayed their bravery. Mexican Americans in particular saw the military as a way to show they were worthy of respect, hoping their fighting side by side with “Americans” would win respect from Anglos and overcome the humiliation of school segregation and exclusions from service in public accommodations.

However, the desired equality did not occur for Latinos. Gus Garcia, a Texas civil rights attorney, appeared before a Senate subcommittee in 1952 on behalf of the American GI Forum, a Hispanic veterans group. While addressing labor issues Latinos confronted, Garcia also described the harsh discrimination he and other Latino veterans faced after returning home after the war:

Frankly, we came back from the war expecting an entirely different situation from that which we found. We came back to find that we could not buy homes because of restrictive covenants. . . . We came back to find

the impression that Rodriguez’s employer [TXI] should be held liable because it hired an illegal immigrant.”

92. Id. at 869 (holding that when a juror makes a clear statement that indicates he relied on racial stereotypes or animus to convict the accused, the Sixth Amendment requires that the evidentiary no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee).
93. See generally PERALES, supra note 48; see also RAUL MORIN, AMONG THE VALIANT: MEXICAN-AMERICANS IN WW II AND KOREA 25 (1966) (documenting tales of bravery of Latino soldiers in both World War II and the Korean Conflict).
disappointment and disillusionment after we had been told that we were going over there to fight for a better way of life and to fight against racism. García also informed the committee that Texans earned fourteen Congressional Medals of Honor, the nation’s highest military award. Proudly and remarkably, Mexican Americans, a relatively small percentage of the total Texas population, received nearly 43% (six) of these medals. In spite of the heroic military achievements, Latino soldiers returned to Texas to encounter the same racist denials of service in public accommodations and in the purchase of restricted real estate that existed before the war.

Today, Americans of Mexican descent account for over 60% of the total authorized resident Latino population. In addition, the United States has an undocumented population estimated at over 12 million—many of whom are Latino. Notwithstanding the numbers, the Mexican stereotype prevails to the extent that hate crimes have occurred when those who target Mexicans end up killing a non-Mexican Latino.

96. See id.
97. See id.
98. See Perales, supra note 48, at 156. Macario Garcia, one of the six Medal of Honor recipients, directly suffered the racist humiliation of denial of service at a Texas restaurant. See id. The Perales book provides affidavits describing incidents of exclusion from restaurants, bars, barber shops, and theaters and of refusal to sell property because of racially restrictive covenants. See generally id.
C. The Latinization of America, 1942 to the Present

When the United States entered World War II in late 1941, Congress approved a “temporary” worker program known as the Bracero Program that lasted until 1964. The Mexican government officials correctly predicted that its termination would lead to massive undocumented entries. Ten years later, Immigration and Naturalization Service (INS) reported the apprehension of over 788,000 aliens, 90% of whom were from Mexico.

During the Bracero Program’s existence, and after the United States economically benefitted from undocumented Mexican labor for several years, President Eisenhower then ordered “Operation Wetback” during the 1950s to deal with complaints of poor economic conditions and surplus labor. The INS operation involved the collaboration of multiple governmental agencies to control the “invading force” of Mexican migrants. While these callous seizures do not directly address the thesis of lawless cops and their use of


107. See JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971). These massive round-up seizures relate to the Fourth Amendment protections that later impact the lawless cops thesis. See generally Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012).
excessive and deadly force, they nonetheless lay the foundation for the police culture of treating immigrants and minority citizens as second-class persons.108

Another event that caused more of a “push” factor from Mexico occurred due to the United States’ domestic policy.109 Shortly after the termination of the Bracero Program, Congress established the Western Hemisphere quota in the Hart–Celler Immigration Act, at times referred to as the “law that created illegal immigration.”110 For Mexican Latinos particularly, Hart–Celler made the United States less accessible via authorized immigration by limiting Latino immigration from the Western Hemisphere for the first time and limiting Mexico’s quota to 20,000 individuals annually.111 This was a major decrease from the average 50,000 per year who entered up until the late 1950s.112 Over fifty years later, the impact of the 1965 Act has resulted in an increase of undocumented Latino removals of 400,000 persons annually.113

Chronologically, in the 1960s, other Latinos from the Caribbean became American residents thanks to American domestic and foreign policy.114 In 1898, Spain ceded Puerto Rico to the United States, and Congress later enacted a law that declared Puerto Ricans United States citizens.

108. See Arpaio, 695 F.3d at 994; see also Lauren Weber, As Health Conditions Worsen at Prison Holding 1,000 Detainees, Staff Fears a Riot, HUFFPOST (July 2, 2018 10:10 PM), https://www.huffingtonpost.com/entry/victorville-prison-detainees-medical-crisis_us_5b3abde8e4b07b827eb9ed38 [https://perma.cc/QRC7-W8WM] (describing a prison with inadequate medical care, worsening conditions, and infectious diseases like scabies and chicken pox).

109. See Hong, supra note 103.


111. Hong, supra note 103.

112. See id.


citizens.\textsuperscript{115} Puerto Ricans began to migrate from the Commonwealth primarily to New York City, Chicago, and, most recently, Florida.\textsuperscript{116}

Cubans did not have any substantial presence until 1959 when the United States began to receive Cuban migrants after Fidel Castro came to power and established a communist regime.\textsuperscript{117} Later, in 1980, during a period of economic pressure, Castro expelled about 125,000 Cubans.\textsuperscript{118} Another factor that later contributed to an increase of the Cuban–American population involved the “wet foot, dry foot” policy that allowed those Cubans who reached dry land to remain in the United States and petition one year later for residency.\textsuperscript{119} Notwithstanding border security, during a four-year period, more than 131,000 Cubans obtained United States residency status.\textsuperscript{120} The negative effect of this policy involved the many innocent people who

\begin{footnotesize}
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\item[\textsuperscript{115}] See 8 U.S.C. § 1402 (2006). Congress declared that persons born in Puerto Rico between 1899 and 1941 and residing in Puerto Rico or other United States territory, would be citizens of the United States, adding that all others born after January 13, 1941 would be citizens at birth. See \textit{id.}
\item[\textsuperscript{116}] Edwin Meléndez & Jennifer Hinojosa, \textit{Estimates of Post-Hurricane Maria Exodus from Puerto Rico}, CUNY, (Oct. 2017), https://centropr.hunter.cuny.edu/sites/default/files/RB2017-01-POST-MARIA%20EXODUS_V3.pdf [http://perma.cc/3GJ9-XU4D]. Experts estimate that Hurricane Maria’s 2017 impact on Puerto Rico will lead to an exodus from 2017 to 2019 of up to 470,335 residents with Florida serving as the state most likely to receive an estimated annual flow of between 40,000 and 82,000 people.
\item[\textsuperscript{117}] \textit{Fidel Castro}, Hist., https://www.history.com/topics/cold-war/fidel-castro [http://perma.cc/GPV3-9HB7]. Fidel Castro (1926–2016) established the first communist state in the Western Hemisphere after leading an overthrow of the military dictatorship of Fulgencio Batista in 1959; in 1961 he openly declared his suspected Communist leanings by publicly declaring himself a Marxist-Leninist.
\end{itemize}
\end{footnotesize}
drowned in their quest to reach South Florida as they travelled in unseaworthy boats.  

About the same time that the Marielitos left Cuba, the effects of American foreign policy in the Central American political arena began to surface. The early 1980s saw a rapid increase in immigration from Central America. United States foreign policy in Central America drove residents to emigrate from their homes to avoid tyrannical abuses by leaders previously supported by the American government. The United States deeply invested funding and assistance in the militaries in El Salvador, Guatemala, and


122. In my role as Special Assistant to the United States Attorney General Benjamin R. Civiletti in 1980, I served as his advisor and representative at hearings before the Select Commission on Immigration & Refugee Policy (SCIRP). In Miami and New Orleans hearings, I witnessed the effects of our foreign policy on the political stability of a nation as Nicaraguan refugees represented the vast number of those who sought relief.

123. The United States was deeply involved in armed conflicts in El Salvador, Guatemala and Nicaragua, usually supporting the military governments in those countries. See KENNETH C. DAVIS, supra note 114, at 520 (referring to CIA Chief Casey’s encouragement for Nicaragua’s military); see also ZINN, supra note 114, at 572 (referring to financial support President Jimmy Carter extended to back the military junta in El Salvador and the support for the Somoza family dictatorship in Nicaragua); Molly Redden, Reminder: Women Migrants Are Fleeing Countries the U.S. Helped Decimate, HUFFPOST (July 22, 2018), https://www.huffingtonpost.com/entry/reminder-migrants-are-fleeing-countries-the-us-helped-decimate_us_5b3e5349e4b09e4a8b2b0654 [https://perma.cc/HM3W-K7UE].

124. See THE OXFORD ENCYCLOPEDIA OF LATINOS AND LATINAS IN THE UNITED STATES 272 (Suzanne Obeler & Deena J. Gonzalez eds. 2005) (discussing how this new war, which lasted from 1980 to 1992, resulted in large-scale immigration to the United States).

Nicaragua. The Chief of the Central Intelligence Agency urged the American government, and President Carter agreed, to support the Nicaraguan military and assist not only the Somoza family dictatorship in Nicaragua but also the military junta in El Salvador. When the United States stopped providing aid in 1979, Somoza went into exile in Miami, and the Sandinistas came to power. However, later, clandestine American-assisted efforts in Nicaragua increased the flow of refugees that migrated to South Florida and other destinations in the United States.

The net result of America’s domestic and foreign policy over the years has been the creation of a rapidly growing Latino population that surpassed African Americans in 2003 as the nation’s largest ethnic or racial minority. The 2010 Census reported 50.5 million United States Latinos. In only five years, Latinos increased to 56.6 million, a growth rate from 16% to 17.6% of the total population. In seventy years, from 1940 to 2010, Latinos increased from 1.4 million to 50.5

126. See Davis, supra note 123, at 520 (referring to CIA Chief Casey’s Nicaraguan’s military aid); see also Zinn, supra note 114, at 572.

127. See Zinn, supra note 114, at 572; see also The Oxford Encyclopedia of Latinos and Latinas in the United States, supra note 124, at 272.

128. See Sandinista, Encyclopaedia Britannica, https://www.britannica.com/topic/Sandinista [https://perma.cc/Z9JN-278G]. A Sandinista is a member of the Sandinista National Liberation Front (known also by the Spanish acronym FSLN). See id. Named for Cesar Augusto Sandino, a hero of Nicaraguan resistance to United States military occupation (1927–1933), the current Sandinistas are members of the Sandinista National Liberation Front that eventually defeated the heavily American financed Somoza dictatorship. See id. The Sandinistas governed Nicaragua from 1979 to 1990, and, after a few years out of office, Sandinista leader Daniel Ortega won reelection as president and remains in power. See id.

129. See The Oxford Encyclopedia of Latinos and Latinas in the United States, supra note 124, at 272; see also Redden, supra note 123.


million. In contrast, during the same time period, the United States population grew from 132.1 million to 308.7 million.

The Latino population growth has concerned certain politicians. One politician in particular, Donald Trump, got personal when he compared immigrants to pests that need to be exterminated. In his Presidential campaign, he not only spoke positively of Operation Wetback in 1954 but also implemented similar practices that have resulted in misery for both unauthorized aliens and lawfully present aliens and citizens. His actions and words may have worked with many within his voter base, but American democracy suffers when any politician lowers himself by comparing people to roaches and mice.

When that person is the President of the United States, the national and international disgrace intensifies! In this context, President Trump’s overt praise for totalitarian dictators for their strong-arm and abusive approaches fails to shock Americans anymore.

The code words that Trump injects appear merely to rally his voters and the far right. Trump’s approach is not novel; he has...
merely taken it to an extreme. In the 1980s, the far right conservatives actively began to warn of the “browning” of America. Almost forty years later, the political right still plays the deflection blame game.

Many steps were taken to halt this “[b]rowning” of America. For example, Dr. John Tanton, the founding father of America’s modern anti-immigration movement collaborated with the Federation of Americans for Immigration Reform (FAIR) in Arizona to enact the 1988 English-Only referendum. In a memorandum that Tanton prepared, he criticized the Latino’s high birth rate, depicting “Hispanics as hyperactive breeders,” adding that “perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down.”

In the same realm, a Harvard political science professor, Samuel P. Huntington, followed Tanton’s extremist views in a book expressing concerns about the growing Latino population, the

140.  See id.
142.  In an interview in July 2018, shortly after President Trump insulted the United States intelligence leadership and members of both parties with his pandering to Putin, Fox News host Tucker Carlson conceded Russia meddled in United States affairs, but he asserted that other countries, like Mexico, have been more successful by “routinely interfering in our elections by packing our electorate.” See Raul A. Reyes, Tucker Carlson’s Racist Attempt to Deflect Outrage over the Trump-Putin Saga, CNN (July 18, 2018, 9:16 AM), https://www.cnn.com/2018/07/18/opinions/tucker-carson-mexico-lame-deflect-trump-russia-outrage-reyes/index.html [https://perma.cc/4GPQ-LCEW]. As the commentator suggests by his rhetorical questions, if Mexico had successfully “pack[ed]” the electorate, Trump would not likely be President after his extreme campaign statements about “Mexicans.” See id. Further, as Tucker must know, the Latino voter turnout is dismal. See id.

144.  See id.
145.  See id. The derogatory comments about the Latino sexual behavior emanated from a memo leaked to the press shortly before the 1988 English Only referendum in Arizona and was intended for Tanton’s collaborators who met to discuss immigration. See id. Rick Swartz, a pro-immigration activist, described Tanton as “the puppeteer behind this entire movement. . . . He is the organizer of a significant amount of its financing, and is both the major recruiter of key personnel and the intellectual leader of the whole network of groups.” Id.
changing face of America, and the “clash of civilizations.” He emphasized that language and religion constitute “central elements of any culture or civilization” and expressed apprehension that the United States civilization was changing radically as a result of Latino growth. Huntington added that Mexicans in particular will pose a problem for the United States since the nation’s population will reach 25% Latino by 2050.

Notwithstanding his academic credentials, Huntington warned that America’s Mexican Latinos will almost certainly experience “revanchist sentiments.” Huntington explained that Mexican demographic expansion in the twenty first century could threaten the American military expansion gained by the land-grab thrashing the United States administered to Mexico in the nineteenth century. This jingoist language only accentuates the Latino threat claim and further disadvantages an already socially burdened group. Admittedly, Huntington’s fear tactics and pessimism about our nation’s future also helps to sell books.

D. United States Latinos and the Lynching Years

Historians have documented lynchings of Latinos that began as early as 1848, shortly after the United States’ conquest of Mexico. Once cultural conflicts developed between Latinos and whites in Texas, an Anglo-led independence effort began. Mexico initially defeated the rebels, a group comprised of mostly Anglos and a few Mexicans. By the next battle, which was won overwhelmingly by the predominantly Anglo rebels, the war cry “Remember the Alamo” found its way into the American vernacular. Anger among Anglos

147. See id. at 59-66.
148. See id. at 204-06.
151. See id. at 53.
152. See The Alamo, supra note 56.
has shockingly continued to fester to the point that the Alamo battle cry appeared on a placard during an anti-immigration protest at the Houston Mexican Consulate in 2006, 170 years after the fact!  

Both black and Latino lynching has involved police participation at times, either directly or passively by failure to intervene. While the overt lynching days have passed into the history books, many view today’s excessive police force as analogous to past mob violence. The lax oversight and lack of accountability regarding police lawlessness has led to a disparate number of minorities suffering the loss of lives or near fatal injuries. Even in this age of instant video access, the continued failure to improve responsibility in the police misconduct arena explains the overt and undeterred police use of excessive force. Recently, international human rights officials placed the killing of unarmed blacks by police as akin to lynching that occurred during the past century. The methods are different, but the consequences and the impunity after the fact are all too similar. A leading civil rights academician has also described racially motivated hate crimes against Latinos as modern-day lynching.

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153. See Jose Carrera, Minutemen: Mexico: Deporte a Sus Paisanos, EL DIA, April 24, 2006; see also SALINAS, supra note 3, at 20.


155. See Mexicans Were Also Lynched by Mobs, Law Officers, NBC NEWS (Feb. 20, 2015, 11:05 AM), https://www.nbcnews.com/news/latino/authors-mexicans-were-also-lynched-mobs-law-officers-n309556 [https://perma.cc/KK82-NN4G].


158. See id.

159. See Kevin R. Johnson & Joanna E. Cuevas Ingram, Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes against Latina/os and the Debate Over Immigration Reform, 91 N.C. L. REV. 1613, 1629-32 (2013). The authors discuss the fatal beating of Luis Ramirez by six white football players in Shenandoah, Pennsylvania who continuously admonished him during the beating to “go back to Mexico.” See generally id. at 1631, 1635, 1654. See also Paul Vercammen, 91-Year-Old Man Beaten with Brick, Told ‘Go Back to Mexico’, CNN
II. LAWLESS COPS AND LATINO VICTIMIZATION: AN OVERVIEW

One thing is certain: The mistreatment of Latinos by law enforcement has been extensive.\textsuperscript{160} However, for whatever reasons, media coverage has been minimal.\textsuperscript{161} Latinos, and particularly Mexican Americans, have been referred to as the sleeping giant, the invisible minority, and the forgotten people, among other things.\textsuperscript{162} Thus, it is not surprising that media coverage regarding Latino injustices has been minimal as compared to the violence that black victims endure.\textsuperscript{163} While several examples of such mistreatment could be included, I can only mention a few that are exemplary of the issue at hand. Such examples include instances of discrimination by federal police officers, state police officers, and even Latino officials within the criminal justice system.

A. Violations of Rights by Federal Law Officers

The federal courts have dealt with many cases involving police discrimination. Some of these include the treatment of Otherson, Serafin Olvera-Carrera, and Anastacio Hernandez-Rojas.


\textsuperscript{163} See Downs, supra note 161.
1. United States v. Otherson

*United States v. Otherson* is discussed primarily to establish that undocumented aliens seized by federal agents are “persons” covered and protected under civil rights laws. In *Otherson*, Border Patrol agents admitted to beating aliens who entered the United States from Mexico without inspection. After being found guilty, one of the agents, Otherson, appealed on the sole question at issue: Do undocumented aliens seized in the United States lack protection under the criminal civil rights statute because their lack of legal status prevents their classification as “inhabitants of any State, Territory, or District?”

The alien assault victim directed an obscene gesture towards a Border Patrol aircraft. Once arrested, Otherson and other agents violently assaulted him by punching, slapping, and striking him with a nightstick. Otherson explained to a trainee that they had to impose their own punishment because “the criminal justice system doesn’t do anything to these assholes.” In this case of first impression, the Ninth Circuit concluded that the civil rights statute broadly protected “all persons within the jurisdiction of the United States.” That language included even those in the United States without authorization because they were physically “within the jurisdiction of the United States.”

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164. See United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980).
165. See id. at 1277.
166. *Otherson*, 637 F.2d at 1285. This court therefore concludes that “inhabitants,” as used in 18 U.S.C. § 242, refers to any person who is within the territorial boundaries of the United States.
167. See *Otherson*, 637 F.2d at 1277.
168. See id. The proof suggested Otherson’s participation in the alien abuse involved a deliberate plan. See id. at 1278. An agent who apprehended the suspect overheard Otherson talk about “[w]ho’s the designated hitter?” *Id.*
170. *Otherson*, 637 F.2d at 1281.
171. *Id.* at 1283.
2. Serafin Olvera-Carrera

Another immigration detention case led to a uniquely different type of injury. In the process of seizing Serafin Olvera-Carrera on suspicion of undocumented status, the force used by immigration agents unintentionally resulted in paralysis. The United States Attorney filed a criminal civil rights charge against three agents not for willfully causing the paralysis but for thereafter acting with deliberate indifference in denying or delaying medical care to a person in their custody.

Once the agents realized that Carrera was not moving normally, an officer pepper sprayed him to determine if he was faking. When he did not react, the agents realized that Carrera was disabled and in serious need of medical care. The agents’ deliberate decision not to provide medical care constituted a constitutional deprivation, as announced in *Estelle v. Gamble*. In *Estelle*, the Supreme Court concluded that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’” forbidden by the Eighth Amendment.

In contrast to the convict status in *Estelle*, Carrera’s serious medical needs arose while he was a predeportation detainee, not a prisoner. Regardless, Carrera still should have enjoyed constitutional protections while in custody. Pursuant to the Fifth Amendment’s Due Process Clause, the Fifth Circuit upheld the prosecution’s claim that Carrera had been subjected to deliberate

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172. Mr. Olvera-Carrera, his official birth name, will be referred to in the rest of the Article as Carrera, as he is mentioned in the court’s opinion.

173. *See United States v. Gonzales*, 436 F.3d 560 (5th Cir. 2006) (cert. denied, Gonzales v. United States, 547 U.S. 1180 (2006)). The three accused immigration agents, Gonzales, Reyna, and Gomez, each dispute the sufficiency of the evidence to support their convictions for the willful deprivation of Carrera’s due-process right to be free from deliberate indifference to his serious medical needs. *Id.* at 573. *See also Reyna v. United States*, 547 U.S. 1139 (2006); Gomez v. United States, 547 U.S. 1180 (2006) for the denial of cert for the other two accused and convicted agents.

174. *See Gonzales*, 436 F.3d at 573.

175. *See id.* at 568, 571.

176. *See id.* at 573-74 (concluding that a finding of “actual awareness” fit the facts).

177. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), (establishing the right for an inmate or prisoner in police custody to receive medical care for serious medical needs).

178. *See Gonzales*, 436 F.3d at 567.
indifference to his serious medical needs that arose during his immigration detention.

3. Anastacio Hernández Rojas: The Personal Side of Undocumented Immigration

The migration of Mexicans to the United States has occurred for over a century. As an example, I can point to the journeys of my brave paternal grandparents who migrated to Texas from a small town in Nuevo Leon, Mexico, about fifty miles from the border crossing at Roma, Texas. Today people travel from distances as far away as Central America and southern Mexico. What motivated Mexicans in the early twentieth century similarly motivates Latinos and other nationality groups in the early twenty first century.

Vast migrations from Mexico, precipitated by the decade long Mexican revolution that began in 1910, increased the Mexican presence in the United States. My own personal family oral histories, official documentation of this migration, and the documented “acceptance” with open arms of Mexican workers by Anglo ranchers further confirms the Mexican population increase. Anglos did not want to pick cotton in the penetrating summer heat, so the agricultural business groups recruited Mexicans from the border areas south of the Rio Grande River and contributed to a significant wave of Mexican migrants between 1910 and 1930. These groups encouraged the

179. See id. at 573 (explaining that under the Fifth Amendment Due Process Clause, pretrial detainees enjoy a constitutional right not to have their serious medical needs met with deliberate indifference on the part of confining officials); see also Jennings v. Rodriguez, 138 S. Ct. 830, 855 (2018) (Thomas, J., concurring) (holding that indefinite detention without a periodic bond hearing for aliens detained for removal violated the Due Process Clause of the Fifth Amendment, but suggesting that “claims about inhumane treatment, assaults, or negligently inflicted injuries suffered during detention” would be appropriate as due process violations that “go beyond the Government’s lawful pursuit of its removal objective”). Similarly, a deliberate indifference claim in a state situation would be alleged under the Fourteenth Amendment’s Due Process Clause. See, e.g., Lozano v. Smith, 718 F.2d 756, 764 (5th Cir. 1983).


181. See TAYLOR, supra note 77, at 102.
federal government to admit Mexican labor and even sponsored a $1,000 advertising campaign for the importation of cotton pickers.\footnote{Id. at 101. Farmers wanted “cheap Mexican labor” to pick their cotton. \textit{Id.} at 105. The cotton business was so prosperous (for the farmers) and popular (for the needy workers) that the Robstown, Texas school mascot became, and remains into the twenty-first century, the “Cotton Pickers.”}

The increase in the undocumented alien population resulted then from the economic \textit{push} from Mexico and the economic \textit{pull} from the United States. Not much has changed as far as the impact of that phenomenon. The push includes such unfavorable conditions as unemployment, food shortages, and overpopulation, factors that motivate the Mexican national to travel north. The pull includes such favorable conditions as a United States demand for low-wage labor and comparatively higher wages in the United States.\footnote{See Salinas \& Torres, supra note 104, at 868 (citing \textit{SAMORA}, supra note 107, at 197).}

My paternal grandfather, Reyes Salinas, began his migration to Texas as early as 1913, when he, at the age of nineteen, presented a border crossing card.\footnote{I possess a copy of a 1913 border crossing card documenting my grandfather’s intent to migrate to Sinton, Texas, approximately 150 miles away from the border port of entry.} Years later, the 1930 Census included information about him, his wife, and his children, living at the time in Victoria County, Texas.\footnote{I possess a copy of a page from the 1930 Census that includes my paternal grandparents and their children then residing in the United States. \textit{See U.S. CENSUS BUREAU, supra} note 89 (listing of census records that included my grandparents, my U.S.-born father, and other family members while my grandfather Reyes Salinas worked in the fields before the family’s voluntary departure to Nuevo Leon, Mexico in 1933). Regardless of skin color of Mexicans, the 1930 Census is the only one in history that listed persons of Mexican descent under a section labeled “Color or Race” as being of the “Mexican” race by listing “Mx” in the small box. Protests from civil rights leaders led to the quick demise of this label.} Historical academic studies conducted by Berkeley sociologist Paul S. Taylor in 1929 also corroborate the Anglo desire for Mexican labor.\footnote{See generally \textit{TAYLOR}, supra note 77.} Taylor began research in the Nueces County, Texas area\footnote{See generally \textit{id.} (describing the presence of Mexican workers in the area).} while my grandfather served as a sharecropper in that same region.

Stories I heard from my grandfather and father corroborate many of Taylor’s findings. My grandmother accompanied my grandfather on what developed into a fifteen-year journey to Texas. After their infant daughter died in Galveston, Texas, my grandparents returned to
Robstown, Nueces County, Texas where Dr. Taylor coincidentally focused his research and where my father was born on a ranch in 1921. Altogether, my grandparents increased the family by having nine children in Texas between 1920 and 1932 while they worked for ranchers. Pursuant to established constitutional law at the time, as well as today, my father and his brethren enjoyed American citizenship, notwithstanding their parents’ undocumented status. In 1933 the federal government’s so-called “repatriation” program effectively sent messages of the removal efforts around the country and convinced my grandparents to load two wagons and “voluntarily” return to Mexico before La Migra, in their deportation fervor, had the chance to separate them from their six surviving United States citizen children and their first child who was born in Mexico in 1918.

Anastacio Hernández Rojas’s (hereafter Anastacio) experience as a migrant is similar, at least in age, to that of my rather youthful grandfather. Anastacio, a native of San Luis Potosi, Mexico, left his family at the age of fifteen to migrate to the San Diego, California area.

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188. See United States v. Wong Kim Ark, 169 U.S. 649, 693-94 (1898). The Fourteenth Amendment of the Constitution dictates that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Id. at 721 (quoting U.S. CONST. amend. XIV).

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States. Id. at 694.

189. La Migra is the Spanish slang term for the federal immigration patrol agents.

190. Anti-alien fervor resulted from the economic collapse during the Great Depression. The federal government increased border patrols to limit immigration. A racist twist entered the battle when Texas Congressman John Box presented a bill to protect “Americans,” a term that describes only European whites; this term did not include American citizens of Mexican descent, a group described by Box as a “degenerate” race. See RIPPLES OF HOPE, supra note 82, at 157. After my father and mother married in 1940, seven years after leaving Texas, he returned to McAllen, Texas with my mother and my three older siblings. I was the fourth to be born and the first born in the United States in 1948.

191. The first name of Anastacio Hernández Rojas has been spelled “Anastasio” in various media reports. It is written as “Anastacio” in this writing as it is more commonly spelled in Spanish and as Maria Puga, the mother of his five children, spelled it in the family’s civil rights lawsuit against the federal government. See Estate of Hernandez-Rojas v. United States, 62 F. Supp. 3d 1169, 1171 (S.D. Cal. 2014) (spelling his name as “Anastacio”).
California area to work.\textsuperscript{192} Six years later he met his wife with whom he had five children, all born in San Diego.\textsuperscript{193} In May 2010, Anastacio spent two weeks in jail for theft.\textsuperscript{194} Police then released him on May 24 to immigration authorities for deportation.\textsuperscript{195} Anastacio remained in Mexico for only a few days. On May 28 he returned to California, accompanied by his youngest brother Pedro.\textsuperscript{196} Border agents quickly seized the two and transferred them to the removal processing area.\textsuperscript{197}

a. Anastacio’s Custodial Nightmare: The Official Story

The nightmare that led to Anastacio’s death began with his return to the custody of the Customs and Border Protection (CBP) agency only four days after his removal from the United States.\textsuperscript{198} The official police story from the transport agent describes Anastacio’s behavior as “odd” based on his being very talkative.\textsuperscript{199} Other agents later depicted Anastacio as times as calm and thereafter as “argumentative, uncooperative,” mobile, and agitated.\textsuperscript{200}

Once Anastacio arrived at the Border Patrol Station carrying a jug of water, agent Gabriel Ducoing instructed him to dispose of the jug in a trash can, but Anastacio instead emptied only the water.\textsuperscript{201} Ducoing angrily pushed the jug out of his hand and took Anastacio into a search area where agents placed him against a wall to be patted down.\textsuperscript{202} Civilian witnesses heard Anastacio complain that Ducoing kicked his legs open during the pat down and injured his ankle.\textsuperscript{203}


\textsuperscript{193} See id.

\textsuperscript{194} See id.

\textsuperscript{195} See id.

\textsuperscript{196} See id.

\textsuperscript{197} See id.

\textsuperscript{198} See id. (describing the transport agent’s reaction to Anastacio’s behavior).

\textsuperscript{199} Id. This behavior possibly resulted from methamphetamine intoxication noted in the autopsy. See id. Common signs of methamphetamine use include talkativeness and aggression, attributed to Anastacio by the first agents who came in contact with him. See id.

\textsuperscript{200} See id. The dumping of the water jug allegedly is done on the basis of security concerns that liquids could be utilized to mix and create harmful products. See id.

\textsuperscript{201} See id.

\textsuperscript{202} See id.

\textsuperscript{203} See id. Anastacio’s previous ankle injury followed by Ducoing’s kicking his ankle caused him pain. Id. According to Pedro, Anastacio suffered a work injury
Due to Anastacio’s allegedly disruptive behavior, supervisor Ishmael Finn ordered Anastacio’s immediate removal to avoid potential safety hazards with other detainees. Finn, who heard Anastacio’s complaint of an injury committed by Ducoing, nonetheless sent this same agent along with another agent to transport Anastacio to the port of entry for deportation to Mexico.

According to Agent Ducoing and his partner, the three enjoyed a peaceful ride to the border, and Anastacio was calm and apologetic about his behavior at the station. Once they arrived at the port of entry, a point that also serves also as the exit from the United States, Anastacio resisted slightly when the agents began removing his handcuffs. Two Immigration and Customs Enforcement (ICE) agents standing nearby intervened, but the four men claim Anastacio’s size and strength prevented gaining control over him. This prompted ICE Agent Llewellyn to use his baton to strike Anastacio several times.

