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EXCITED DELIRIUM AND POLICE USE OF FORCE

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Excited delirium is often described as a psychiatric illness characterized by a sudden onset of extreme agitation, confusion, and aggression that can make people irrationally combative and dangerous. Since its inception in the 1980s, this medical condition has been used to justify deadly uses of force by police officers who detain individuals whose seemingly bizarre and uncontrollable behavior is believed to be a threat. Excited delirium is also commonly used by medical examiners and law enforcement to explain why the extreme toll taken on the bodies of people who experience these psychiatric episodes might lead to spontaneous death when they are in police custody. While this diagnosis is increasingly relied upon to explain police use of force and in-custody deaths, a curious matter remains unresolved: excited delirium, as an actual medical condition, does not seem to exist. It is not recognized as a valid medical diagnosis in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") nor in the World Health Organization's International Classification of Diseases ("ICD-10"), which are the most authoritative classifications of mental health conditions. Moreover, excited delirium has an ignoble history linked to racism and fraudulent forensic science. Nevertheless, excited delirium continues to

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play a prominent role in policing, prosecutions, and § 1983 constitutional tort claims adjudicated by federal courts when victims of police violence seek damages for violations of their constitutional rights.

This Article provides the first comprehensive assessment of excited delirium in law and legal scholarship. Drawing upon an original dataset that collects information on in-custody deaths over the past decade tied to excited delirium, this Article documents the extent to which this condition has been articulated by legal and medical actors as a cause of death in situations where police have used force. The data show, among other findings, that at least 56% of deaths that occur in police custody that are attributed to excited delirium involve Black and Latinx victims. By putting these findings in conversation with an examination of the scientific literature and § 1983 police excessive force cases that discuss excited delirium, this Article draws attention to how excited delirium has become a misplaced medical diagnosis that obscures and therefore excuses questionable uses of police force that produce harm and death—especially in communities of color. By relying on pseudoscience with little evidence, medical examiners and coroners have given life to a false medical condition that is often used to shield police officers from accountability when they use unacceptably harsh and unlawful force. Excited delirium shifts the blame for these deaths to what is often wrongly presumed to be an individual’s tragic medical condition, which obfuscates the structural conditions that predictably lead to unlawful uses of police force that are the more proximate cause of harm. By offering this examination of excited delirium, its role in policing, and how it impacts the adjudication of excessive force claims, this Article suggests that policymakers and legal actors should be more attentive to how science and medicine can be used inappropriately to impede police accountability and justice for victims of police violence.

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INTRODUCTION

Tommie McGlothen Jr. left his sister's house in the Lakeside area of Shreveport, Louisiana, while experiencing a mental health crisis in April 2020.¹ As he walked down the street, his erratic behavior gave a passerby the impression that McGlothen was attempting to break into a car. The police were summoned. When officers approached McGlothen, a dispute erupted and McGlothen was handcuffed. Witnesses noted that although McGlothen was not resisting at this point, the officers struck him several times and slammed him into a patrol car.² The officers then put

¹ Gerry May, Attorney Disputes Coroner's Finding in Death of Tommie McGlothen, Jr. After Police Confrontation, KTBS (June 10, 2020), https://www.ktbs.com/news/3investigates/attorney-disputes-coroners-finding-in-death-of-tommie-mcglothen-jr-after-police-confrontation/article_f100f4a6-ab7b-11ea-9d9b-1b7fb00daba3.html [https://perma.cc/8SEX-6Y42].

² Gerry May, Shreveport Man Dies in Police Custody; Family Fears "Cover-Up," KTBS (May 31, 2020), <https://www.ktbs.com/news/shreveport-man-dies-in-police-custody-family->

McGlothen into the back of the car and left him there alone for nearly an hour. When they returned to check on him, McGlothen was unresponsive.³ Paramedics arrived at the scene, and witnesses said that the “ambulance drove off slowly with no lights or siren,”⁴ suggesting to some onlookers that he was already dead.

The local coroner, Dr. Todd Thoma, released a report on the cause of McGlothen’s death two months later. Curiously, he concluded that it was “natural”—the result of a psychiatric condition known as excited delirium. As Thoma explained:

These people get into a situation where they become confused, disoriented, violent, aggressive. They can’t listen to reason. There is no reason. This is a medical problem. This is not somebody’s behavioral problem When police try to restrain [people suffering from excited delirium] to try to take them into custody, it takes a lot of force sometimes to do that. . . . [They are also] impervious to pain.⁵

Thoma recites what has become an increasingly familiar narrative embraced by coroners, law enforcement, and other legal and medical actors when people seem to suddenly and inexplicably die after being involved with the police. The death is seen as an unfortunate, yet natural, byproduct of a psychiatric condition that causes people to get so overworked and agitated that they spontaneously die, through no fault of anyone or anything except for their own defective bodies.

But what is curious about the coroner’s initial determination of McGlothen’s death is that all available evidence suggests that he died from injuries other than some mysterious psychiatric disorder. Video evidence shows four police officers pummeling a handcuffed McGlothen for several minutes with repeated punches and kicks. They hit him with night sticks, tased him, and used mace.⁶ The coroner concluded that “[a]lthough [an] autopsy showed that Mr. McGlothen suffered multiple

fears-cover-up/article_ef947450-a20a-11ea-ac9e-87e6f58f8b87.html
[<https://perma.cc/6ADP-6EFT>].

³ Gerald Herbert & Rebecca Santana, ‘Denied the Truth’ Says Son of Black Man Who Died in Custody, ABC News (June 12, 2020, 5:19 PM), <https://abcnews.go.com/US/wireStory/denied-truth-son-black-man-died-custody-71222156> [<https://perma.cc/G9ES-NMPP>].

⁴ KSLA Investigates Reveals Video of Tommie McGlothen’s Last Encounter with Police, KSLA (June 8, 2020, 4:58 PM), <https://www.ksla.com/2020/06/08/ksla-investigates-reveals-video-tommie-mcglathens-last-encounter-with-police/> [<https://perma.cc/J2WM-NPJZ>].

⁵ May, *supra* note 1.

⁶ Herbert & Santana, *supra* note 3; May, *supra* note 2.

blunt force injuries from both his confrontation with police and the citizens earlier in the day and that evening, no injuries were life-threatening or could be considered serious.”⁷ However, when McGlothen’s family saw his corpse, they were shocked by its condition. His sister, Macronia McGlothen, said: “When we got to the funeral it looked like he had been beaten. His nose was broken. His jaw was broken. And his eye was swollen. It looked like he had a fractured skull. . . . So something’s not adding up.”⁸

* * *

Science and medicine have longstanding relationships with law and, in particular, law enforcement. Forensic scientists have worked with police investigators for many years to help understand crime scene evidence, and medical examiners have lent their knowledge of human anatomy and pathology to help investigators understand how mysterious deaths might have occurred. This intimate relationship between medical knowledge and legal procedures has been well documented.⁹ However, less attention has been paid to how medical professionals might use their knowledge of science and medicine to participate in—and, at times, even conceal—unlawful uses of force by law enforcement that lead to community members’ harm and death. For example, in a recent article in the *California Law Review*, my co-author and I examined how paramedics have partnered with police to administer harsh drugs that have a sedative effect, also known as chemical restraints, on people who have been

⁷ Caddo Coroner: McGlothen’s Death Natural, Possibly Preventable, KSLA (June 9, 2020, 9:41 AM), <https://www.ksla.com/2020/06/09/caddo-coroner-mcglothens-death-natural-possibly-preventable/> [<https://perma.cc/QU2Q-25ZP>]. In September 2020, four officers were charged with negligent homicide and malfeasance after Thoma “determined that Mr. McGlothen’s death ‘was preventable’ because the officers should have known he needed medical treatment.” Michael Levenson, *Four Louisiana Officers Charged in Death of Black Man with Mental Illness*, N.Y. Times, (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/shreveport-police-officers-charged-death.html> [<https://perma.cc/X9D2-3FQ3>].

⁸ May, *supra* note 2.

⁹ See, e.g., Radley Balko & Tucker Carrington, *The Cadaver King and the Country Dentist*, at xiv, xxii (2018) (noting that a single medical examiner testified in approximately 80% of Mississippi’s homicide cases over almost twenty years); Nigel McCrery, *Silent Witnesses: The Often Gruesome but Always Fascinating History of Forensic Science*, at xxiii (2014) (describing the impact of DNA testing on criminal adjudication around the world); Douglas Starr, *The Killer of Little Shepherds: A True Crime Story and the Birth of Forensic Science 11–12* (2010) (explaining the origin of modern forensic science at the turn of the twentieth century).

detained or arrested—many of whom are thought to be experiencing excited delirium.¹⁰ These drugs are often used not for the health and well-being of the person under arrest, but to assist law enforcement by easing their efforts at managing what are often thought to be unmanageable bodies. Chemical restraints, such as ketamine, have been increasingly employed by police and EMS responders in recent years and have led to unnecessary hospitalizations and deaths of detained people.¹¹

The questionable relationship between medical professionals and law enforcement is not limited to chemical restraints. Medical examiners and coroners play a critical role in the legal system in providing the official cause of death when someone dies in police custody. Forensic pathologists are often relied upon by police and investigators to explain how an unusual or unexpected death might have occurred. Excited delirium, as a psychiatric disorder that is thought to place significant physical stress on people, appears to offer medical insight into what seems like an epidemic of people suffering from drug dependency or mental health crises dying without explanation.

There are at least three aspects of excited delirium that are unusual and worthy of exploration. First, excited delirium appears to be more common among Black people. Although studies on excited delirium are scant, data suggest that Black people are diagnosed as suffering from it at much higher rates than White people.¹² Second, the disease strangely seems to happen when police are around. For example, a recent review in *Florida Today* showed that nearly two-thirds of the deaths in Florida officially listed as being caused by excited delirium over the past decade occurred while the decedent was in police custody or had some other interaction

¹⁰ Osagie K. Obasogie & Anna Zaret, *Medical Professionals, Excessive Force, and the Fourth Amendment*, 109 *Calif. L. Rev.* 1 (2021).

¹¹ Patty Nieberg, *Elijah McClain Case Leads to Scrutiny of Ketamine's Use During Arrests*, *Denv. Post* (Aug. 22, 2020, 2:31 PM), <https://www.denverpost.com/2020/08/22/elijah-mcclain-ketamine-police-arrests/> [<https://perma.cc/34SE-PB9R>]; see also Gregory Yee, *Mount Pleasant Man's Ketamine-Related Death in Police Custody Under Investigation*, *Post & Courier* (Feb. 28, 2020), https://www.postandcourier.com/news/mount-pleasant-mans-ketamine-related-death-in-police-custody-under-investigation/article_8b07f4de-59ae-11ea-adad-2f0e6f56d779.html [<https://perma.cc/3M86-SJSP>]; John Croman, *Man Files Lawsuit Over Ketamine Injection*, *KARE* (July 14, 2018, 1:35 PM), <https://www.kare11.com/article/news/man-files-lawsuit-over-ketamine-injection/89-573408858> [<https://perma.cc/G3D4-86QS>].

¹² See *infra* Subsection III.C.2.

with law enforcement.¹³ Yet, this may be an undercount as other deaths that implicate police officers in Florida and across the country might be presumed to involve excited delirium without official designation or further investigation.¹⁴ And lastly, and perhaps most strangely, excited delirium is not a psychiatric disorder that is recognized by most medical professionals. Professional organizations such as the American Psychiatric Association¹⁵ and the American Medical Association¹⁶ have been extremely critical of the term and oppose its use. Medical guidebooks used to identify psychiatric conditions, such as the Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”) and the International Classification of Diseases (“ICD-10”), do not acknowledge it as a valid psychiatric disorder. Moreover, the peer-reviewed literature on excited delirium is rather thin; there is no clear articulation of causal mechanisms or pathways to support the notion that excited delirium has a distinct pathology that leads to death.