According to the agents, while on the ground, Anastacio continued to struggle by fighting and kicking. Several more agents then assisted and handcuffed Anastacio behind his back. His screaming and kicking continued. From this point, Anastacio underwent a lengthy struggle; he was severely assaulted at the hands of as many as twelve agents, and CBP Agent Jerry Vales tased Anastacio four to five times.

that led to placement of a metal screw as part of the medical procedure; Ducoing’s response to Anastacio’s complaint was asking him “if he wanted to be beaten.” Id.

204. See id.
205. See Estate of Hernandez-Rojas v. United States, 62 F. Supp. 3d 1169, 1172, 1176-77 (S.D. Cal. 2014) (noting that the port of entry where Anastacio would undergo removal is referred to several times as “Whiskey 2”).
206. See Inda, supra note 192.
207. See id.
208. See id.
209. See id. (discussing how the autopsies further show that Anastacio had a baton injury to the abdomen). The international migration phenomenon literally requires book-length details for an adequate investigation. See, e.g., Lupe S. Salinas, Always Running: La Migra. Detentions, Deportations, and Human Rights, in IMMIGRATION AND THE LAW: RACE, CITIZENSHIP, AND SOCIAL CONTROL 120-68 (Sofía Espinoza Álvarez & Martín Guevara Urbina eds., 2018).
210. See Inda, supra note 192.
211. See id.
212. Estate of Hernandez-Rojas v. United States, 62 F. Supp. 3d 1169, 1172, 1177 (S.D. Cal. 2014) (explaining that agents estimated that the encounter with Anastacio lasted twenty minutes); see also id. at 1189 n. 1 (listing eight agents and four supervisors as civil defendants).
Notwithstanding the graphic video showing the unnecessary and excessive tasing along with the medical and the physical evidence, including five broken ribs, the DOJ determined that the facts of the case did not warrant federal criminal charges.\footnote{See Dep’t of Justice, Federal Officials Close the Investigation into the Death of Anastacio Hernandez-Rojas (Nov. 6, 2015), http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-Anastacio-hernandez-rojas [https://perma.cc/42Y3-K73J]. The DOJ prosecutorial decision will be more thoroughly analyzed in the Revictimization section. See infra Part IV.} In a later section on the postmortem revictimization, I will establish how the trauma and extensive injuries revealed on Anastacio’s body overwhelmingly speak volumes about the brutal and unconstitutional beating he received while in the custody. This beating led to five broken ribs, laceration of the liver, hemorrhaging of the diaphragm, and a baton injury to the abdomen.\footnote{See id.; see also Inda, supra note 192. The international migration phenomenon literally requires book-length details for an adequate investigation. See, e.g., Salinas, supra note 209.}

b. Witnesses that Support Claims of Anastacio’s Injustice

Dr. Jonathan X. Inda, the author of a scholarly study of Anastacio’s death, discusses witnesses to the events, including Anastacio’s brother Pedro and even Border Patrol agents, who help provide the departed Anastacio with a voice. These persons tell a different story, one that dismantles the account of Anastacio as unruly and violent. His water pouring incident did not amount to much except a misunderstanding of the nature of the command, and agent Ducoing’s response was completely out of proportion.

Anastacio was then taken to an interview room, apparently without problems or resistance.\footnote{See Inda, supra note 192.} While in the room, Anastacio told another agent that agent Ducoing had hurt him and complained about the pain and mistreatment.\footnote{See id. He also reported the mistreatment to Supervisor Finn, who, instead of addressing Anastacio’s concerns, told his agents to remove him immediately to Mexico. Id.} The agent took no action to address Anastacio’s concerns even though Border Patrol policy requires that detainees needing medical attention are to be evaluated by qualified personnel.\footnote{See id.} Agents who have been accused of mistreatment are also
obligated to report the complaint to their superiors and remove themselves from further interactions with the complainant.218

After the interview, agent Ducoing led Anastacio to a processing area in the same building and other officers took over.219 Anastacio complained to them about the pain caused by the abuse and requested medical attention.220 Agent Sandra Cardenas observed his ankle and then asked agent Jose Galvan if an Emergency Medical Technician had been called.221 Galvan responded that they were waiting for a supervisor to respond.222

Supervisor Ishmael Finn then arrived to see Anastacio, who reiterated his complaints.223 Instead of addressing Anastacio’s concerns, Finn told his agents to take Anastacio immediately for removal to Mexico, bypassing standard procedures.224 Furthermore, contrary to agency policy, Finn included Ducoing, the agent about whom Anastacio complained, as one of the agents assigned to transport him.225 Although Finn acknowledged the “common practice” that, if a detainee makes a complaint against an agent, “then obviously, that agent is not going to have any more contact with that prisoner,” yet Finn contradicted himself and agency practices.226

c. Anastacio’s Detention and Treatment: His Last Twenty Minutes of Conscious Existence

As discussed earlier, agents estimate that the events that led to Anastacio’s loss of consciousness while in the custody of a dozen trained border agents, including supervisors, lasted approximately twenty minutes.227 The last moments in Anastacio’s difficult life began

218. See id.
219. See id.
220. See id.
221. See id.
222. See id.
223. See id.
225. See id.
226. Id. at 1176. Finn denied that Anastacio told him that an agent kicked his ankle while detained. Id. at 1177. I include these contradictions from several federal agents and supervisors as evidence of a full consideration of the multiple claims and allegations that Anastacio actively resisted during his detention while handcuffed and surrounded by the federal agents most of the time.
227. See also id. at 1185. Defendant federal agents acknowledge that approximately twenty minutes passed between the time Anastacio arrived at the removal area and the time he was tasered and had his legs zip tied. See also id. at 1186.
with agent Ducoing’s forceful kicking of his ankle, followed by Anastacio’s complaint to the agent and to supervisor Finn.\textsuperscript{228}

In his deposition, Finn swore that a supervisor, such as himself, is obligated to report any complaints to the Office of the Inspector General, but he declared he had never previously received a complaint.\textsuperscript{229} Two witnesses in the office contradicted Finn; one stated that he heard Anastacio tell Finn that an agent hurt his ankle and another employee told Finn that Anastacio was kicked by either Ducoing or another agent.\textsuperscript{230} I mention these sworn statements and actions by Finn as apparent violations of federal perjury law, which further support the claim that the excessive use of force justified criminal indictments for the beating and tasing that resulted in Anastacio’s death.\textsuperscript{231}

Once at the border crossing, Ducoing claims Anastacio’s behavior changed as the handcuffs were removed, but he conceded that Anastacio was “not throwing punches but was pushing the agents and would not go down.”\textsuperscript{232} Two other agents assisted Ducoing and his partner, but it is unclear what provoked the use of baton strikes against Anastacio by one of these two other agents—strikes that apparently caused Anastacio’s spine-chilling cries of pain heard on the witness videos and screams of “ayuda me” (“help me” in English).\textsuperscript{233}

A fifth agent, Llewellyn, arrived and assisted the other four to force Anastacio to his stomach and to handcuff him behind his back.\textsuperscript{234}

\textsuperscript{228} See id. at 1172. Two other agents confirmed this complaint directly to Finn. \textit{Id.} at 1176.

\textsuperscript{229} See id. at 1176.

\textsuperscript{230} See id. at 1177.

\textsuperscript{231} See 18 U.S.C. § 1621 (2016) (detailing perjury before federal courts or grand juries).

\textsuperscript{232} \textit{Estate of Hernandez-Rojas}, 62 F. Supp. 3d at 1177-78.

\textsuperscript{233} See id. at 1177 (indicating that Agent Krasielwicz stated an ICE agent struck Anastacio with a baton, leading to Anastacio’s screaming “\textit{ayuda me},” which means “help me” in English). Two other sources corroborate this plea for mercy by Anastacio. First, civilian witness Osvaldo Chavez testified that Anastacio was screaming “\textit{ayuda}.” See \textit{id.} at 1177-78. Second, in a video recorded by civilian witness Humberto Navarrete, he captured Anastacio’s cries for help: “\textit{Ayudenme}” (Help me), followed by “\textit{Ayuda! Ayúdenme! Ya! Por favor! Señores ayúdenme!” (Help! Help me! Please! People help me!). See \textit{Inda, supra} note 192.

\textsuperscript{234} See \textit{id.} at 1177.
Llewellyn allegedly punched Anastacio “repeatedly.”235 While Anastacio was lying on his stomach and in handcuffs, the agents allegedly “punched, kicked and stepped on Anastacio’s head and body.” 236 From that point forward, Anastacio’s beating should thereafter be viewed as excessive force because, while handcuffed behind his back, Anastacio did not pose a realistic threat to any federal agent.237

Ducoing then called supervisor Finn, who in turn sent a caged unit to return Anastacio to initiate the filing of criminal charges.238 When the unit arrived, the agents lifted him. Anastacio “started kicking and fighting” and arched his back, hitting his head against the window when agents attempted to place him in the vehicle.239 Ducoing and the agents then laid Anastacio on the ground, on his stomach, while still handcuffed. Ducoing stepped away while the other agents continued to hold Anastacio face down on the ground.240

“[Agent] Vales arrived with his Taser and told everyone to stay away from Anastacio.”241 Vales supposedly gave “Anastacio a warning that he was going to be tasered,” but only one agent supports that claim.242 The video sound clearly confirms that Vales ordered Anastacio to “stop resisting.”243 The question that a neutral investigator must consider is: How can a detainee, while lying on the ground on his stomach with hands handcuffed behind his back, resist

235. See id. at 1172.
236. Id.
237. See Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that Fourth Amendment excessive force claims are properly analyzed under an objective reasonableness standard); Ramirez v. Knoulton, 542 F.3d 124, 128 (5th Cir. 2008) (“To prevail on an excessive force claim, a plaintiff must establish: ‘(1) an injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.’ . . . In deciding [the ‘clearly excessive’ and ‘clearly unreasonable’] question[s], we must determine whether ‘the totality of the circumstances justified’ the particular use of force.”).
239. Id.
240. See id.
241. Id. at 1178.
242. Id.
243. See id. A transcript of a video recorded by civilian witness Humberto Navarrete documents the following: “[Male’s voice] ‘Stop resisting.’” Inda, supra note 192. Ashley Young, who was returning to the United States from Tijuana, videotaped part of the tasing. Ms. Young states that Agent Vales had just arrived with the taser and almost immediately started screaming “‘Stop resisting. Stop resisting.’” However, she and the other civilian witnesses commented on the video that Anastacio is not moving or resisting. Id.
to the point that he is a danger to the twelve agents that surrounded him?

According to Ducoing, after the first Taser shot, the handcuffed Anastacio “stood up” somehow and started yelling again.244 This claim, if true, suggests that Vales provoked actions that appeared to constitute “resisting.” According to Ducoing, however, Anastacio continued to scream, while on his back, and because Anastacio was not “complying with orders,” Vales attempted to “drive stun” Anastacio, an effort to apply the Taser directly against the target’s body.245

Because Anastacio was completely controlled by the crowd of border agents and no danger to the agents, Vales’s gratuitous tasing constituted the wanton and cruel application of pain in violation of law.246 In fact, contrary to the overall claims that Anastacio constituted a threat, one video scene shows a man—presumably an agent in the crowd247—reach in and remove Anastacio’s pants and take them away.248 All the agents had to do was leave him alone; instead, one decided to shock him repeatedly and a few engaged in the extreme recklessness of placing their weight and force on the back and neck of a man being held face down with his hands cuffed behind his back. These actions should place anyone—even lay citizens—on notice that this would obstruct the flow of oxygen to his brain.

Finally, in denial of summary judgment to the federal agents, the federal judge considered whether the plaintiffs’ claims demonstrated a substantial risk of serious harm by forcibly holding Anastacio down for an extended period of time while his hands were cuffed behind his

244. See id.
245. See id.; see also id. at 1178 n.3.
246. This brutal application of electrical shocks against a handcuffed detainee might explain why Vales took the Fifth Amendment privilege to remain silent and not answer questions that might tend to incriminate him. See id. at 1184 n.4 (providing that the question addressed to Vales was whether he received information, as part of his Taser training, that “if the subject stops resisting an officer, the use of the Taser must stop”).
247. This pants-pulling incident occurred in the area controlled by law enforcement agents.
back. The judge also considered acts by the agents of ziptying his legs while his arms were handcuffed behind him, applying a Taser several times, despite knowledge of a substantial risk of serious harm, and the omission and indifference of supervisory officers who failed to prevent or intervene in the tasering of a passive, handcuffed man whom agents placed face down on the ground.

Dr. Wagner’s autopsy of Anastacio’s death resulted in a diagnosis of “anoxic encephalopathy due to resuscitated cardiac arrest, due to acute myocardial infarct, due to physical altercation with law enforcement officers and with contributing facts of hypertensive cardiomyopathy and acute methamphetamine intoxication.” In plain English, the anoxic encephalopathy amounts to a condition where brain tissue is deprived of oxygen, leading to an overall loss of brain function, and a myocardial infarct is a heart attack. Dr. Wagner also mentions hypertensive cardiomyopathy, a medical term for what many Americans simply know as high blood pressure.

However, as applied to Anastacio, one thing is clear: The actions of the agents in their extremely abusive and lengthy engagement would suffice to increase any person’s blood pressure. The fact that Anastacio entered this encounter far outnumbered and with a medical condition of which the federal agents were unaware does not matter as to the impropriety of their conduct. They did not decide their actions on the basis of Anastacio’s weak medical condition or on his use of narcotics. They simply did not know.

In a constitutional tort action, the rule generally is that the tortfeasor takes the victim as he finds him. In a criminal prosecution,
a similar rule applies. In this case, in the event the DOJ obtained an indictment, Anastacio’s preexisting medical condition should not have barred a finding of guilt, but, as with any evidence, it can be a factor to consider in sentencing.255

d. The Potentially Probative Video of Anastacio’s Victimization by Excessive Police Force

The May 28, 2010 actions of federal border agents contributed to Anastacio’s death three days later. Much of this encounter was captured on video, providing evidence of the brutality. A video produced by Ashley Young,256 along with the video demonstrating how agents applied pressure to his back and neck, “provide[] [audio] evidence that Anastacio continued to do no more than ask for help.”257

A voice on one of the videos can be heard yelling, “Ya, déjenlo,” which basically means, “Enough! Leave him alone.”258 Another voice states in English, “Hey! He’s not resisting!” and “Why you guys keep pushing on him? He’s not even resisting!”259 Ignoring the shouting of the bystanders, the actions by the officers in the video sufficed to deprive Anastacio of the oxygen his brain needed to survive.260 That no criminal charges resulted from this custodial beating or his death on United States territory makes the case even more noteworthy.261

jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable . . . ”).

255. 18 U.S.C. § 242 (2012) (“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State . . . to the deprivation of any rights . . . and if death results from the acts committed in violation of this section . . . shall be fined under this title, or imprisoned for any term of years or for life, or both . . . .”).

256. See Estate of Hernandez-Rojas, 62 F. Supp. 3d at 1178. Ashley Young is twice listed, perhaps in error, as Allison Young in the opinion. See id. (stating “[t]he audio of [the] Allison Young videotape” and “the videotape recorded by Allison Young”); see also Death on the Border: Shocking Video, supra note 248.

257. Estate of Hernandez-Rojas, 62 F. Supp. 3d at 1178, 1181; see also Death on the Border: Shocking Video, supra note 248 (showing agents applying pressure to Anastacio’s head and neck).


259. Id.


Civilian witnesses standing on a pedestrian bridge recorded the action and the eerie sounds of Anastacio crying out in pain. The video depicted a mob-like attack on one man and the screams of a person being tortured. The mob consisted of a dozen trained border agents against one handcuffed man unable to defend himself against excessive force. Anastacio can be heard crying out for help in a prolonged and painful-sounding “Noooh.” He then pleads in Spanish with the men surrounding him, who all, ironically, happen to be federal agents: “Ayúdenme, por favor, señores, por favor” (Help me, please, sirs, please). Based upon my bilingual abilities, I can only conclude that Anastacio desperately and ironically begged the other border agents standing nearby to stop the beating their fellow agents exacted upon him!

The several agents included four supervisors who definitely had a higher legal duty to intervene to stop the punitive treatment. Nonetheless, while the civilians took videos of the events and screamed for the agents to stop, CBP Supervisor Ramon De Jesus confiscated bystanders’ telephones and erased photographs and videos. The lower-ranked agents similarly had a legal duty to

263. See Inda, supra note 192.
264. See id.
265. See id.
266. Id. at 1177-78 (explaining that the video recorded by Ashley Young confirms these pleas for help rather than offering resistance). The opinion in these two pages mentions twelve agents present, including supervisors. See id. at 1172 n.1, 1177-78 (listing the dozen agents, including the four supervisors).
267. See id. at 1188 (noting that “officers [nonetheless] have a duty to intercede when their fellow officers violate the constitutional rights” of a suspect or other citizen) (citing Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000)). For a highly-publicized case addressing the legal duty of a supervisor to prevent violations of civil rights deprivations, see United States v. Koon, 833 F. Supp. 769, 774 (C.D. Cal. 1993). The United States government charged Sergeant Stacey C. Koon with willfully permitting the other officers in his presence, and under his supervision, to unlawfully strike with batons, kick, and stomp Rodney Glen King and with the willful failure to prevent the unlawful assault by these officers, all in violation of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody. Sergeant Koon’s conviction rests entirely upon the wrongfulness of his own conduct, that is, his willful refusal to prevent illegal use of force in his presence. Id. at 776. See also John Carlos Frey, What’s Going on with the Border Patrol?, L.A. TIMES (Apr. 20, 2012), http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420 [https://perma.cc/XR4G-E6DY].
intervene. Instead of stopping the brutality, the agents can be seen retreating to allow the Taser-carrying agent to administer his deliberately indifferent, conscience-shocking brutality upon Anastacio. The totality of the evidence indicates that the agents merely had to retreat to allow the handcuffed detainee to calm down from the dreadful baton strikes and the extremely painful first Taser shock. In place of calming Anastacio down, Agent Vales provoked Anastacio to struggle more when he administered additional shocks, opening the door so agents could falsely claim that Anastacio continued to resist and conveniently justify the cruel and unusual infliction of as many as five painful electrical discharges—the last one of these shocks to his bare skin. Not surprisingly, Anastacio’s brain gave up and he died three days later, due in substantial part to the overexertion the agents forced Anastacio to undergo.

In addition to specific acts of violence against particular detainees, border agents have engaged in several situations involving cross-border rock-throwing—where some deaths have occurred.


270. Death on the Border, supra note 248.
271. See id. at 1178.
272. See Inda, supra note 192.
273. Other circumstances might lead a border agent to believe he needed to resort to deadly force. On June 7, 2010, Sergio Adrián Hernández Güereca, a fifteen-year-old Mexican national, was with a group of friends in the cement culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico. Hernández and his friends were playing a game in which they ran up the embankment on the United States side, touched the fence, and then ran back down. Border Patrol Agent Jesus Mesa, Jr., arrived and detained one of Hernández’s friends in United States territory. Hernández ran across the international boundary into Mexican territory and stood by a pillar that supports a bridge. Agent Mesa fired at least two shots across the border at Hernández, fatally striking him in the face. Hernández was unarmed and unthreatening at the time. Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017). Thereafter, the United States
The Department of Homeland Security (DHS) Inspector General began an investigation after sixteen members of Congress expressed concern about whether the incidents epitomized a broader problem within the agency. In some of these matters, federal agents have faced serious questions regarding the use of deadly force against Mexican cross-border rock throwers. Federal investigators reviewed United States Border Patrol policies on the use of deadly force along the border with Mexico and found the use of deadly force against rock throwers to be excessive in many cases, questioning why the agents did not retreat beyond the reach of the rocks to eliminate any possible danger to themselves.

The United States Supreme Court and the Fifth Circuit recently reviewed the propriety of holding a federal officer accountable in a Bivens civil action for shooting at and killing a person on the Mexican side of the river. In Hernandez v. Mesa, the High Court remanded government conducted a review of the use of deadly force in border confrontations. See generally U.S. CUSTOMS & BORDER ENF’T, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 1-6 (2014). The agency promulgated standards for the use of deadly force against fleeing subjects who inflicted or threaten to inflict serious physical injury or death to an officer/agent or to another person as well as circumstances where the escape of the subject poses an imminent threat of serious physical injury or death to the officer/agent or to another person. Id. at 3.

Sarah Childress, Few Answers on Border Patrol Agents’ Use of Force, PBS (Sept. 20, 2013), https://www.pbs.org/wgbh/frontline/article/few-answers-on-border-patrol-agents-use-of-force/ [http://perma.cc/7F7K-XK9K]. Sixteen Democratic members of Congress requested an inspector general’s report that would for the first time define the Border Patrol’s use-of-force policy, but the report, scarce on details and with proposed reforms redacted, failed to answer most of the major questions posed by members of Congress. Id.


See Hernandez v. Mesa, 137 S. Ct. 2003, 2007-08 (2017) (per curiam) (remanding to the Court of Appeals to determine whether the Hernandez family may recover damages for the violent shooting of their son). State criminal and federal Bivens cases involving border agents shooting at rock throwers and others on the Mexican side have been difficult to win based on emotional, evidentiary, and legal impediments. A jury acquitted Border Patrol agent Lonnie Swartz of second-degree murder in the 2012 death of sixteen-year-old Jose Antonio Elena Rodriguez of
the case to the Fifth Circuit for review as to whether the circumstances present a “new context” under Bivens and if numerous “special factors” counsel against a federal courts’ interference with the Executive and Legislative branches of the federal government. The Fifth Circuit responded, stating that the Hernandez v. Mesa case is “not a garden variety excessive force case against a federal law enforcement officer” and the “transnational aspect of the facts presents a ‘new context’ under Bivens, and numerous ‘special factors’ counsel against federal courts’ interference with the Executive and Legislative branches of the federal government.” Considering the forceful and well-reasoned dissent by Justice Breyer in the Mesa case, the 2018 appellate court decision is not likely to be the last word on this recent Bivens interpretation.

B. Violations by State Law Enforcement Officers

Chicano historian Rodolfo Acuña details the endless abuses of Latinos by the Texas Rangers. Regrettably, police abuse continues even though lawless cops have been prosecuted over the years. For these reasons, I impart a pessimistic picture of police–community relations unless attitudes change radically in America. Violence at the hands of the police is an unfortunate, common aspect of Chicano/Latino history. When Latinos speak out or when their population increases, they appear to present a threat, often resulting in

Nogales, Sonora, Mexico. See Perla Trevizo, Feds Mull Retrial After Border Agent Cleared in Mexican Teen’s Killing, ARIZ. DAILY STAR (Apr. 24, 2018), http://tucson.com/news/local/feds-mull-retrial-after-border-agent-cleared-in-mexican-teen/article_276a02ea-3db6-5d97-aba1-fb25a4b98b17.html [https://perma.cc/55ZL-3CW9]. The sixteen bullets fired through the border fence struck Elena Rodríguez eight times in the back and twice in the head. Besides Swartz, three Border Patrol agents have been criminally charged in this same area since 1992, with none of these cases resulting in a conviction. See id.

278. Hernandez, 885 F.3d at 814.
a negative reaction from police and others.\textsuperscript{283} We have also seen that no one, not even a Latino college student, is exempt from excessive force.\textsuperscript{284}

The standard for an excessive force claim under the Fourth Amendment is objective reasonableness from the “perspective of an officer on the scene.”\textsuperscript{285} The Supreme Court, in addressing the Fourth Amendment rights of suspects and the use of deadly force by police to seize fleeing felons, held that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.\textsuperscript{286} When the suspect does not pose an immediate threat to the officer and others, the failure to apprehend him does not justify the use of deadly force.\textsuperscript{287} On the contrary, it is not constitutionally unreasonable to prevent escape by using deadly force where the officer believes that the suspect poses a threat of serious physical harm.\textsuperscript{288}

The negative attitudes among some police officers toward Latinos have endured for a while. The 1942 prosecution in \textit{People v.}

\begin{itemize}
\item \textsuperscript{284} In early April 1979, the jury announced the guilty \textit{Webster} verdict in my criminal civil rights prosecution of Houston police officers. The publicity surrounding the successful prosecution educated the community on the realities of lawless cops. In late April 1979, attorney David T. Lopez convinced a federal jury to return the first known successful civil rights damages claim of brutality against Houston officers. The victims included my law school classmate and friend Daniel Bustamante and several other Chicanos who attended a 1975 going-away party for another friend leaving Houston to work on her Ph.D. degree. Daniel and others at the party went outside to investigate a noise and saw one of the invitees outside on the ground, handcuffed and being kicked by officers. Daniel asked them to stop or they would kill him. He and others then got attacked by officers. Daniel presented a photo of his forehead with a shoe print applied by an officer. I left the party earlier that evening. See Sandra Enriquez, Samantha Rodriguez, & Daniel Bustamante, \textit{Oral History Interview with Daniel Bustamante: Clip One}, PORTAL TO TEX. HIST. (July 1, 2016), https://texashistory.unt.edu/ark:/67531/metapth987495/m1/ [https://perma.cc/Z24Y-TAEC]; Sandra Enriquez, Samantha Rodriguez & Daniel Bustamante, \textit{Oral History Interview with Daniel Bustamante: Clip Two}, PORTAL TO TEX. HIST. (July 1, 2016), https://texashistory.unt.edu/ark:/67531/metapth987495/m1/#track/2 [https://perma.cc/Z24Y-TAEC].
\item \textsuperscript{285} Hernandez \textit{v.} City of Miami, 302 F. Supp. 2d 1373, 1376 (S.D. Fla. 2004), \textit{aff'd}, 124 Fed. App'x 642 (11th Cir. 2004) (citing Pace \textit{v.} Capobianco, 283 F.3d 1275, 1281 (11th Cir. 2002)).
\item \textsuperscript{286} Tennessee \textit{v.} Garner, 471 U.S. 1, 11-12 (1985).
\item \textsuperscript{287} \textit{Hernandez}, 302 F. Supp. 2d at 1376.
\item \textsuperscript{288} \textit{Id.} (citing Tennessee \textit{v.} Garner, 471 U.S. 1, 11-12 (1985)).
\end{itemize}
Zammora\textsuperscript{289} epitomizes police and prosecutorial misbehavior including prejudicial police testimony.\textsuperscript{290} A grand jury indicted seventeen Chicano youth for the murder of another Latino in a case referred to as the largest mass trial for murder in American history.\textsuperscript{291} The appellate court reversed the convictions because the record lacked the legally sufficient evidence of guilt,\textsuperscript{292} and the judge engaged in prejudicial misconduct that conveyed his opinion of guilt to the jury.\textsuperscript{293} A similar police–prosecution collaboration occurred in Houston, Texas in 1982 and contributed to the death sentence of Ricardo Aldape-Guerra in a police killing that his companion committed independently.\textsuperscript{294} Fortunately, the habeas court discovered the misconduct and released him from death row.\textsuperscript{295} The Zammora example of police, prosecutorial, and/or judicial misconduct sadly repeats itself in later death cases involving Latino victims.\textsuperscript{296} Another wartime incident that sparked conflict in the East Los Angeles barrio involved physical confrontations between Chicanos

\textsuperscript{289} See generally People v. Zammora, 152 P.2d 180 (Cal. Ct. App. 1944). The Chicano playwright Luis Valdez documented the 1943 East Los Angeles Zoot Suit Riots for the stage and later served as director of the movie. See Luis Valdez, Zoot Suit and Other Plays; see also Zoot Suit (Universal Pictures 1981). The movie incorporates the real-life injustice suffered by a score of Mexican–American youth in a murder case where the prosecutor did not have the legally required proof to prove their criminal case. See id.

\textsuperscript{290} See Zoot Suit Riots: Racism Underlies Week of Violence in Los Angeles, SUN (June 1, 2013, 12:00 AM), https://www.sbsun.com/2013/06/01/zoot-suit-riots-racism-underlies-week-of-violence-in-los-angeles/ [https://perma.cc/ZW3F-3URA]. A Los Angeles County Sheriff’s Captain appeared before the People v. Zammora grand jury and compared Mexican Americans to a race that was of the “‘Oriental persuasion’ . . . who liked to fight”; “All he knows and feels is a desire to use a knife or some lethal weapon. In other words, his desire is to kill, or at least let blood.” Id. The United States had earlier that year declared war against the Japanese.

\textsuperscript{291} See Roger Daniels & Harry H. L. Kitano, American Racism: Exploration of the Nature of Prejudice 74 (1970).

\textsuperscript{292} See Zammora, 152 P.2d at 197-99.

\textsuperscript{293} See id. at 202, 214.


\textsuperscript{295} See id. at 620. Richard Bax, one of the prosecutors in the 1982 trial, admitted at the habeas hearing that the physical evidence “totally pointed towards [Aldape-Guerra’s companion] as being the shooter.” Id. at 630 n.7 (showing that the habeas opinion utilizes the victim’s maternal last name of Guerra instead of Aldape-Guerra, both parental names).

\textsuperscript{296} See, e.g., United States v. Denson, 588 F.2d 1112 (5th Cir. 1979) (deciding the case of the drowning death of Jose Campos Torres); see Salinas, supra note 3, at 212 (noting that the Zammora defendants and Aldape-Guerra could theoretically be guilty of murder if the evidence existed that the accused men aided or otherwise encouraged the person who killed the victims).
wearing zoot suits and sailors on shore leave. During the beatings by military men and civilians of Latino men, the Los Angeles Police Department (LAPD) basically declared the crisis to be a military matter while the military police claimed they lacked jurisdiction on civilian turf. 297 Time Magazine reported that LAPD officers accompanied the military taxi caravans in police cars, watched the beatings, and then jailed the victims. 298

All blatant violations of one’s civil rights must be prosecuted in order to deter lawless cops, even if the assault does not result in death. As the 1943 Los Angeles attacks indicate, police historically display a low level of respect for Mexican people. Also, to set the record straight, civil rights violations are not always racially motivated. 299 For example, during my federal prosecutorial days, I tried several cases in South Texas along the Mexico border where Latinos served the role of both the accused cop and the victim. 300

1. The Plan de San Diego and the Racially Motivated Retaliation Against Mexicans

In 1915, the Rio Grande Valley of Texas experienced a brief revolt by mostly United States-born Latinos who supposedly sought to reclaim the area for Mexico. Within a month, the uprising quickly ended, but then a frenzy of shootings and lynchings by Texas Rangers and local Anglo vigilantes raged across the Rio Grande Valley for years, accumulating a death toll of over 3,000 lives. 301 The rebellion aggravated race relations, further perpetuating Latino–Anglo segregation in housing, schools, restaurants, swimming pools, and other public accommodations through the 1970s.

297. See ACÜA, supra note 280, at 203-08. The anti-Latino racial malice can be seen in the various news media reports. The Los Angeles Herald Express reported that 200 Navy men formed a task force and launched a reprisal attack on zoot suit “gangsters.” See MORALES, supra note 281, at 16.
298. See MORALES, supra note 281, at 16.
300. Exemplary cases include United States v. Morales, 675 F.2d 772 (5th Cir. 1982), where the Chief of Police of La Joya, Texas committed perjury when he denied assaulting a handcuffed Latino prisoner (a fellow officer taped his admission); United States v. Contreras, 693 F.2d 132 (5th Cir. 1982), where a Hidalgo, Texas police officer in this border town conspired with Mexican officials to conduct a false arrest, abduction, and forceful removal into Mexico.
301. See McLemore, supra note 42, at A1.
The San Diego rebellion began when armed rebels attacked an Anglo’s ranch, killing him and his adult son. Scattered attacks continued over the next few months. Anglos created vigilante groups while large landowners asked the governor for assistance, and the Texas Rangers responded by launching a reign of terror in which being “Mexican” sufficed for being a criminal and a threat to Anglo life. Both the guilty and the innocent were turned over to the Rangers with very few arrestees actually reaching the jail. Instead, lynchings and impromptu firing squads became common with the bodies of the dead left as a means of teaching other Latinos a lesson about what happens to those who threaten the status quo.

Although the rebel attacks ended in 1915, Ranger and continued vigilante attacks and lynchings prompted Brownsville State Representative J.T. Canales to demand an end to Ranger oppression. In 1918, he filed nineteen charges against Texas Ranger violence and demanded a reorganization of the force. In response, a Ranger threatened the legislator, and Canales opted not to seek reelection in 1920. Nonetheless, witnesses gave testimony for two months about Ranger brutality as a result of the San Diego revolt.

2. Medrano v. Allee—The Farm Workers and the Texas Rangers

Eventually, the so-called “sleeping giant,” as sociologists and others have labelled the Mexican people, awakened and began to

302. See id.
303. See id.
304. See id.
305. See id.
307. See id.
308. See id.
309. In an apparent effort to terrorize the Latino population, Rangers at times eliminated innocent persons in a process which became known as “revenge by proxy.” See FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS, supra note 59, at 153-54.
demand fair pay. Anglo and some well-to-do Latino ranchers did not deem it appropriate for “Mexicans,” especially the predominantly poor farmworkers of the Rio Grande Valley in Texas, to make such demands. During a one-year period beginning in June 1966, the United Farm Workers Organizing Committee recruited predominantly Mexican-descent agricultural workers to join the union. After a railroad bridge suffered partial burn damage, the ranch company called the Texas Rangers for assistance.

Latino exploitation continued through the early 1970s when a three-judge federal court panel in *Medrano v. Allee* applied provisions of the federal Civil Rights Act to prohibit abuses by the Rangers. *Medrano* ordered the termination of the state prosecutions of the farm workers and their companions and also enjoined the Rangers from interfering with labor disputes. As a result of the union-busting tactics by the Rangers, along with other law enforcement agents and public officials, the court granted farmworkers and their supporters First and Fourteenth Amendment free speech protections.

The abuses included the arrest of a minister and others who organized pickets and the subsequent endangerment of the minister and union member Magdaleno Dimas by holding their faces inches from a passing train. The leader of the Ranger pack, Captain A.Y. Allee, had a streak of intolerance towards Latinos, particularly those who challenged his authority. When Rangers went to Dimas’ home to arrest him, Allee did so by breaking into the house and arresting Dimas and a friend in a fashion described in the court opinion as “violent and brutal.”

“Captain Allee admitted that he struck Dimas on the head with his shotgun barrel,” but, as later described, he then testified “that

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312. See *id.* at 612.
313. See *id.* at 609, 634.
316. See *id.* at 610, 634.
317. See *id.* at 615.
318. See generally *Lopez v. Allee*, 493 S.W.2d 330 (Tex. Civ. App. 1973). In a 1971 incident, Allee struck a grocery store cashier, Abel Lopez, claiming Lopez was about to strike him. More credibly, the attack occurred because the Latino had the “audacity” to differ with Mr. Allee over the price of a bottle of water.
neither man was hit or kicked at all except for that one blow.” 320 Allee further claimed “that both men fell when they attempted to run from the room and collided with a door and each other.” 321 Dimas was hospitalized for four days with a concussion. 322 X-rays revealed that he had suffered such a hard strike to his back that his spine was curved out of shape. 323 The judge expressed serious doubts that two grown men could suffer the extensive injuries in the fashion described by Allee. 324

3. Los Angeles and the Reputation for Lawless Police Behavior

Since time immemorial, Los Angeles has been known for its unprofessional and sometimes clearly racist police actions. 325 Police misconduct in Los Angeles easily preceded the 1948 execution of seventeen-year-old Augustin Salcido by Officer William J. Keyes. 326 Keyes, who had a reputation for shooting Mexicans, allegedly boasted of “having 12 notches on his gun.” 327 Even though Keyes had a police partner, he still strangely pulled his gun and killed Salcido with several shots to the head, one of them at such a close distance that his head

320. Id. at 617.
321. Id.
322. See id.
323. Id. (testifying that the X-ray negatives revealed the spine damage and misshapen appearance).
324. See id. While Latinos finally began to find court protections in the post-1960 era, civil and human rights did not exist for this ethnic group in earlier years. Early Anglo-Mexican relations reveal extreme violence directed against Mexicans in Texas. See David Montejano, Anglo and Mexican in the Making of Texas, 1836-1986, 26-37 (1987). The controversies often centered on Anglo desires to acquire land, cattle, and other livestock. Regarding Latino brutality, Texas Rangers ranked high among police outlaws who abused and misused their authority. See generally Paredes, supra note 41. Land primarily served as the motive for Ranger involvement in fatal shootings of two members of the De La Cerda family in Brownsville. See Acuña, supra note 280, at 40. A rare murder charge resulted against a Ranger. Id. Coincidentally, the King Ranch interests, specifically Richard King and Major John Armstrong, made the bond for the Ranger’s release. Id.
325. See, e.g., David Freed, Police Brutality Claims Are Rarely Prosecuted, L.A. Times (July 7, 1991), http://articles.latimes.com/1991-07-07/news/mn-3054_1_police-brutality/2 [https://perma.cc/6ERF-3BZZ]. For example, after Los Angeles police officers ransacked the Larez family home and broke the owner’s nose in the process, former LA Police Chief Daryl F. Gates suggested publicly that Larez was lucky the officers only broke his nose. Id. The jury ordered $170,000 in punitive damages against Gates personally. Id.
326. See Guy Endore, Justice for Salcido 5 (1948)
wound had powder burns.\textsuperscript{328} Within a few days, the Coroner’s inquest returned a finding of “Justifiable Homicide” after five minutes of deliberation.\textsuperscript{329}

4. Ruben Salazar, Former Los Angeles Times Columnist—The Anti-Vietnam Moratorium

On August 29, 1970, another police encounter in Los Angeles led to the death of prominent journalist Ruben Salazar.\textsuperscript{330} On the day that Salazar died, the National Chicano Moratorium Committee, led by Rosalío Muñoz, the UCLA student body president, organized a march against the war in Vietnam. Rodolfo Acuña and thousands of others participated. Acuña was arrested and observed police mace persons detained in a police bus.\textsuperscript{331} Acuña wrote an account in which Dr. James Koopman, UCLA Medical School, witnessed “a row of gold helmets marching across the park.”\textsuperscript{332} Photographs taken by two La Raza newspaper photographers show persons with the helmets that Koopman described.\textsuperscript{333} In addition, those photographs corroborate that the police confronted the people at the Silver Dollar Café, the location where Salazar had sought refuge.

Salazar entered the café with two others from KMEX, the television station where he worked.\textsuperscript{334} The tear gas police fired into the building forced people out.\textsuperscript{335} When Salazar’s colleagues begged the officers to let them check on Salazar, the deputies refused to acknowledge their request.\textsuperscript{336} Two hours later they found Salazar’s lifeless body.\textsuperscript{337} The tear gas projectile fired by the deputy struck the forty-two year old Salazar in the head, killing him.

\textsuperscript{328} See ENDORE, supra note 326, at 13.
\textsuperscript{329} Id. at 5.
\textsuperscript{331} See ACUÑA, supra note 280, at 260.
\textsuperscript{332} Id. at 259-60.
\textsuperscript{333} See MORALES, supra note 281, at 100.
\textsuperscript{334} See ACUÑA, supra note 280, at 260.
\textsuperscript{335} See id.
\textsuperscript{337} See ACUÑA, supra note 280, at 260.
instantly.\textsuperscript{338} Salazar’s death regretfully became just another moment of injustice involving Los Angeles’s Latino population.

5. Santos Rodriguez of Dallas, Texas—The Death of a Twelve-Year-Old Handcuffed Kid

Dallas police officer Darrell Cain shot Santos Rodriguez, a twelve-year-old kid, while pointing his service weapon at the kid’s head to coerce a confession.\textsuperscript{339} The gun discharged and killed the boy.\textsuperscript{340} The jury found the officer guilty of murder with malice, but they only assessed the minimum five-year sentence.\textsuperscript{341}

The following details led to the boy’s grossly unjustifiable death. The incident began when Officer Arnold observed the Rodriguez brothers behind a service station.\textsuperscript{342} Over the police radio, the officer, who recognized the boys from a prior contact, issued their description and their home address.\textsuperscript{343} That the opinion is silent as to probable cause indicates that the officer must have speculated that the boys had done something wrong.

Officer Arnold arrived at the Rodriguez home about the same time as Officer Cain. The two entered the house and arrested the two juveniles.\textsuperscript{344} David Rodriguez, Jr., a thirteen-year-old, claims the

\textsuperscript{338} See L.A. Cty. Office of Ind. Review, supra note 330, at 2. Deputies had allegedly received reports that a man with a gun had entered the restaurant before the officer aimed and discharged the tear gas canister. See id.Shortly before his death, Salazar and his KMEX crew launched an investigation into LAPD officers and sheriff’s deputies for allegedly planting evidence on suspects and engaging in brutality in the Latino Eastside. See id. LA police agents visited the station and “warned” Salazar about the impact the coverage would have on the department’s image and how this “kind of information could be dangerous in the minds of barrio people.” Robert J. Lopez, Records Show Salazar Had Clashed with LAPD, L.A. Times (Aug. 29, 2010), http://www.latimes.com/archives/la-xpm-2010-aug-29-la-me-salazar-20100829-story.html#share=email-story [http://perma.cc/3QXF-ZPDU]. Evidence planting continued in the LAPD. See L.A. Cty. Office of Ind. Review, supra note 330, at 8. The tear gas projectile fired by the deputy directly into the café had the force to penetrate walls. See id. at 7.


\textsuperscript{340} See id.

\textsuperscript{341} See id.

\textsuperscript{342} See id.

\textsuperscript{343} See id.

\textsuperscript{344} See id. With regard to the Rodriguez brothers being seen behind a gas station, that is insufficient information alone to warrant probable cause of having committed a burglary, thus, making the seizure without a warrant unreasonable. See generally U.S. Const. amend. IV. The entry into the house without a warrant is even
officers arrived and handcuffed them behind their backs, placing them under arrest.\textsuperscript{345} Santos was placed in the front seat of the patrol car with Officer Arnold, and David was placed in the rear seat with Officer Cain.\textsuperscript{346}

They were then taken to the service station.\textsuperscript{347} At the trial, David testified that Officer Arnold asked Santos about a third person that had been with them at the station, and Santos replied that they had not been at the station earlier.\textsuperscript{348} David further described how Officer Cain took out his pistol, opened the cylinder, and twirled it.\textsuperscript{349} David could see bullets in every chamber of the cylinder. Cain then shut the cylinder and aimed it at Santos’s head. David observed no attempt to unload the pistol.\textsuperscript{350}

Dallas Police Officer Jerry Foster responded to the police broadcast and went to the service station.\textsuperscript{351} Officer Arnold’s vehicle then arrived with Officer Cain and the two brothers. Officer Foster walked over to Arnold’s vehicle and laid his arm on the door just as a shot rang out. Foster saw the kid’s head drop and blood coming out the side. Cain screamed and jumped out of the car, stating, “My God, My God, What have I done, I didn’t mean to do it.”\textsuperscript{352}

Within eight to ten seconds after the shot, and four or five seconds after Cain exited the car, Foster took Cain’s pistol away from him. Foster did not see Cain open or reload the pistol.\textsuperscript{353} When he unloaded the pistol, Foster found five live rounds and one empty cartridge.\textsuperscript{354} Cain testified at trial that, when Santos denied committing the burglary to Arnold, he offered to “make him tell the truth,” adding that he then stuck his pistol down between his legs, unloaded the bullets, and placed them between his legs, glanced at the cylinder, and

more egregious under Fourth Amendment standards. \textit{See generally} Florida v. Jardines, 569 US 1 (2013) (describing officers, acting on an unverified tip of a defendant growing marijuana in his home, taking a drug-sniffing dog onto the front porch to seek incriminating evidence; this constituted a Fourth Amendment search of the home’s curtilage, unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search).

\textsuperscript{345} \textit{See Cain}, 549 S.W.2d at 709.
\textsuperscript{346} \textit{See id.}
\textsuperscript{347} \textit{See id.}
\textsuperscript{348} \textit{See id.} (noting Officer Foster claims he yelled out to Arnold as he arrived with the boys that there was supposed to be a third person).
\textsuperscript{349} \textit{See id.}
\textsuperscript{350} \textit{See id.}
\textsuperscript{351} \textit{See id.}
\textsuperscript{352} \textit{Id.}
\textsuperscript{353} \textit{See id.}
\textsuperscript{354} \textit{See id.}
saw no bullets. He then pointed the gun at Santos, told him to tell the truth, and pulled the trigger. The pistol clicked. Cain again told Santos to tell the truth and that there was a bullet in the gun. He pulled the trigger and the gun went off. He jumped from the car, screaming and crying. Cain further testified that he picked up the removed bullets from his lap before leaving the car. He added that he reloaded the pistol before it was taken from him.

The jury obviously did not accept Cain’s testimony. Foster never saw Cain reload, adding that he checked and found Cain’s gun with five bullets and one empty cartridge. The murder with malice verdict returned by the jury clearly shows that the jury did not believe Cain’s story! An officer dusted for fingerprints at the service station and found that the prints recovered did not belong to the Rodriguez brothers.

6. United States v. Hayes—The Unlawful Arrest and Shooting of Richard A. Morales

United States v. Hayes involved a state prosecution for murder and thereafter for a separate federal civil rights violation, demonstrating another outrageous episode in law enforcement history. On September 14, 1975, Frank Hayes, Chief of Police of the Castroville Police Department in Medina County, Texas, directed Officer Donald McCall to serve a misdemeanor arrest warrant on Richard A. Morales. He also ordered McCall to obtain the serial numbers from a stereo and television set at the Morales residence in order to determine whether these items had been stolen. McCall arrested and handcuffed Morales.

Without a warrant, McCall then conducted a search of the serial numbers from the television and stereo. About this time, Hayes arrived

355. Id. at 711.
356. See id.
357. See id.
358. See id. at 709. Another officer testified that he dusted the service station for fingerprints and confirmed that none matched the Rodriguez brothers. Id. at 710-11.
359. See id.
360. See id. at 710-11.
361. See generally United States v. Hayes, 589 F.2d 811 (5th Cir. 1979).
362. See id. at 815.
363. See generally id. Hayes did not have a search warrant. As a result, the search and seizure of information from his residence violated the Fourth Amendment. U.S. CONST. amend. IV; see also id.
at the Morales residence in his personal car. Hayes called Morales a “thieving son of a bitch,” told him numerous times that he was going to kill him and struck him in the stomach with his fist.\textsuperscript{364} Everyone then left Morales’ s residence in two separate vehicles. They proceeded several miles to a gravel road in a deserted area. During the trip, Hayes instructed McCall to tell Morales that Hayes would kill him if he did not reveal the location of stolen merchandise.\textsuperscript{365}

Once the officers stopped, Hayes directed that all lights be extinguished, took possession of a double-barreled, twelve-gauge shotgun, and struck Morales in the stomach with the breach of the shotgun.\textsuperscript{366} Hayes then stated that he had killed one “Mexican” and was “fixing to kill” another one.\textsuperscript{367} Hayes directed McCall to remove the handcuffs, and he then told everyone to leave the scene. Hayes then questioned Morales further and pushed him with the butt and then the barrel of the shotgun.\textsuperscript{368} Morales allegedly pushed the barrel of the gun aside and stepped back. As stated in the opinion, the “shotgun discharged, killing Morales.”\textsuperscript{369} As Hayes promised, he succeeded in killing another Mexican.\textsuperscript{370}

The rest of this horrific story involves concerted efforts by Hayes and his family to cover up the allegedly “accidental” shooting.\textsuperscript{371} The first act involved a false statement to the Medina County Sheriff that Morales had escaped.\textsuperscript{372} The second aspect of the conspiracy to obstruct justice involved removal of the corpse 400 miles away to Panola County where Hayes’ s wife and her sister buried the body.\textsuperscript{373} Police apprehended the two women while disposing of bloody garbage bags and shovels from the trunk of the car. Mrs. Hayes later admitted her efforts to help her husband and then directed law enforcement officials to the location of the grave, although she claimed she buried Morales to “preserve” the evidence!\textsuperscript{374}

A Medina County grand jury indicted Frank Hayes for the offense of capital murder, which was later reduced to murder.\textsuperscript{375} At the

\begin{footnotes}
\item 364. See id. at 815.
\item 365. See id.
\item 366. See id.
\item 367. See id.
\item 368. See id. at 815-16.
\item 369. Id. at 816.
\item 370. See id.
\item 371. Id.
\item 372. See id.
\item 373. See id.
\item 374. Id.
\item 375. See id.
\end{footnotes}
trial, the jury instead found Hayes guilty of aggravated assault and assessed a ten-year prison sentence. A federal grand jury then returned an indictment charging Frank Hayes with depriving Richard A. Morales of his right to liberty without due process of law, resulting in his death.\textsuperscript{376} A jury found Officer Hayes guilty, and the federal judge later sentenced Hayes to life imprisonment.\textsuperscript{377}

On appeal Hayes claimed a violation of his Fifth Amendment right not to be tried twice for the same offense. The Fifth Circuit affirmed the conviction, rejecting his double jeopardy claim.\textsuperscript{378} In 1959, the Supreme Court had clearly established that there is no constitutional bar to successive state and federal prosecutions for the same criminal conduct that violates two separate federal and state statutes.\textsuperscript{379}

In addition, the Court reasoned that to prohibit consecutive prosecutions would enable one sovereign government to interfere with the administration of the other’s criminal law.\textsuperscript{380} This “dual sovereignty” concept provides that two sovereigns, here the state of Texas and the United States federal government, derive power from different sources. Each government determines what shall be an offense against its peace and dignity. Accordingly, an act denounced as a crime by both national and state sovereigns is an offense against the peace and dignity of both and therefore may be punished by both.\textsuperscript{381}

Hayes also questioned the propriety of being held responsible for the death of Morales since he allegedly did not intend to kill him.\textsuperscript{382} The Fifth Circuit responded by stating that “Hayes’[s] argument, unlike his shotgun, hits wide of its mark.”\textsuperscript{383} The court affirmed the conviction for violating Morales’s civil rights.\textsuperscript{384} Hayes further contended on appeal that the statute requires “a willful intent to do the act which causes the resulting death, and a willful intent to cause the death of the victim.”\textsuperscript{385} The court disagreed, holding that the 1968

\begin{itemize}
\item \textsuperscript{376} See id.
\item \textsuperscript{377} See id. at 817.
\item \textsuperscript{378} See id. at 818. The Fifth Amendment of the United States Constitution provides that no person shall twice be placed in jeopardy for the “same offense.” U.S. CONST. amend. V.
\item \textsuperscript{380} See United States v. Lanza, 260 U.S. 377, 382 (1922).
\item \textsuperscript{381} See id.
\item \textsuperscript{382} See Hayes, 589 F.2d at 820.
\item \textsuperscript{383} Id.
\item \textsuperscript{384} See id. at 822.
\item \textsuperscript{385} Id.
\end{itemize}
amendments altered the statute only to the extent of requiring the additional element that death followed as a proximate or foreseeable result of Hayes’s willful violation of Morales’s rights.\textsuperscript{386}

The Fifth Circuit in Hayes dictated that a person should be held accountable for his actions if he acts willfully “in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.”\textsuperscript{387} Finally, the court concluded that the more severe punishment prescribed for those § 242 violations resulting in death is clearly designed to deter the type of conduct that creates an unacceptable risk of loss of life. The court found that the “risk of death resulting from being struck in the stomach with the breach, butt, and then the barrel of a loaded double barreled twelve-gauge shotgun is precisely such an unacceptable risk. Loaded guns are designed to injure and kill.”\textsuperscript{388} The majority opinion added:

No matter how you slice it, “if death results” does not mean “if death was intended.” To hold otherwise would make a mockery of the statute. Can it be seriously argued that a police officer, determined only to extract a confession from a prisoner, who inflicts a fatal wound in the persuasion process, has not committed the type of offense which Section 242 was designed to proscribe?\textsuperscript{389}

The Hayes opinion indicated a promising future for the development of the law in the criminal civil rights area and of policy decisions within the DOJ. However, recent decisions, primarily at the federal administrative level, have contributed to limited enforcement of criminal statutes enacted in the post-Civil War era.\textsuperscript{390}

7. United States v. Denson—The Beating and Drowning of Jose Campos Torres

In the Jose Campos Torres drowning case, Houston police labeled this United States citizen and Vietnam War veteran a “wetback.”\textsuperscript{391} Sure, Torres was not acting like a model citizen, but that

\textsuperscript{386} Id. Hayes claimed that the indictment was insufficient because it failed to charge Hayes with intentionally causing the death. See id.

\textsuperscript{387} Id. at 821 (citing Screws v. United States, 325 U.S. 91, 105 (1945)).

\textsuperscript{388} Id.

\textsuperscript{389} Id.

\textsuperscript{390} See, for example, the 2012 decision by the Criminal Section of the DOJ Civil Rights Division to decline charges against any of the border federal agents who engaged in excessive force and punitive tasing of a handcuffed Anastacio Hernandez-Rojas. Dep’t of Justice, supra note 213.

\textsuperscript{391} See Curtis, supra note 23. Denson stated, “Let’s see if the wetback can swim.” Id.
did not permit the police to become his “judge, jury, and executioner,” particularly when our law mandates constitutional respect for all persons, even undocumented persons. However, in the dark of night, near the criminal courthouse in downtown Houston, Texas, Torres drowned when lawless cops pushed him into Buffalo Bayou.

A bar owner in a Houston barrio called police because a young Latino male, Jose Campos Torres, was creating a disturbance. Police arrived and arrested Torres for public intoxication. Evidence at a state and later a federal trial established that Torres, dressed in combat boots and army fatigue pants, had a highly intoxicating blood-alcohol concentration of .22 in his system. The details of Torres’s attire make the actions of the officers even more atrocious because the additional weight of his clothing would guarantee drowning beyond all doubt.

Once arrested and placed in the rear of a police car, Torres became a pest, cursing and kicking the windows while police chatted nearby. One of them brandished his new service revolver, and another remarked the gun would be excellent for shooting “wetbacks” as they swam across the Rio Grande River. Unfortunately, these insensitive and racist comments set the stage for what was to come.


393. United States v. Otherson, 637 F.2d 1276, 1281 (9th Cir. 1980).

394. See Curtis, supra note 23. Of the six officers at the scene, one abstained from participating or encouraging Denson in pushing Torres into the bayou. See id. Officers of the law may only enforce the public intoxication and disorderly conduct statutes by arrest. Once the person accused goes to court, the judge will decide what punishment should be administered. The law at the time limited the penalty to a fine only. Arresting officers are not given the discretion or authority to conclude guilt and assess their own style of punishment. U.S. Const. amend. V, ratified in 1791, provides that no person shall be “deprived of life, liberty or property without due process of law;” U.S. Const. amend. XIV, ratified in 1868, uses the same eleven words and is referred to as the Due Process Clause.

395. In the indictment, the victim is listed as Joe Luna Torres, Jr., apparently the name on his birth certificate.

396. See id. (describing Torres’ actions after he got arrested).

397. See id.

398. See Lupe Salinas, Latinos and Criminal Justice in Texas: Has the New Millennium Brought Progress?, 30 T. Marshall L. Rev. 289, 325 n.210 (2005). In the state trial final arguments, prosecutor Erwin Ernst, who had an excellent reputation for fairness, emotionally asserted the officers who surrounded and beat Torres had formed a “Ring Around the Wetback.” Id.
The police took Torres to “The Hole” in retaliation for the car damage the extremely drunken Torres had attempted and to teach him a lesson. The Hole was a secret police hideaway in downtown Houston, a mere two blocks from the criminal courthouse where I worked as a state prosecutor. The Hole was located then next to an office furniture building and practically hidden from street-level view. There, five of the six police officers beat Torres with clubs and flashlights on the night of May 4, 1977.399 One of the officers, Carless Elliott, a rookie and son of a high-ranking detective, did not participate in the assault.

After the beating, Officer Stephen Orlando took Torres to the Houston City Jail to book him.400 However, the sergeant on duty refused to admit Torres because of his bloody condition. The sergeant instead directed Orlando to take Torres to Ben Taub, the public hospital, but he disregarded the instructions to provide medical care.401 Instead, Orlando directed his previous companions by police radio to meet him for the second round at The Hole.402

Once all six officers reconvened at The Hole, Orlando, Denson, and a few other officers removed Torres’ handcuffs and escorted him to the edge of the parking lot overlooking Buffalo Bayou. Some officers, including Stephen Orlando, claimed that Officer Denson pushed Torres into the bayou; others, including Orlando, who later changed his story, claimed Torres jumped in.403 Either way, the officers’ threatening actions caused Torres to end up in the bayou, in his extremely drunken and beaten condition.

Torres’ bloated body surfaced a few days later—on Mother’s Day 1977.404 The reference to The Hole and the fact that it was a popular location for some officers could only arouse one’s interest. In fact, during the federal deliberations, the jury requested a view of The Hole, but Judge Sterling denied their request for the opportunity to get a look at what was being described.405 One can only speculate as to the judge’s reasoning, but considering the judge’s later-expressed

399. See Curtis, supra note 23, at 10.
400. See id. at 11 (describing the officer’s conduct after the beating).
401. See id. at 10 (discussing Officer Orlando’s decision to let Torres go, rather than spend hours in the hospital).
402. See id. at 11 (explaining the officers’ decision to return to The Hole).
403. See Salinas, supra note 398, at 325.
sympathy for the officers in sentencing, it appears that the more credible explanation for the denial of the jury request centered on the concern that the jury would more readily imagine what a horrific midnight visit to The Hole it must have been for Torres as the cops encircled him, beat him, and later marched him to the edge of the bayou to drown him.

Officer Elliott, the only one who abstained from beating Torres, reported the incident to his father, Louis Elliott, a high-ranking officer in the department.406 Elliott had been requested by those involved not to say anything until after they got their stories straight. The two Ellotts immediately reported the crime to Houston Police Department Chief Pappy Bond, who took decisive action and personally arrested Terry Denson and fired the five officers involved in the brutality.

The Hole likely derived its name because the lot was out of public view from the street. Many courthouse personnel frequented it but not in the same fashion as some police officers who used it as an evening hangout. Located near the criminal courthouse, during the day The Hole served as a parking lot for lawyers and court staff.407 A ramp from Commerce Street down to the dock level served as the entrance. Located on the edge of Buffalo Bayou, the lot’s downward slope towards the body of water raised at least minor apprehensions about failing car brakes. From the parking lot, one could see the side of the Wilson office furniture building, the ramp leading up to the street, and the bayou below. Very little, if any, of the activity could be observed on the street.

Ted Poe, a prosecutor who had a reputation of never having lost a case, was one of the two prosecutors for the state murder trial.408 I had the honor of serving as his immediate subordinate prosecutor in a felony district court during my first assignment at that level in 1975. Poe later became a criminal court judge, and we served together again on the criminal bench.409 However, his prosecutorial charm did not work with the Torres case that ended in a negligent homicide verdict,

406. Stephen Orlando also had family working with HPD. His father served as a Homicide Division detective and his mother worked as a civilian in the dispatcher’s section.

407. During my early years with the District Attorney, I parked for free at The Hole.

408. See Wilson, supra note 405, at 254 (explaining that Ted Poe, who never lost a felony case, led the prosecution team).

409. Ted Poe surfaces again in this Article because, as a Member of Congress, he engaged in efforts to pardon lawless agents who shot an unarmed drug dealer who escaped from them. They then engaged in fraudulent activities.
shocking the public with a result that appeared to disregard the key evidence of knowledge and intent that death would occur.

Within two weeks of the state verdict in the Torres killing, J.A. “Tony” Canales, the United States Attorney for the Southern District of Texas, and his newly established Civil Rights Division, took the Torres death case to a federal grand jury. Only nine days after the state verdict, the federal grand jury returned a four-count indictment on October 20, 1977. The primary and most serious charges accused former Houston police officers Terry Wayne Denson, Stephen Orlando, Joseph James Janish, and Louis Glenn Kinney with violations of the civil rights deprivation and conspiracy statutes.