¹³ Alessandro Marazzi Sassoon, *Excited Delirium: Rare and Deadly Syndrome or a Condition to Excuse Deaths by Police?*, Fla. Today (Jan. 30, 2020, 2:52 PM), <https://www.floridatoday.com/in-depth/news/2019/10/24/excited-delirium-custody-deaths-gregory-edwards-melbourne-taser/2374304001/> [https://perma.cc/4M2A-5GE3].

¹⁴ One example where this occurred is the police killing of George Floyd. One officer at the scene, Thomas Lane, described his concern that Floyd might have experienced excited delirium while being restrained (and ultimately strangled to death) by Officer Derek Chauvin. See Steve Eckert & Jeremy Jojola, *KARE 11 Investigates: Did Officers Fear George Floyd Had ‘Excited Delirium’?*, KARE 11 (Apr. 13, 2021), <https://www.kare11.com/article/news/investigations/kare-11-investigates-did-officers-fear-george-floyd-had-excited-delirium/89-f7cc01f2-427c-48ab-a4fe-3f414c3c2236>. Given the troubling and inaccurate manner that Minneapolis police initially reported the confrontation between police and George Floyd—the headline of the police press release read “Man Dies After Medical Incident During Police Interaction”—excited delirium could have easily become part of the way that Floyd’s death was described, but for video of the incident and public outcry. See Eric Levenson, *How Minneapolis Police First Described the Murder of George Floyd, and What We Know Now*, CNN (Apr. 21, 2021), <https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html> [https://perma.cc/6TQN-ZTGA]. Indeed, even after the video of Floyd’s murder and social unrest, excited delirium still emerged as a possible explanation of his death during Derek Chauvin’s trial. See Steve Karnowski, *Explainer: Why ‘Excited Delirium’ Came Up at Chauvin Trial?*, AP News (Apr. 19, 2021), <https://apnews.com/article/health-death-of-george-floyd-trials-george-floyd-3b60b3930023a2668e7fc63f903fc3aa>.

¹⁵ Press Release, Am. Psychiatric Ass’n, *Position Statement on Concerns About Use of the Term ‘Excited Delirium’ and Appropriate Medical Management in Out-of-Hospital Contexts* (Dec. 2020), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Use-of-Term-Excited-Delirium.pdf> [https://perma.cc/2HVX-2X3N].

¹⁶ Press Release, Am. Med. Ass’n, *New AMA Policy Opposes ‘Excited Delirium’ Diagnosis* (June 14, 2021), <https://www.ama-assn.org/press-center/press-releases/new-ama-policy-opposes-excited-delirium-diagnosis> [https://perma.cc/T9DP-6XPT].

Nevertheless, excited delirium as a psychiatric diagnosis allows law enforcement to pathologize people's behavior, justify the use of chemical or physical restraints (and even deadly force), or explain how someone might unexpectedly die while in custody. As one example, a recent investigation uncovered that paramedics in Colorado used a chemical restraint called ketamine to sedate 902 people who were thought to be experiencing excited delirium in pre-hospital (i.e., public) settings over a two-and-a-half year period.¹⁷ This includes the death of Elijah McClain, a twenty-three-year-old Black man who was approached by police while walking down a street after a 911 caller said he "looked sketchy."¹⁸ Multiple officers tackled him and placed him in a chokehold. Paramedics injected him with ketamine when they arrived at the scene after the officers reported that McClain had "incredible, crazy strength" and was "definitely on something,"¹⁹ which were "signs they took not as a struggle to survive, but as symptoms of excited delirium."²⁰ The amount of ketamine injected into McClain was grossly inappropriate for his size,²¹ and McClain went into cardiac arrest in the ambulance on the way to the hospital. He died several days later.

The numbers from Colorado regarding the widespread use of ketamine in response to perceived episodes of excited delirium, along with evidence from other states, demonstrate that this unfounded medical diagnosis is having an increasing influence on: (1) how law enforcement assess and respond to people that they engage and their decision to use force; (2) how medical examiners and coroners classify the cause of death when police

¹⁷ Michael de Yoanna & Rae Solomon, *Medics in Colorado Dosed 902 People with Ketamine for 'Excited Delirium' in 2.5 Years*, KUNC (July 21, 2020, 5:35 PM), <https://www.kunc.org/news/2020-07-21/medics-in-colorado-dosed-902-people-with-ketamine-for-excited-delirium-in-2-5-years> [https://perma.cc/5RUA-ZEJA].

¹⁸ Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. Times (last updated Oct. 19, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [https://perma.cc/6CTY-S438].

¹⁹ *Id.*

²⁰ John Dickerson, *Excited Delirium: The Controversial Syndrome That Can Be Used to Protect Police from Misconduct Charges*, 60 Minutes (Dec. 13, 2020), <https://www.cbsnews.com/news/excited-delirium-police-custody-george-floyd-60-minutes-2020-12-13/> [https://perma.cc/98HM-799S].

²¹ Brian Maass, *Ketamine Dose for Elijah McClain 'Too Much,' Says Anesthesiologist*, CBS4 Denv. (July 7, 2020, 11:59 PM), <https://denver.cbslocal.com/2020/07/07/elijah-mcclain-ketamine-aurora-police-anesthesiologist/> [https://perma.cc/5DR6-TNML] ("Multiple anesthesiologists are questioning the amount of Ketamine, a widely employed sedative, used on Elijah McClain just before he stopped breathing last August, with one doctor saying it was, 'Too much, twice too much.'").

interactions have deadly endings; and (3) how courts review the appropriateness of police use of force when these matters are litigated as possible instances of excessive force that might violate the Fourth Amendment. This Article examines how excited delirium is being used in law, places these developments in a social and historical context, and provides an evidence-based set of recommendations on how law and policy should move forward.

This examination of excited delirium is closely connected to doctrinal issues regarding police use of force. Part II reviews the social context and community impact of police violence while also being attentive to the doctrinal evolutions that constitute modern use of force jurisprudence to show how law makes it difficult to hold police accountable when excessive force is used. Understanding the role of law in undermining accountability provides an important context for appreciating how excited delirium, as an ostensible medical diagnosis, became enmeshed in the legal system as an additional way to exculpate police officers of wrongdoing. Part III offers a close examination of the history of excited delirium and reviews the scientific evidence used to support it as a diagnosis. This Part ends with a discussion of an original empirical dataset that I collected on how excited delirium has been used to describe the cause of deaths that occur in police custody as reported in local newspapers over the past decade. Part IV continues this assessment by examining how excited delirium has been discussed in federal courts, mostly in constitutional tort cases pursuant to 42 U.S.C. § 1983. An examination of these cases demonstrates that federal courts often give weight and meaning to excited delirium that is not supported by the existing scientific evidence. Part V provides a series of recommendations on how federal courts, local police departments, and medical professionals (including coroners and medical examiners) should approach excited delirium. I then briefly conclude in Part VI.

I. POLICE USE OF FORCE: SOCIAL CONTEXT AND LEGAL DOCTRINE

It is not immediately known how often excited delirium is used by law enforcement or coroners to explain deaths in custody since the issue is not officially tracked and there is little publicly available data. It is considered relatively rare, yet “researchers suspect that the condition accounts for a half-dozen deaths in most major cities each year . . . [and] [b]y some estimates, excited delirium is now being ruled as the reason behind the

majority off [sic] all in-custody deaths.”²² A 2008 review of forty-five sudden and unexpected deaths in police custody in Maryland between 1990 and 2004 found a majority of decedents tested positive for drugs, which suggests to the authors that excited delirium may have been the cause.²³ Yet, Alessandro Marazzi Sassoon, a journalist with *Florida Today*, found that 62% of the eighty-five people who have been determined to have died of excited delirium in Florida since 2009 also had physical force used on them by law enforcement.²⁴ He noted that “[a] majority of those cases are complicated by the presence of illegal stimulant drugs like cocaine or methamphetamine. But in those deaths where there was no drug use and the toxicology came back negative, the only common denominator in virtually every case was the involvement of law enforcement.”²⁵

Several commentators have raised concerns about the uncanny connection between excited delirium being ruled as the cause of death, the presence of police officers, and their use of force on the decedent.²⁶ This all-too-common context, and the implication that excited delirium is being used by police to evade accountability for possibly unlawful uses of force, requires a brief examination of the social context of police use of force in America, the constitutional rules and standards used to regulate police and adjudicate claims of excessive force, and an assessment of how accountability is often adjudicated and determined by federal courts.

²² Daniel Costello, ‘Excited Delirium’ as a Cause of Death, *L.A. Times* (Apr. 21, 2003), <https://www.latimes.com/archives/la-xpm-2003-apr-21-he-delirium21-story.html> [<https://perma.cc/TQ22-VLB2>].

²³ Pamela Southall, Jami Grant, David Fowler & Shauna Scott, Police Custody Deaths in Maryland, USA: An Examination of 45 Cases, 15 *J. Forensic & Legal Med.* 227, 229 (2008) (“Sixty percent of those who died in police custody were positive for cocaine. An additional eleven percent of the decedents were positive for phencyclidine. These drugs, the former more commonly than the latter, are clearly associated with excited delirium deaths.”).

²⁴ Marazzi Sassoon, *supra* note 13.

²⁵ *Id.*

²⁶ See, e.g., Michael Barajas, Excited. Delirious. Dead., *Tex. Observer* (Oct. 16, 2017), <https://www.texasobserver.org/excited-delirious-dead/> [<https://perma.cc/F39P-K67C>] (“Excited delirium has long been a controversial diagnosis.”); Laura Sullivan, Death by Excited Delirium: Diagnosis or Coverup?, *NPR* (Feb. 26, 2007, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=7608386> [<https://perma.cc/SBD9-KQ78>] (quoting an American Civil Liberties Union official as saying that police departments use excited delirium “as a means of white-washing what may be excessive use of force and inappropriate use of control techniques by officers during an arrest”).

*A. Excessive Force and Law Enforcement: Prevalence and
Community Impact*

The extent to which police use force—and, in particular, kill civilians—is poorly understood. During a private gathering of politicians and law enforcement officials in 2015, then-FBI Director James Comey described the lack of data on police use of force as “embarrassing and ridiculous.”²⁷ As part of the Uniform Crime Reporting Program,²⁸ the FBI keeps Supplementary Homicide Reports that list the deaths of people in custody. But these “*only* include[] homicides committed by police that in the judgment of the police department or the local FBI have been justified, that is, considered legal.”²⁹ Other “official” sources from the federal government concerning police killings include the National Vital Statistics System, which contains county-level information on causes of death, and the Arrest-Related Death list managed by the Bureau of Justice

²⁷ Aaron C. Davis & Wesley Lowery, FBI Director Calls Lack of Data on Police Shootings ‘Ridiculous,’ ‘Embarrassing’, Wash. Post (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html [https://perma.cc/PU5W-MVSJ] (“You can get online today and figure out how many tickets were sold to [the movie] ‘The Martian,’ which I saw this weekend. . . . The CDC can do the same with the flu It’s ridiculous—it’s embarrassing and ridiculous—that we can’t talk about crime in the same way, especially in the high-stakes incidents when your officers have to use force.”).

²⁸ Uniform Crime Reporting (“UCR”) Program, FBI, <https://www.fbi.gov/services/cjis/ucr> [https://perma.cc/DEJ4-SVG7] (last visited Aug. 20, 2021) (“The Uniform Crime Reporting (UCR) Program generates reliable statistics for use in law enforcement. It also provides information for students of criminal justice, researchers, the media, and the public. The program has been providing crime statistics since 1930. The UCR Program includes data from more than 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies. Agencies participate voluntarily and submit their crime data either through a state UCR program or directly to the FBI’s UCR Program.”).

²⁹ Patrick Ball, Violence in Blue, GRANTA (Mar. 4, 2016), <https://granta.com/violence-in-blue/> [https://perma.cc/TU87-4YF4]. Additionally, Professor Frank Zimring and Brittany Arsiniega identify three problems with these data:

The first problem is that the supplemental homicide reports are always incomplete and also vary over time in the number of agencies that report killings by police. The second problem is that very little information about the circumstances that led to the killings by police is reported to the FBI. The third problem is that there is no auditing process to assure the accuracy of what individual agencies choose to report. Even though the data from this program may be the best information currently available in comparison to the alternatives, it must be upgraded to permit effective policy analysis.

Franklin E. Zimring & Brittany Arsiniega, Trends in Killings of and by Police: A Preliminary Analysis, 13 Ohio St. J. Crim. L. 247, 247 (2015).

Statistics.³⁰ These official sources tend to undercount the true number of police killings. For example, Professor Frank Zimring writes that with regards to the National Vital Statistics System, “[f]or many years, the number of killings by police was substantially underreported simply because county coroners didn’t identify many killings that were caused by police, and thus while the report of a death went into the system, it was not listed in the legal intervention category.”³¹

This inattention to the scale of police use of force and deaths in custody has been stunning. Prior to 2000, there was limited federal data on the number of people who died while incarcerated or detained.³² This began to change after investigative journalist Mike Masterson³³ published a series of articles in 1995 estimating that large-scale (and often suspicious) deaths were happening in American jails.³⁴ This new information led Congress to pass the Death in Custody Reporting Act of 2000, which required each state to provide quarterly reports on any person who died

³⁰ Zimring writes:

The [Bureau of Justice Statistics] created three separate data-gathering programs under the authority of the [Death in Custody Reporting Act of 2000], the first two of which survey, respectively, deaths in prisons in the United States and deaths in jails and similar holding facilities. For the Arrest-Related Deaths reports established in 2003, data is gathered from the accounts of deaths that law enforcement agencies provide, but each state has a state-level program coordinator to engineer compliance by the reporting state and local agencies.

Franklin E. Zimring, *When Police Kill* 29–30 (2017).

³¹ *Id.* at 25. Zimring does note that the Bureau of Justice Statistics has made,

[A] more sustained effort than the FBI to remedy the undercount of arrest-related deaths when it resumed collecting data for calendar [year] 2011. When the data submitted from the agencies was compared to that of the cases of killings by police submitted to the SHR programs, the Bureau of Justice Statistics estimated that the true annual number of police killings for 2003 through 2009 and 2011 was over 900. Because all of the official estimates were much lower than this, the bureau did not publish its 2011 survey number and has focused instead on designing a study of the volume of killings by police that will use crowdsourced reports of arrest-related deaths to create a multi-method estimate of total killings.

Id. at 31.

³² Ethan Corey, *How the Federal Government Lost Track of Deaths in Custody*, Appeal (June 24, 2020), <https://theappeal.org/police-prison-deaths-data/> [<https://perma.cc/9ZBN-B26K>].

³³ *Id.* (“In a speech on the House floor, Republican Asa Hutchinson, then a representative from Arkansas and the bill’s co-sponsor, credited Masterson’s reporting for inspiring him to introduce the [Death in Custody Reporting Act of 2000].”).

³⁴ Mike Masterson, *Dying in Custody*, Ashbury Park Press, Feb. 5, 1995, at A1, C6; Mike Masterson, *Dying in Custody*, Ashbury Park Press, Feb. 6, 1995, at A1, A6; Mike Masterson, *Dying in Custody*, Ashbury Park Press, Feb. 7, 1995, at A1, A18.

while being arrested, on the way to a jail or prison, or while incarcerated.³⁵ However, without funding to collect data or a mechanism to force states to comply, the Bureau of Justice Statistics had to largely rely on voluntary reporting. These data were woefully incomplete,³⁶ although they did show that there were almost 5,000 deaths connected to police arrests or detentions between 2003 and 2009, most of which were homicides.³⁷ The program that collected voluntarily submitted data on arrest-related deaths was suspended in 2014 due to a failure to receive adequate data from states in the two previous years.³⁸ In December 2014, Congress passed a new law, the Death in Custody Reporting Act of 2013, aimed at improving compliance and cooperation in the way that states report these figures to the federal government. However, this new law suffered from the same basic problem as the previous one: It “didn’t provide states or the federal government with additional money to modernize the often-fragmented and archaic data collection systems.”³⁹ Moreover, since federal law prohibits data from the Bureau of Justice Statistics from being used for law enforcement, any use of the data by the Department of Justice could be determined unlawful.⁴⁰

The absence of adequate public means or incentive to collect this type of data has led many scholars to criticize and document the incomplete

³⁵ Death in Custody Reporting Act of 2000, Pub. L. No. 106-297, 114 Stat. 145 (2000) (prior to 2013 amendment).

³⁶ Corey, *supra* note 32 (“The BJS used its own budget to collect data from all 50 state prison systems and nearly 90 percent of local jails each year, but the agency lacked the resources to survey each of the nation’s roughly 18,000 law enforcement agencies individually, so it relied on state governments to track arrest-related deaths on its behalf. Many states collected that data in a haphazard fashion, often relying on media reports or voluntary reports by law enforcement agencies with no additional verification. Only 36 states reported data every year.”).

³⁷ Andrea M. Burch, U.S. Dep’t of Just., Arrest-Related Deaths, 2003–2009 - Statistical Tables 1 (2011).

³⁸ Corey, *supra* note 32.

³⁹ *Id.*

⁴⁰ The Department of Justice tried to resolve this issue by:

[Assigning this] task to the Bureau of Justice Assistance, which administers department grants to the states but has little experience conducting statistical research. “BJA is not a statistical agency; it’s a grant management agency. BJS has expertise, but they’re scientifically independent,” the former official told *The Appeal*. “None of this was contemplated in the statute.” Additionally, penalties for noncompliance fall on state governments, but much of the data is in the hands of local sheriffs and police. As a result, the former official noted, agencies that comply with the law could be penalized for noncompliance by other agencies in their state.

Id.

nature of crime statistics collected by state and federal governments, including those concerning police use of force that lead to in-custody deaths.⁴¹ Many believe that the most accurate and reliable source for data on deaths connected to police use of force remains crowdsourced efforts run by private citizens, such as Fatal Encounters⁴² and Mapping Police Violence,⁴³ or databases maintained by journalists, such as those at *The Washington Post*⁴⁴ and *The Guardian*.⁴⁵ Crowdsourced information is an attempt to remedy what Kelly Gates describes as the “moral economies” of “absent knowledge,” meaning that the lack of information on the number of people killed by police is actively produced in ways that align with society’s broader devaluing of poor people of color who are the most likely victims.⁴⁶ These efforts at crowdsourcing information on police use

⁴¹ See, e.g., James P. Lynch & John P. Jarvis, Missing Data and Imputation in the Uniform Crime Reports and the Effects on National Estimates, 24 J. Contemp. Crim. Just. 69 (2008); Colin Loftin, David McDowall & Min Xie, Underreporting of Homicides by Police in the United States, 1976–2013, 21 Homicide Stud. 159 (2017); Justin M. Feldman, Sofia Gruskin, Brent A. Coull & Nancy Krieger, Quantifying Underreporting of Law-Enforcement-Related Deaths in United States Vital Statistics and News-Media-Based Data Sources: A Capture-Recapture Analysis, 14 PLOS Medicine e1002399 (2017); Franklin E. Zimring, How Many Killings by Police?, 2016 U. Chi. Legal F. 691 (2016).

⁴² See Fatal Encounters, <https://fatalencounters.org> [<https://perma.cc/L94C-3XEZ>] (last visited Aug. 19, 2021).

⁴³ See Mapping Police Violence, <https://mappingpoliceviolence.org> [<https://perma.cc/C3SW-N3DU>] (last visited Sept. 13, 2021).

⁴⁴ See Fatal Force, Wash. Post, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> [<https://perma.cc/8C83-98HB>] (updated Sept. 15, 2021).

⁴⁵ See The Counted: People Killed by Police in the US, Guardian, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<https://perma.cc/7YQR-QHL7>] (last visited Aug. 19, 2021).

⁴⁶ Kelly Gates, Counting the Uncounted: What the Absence of Data on Police Killings Reveals, in *Digital Media and Democratic Futures* (Michael X. Delli Carpini ed., 2019). Gates notes that

[O]ne of the ways that absence is complexly intertwined with presence in this case is in the stark contrast between the absent data and the volumes of data made present by the administrative practices of policing, especially the production of *crime statistics*. In the United States, the federal government has seen fit to develop an extensive system for producing data about crime, mining the knowledge work of policing with the voluntary yet cooperative participation of the country’s roughly “18,000 city, university/college, county, state, tribal, and federal law enforcement agencies” . . . [yet] [t]he contrast between what is absent and present—the lack of data on people killed by the police and the more systematic collection of [crime statistics by local, state, and federal governments]—itself is a measure of this moral economy. The absence of an official form of police accountability in the form of data on these deaths is consistent with the absence of criminal convictions (or even charges) against officers who kill, despite the obvious injustice of so many killings such as those of Michael Brown, Eric Garner, twelve-year-old Tamir Rice, Walter Scott, Freddie Gray, Samuel DuBose, and the list

of force have their own limits and have been criticized by some scholars for being insufficient.⁴⁷ Issues include factual inaccuracy, relying on hearsay, mistakenly double-counting certain homicides, or, in the case of *The Washington Post*, only counting shooting deaths.⁴⁸ Moreover, these databases are limited in that information on police killings only dates back to 2013. The Fatal Encounters database provides less comprehensive information going as far back as 2000. Thus, for a problem that has characterized modern policing at least since the end of the Civil War,⁴⁹ there is only meaningful data to understand the scope of police killings of civilians for the past fifteen to twenty years.

The available data show that police use of force is a staggering problem, unique in severity in the United States as compared to other democracies.⁵⁰ While most homicide victims are killed by someone they

goes on. To rehearse an obvious but critical point, particular social groups have more agency relative to others in shaping this moral economy; there are hierarchies of agency determining what is valued and not valued in the production of life and death statistics, including the relative valuation of social groups themselves. . . . In fact, it is no stretch to suggest that this moral economy is bound up with and dependent on the absence of an official accounting of police use of lethal force. Given the long brutal history of policing in the service of property and privilege that has shaped visibility itself, the state would be expected to systematically produce such an absence, and even be required to do so, rendering invisible the deaths of those killed by police by its refusal to document the mortalities.

Id. at 124–25.

⁴⁷ See, e.g., John A. Shjarback & Justin Nix, Considering Violence Against Police by Citizen Race/Ethnicity to Contextualize Representation in Officer-Involved Shootings, 66 J. Crim. Just. 6, 8 (2020) (arguing that “[d]ata limitations and the near exclusive focus on new Internet-based, crowd-sourced collections may omit factors that are confounding the relationship between race/ethnicity and fatal police-citizen violence”).

⁴⁸ For an extended description of the strengths and limitations of crowdsourced efforts, see Zimring, *supra* note 30, at 32–36.

⁴⁹ For a discussion of how the disproportionate use of force on communities of color emerged in some regions out of the use of violence to control African-Americans during slavery and Jim Crow to shape the modern criminal justice system, see Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (2003); H.M. Henry, *The Police Control of the Slave in South Carolina* (1914) (Ph.D. Dissertation on file with author); Philip L. Reichel, Southern Slave Patrols as a Transitional Police Type, 7 *Am. J. Police* 51, 54 (1988); Elizabeth Hinton & DeAnza Cook, The Mass Criminalization of Black Americans: A Historical Overview, 4 *Ann. Rev. Criminology* 261, 262 (2021).