Count one of the indictment, the most serious charge, accused Officers Denson, Orlando, Janish, and Kinney with conspiring to injure, oppress, threaten, and intimidate Torres in the free exercise of his constitutional right not to be deprived of liberty without due process of law.\(^\text{410}\) The charge claims the officers struck Torres while he was handcuffed and that Denson pushed Torres into Buffalo Bayou in Houston, Texas. Count two charged Denson and other officers with willfully striking Torres, thereby infringing upon his constitutional right to due process of law. Count three alleged that Denson, aided and abetted by others, willfully assaulted Torres by pushing him into Buffalo Bayou, thereby infringing upon his constitutional right to due process of law, an act which resulted in Torres’s death.\(^\text{411}\) Finally, count four charged Denson and others with conspiring to prevent rookie officer Carless E. Elliott from communicating information about the civil rights violations.\(^\text{412}\)

The federal prosecution commenced in January 1978. After a fifteen-day jury trial, on February 8, 1978, the jury found Defendants Denson, Orlando, and Janish guilty on counts one and two of the indictment.\(^\text{413}\) Count one prescribed imprisonment for any term of years or for life.\(^\text{414}\) Regardless of the role each officer played or the extent of their participation in the brutality, United States District Court Judge Ross Sterling sentenced each defendant identically. As to count one, Judge Sterling assessed ten years imprisonment with the execution of the sentence suspended for five years. On count two, the

\(^{410}\) See United States v. Denson, 588 F.2d 1112, 1114 (5th Cir. 1979).
\(^{411}\) See id.
\(^{412}\) Id. at 1114-15.
\(^{413}\) Id. at 1115.
judge assessed a sentence of imprisonment for one year, additionally ordering that the sentences be served consecutively.\textsuperscript{415}

Thereafter, the United States Attorney appealed the probation issue to a three-judge panel of the Fifth Circuit Court of Appeals. The panel concluded that Judge Sterling exceeded his authority in suspending execution of the sentence by placing defendants on probation, concluding that probation is not available for any crime “punishable” by death or life imprisonment, but the panel declined to issue a writ of mandamus.\textsuperscript{416}

As to the mandamus issue, the \textit{en banc} appellate court reversed the panel and granted the writ, but the majority declined to assign the sentencing hearing to a different judge.\textsuperscript{417} Some judges expressed concern that upon resentencing, the district court “could simply sentence Defendants to one-year imprisonment on Count One to run concurrently with a one-year sentence on Count Two,” thus rendering issuance of a writ “a futile gesture.”\textsuperscript{418} In dissent, Judge Goldberg urged resentencing by a different judge since Judge Sterling had already declared that one year’s imprisonment constituted an appropriate sentence.\textsuperscript{419}

8. Larry Ortega Lozano, Ector County (Odessa), Texas Sheriff’s Department, January 1978

Odessa police arrested Larry Ortega Lozano for failing to show his driver’s license after a minor traffic accident to which he admitted to being the driver.\textsuperscript{420} Lozano displayed erratic behavior during his initial contact with police, acting first cooperatively before becoming aggressive.\textsuperscript{421} His mental aberrations continued during the booking process, and police apparently used excessive force in reaction to Lozano’s aggressive behavior. The sheriff evidently knew of Lozano’s condition, and he demonstrated this knowledge when he personally placed the order for a mental health representative to assess Lozano’s condition.\textsuperscript{422}

\begin{itemize}
\item \textsuperscript{415} United States v. Denson, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc).
\item \textsuperscript{416} United States v. Denson, 588 F.2d 1112, 1116, 1129 (5th Cir. 1979).
\item \textsuperscript{417} See id. at 1149.
\item \textsuperscript{418} Denson, 603 F.2d at 1148-49 (citing Denson, 588 F.2d at 1131).
\item \textsuperscript{419} See id. at 1148-49 (Goldberg, J., dissenting). The strange sentencing behavior by Judge Ross Sterling is discussed \textit{infra} Subsection IV.A.3, in the section on Revictimization.
\item \textsuperscript{420} Lozano v. Smith, 718 F.2d 756, 757 (5th Cir. 1983).
\item \textsuperscript{421} See id. at 757-58.
\item \textsuperscript{422} See id. at 759.
\end{itemize}
The caseworker reported that Lozano “was in terrible physical condition. His face was black and blue and so swollen his eyes were shut. He kept lifting his eyelids with his fingers so he could look at me.”\textsuperscript{423} The sheriff took the strange position that once the mental health agency received a report that the jail has custody of a mentally disturbed inmate, the agency takes “care of it from that point on.”\textsuperscript{424} The sheriff’s delegated staff person claimed he could not spare a deputy to watch over Lozano at the medical center.\textsuperscript{425}

Twelve days later, Lozano began to harm himself physically, and a deputy used a forceful headlock to subdue him.\textsuperscript{426} According to both medical examiners that testified, Lozano died as a result of a traumatic injury to the neck, which caused asphyxia, adding that the fatal neck injury could also have been produced by the deputy’s excessive pressure.\textsuperscript{427} According to the family’s medical examiner witness, Lozano had 115 separate injuries to his body.\textsuperscript{428} Notwithstanding the deliberate indifference to Lozano’s mental health needs and his physical safety, particularly the cost justification excuses of the county sheriff, the Carter Administration DOJ declined criminal civil rights charges in June 1979.\textsuperscript{429}


One night, four Phoenix police officers responded to an emergency call from Julio Valerio’s mother about a domestic dispute between Julio and his father, stating also that Julio, upset, had taken a kitchen knife.\textsuperscript{430} Within four minutes after the call, four officers confronted Julio, ordered him to drop the knife, received support from an additional eight officers, cornered Julio in a fenced-in area, and called for a canine unit.\textsuperscript{431} Instead of waiting for the police dog to

\begin{itemize}
  \item \textsuperscript{423} \textit{Id.}
  \item \textsuperscript{424} \textit{Id. at 760 n.8.}
  \item \textsuperscript{425} \textit{See id. at 761.}
  \item \textsuperscript{426} \textit{See id. at 763.}
  \item \textsuperscript{427} \textit{See id. at 764.}
  \item \textsuperscript{428} \textit{Id.}
  \item \textsuperscript{429} \textit{See Letter from LULAC and Several Organizations and Community Leaders to Jimmy Carter, President of the United States, https://library.ucsd.edu/dc/object/bb89774813/_1.pdf [https://perma.cc/UK3Y-NR7H] (asking for the DOJ to reopen the Lozano investigation).}
  \item \textsuperscript{430} \textit{Mary Romero, State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member, 78 DENV. UNIV. L. REV. 1081, 1081-82 (2001).}
  \item \textsuperscript{431} \textit{See id. at 1082.}
\end{itemize}
arrive, an officer attempted to use pepper spray on Julio. In reaction to the gas, Julio stepped in the direction of the officers. Six police officers wearing bullet-proof vests fired twenty-five rounds at Julio, killing him. All this occurred within three minutes of the police coming in contact with Julio.432

Sixteen-year-old Julio Valerio stood 5’8” and weighed 120 pounds.433 In justification for shooting and killing the teenager, the officers claimed they feared for their lives.434 In contrast to Julio’s police confrontation, just one week before, police disarmed a white person armed with a knife without firing a single shot, even though that subject had threatened to kill an officer the previous week.435 The following day, the Arizona Republic published an article with the headline “Police Kill Teen Armed With Knife” in which the police chief justified not shooting Julio in the legs because that still would have endangered the officers if he fell forward with the knife in his hands!436

As officers typically do in cases where deadly force is used, the police report included an accusation of aggravated assault on a police officer.437 The 1977 Torres drowning case was a particularly extreme example where detective R.C. Rich, the president of the police officers association, gave the horrible “but-for” explanation for Torres’ drowning death: “If he hadn’t been out there drunk and raising hell, nobody wouldn’t have messed with him.”438 The police association leader added: “I’m not saying what happened to him was right, but he was out there violating the law, and his own people called in on him.”439 In a bit of hyperbole, I ask, does this police leader mean that the Latino bar owner, one of “his own people,” who called police to take the public drunk to jail, is an accessory to the drowning?

432. See id.
433. Id. at 1102.
434. See id. at 1107.
435. See id. at 1105.
436. See id. at 1106.
437. See id. at 1108.
438. See id.
Luis Alfonso Torres, Baytown, Texas, Killed by a “Knee to the Throat” Arrest Maneuver

Luis Alfonso Torres died in 2002 shortly after an alleged “fight” with three Baytown, Texas officers.\(^\text{440}\) Police looked for Torres after family members reported he left an ambulance while receiving treatment for high blood pressure and they feared for his safety. A police car video documented that Torres did not throw a punch, an action that could qualify the encounter as a “fight” or struggle. Police, instead, jumped Torres from behind and took him down.\(^\text{441}\) Torres never attempted to harm or subdue any officer. In fact, he appeared quite cordial with the officers before the physical encounter.

One of the officers applied his knee to Torres’s neck while he was on the ground. To aggravate respiratory matters, an officer then pepper-sprayed Torres.\(^\text{442}\) Torres died at the scene a few minutes later from mechanical asphyxiation, suffocated by an improper arrest tactic.\(^\text{443}\) Notwithstanding the video and the excessive force, a Harris County grand jury returned a no-bill, concluding there was no probable cause for any criminal charges, not even criminal negligence!\(^\text{444}\)

Under the circumstances, a police officer is not just “an ordinary person” in assessing criminal negligence. Police officers receive training on arrest maneuvers. Any citizen, even without police

\(\text{440.}\) See Lupe Salinas, Learning from Errors in Torres Case, HOUS. CHRON., Sept. 13, 2003, at A41.

\(\text{441.}\) See id.

\(\text{442.}\) See id.

\(\text{443.}\) See id. This injury to the throat is similar to what Larry Lozano suffered. See id.

\(\text{444.}\) A no-bill refers to an entry made by a grand jury that the members, usually by a defined majority vote, concluded that insufficient evidence exists for an indictment on a criminal charge to proceed to trial. See No Bill Law and Legal Definition, U.S. LEGAL, [https://definitions.uslegal.com/n/no-bill] (last visited Feb. 18, 2019). A finding of probable cause thus refers to sufficient reasons based upon known facts to believe a crime has been committed, thus authorizing police to arrest on the basis of a true bill finding by the grand jury. See Gerald & Kathleen Hill, Probable Cause, PEOPLE’S L. DICTIONARY, [https://dictionary.law.com/Default.aspx?selected=1618] (last visited Feb. 18, 2019). Shortly after the Luis Alfonso Torres asphyxiation death, Micah Aldred, one of the same officers, used a Taser on another person of Latino descent, this time a fifty-nine-year-old woman who stood slightly more than five feet tall. She fell and suffered substantial head injury. Cindy Horswell, Police Officer in Torres Case Accused Again, HOUS. CHRON. (July 25, 2003), [https://www.chron.com/news/houston-texas/article/Police-officer-in-Torres-case-accused-again-2126332.php] (http://perma.cc/35WL-7XXT).
training, knows that the weight and force of a knee on a person’s throat can be life threatening. Force applied to one’s throat in effect implies excessive force. Adding pepper spray to the victim’s face predictably will aggravate the asphyxiation symptoms that ended Mr. Torres’s life within a few minutes. Notwithstanding the facts, both the state grand jury and the DOJ failed to prosecute the police officer.\(^{445}\)

11. Pedro Oregon-Navarro—The Warrantless Home Entry by Police to Search for Drugs

*Pineda v. City of Houston*\(^ {446}\) involved a nightmarish and unconstitutional warrantless entry\(^ {447}\) into the residence of Pedro Oregon-Navarro in 1998. While patrolling a Latino *barrio*, Houston police officers and members of a Gang Task Force stopped a vehicle on a traffic violation that resulted in the drug arrest of the driver. In exchange for lenient treatment by the police, the arrested man volunteered information about his supplier, a man named Rogelio.\(^ {448}\) This supplier turned out to be Pedro Oregon-Navarro’s brother.\(^ {449}\)

The two officers contacted their sergeant, Darrell Strouse.\(^ {450}\) Several other members of the task force joined them as they devised a plan to seize the supplier. The plan included returning to Oregon-Navarro’s apartment at about 1:30 a.m. and entering illegally without a search or arrest warrant. The plan included having the arrested driver knock on the door. When the door opened, the driver would drop to the ground, and the officers, who waited at the foot of the stairs, would rush into the apartment.\(^ {451}\) All occurred pursuant to this plan. However, in the commotion, one of the officers accidentally shot another officer in the back. This gunfire prompted a blast of more gunfire from the


\(^{446}\) See *Pineda v. City of Houston*, 291 F.3d 325, 327 (5th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). The case is also discussed at *Pineda v. City of Houston*, 124 F. Supp. 2d 1057 (S.D. Tex. 2000) and *Pineda v. City of Houston*, 175 S.W.3d 276 (Tex. App. 2004) (explaining that the focus of Pineda’s claims was on the officers’ intentional tortious conduct, i.e. wrongful use of force, wrongful use of excessive force, and assault, the court held that the city’s immunity was not waived).

\(^{447}\) See *Pineda*, 291 F.3d at 327.

\(^{448}\) See *id.* This information provided the basis for probable cause, which a neutral detached magistrate could have found had the officers taken a little more time to follow the Fourth Amendment and state law.

\(^{449}\) See *id.*

\(^{450}\) See *id.*

\(^{451}\) See *id.*
officers, resulting in Oregon-Navarro’s death, with nearly ten shots to his body, most of them to his back. A pistol found near Pedro’s body was identified by Rogelio as belonging to his brother, Pedro Oregon.

After a state grand jury failed to return a homicide indictment of any of the officers, the Oregon family and LULAC, the national Latino civil rights organization, along with several members of Congress, asked the DOJ for a criminal investigation. The Civil Rights Division conducted a review for at least six months, but no federal civil rights charge ever surfaced.

The victim’s family then filed a federal civil rights claim, asserting that the Houston Police Task Force engaged in a pattern of unconstitutional warrantless home searches pursuant to a city custom. However, the federal appellate court concluded that there must be a “persistent and widespread practice” to constitute a custom. The court further concluded that eleven incidents of equivocal compliance with the Fourth Amendment cannot support a pattern of illegality in one of the nation’s largest cities and police forces. The court ruled that the Pineda litigants established neither a custom nor a case of inadequate training.

12. *State v. Carbonneau/Eli Escobar, Victim—Houston Police Department*

In November 2003, Houston police officer Arthur Carbonneau fatally shot fourteen-year-old Eli Eloy Escobar II. The District
Attorney’s murder indictment of Carbonneau was the first murder indictment of a police officer in Houston since Officers Terry Denson and Stephen Orlando were charged in the drowning death of Joe Campos Torres in 1977.\textsuperscript{459} Hopes that the justice system had begun a transformation towards impartiality soon dissipated when the jury returned its verdict.

Witnesses claimed that Carbonneau drew his gun and put the gun to Eli’s head while wrestling him to ground.\textsuperscript{460} Carbonneau claimed that he feared for his life, alleging that Eli’s hands were going to the small of his back and that he feared Escobar had a weapon, but Carbonneau then somewhat contradicted himself by stating that, “it appeared to him that Escobar was trying to pull something out of his waistband that Carbonneau suspected might be a weapon.”\textsuperscript{461} At another time, he claimed that his pistol fired accidentally when Escobar’s hand or foot bumped his gun hand.\textsuperscript{462}

Evidence from civil discovery revealed that the officer had failed his firearms testing, but the Houston police department disregarded that issue and nonetheless certified Carbonneau to patrol the streets.\textsuperscript{463} If nothing else, to offset the pain and suffering of the parents for the loss of their only child, the City of Houston memorialized Eli Escobar with a plaque at a city park and the police department enacted the Escobar Rule for police training as to when it is appropriate to have a gun drawn and when not to shoot.\textsuperscript{464}

Obviously, the criminal justice system includes prosecutors, defense attorneys, judges, and juries, and all of these groups include people with their respective prejudices. It is difficult to explain what could have occurred at a trial that began with a murder charge and

\textsuperscript{460}. See Escobar, 2007 U.S. Dist. LEXIS 72706, at *8.
\textsuperscript{461}. Id. at *10.
\textsuperscript{463}. See Escobar, 2007 U.S. Dist. LEXIS 72706, at *47 (discussing training).
ended at the lowest homicide level, a criminally negligent homicide.465 The jury necessarily concluded that the evidence against Carbonneau lacked the extreme recklessness necessary for murder.466 However, the definition of the mental state for recklessness for a manslaughter conviction applied.467 When an officer handles a weapon near the head of an unarmed youth while trying to detain him, he clearly had to be aware of a substantial and unjustifiable risk of a discharge of the weapon.

13. Officer Ricardo Perez, City of Miami Police Department: Juan Pablo Hernandez, Victim

In 1997 Ricardo Perez, a City of Miami police officer, shot Juan Pablo Hernandez.468 The shooting victim thereafter filed a civil rights lawsuit against Perez and the City of Miami.469 During daylight hours with good visibility, Perez, while in his patrol car, saw Hernandez walking in a “residential middle class” area not regarded as a “high crime” area.470 The officer noticed that Hernandez was fumbling around with his waistband and froze momentarily when he made eye contact with Perez. Although Officer Perez did not see a gun, he thought Mr. Hernandez was “acting suspiciously.”471

Officer Perez drew his gun and, while still in the driver’s seat of the patrol car, ordered Hernandez to approach the car and pull up his

465. See TEX. PENAL CODE ANN. § 19.02 (West 2017). The more appropriate verdict, based on the facts, is manslaughter based on the officer recklessly holding a gun while trying to control a frightened immature kid. § 19.04.

466. As to another Houston murder charge, see Brian Rogers, Mistrial Declared in Houston Diner Choking Case, HOU. CHRON. (June 23, 2018, 8:56 PM), https://www.chron.com/news/houston-texas/houston/article/Jurors-in-choking-trial-aren-t-barred-from-13020300.php [https://perma.cc/3WVT-9HUD]. The retrial of the murder charge against Terry Thompson for a chokehold death resulted in a murder guilty verdict and a twenty-five-year sentence. His wife, Chauna Thompson, a former deputy for the Harris County Sheriff’s Office, faces a separate murder charge for aiding her husband in holding the victim down while he choked the victim. See id.

467. A person acts “recklessly” or is reckless with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. TEX. PENAL CODE ANN. § 6.03(c) (West 2017).


469. See id.

470. Id. at 1375.

471. Id.
shirt. Hernandez complied, raised his shirt, took the gun from his waistband so that the barrel was pointed down, and released the gun inside the open front passenger window. Hernandez then immediately turned and started running away from the patrol car. While sitting in the driver’s seat of the patrol car Officer Perez discharged his weapon, hitting Hernandez in the back.  

Officer Perez requested summary judgment, but his assertion of the defense of qualified immunity failed. Essentially, Perez asserted his action in shooting Hernandez had not been clearly established to constitute a violation of the victim’s constitutional right to be free from excessive force. The trial court determined that the law was clearly established in that “it would have been clear to a reasonable officer that the [officer’s] conduct was unlawful.” Stated another way, the primary question was “whether the state of the law gave the defendant ‘fair warning’ that his alleged conduct was unconstitutional.” The trial judge obviously concluded that the officer had sufficient awareness that his conduct was barred.  

Regarding the use of deadly force to prevent the escape of an apparently unarmed felon, the Supreme Court concluded that deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or to others. Although State and city police officials promoted adherence to the common law rule that applied at the time the Fourth Amendment, the language of the amendment that applies to the seizure of a person by the use of deadly force against a fleeing felon must be “reasonable.”  

Thus, the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally

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472. See id.
473. See id.
474. See id. at 1381.
475. Id. at 1374 (citing Saucier v. Katz, 533 U.S. 194, 201-02 (2001)).
476. Id. at 1374, 1380.
477. All is not lost. The trial judge stated that Officer Perez can assert a qualified immunity defense and request special interrogatories to resolve factual disputes regarding that defense. See id. at 1381.
478. Tennessee v. Garner, 471 U.S. 1, 3 (1985). However, in this case, the shooting officer had no articulable basis to think Garner was armed. The officer could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. The officer’s only attempted justification centered on his need to prevent an escape. Id. at 20-21.
479. Id. at 13. The common law rule still exists in force in some states. Id.
unreasonable. Specifically, as applied to the facts in Tennessee v. Garner, a law officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute unconstitutionally adheres to the common law on its face and permits the use of deadly force against unarmed fleeing suspects.

On the other hand, the statute can be applied constitutionally if the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. In this scenario, it is not unreasonable under the Fourth Amendment to prevent escape by using deadly force to seize the suspect if the officer could realistically and feasibly warn the suspect of the likely or contemplated use of deadly force.

Tennessee v. Garner underscores the dilemmas that officers or other persons encounter when they carry a weapon and thus have the potential to use deadly force in a circumstance that requires a split-second decision. Six justices joined Justice White’s majority opinion while Justice O’Connor authored the opinion for the three dissenting justices. The fact that nine members of the Court had contradictory views on the meaning of the Fourth Amendment’s “unreasonableness searches and seizures” clause as applied to the use of deadly force in shooting an unarmed fleeing felon signals the difficulties the federal courts will continue to have in litigation involving fatalities caused by police officers.

480. Id. at 11 (emphasis added).
481. See id.
482. See id. at 11-12.
485. Since Garner, the federal courts have addressed a large number of cases involving the propriety of the use of deadly force. See, for example, Kisela v. Hughes, 138 S. Ct. 1148 (2018); Hernandez v. Mesa, 137 S. Ct. 2003 (2017); County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017); Mullenix v. Luna, 136 S. Ct. 305 (2015) to name a few cases that have addressed the propriety of the use of deadly force; see generally also Graham v. Connor, 490 U.S. 386 (1989) (discussing the use of
C. The Effect of Latino Police and Officials in the Justice System

In the 1970s, a major concern centered on the lack of police officers from the Mexican–American and other Latino communities. Many activists believed that Latinos feared and distrusted police since most departments, with the exception of New Mexico, lacked enough Latino and bilingual officers to comprise a representative police force.\(^{486}\) One common factor stands out from 1970 to 2010: Since Latinos still face the sad reality of victimization, even with more Latino officers on the force, is there any realistic relief from the unwarranted use of excessive and deadly force?

Latino officers are like any other officer. When officers of distinct races engage in brutality, they assume that the Code of Silence will stifle all officers, including Latino officers, from reporting abuse or cooperating with investigators. Regardless of cultural and ethnic affinity, Latino officers also violate the civil rights of Latinos they arrest. For example, in 1988 Detective Hector Polanco of the Austin, Texas police department arrested Chris Ochoa and his friend without probable cause of any involvement in a rape and murder.\(^{487}\) Polanco thereafter coerced Ochoa with threats, including a death penalty prosecution.\(^{488}\) Ochoa succumbed to Polanco’s yelling, chair throwing, and threats to harm him. Ochoa then “admitted” to details contained in Polanco’s suggestive leading questions. Polanco specifically told Ochoa “white guys always walk, and the Hispanics always get the needle.”\(^{489}\) Other Polanco interrogation victims substantiated Ochoa’s description of the detective’s sordid tactics. For instance, Polanco

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excessive nondeadly force). As of February 10, 2019, the Lexis Shepards search had registered 4,621 cases that cited Tennessee v. Garner, https://advance.lexis.com/shepards/shepardspreviewpod/?pdmfid=1000516&crid=504d84ba-6132-4ce1-848d-67e9f77e6ce0&pdsheid=urn%3AcontentItem%3A7XW4-F5B1-2NSF-C50J-00000-00&pdshepcat=initial&ecomp=53zbk&prid=cfc76bf5c-c049-4b35-aet9-4d84e9ba30c6b [https://perma.cc/5PDF-TDS5].


488. *See* id.

intimidated them with the promise to have inmates rape them and the threat of seeking the death penalty.490

Why officers of Latino descent would harm anyone, including their own ethnicity, is puzzling, considering the lengthy history of excessive police force experienced by this community. However, once a Latino or black joins the force, many factors explain violent behavior. The primary dynamic emanates from the police family’s institutional culture and not necessarily from the individual’s personality. The desire to belong—to be accepted by your peers—impacts not only children at school but also adults in their professions. What we need to understand is why the peer group pressure among police and officials can lead an ethical person to violate the law in order to be accepted as “one of the family.”491

Can a culturally proud Latino discriminate against and abuse another person that belongs to his own ethnic group? Supreme Court Justice Thurgood Marshall, a longtime civil rights litigator, answered this question in the affirmative.492 In Castaneda v. Partida, the Court addressed an allegation of discrimination against Latinos in the selection of a grand jury in Hidalgo County on the Texas–Mexico border.493


493. See id. at 482.
1. Latinos and Grand Jury Selection

In *Castaneda v. Partida*, Partida, the accused, claimed that Latino elected officials discriminated against other Latinos in the grand jury selection process. In the 1970s, when Partida complained, the county population was approximately 80% Latino. Notwithstanding this demographic, over an eleven-year period, of the individuals county officials summoned for grand jury service, only 39% were Latino. This statistical disparity sufficed to demonstrate a prima facie case of intentional discrimination in the grand jury selection process. The state offered responses to explain the undercount, but it never overcame the discriminatory evidence. The State’s attempt to rebut this prima facie claim merely involved an assertion that three of the five jury commissioners, five of the grand jurors who returned the indictment, seven of the petit jurors, the judge presiding at the trial, and the sheriff who served notice to appear on the grand jurors each had Spanish surnames. The State offered only the testimony of the judge who selected the jury commissioners, but none of the commissioners testified. Under the circumstances, the Supreme Court concluded that no inference could be drawn to explain the population disparity.

Although the majority found an equal protection violation, Justice Thurgood Marshall filed a concurring opinion primarily to respond to Justice Powell’s disbelief that members of a minority group would discriminate against their “own” people. First, Justice Marshall noted that the commissioners had ample opportunity to discriminate against Latinos because the selection system is entirely discretionary and Spanish-surnamed persons are readily identified. In addition, he observed that for more than three decades, the Supreme Court recognized and questioned the potential abuse inherent in the Texas grand jury selection plan.

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494. See id. at 490.
495. See id. at 486.
496. See id. at 487. Of the 870 persons who were summoned to serve as grand jurors from the 1962 to 1972 time period, 339, or 39%, were Spanish surnamed. See id. at 487 n.7.
497. See id. at 492.
498. See id. at 484.
499. See id. at 482-83.
500. See id. at 499.
501. See id. at 501, 503 (Marshall, J., concurring).
502. See id. at 502.
503. See id.
Justice Marshall also noted studies by social scientists who explained that minority persons often avoid the majority group’s prejudice by adopting various levels of assimilation or even accommodation in the dominant culture. This includes minority persons using the defense mechanism of disassociation from their ethnic group, even to the point of adopting the majority’s negative attitudes towards the minority in a process known today as internalized racism. This behavior occurs frequently among minorities who have achieved some measure of economic or political success as well as acceptability among the dominant group.

Justice Marshall closed his opinion with a plea that members of the Court shun stereotyping, particularly in claims of intentional discrimination, by avoiding generalizations concerning minority groups. The majority opinion refers to the complaint by the Texas Court of Criminal Appeals to the limited record at the trial level. The Texas appellate court included gratuitous and speculative comments about how many of those with Mexican–American names were not citizens of the state but were so-called wetbacks from Mexico or had other disqualifying credentials. The Supreme Court ultimately recognized that, considering “the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”

504. See id. at 503.
505. Internalized racism is the phenomenon that occurs when victims of racism, through coercion or conditioning, display racist attitudes toward and commit racist actions against themselves or their racial/ethnic group. Internalized racism, among other things, involves placing higher values on members who appear or act more like the dominant group—that is, valuing people who appear more “white.” Internalized Racism, URB. DICTIONARY (Jan. 24, 2011), https://www.urbandictionary.com/define.php?term=Internalized%20racism [https://perma.cc/R9X8-A9UE]. As applied to the minority officers in the police brotherhood, these officers may want to adopt the characteristics of the abusive officers to become more “respected” and trusted.
506. Castaneda, 430 U.S. at 503. Racial and ethnic minorities are all too familiar with the labels associated with this phenomenon. We have all regretfully heard of the Uncle Tom and the Mexican Tio Taco or worse, the vendido (Spanish for one who sells out to the other side at the expense of his own ethnic group), or the Oreo in the black community, and the Coconut among Latinos.
507. See id. at 504.
508. See id. at 498.
509. Id. (citing Partida v. State, 506 S.W.2d 209, 211 (Tex. Crim. App. 1974)).
510. Castaneda, 430 U.S. at 499. The tough-guy mentality of some Latino officers against their own can arise from the peer group pressure from their Anglo colleagues. Obviously, the abusive attitude may have already been learned from their
2. Latino State Prosecutors

Miami–Dade State Attorney Katherine Fernandez Rundle reputedly does everything possible to avoid law enforcement’s criticism. Instead, Fernandez Rundle has the reputation of failing to initiate investigations and charges against police officers in cases involving questionable use-of-force injuries and shooting fatalities. Generally in Florida, as in other states, officers are granted flexibility to use force in alleged self-defense circumstances. In over two decades, Fernandez Rundle’s office has not charged an officer for a fatal on-duty shooting and only recently charged one for a nonfatal shooting.

Her callous decisions favoring cops, guards, and public officials have drawn unfavorable attention to no avail because she continues her elective service. In addition, Fernandez Rundle has an extensive record of excuses for public officials accused of corruption and murder. Her justification for declining charges for the use of a fatal upbringing at home. A 1970s police department utilized a billboard to urge “machos,” the tough men, to seek employment with them. See Morales, supra note 281, at 101.


512. See, e.g., Curtis, supra note 169. During the 1970s Houston, Texas grand juries considered at least 24 cases of police officers who have shot, wounded and killed civilians with no criminal charges. Id.

513. See id.

514. Beginning in 1993, through the Clinton, Bush, Obama, and now Trump eras, District Attorney Fernandez Rundle has not once charged a police officer for an on-duty killing. Jerry Iannelli, Katherine Fernandez Rundle, Miami’s Top Prosecutor, Is a Disgrace, Miami New Times (Mar. 20, 2017, 8:31 AM), http://www.miaminewtimes.com/news/katherine-fernandez-rundle-miami-dade-county-state-attorney-is-a-disgrace-9213209 [https://perma.cc/8RBJ-4U78]. What she has done instead is make decades worth of excuses for cops accused of questionable actions. Id. When a Miami-Dade cop tased a man to death, the officer was not charged. Id. When a Miami-Dade cop was fired for shooting an unarmed black man, the officer walked free and was later rehired. Id.

application of a Taser to the chest of a young man rested upon the Florida state law that allows the use of “any” force and the medical examiner’s claim that the death was “accidental.” 516 However, in neglecting to charge any prison guards who threw Darren Rainey, a black, schizophrenic inmate, “into a scalding-hot shower for two hours until he died, Rundle has reached an all-time low.” 517

Florida is not alone. For years, the Houston, Texas Harris County District Attorney’s Office overlooked apparent police abuses. Many wonder if the favoritism stemmed from the fact that local police and county deputy sheriffs provide the testimony in criminal cases presented by the prosecutor’s office. In other cases, the prosecutorial effort may be contingent on the police involvement and/or the race of the homicide victim.

As a former Harris County Assistant District Attorney, I became aware of two other fatality investigations that involved Houston Police Department (HPD) officer suspects. The two 1977 killings of civilians by police involved the February shooting of Randy Webster and the May drowning of Jose Campos Torres. 518 In the first, Randy Webster, a white seventeen-year-old theft suspect, led HPD officer Mays on a high-speed chase. A second police car joined in the chase. During the chase, cab driver Billy Junior Dolan got involved and tried to block the van. After several miles of racing dangerously through red lights and other busy intersections, the suspect came to an abrupt stop, exited the van, and surrendered by raising his hands. 519

According to a version provided by Mays, the suspect exited the stolen van. 520 As Mays exited the police car, he took out his gun and observed that the suspect had a gun of his own. Mays immediately lunged and fired at the suspect, resulting in a fatal wound. 521 In addition, Lexie Fate Daffern, a civilian driving by the scene on his way to work, appeared before the state grand jury and claimed he saw the

517. See Iannelli, supra note 514. The prosecutor did not consider or believe testimony from inmates that they heard Rainey’s crying for over an hour that the water was too hot and nurses who saw Rainey’s skin peeling off. See id.
518. See Curtis, supra note 23.
519. See id.
520. See id.
521. See id.
shooting, corroborating the story presented by Mays. The state grand jury did not return any criminal charges. What the state prosecutor handling the presentation ignored was the physical evidence that squarely contradicted the claim by Officer Mays that he shot Webster as they faced each other. The bullet entered the back-left side of Webster’s head.

In addition, the conflicts in the police story deepened when cab driver Dolan provided a completely different version. Confirming his credibility, several months later the county medical examiner’s report corroborated the testimonial evidence that Dolan presented in his three separate but consistent statements. Part IV on revictimization discusses details about the state prosecutorial disregard for the evidence and about the federal judge’s attitude in this case.

In conclusion, the 1970s Latino civil rights activism may have contributed to the employment gains of Latinos in police forces, with the goal of having more culturally and linguistically sensitive police officers. Many believed that the increase in Latino officers would diminish the abuses against Latinos. However, that has not been the result. Albuquerque, New York, Los Angeles, and Miami eventually increased the percentage of Latino police officers in each city. In spite of these presumed improvements, these cities still encounter private litigation as well as federal sanctions and oversight due to confirmed violations of federal civil rights laws.

522. At the time that Daffern appeared at the state grand jury, I still served as an Assistant District Attorney. Before Daffern’s surprise appearance, the Harris County courthouse crowd understood that the grand jury had decided to no-bill the police officers after the police officers and cab driver Billy Junior Dolan testified. See Curtis, supra note 23. Once Mr. Daffern later offered his testimony, the state grand jury took no further action. Within three months, I resigned as a state prosecutor and assumed my federal prosecutor duties. I later invited Mr. Daffern to the federal grand jury, and he repeated his claims in support of Mays’s false claims. Daffern eventually admitted his perjury. See United States v. Mays, 470 F. Supp. 642, 644 (S.D. Tex. 1979); United States v. Mays, 460 F. Supp. 573, 574 (E.D. Tex. 1978).