⁵⁰ Amelia Cheatham & Lindsay Maizland, How Police Compare in Different Democracies, Council on Foreign Rels. (Apr. 21, 2021, 1:04 PM), <https://www.cfr.org/backgrounder/how-police-compare-different-democracies> [<https://perma.cc/2DTQ-4XJX>] (“The United States far surpasses most wealthy democracies in killings by police. U.S. police killed an estimated 7,638 people between 2013 and 2019. . . . In comparison, at least 224 people died in encounters with Canadian police between 2013 and 2019. Some countries, such as Finland

know, one-third of people killed by strangers in the United States are killed by law enforcement.⁵¹ Over the past five years, these databases have consistently documented over 1,000 police killings each year. This figure from crowdsourced data has been confirmed by academics who have conducted independent analyses.⁵² Yet, this number only reflects known, reported incidents; statistical methods have been used to estimate the total number of people killed by the police each year at between 1,250 and 1,500.⁵³ Surprisingly, there is little correlation between crime rates in various cities and the rate at which police kill individuals.⁵⁴ This is important to note, in that police continue to kill at a steady pace as the overall crime rate drops in the United States.⁵⁵

While the extent to which police kill civilians is striking, it is not evenly distributed. Communities of color are disproportionately victimized by law enforcement. Scholars have painstakingly described the social, political, and doctrinal conditions that produce this reality. Paul Butler sees policing and, more specifically, police use of force as a deliberate mechanism to control and surveil Black people in ways that align with enduring legacies of racial oppression in the United States.⁵⁶ Devon

and Norway, have gone years without police killings.”). For an extended discussion of how the United States compares to other developed countries with regards to police use of force, see Zimring, *supra* note 30, at 74–90.

⁵¹ Ball, *supra* note 29.

⁵² See, e.g., Zimring, *supra* note 30, at 24 (surveying data from governmental sources such as the National Center for Health Statistics at the CDC, the FBI’s Supplemental Homicide Reporting system, and the Arrest-Related Death Program at the Bureau of Justice Statistics, to conclude that “the annual death toll from police activity in the United States is well over 1,000 civilians each year [or] three killings a day”).

⁵³ Ball, *supra* note 29 (concluding that, over an eight-year period, “it is likely that there were approximately 10,000 homicides committed by the police, that is, about 1,250 per year,” though noting that the true number is likely higher given the many jurisdictions that “openly refuse to share any data with the FBI” and estimating that the true number is closer to 1,500 per year); see also Kristian Lum & Patrick Ball, *Estimating Undocumented Homicides with Two Lists and List Dependence*, Hum. Rts. Data Analysis Grp. (Apr. 2, 2015), <https://hrdag.org/wp-content/uploads/2015/07/2015-hrdag-estimating-undoc-homicides.pdf> [<https://perma.cc/NR6G-LTWD>] (independently concluding same figure of approximately 10,000 homicides over the eight-year period).

⁵⁴ Police Accountability Tool, Mapping Police Violence, <https://mappingpoliceviolence.org/cities> [<https://perma.cc/2F8A-XCHW>] (last visited Sept. 13, 2021).

⁵⁵ U.S. Dep’t of Just. Off. Pub. Affs., *FBI Report on Crime Shows Decline in Violent Crime Rate for Third Consecutive Year* (Sept. 28, 2020), <https://www.justice.gov/opa/pr/fbi-report-crime-shows-decline-violent-crime-rate-third-consecutive-year> [<https://perma.cc/HT4H-GSP2>].

⁵⁶ Paul Butler, *Chokehold: Policing Black Men* 6 (3d ed. 2018) (“[W]hat happens in places like Ferguson, Missouri, and Baltimore, Maryland—where the police routinely harass and

Carbado has described how Fourth Amendment jurisprudence that essentially legalizes racial profiling creates the doctrinal conditions for police contacts with minority communities that all too often lead to deadly uses of force.⁵⁷ Zachary Newman and I blend this doctrinal assessment of pathways to police violence with a sociological understanding of how police perspectives on “what counts” as unlawful excessive force endogenously becomes the constitutional standard enforced by federal courts, rendering futile most efforts at holding police accountable.⁵⁸ These dynamics have had a remarkable impact on the health and well-being of minority communities. Citing data on violent deaths from the Centers for Disease Control, Amnesty International notes that Blacks make up roughly 13% of the population yet nearly one-third (27.6%) of the total deaths caused by police officers.⁵⁹ Edwards et al. have found that the risk of being killed by police is particularly acute for Black men, who are between 3.2 and 3.5 times more likely to be killed by the police than their White counterparts.⁶⁰ As noted by Edwards, Lee, and Esposito, “[p]olice violence is a leading cause of death for young men, and young men of color face exceptionally high risk of being killed by police.”⁶¹ Over the course of their lives, Black men face a one in one thousand chance of being killed by law enforcement.⁶²

These figures, along with their disproportionate impact on communities of color has led the American Public Health Association to declare that police violence is “a public health crisis.”⁶³ Public health

discriminate against African Americans—is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system is *supposed* to work. The problem is not bad apple cops. The problem is police work itself. American cops are the enforcers of a criminal justice regime that targets [B]lack men and sets them up to fail.”).

⁵⁷ Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 *Calif. L. Rev.* 125 (2017); see also Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. Rev.* 1182 (2017) (describing how ostensibly race-neutral police policies can and have been enforced in race-specific ways).

⁵⁸ Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 *Cornell L. Rev.* 1281 (2019).

⁵⁹ Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States* 4 (2015).

⁶⁰ Frank Edwards, Michael Esposito & Hedwig Lee, *Risk of Police-Involved Death by Race/Ethnicity and Place, United States, 2012–2018*, 9 *Am. J. Pub. Health* 1241, 1241 (2018).

⁶¹ Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 *PNAS* 16793, 16796 (2019).

⁶² *Id.* at 16793.

⁶³ APHA Calls Out Police Violence as a Public Health Crisis, *Am. Pub. Health Ass’n* (June 4, 2020), <https://www.apha.org/news-and-media/news-releases/apha-news->

officials are not only concerned by the immediate physical harm to individuals caused by police use of force, but also the cascading social, emotional, and psychological impact that these killings have on communities and individual well-being. Aggressive policing that increases civilian contact with law enforcement often precipitates violent uses of force that have been documented to increase trauma and anxiety among young people in urban environments.⁶⁴ Studies have shown that Black Americans' broad exposure to police violence has an adverse impact on mental health.⁶⁵ It is important to note that individuals who have been directly impacted by having someone close to them killed by police have been shown to suffer particular psychological and emotional trauma⁶⁶—not an insignificant finding given the remarkable breadth of police violence across the country. Indeed, police violence is thought to have intergenerational effects, as several immediate family members of victims—such as the twenty-seven-year-old daughter of Eric Gardner—have died shortly after these incidents.⁶⁷

It is in this context that individual officers and police departments have sought alternative justifications for why a particular use of force might have been valid in a given situation. As a seemingly objective medical

releases/2020/apha-calls-out-police-violence [https://perma.cc/3EW4-ASZQ]; see also Nancy Krieger, Jarvis T. Chen, Pamela D. Waterman, Mathew V. Kiang & Justin Feldman, Police Killings and Police Deaths Are Public Health Data and Can Be Counted, *PLOS Med.* 1–2 (Dec. 8, 2015), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001915> [https://perma.cc/TS5S-Q27J] (describing law-enforcement-related deaths as a public health concern).

⁶⁴ Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, Aggressive Policing and the Mental Health of Young Urban Men, *104 Am. J. Pub. Health* 2321, 2321, 2324–25 (2014).

⁶⁵ Jacob Bor, Atheendar S. Venkataramani, David R. Williams & Alexander C. Tsai, Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study, *392 Lancet* 302, 302, 308 (2018); see also Mubarakah Ibrahim, Black Boys Coping with the Trauma of Watching Black People Die, *Huffington Post* (May 23, 2017), https://www.huffpost.com/entry/black-boys-coping-with-the-trauma-of-watching-black_b_59210248e4b0e8f558bb274a [https://perma.cc/7WL4-29T9] (describing how police violence can cause mental trauma to Black Americans through exposure by the media).

⁶⁶ Rafael Outland et al., Living with Trauma: Impact of Police Killings on the Lives of the Family and Community of Child and Teen Victims, *Current Psych.* (Nov. 2020).

⁶⁷ Peter Wade, Police Violence Has Generational Consequences, *Rolling Stone* (Nov. 10, 2019, 2:10 PM), <https://www.rollingstone.com/politics/politics-news/police-violence-has-generational-consequences-910425/> [https://perma.cc/LY3T-F6G9]; see also Thema Bryant-Davis, Tyonna Adams, Adriana Alejandre & Anthea A. Gray, The Trauma Lens of Police Violence Against Racial and Ethnic Minorities, *73 J. Soc. Issues* 852, 859–60 (2017) (describing the different types of trauma that can affect racial and ethnic minorities as a result of police violence).

diagnosis, with what initially appears to some as having scientific support, excited delirium has been brought into an increasing number of ‘use of force’ cases to justify why a person’s behavior may have required law enforcement to use force that might lead to someone’s death. The next section briefly reviews the legal standard used for determining what types of force are deemed excessive as a way to understand the constitutional limits that shape officers’ responses to individuals thought to suffer from this psychiatric condition.

B. Excessive Force and Constitutional Standards

Before the 1920s, federal constitutional law was rarely used to intervene in state criminal proceedings. Yet, this perspective had changed by the 1940s, whereby the Supreme Court had “interpreted the Due Process Clause of the Fourteenth Amendment to invalidate state criminal convictions in a wide variety of settings,” including forced confessions and defendants’ right to be represented by an attorney.⁶⁸ This movement was part of a broader trend towards incorporation that shifted the Supreme Court’s perspective on federalism, where the guarantees of the Bill of Rights that were initially thought to only limit the federal government gradually came to be understood as also restricting states. The Warren Court continued this expansion of federal constitutional law into state criminal proceedings—especially in the area of the Fourth Amendment. For example, *Mapp v. Ohio* applied the exclusionary rule to state criminal adjudications,⁶⁹ while *Katz v. United States* ensured individuals’ expectation of privacy as a way to expand protections against unlawful searches and seizures at the state level.⁷⁰

Although this moment is largely thought of as a revolution in criminal procedure⁷¹ and a clarification of the constitutional rights that limit

⁶⁸ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 *Mich. L. Rev.* 48, 48 (2000). Klarman notes that these incidents involved “mob-dominated trials, violation of the right to counsel, coerced confessions, financially-biased judges, and knowingly perjured testimony by prosecution witnesses.” *Id.*

⁶⁹ *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

⁷⁰ *Katz v. United States*, 389 U.S. 347, 353 (1967).

⁷¹ Jack E. Call, *The United States Supreme Court and the Fourth Amendment: Evolution from Warren to Post-Warren Perspectives*, 25 *Crim. Just. Rev.* 93, 93 (2000).

The 1960s constituted one of the most remarkable periods in the history of the Supreme Court. The changes in constitutional law brought about by the Warren Court in that decade were so dramatic that they are sometimes referred to collectively as the due process revolution (Hall, 1992). It was a “due process” revolution because the due

policing, one area remained hazy: police use of force. For much of the twentieth century, questions about the constitutionality of assorted uses of force by the police were adjudicated at the federal level through diverse legal mechanisms⁷² without much clarity on which legal standard should be used to determine whether a particular instance of police force violated victims' constitutional rights. While various state causes of action and remedies existed,⁷³ *Rochin v. California* gave the Supreme Court an early opportunity to explore the extent to which federal constitutional law might limit the use of force by state and local police officers.⁷⁴ In *Rochin*, three Los Angeles deputy sheriffs entered Rochin's home on suspicion that he was selling narcotics. They found him in the bedroom. Shortly after the officers entered, they saw two pills on the nightstand that Rochin quickly put into his mouth. Seeking the pills for evidence, the officers attempted to force Rochin to expel them.⁷⁵ After that did not work, the officers took Rochin to the hospital, where a doctor gave him a solution that forced him to vomit the pills. The pills turned out to be an illegal substance, a fact that was used to convict Rochin.

The California District Court of Appeal affirmed Rochin's conviction and the Supreme Court of California declined to hear the case. Surprisingly, the U.S. Supreme Court granted certiorari and reversed, finding that the abuse inflicted upon Rochin in pursuit of the evidence

process clause of the Fourteenth Amendment was interpreted by the Court to require most of the rights in the Bill of Rights, which had previously applied only to the federal government, to be followed by state and local governments as well. It was a "revolution" because the changes brought about a redistribution of judicial power that gave federal courts the final authority to give meaning to those ambiguous rights contained in the Bill of Rights.

Id.

⁷² For a discussion of the different legal mechanisms used to bring excessive force claims, see Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 Nw. U. L. Rev. 1465, 1475 (2018).

⁷³ See, e.g., Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 93 Minn. L. Rev. 493, 493–94 (1955).

⁷⁴ *People v. Rochin*, 225 P.2d 1 (Cal. Dist. Ct. App. 1950).

⁷⁵ See *id.* at 1–2:

Two capsules, which were wrapped in cellophane, were on a small table therein. Jack Jones, one of the deputies, said to the defendant, "Whose stuff is this?" Defendant then grabbed the capsules and put them in his mouth. Jones testified that at that moment the three deputies jumped upon the defendant, grabbed him by the throat, and began to squeeze his throat in an effort to eject the capsules from his mouth; that force was applied to his throat; that defendant "hollered a little bit"; that he (Jones) put his fingers in defendant's mouth; and they put handcuffs on defendant while he was in the room.

violated his Fourteenth Amendment due process rights. Despite what was then understood to be tremendous deference to states regarding criminal law,⁷⁶ the Court held that the behavior of the officers was egregious to the point of “shock[ing] the conscience”⁷⁷ and thus violated fundamental rights guaranteed by the Fourteenth Amendment. In expounding on the importance of due process and fundamental rights, the Court put forth a powerful vision for the role of constitutional law in overseeing state criminal procedure:

These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or are “implicit in the concept of ordered liberty.” The Court’s function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment.⁷⁸

The Supreme Court’s decision in *Rochin* concerned the use of force in relation to obtaining evidence,⁷⁹ yet this “shocks the conscience” standard

⁷⁶ *Rochin v. California*, 342 U.S. 165, 168 (1952) (“Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations . . . in the original Constitution, prohibiting bills of attainder and *ex post facto* laws, and of the Thirteenth and Fourteenth Amendments.”).

⁷⁷ *Id.* at 172.

⁷⁸ *Id.* at 169 (citations omitted).

⁷⁹ Throughout the *Rochin* decision, the Court makes clear that the issue is not simply the use of force by police in general, but specifically how that force is used to obtain evidence from a suspect. This is seen through how the Court makes a strong comparison between the due process concerns raised by using physical force to obtain pills from *Rochin* and the due process concerns connected to coercing confessions from a suspect. The Court notes:

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend “a sense of justice.” . . . It would be a stultification of the responsibility which the course of

nonetheless came to influence how the Court approached questions concerning police use of force in general.⁸⁰ One interesting aspect about *Rochin* is that the California State Court of Appeals, in upholding the original conviction, noted that the particular actions of the police and doctor were clearly unacceptable yet “[a] remedy of defendant for such highhanded and reprehensible conduct is an action for damages.”⁸¹ This suggestion that such physical intrusions and abuses are more appropriately addressed through tort actions seeking damages foretold the direction that police use of force litigation would take in the following years, albeit at the federal level with regards to *constitutional torts*. Almost a decade after *Rochin*, the Supreme Court decided *Monroe v. Pape*, which involved a Black family in Chicago that brought suit under

constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach. To attempt in this case to distinguish what lawyers call “real evidence” from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

Id. at 172–74.

⁸⁰

While *Rochin* centered around police use of excessive force in obtaining evidence, the Second Circuit in *Johnson v. Glick* transformed the “shock the conscience” language into a broader test. The court held that a guard's unprovoked attack on a suspect being held for trial deprived that suspect of liberty without due process of law. The *Glick* court believed the *Rochin* test, “conduct that shocks the conscience,” pointed the way for cases involving police use of excessive force.

Irene Prior Loftus, G. David Porter, J. Robert Suffoletta, Jr. & Deanne M. Tomse, The “Reasonable” Approach to Excessive Force Cases Under Section 1983, 64 *Notre Dame L. Rev.* 136, 145 (1989).

The authors note that: “Although *Glick* did not use the ‘shock the conscience’ language in its four factor analysis, the language became a part of the analysis used in later cases.” Id. at 145 n.69. They cite to an example in *Hall v. Tawney*, 621 F.2d 607 (1980), when the Court brings the *Rochin* “shocks the conscience” language into a police use of force matter:

As in the cognate police brutality cases, the substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). This approach was replicated in subsequent cases.

⁸¹ *People v. Rochin*, 225 P.2d 1, 3 (Cal. Dist. Ct. App. 1950).

42 U.S.C. § 1983 against the police department for breaking in and ransacking their home in addition to detaining and interrogating the father for several hours—all without the requisite warrants.⁸² This statute, originally enacted by Congress during Reconstruction as part of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), was created after the Civil War in response to the violence and injustice endured by formerly enslaved persons who often had their constitutional rights violated by or with the assistance of state and local officials. Section 1983 remained largely dormant after it became law as a result of a series of holdings that significantly reduced its scope.⁸³ Nonetheless, § 1983 created a private cause of action that could, in theory, allow plaintiffs to bring suit against government actors for monetary damages when they violate constitutional rights. The *Monroe* decision reflects the moment where the Supreme Court rediscovered and affirmed this transformative power, in which the Court held that § 1983 could be used by plaintiffs to sue the Chicago police officers for an unlawful search and seizure that violated their Fourth Amendment rights. This opened up § 1983 as a tool for police accountability—including and especially when officers are accused of using excessive force.⁸⁴

The transformations regarding the ability to bring private causes against law enforcement for violating individuals' constitutional rights were followed by parallel developments in how federal courts understood "what counts" as excessive force by police officers. In its 1973 case *Johnson v. Glick*, the U.S. Court of Appeals for the Second Circuit moved this conversation forward in interesting and influential ways. Johnson was detained on felony charges while awaiting trial in New York state court.⁸⁵

⁸² *Monroe v. Pape*, 365 U.S. 167 (1961).

⁸³ Michael Wells notes:

Interestingly, the Supreme Court rarely addressed § 1983 issues during that ninety-year period. Few cases were brought under the statute, and lower courts typically gave it a limited reach. When lower courts did consider § 1983 claims, they mainly read "under color of" as a requirement that the plaintiff show that state law *authorized* the violation, so that the availability of a state remedy would thwart the plaintiff's effort to obtain access to federal court. Under this interpretation, the application of a statute that denies the right to vote to African Americans would be a § 1983 violation, whereas police brutality that violates state law would not.

Michael L. Wells, Marshall Shapo's Constitutional Tort Fifty-Five Years Later, 115 Nw. U. L. Rev. 256, 257 (2020).

⁸⁴ See, e.g., Alan Ray Stafford, *Lawsuits Against the Police: Reasons for the Proliferation of Litigation in the Past Decade*, 2 J. Police & Crim. Psych. 30, 31 (1986).

⁸⁵ The *Johnson* Court notes that although the plaintiff was being detained at the time of the assault by the guard, his constitutional claims were not limited to the Eighth Amendment.

He brought a § 1983 suit against Officer Fuller for hitting him on the head twice while he was being checked back into the detention center.⁸⁶ Drawing on the Supreme Court's holding in *Rochin*, the Second Circuit extended its finding of a due process violation connected to the collection of evidence to hold that such police misconduct can also be the basis of a constitutional tort action under § 1983.⁸⁷ The *Johnson* Court notes that *Rochin*'s "shocks the conscience" test "is not one that can be applied by a computer, [but] it at least points the way,"⁸⁸ and then develops a set of considerations that federal courts must balance in determining whether police use of force becomes excessive and unconstitutional:

[T]he need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to

Johnson v. Glick, 481 F.2d 1028, 1029, 1032 (2d Cir. 1973) ("We have considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence. . . . Yet it would be absurd to hold that a pre-trial detainee has less constitutional protection against acts of prison guards than one who has been convicted.").

⁸⁶ The Second Circuit states that it was:

[A]lleged that, while plaintiff was being checked back into the House of Detention, Officer Fuller reprimanded Johnson and other men for a claimed failure to follow instructions; that when Johnson endeavored to explain that they were doing only what another officer had told them to do, Officer Fuller rushed into the holding cell, grabbed him by the collar and struck him twice on the head with something enclosed in the officer's fist; that during this incident the officer threatened him, saying "I'll kill you, old man, I'll break you in half"; that Fuller than [sic] harassed Johnson by detaining him in the holding cell for two hours before returning him to his cell; that when Johnson requested medical attention, Fuller, who was called upon by another officer to escort Johnson to the jail doctor, instead held him for another two hours in another cell before permitting him to see the doctor; and that despite the "pain pills" given him by the doctor, Johnson has since "been having terrible pains in his head."

Id. at 1029–30.

⁸⁷ The Second Circuit notes:

The solution lies in the proposition that, both before and after sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or, as in *Monroe v. Pape*, of the Fourth. *Rochin v. California* must stand for the proposition that, quite apart from any "specific" of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law. If *Rochin* suffered such a violation of his constitutional rights by the police as to be entitled to invalidation of a conviction obtained as a consequence, he also was the victim of a violation sufficient to sustain an action under the Civil Rights Act.

Id. at 1032 (citations omitted).

⁸⁸ *Id.* at 1033.

maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.⁸⁹

The *Johnson v. Glick* decision did important doctrinal work in connecting § 1983, as a private cause of action, to a constitutional standard that could help federal courts determine when police use of force becomes unconstitutional. In referencing *Rochin*, the Second Circuit keeps the conversation about police use of force within the confines of the Fourteenth Amendment and substantive due process. Although the *Johnson v. Glick* decision became highly influential in how federal courts analyzed § 1983 excessive force claims,⁹⁰ plaintiffs continued to base excessive force suits on a variety of federal claims that included the Fourth Amendment, Due Process, Equal Protection, and § 1983 as a standalone source of rights.⁹¹

The Supreme Court began to bring more clarity and texture to the question of constitutional standards and police use of force in 1985 with *Tennessee v. Garner*.⁹² Edward Garner was a fifteen-year-old Black child who burglarized a home in Memphis, which led a neighbor to call the police. The police arrived, and Officer Hyman chased Garner from the house to the backyard, where he observed that Garner was unarmed, identified himself, and told the child to stop. As Garner began to climb the fence, Hyman shot him in the back of the head and killed him. Garner's family brought a § 1983 suit for violation of the child's constitutional rights. In deciding in favor of the plaintiffs, the Supreme Court struck down the Tennessee statute that authorized the use of deadly force on fleeing suspects, even when unarmed. The Court began its analysis by asserting that the use of deadly force by law enforcement constitutes a seizure, and therefore must be subject to a Fourth Amendment reasonableness standard.⁹³ This significantly narrowed the

⁸⁹ *Id.*

⁹⁰ In *Graham v. Connor*, the Supreme Court notes that:

In the years following *Johnson v. Glick*, the vast majority of lower federal courts have applied its four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.

Graham v. Connor, 490 U.S. 386, 393 (1989).

⁹¹ *Obasogie & Newman*, *supra* note 72, at 1485.

⁹² 471 U.S. 1 (1985).

⁹³ *Garner*, 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person. While it is not always clear just when minimal police

analysis regarding the constitutional standard for deadly use of force, as Garner's original § 1983 suit was tied to five separate constitutional claims.⁹⁴ The Supreme Court then concluded that using deadly force on an unarmed fleeing person is not reasonable, thus making the Tennessee statute unconstitutional.⁹⁵ *Garner* marks an important moment in criminal procedure by: (1) being one of the few instances in which the Supreme Court definitively found a particular police practice or action—i.e., using deadly force on unarmed fleeing persons suspected of a crime—to be a violation of constitutional rights and (2) providing guidance that the use of deadly force constitutes a seizure that federal courts must subject to a Fourth Amendment reasonableness analysis.