523. See Curtis, supra note 23 (discussing a “no-bill” after the police officers and Billy Junior Dolan testified).

524. These details are well known to me since I obtained the federal grand jury indictment in United States v. Mays and served as lead counsel in the prosecution. Once the cab driver provided his statements, the “sour grapes” character assassination began. Dolan wanted to become a cop, but his credit history barred him. Therefore, police claimed his testimony was retaliatory. The problem is that his claims, when compared with the physical evidence, pass the test of credibility with flying colors, notwithstanding the jury’s acquittal of Mays on the § 242 civil rights charge.

525. See infra Part IV.

526. See SALINAS, supra note 3, at 69-71, 79-84, 142-43. Cities under consent decrees included East Haven, Miami, and Albuquerque. See id. at 138-42. Pursuant to
The United States Civil Rights Commission found that most police departments lacked sufficient Latino, bilingual officers to comprise a representative police force through the end of the 1960s. During the almost half century since 1970, even with an increase in the number of Latino officers, police departments still engage in the victimization of all members of the population, although black and Latino minorities continue to endure the brunt of the abuse.

To some extent, the federal investigations that led to consent agreements have been helpful in making progress. However, with negative attitudes and actions from top leaders in municipal and county police departments, those in the subordinate ranks receive the clear message that they do not have to follow the leader on everything. Of course, the public also has to contend with the

42 U.S.C. § 14141, the United States DOJ is authorized by federal law to sue a state or local government for equitable and declaratory relief when that government engages in a pattern or practice of conduct by law enforcement officers that deprives persons of rights secured by the Constitution or laws of the United States. See 42 U.S.C. § 14141 (2012).

527. See U.S. CIVIL RIGHTS COMM’N, supra note 160, at 83.


529. See SALINAS, supra note 3, at 141. The Mayor of East Haven, when asked by a reporter what he was going to do about the indictments of the town’s police officers and the Latino community’s claims of discrimination sarcastically responded, “I might have tacos when I go home. I’m not sure yet.” Id.
nation’s president, our highest political leader, who openly advises officers that they should be “rough” when they take persons into custody.\textsuperscript{530}

Overall, Latinos have been frustrated by society and the leadership. This leadership confirms prevailing sentiments among Latinos of their perceived status as second-class citizens, consistent with their lower income and educational attainment as compared to those of other racial and ethnic groups in America.\textsuperscript{531}

III. LATINO REVICTIMIZATION BY THE JUSTICE SYSTEM

What made the Jose Campos Torres drowning, prosecution, and outcome so offensive for the Latino community, and others who respect the rule of law, was the method in which the state trial judge in Houston, the state jury in Huntsville, the federal district sentencing judge, and even the appellate jurists engaged in unfair resolutions.\textsuperscript{532} Similarly, the justice system revictimized other police brutality victims through the abusive application of procedural rules. For example, in the fatal police beating case of African–American Bobby Joe Conner, a white local district judge changed the trial venue to a county with a notoriously racist reputation.\textsuperscript{533} And the wheels of justice keep rolling off the tracks for people of certain descent.

\textsuperscript{530} Jonathan Chait, Trump Now Sounds Like a Fan of North Korean Repression, N.Y. MAG. (June 12, 2018), http://nymag.com/intelligencer/2018/06/trump-now-sounds-like-a-fan-of-north-korean-repression.html [https://perma.cc/G5M7-HN2Y] (“We’re getting them [criminals] out anyway, but we’d like to get them out a lot faster . . . [W]hen you see these thugs being thrown into the back of a paddy wagon, you just see them thrown in—rough, I said, please don’t be too nice.”).

\textsuperscript{531} See Salinas, supra note 3, at 12-13.

\textsuperscript{532} See infra Subsections IV.B.1-4 (discussing the role the state trial judge, state jury, federal district sentencing judge, and appellate jurists played in the sentencing of the Houston police officers that killed Jose Campos Torres).

\textsuperscript{533} See generally United States v. McMahon, 339 F. Supp. 1092 (S.D. Tex. 1971) (discussing the 1971 Conner beating death that resulted in a state murder indictment and continue with the sentence of J.A. McMahon and A.N. Hill, two white Houston officers). The presiding Harris County district judge granted a transfer of the trial to New Braunfels, Texas, disregarding the home county’s historical reputation regarding the dominant German–American population and its negative race relations with blacks and Mexican Americans. Acquittals occurred in both the state and the federal civil rights trials with no blacks on the juries. See also Zamora v. New Braunfels Ind. Sch. Dist., 519 F.2d 1084 (5th Cir. 1975) (per curiam), rev’d 362 F. Supp. 552 (W.D. Tex. 1973) (discussing how the NBISD deliberately segregated Chicanos going back to 1910 when the first Mexican school was built).
Although injustices have existed against Latinos since time immemorial, the revictimization discussion begins with the contemporary civil rights era of the late 1960s. The first case I discuss involves the discretionary, but abusive, decision to seek vindication for a Latino homicide victim. Public district attorneys are generally elected or possibly appointed. They take an oath to represent the interest of victims and of society in general. In deciding to file charges, the oath references the necessity of credible evidence to justify prosecution of the particular crime included in the indictment. Further, a district attorney’s duty is not to convict but to see that justice is done. In the process of trying an accused, prosecutors nationally have a mandatory ethical duty to abstain from suppressing facts or secreting witnesses capable of establishing the innocence of the accused. 534

Ruben Salazar’s death occurred after being hit in the head by a tear gas canister fired by a deputy sheriff directly into an occupied café. 535 The projectile struck Salazar in the head. His death constituted a homicide, i.e., death at the hands of another. 536 Since the deputy who pointed the canister into the café had no legally justifiable defense, a prosecutor should then have reviewed the evidence and the law to decide if a prosecution was warranted to vindicate Salazar’s death. 537

A neutral prosecutor should have conducted at least a patient and thorough investigation to consider the propriety of some criminal charge, manslaughter or gross negligence homicide. First, the deputy was aware that the building was occupied by several persons who sought shelter. 538 Second, the container had printed instructions from the manufacturer that it should not be fired directly into a crowd. 539 The reasons for that admonition are obvious. Evidence of voluntary action and this mental state would give rise to a charge of criminal or

534. See, e.g., TEX. CODE CRIM. PROC. ANN. § 2.01 (West 2013).
535. See ACUÑA, supra note 280, at 260.
536. See id. at 262.
537. The culpable mental states that apply in a homicide generally include an act done intentionally for murder, an option not relevant here due to the riot type situation. An act committed recklessly constitutes manslaughter where the actor has an awareness of a substantial risk that the projectile can cause death if it strikes a person, and the actor consciously disregards that risk and fires the projectile into an occupied building. The recklessness level of culpability unquestionably existed in this case as would the lesser offense of gross negligence homicide. See MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).
539. See ACUÑA, supra note 280, at 262; see also L.A. Cty. Office of Ind. Review, supra note 330, at 15.
gross negligence homicide. Notwithstanding the clear evidence of shooting directly into the café, no prosecutor filed a criminal charge.

The coroner’s jury that reviewed the evidence returned with four of the seven jurors concluding that it was a homicide, but the other three concluded it was death by accident.\textsuperscript{540} Members of a coroner’s jury are generally persons not trained in the law, and the term “accident” even confuses some lawyers and judges.\textsuperscript{541} An “accidental” death is one that happens by chance and is not planned. An accident can perhaps be found or established in a situation where an officer in a drug raid trips on an object and involuntary pressure on the trigger causes a discharge, killing a fellow police officer. The officer did not voluntarily pull the trigger, and a voluntary act is required for a criminal charge.\textsuperscript{542}

Many believed that the deputy who fired the projectile would be prosecuted, but only a mere month later District Attorney Evelle J. Younger announced he would not prosecute the case.\textsuperscript{543} The Los Angeles Times issued an editorial in which it sarcastically commented that even though “an innocent man was killed by a weapon that should not have been used,” no one would be held accountable.\textsuperscript{544} Many believe Younger acted out of political pragmatism because he had filed for State Attorney General, a post he ultimately won.\textsuperscript{545}

Thus, the victimization of a Mexican–American journalist who fought the police and the political system through his news coverage was lost in Younger’s Machiavellian efforts to become the new Attorney General of California. Salazar, as a result, became a victim again, first at the hand of a recklessly lawless cop and then at the whim of a manipulative politician wending his way to Sacramento.

\textsuperscript{540} See ACUÑA, supra note 280, at 260.
\textsuperscript{541} See Cain v. State, 549 S.W.2d 707, 713 (Tex. Crim. App. 1977) (explaining that Cain admitted he pulled the trigger, but he thought he had unloaded the pistol) (citing Starling v. State, 522 S.W.2d 505, 506 (Tex. Crim. App. 1975) (discussing that the wife called the sheriff and said she “accidentally” shot her husband; what really occurred is that she intentionally pulled the trigger while thinking the gun was not loaded).
\textsuperscript{542} See Cain, 549 S.W.2d at 713 (explaining that Cain admitted he pulled the trigger, but he thought he had unloaded the pistol).
\textsuperscript{543} See ACUÑA, supra note 280, at 262.
\textsuperscript{544} See Remembering Ruben Salazar, L.A. TIMES (Apr. 22, 2008), http://articles.latimes.com/print/2008/apr/22/opinion/la-oew-salazarcc22apr22 [https://perma.cc/PJR4-VJTD]. The DOJ Civil Rights Division understandably did not pursue criminal litigation since their burden of proof is much higher than what the state law requires.
\textsuperscript{545} See ACUÑA, supra note 280, at 262.
B. The Revictimization of Jose Campos Torres

In addition to police misbehavior, Latinos at times have to worry about judicial misconduct or insensitivity. The relationship between local, state, and county judges and police officers is a delicate one.\textsuperscript{546} In the alternative, the judicial insensitivity or favoritism may be related to implicit bias. In many cases, state judicial and law enforcement agents engage in \textit{ex parte} matters such as processing search warrants and other orders. At times, patriotic support for police officers blurs the professional judicial responsibility owed to the public. If a person, even an officer, violates the law, why would he or she not be treated like any other accused? Obviously, the officer should enjoy all the legal benefits any civilian would and should have. By the same token, a poor minority person who, like a white person, gets drunk and disorderly should enjoy the same legal benefits and courtesies.

In 1977, Jose Campos Torres died while in the custody of several white Houston police officers.\textsuperscript{547} The Torres case included discretionary decisions by both the state and the federal judges who presided over the prosecutions. The details of this deadly assault are reported earlier in this Article.\textsuperscript{548}

1. \textit{Judge Stilley Moved the Trial to Unfavorable Grounds}

Briefly, after the state murder indictment for the death of Torres, the defense moved for a change of venue due to the intense media coverage.\textsuperscript{549} State Judge Allen Stilley, who had shortly before retired as a career prosecutor, considered the publicity in the case and correctly granted the motion.

He made the peculiar decision, however, to move the trial a mere seventy-five miles north from Houston to Huntsville, a city that depended on Houston’s major media outlets for its news.\textsuperscript{550} Other factors undercut Huntsville as a location for a fair trial for a victim of a drowning perpetrated by cops. First, the city and county housed the state’s central prison unit, Death Row, and the prison’s administrative

\begin{itemize}
  \item \textsuperscript{546} In contrast, the relationship between federal judges and law enforcement agents is more ethical, strict and formal.
  \item \textsuperscript{547} \textit{See} Curtis, \textit{supra} note 23.
  \item \textsuperscript{548} \textit{See supra} Subsection III.B.7 (discussing the details of Jose Campos Torres death).
  \item \textsuperscript{549} \textit{See} SALINAS, \textit{supra} note 3, at 233.
  \item \textsuperscript{550} \textit{See id.}
\end{itemize}
offices. Second, a substantial percentage of the potential jurors depended on law enforcement for their economic wellbeing. Third, Judge Stilley’s awareness of the Huntsville population\textsuperscript{551} made his decision appear to be a calculated one that would guarantee a population for jury selection that not only favored police officers but also increased chances for an all-white jury. The Latino community’s outrage naturally surfaced once the trial judge moved the venue to a county and city with a predominantly Anglo population and with an employment dependence on the law enforcement profession and on the state prison system. The 1980 Walker County population totaled 41,789, providing an idea as to how small the jury pool had to be for a high publicity case involving Anglo officers charged with the murder by drowning of Jose Campos Torres, a Mexican American.\textsuperscript{552} The primary goal of a change of venue centers on both sides, the accused and the prosecution, having the ability to have a chance for the selection of a fair and impartial jury. A legal justification for a change usually depends on the concerns of widespread publicity. The move to Huntsville, Walker County, Texas, only seventy-five miles away from Houston, did little for the fair trial concept and for the goal of finding objective jurors since Huntsville residents had the same media (television, radio, and newspapers) as Houston residents.\textsuperscript{553}

2. Jury Nullification

Not surprisingly, the state jury acquitted the officers of murder and manslaughter. The jury convicted the officers of misdemeanor negligent homicide and then granted probation with no jail time as a condition. The worst part is that the jury appeared to have exercised its flexibility by nullifying the evidence and coming up with an ultimate verdict that contradicted the evidence and the law. Sometimes it is based on what I call the “pity factor”;\textsuperscript{554} in other cases, this jury

\begin{itemize}
\item \textsuperscript{551} Both Judge Stilley and I, in our capacities as fellow prosecutors and later as criminal court jurists, attended prosecutor and judicial training programs in Huntsville, Walker County, Texas.
\item \textsuperscript{552} John Leffler, \textit{Walker County, Texas State Historical Ass’n} (Feb. 18, 2019), http://www.tshaonline.org(handbook/online/articles/hcw01 [http://perma.cc/FR3Q-SZSY].
\item \textsuperscript{553} See \textit{Salinas, supra} note 3, at 233.
\item \textsuperscript{554} An example of a “pity factor” jury nullification involved an assault trial that I presided over. The accused, a senior college student about to enter the teaching profession, beat his male neighbor after repeated warnings to the neighbor to quit sexually approaching the accused’s mother. The neighbor could not control his desires, and the defendant lost control of himself. The adept defense counsel
nullification might be based on the “social disapproval”\(^{555}\) factor. One can conceive of additional nullification categories.

The state jury trial verdict in the Torres drowning might have been a combination of both the pity factor and the social disapproval factor. First, as stated earlier, the Huntsville jury list undoubtedly had many persons with knowledge about criminal law.\(^{556}\) They knew the distinctions between a murder, a manslaughter, and negligent homicide when it came to evaluating what verdict to reach. The first two crimes easily fit the existing evidence and \textit{mens rea} of the officers. Jurors may have also been influenced in their verdict by the social peer group factor of choosing between a “drunk” and the “good cops” who Torres provoked into committing murder. It would be naïve to ignore the racial differences between the white officers and the Mexican–American Vietnam veteran in evaluating the officers’ attitude towards Torres when the officers discussed seeing if a “wetback” could swim before they pushed him into the bayou in his drunken state\(^{557}\).

3. The Role of Judge Ross Sterling

After the federal civil rights indictment, only nine days after the horrific state jury verdict, the Torres victimization rose to a new level. This time the jury did not engage in a nullification exercise. Instead, the federal trial judge, the Honorable Ross Sterling, served as the oppressor. Unlike state trials, federal court rules mandate that judges assess the punishment. Sterling’s judicial impropriety involved his rationale and justification for giving the officers responsible for Torres’s drowning death such an insignificant sentence. Before the actual sentence was announced, Judge Sterling described the incident involving Torres and the police as “a situational offense[,] which these defendants will never encounter again” because they will never again

\footnotesize{
mentioned to the jury, without objection by the District Attorney, that a conviction would bar him from his profession.

\(^{555}\) An example of a “social disapproval” jury nullification involves the 1995 acquittal of O.J. Simpson by a jury comprised of 50% black members. After Detective Mark Fuhrman was caught lying about never having used the N-word, the tide turned against the strong evidence of guilt in Simpson’s murder trial.

\(^{556}\) See \textit{supra} Subsection III.B.I (stating that Huntsville is a hub for Texas state prisons, and much of the population relies on law enforcement for their economic wellbeing).

\(^{557}\) See \textit{Curtis, supra} note 169.}
be police officers. Judge Sterling then “startled” court observers when he justified the additional basis for the sentences he imposed by noting:

[T]he Government entered into a plea agreement with one of the former police officers not on trial in this case that if he would testify against those on trial here, he would be permitted to plead guilty to the same actions upon which the jury found these Defendants guilty under a different statute carrying a maximum penalty of one years’ [sic] imprisonment and further that in his case the Government would recommend probation.

What Judge Sterling overlooked is that in all group or conspiratorial actions, the prosecutor generally requires someone from the “inside,” i.e., someone who had personal knowledge of what occurred, to testify in order to fill in the gaps. Prosecutions at all levels of our criminal justice system rely upon testimony from persons who participated in the wrongdoing. Sometimes, a cooperating witness serves as the only way to learn exactly what was said or done by those involved.

Our system of criminal justice enforcement would encounter serious shortcomings if the testimony of crooks or drug deal conspirators would automatically face credibility impediments. A jury must be able to view the evidence in its totality. Only insiders are in a position to testify about how criminal conspirators operated. Prosecutors rely on this type of critical testimony in organized crime and drug cases. Our law generally recognizes accomplice testimony as relevant. Such testimony does not per se become tainted or weakened by virtue of its use against an accused that once wore a police badge. On another note, the use of accomplice witnesses is particularly essential in police wrongdoing because the unwritten Code of Silence is so well ingrained in the law enforcement community.

559. See id. at 270.
560. United States v. Denson, 588 F.2d 1112, 1116 (5th Cir. 1979) (error in original).
561. See Earl Ofari Hutchinson, It’s Time For Cops To Break The Blue Code Of Silence, HUFFINGTON POST, https://www.huffingtonpost.com/earl-ofari-hutchinson/its-time-for-cops-to-brea_b_12173778.html [https://perma.cc/XX5V-J9UG] (last updated Sept. 25, 2017) (explaining how civil rights organizations have urged the Los Angeles Police Department, the Los Angeles County Sheriff’s Department, and other police agencies, locally and nationally, to establish a “Breaking the Blue Code of Silence” hotline).
4. The Role of the Appellate Court

After the three-judge panel decision, the Fifth Circuit’s entire membership reviewed the panel opinion en banc. Departing from the three-judge panel, the Fifth Circuit en banc majority agreed that a writ of mandamus should issue as a matter of course when the writ seeks to confine a trial court to a lawful exercise of its prescribed sentencing authority. However, the en banc court ignored the reality of a sincere conflict when District Judge Ross Sterling resumed the sentencing, stating that it was “unseemly for [them] either to assume that he [would] take a particular course or to suggest what he should do so long as he reaches his decision in accordance with the controlling statute.” What was “unseemly” was what Judge Sterling later did by insulting the appellate court and the Latino community in particular by sending Latinos the subliminal message that they were, after all, “just Mexicans!”

Again, the Fifth Circuit revictimized Torres by returning the sentencing issue to Judge Sterling. Four judges of the en banc panel dissented on the issue of resentencing by a different judge. Judge Goldberg, for the dissenters, concurred with the majority’s decision to issue the writ of mandamus, but he asserted that it would be “fairer and more decorous” for resentencing to be conducted by a district judge other than the one who imposed the illegal sentences because “the fairness and integrity of the sentencing process require it.” He explained that “[a] judge has a duty not just to be impartial but to appear impartial,” and Judge Sterling had already declared in his sentencing memorandum that one year’s imprisonment constituted an appropriate sentence. Judge Goldberg’s concerns proved prophetic. Judge Sterling vengefully, it appears, sentenced the officers who

562. See United States v. Denson, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc).
563. See id.
564. See id. at 1149.
565. See id.
566. See id.
567. See id. at 1150.
568. Shortly after the en banc ruling in the Denson case on October 4, 1979, the word spread at the federal courthouse building in downtown Houston where I worked as an Assistant United States Attorney that Judge Ross Sterling had a heated discussion with his former boss, the Honorable John Brown, Chief Judge of the Fifth Circuit Court of Appeals, about comments in the dissenting opinion that favored assignment of sentencing to a different judge. Chief Judge John Brown, who employed Sterling as a law clerk in 1957, joined the dissenting group of four jurists.
killed Torres to one year and one day to run concurrently with the one-year sentence for the misdemeanor.\textsuperscript{569} Prior to the \textit{en banc} dissenting opinion, the sentencing ruling he entered ordered the two sentences to run \textit{consecutively}.\textsuperscript{570}

Judge Goldberg expressed concerns that the \textit{en banc} majority overlooked the unique judicial role where the court is dealing not only “with the rights of criminal defendants” but also “with lawless behavior by the police.”\textsuperscript{571} He emphasized that victims of legal authorities “have nowhere to turn—\textit{nowhere, that is, except to our courts}.”\textsuperscript{572} In order to dispel all doubts about the judicial system, the court system must “remove every suggestion of unfairness from the procedures [it] supervise[s]. . . . [and] direct that a different judge resentence the[ ] defendants.”\textsuperscript{573}

Judge Sterling’s official disparate treatment against the Chicano victim and his favoritism with respect to the accused officers became apparent to the legal community and to the public. His stubborn adherence to an illegal probation sentence that favored officers who had engaged in horrific behavior aggravated matters in the Mexican–American community. For the first time in Houston’s history, Latino residents lost their patience, and some engaged in violence—the 1978 Moody Park Riots, for example—\textsuperscript{574} sparked by the judicial insults towards the Latino community.\textsuperscript{575}


\textsuperscript{570} See United States v. Denson, 588 F.2d 1112, 1115 (5th Cir. 1979) (emphasis added).

\textsuperscript{571} \textit{Denson}, 603 F.2d at 1152 (Goldberg, J., dissenting).

\textsuperscript{572} \textit{Id.} (emphasis added).

\textsuperscript{573} \textit{Id.} at 1153. In 1977, shortly before the murder of Jose Campos Torres, Randy Webster, a Caucasian, died when a white HPD officer, D. H. Mays, shot him immediately after a high-speed chase. This 1979 prosecution of lawless cops in the shooting, planting a throwdown, and conspiracy to obstruct justice by lying to the FBI and committing perjury resulted after I discovered that the gun used as a throwdown entered a patrol officer’s possession after it had been in the HPD Property Room for years.

\textsuperscript{574} See Tallet, \textit{supra} note 45.

\textsuperscript{575} See Hearings on Migratory Labor, \textit{supra} note 94, at 131.
C. Revictimization of Santos Rodriguez: DOJ Rejects Federal Prosecution of Officer Who Used a Firearm to Force a Juvenile to Confess, Resulting in His Death

Pursuant to the so-called Petite Policy, also referred to as the Dual and Successive Prosecution Policy, the DOJ declined federal civil rights charges against the former officer who killed juvenile suspect Santos Rodriguez while trying to coerce a confession from him.576 The grossly inadequate five-year sentence by a Texas jury in for a murdered child angered the public and the Latino community. Again, the justice system, both state and federal, sent an unfortunate message that Latino people, including children, lack personal value.

The Petite Policy is derived from the name of a federal double jeopardy case,577 but it is actually the name generally applied to a DOJ internal policy formalized in 1959, one year before the ruling in *Petite v. United States*.578 This policy establishes guidelines and directs appropriate DOJ officers to exercise discretion in determining whether to bring a federal prosecution based on substantially the same act or transaction involved in a prior state or federal proceeding.579 The policy seeks to vindicate substantial federal interests through appropriate federal prosecutions and to protect persons charged with

576. *See* Blockburger v. United States, 284 U.S. 299, 303-04 (1932) (finding no Double Jeopardy Clause issue where the separate offense prosecution requires proof of an element not contained in the other); *see also* Petite v. United States, 361 U.S. 529, 531 (1960) (per curiam) (involving a federal double jeopardy issue). The Petite Policy is now an internal Justice Department rule that provides guidance as to the conditions under which the DOJ will permit a second prosecution that would be constitutionally permitted by the Fifth Amendment Double Jeopardy Clause. *See* U.S. Attorneys’ Manual, Dual and Successive Prosecution Policy (Petite Policy), U.S. Department of Justice, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031 [https://perma.cc/F4BU-7U9K] [hereinafter “Petite Policy”].


578. *See* Petite Policy, *supra* note 604; *see also* Petite v. United States, 361 U.S. 529, 531 (1960) (per curiam).

579. The DOJ initiated this internal policy after the Supreme Court rulings in Abbate v. United States, 359 U.S. 187, 195 (1959) and Bartkus v. Illinois, 359 U.S. 121, 122-33 (1959) (finding that no double jeopardy violation existed in both *Abbate*—a federal prosecution—and *Bartkus*—a state prosecution—followed prosecutions by other sovereignties under the dual sovereignty doctrine); *see also* Heath v. Alabama, 474 U.S. 82, 88 (1985) (applying the same rationale to two different states that had jurisdiction to prosecute a crime; Alabama obtained a capital murder death sentence after Georgia assessed a life sentence in a plea bargain for the same victim).
criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same conduct.

The DOJ guidelines for a dual and successive prosecution provide that a presumption may be overcome when a conviction was achieved in the prior prosecution under two circumstances that appear relevant in the Santos Rodriguez case. First, the prior sentence was manifestly inadequate in light of the federal interest involved. Second, a substantially enhanced sentence is available through a contemplated federal prosecution for deprivation of civil rights where an independent federal judge has the responsibility to assess the appropriate punishment.580

In summary, the assessment by a jury of the least possible sentence, considering all the aggravating facts, constituted an utterly absurd and grossly inadequate punishment. Second, the DOJ can authorize a federal prosecution in circumstances where the severity of the sentence in the prior state murder prosecution was affected by certain factors, one of which is “jury nullification in clear disregard of the evidence.”581 It appears that the public’s adoration of, and esteem for, the police profession obstructed the jury’s ability to consider the full range of punishment that provided up to a maximum life sentence. Considering that the jury heard evidence of an extremely unnecessary and horrible crime by a man sworn to uphold the law, the jury nonetheless assessed the bare minimum sentence.

Regardless of the result in a prior state prosecution, DOJ lawyers have another avenue by which they may overcome the presumption not to engage in a successive prosecution. The Dual and Successive Prosecution Policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same acts or transactions unless three substantive prerequisites are satisfied.582 Although the guidelines consider these circumstances will occur only in “rare cases,” it seems that the Santos Rodriguez facts fit the three conditions.583 The first condition is that the alleged violation involves a compelling federal interest, particularly one implicating an enduring national priority. The second situation that fits is that the alleged violation involves “egregious conduct, including that which threatens or causes loss of life . . . or the

581. See Petit Policy, supra note 576.
582. See Petite Policy, supra note 576.
583. Id.
due administration of justice.” The third circumstance is that the result in the prior prosecution was manifestly inadequate in light of the federal interest involved.

The killing of a twelve-year-old kid under the facts in *State of Texas v. Cain* qualifies as a rare circumstance. In that case, a lawless cop used a Russian Roulette-type tactic with a suspect—in this case a child—to gain an admission of guilt. After almost half a century as a law student and now a lawyer, the fact pattern exposed in the *Cain* case definitely presents a unique and extraordinary incident that I hope remains a rare factual state of affairs.

First, nothing can be a more enduring national priority than the respect for the United States Constitution’s Bill of Rights and for the rule of law and the right to life. The fight to preserve the first eight amendments of our Constitution has been a persistent and aggressive effort to maintain our system of justice as one dedicated to freedom and individual liberty.

Second, the egregious actions taken by the officer in the Santos Rodriguez case not only threatened life but actually caused the loss of life of a kid just entering his teenage years. In addition, Cain’s actions appallingly threatened the administration of justice by fabricating a story that he had removed the bullets from his gun before he pointed it at Santos’ head. Officer Foster heard Cain cry out, in part, “I didn’t mean to do it” as Cain, within seconds, exited the police car.

A third requirement that the government must evaluate is whether the defendant’s conduct constitutes a federal offense and whether the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. This is the same test applied to all federal prosecutions. Unbelievably, in his anguished outcry and credible disorientation, Cain allegedly collected the loose bullets from his car seat and inserted them back into the cylinder, all within eight to ten seconds. Officer Foster, who quickly took the gun from Cain, estimated this time span. Foster disputed the reloading story as did David, Santos’ brother, who sat in the back seat next to Officer Cain. David testified he saw the bullets in the cylinder.
when Cain opened it before threatening Santos.588 Through this desperate and incredible claim to the jury, Cain endangered the due and proper administration of justice and engaged in an obstruction of justice by committing perjury. The jury’s guilty verdict indicates they did not believe his fabricated story about the bullets.

The arguments already set forth adequately address the circumstance that the sentencing outcome in the prior state prosecution was patently inadequate in light of the federal interest involved. The life of a young boy was taken by an officer who knew he was committing a clearly forbidden act by getting the suspect to confess in desecration of the Constitution he swore to uphold. Worse, he did it in order to make his job easier and, in the process, he took an innocent human life without due process of law.589

By 1973, the United States Supreme Court had clearly established that children like Santos enjoy the protections of the rights embedded in our Constitution.590 Notwithstanding the organizational pleas for justice by LULAC and others for Santos, the DOJ revictimized him directly, and the Latino community vicariously, by not pursuing federal charges and deterring this horrendous crime against humanity with an appropriate prison sentence.

The DOJ, it appears, misapplied its discretionary policy in a few basic regards. First, a mere five-year sentence for such a vicious act is zilch. What deterrent value can this sentence possibly convey to another wayward cop? Second, the state and the federal governments have quite distinct interests. The state seeks to deter dangerous behavior that leads to the loss of life. The federal government, on the other hand, seeks to protect and encourage respect for constitutional rights. In seeking to force Santos to confess, Cain violated clearly established federal law.591 Aggravating the situation, Cain may have

588. See Cain, 549 S.W.2d at 710.
589. See id. at 710-11.
590. See In re Gault, 387 U.S. 1, 12-13 (1967) (acknowledging the right of a juvenile to have Fourteenth Amendment due process right to retained or appointed counsel if they were too poor to hire); see also In re Winship, 397 U.S. 358, 367 (1970) (concluding that the standard for determining guilt or juvenile delinquency that would result in loss of liberty is the more strict standard of beyond a reasonable doubt); Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that students do not lose their First Amendment rights to freedom of speech when they step onto school property).
591. See United States v. Hayes, 589 F.2d 811, 821 (5th Cir. 1979) (“Can it be seriously argued that a police officer, determined only to extract a confession from a prisoner, and who inflicts a fatal wound in the persuasion process, has not committed the type of offense which Section 242 was designed to proscribe?”).
killed a completely innocent child. The fingerprints found at the burglary did not match either of the Rodriguez brothers.

D. The Postmortem Revictimization of Anastacio Hernández-Rojas

After hearing about the official abuses in Venezuela, Nicaragua, the Philippines, and parts of Africa and the Middle East, we Americans are quick to question the savagery of their law enforcement agents and governments. Human rights questions immediately arise—causing Americans to appear a bit hypocritical. After all, in the United States, there is no real accountability as to federal agents, particularly since the immigration debate has been an issue that has led to extremely hazardous and hot-tempered reactions in this nation since the mid-1990s. The case of Anastacio Hernández-Rojas demonstrates the need for Americans to more closely evaluate and question our own system.

1. Imagine Anastacio Hernández-Rojas Is White

Government lawyers should conduct in their minds an exercise similar to the scene from the movie *A Time to Kill* where the defense lawyer uses his eloquent closing argument to ask the jury to “imagine” that the victim they heard testimony about was a little white girl (the all-white jury obviously knew the victim was actually a black child). Without stating the outcome, I will only say the final argument impressed the jury.