Although the *Garner* decision overturned several state statutes that, at the time of that litigation, authorized the use of deadly force on unarmed fleeing persons,⁹⁶ there was still an open question regarding the constitutional standard for the use of excessive force. Even after *Garner*, the *Johnson v. Glick* analysis continued to shape federal courts' approach to cases regarding police use of force, and plaintiffs continued to bring § 1983 cases based on diverse constitutional claims against police officers that used excessive force. This shifted in 1989, with the Supreme Court's decision in *Graham v. Connor*. In *Graham*, police officers in Charlotte, North Carolina stopped and beat up Dethorne Graham. The officers thought he was publicly intoxicated when Graham was in fact suffering from an insulin reaction due to having diabetes. The physical assault by the officers left Graham with "a broken foot, cuts on his wrists, a bruised

interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." (citations omitted)).

⁹⁴ *Id.* at 5 ("The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.").

⁹⁵ *Id.* at 11–12 ("[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.").

⁹⁶ The *Garner* decision overturned state laws with regards to the use of deadly force on unarmed fleeing individuals in 21 states: Alabama, Arkansas, Connecticut, Florida, Idaho, Kansas, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, Washington, Oregon, Wisconsin, Michigan, Ohio, Virginia, and West Virginia. Philip Hager, Court Limits Police Use of Deadly Force: Fleeing Suspects May Not Be Shot Unless They Pose a Danger, L.A. Times (Mar. 28, 1985), <https://www.latimes.com/archives/la-xpm-1985-03-28-mn-29048-story.html> [<https://perma.cc/A3UQ-FZTB>].

forehead, and an injured shoulder; he also claim[ed] to have developed [an ongoing] loud ringing in his right ear”⁹⁷

Graham brought a § 1983 claim against the officers and alleged—in line with the then-popular *Johnson v. Glick* framework—that the officers’ use of force against him violated his rights under the Fourteenth Amendment. The District Court applied the *Johnson* test and found that the use of force “was not applied maliciously or sadistically” and was part of a “good faith effort to maintain or restore order.”⁹⁸ The U.S. Court of Appeals for the Fourth Circuit affirmed, but the Supreme Court took this as an opportunity to extend its decision in *Tennessee v. Garner* and apply a Fourth Amendment reasonableness standard to *all excessive force claims* arising out of an arrest or investigatory stop, not only those that involve deadly force on unarmed fleeing persons.⁹⁹ This was a dramatic shift in the jurisprudence on policing and excessive force. The Supreme Court in *Graham* directly addressed the *Johnson v. Glick* test as being too focused on the individual mindsets of law enforcement,¹⁰⁰ and positioned the Fourth Amendment test as one that focuses on “objective reasonableness” where “subjective concepts like ‘malice’ and ‘sadism’

⁹⁷ *Graham v. Connor*, 490 U.S. 386, 390 (1989).

⁹⁸ *Graham v. Charlotte*, 644 F. Supp. 246, 248–49 (W.D.N.C. 1986).

⁹⁹ *Connor*, 490 U.S. at 394–95 (1989).

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right “to be secure in their persons . . . against unreasonable . . . seizures” of the person. This much is clear from our decision in *Tennessee v. Garner*. . . . Today we make explicit what was implicit in *Garner*’s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.

Id. (citations omitted).

¹⁰⁰ *Id.* at 397.

[The test offered in *Johnson v. Glick* that] requires consideration of whether the individual officers acted in “good faith” or “maliciously and sadistically for the very purpose of causing harm,” is incompatible with a proper Fourth Amendment analysis. . . . Whatever the empirical correlations between “malicious and sadistic” behavior and objective unreasonableness may be, the fact remains that the “malicious and sadistic” factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is “unreasonable” under the Fourth Amendment.

have no proper place in that inquiry.”¹⁰¹ Importantly, the Court declined to offer clarity on what objective reasonableness actually entails, and only states that this Fourth Amendment test “is not capable of precise definition or mechanical application” and that federal courts should pay “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.”¹⁰² This imputation of ambiguity¹⁰³ into excessive force jurisprudence with regards to federal courts’ understanding of which police actions violate the constitution has given rise to significant consternation among legal scholars, many of whom believe that more guidance from the judiciary is needed to create standards that can protect individual rights and hold officers accountable for violations.¹⁰⁴ Nevertheless, *Graham* continues to shape federal courts’ approach to claims regarding excessive use of force.¹⁰⁵

C. Law, Police Use of Force, and Accountability: Structural and Doctrinal Barriers

The objective reasonableness standard and its emphasis on what is perceived as being the “facts and circumstances of each case,” along with how police understand who is “resisting or evading arrest,” have direct implications on how excited delirium is used by law enforcement, coroners, and federal courts to shape inquiries regarding officer accountability when people die in police custody. This interaction between what we know about excited delirium as a putative psychiatric condition and Fourth Amendment standards on use of force will be discussed at length in Part IV. Before doing so, it is useful to have a brief

¹⁰¹ *Id.* at 399.

¹⁰² *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

¹⁰³ For a discussion of how ambiguity shapes federal courts’ application of the Fourth Amendment in excessive force cases, see Obasogie & Newman, *supra* note 58.

¹⁰⁴ See, e.g., Rachel Harmon, *When Is Police Violence Justified?*, 102 *Nw. U. L. Rev.* 1119 (2008); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 *Va. L. Rev.* 211 (2017); see also Alice Ristoph, *The Constitution of Police Violence*, 64 *UCLA L. Rev.* 1182, 1188 (2017) (arguing that the constitutional standards, while not indeterminate, are excessively permissive).

¹⁰⁵ See, e.g., *Scott v. Harris*, 550 U.S. 372, 381 (2007); *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014).

discussion about officer accountability and police use of force in general and the barriers that are often present.

Within the sphere of police use of force, there are several structural barriers that limit officer accountability. First, it is extremely unlikely for police to face criminal charges for using excessive force. Data collected by the Mapping Police Violence Project shows that 98.3% of all killings by law enforcement from 2013 to 2020 have not resulted in charges being brought against an officer.¹⁰⁶ In a complementary set of data on police shootings,¹⁰⁷ Philip Stinson at Bowling Green University has created what many consider to be the most comprehensive dataset on police misconduct that provides greater detail on how infrequently police face criminal charges for killing community members. Stinson has found that in light of an estimated greater than one thousand people killed by the police each year, only 110 police officers in the United States were charged with murder or manslaughter from 2005 to 2020.¹⁰⁸ Convictions are even more uncommon:

¹⁰⁶ Mapping Police Violence, <https://mappingpoliceviolence.org> [<https://perma.cc/C3SW-N3DU>] (last visited Sept. 17, 2021).

¹⁰⁷ Carl Bialik, An Ex-Cop Keeps the Country's Best Data Set on Police Misconduct, *FiveThirtyEight* (Apr. 22, 2015, 4:52 AM), <https://fivethirtyeight.com/features/an-ex-cop-keeps-the-countrys-best-data-set-on-police-misconduct/> [<https://perma.cc/BK4K-GA6J>].

¹⁰⁸ Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygari, Why It's So Rare for Police Officers to Face Legal Consequences, *FiveThirtyEight* (June 4, 2020, 6:00 AM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

Table 1¹⁰⁹

Charges on which nonfederal law enforcement officers arrested for murder or manslaughter in an on-duty shooting were convicted, 2005–2020

<i>Charge</i>	<i>Number of convictions</i>
Manslaughter	6
Involuntary manslaughter	6
Murder*	5
Voluntary manslaughter	5
Federal criminal deprivation of civil rights	5
Official misconduct	3
Negligent homicide	3
Reckless homicide	2
Aggravated assault	1
Reckless discharge of firearm	1

*Not counting convictions that were later overturned

Given what we know about the remarkable injustices tied to police use of force,¹¹⁰ it is unlikely that all, most, or even a plurality of these killings were necessary or lawful. Victims' perceived lack of credibility, the close relationships between prosecutors and law enforcement, and jurors' deference and empathy towards law enforcement makes prosecution of police officers highly unlikely and conviction even less so.¹¹¹ Trivedi and Gonzalez Van Cleve draw particular attention to what they term the co-dependent relationship between police and prosecutors that allows police misconduct to flourish.¹¹² The structural nature of this co-dependence—

¹⁰⁹ Table reproduced from Amelia Thomson-DeVeaux et al., *supra* note 108 (citing data compiled by Professor Philip M. Stinson).

¹¹⁰ “Studies of the two groups most aware of police practices—residents of high-crime neighborhoods and police officers themselves—have demonstrated that the violation of individual rights is a common feature of contemporary American policing.” Marshall Miller, *Police Brutality*, 17 *Yale L. & Pol’y Rev.* 149, 151 (1998). For an extended description of the impact of police violence in the Black community, see Butler, *supra* note 56.

¹¹¹ See Miller, *supra* note 110, at 152–54 (1998).

¹¹² The authors write that “ample evidence indicates that when police are the ones committing the crimes, prosecutors deploy their immense discretion to cover for and effectively encourage the criminality rather than to combat it and seek justice.” Somil Trivedi

where prosecutors rely on law enforcement to testify in their cases and police rely on prosecutors to convict the people that they arrest—creates an atmosphere that makes it difficult for victims' *individual* interests to trump the longstanding interests that prosecutors and police departments have *as institutions* in maintaining amicable relationships.

A second structural barrier to police being held accountable for using excessive force is that police departments' administrative sanctions against offending officers tend to be insubstantial or non-existent. Police administrators have several ways to discipline officers who fail to follow department policy or engage in misconduct. This includes suspension, verbal or written reprimands, or termination. Yet, police departments rarely administer significant punishment for allegations of using excessive force or other police misconduct.¹¹³ Investigators at *USA Today* obtained the disciplinary records of police officers from across the country and found that between 2010 and 2020, over 85,000 officers had been investigated or disciplined for misconduct—including 22,924 investigations regarding excessive use of force.¹¹⁴ Yet, not only does it remain rare for officers engaged in misconduct to receive substantial punishment or to be fired from their departments,¹¹⁵ research also

& Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. Rev. 895, 898 (2020).

¹¹³ As Human Rights Watch noted:

When, in a small percentage of cases, complaints alleging excessive force are sustained (following citizen or internal review procedures), there is no guarantee that the offending officer will be punished appropriately. Ranking officers, who should themselves be judged by how they handle sustained complaints of misconduct by their subordinates, may choose to apply lenient sanctions or none at all. If they do[] choose to discipline an officer, arbitrary statutes of limitations in some cities prevent them from taking any action when investigations have been delayed. Furthermore, when higher-ranking police officials order disciplinary measures, subordinates often bring administrative appeals and win them. Even in cases where heads of police departments have ordered the dismissal of officers known to be brutal, the officers have won reinstatement, with back pay, through arbitration or court appeals.

Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States* (1998), <https://www.hrw.org/legacy/reports98/police/uso28.htm#TopOfPage> [<https://perma.cc/8DS9-6LWT>].

¹¹⁴ John Kelly & Mark Nichols, *Tarnished Brass*, *USA Today* (June 11, 2020), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> [<https://perma.cc/YM4T-NUKŪ>].

¹¹⁵ See, e.g., Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, *N.Y. Times* (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> [<https://perma.cc/Z7PJ-472J>] (documenting the example of Derek Chauvin, who killed George Floyd in Minneapolis, Minnesota, in May

suggests that officers who receive administrative sanctions that are upheld are more likely to receive additional future complaints than non-sanctioned officers¹¹⁶—a phenomenon that the authors attribute to, in part, perceptions of unfairness during the administrative process that breed more misconduct when offending officers are back on the streets.¹¹⁷ This evidence of how sanctions not only fail to deter or weed out offending cops but might actually stimulate more offenses highlights the particular problem of accountability that is pervasive throughout many police departments. The issue of accountability has as much to do with the Blue Wall of Silence¹¹⁸ as it does with the labor contracts negotiated by police unions that set the terms for administrative actions that can be taken in a manner that is highly favorable to officers.¹¹⁹ The end result is that the culture of policing and the lack of discipline make it difficult for offending officers to be held accountable for using excessive force on civilians.

A third structural barrier to holding police officers accountable is the nature of civil actions that plaintiffs can bring through 42 U.S.C. § 1983 against abusive officers.¹²⁰ Section 1983 provides victims of police

2020 after holding his knee on Floyd's neck for nine minutes and had seventeen misconduct complaints prior to his arrest of Floyd).

¹¹⁶ Christopher J. Harris & Robert E. Worden, *The Effect of Sanctions on Police Misconduct*, 60 *Crime & Delinquency* 1258 (2014).

¹¹⁷ Harris & Worden also note that,

Decades of research on police has repeatedly found that patrol officers regard police discipline as a threat as unpredictable as any they face on the street, and the rules and regulations for whose violation they might be sanctioned as simply incompatible with getting the job done. Although not all officers perceive their bureaucratic environment in the same terms, and the evidence is fragmentary, we would surmise that many officers are skeptical about the legitimacy of their departments' administrations, in general, and would regard sanctions for many of the violations of departmental regulations as substantively and/or procedurally unfair.

Id. at 1280.

¹¹⁸ Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 *Police Pract. & Rsch.* 7 (2002).

¹¹⁹ See, e.g., Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, 9 *Police Prac. & Rsch.* 95, 102–03, 105–06 (2008); Christopher Ingraham, *Police Unions and Police Misconduct: What the Research Says About the Connection*, *Wash. Post* (June 10, 2020), <https://www.washingtonpost.com/business/2020/06/10/police-unions-violence-research-george-floyd/> [<https://perma.cc/C2F8-QQVP>]; Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, *New Yorker* (June 18, 2020), <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses> [<https://perma.cc/ADD9-RU8Y>].

¹²⁰ For discussions on the limits of § 1983 litigation in holding police accountable and providing remedies to victims, see John C. Jeffries, *The Liability Rule for Constitutional Torts*,

violence a private cause of action to sue offending officers for violating their constitutional rights, allowing them to recover damages. As described in Section II.B, § 1983 emerged during Reconstruction out of a recognition that relying upon state and local prosecutors, judges, and juries to entertain criminal charges against government officials who enabled or directly participated in violence against newly freed African Americans would leave this group with little recourse or protection against rampant state violence.¹²¹ Allowing victims to bring civil cases for violations of their constitutional rights—understood to be the Fourth Amendment in excessive force cases per *Graham v. Connor*—is thought to create the possibility of financial liabilities that would incentivize police officers to be on their best behavior when interacting with community members. However, the incentive structure surrounding § 1983 litigation has not turned out that way.

Officers that are found civilly liable for using excessive force rarely pay damages. Joanna Schwartz conducted an empirical study of the indemnification practices of forty-four large police agencies and another thirty-seven agencies that were small to mid-sized. She found that between 2006 and 2011, governments paid 99.98% of all damages won by plaintiffs who brought § 1983 suits against police officers.¹²² Not only did officers not pay any of the punitive damages awarded in this sample during this period, but “[g]overnments satisfied settlements and judgments in police misconduct cases even when indemnification was prohibited by statute or policy [and] . . . even when officers were

99 Va. L. Rev. 207, 264–69 (2013); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of *Monroe v. Pape**, 78 UMKC L. Rev. 889 (2010); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913 (2015).

¹²¹ Theodore Eisenberg notes that:

Section 1983 was first enacted as Section 1 of the Civil Rights Act of 1871, which attempted to deal with widespread legal abuses and physical violence, often backed by the Ku Klux Klan, against Southern Blacks and their white supporters. Representative Perry eloquently summarized the problem that Congress addressed: “Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.”

Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 484–85 (1982).

¹²² Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912–13, 915 (2014).

disciplined or terminated by the department or criminally prosecuted for their conduct.”¹²³ While it is difficult to make hard conclusions from Schwartz’s limited sample in light of the 18,000 law enforcement agencies in the United States, this dynamic suggests that the general practice of indemnifying police officers limits the accountability that § 1983 litigation is thought to bring to police use of force.

In addition to these structural limitations, there are also significant doctrinal barriers to police accountability in excessive force litigation. The first doctrinal limitation to police accountability is the constitutional standard itself. Objective reasonableness, as put forth by the Supreme Court in *Graham v. Connor*, creates an ambiguous rule derived from the equally ambiguous Fourth Amendment that implores federal courts to look at the “totality of the circumstances” but provides little other guidance to trial judges and juries on “what counts” as excessive force. In light of this ambiguity, federal courts have often turned to local police departments’ use of force policies for guidance on which types of police behaviors are deemed appropriate.¹²⁴ Use of force policies are the administrative rules developed by police departments that instruct officers on when to use force and what type of force is allowable in a given circumstance.¹²⁵ However, since these rules are developed by police officers and unions, they reflect the interest and perspective of law enforcement and not necessarily the community. When federal courts defer to local police departments’ rules as the *constitutional standard* for which types of behaviors constitute the meaning of excessive rather than developing their own independent standards, police perspectives inevitably become constitutional law.¹²⁶ This dynamic of legal endogeneity, where the perspectives of the group meant to be regulated by law become the legal standard for regulation,¹²⁷ makes accountability for excessive force nearly impossible. Judicial deference to the

¹²³ *Id.* at 890.

¹²⁴ Obasogie & Newman, *supra* note 58, at 1288.

¹²⁵ See DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie & Brittany Packnett, Campaign Zero, Police Use of Force Policy Analysis 1 (Sept. 20, 2016), <https://static1.squarespace.com/static/56996151ebced68b170389f4/t/57e1b5cc2994ca4acd97700/1474409936835/Police+Use+of+Force+Report.pdf> [<https://perma.cc/XB24-ED28>].

¹²⁶ Obasogie & Newman, *supra* note 58, at 1322 (citing Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights (2016)).

¹²⁷ For an extended description of legal endogeneity theory as a sociological phenomenon, see Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights 12–16 (2016).

administrative rules created by police departments to understand which types of force are constitutionally reasonable creates a situation where both civil and criminal complaints concerning police use of force have little chance of succeeding.

A second doctrinal barrier, also precipitated by *Graham v. Connor*, is that all claims of excessive force must be litigated through a Fourth Amendment framework. In *Graham*, the Supreme Court made a definitive shift away from then-existing excessive force jurisprudence that analyzed such claims mainly (though not exclusively) through Fourteenth Amendment substantive due process and reconfigured judicial analyses to focus exclusively on the Fourth Amendment. The *Graham* Court states,

Today we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach.¹²⁸

This shift was dramatic not only because it changed the standard from a subjective approach that focused on the officer's intent to a seemingly objective assessment based on what is reasonable, but it also brought a different weight and sensibility to the question of police use of force by moving the constitutional discussion from the Fourteenth to the Fourth Amendment. The Fourteenth Amendment emerged during Reconstruction as part of a suite of transformative changes to the Constitution that would fundamentally alter the relationship between the states and federal government after the Civil War. Concerns regarding race and racism animated the Fourteenth Amendment, making it a source of American law that is necessarily always in conversation with the broader history of inequality, group conflict, and racial justice in America. Although substantive due process often speaks to individual liberties, its connection to the Fourteenth Amendment made questions about excessive force before *Graham* more available to an understanding of how race and racism might influence police officers' decisions to use force. Yet, the textual availability and possibility for this type of group-centered doctrinal conversation, though never fully materializing in § 1983

¹²⁸ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

litigation before *Graham*, is almost entirely unavailable with post-*Graham* Fourth Amendment assessments of police use of force. By moving excessive force conversations to the Fourth Amendment, the Supreme Court *hyper-individualized* the dynamics surrounding police use of force, making it intelligible only as an issue about what “Officer *A*” did to “Civilian *B*” without understanding how broader historical and sociological contexts give police officers as a group the power and authority to disproportionality treat communities of color with violence and disdain without being held accountable. Thus, *Graham* arguably shut off the potential of § 1983—originally known as the Ku Klux Klan Act—to be used as a tool of racial justice, and turned it into a de-historicized, de-contextualized, quasi-ordinary tort claim that might occasionally bring justice to some individuals but nonetheless remains largely impotent in facilitating justice for racial groups vulnerable to state violence.¹²⁹

A third doctrinal barrier to police being held accountable for excessive force is qualified immunity. There is nothing in the original Civil Rights Act of 1871 or its modern incarnation at 42 U.S.C. § 1983 that suggests that police or any governmental official might enjoy certain immunities from civil liability for violating a person’s civil rights. However, just a few years after the Supreme Court brought § 1983 out of dormancy in *Monroe v. Pape* (1961) to allow plaintiffs to bring private causes of action against abusive police officers, the Supreme Court decided *Pierson v. Ray* (1967) which gave rise to what has become known as the doctrine of qualified immunity. The *Pierson* Court held that the common law “good faith and probable cause” defense available in state tort law at the time the 1871 Act was established also applied to constitutional tort claims under § 1983, thus giving government officials certain immunities from civil liability.¹³⁰ While *Pierson* did not involve an excessive force claim against the police but rather a false arrest, the doctrine of qualified immunity that emerged from the case has been extended to cases that involve police violence.¹³¹ Qualified immunity took its modern form in

¹²⁹ For an extended discussion of the dynamic of hyper-individualizing nature of the Fourth Amendment, see Obasogie & Newman, *supra* note 72, at 1472–74.

¹³⁰ The *Pierson* Court stated “[w]e hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.” *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

¹³¹ See Osagie K. Obasogie & Anna Zaret, Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force, 170 U. Pa. L. Rev. (forthcoming)

1982 with the Supreme Court's decision in *Harlow v. Fitzgerald*, where the Court revised qualified immunity as a doctrine that shields officials to the extent that their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹³²

The *Harlow* Court then notes:

If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.¹³³

Thus, by introducing this formulation, officers who engage in excessive force are shielded from civil liability unless a federal court in the same jurisdiction previously held that a similar action under identical circumstances violated the Constitution. This is a remarkably high standard that leaves many § 1983 plaintiffs without recourse.

These structural and doctrinal barriers combine to make accountability in the realm of police use of force rare.¹³⁴ The existing scholarly literature on police use of force largely limits the discussion of police accountability for using force on civilians to two areas: qualified immunity and indemnification. The conversation on qualified immunity has focused on empirical examinations of its impact and broader historical and doctrinal conversations on whether it is legitimate or should continue to be a part of federal courts' assessment of § 1983 claims. On the other hand, the smaller literature on indemnification assesses the extent to which cities

2022) (discussing the doctrinal evolutions leading qualified immunity to become closely tied to police excessive force cases).

¹³² *Harlow v. Fitzgerald*, 457 U.S. 800, 815–18 (1982).

¹³³ *Id.* at 818–19 (1982).

¹³⁴ Erwin Chemerinsky writes,

In recent years, the court has made it very difficult, and often impossible, to hold police officers and the governments that employ them accountable for civil rights violations. This undermines the ability to deter illegal police behavior and leaves victims without compensation. When the police kill or injure innocent people, the victims rarely have recourse.

Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. Times (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html> [https://perma.cc/J8ZU-QRWT].

and municipalities pay for the damages connected to § 1983 suits and other settlements related to police use of force. Indemnification and qualified immunity are important issues that shield officers from being held accountable for excessive use of force. But there are emerging developments in medicine that are being brought into excessive force conversations to mitigate police responsibility and exculpate officers from liabilities related to the possible violation of constitutional rights. The next Part explores how excited delirium, as a psychiatric diagnosis, further complicates legal conversations regarding police officers being held accountable for using excessive force.