Anastacio Hernández-Rojas was a Latino man. Visualize the prosecutorial discretion and reaction if law enforcement agents encountered an intoxicated white detainee who resisted, and the agents handcuffed him and placed him lying face down. Because the angry drunk kept moving and swinging his legs, some officer decided to calm him down and beat him with a baton. The strikes caused the arrestee to move even more, coming in contact involuntarily with the

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592. During the past twenty-five years, several acts of violence have occurred, by both federal agents and private citizens, including hate crimes and homicides against individuals identified as or believed to be unauthorized aliens. See generally The Editorial Board, *Impunity and the Border Patrol*, N.Y. TIMES (May 11, 2014), https://www.nytimes.com/2014/05/12/opinion/impunity-and-the-border-patrol.html [https://perma.cc/92EX-VH87] (discussing that of 809 complaints against United States Border Patrol Agents in three years, “in nearly every case, the outcome was the same: inaction or a lack of a resolution.”).

593. See *A TIME TO KILL* (Regency Enters. 1996).
officer. Other agents then came to the “injured” officer’s defense and used force to control this allegedly wild drunk.

In the end, the force was sufficient to cause several broken ribs and a swollen face. After he was in the hospital, recuperating from a punctured lung, police discovered the drunk was the son of the owner of the city’s basketball franchise, a billionaire. We pretty much know that in the case of a white man, there would be some form of accountability at various levels, including a criminal prosecution. A recent example of brutal and unjustified police force involved a white man named Francis Pusok who had a police record involving violence. Pusok engaged police in a high-speed chase that culminated in the theft of a horse to continue his escape through mountainous terrain.\textsuperscript{594}

As applied to the circumstances facing Anastacio, while surrounded by a dozen agents, a man handcuffed behind his back and on the ground, “officer safety” becomes a fabricated stretch of the imagination. The video of Anastacio’s abuse even depicts an agent reaching in and pulling off Anastacio’s pants during the twenty-minute ordeal with twelve agents that surrounded him.\textsuperscript{595} It is also clear that the twelve able-bodied agents that surrounded Anastacio constituted a sufficiently powerful force to subdue a man in this condition. They had no credible justification to administer punitive and excessive force sufficient to break not one, but five ribs!

\textsuperscript{594} In contrast to the bruises and the black eye Pusok received, the Latino Anastacio suffered severe and fatal injuries, and his family did not witness a single criminal charge. His family had to lobby to get the DOJ just to open an investigation that finally occurred two years later, and his family, including five children, received only $1 million five years later. This was only $350,000 more than Pusok obtained less than two weeks later! See Joe Nelson & Ryan Hagen, \textit{Francis Pusok to Get $650K from San Bernardino County in Deputy Beating}, SAN BERNARDINO SUN (Apr. 21, 2015), https://www.sbsun.com/2015/04/21/francis-pusok-to-get-650k-from-san-bernardino-county-in-deputy-beating/ [https://perma.cc/32VK-4J58] (discussing how after Francis Jared Pusok received a video recorded excessive force beating that included kicks and Taser shocks as he surrendered, the county board of supervisors approved a $650,000 settlement with him within two weeks); see also Sophie Jane Evans & Kieran Corcoran, \textit{FBI Launches Civil Rights Investigation into Ten California Deputies Filmed Punching and Kicking Suspect as He Lay in the Desert After Horseback Chase}, DAILY MAIL (Apr. 12, 2015), https://www.dailymail.co.uk/news/article-3035290/FBI-launches-civil-rights-investigation-ten-California-deputies-filmed-punching-kicking-suspect-lay-desert-horseback-chase.html [https://perma.cc/TB32-96NC] (“Francis Pusok . . . was left with a prominent black eye after . . . being attacked by sheriff’s deputies in . . . California.”).

\textsuperscript{595} See Death on the Border, supra note 248 (showing an agent reach in and pull off Hernández Rojas’s pants and then he walks away with them).
2. Was the Force Reasonable?

These documented facts constitute the totality of the evidence that a neutral federal prosecutor, a judge, or a jury should take into account in determining whether officers exceeded the force necessary. The United States Supreme Court in *Graham v. Connor* 596 obviously recognized that an arrest necessarily carries the right to use some force, if needed, to effect it. More specifically, the Court enunciated the following standards:

Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, . . .” its proper application requires careful attention to 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. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. 597

Since federal circuit courts have noted that 18 U.S.C. § 242 is merely the criminal analog of 42 U.S.C. § 1983, in that Congress intended both statutes to apply similarly, then civil precedents are equally persuasive in the criminal setting. 598 The *Graham* reasonableness test thus provides a foundation for an assessment of criminal liability in Anastacio’s death. 599 As applied in the civil case regarding Anastacio’s treatment, the district court applied the *Graham* language that requires a court to balance the amount of force applied against the need for the use of that force pursuant to the Fourth Amendment’s reasonableness standard. 600

*Graham* highlights these aspects of a police–civilian confrontation in determining whether police have engaged in conduct that violates the Fourth Amendment: first, the severity of the crime at issue; second, whether the suspect poses an immediate threat to the

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597. *Id.* at 396-97 (emphasis added).
598. See *United States v. Mohr*, 318 F.3d 613, 624 n.5 (4th Cir. 2003) (citing *United States v. Cobb*, 905 F.2d 784, 788 n.6 (4th Cir. 1990)).
599. See *Graham*, 490 U.S. at 396-97.
safety of the officers or others; and third, whether he is actively resisting arrest or attempting to evade arrest by flight. 601

As to the severity of the crime, an unauthorized border crossing is a nonsevere, nonviolent crime. However, in order to explain their brutality, the agents asserted that they reacted to the felony crime of assault on an officer. 602 The officers all alleged that Anastacio was an out-of-control individual who was, at all times, violent and unresponsive to their commands. 603 In contrast, the primary custodial agents, Ducoing and Krasielwicz, contended that Anastacio’s behavior changed as the handcuffs were removed; for example, he was not throwing punches but he was pushing the agents and would not go down. 604

This is quite distinct from the claims of others. The low-level of seriousness of the illegal entry crime did not warrant such an extreme physical reaction. An agent struck Anastacio with a baton that led to his screaming “ayuda me” (“help me”), which should lead most people to infer that he was not resisting. 605 The evidence presented by Ashley Young and other eyewitnesses strongly refute the officers’ contrary claims during the encounter. 606 The judge added that a reasonable jury could find that Anastacio did not assault any of the officers, but he instead reacted to the infliction of the unwarranted and severe pain. 607

Second, the suspect did not pose an immediate threat to the safety of the officers or others. 608 While Anastacio was lying on his stomach and in handcuffs, the agents allegedly “punched, kicked and stepped on Anastacio’s head and body.” 609 This conduct definitely fits the punishment and abuse category because the detainee is under control, he is in handcuffs, and the agents can retreat and quit beating him while he calms down from the vicious beating he already


602. In many police-civilian confrontations that involve violence, at times mostly from the police side, a charge of aggravated assault on a police officer (AAPO) commonly serves as a cover-up or effort to make the excessive force “justifiable.” See for example the Phoenix police killing of sixteen-year-old Julio Valerio with a twenty-five-shot barrage. The police then began a character attack (gang member, drug dealer) and topped it off with a posthumous charge of AAPO. Julio held a knife, but he moved only after an officer pepper-sprayed him. Romero, supra note 430, at 1082, 1102, 1105-06.


604. See id. at 1177 (emphasis added).

605. See id. at 1178.

606. See id. at 1182.

607. See id.

608. See id.

609. Id. at 1172.
received. The judge noted a reasonable jury could find that an unarmed, handcuffed man, who was face down on the ground, was not a realistic threat to the eight agents and four supervisors who surrounded the him.  

As the judge so succinctly observed, the “sheer number of officers available at the scene demonstrates rather strongly that there was no objectively reasonable threat to the safety of anyone other than Anastacio.”

The third category in the Graham standard for explaining the use of greater than normal force considers whether Anastacio was actively resisting arrest or attempting to evade arrest by flight. As with their other allegations, the agents asserted claims that were refuted by the overwhelming evidence. The judge tersely noted that the video evidence alone proved Anastacio was not resisting arrest. Nor was he attempting to evade arrest. Anastacio had been in an immigration custodial situation many times before in the more than two decades of being an undocumented alien in the United States. He knew that he could not escape from the agents because he was in an enclosed area adjacent to the border.

An additional relevant factor in applying the Graham balancing test relates to the existence of a warning when the degree of force could result in serious bodily injury. The abusive use of a Taser shock is clearly established to be impermissible if there is no urgent need. In Anastacio’s handcuffed and controlled situation, a violation screams out as clearly as Anastacio’s plea for help. Instead of providing assistance, agent Vales arrived prepared to join in the criminal abuse and “repeatedly told Anastacio to stop resisting. [However, s]uch a statement [was] not a warning to Anastacio that he would be tasered.”

Taking plaintiffs’ allegations as true, a reasonable jury could find that the “warning” did not appear to be for the purpose of seeking Anastacio’s compliance or stopping an immediate threat to officers but was instead used to mask Vales’s intent to use unnecessary and

610. See id. at 1182.
611. Id.
612. See id. at 1180.
613. See id. at 1171.
614. See id. at 1177.
615. See id. at 1182.
616. See id. at 1183 (citing Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003)) (once the mental patient was handcuffed and lying on ground without offering resistance, officers who knelt on him and pressed their weight against his torso and neck despite his pleas for air used excessive force).
excessive intermediate force on Anastacio by shocking him with the Taser. Balancing the nature and quality of the intrusion and the governmental interest, the use of force by each defendant was not objectively reasonable.\textsuperscript{618}

The agents surely did not have to vent their job frustrations or retaliate against Anastacio for making a complaint to supervisor Ishmael Finn about Ducoing, the agent who injured him during the initial encounter.\textsuperscript{619} For whatever reason, the group of agents inflicted a sadistically violent attack that included kicks, baton strikes, and Taser shocks. After the failure to prosecute Anastacio’s beating and death, and the deaths of so many others that have occurred without a conviction, I wonder whether our federal border police feel sufficiently comfortable that they will always avoid or be absolved of civil rights abuses that approach human rights violations as well?\textsuperscript{620}

Notwithstanding the overwhelming and credible evidence, the DOJ, after a “careful and thorough review” of the previously discussed evidence,\textsuperscript{621} deemed the evidence lacking for a federal criminal civil rights prosecution.\textsuperscript{622} Under the applicable federal criminal civil rights law, prosecutors must establish, beyond a reasonable doubt, that an official willfully deprived an individual of a constitutional right, meaning that the official acted with the deliberate and specific intent to do something the law forbids. Specifically, the federal government cannot disprove the agents’ claim that they used reasonable force in an attempt to subdue and restrain a combative detainee so that he could

\begin{footnotes}
\item[618] See id.
\item[619] See id. at 1172.
\item[620] As the DOJ concluded in Anastacio Hernandez-Rojas’s death that they cannot disprove claims by agents that they used reasonable force, then the justice system has a problem. There are ways to prove unreasonable force! It has been done before. Even before the 2015 DOJ decision in Anastacio’s death, the \textit{New York Times} expressed concerns about the immigration agency. See The Editorial Board, \textit{Impunity and the Border Patrol}, N.Y. TIMES (May 11, 2014), https://www.nytimes.com/2014/05/12/opinion/impunity-and-the-border-patrol.html [https://perma.cc/7LYM-XPUV] (discussing that of 809 complaints against United States Border Patrol Agents in three years, in nearly every case, the outcome was the same: inaction or a lack of a resolution); see generally United Nations, Office of High Commissioner for Human Rights, \textit{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx [https://perma.cc/5844-T2D5].
\item[621] See the Anastacio Hernandez-Rojas evidence discussion supra note 213 and accompanying text.
\item[622] See Dep’t of Justice, supra note 213.
\end{footnotes}
be placed inside a transport vehicle.\textsuperscript{623} Federal criminal law mandates this standard in criminal civil rights prosecutions.\textsuperscript{624}

The DOJ added that federal prosecutors cannot disprove the agents’ claim that they used reasonable force in an attempt to subdue and restrain a combative detainee so that he could be placed inside a transport vehicle.\textsuperscript{625} Why would the DOJ concede the inability to prove excessive and unreasonable force was used when Anastacio’s physical condition speaks volumes to contradict the idea of reasonable force?

Of course, I unequivocally disagree with the DOJ’s assessment. I realize that the DOJ has a standard, and an appropriate one, that criminal charges should not be presented where the evidence does not establish independent proof beyond a reasonable doubt. In this case, the evidence is replete with willfulness and malice. The agents and supervisors hardly indicated concerns for Anastacio’s safety while they struck the handcuffed man repeatedly as though he were a piñata!\textsuperscript{626} The DOJ decision not to charge any of the more culpable agents and supervisors indicates the DOJ yielded to the agents’ claims and provided the agents’ version with excessive leeway. Contemplate these questions: What explains the five broken ribs? Does this not indicate willfully applying excessive force and specific intent to violate his right not to be deprived of liberty without due process of law?\textsuperscript{627}

\textsuperscript{623} See Dep’t of Justice, supra note 213.

\textsuperscript{624} See 18 U.S.C. § 242; see generally United States v. Slager, 2018 U.S. Dist. LEXIS 6382, at *1 (D.S.C. Jan. 16, 2018); United States v. Hayes, 589 F.2d 811 (5th Cir. 1979). Former officer Slager was convicted of deprivation of rights under the color of law, the use of a weapon during the commission of a crime of violence, and obstruction of justice; the judge sentenced him to 240 months in prison after granting downward departures for undergoing a successive state and federal prosecution and susceptibility to abuse in prison. See generally Slager, 2018 U.S. Dist. LEXIS 6382, at *1.

\textsuperscript{625} Dep’t of Justice, supra note 213 (emphasis added).

\textsuperscript{626} I am not trying to be comical. If you have been to a Mexican birthday for a youngster, you may have witnessed the wild swinging of the stick or pole used to strike the piñata until it breaks and the candy falls out.

3. The Appropriate Analysis Based on Available Evidence

In rebuttal, I contend that the evidence from the videos, from the eyewitnesses, from some of the agents, and from the physical condition of the victim speaks for itself. The overall evidence of what occurred disproves the agents’ claims that they used reasonable force. As stated in Title 18, United States Code, § 242, entitled Deprivation of rights under color of law:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.\(^{628}\)

It is obvious that a criminal civil rights prosecution should have a high standard of proof. Pursuant to interpretations of § 242, the criminal provision, acts under “color of law” include not only acts done by federal, state, or local officials within their lawful authority but also acts done beyond the bounds of that official’s lawful authority.\(^{629}\)

The basic requirement is that the acts are done while the official is purporting to or pretending to act in the performance of his or her official duties, even though the actions constitute a misuse of the authority of his or her office.\(^{630}\) Further, it is not necessary that deprivation of civil rights by a person acting under color of law be motivated by animus toward the race, color, religion, sex, handicap, familial status, or national origin of the victim.\(^{631}\)

The agents concede that, from the time Anastacio arrived at deportation area near the port of entry until the time he was tased and


\(^{629}\) See id.


his legs ziptied, approximately twenty minutes passed.\textsuperscript{632} Prior to using the Taser, agents handcuffed Anastacio and put him face down on the ground with several agents holding him down with their knees and hands.\textsuperscript{633} When Vales arrived, Anastacio continued to cry out in pain and ask for assistance. Other than this, he was inactive. The situation had deescaled over a significant amount of time, giving the agents ample time to deliberate and plan how to deal with Anastacio. Sufficient time passed for agents to consider whether to continue to hold Anastacio forcefully face down, to tase him several times, and to place his legs in zipties before finally turning him on his back. Consequently, deliberate indifference is the appropriate standard to apply.\textsuperscript{634}

a. Eyewitness Accounts

Anastacio’s family presented evidence that, if taken as true, demonstrates that the agents created a substantial risk of serious harm by forcibly holding Anastacio down for an extended period of time while his hands were cuffed behind his back and he was not resisting.\textsuperscript{635} When Vales arrived and found these circumstances, Vales decided to tase Anastacio several times despite Anastacio’s lack of resistance. Worse, the supervisory defendants, Avila, Caliri, and DeJesus, failed to intervene in the tasing of a passive, handcuffed man who was face down on the ground. The objective evidence indicates these actions were taken with deliberate indifference.\textsuperscript{636} This standard also applies to the two agents who struck Anastacio with batons as he was being held by the two primary custodial agents, Ducoing and Krasielwicz.\textsuperscript{637} Finally, the deliberate indifference standard applied as well when two other agents ziptied Anastacio’s legs while his arms were cuffed behind him.\textsuperscript{638}

\begin{thebibliography}{9}
\bibitem{fn2} See id. at 1185.
\bibitem{fn3} See id.
\bibitem{fn4} See id. at 1186.
\bibitem{fn5} See Solis v. County of Los Angeles, 514 F.3d 946, 957 (9th Cir. 2008). “Deliberate indifference occurs when ‘the official acted or failed to act despite his knowledge of a substantial risk of serious harm.’” \textit{Id.} (quoting Farmer v. Brennan, 511 U.S. 825, 841 (1994)); see also Farmer, 511 U.S. at 842 (explaining that a factfinder may conclude that the officers knew of a substantial risk of harm from the very fact that the risk was obvious).
\bibitem{fn6} See Estate of Hernandez-Rojas, 62 F. Supp. 3d at 1181.
\bibitem{fn7} See id. at 1186.
\end{thebibliography}
Once the agents handcuffed Anastacio, he was hardly able to harm an agent. Witnesses, as well as the video of the agents who formed a ring around Anastacio as he lay on the ground, support the fact that any movement Anastacio made was the reaction to the application of force from the hits, kicks, and shocks, consistent with the well-known principle, Newton’s Third Law of Motion. Formally stated, the principle dictates: “For every action, there is an equal and opposite reaction.” Applying Newton’s law to the beating of Anastacio, the movements and actions he displayed were the reactions to the painful strikes and electrical shocks he received.

It is shameful to concoct a story accusing Anastacio of attempting to assault the police in order to justify the continual beating and shocks he received. The gang of sadistic agents continued their attack even though civilian witnesses yelled at them to stop, emphatically stating that he was not resisting. Evidence that these


640. See Starting Point with Soledad O’Brien, CNN (Apr. 23, 2012, 08:00 AM), http://www.cnn.com/TRANSCRIPTS/1204/23/sp.02.html [https://perma.cc/QGA3-YYQE]. This Newton’s law version of Anastacio’s movement is confirmed by a witness, Ashley Young, who was returning from dinner in Tijuana, Mexico and heard the screaming sounds of a disturbance. From the pedestrian overpass that leads back into the United States, Ms. Young saw two border patrol agents on top of Anastacio, who was handcuffed, and his pants were to his knees. See id. She added: “And then, over the course of 25 minutes, it just escalated and several more officers showed up. And I witnessed Anastacio being tased five times.” Id. Her interviewer, CNN’s Soledad O’Brien, then addresses a question prompted from the video where an agent tells him to stop resisting, and asks, “Ashley, did you see him as you watched this transpire for roughly thirty minutes, did you see him resisting in any way?” Ashley emphatically responded “No. He wasn’t resisting. The only thing that they could potentially make a case for is that his body was convulsing as he was being tased, but he wasn’t resisting.” Id. O’Brien then asked the investigative reporter, John Carlos Frey, as to why an officer would yell “quit resisting,” and Frey responds, “I think that the officer yelling ‘quit resisting’ was more for the crowd to let them know that they were actually in the middle of some sort of a melee.” Id. Frey adds, “there is a man lying on the ground with over a dozen officers standing around him. There’s no way, at least, by the videotape, that the man is in any way, shape, or form resisting.” Id.

upset witnesses made these outcries is highly probative in the conclusion that the DOJ officials who reviewed the case either ignored or minimized this proof either entirely or improperly.\textsuperscript{642}

b. Police Motivation to Fabricate Facts

In my opinion, several reasons arguably exist as to why the agents inflicted this summary punishment on Anastacio. One motivating reason for the angry assault was that Anastacio reported agent Ducoing to Finn, although Finn later denied that Anastacio accused Ducoing.\textsuperscript{643} Anastacio’s complaint is confirmed by Krasielwicz and two others.\textsuperscript{644} Finn, Ducoing’s supervisor, then violated a customary agency rule that called for separating the alien complainant from further custodial contact with the agent whom he had accused of misconduct. Regardless of the rule he described to the federal judge, Finn ordered Ducoing and his partner to take Anastacio to the removal processing location.

A second reason centers on the fact that Anastacio had already been detained and removed several times before and kept returning and violating the entry law, easily a frustrating experience for the agents. A third reason is that Anastacio further demanded to see an immigration judge, adding to the annoyance these agents likely felt when this so-called “illegal” acted as if he had “rights.”\textsuperscript{645}

As to the criminal action, however, the DOJ failed to deliver on its responsibility to enforce criminal civil rights provisions. The DOJ letter declining criminal charges stated that the federal investigation included a review of videos of the incident, witness accounts, medical expert accounts and medical records, autopsy reports, official use of force training materials, and forensic evidence. In a very critical omission in its listing, the official DOJ letter does not specifically mention the 2014 federal district court summary judgment ruling in the Hernández-Rojas civil rights damages litigation. That opinion contains significant information that lends support to the assessment regarding taking a criminal case to trial.

\textsuperscript{642}See FED. R. EVID. 803(1) (concerning present sense impressions); see also FED. R. EVID. 803(2) (concerning excited utterances; FED. R. EVID. 803(3) (concerning then-existing mental, emotional, or physical condition).
\textsuperscript{643}See Estate of Hernandez-Rojas, 62 F. Supp. 3d at 1172, 1176.
\textsuperscript{644}See id. at 1176.
\textsuperscript{645}See id. at 1172.
c. Destruction of Evidence

Another vital area concerns the destruction of evidence. I take the liberty to share a Spanish dicho, or common saying, that states El que nada debe, nada teme. In other words, “If you have nothing to hide, you have nothing to fear.” In that case, why would a Border agent’s supervisor engage in the destruction of evidence or obstruction of justice? Agents saw and heard the complaints by the witnesses on an overpass. According to evidence in the civil action, Supervisor Ramon DeJesus, who was one of the supervisors in the ring of federal agents hovering over Anastacio, confiscated bystanders’ telephones and erased photographs and videos.

Ashley Young, a witness on the bridge who also shot a video, heard an officer demand from two witnesses that they hand over their cell phones or delete the video they had taken. As to her video, she just kept walking. Ms. Young also confirmed that a crowd of border patrol agents stood around Anastacio and that he did not appear to be moving.

Further, according to the district judge, the supervisory defendants indisputably had the ability, duty, and opportunity to intervene. Instead it appears that a supervisor preferred to prevent photos and videos from being used against the agents than prevent the beating and tasing of Anastacio. We know now that no repercussions

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646. See generally Tatum v. State, 836 S.W.2d 323 (Tex. App. 1992). Flight from the scene of a crime is often probative as circumstantial evidence of guilt. Id. at 325; see also Flores v. State, 756 S.W.2d 86, 87 (Tex. App. 1988). A similar argument can be made about the spoliation or destruction of evidence. Such conduct is tantamount to a consciousness of guilt about something, or at least a belief that what is going on is not proper or ethical conduct. It makes for a convincing argument to the jury as to their assessment of credibility.


648. See Van Zeller & Foley, supra note 641; see Ibarra v. Harris Cty., 243 Fed. App’x 830, 834 (5th Cir. 2007). Both plaintiffs and defendants agree that taking photographs of police activity is not, in and of itself, a criminal act. The district court determined that the County Sheriff maintained and acquiesced to an unconstitutional policy permitting officers to effectuate the warrantless seizure of cameras and video recorders and to destroy the film. In his deposition the Sheriff approved of his deputy’s actions in arresting Ibarra and seizing the camera and that the deputy had acted in accordance with the department’s word of mouth or standard operating procedures. See id. at 836.

resulted from the horrific images of a man being tortured. As Ashley Young stated, she “felt like she watched someone be ‘murdered.’”

In conclusion to the saga of Anastacio’s sad and tragic death, evidence that as many as twelve federal agents joined forces against one man and handcuffed and hogtied him while subjecting him to clearly excessive force suggests malice. If the “use of force” training materials permit what these agents did, then our system of justice has been incapacitated by placing reliance on claims made by self-interested agents, at least one of whom had to know that applying a Taser to a handcuffed prisoner surrounded by so many agents had to be objectively viewed and considered inhumane and cruel.

E. How a Law and Order Prosecutor and Judge Became a Law and Disorder Politician

Politicians play an important role in the revictimization process. Consider Ted Poe, a current Congressman and member of the Republican Party. A strange thing happened to Ted Poe—he lost the tough law and order posture that I knew when we both served as Assistant District Attorneys and then when we served as State Criminal District Court judges in Houston. Once Ted became a conservative Republican member of Congress from Texas, his conduct, or misconduct depending on your point of view, proved to me that the justice system is plainly and simply political in the sense that your opinion of the law blows with not only the wind but also with one’s biases and views.

Once Poe retired from the bench and became a member of Congress, he abandoned his ethical commitment to law and order by

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650. See Van Zeller & Foley, supra note 641 (explaining that Young’s statement of observing a murder arguably can be presented as a state of mind exception to the hearsay rules specifically pursuant to Federal Rule of Evidence 803(3), describing a statement of the declarant’s then-existing emotional condition (such as a mental feeling)).

seeking a pardon for two border agents who violated §242 of the criminal civil rights statute. The agents wounded an unarmed drug dealer in the back as he fled, leaving his hefty drug cargo behind.652 The agents were found guilty of assault with a dangerous weapon, violating the suspect’s civil rights, and defacing a crime scene by tossing their shotgun casings into the Rio Grande to hide the evidence.653 In other words, they engaged in a deceitful cover-up. This conduct in all respects is quite distinct from “law and order” behavior. This is why I was shocked to see Poe’s support for federal cops who violated federal law by depriving a criminal suspect of his Fourth and Fourteenth Amendment rights not to be punished without due process of law.654 Lawless cops also include those who seek to substitute their authority for that of a prosecutor, the jury, and/or a judge.655

These two agents engaged in extrajudicial or summary punishment, a violation of our nation’s civil rights laws.656 While I do not like drug dealers, I cannot justify killing a fleeing drug dealer without legal basis. In defending these two agents who engaged in vigilante-type street justice and punishment and then conducted a fraudulent cover-up, Poe argued that these two almost-assassins should be liberated, stating on the floor of the Congress: “Our Federal Government needs to get on the right side of the border conflict, and that is the American side.”657 So now we can add a member of Congress to those public officials who would do the so-called “American side” thing and revictimize a person shot in the back for a violation of federal law.658

652. See United States v. Ramos, 537 F.3d 439, 442 (5th Cir. 2008). After the drug smuggler abandoned the van and began to run toward the Mexican border, the agents fired several shots and inflicted one minor injury, but the suspect escaped; the agents then conducted a “cover-up” that included removal of the spent shells and their failure to report the discharge of their weapons as clearly required by Border Patrol policies. See generally id.


654. See U.S. CONST. amends. IV, XIV. The Fourth Amendment prohibits unreasonable seizures and the Fourteenth Amendment provides for due process of law protections. See id.

655. See Gross, supra note 392, at 155.


658. Id.
Judge Poe, even as a member of Congress, took the same oath as a DA and as a jurist, i.e., to uphold the United States Constitution. He should not permit his political extremism to blind him and undermine his well-earned reputation. Clearly established law states that cops cannot shoot unarmed fleeing felons in the back! Nor can the cops then conspire to commit a cover up by discarding the fifteen shell casings that they fired at the felon and then deceptively failing to report the shooting to their supervisors.

Since Poe had a reputation of never having lost a prosecution, many of those who vicariously suffered the brutality experienced by Campos Torres expressed the optimism that justice would be done, notwithstanding the change of venue to Huntsville, Texas and the city’s extreme law enforcement bias. I figured that notwithstanding the odds of a Huntsville jury, Ted Poe could win that case and achieve equal justice under the law.

However, the mere misdemeanor results show that Poe’s outstanding advocacy failed in his outward effort to obtain a murder conviction against the lawless cops. I only hope it was the jury that engaged in the nullification of a murder charge and not that Poe engaged in any efforts similar to his being on the “American side.”

Looking back on the Campos Torres prosecution, the actions and words of Representative Poe inevitably raise questions about the abrupt change in his ability to be a tough law and order type, since civil rights laws have been part of our national law for over a hundred years.

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660. See 18 U.S.C. § 371 (2012) (stating it is a federal crime to conspire to commit an offense against or to defraud the United States); United States v. Mays, 470 F. Supp. 642, 648 (S.D. Tex. 1979) (discussing a conviction for a Section 371 conspiracy to commit an offense or to defraud the United States after officers entered into a throwdown gun conspiracy to defraud the United States in its investigative efforts into the shooting).
661. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871) (discussing the need civil rights actions against government actors under 42 U.S.C. § 1871 Civil Rights Act). For an excellent discussion of the legislative history of the 1871 Civil Rights Act, § 1983, which supports the rationale for holding local governments accountable in limited circumstances, see Monell v. Department of Social Services, 436 U.S. 658, 664-95 (1978). The Court held that Monroe v. Pape is overruled insofar as it holds that local governments are wholly immune from suit under § 1983. Id. at 663. The Court concluded that a local government may be held liable under § 1983 for an injury that results from the execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, and this official action serves as the moving force that inflicts the injury. Id. at 694-95.
Not much has changed since the 1970s with regard to prosecutions of lawless cops. Some have occurred, but many prosecutors have looked the other way. The absence of deterrence and the minimal accountability in police criminal prosecutions creates a challenge for the justice system. During the 1970s, the Houston, Texas grand jury reviewed at least twenty-four cases of police officers who shot and killed or wounded civilians. Not one faced a formal criminal charge until an off-duty officer was indicted in April 1977 for the attempted murder of a businessman in a road rage situation.

IV. POLICE ACCOUNTABILITY—ISSUES THAT NEED RESOLUTION

_The Washington_ has tracked every fatal shooting by a police officer in the line of duty. From January 1, 2015 to January 6, 2018, a total of 2,945 people had been shot and killed by police. According to criminologist Philip Stinson, an on-duty police officer shoots and kills someone about 1,000 times a year. Of those deaths, the criminal justice system typically concludes that only around one shooting each

662. See Curtis, supra note 169.
663. See id. Did the unusual indictment of an officer perhaps result from his off-duty status and the social standing of the victim? In 1971 and 1977, the Houston grand jury returned only two murder indictments against on-duty Houston police officers, respectively in the Bobby Joe Conner beating and the Joe Campos Torres drowning. Both ended in exonerations of the murder charge. See United States v. McMahon, 339 F. Supp. 1092, 1093 (S.D. Tex. 1971) (discussing state court acquittal of the officers who killed Conner); Bill Curry, 1-Year Sentences Imposed In Houston Brutality Case, WASH. POST (Oct. 31, 1979), https://www.washingtonpost.com/archive/politics/1979/10/31/1-year-sentences-imposed-in-houston-brutality-case/26bd9c2f-ff7b-4228-9e31-cbe7e8284187/?utm_term=.4669008521be [http://perma.cc/VZ5K-MSWQ] (discussing the state court trial of the officers involved in the death of Torres, which resulted in only negligent homicide convictions).


665. Id.
year warrants a manslaughter or murder conviction. Records indicate an increase in the number of officers facing charges related to on-duty shooting deaths. For example, prior to 2015, about five officers per year faced such charges, but in 2015 that number rose to eighteen officers charged.

Police departments need to implement a predictable plan for the removal of lawless cops, those bad apples that contaminate the younger cops and create a danger for the rest of the officers who want to conduct their work professionally. The death of Eric Garner during a 2014 arrest for selling cigarettes is one such example of lawlessness. Officer Daniel Pantaleo wrapped his arm around Garner’s neck tightly as Garner begged for breath, stating he could not breathe. The autopsy determined Garner died from the chokehold and the compression of his chest.

As a general practice, the DOJ historically defers to state authorities to investigate and prosecute state criminal laws. A Staten Island grand jury had already no-billed Officer Daniel Pantaleo on criminal charges for the death by chokehold. The NYPD thereafter delayed this hearing to permit the DOJ to complete a federal civil rights investigation, a practice required by neither law nor comity.


668. Stinson, supra note 666 (discussing an increasing trend in officers charged with murder or manslaughter since 2015).

669. Id.


671. See id.

672. See id. About a year after Garner’s death, a congressman proposed a bill that would make it illegal to use chokeholds. See Christopher Mathias, New Bill Would Ban Police Chokeholds Under Federal Law, HUFFINGTON POST (Apr. 27, 2015, 4:28 PM), https://www.huffingtonpost.com/2015/04/27/chokeholds_n_7154970.html [https://perma.cc/W9K9-UXHC] (proposing to prohibit police officers from using chokeholds under federal law). The Supreme Court has previously declined to categorically prohibit officers from using chokeholds. See City of Los Angeles v. Lyons, 461 U.S. 95, 97-98 (1983) (holding that Lyons was limited to suing the police and the city for individual damages; injunctive relief against chokehold tactics was denied).

673. The separate sovereignty doctrine and principles of comity dictate respect for each of the two separate governments. Stated another way, both state and federal
Due to this delay, the police leadership continued to employ an officer who committed not only a police violation but also a crime. Finally, after postponing disciplinary proceedings due to the DOJ investigation, in mid-2018 the NYPD initiated preparations for an internal administrative trial.\textsuperscript{674} Lawyers from the Civilian Complaint Review Board, an outside oversight agency that looks into police wrongdoing, will administratively prosecute the officer to seek his removal.\textsuperscript{675} The review board already determined in 2017 that Pantaleo used a prohibited chokehold and recommended departmental charges that could lead to suspension or dismissal.\textsuperscript{676}

Unfortunately, notwithstanding the constitutional, statutory, and administrative protections our justice system provides both public employees and the citizenry, deliberate action has to be taken to stabilize the checks and balances between police and the public. Our nation has experienced a regrettable history of lawlessness among a significant minority of police officers.\textsuperscript{677} Worse, the failure of several of our governmental agencies and the citizenry to hold these public servants accountable has developed into a gloomy indicator for our nation’s safety.

The police accountability issues involve primarily governmental solutions. On the other hand, a highly critical concern centers on our citizens who fill the potential jury pools across the nation. In seeking

prosecutors have their own governmental interest to address. See, e.g., Abbate v. United States, 359 U.S. 187, 193-94 (1959).

\textsuperscript{674} Mueller, \textit{supra} note 670. The status of the civil rights investigation into Mr. Garner’s death remains unclear. Federal civil rights prosecutors recommended charges against Pantaleo, but top Justice Department officials expressed strong reservations about moving forward with a case they doubt can be proved successfully under the strict federal civil rights proof standard. \textit{See id.}

\textsuperscript{675} \textit{See id.} The NYPD has not always held off on disciplinary proceedings while state or federal investigations continue. For instance, the city conducted an administrative trial of Officer Francis X. Livoti while federal prosecutors were still deciding whether to charge him with civil rights violations in the chokehold death of Anthony Baez. He was fired from the police department in 1997. \textit{See id.} The DOJ later convicted Livoti. See United States v. Livoti, 22 F. Supp. 2d 235, 238 (S.D.N.Y. 1998) (noting Livoti’s federal conviction for violating the civil rights of Baez).

\textsuperscript{676} Mueller, \textit{supra} note 670.

\textsuperscript{677} During 2005-2012, 10,787 individual non-federal sworn law enforcement officers with general powers of arrest faced criminal charges. Philip M. Stinson, Associate Professor, Bowling Green St. Univ., Presentation at the 2017 Urban Elected Prosecutors Summit: Police Shootings Data: What We Know and What We Don’t Know 12 (Apr. 20, 2017), https://scholarworks.bgsu.edu/crim_just_pub/78 [https://perma.cc/W9K9-UXHC]. The arrested officers represented 4,043 state, local, special, and tribal law enforcement agencies located in all fifty states and the District of Columbia. \textit{Id.}
solutions, the public needs public officials at all levels to adhere to their oath. Citizens have to do their part to make good government function. The need for trust—at all levels—makes the police accountability issue even more significant.678

Experts have conducted studies regarding the on-duty discharge of firearms that reveal interesting information, but it does not explain the elevated number of apparently avoidable fatal shootings.679 The fatality numbers are high among white, black, Latino, and Native American communities.680 However, the minority numbers reflect disproportionately higher rates of deaths.681 We must take drastic action to protect our reputation as a people and to distance ourselves from nations where dictatorships and lawlessness rule in favor of the wealthy and the tyrants that “govern.”

America approaches the century mark since the first systematic investigation of police misconduct. In 1929, President Herbert Hoover enacted the National Commission on Law Observance and Enforcement, commonly known as The Wickersham Commission.682
Although the Commission’s primary goal focused on prohibition enforcement, participants and observers addressed brutality and other lawless tactics among police. 683

The Commission issued the Report on Lawlessness in Law Enforcement, and its findings prompted “the appearance of the first formal internal affairs units designed to investigate police misconduct and to receive citizen complaints about abuse.” As police officials still do today, they angrily denounced the critical report and denied its findings. 685 The report placed police misconduct problems on the national agenda and pointed policymakers in the direction of reform, but it never provided any specific solutions. The introductory comments note “[o]ne of the curious aspects of the report, however, is the extremely brief and vague discussion of possible remedies. The report concludes that law cannot really solve the problem of lawlessness and that the solution ultimately depends on the ‘will of the community.’” 686 In other words, the people need to decide: Is this existing state of affairs of police lawlessness what we want to maintain? If not, what do we do?

In reliance upon experts in part, as well as my observations during years of experience as a professional in the criminal justice field, I enumerate issues that should be addressed and provide recommendations wherever possible. Obviously, I am not presenting a complete listing. Some remedies can be readily established. Others, like the jury’s wayward behavior in the secrecy of the jury room, might be more difficult and will require a steadier educational approach. 687 Since change is gradual, police departments and legislative, administrative, and professional entities must begin to study, discuss, and implement solutions in order to improve trust between the police profession and the community.

The following remedial suggestions require a concerted effort of commitment and amenable debate. To some extent, the order in which

683. See generally id. at vi-vii, xi. The Commission findings sensitized the Supreme Court on these “third degree” brutality practices, such as the use of “physical brutality, or other forms of cruelty, to obtain involuntary confessions.” See id. at x. See, e.g., Brown v. Mississippi, 297 U.S. 278, 281-82 (1936) (describing police savagely beating two arrestees and coercing confessions from them).

684. See Walker, supra note 682, at xi.

685. Id.

686. See id.

687. See, e.g., Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017) (asserting that a juror went outside the record and the evidence and injected prejudicial racial stereotypes against the Latino accused).
they are discussed reflect my sense of priorities, although others might disagree.

A. Creation of a State-Level Special Prosecutor’s Office

Without a doubt, each state should have a legislatively mandated Special Prosecutor’s Office to address public integrity, civil rights, and excessive force or brutality accusations. Some experts refer to the position as that of an Independent Prosecutor. The title speaks for itself. Also, to clarify, I distinguish the civil rights category from the excessive force claims because experience indicates that some police actions amount to retaliation against individuals for asserting First or Fourth Amendment rights as opposed to being assaulted without justification.

From my personal observation, beginning in the 1970s Harris County grand juries, as well as those in other parts of the nation, seldom returned an indictment in a police shooting or beating to death of a civilian. Two things occur in this setting that might explain the improbability of an indictment. First, when prosecutors present the case professionally, i.e., without bias, the grand jury majority might not want to place the police officer’s liberty in danger. Second, when prosecutors present the case with a pro-police bias to obtain a no-bill, then our system of justice is compromised. This can easily be done if the prosecutor advises the members of the grand jury that the district attorney’s office will have a tough time proving the intent to kill or recklessness element. Unquestionably, biased grand jury presentations have occurred in Houston, Texas as well as in other major metropolitan areas of the nation. The other obvious problem is the

688. See generally Kate Levine, Who Shouldn’t Prosecute the Police, 101 IOWA L. REV. 1447, 1447 (2016). In this excellent study, Professor Levine makes it clear that prosecutors should not prosecute alleged criminal wrongdoing by officers upon whom they traditionally rely to present testimony in their other regular criminal prosecutions. Professor Levine, a faculty member at St. John’s University School of Law, argues that the law and scholarship about conflicts of interest require a recusal by prosecutors in police prosecutions. Levine discusses several options that can provide a remedy; see also Ties That Bind, GUARDIAN, https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings (last visited Feb. 18, 2019) [https://perma.cc/9FDJ-M45N] (detailing discussion about conflicts of interest in general among lawyers and police-related conflicts among prosecutors in particular).

following: Even when a homicide indictment is returned, a conviction seldom results.\textsuperscript{690}

In a study entitled “Fatal Police Shootings: Issues for Prosecutors,” Professor Stinson, a criminologist, recommended, \textit{inter alia}, that prosecutors should have written policies in response to officer-involved shootings as well as have an outside prosecutor for handling the related investigations, charging decisions, and prosecutions to avoid the appearance of bias and partiality.\textsuperscript{691} In my opinion, Stinson’s recommendation is an outstanding solution for those states and cities that have a small population or a small police force.

However, for those states with large cities that have a population exceeding 400,000 inhabitants, and particularly for the largest populated states that have numerous police complaints, the central, legislatively created Special Prosecutor’s Office represents the appropriate solution. The amount of public funds that municipalities within a state expend for civil rights litigation serves as another indicator of the need for a centralized prosecutorial approach.

Two outstanding criminal defense attorneys, the late Percy Foreman and Houston attorney Dick DeGuerin, criticized the rampant Houston, Harris County, Texas police brutality during the 1970s.\textsuperscript{692} Foreman pointed the finger at the local district attorney for the “traditional” failure to enforce the law against police officers, and he labelled the Torres drowning as not “an aberration” but “merely another expression out of several hundred in a ‘consistent, repetitive [sixteen]-year pattern’ of police violence abetted by local district attorneys who have ‘whitewashed every charge against policeman’ before grand juries.”\textsuperscript{693}

Perhaps Foreman’s comments convey the attitude that has emboldened cops and opened the door to more police violence, even enabling a cop to spontaneously say, “Let’s see if the wetback can swim.”\textsuperscript{694} DeGuerin agreed “that the Harris County District Attorney

\textsuperscript{690} See United States v. McMahon, 339 F. Supp. 1092, 1092-93 (S.D. Tex. 1971), for an example of the beating death of Bobby Joe Conner by Houston police officers in the early 1970s. Both state and federal prosecutions ended in acquittals. \textit{Id.}

\textsuperscript{691} See Stinson, \textit{supra} note 677.

\textsuperscript{692} See Curtis, \textit{supra} note 169.

\textsuperscript{693} See \textit{id.}

\textsuperscript{694} See \textit{id.} Foreman made these comments in 1977, even though years earlier his own son, a deputy sheriff, faced criminal charges. \textit{See generally} David Lyons, \textit{Foreman Agrees to Handle Case for 10 Indicted Isle Law Officers, GALVESTON DAILY NEWS}, Oct. 26, 1972.
is ‘in bed with the police department because he has to work with them every day’ to prosecute normal criminal cases.”

DeGuerin recommends a special independent prosecutor for criminal investigations involving police officers.

The Special Prosecutor should further assume the responsibility to investigate issues related to public integrity. For example, county commissioners and other officials make financial and budgeting decisions that impact the local prosecutor’s budget. If the local prosecutor has reason to believe that the precinct commissioner is living a lifestyle beyond the means of his annual salary, the local prosecutor should not be the one to supervise the investigation. The prosecutor should have the power under state law to have all investigatory and prosecutorial decisions made by a neutral Special Prosecutor at the state level.

B. Legislative Enactment of a Federal Law to Penalize the Code of Silence

The justice system has no choice but to seek a legislative prohibition of the entrenched Code of Silence within police departments. The adherence to the Code ultimately places an officer with knowledge of criminal activity in the position of committing perjury. This occurs because the policy inculcated at many police academies is that an officer must not “rat” on a fellow officer. If a cop sees an officer kick a handcuffed prisoner, his statement under oath that he does not know what occurred or that he did not see anything is a pure lie, a materially false statement that can be easily proven to a neutral jury as perjury!

This extreme indoctrination led to retaliation against NYPD Officer Frank Serpico for blowing the whistle on crooked cops and violating the sacred Code of Silence. During the 1970s, NYC established the Knapp Commission that led to hearings where Serpico voluntarily testified about cops taking bribes. Police animosity against Serpico resulted in his fellow officers ignoring him when he was shot.

695. Curtis, supra note 169.
696. See id.
697. See Hutchinson, supra note 561.
in the face during a drug raid. No fellow cop placed an emergency “officer down” call to the dispatcher. Serpico survived only because an elderly neighbor alerted 911, and two other cops responded and rushed him to a nearby hospital. He discovered that one of the officers later stated, “If I knew it was Serpico I would have left him there to bleed to death.” Serpico left the NYPD shortly thereafter.

This resilient adherence to the Code of Silence contributed to the introduction of the term testilying into the legal arena. The Code of Silence has existed as long as there have been organized police forces, from the 1840s in New York to the wave of corruption that spread through urban police forces in the 1970s. While the code historically protected the corruption rackets, today the Code of Silence protects officers who violate civil rights through violence and other misconduct. The 1980s and 90s introduced us to a new and more invidious Code of Silence, typified by the high-profile beating and shooting cases of Rodney King and Abner Louima, respectively. Investigators attribute the persistence of the code to the “police culture that exalts loyalty over integrity [and] the silence of honest officers who fear the consequences of ‘ratting’ on another cop no matter how grave the crime.” Myriam E. Gilles, Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability, 80 B.U. L. REV. 17, 64-66 (2000) (alteration in original) (citing REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 77 (July 7, 1994), http://www.nyc.gov/html/ccpc/assets/downloads/pdf/final_report.pdf [hereinafter MOLLEN COMMISSION]). The term “testilying,” is a portmanteau, a made-up word coined from the combination of the words testify and lying during official testimony. For a detailed recent article about the development of the term, see Joseph Goldstein, ‘Testilying’ by Police: A Stubborn Problem, N. Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/QZ9N-MS4X] (“‘Behind closed doors, we call it testilying,’ a New York City police officer, Pedro Serrano, said in a recent interview, echoing a word that officers coined at least 25 years ago. ‘You take the truth and stretch it out a little bit.’”). Serrano also bravely recorded comments from supervisors that contributed to the NYC racial profiling practices being ruled unconstitutional by a federal judge in 2013. See Floyd v. City of New York, 959 F. Supp. 2d 540, 596 (S.D.N.Y. 2013).
to this testilying phenomenon.\textsuperscript{704} Additionally, the ramifications of following the Code of Silence can go far beyond perjury. In order for the code to be effective all around, to build that “blue wall of silence,”\textsuperscript{705} the loyalty to the code “mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoing be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged.”\textsuperscript{706}

The NYPD administrative disciplinary practices, those that allow lying cops to remain on the payroll and later obtain a promotion, might explain why more officers are not reticent about testilying.\textsuperscript{707} There are too many examples, but one will suffice.\textsuperscript{708} Officer Nector Martinez testified under oath to a grand jury about a woman he arrested for possession of a gun. As the trial approached, the defense found a security video of the original contact of Martinez with the accused. The prosecutor eventually dropped the gun possession charge since the video proved Martinez’s story materially false. Instead of pursuing perjury charges against the cop, the prosecution’s dismissal papers noted only “clear inconsistencies” between Martinez’s “recollection of events and the video.”\textsuperscript{709} Martinez remained on the force and later received a promotion to detective.\textsuperscript{710}

In reaction to the wave of police abuses after the death of Michael Brown, many involving shootings, Professor Bedi questioned why society is not succeeding in subjecting police officers to criminal

\textsuperscript{704} Christopher Slobogin, \textit{Testilying: Police Perjury and What to Do About It}, 67 U. COLO. L. REV. 1037, 1054 (1996); see also \textit{id.} at 1044; \textit{id.} at 1044 n.32 (“[P]olice supervisors, driven by the same crime control and quota pressures that drive field officers, actively encourage testilying.”).

\textsuperscript{705} \textit{See MOLLEN COMMISSION, supra} note 703, at 77.


\textsuperscript{707} \textit{See Goldstein, supra} note 703.


\textsuperscript{709} Goldstein, \textit{supra} note 703.

\textsuperscript{710} \textit{See id.} (showing an example where the actions of the prosecutor establish the need for an independent prosecutor).
sanctions for acts of misconduct. He then addressed a more fundamental question:

Why are police officers—given their unique responsibilities and powers—subject to the same criminal code as everyone else? I analogize to soldiers who have their own set of criminal laws under the Uniform Code of Military Justice (UCMJ). Given the similarities between soldiers and police officers—both carry guns, are part of a hierarchal structure, and most notably, are tasked to protect society through use of force and possibly deadly force—it stands to reason that both groups should be subject to unique laws specifically tailored to their respective duties and responsibilities.

Professor Bedi contends that a specially designed uniform code of police justice would ultimately be more effective in regulating police behavior and deterring instances of abuse than the current system of civil disciplinary actions that includes mostly demotions or terminations. Considering the strong similarities between the military and police, i.e., both defend communities against threats to safety and security, Bedi notes that their respective “unique status and powers” necessitate the “need for special criminal rules to regulate their respective duties.” While Bedi sees these changes as easing the barriers to the initiation of charges against police, he further notes that they will “instill greater confidence in police accountability.”

Legislation already exists at the federal level that touches slightly on this issue. Also, Texas, perhaps like other states, has a provision that mandates that persons have a general duty to report knowledge of a felony offense. The wording in itself makes it

712. Id.
713. Id. at 15.
714. Id. at 15-16.
715. The misprision of felony provides that: Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both. 18 U.S.C. § 4 (2012).
716. See TEX. PENAL CODE ANN. § 38.171 (West 2017). A “Failure to Report Felony” makes it a misdemeanor for a person who observes the commission of a felony, which a reasonable person would believe was an offense involving serious bodily injury or death, and who fails to immediately report the commission of the offense to a police officer or law enforcement agency under circumstances in which a reasonable person would believe that the commission of the offense had not been
difficult to enforce. Since the Fourteenth Amendment Due Process Clause requires that statutes be clear and provide notice to the accused as to what constitutes criminal behavior, and with the goal of eroding the Code of Silence, I propose the following federal legislative enactment, which I would call the Uniform Prohibition of the Law Enforcement Agent Code of Silence Act:

Whoever, having a license to exercise the position of a law enforcement agent at any level of government within the United States and the various states and territories and having knowledge of the actual commission of a misdemeanor or of a felony cognizable by a court of the United States, or of a state of the United States, ignores, maintains silence, or conceals and does not as soon as possible make known the same to an immediate supervisor within the law enforcement department and to the local or federal prosecuting authority as well, shall be imprisoned not more than three years; and if the misdemeanor or felony is one in which death results, shall be imprisoned not more than twenty years.

Much damage has been done by the maintenance of the Code of Silence. In 1994, Acting New York Supreme Court Justice Gerald Sheindlin expressed his belief that officers committed perjury during a trial that involved the use of a prohibited chokehold.717 As a trial judge, based on the overall evidence, he reluctantly found NYPD officer Francis Livoti not guilty of “negligent homicide” of Anthony Baez.718 Only one courageous police witness contradicted the account given by the other officers that Baez resisted. This is an example of a case where testifying created the maximum obstruction of justice that was not corrected until a federal civil rights prosecution resulted in Livoti’s conviction.719

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719. Id. (asserting that the Court justified an enhanced sentence since Livoti committed perjury during his state grand jury testimony by testifying falsely on many material matters). Other federal and state statutes seek to protect witnesses and public servants from retaliation. A federal law, entitled “Retaliating Against a Witness, Victim, or an Informant,” provides that one who “kills or attempts to kill another person with intent to retaliate against any person” or “knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person” for providing information as a witness at an official proceeding, shall be guilty. 18 U.S.C. § 1513(a)(1)(A), (b)(1) (2012). An exemplary state statute, entitled “Obstruction or Retaliation,” provides that a “person commits an offense if the person intentionally or knowingly harms or threatens to harm another by an unlawful act . . .
The single witness who contradicted the other officers that Baez resisted arrest later asked for an administrative assignment since she “feared she would not get back-up in dangerous situations from fellow officers.” She obviously could not forget that twenty years before Serpico’s fellow officers left him to die like a “rat.”

I would urge legislators to consider enacting this statute because of the seriously deleterious effect the police Code of Silence is having across the criminal justice system and on the ability of governmental administrators to remove lawless cops from their workforce. The continued presence of these lawbreakers and conspirators expose municipal government policymakers to liability under civil rights law for the payment of damages to victims of these wayward police officers. The continuation of the Code of Silence is a cancer that destroys respect for law-abiding patrol officers and supervisors and for the government. Congress should enact this proposed legislation to supplement the federal retaliation statute to provide ammunition against this obstruction of justice. Not only large municipalities like

in retaliation for or on account of the service or status of another as a . . . public servant, witness, prospective witness, or informant.” See TEX. PENAL CODE ANN. § 36.06(a)(1)(A) (West 2017).


721. See id. Federal and state legislation that seek to protect witnesses and public servants from retaliation already exists. The federal law, entitled “Retaliating against a witness, victim, or an informant,” provides that one who “kills or attempts to kill another person with intent to retaliate against any person” or “knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person” for providing information as a witness at an official proceeding, shall be guilty. § 1513(a)(1), (b)(1). The Texas statute, entitled “Obstruction or Retaliation,” provides that a “person commits an offense if the person intentionally or knowingly harms or threatens to harm another by an unlawful act . . . in retaliation for or on account of the service or status of another as a . . . public servant, witness, prospective witness, or informant.” TEX. PENAL CODE ANN. § 36.06(a)(1)(A) (West 2017). While the state version is similar to the federal law, a proof issue exists in that the federal law clearly meets the typical description of a specific intent crime while the state version flexibly permits a jury to conclude from the evidence if the actor’s mental state was that of acting intentionally or knowingly in harming or threatening to harm a witness, for example.

722. See Monell v. Dep’t of Soc. Servs. of the City of New York, 436 U.S. 658, 694 (1978) (concluding that a local government may be liable when the execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983). The Court added that Monell unquestionably involves official policy as the moving force of the constitutional violation. Id.
Los Angeles, Houston, New York, Phoenix, Philadelphia, and Chicago, but also small towns pay for victims deprived of their civil rights by lawless cops with funds that come from “We, the People,” the hardworking taxpayers of the nation.\(^{723}\)

C. Legislative Extension of the Statute of Limitations in Code of Silence Obstructions

Areas where lawmakers need to consider the promulgation or amendment of statutes of limitations are in civil rights and criminal obstruction of justice cases. I will provide an incredible example, one that is weird but true. A lawless cop named Hector Polanco, of the Austin Police Department, detained and then threatened Chris Ochoa and his friend Richard Danziger with a death penalty capital murder charge for the 1988 rape and shooting death of a young woman.\(^{724}\) Ochoa and Danziger did not obtain their innocence until 2001.\(^{725}\)

A few years after Ochoa’s coerced confession, the Austin Police Department (APD) removed Polanco from the task force investigating the Yogurt Shop murders of four young employees amid allegations that he had coerced a confession from a suspect.\(^{726}\) The department

\(^{723}\) See POLICE SHOOTINGS: TRIALS AND CONVICTIONS ARE RARE FOR OFFICERS, CNN (Mar. 27, 2018, 4:41 PM), https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html [https://perma.cc/A8JM-VMDG] provides examples of settlements received by civil litigants, noting the following amounts received by civil litigants who were victims of police brutality: Philando Castile, St. Anthony and Roseville, MN, $3.8 million; Freddie Gray, Baltimore, MD, $6.4 million; Eric Garner, NYC, $5.9 million; Tamir Rice, Cleveland, OH, $6.0 million; Michael Brown, Ferguson, MO., $1.5 Million.

\(^{724}\) See SALINAS, supra note 3, at 214-16, for a complete description of this injustice. An inmate brutally beat Danziger, leaving him with severe brain damage; upon his release, Ochoa graduated from college and attended the University of Wisconsin law school, the site of the Innocence Project that liberated him. See id. He is now a lawyer in Wisconsin. See id. Both received settlements from the responsible governments. See id.

\(^{725}\) See id. at 216-17.

\(^{726}\) Two weeks after the DePriest murder, Ochoa and his friend Danziger pulled into the Pizza Hut parking lot and drank beer. Suspicious employees called the police. Two days later Detective Polanco and other detectives picked them up for questioning. After a couple of days and rough and threatening questioning, Ochoa confessed and fingered Danziger in the process. CHRISTOPHER OCHOA TIME SERVED: 13 YEARS, supra note 489. (“[W]hite guys always walk, and the Hispanics always get the needle.”). Ochoa eventually made a deal with the District Attorney, pled guilty to murder and secured a life sentence, and then he later testified falsely against Danziger, who was convicted of aggravated sexual assault. See Hall, supra note 490; see also DANZIGER v. STATE, No. 3-90-086-CR, slip op. at x (Tex. App. 1991). “Why would an
then accused Polanco of perjury for lying about taking a statement from a witness who would later claim that Polanco and others had been fed him information and coerced into signing the statement. The APD fired Polanco in 1992 for perjury, but an arbitrator later ruled that he had merely forgotten about the statement. The APD had to reinstate Polanco, and he served among good cops until he resigned shortly before a hearing cleared Ochoa and Danziger of their respective coerced convictions that he had created. One can assert, without hesitation, that the arbitrator’s decision to reinstate Polanco based on an alleged memory lapse qualifies as Exhibit A in proving arbitrariness of the process, particularly considering Polanco’s bad reputation within the department. 727 In addition to the arbitrary results that arbitration can produce, police unions and associations at times go above and beyond supporting their officers, such as a somewhat inconsistent statement by the president of the Austin Police Association in referring to the case of Ochoa and Danziger and to Polanco as well: “We tried and convicted the wrong two men,” but the police leader added “Nobody has shown [Polanco] did something wrong.” 728 These outcomes indicate that arbitration serves as a barrier to the ability of police department leadership to remove the lawless cops that impede efforts of professional and ethical cops.

The crooked cop Hector Polanco escaped criminal charges. If a penal offense even existed for what he did, the statute of limitations would likely have expired. The actions in which Polanco engaged appear to fit the “Official Oppression” statute that provides for only a Class A misdemeanor where a “public servant act[ing] under color of his office or employment . . . intentionally subjects another to mistreatment or to arrest, detention, search, [or] seizure . . . that he knows is unlawful.” 729 Obviously, with all the recent discoveries of crooked cops like Polanco and some others in New York City, more specific statutes need to be enacted to establish long-term penalties for innocence person confess to a crime he didn’t commit? Sometimes it depends on who is asking him the questions.” Hall, supra note 490.

727. See Hall, supra note 490.
728. See id.
729. TEX. PEN. CODE ANN. § 39.03(a)(1), (d) (West 2017). In the Michael Morton case, the prosecutor who hid exculpatory evidence and “restrained” Morton in jail for twenty-five years for the murder of his wife faced a charge of tampering with evidence and contempt of court. The tampering was dismissed, and Anderson served ten days in jail. Chuck Lindell, Ken Anderson to Serve 10 Days in Jail, AUSTIN AM.-STATESMAN (Nov. 8, 2013), https://www.statesman.com/NEWS/20131108/Ken-Anderson-to-serve-10-days-in-jail [https://perma.cc/B5QA-GP3C].

an aggravated felony form of official oppression in those Ochoa-type cases built of perjury, coerced confessions, and fabricated evidence.730

In addition, state legislatures should enact legislation that provides that the statute of limitations does not begin to run in these types of corrupt and fabricated imprisonments until a prosecuting authority discovers the existence of the violation. In Ochoa’s case, when the exoneration occurred, the statute of limitations arguably would have begun to run for a criminal prosecution. However, the absence of any applicable penal statute makes this issue a merely hypothetical question.

D. National Zero Tolerance Standard for Employment as a Police Officer

Our national security and our nation’s general welfare mandate that our police administrators take actions to maintain professionalism among our police forces, large and small. Government officials must send an unequivocal message that an acquittal in a criminal accusation does not automatically grant a lawless cop any particular right to remain employed on the police force. Simply stated, the standard for continued employment in a law enforcement position should be that any officer who engages, as shown by clear and convincing evidence, in non-justifiable violence, an act involving moral turpitude, and/or acts of deception must be removed from employment. Governmental entities have to protect the taxpayers, the people they serve, from the liability that a lawless cop can create.731


731. In Monell v. Department of Social Services, 436 U.S. 658, 661, 694 (1978), the Court announced that a local government may be sued successfully under §1983 for an injury inflicted when execution of an official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were medically required. The Fifth Circuit upheld governmental liability in Brown v. Bryan County, 219 F.3d 450 (5th Cir. 2000), cert. denied, Board. of County Commissioners v. Brown, 532 U.S. 1007 (2001). In Brown, the Fifth Circuit concluded liability on the part of Bryan County on the basis of its failure to provide any training to a reserve deputy who was allowed to make arrests. The Brown jury concluded from the evidence that the county sheriff, admittedly a policymaker, implemented a training policy so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff Brown and this failure constituted the “moving force” behind her injury. Id. at 452-53. Since 2006, at least 451 of 1,800 officers fired from thirty-seven of the
E. Police Professional Training Standards on the Use of Deadly Force

In many cases police officers use deadly force, typically because the officers assume, without any articulable basis, that the suspect has a gun, which causes the officers to fear for their lives. There have been many cases when innocent people would still be alive if the officer would just have waited half a second more or not drawn their weapon at all and used an impact weapon instead. These are some examples where officers were too quick to pull the trigger, and unfortunately a life was taken. In contrast, officers often have to act quickly, such as in the police chase of a suspect who had killed his grandmother, stole her car, and began to shoot at cops during the chase. Police had to make a serious life-or-death decision when the suspect crashed and ran towards a Trader Joe’s store. The crook shot at the cops, and cops wounded the suspect in return, but, in the shootout, a police bullet hit and killed an employee inside the store.

At a meeting of police and justice officials, experts discussed new training methods and policies that could lead to a decrease in the annual number of fatal shootings. A Maryland police administrator expressed concerns over a prevalent attitude among police officers that “my safety is more important than the safety of anyone else’s.” Our goal should be to have everyone go home safely at nation’s largest departments have won their jobs back through appeals provided for in union contracts. Theresa Vargas & Kimbriell Kelly, Philadelphia Police Were Forced to Rehire Officer Cyrus Mann, Who Fatally Shot an Unarmed Man in the Back, WASH. POST (Oct. 7, 2017), https://www.washingtonpost.com/graphics/2017/investigations/fired-rehired-three-shootings-in-three-years/?utm_term=.e9f32e09b682 [https://perma.cc/9Z8V-L77A]; Kelly et. al, supra note 524 (describing a situation where a former Philadelphia police commissioner described the demoralizing impact on the ethical officers of having to rehire eighty fired officers since 2006, “three of them twice”).

See Burke, supra note 698.


733. Immediately, some questioned the LAPD’s response, while others praised the officers’ efforts. According to Charles “Sid” Heal, a retired sheriff’s commander and expert on law enforcement shootings, “the video reflects the realities of the life-and-death decisions officers face.” If you do not shoot, the lives of hostages and officers will be in jeopardy. See id.
the end of the day.”\textsuperscript{735} The standards that currently govern the use of deadly force by police officers results in “an Orwellian criminal justice system where all are equal but some are more equal than others. If we value all lives equally, we should require officers to actually see a gun before they decide to use deadly force.”\textsuperscript{736}

“Academics and activists alike have expressed support for policies and laws that reflect the idea that a threat should be ‘imminent’ before police resort to the use of deadly force.”\textsuperscript{737} Many cases where a fatality occurred and where an officer was absolved and kept on the force involved a conclusory “fear for my life.”\textsuperscript{738} As required by \textit{Terry v. Ohio}, to justify a seizure an officer must assert \textit{specific and articulable facts} before engaging in a temporary seizure of a person.\textsuperscript{739} A similar standard of specific and articulable facts should be required when an officer justifies a shooting or a chokehold to seize a person.

F. Police Use of Deadly Force

Because we are a nation of laws, and we want to do the right thing, it is imperative that our nation’s Supreme Court and other lower tribunals that comprise the judicial branch engage in a realistic analysis of a police officer’s use of deadly force as it relates to the history of the Fourth Amendment and its development. Nothing should diminish the reality of the dangerousness of police work. At


\textsuperscript{736} \textit{Id.} (providing an extremely appropriate reference to George Orwell’s theme from \textit{Animal Farm}).

\textsuperscript{737} \textit{Id.}

\textsuperscript{738} See Madison Park, \textit{Police Shootings: Trials, Convictions Are Rare for Officers}, CNN, https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html (last updated Oct. 3, 2018, 4:41 PM) (noting that a Tulsa officer testified she shot an unarmed black man with his hands in the air because she “feared for her life;” notwithstanding video evidence to confirm the absence of any threat, she received an acquittal based on a vague claim not founded on “specific and articulable facts” of fear); \textit{see also} Mary Romero, \textit{supra} note 430 (justifying the shooting death of a sixteen-year-old holding a knife while surrounded by twelve Phoenix officers where one officer pepper-sprayed the kid and his movements caused the officers “fear” for their lives).

\textsuperscript{739} See \textit{Terry v. Ohio}, 392 U.S. 1, 20-21 (1968).
the same time, our Constitution seeks to protect all persons from unreasonable seizures. Our nation needs deterrents to the use of force and meaningful guidance to legislatures and law enforcement bodies about protecting civilian’s constitutional rights.\textsuperscript{740} 

I am not recommending any legislative action on police use of deadly force in general. In the alternative, I strongly suggest a study similar to the work done in the late 1950s on the Model Penal Code. A national commission of experts in the field should be established to study this dilemma. As David A. Harris, a professor of police behavior at the University of Pittsburgh School of Law noted, the law generally sides with police who have “wide latitude when it comes to using force.”\textsuperscript{741} This study group can also revisit many of the recommendations of the United States Commission on Civil Rights issued in a 2000 report urging Congress to amend 18 U.S.C. § 242 to remove the “judicially imposed specific intent requirement.”\textsuperscript{742}

\textsuperscript{740}\textit{See} Gross, \textit{supra} note 392, at 181.\textsuperscript{741}\textit{Daniel Arkin} & \textit{Ron Allen}, \textit{It’s Very Difficult to Convict Officers in Police Shootings, Experts Say}, NBC NEWS (June 27, 2017), https://www.nbcnews.com/news/us-news/it-s-very-difficult-convict-officers-police-shootings-experts-say-n776901 [https://perma.cc/ZR7P-B953] (citing David A. Harris, a professor of police behavior at the University of Pittsburgh School of Law).\textsuperscript{742}\textit{See Revisiting Who Is Guarding the Guardians?: A Report on Police Practices and Civil Rights in America, Ch. 5: Remedies and Legal Developments, U.S. COMMISSION ON C.R.} (Nov. 2000), https://www.usccr.gov/pubs/guard/ch5.htm [https://perma.cc/H79F-3EZT]; \textit{see also} United States v. Johnstone, 107 F.3d 200, 208-09, 210 (3rd Cir. 1997) (“Willful” in 18 U.S.C. § 242 “means either particular purpose or reckless disregard. Therefore, it is enough to trigger § 242 liability if it can be proved—by circumstantial evidence or otherwise—that a defendant exhibited reckless disregard for a constitutional or federal right.” To convict a defendant under § 242, the government must show that the defendant had the particular purpose of violating a protected right made definite by a rule of law or recklessly disregarded the risk that he would violate such a right. The government does not need to show that the defendant knowingly violated any right). After the Webster verdicts of guilty to conspiracy and perjury but not guilty on the § 242 count, a juror, while commending me on a great job, told me that the not-guilty verdict resulted because they did not view the evidence as proving that officer Mays intended to “murder” the young man. In other words, the specific-intent language confused them into thinking that it referred directly to the death as opposed to the unlawful beating the officers inflicted on Webster, while Mays recklessly disregarded the risk of striking Webster while holding his service weapon in his hand. \textit{See} United States v. Mays, 470 F. Supp. 642, 645 (S.D. Tex. 1979) (noting that after a high-speed chase, officer Mays, with gun in his hand, assaulted the unarmed Webster and shot him in the head; he and the other officers then agreed to planting a gun next to the bleeding teenager to cover up the truth).
G. Arbitration Agreements—Should They Play a Role in Disciplinary Proceedings?

Arbitration agreements provide another avenue for due process protection, but they are not constitutionally required. However, many police agencies and unions have negotiated arbitration review for officers who face administrative disciplinary action. I wonder about the need for this layer of review when we have courts that can determine the validity of officer terminations. This optional arbitration avenue has too often allowed an officer to remain on the force, despite police leaders knowing they had a problem cop on the payroll.

The case of bad cop Hector Polanco in Austin, Texas serves as an example of what is wrong and depressing to police management and to the public. Although authorities did not take more aggressive action against detective Hector Polanco, he finally retired shortly after it became clear that Ochoa and Danziger would be declared innocent. For two days after his arrest without probable cause, Ochoa resisted the accusation by Polanco that he was guilty of the crime, but Polanco finally wore him down and Ochoa “confessed” to avoid execution. With so many corrupt activities that Polanco

743. See Mark Iris, Police Discipline in Chicago: Arbitration or Arbitrary?, 89 J. CRIM. L. & CRIMINOLOGY 215, 243 (1998). While an arbitrator’s ultimate decision may be clear, “the explanations are more ambiguous. Nonetheless, the pattern is so striking and so uniform as to raise serious questions relative to the merits of the entire arbitration process.” Id.


746. Weinstein, supra note 744. The Austin City Council settled with both accused victims, granting Ochoa $5.3 million and Danziger, who sustained permanent
engaged in, it is sad that an arbitrary and capricious arbitration \(^747\) allowed him nine more years of disservice to the people of Austin, Texas and permitted Polanco the opportunity to engage in many other abuses.\(^748\) With a decision as serious as the termination of a lawless cop, it is quite shocking that in many police departments in America “the final word in disciplinary actions involving police officers is not had by the chief of police, the mayor, or a civilian review board, but by an arbitrator.”\(^749\)

H. Internal Affairs Division

As with other city police departments, instead of addressing physically abusive cops, Los Angeles concentrated on corruption issues, because the Code of Silence probably ensured the subject of brutality was off limits. The huge settlement payments Los Angeles has entered into over the years can only suggest that adjustments must be made to make its Internal Affairs Division (IAD) more effective.\(^750\) At the same time, many criticize IADs since most have officers brain damage from a prison beating, received a total of $10 million from the city and the county. \textit{Id.}

747. Iris, \textit{supra} note 743, at 243-44.
748. \textit{See} Hall, \textit{supra} note 490; Kelly et. al, \textit{supra} note 708.
749. Iris, \textit{supra} note 743, at 215.
750. \textit{See} Internal Aff. Group, L.A. POLICE DEP’T, http://www.lapdonline.org/ internal_affairs_group [https://perma.cc/HVA4-MCTE] (last visited Feb. 18, 2019). Historically, the idea behind the Internal Affairs concept, generally referred to as IAD, centered on the need to maintain cooperative police-community relations. The success of the typical IAD depends on the idea that police departments, managed properly, have the capacity to police themselves in a manner that enhances public trust. Agencies that objectively and thoroughly police themselves, yet remain accountable to the public and civilian authority, are stronger than agencies policed from the outside where internal accountability is not a priority. \textit{See} U.S. DEP’T OF JUSTICE, ORIENTED POLICING SERVS, STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE 14 (2016), https://ric-zai-inc.com/Publications/cops-p164-pub.pdf [https://perma.cc/7LZ9-9B9L]. The Internal Affairs investigative unit has been criticized by some police leaders since its initial recommendation by the Wickersham Commission in the 1930s era. \textit{See} Walker, \textit{supra} note 682, at v. In more modern times, related to the unprofessional actions of a Ferguson, Missouri officer in the aftermath of the killing of Michael Brown by another Ferguson officer, a journalist complained about the indifference shown to his complaints against the officer who arrested him. \textit{See}, \textit{e.g.}, Ryan J. Reily, \textit{Here’s What Happens When You Complain To Cops About Cops: The Internal Affairs Division Usually Decides the Officer Did Nothing Wrong}, HUFFINGTON POST (Oct. 9, 2015 1:43 PM), https://www.huffingtonpost.com/ entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce [https://perma.cc/8CZZ-9MEM].
investigating other officers, and then these investigators rotate back into the different divisions.

For years, Houston’s infamy in police and civilian relations has been memorialized in music and in movies.751 Movies depicts the extent to which officers sworn to uphold the law engage in wrongdoing to fabricate evidence and stories to protect themselves and other cops from criminal liability.752 Notwithstanding years of police violations of civil rights, the city police did not establish an IAD until five Houston patrol officers participated in the drowning of Jose Campos Torres in May 1977.753 In an earlier nonfatal assault by cops on Demas Benoit, Jr. after a high-speed chase, a rookie cop had already handcuffed Benoit, but then an officer began to bang Benoit’s head into the ground, another kicked him, and a third held his foot on Benoit’s head. When the rookie cop told the officers to stop because Benoit was already handcuffed, one told him “shut up and let them do their police work.”754

The New York City experience is noteworthy in one particular regard. By the early 1990s, New York City’s police corruption and brutality issues included allegations of cops stealing drugs and protecting high-level traffickers.755 Still, cops banded together to deal with complaints and the attitude surfaced among cops that any officer associated with IAD had joined the enemy.756 After several years of resistance from officers, with the usual attacks against “rats” who told on other cops, NYPD Chief Ray Kelly recruited Charles Campisi, an

752. See The Killing of Randy Webster, supra note 751.
754. Curtis, supra note 23.
756. See id.
NYPD veteran, to start the new Internal Affairs Bureau (IAB). Campisi had to overcome the attitude that only cowards and snitches wanted to join IAB to go after cops.\footnote{757} As a result, Campisi’s first changes involved a mandate that only persons selected or drafted could work in the IAB. In addition, in 1993 the NYC Council created the Civilian Commission Review Board (CCRB) as an all-civilian group with the added power to issue subpoenas that would allow obtaining filmed footage from local media outlets as well as authority to recommend discipline.\footnote{758}

From 1992 to 2008, NYPD’s IAB investigations led to arrests of nearly 2,000 NYPD officers, about 119 per year. Most investigations involved drugs, theft, fraud, bribery, and sex offenses, but while these cases have decreased, cases involving excessive force have risen significantly. The IAB investigations tell intriguing stories not only of officers who betray the badge but also of the aversion among many who refer to the IAB as the “rat squad,” an indication that they want to continue with their misdeeds. Based on the success of the NYPD model under Charles Campisi, this approach must undergo further study and fine-tuning in order to implement an improved model in other communities. After all, the NYPD IAB has improved in its successful efforts to remove crooked cops who breed disrespect among the public.

\begin{footnotes}
\footnote{757. See id.}
\footnote{758. After years of operating with a limited budget, the 1997 broomstick-sodomy brutality of Haitian immigrant Abner Louima by NYPD officers led to the CCRB’s increased budget and improved performance. The CCRB currently represents the largest civilian oversight agency in the country.}
\footnote{760. Id.}
I. The American People—The Citizens Who Comprise Potential Jury Pools

Our own awareness of the importance of police and other law agents in our society leads to the inevitable confidence and trust of police by the public. In her assessment of police accountability in America, Professor Rachel Moran refers to the deaths of several unarmed black men that led to the vociferous protests by Black Lives Matters activists and other supporters. Moran points to the racial divide within our nation regarding the killing by predominantly white officers of black men.\textsuperscript{762} The survey Moran cites in her article occurred in 2016 after an increase in police shootings that triggered the revenge assassinations of five innocent Dallas, Texas police officers.\textsuperscript{763}

The title of Moran’s article, \textit{In Police We Trust}, perhaps tells it all.\textsuperscript{764} She describes how our jurisprudence defers to the police in many respects.\textsuperscript{765} Police traditionally had the upper hand in the circumstances in which they obtained confessions and with regard to the sanctions for entering homes without a search warrant.\textsuperscript{766} Those flexible standards faced scrutiny from the Warren Court rulings in \textit{Miranda v. Arizona}\textsuperscript{767} and \textit{Mapp v. Ohio}.\textsuperscript{768} With the later change in the composition of the Supreme Court, however, these opinions began to encounter exceptions that have undermined or altered the original protective constitutional rulings.\textsuperscript{769}

\textsuperscript{762} See Moran, \textit{supra} note 8, at 954 (stating that 75% of white Americans believe that the police do “an excellent or good job” in treating racial and ethnic minorities equally while only one-third of black Americans believe the same (citing Rich Morin & Renee Stepler, \textit{The Racial Confidence Gap in Police Performance}, \textit{Pew Res. Ctr.} (Sept. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/ [https://perma.cc/3S8Q-XZR8]).

\textsuperscript{763} Fernandez, Pérez-Peña, & Engel Bromwich, \textit{supra} note 46.

\textsuperscript{764} See Moran, \textit{supra} note 6, at 955-56 (citing Anthony O’Rourke, \textit{Structural Overdelegation in Criminal Procedure}, 103 J. CRIM. L. \& CRIMINOLOGY 407, 408-09 (2013) (discussing of Supreme Court cases in which the Court, in the assessment of a police officer’s judgment, deferred to the officers’ actions or decisions).

\textsuperscript{765} See id.

\textsuperscript{766} See generally Miller v. Fenton, 474 US 104 (1985) (showing the resurrection of the totality of the circumstances standard); Wolf v. Colorado, 338 U.S. 25 (1949) (explaining that the exclusionary rule is not mandated because alternative remedies exist); Brown v. Mississippi, 297 U.S. 278 (1936) (showing that a confession extracted by police violence is not admissible).


\textsuperscript{768} See generally Mapp v. Ohio, 367 US 643 (1961).

All Americans, regardless of color, have been inculcated with the sense of trusting in our police officers. It has carried over into court proceedings where many citizens declare that they will place full credibility in the word of an officer because they have taken an oath as police officers to abide by the law. As a criminal court trial judge, I had to address this issue on various occasions with jury panels. As the factfinders, the jury had the total power to accept all, part, or none of what a witness had to say in court, even if the witness wore a badge. As a federal prosecutor, I obtained perjury convictions in two cases and caught several other police officers in obvious fabrications, obstructions of justice, and lies.\(^{770}\)

We as a nation need to heed the words of Professor Moran as described in her article, *In Police We Trust*:

For decades, the legal system has accepted—quite deliberately in many cases, and simply unquestioningly in others—the premise that deference to police officers is “what is right.” It is time to rethink our definition of what is right. Our legal system has all too frequently closed the door on people of color, and police departments and officers have all too frequently enabled, or led the way in, these exclusions. Our nation’s police departments desperately need to be reformed. . . . [O]ne aspect of this reform is changing the way we review misconduct complaints. And it is the people in positions of privilege - often white - who must stop burying their heads in the proverbial sand and acknowledge the damage that decades of deference has done.\(^{771}\)

These words of wisdom are similarly applicable to the need to assess and revise our way of thinking for that eventual moment when we receive a jury summons and possibly get selected to hear evidence in a criminal trial.

\(^{770}\) See David Hanners, *Deadlocked Jury Get the ‘Dynamite’ Charge*, BROWNSVILLE HERALD, Jan. 18, 1982. This news story reported on my prosecution in United States v. Ramos, Criminal No. 81-775 (S. D. Tex., Brownsville Div. 1982). During my questioning of a police witness, I asked what the accused McAllen, Texas sergeant “then stated.” The accused was charged with summary punishment of a Latino after a high-speed chase. The witness apparently feared a perjury charge and surprised me by volunteering that the sergeant told the patrol officers to say that they “did not see anything.” Notwithstanding my “unexpectedly awesome” cross-examination, the outcome was a hung jury, and the sergeant thereafter entered a plea of guilty.

\(^{771}\) See Moran, *supra* note 8, at 1003. Moran further cites the work of Anthony O’Rourke, in which he discusses Supreme Court cases in which the Court, in the assessment of a police officer’s judgment, deferred to the officers’ actions or decisions. O’Rourke, *supra* note 764, at 955-56 n.12.
Prosecutors throughout the United States have encountered difficulties in convincing juries to find officers guilty of crimes. For instance, in the death case of Eli Escobar, previously discussed, the jury offered post-trial comments that pointed to the conflicts with returning guilty verdicts against lawless cops. The jury foreman stated: “This jury expresses its deepest sympathies to both the Escobar and Carbonneau families. This incident touched our hearts, and our thoughts and prayers will be with both families.” While it may have been emotionally difficult to find an officer guilty and properly sentenced, the public’s compassion for the good professional officers we trust should not obstruct justice in a specific case.

Carbonneau provided the jury three different explanations for why he held his gun and why he discharged the gun. Notwithstanding the apparent dishonesty and effort to justify his reckless actions, the jury displayed the natural inclination to trust the police. In the end, the jury accepted one, two, or all three of the explanations given by the officer. Instead of accepting that he fabricated conflicting stories, the jury permitted these claims to affect their judgment to conclude guilt at the lowest possible mental state. It appears that the trust in our


774. Id.

775. In the 2008 case of State v. Buckaloo, two Pasadena, Texas police officers brutalized Pedro Gonzales so severely that the autopsy revealed eleven fractures on eight ribs and a punctured lung. In a case of the battle of the experts, the state’s witness said that Gonzales suffocated when his chest cavity filled with blood because of the punctured lung. The defense’s medical expert claimed that the victim’s severe alcohol withdrawal caused his death. Pasadena police initially said Gonzales stumbled in a parking lot, but the department later acknowledged that the officers used “knee strikes” to subdue Gonzales, who they claimed resisted arrest. A cover-up claim gained credibility when nine minutes after the officers encountered Gonzales at 2:00 a.m., a woman called 911 to report that officers were beating a man, later identified as Gonzales. See Brian Rogers, Jury Acquits 2 Officers in Pasadena Inmate Beating (June 3, 2008, 5:30 AM), http://www.chron.com/disp/story.mpl/metropolitan/5815360.html [https://perma.cc/3247-3R9X]. Even with such extensive evidence of excessive force, the prosecutor failed to obtain a conviction. Of course, one has to also consider the jury in the equation of justice. See id.

776. It appears that the In Police We Trust theme overwhelmed the jury. See Moran, supra note 8, at 958 (explaining that deference occurs when any official body,
police has reached a point where efforts to educate the public have to occur in a neutral-type approach. A solution will be left to experts in the field.

VI. CONCLUSION: AMERICANS NEED TO TALK AS ONE PEOPLE

Overall, as a nation, the United States has been a model for integrity in most of its governmental standards. We serve on juries and we vote secretly and, in a general sense, without barriers being imposed. Hopefully, the future will grant more freedoms. Police brutality and deception have created problems for our government. However, a greater problem has occurred from the inaction at the hands of police chiefs, prosecutors, both state and federal, and other authorities who are in position to deter lawless cops from errant behavior.

While the prospect to address police misconduct has always existed, the opportunity to discuss it seriously has become more difficult under President Trump’s leadership. The President’s comments to police officers that they do not have to treat “criminals” so tenderly can only incite and encourage those officers who are already potential wrongdoers. Those inclined to be lawless cops do not need that top-level encouragement. If anything will stop a crooked and brutal cop, it is peer-group pressure as well as strong leadership at the top. Police have to work together to avoid the dangers that led to such as a trial jury, tasked with reviewing police conduct fails to rigorously scrutinize the decisions or actions of police officers).

777. Online voting, for example.

778. See generally Tallet, supra note 45. In 2018, the United States Commission on Civil Rights issued a report on the use of force by police. The Commission recommended development of trusting police and community resident interactions; policing free from bias or discrimination; improvement of community-police relations by reinstating the Office of Community Oriented Policing Services (COPS) and maintaining the Community Relations Services office (CRS); reductions in the use of excessive force; funding for training to assist officers to minimize risks for the public; and the return of the DOJ’s vigorous enforcement of constitutional policing, including the use of consent decrees as necessary where constitutional policing standards are not being upheld. See U.S. COMM’N ON CIVIL RIGHTS, POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 3-5 (2018).

779. Chait, supra note 530 (“We’re getting them [criminals] out anyway, but we’d like to get them out a lot faster[.] . . [W]hen you see these thugs being thrown into the back of a paddy wagon, you just see them thrown in — rough, I said, please don’t be too nice.”).
the retaliation the nation and the world witnessed in Dallas, Texas after a military veteran sniper killed five Dallas police officers.\footnote{Fernandez, Pérez-Peña & Engel Bromwich, \textit{supra} note 46.}

To prevent these extremes, our legal system needs to show both law enforcement and the public that those who do not respect law and order will be held accountable. This remedial action includes the swift prosecution of those who threaten and harm police officers and other public servants as well as the suspension, termination, and prosecution of those public officials and police officers who violate their oath of office and the law. Above all, the true American way is for all of us to know about each other and to set the stage for productive discussions. As stated by Kevin Baker, an American novelist and journalist:

Reconciliation is only possible when [public servants, from the top to the bottom,] start telling the truth. And while reconciliation is not complete justice—justice demanding, as it does, accountability and at least compensation [for losses]—makes it possible to move forward. This is serious business. Done right, it would establish the real narrative of the moral twilight we are moving through now, alter political behavior for the better, and revive enough faith in this country’s ability to govern itself for democracy to prevail. It may even restore truth itself.\footnote{See Kevin Baker, \textit{Nothing in All Creation Is Hidden: Why America Needs Truth and Reconciliation After Trump}, \textit{NEW REPUBLIC} (May 17, 2018), https://newrepublic.com/article/148270/nothing-creation-hidden [https://perma.cc/4T7V-BQLH].}

Making America great again should never mean a return to the Black Codes and the “lynching” mentality that includes unjustifiable and excessive shooting, choking, and tasing. This illegality disrespects the constitutional protection of due process and the dignity of women and men. Of course, we need the leadership itself to serve as an example for others. We do not need to treat unauthorized immigrants with disparagement or refer to immigrants as “animals,” rapists, or persons who “infest” our nation.\footnote{See David A. Graham, \textit{Trump Says Democrats Want Immigrants to ‘Infest’ the U.S.}, \textit{ATLANTIC} (June 19, 2018), https://www.theatlantic.com/politics/archive/2018/06/trump-immigrants-infest/563159/ [https://perma.cc/49K5-C8V7].} Americans are a better people than that, and we should not tolerate politicians who disgrace the United States by engaging in gutter politics. In closing, imagine that nation that motivated the Founding Fathers “to form a more perfect Union, establish Justice, [and] insure domestic Tranquility.”\footnote{U.S. \textit{CONST. pmbl.}} Perhaps, in an earlier time, those founders also had the spirit and inspiration of another immigrant to America, John Lennon, who wanted a more peaceful world for all by preaching through his music: “You may say
that I’m a dreamer. But I’m not the only one. I hope someday you’ll join us. And the world will be as one.”

Finally, the question arises as to whether the problem centers on the nation’s immigration enforcement and border patrol police. In an Op-Ed in the *Los Angeles Times*, John Carlos Frey, a documentary filmmaker, deduced that insufficient training and little public oversight of the Border Patrol have led to problems, including violence against migrants. Frey took notice of the Bush Administration’s 2007 efforts to strengthen border security. Eventually, this led to doubling the size of the Border Patrol, an agency of the Department of Homeland Security (DHS). Because recruits were difficult to find, the DHS lowered its standards and relaxed training regimens. Individuals without a high school diploma could already join, and the DHS also began to defer background checks. In less than two years DHS hired 8,000 new agents. The Border Patrol, which had a force of 11,000 in 2007, had more than 21,000 agents by 2012. Frey figured that nearly half of the Border Patrol force now includes rookies with two years of experience or less who are dangerously armed with batons, pepper spray, Tasers, rifles, and handguns.

DHS maintains secrecy about when and why police agents can fire a weapon. With insufficient training and little public oversight, it is not surprising that since May 2010 there have been at least eight documented cases of extreme use of force against unarmed and noncombative migrants resulting in death. Of eight recent killings by Border Patrol agents, not even one agent has been disciplined. As long as this indifference to accountability continues, the message is that any person who throws a rock from across the border is subject to execution.

786. *See* id. The inability or decision not to conduct psychological studies undoubtedly has allowed several agents with extreme and intolerant attitudes to enter the force. Also, persons without a high school degree simply are not the types of persons the United States should hire for work that involves handling dangerous and deadly weapons.
787. *See* id.
788. *See* id.
789. *See* id.
790. *See* id.
791. *See* id.
In summary, American history has seen repeated examples of racist-type reactions from European whites against immigrants that differed from them either racially, ethnically, or culturally. Much of this conflict centered on an early American indoctrination and belief in the superiority of the Caucasian race. The racial conflicts against blacks, Mexicans, Native Americans, and Asians developed over the belief that the “colored” races were inherently inferior. Even when a Mexican appeared “white,” as in the case of a blue-eyed, white-skinned person, those in positions of power continued to classify that white Latino as unworthy of full equality.

Even after Macario Garcia, a Mexican national, risked his life for the United States, received serious injuries while fighting as an Army soldier, and earned the highest recognition a soldier can achieve for his service from President Truman, he still did not qualify socially to be respected by a Caucasian restaurant owner who refused to serve him a cup of coffee. One month after Garcia received his Congressional Medal of Honor, he was still a unique military hero. But to the white restaurant owner, nothing had changed—Garcia was still just a “Mexican.”

I continue to view issues related to racial justice optimistically, but I am concerned about what can happen with the guidance our current Commander-in-Chief is providing. For example, a 2018 Quinnipiac poll question asked: “Do you think President Trump has emboldened people who hold racist beliefs to express those beliefs publicly or don’t you think so?” As a group, “55% of respondents said ‘yes.’” The tension in race relations has reached the level that a journalist, a member of the profession that the President constantly

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792. See, e.g., Gong Lum v. Rice, 275 U.S. 78, 85-87 (1927) (stating that Chinese-descent citizens were classified as “colored,” and the U.S. Supreme Court upheld her exclusion from a white school that barred “colored” students).

793. See PERALES, supra note 48, at 156 (detailing the refusal to serve Medal of Honor Mexican American soldier while in uniform in Texas).


795. Id. Indicative of the encouragement many sense from our national leadership, see Fernando Ramirez, Texas Tech President Says ‘Repulsive and Racist Rhetoric’ by Students Is Free Speech, HOUS. CHRON. (July 5, 2018, 1:37 PM), https://www.chron.com/news/politics/texas/article/Texas-Tech-racist-immigrant-president-free-speech-13052099.php?ipid=hpcpt [https://perma.cc/7PKZ-CP6P] (asserting that Kyle Mitchell, a student, later apologized in a tweet, after stating “the U.S. government should sell ‘permits for legal hunting on the border’ in order to make a ‘sport’ out of killing immigrants”).
attacks as America’s enemy, expresses concern that the people of this nation have lost the distinction between “‘straight talk’ and hate talk.”

Almost seventy-five years after the overtly racist days of 1945, with a leader who tweets his thoughts on race and police relations and his views on diplomacy, we Americans have reason to be concerned. During our 240-year history, the United States has endured moments of social and racial hatred and has overcome them. The KKK existed, spewed hatred, murdered innocent people, went into seclusion, reorganized. Now this group, and organizations with similar extremist beliefs, recently received encouragement from many places of power, including the White House. Police departments today could have, but many in the past definitely had, extremists and KKK sympathizers on the force.

As I stated in a law journal a decade ago, we Americans, as a people, have to be concerned about electing officials who have private racist attitudes, get into public office, and manage to convert these thoughts into public policy. In agreement with the editorial journalistic comments, I urge that we Americans do our utmost to have the difficult conversations about race issues and seek solutions.

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796. Jones, supra note 794.
797. Editorial Board, Trump Sends the Wrong Message on New Zealand. World Leaders Must Denounce the Attack, WASH. POST, Mar. 15, 2019, March 15 at 7:45 PM, https://www.washingtonpost.com/opinions/a-massacre-streamed-live-impelled-by-bigotry/2019/03/15/a373568c-475b-11e9-aaf8-4512a6fe3439_story.html?noredirect=on&utm_term=.659dfd63e06d. President Trump should go further and, for starters, condemn the alleged killer whose nativist rhetoric that refers to immigrants as “invaders,” terminology that overlaps with his own, using the word “invasion” of immigrants almost on the same day to justify his national emergency declaration to build a wall along the U.S.—Mexico border.
798. See, e.g., United States v. Price, 383 U.S. 787, 790 (1966) (deputy sheriffs in Mississippi conspired with several members of the KKK to kidnap and murder out-of-state civil rights workers). In the 1970’s, Frank Converse, a state Klan leader from Houston, Texas boasted that the Klan had infiltrated the Houston Police Department in undercover-type capacities. See Brittanie Shey, The Day The KKK Bombed KPFT, HOUS. PRESS (May 12, 2010), https://www.houstonpress.com/music/the-day-the-kkk-bombed-kpft-6497751 [https://perma.cc/E4SR-E5ZC]. During the period after 1964, the HPD Chief of Police was Herman Short, a strong supporter of segregationist George C. Wallace in the 1968 presidential campaign and a leader viewed by blacks and others as a Ku Klux Klan sympathizer. See Curtis, supra note 169.
800. See Jones, supra note 794.
to our differences. Let us return to that united melting pot that made America not only great but also distinguished and remarkable around the globe. We were there, and we should not let the recent emergence of xenophobic politics begin to erode that awesome quality that the United States of America has enjoyed—albeit with some struggles—for half a century since Congress enacted the Civil Rights Act of 1964 and other legislation aimed at mutual respect among all Americans.

801. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1676 (2014) ("Race matters. Race matters in part because of the long history of racial minorities’ being denied access to the political process. . . . Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.")