II. EXCITED DELIRIUM

Excited delirium is thought to be a psychiatric condition that is characterized by the acute onset of aggression, inexplicably strange and violent behavior, and physical distress.¹³⁵ This illness is described as often requiring the use of force by law enforcement due to the person's inability to follow commands and the dangers that an uncontrolled person experiencing mania might present to the public, to officers, or to themselves.¹³⁶ Excited delirium is also used to describe why people suffering from the condition might spontaneously die, especially when in police custody, due to the stress that the delirium places on their bodies.¹³⁷

¹³⁵ Deborah C. Mash, *Excited Delirium and Sudden Death: A Syndromal Disorder at the Extreme End of the Neuropsychiatric Continuum*, 7 *Frontiers Physiology* 1 (2016) (“The characteristic symptoms of [excited delirium syndrome (“ExDS”)] include bizarre and aggressive behavior, shouting, paranoia, panic, violence toward others, unexpected physical strength, and hyperthermia.”).

¹³⁶ Philippe Gonin, Nicolas Beysard, Bertrand Yersin & Pierre-Nicolas Carron, *Excited Delirium: A Systematic Review*, 25 *Acad. Emergency Med.* 552, 552 (2018) (“ExDS usually requires the use of physical or mechanical restraint, including the intervention of security officers or law enforcement officers.”).

¹³⁷ Mash describes the physiological processes of excited delirium:

Elevated synaptic dopamine when coupled with failed dopamine transporter function leads to agitation, paranoia and violent behaviors associated with ExDS. CNS dopamine also regulates heart rate, respiration, and core body temperature with chemical imbalance resulting in tachycardia, tachypnea, and hyperthermia. Hyperthermia is a hallmark of excited delirium and a harbinger of death in this syndromal disorder. Victims of excited delirium are in an extremely heightened emotional state exhibiting marked paranoia and mounting irrational fear. Abnormal signaling in the brain-heart axis may be a precipitant of a sudden fatal arrhythmia, since hyperdopaminergic signaling in the limbic system can convert extreme emotional stress into autonomic toxicity. The connection between the hyperdopaminergia and chaotic signaling in

This Part examines the history of excited delirium as a disease and clinical diagnosis, provides a critique of its use, application, and its very existence, and then describes findings from an empirical investigation into how excited delirium is discussed in news outlets when it is part of a law enforcement encounter where force is used.

A. History of Excited Delirium

The earliest antecedent to what is currently called excited delirium is “Bell’s Mania”—a condition identified by Luther Bell in 1849.¹³⁸ Bell used this diagnosis to describe patients under his observation who experienced a particular type of delirium that could be distinguished from similar psychiatric disorders by its rapid onset.¹³⁹ Bell noted that the then-prevalent understanding of deliriums like this was that they were chronic and ongoing. The patients he observed, however, developed the characteristic symptoms of aggression and anxiety in a relatively short time frame—roughly one week.¹⁴⁰ Bell reported that this new variant of exhaustive delirium was particularly taxing, leading to a 75% mortality rate.

By the early twentieth century, other researchers in this area of psychiatry had published similar findings akin to the type of hyperactive

higher brain autonomic regulatory centers may explain the abrupt loss of autonomic function that leads to sudden unexpected death in victims of the ExDS.

Mash, *supra* note 135, at 6–7.

¹³⁸ “Excited delirium syndrome is a term that has been used for decades to describe a behavioral syndrome that was first described by Bell as a psychiatric syndrome of lethal, febrile, manic behavior seen within some institutionalized patients in the mid-1800s. At the time, it was called ‘Bell’s mania.’” Jeffrey D. Ho et al., *Successful Management of Excited Delirium Syndrome with Prehospital Ketamine: Two Case Examples*, 17 *Prehospital Emergency Care* 274, 276 (2013).

¹³⁹ Bell writes:

Without detailing the points of accord and disagreement, it is enough to draw the broad line of separation between one disease and any forms of either active or passive congestion, to observe, that these are ordinarily chronic and readily relievable diseases, while the other has the sudden onset and the rapid, defined march, of the acute and self-limiting maladies.

Luther V. Bell, *On a Form of Disease Resembling Some Advanced Stages of Mania and Fever, but so Contradistinguished from Any Ordinarily Observed or Described Combination of Symptoms, as to Render It Probable that It May Be an Overlooked and Hitherto Unrecorded Malady*, *Am. J. Insanity* 97, 106 (1849).

¹⁴⁰ *Id.* at 101 (“On inquiry of the invasion of the attack, you will find that it came on quite suddenly ‘about a week since’—frequently, indeed, by a sudden outbreak.”).

disorder described by Bell.¹⁴¹ Yet, by the 1950s, the development of new antipsychotic drugs and shifts away from institutionalizing psychiatric patients reduced the incidence of uncontrolled mental illnesses that led to sudden deaths.¹⁴² However, *excited delirium* as a new iteration of this diagnosis returned in the 1980s with the emergence of the cocaine epidemic as a way to explain what was then perceived as drug induced manias that sent people to local emergency rooms with acute onsets of aggression, hysteria, and anxiety that appeared to mirror Bell's previous research.¹⁴³ Much of this rebranding of Bell's nineteenth-century observations was based on the work of Charles Wetli. Wetli, a South Florida coroner during the 1980s era of cocaine and night clubs, observed a growing trend in which people "had raged wildly before sudden death [in which] [c]ocaine was found in their systems, but not enough to cause overdose."¹⁴⁴ In 1981, Wetli provided definitional guidance to emergency department physicians who might encounter patients with cocaine-induced delirium:

There are two major types of delirium: stuporous (dull, lethargic, hypoactive, mute, somnolent, and apathetic); and excited (thrashing, shouting, hyperactive, fearful, panicky, agitated, hypervigilant, and violent). Patients with excited delirium are more common and, because

¹⁴¹ See, e.g., S. H. Kraines, *Bell's Mania (Acute Delirium)*, 91 *Am. J. Psychiatry* 29, 40 (1934); Charles P. Larson, *Fatal Cases of Acute Manic-Depressive Psychosis*, 95 *Am. J. Psychiatry* 971 (1939).

¹⁴² For instance:

Historical research indicates that the worrisome behaviors and deaths following uncontrolled psychiatric illness described in the 1800s seemed to decline drastically by the mid-1950s. This is largely attributed to the advent of modern antipsychotic pharmaceutical therapy that changed psychiatric practice from one of custodial patient control to a goal of de-institutionalization and patient placement within normal community settings.

Am. Coll. of Emergency Physicians, White Paper Report on Excited Delirium Syndrome (Sept. 10, 2009), https://www.prisonlegalnews.org/media/publications/acep_report_on_excited_delirium_syndrome_sept_2009.pdf [<https://perma.cc/M622-3RP3>]; see also Mash, *supra* note 135, at 2 ("Between 1954 and 1975, the advent of the neuroleptic drugs like Thorazine transformed psychiatric practice and reduced the incidence of exhaustive mania in institutionalized and unmedicated patients.").

¹⁴³ See generally David A. Fishbain & Charles V. Wetli, *Cocaine Intoxication, Delirium, and Death in a Body Packer*, 10 *Annals Emergency Med.* 531 (1981) (describing the symptoms of patient who was discovered to have delirium).

¹⁴⁴ Gus Garcia-Roberts, *Is Excited Delirium Killing Coked-Up, Stun-Gunned Miamians?*, *Mia. New Times* (July 15, 2010), <https://www.miaminewtimes.com/news/is-excited-delirium-killing-coked-up-stun-gunned-miamians-6367399> [<https://perma.cc/RTK5-5UBZ>].

they present a management problem, are often labeled as suffering from a functional psychiatric illness.¹⁴⁵

Thus, this re-imagining of excited delirium during the 1980s cocaine epidemic gave the psychiatric condition a new identity. In 1985, Wetli and Fishbain published an article in the *Journal of Forensic Sciences* that relied upon seven cases of recreational drug users “who died suddenly and unexpectedly of cocaine intoxication but with a psychiatric presentation of excited delirium.”¹⁴⁶ Thus, these cases were used as an evidentiary basis from which to formally bring excited delirium into forensic medicine as a way to connect abnormally aggressive behavior, cocaine use, and unexpected deaths in a way that is different from a traditional drug overdose. The authors argued that drug overdose victims tend to first have seizures and then suffer respiratory problems that lead to their sudden death—a pattern not present with the seven cases of excited delirium observed in the study.¹⁴⁷ Wetli and Fishbain suggest that while the cocaine used by the decedents was not enough to cause an overdose, it was enough to initiate a psychiatric crisis that led to spontaneous death.¹⁴⁸ Yet, the authors acknowledge that the connections that they make are largely speculative in stating “the exact mechanism of death in these cases of excited delirium is unknown. . . . [and] [t]hus far a review of the toxicologic data has failed to identify any common cocaine congeners (contaminants) in these victims.”¹⁴⁹ Thus, not only is the supposed mechanism of excited delirium not known, the authors could not find any shared toxicologic attributes among the seven cases that might substantiate their claims.

Nevertheless, this 1985 article gave rise to excited delirium becoming a useful term and framework for forensic pathologists to explain the cause of what were otherwise inexplicable deaths. Wetli’s work was foundational in expanding the concept and legitimating it among his peers in medical forensics while translating it into the realm of law as an expert

¹⁴⁵ Fishbain & Wetli, *supra* note 143, at 532 (footnotes omitted).

¹⁴⁶ See, e.g., Charles V. Wetli & David A. Fishbain, Cocaine-Induced Psychosis and Sudden Death in Recreational Cocaine Users, 30 *J. Forensic Sci.* 873, 873 (1985).

¹⁴⁷ *Id.* at 878.

¹⁴⁸ *Id.* at 879 (“One may thereby speculate on the possible role of autonomic reflexes, a toxic cardiac dysrhythmia, or ‘restraint stress,’ as has been postulated for the sudden death associated with acute exhaustive mania.”).

¹⁴⁹ *Id.* at 879.

witness for police officers.¹⁵⁰ But, Wetli was not alone. Deborah Mash, a co-author with Wetli who has been described as his “heir as the world’s leading expert on excited delirium,”¹⁵¹ has published recent work that suggests certain biomarkers connected to dopamine transporters and heat shock proteins are, along with certain behavioral traits, associated with excited delirium.¹⁵² Moreover, she is careful to specifically state that this association between biomarkers and psychiatric disease might lead people to die spontaneously in police custody *due to no fault of the police*.¹⁵³ Thus, to Mash, excited delirium represents a biological predisposition that exculpates police from responsibility for in-custody deaths. As she told the *Texas Observer*, “[t]hese people aren’t dying because of police. It’s a brain disease. People don’t act out in these very bizarre manners *that police describe* without an underlying brain disorder. Plenty of people abuse cocaine and never develop excited delirium.”¹⁵⁴ This deference to police and treating deaths in police custody as a function of a biological

¹⁵⁰ The *New York Times* described Wetli in his obituary as “a pioneer in the field of forensic pathology, and his career dovetailed with the emerging use of scientific evidence to solve complex crimes and unexplained deaths. His expertise made him a valuable resource and expert witness for many law enforcement agencies and lawyers in cases across the country.” Katharine Q. Seelye, Charles Wetli, Medical Examiner for T.W.A. Flight 800 Crash, Dies at 76, *N.Y. Times* (Aug. 16, 2020), <https://www.nytimes.com/2020/08/16/obituaries/charles-wetli-dead.html> [<https://perma.cc/L8V3-6RMF>].

¹⁵¹ Garcia-Roberts, *supra* note 144.

¹⁵² Deborah C. Mash et al., Brain Biomarkers for Identifying Excited Delirium as a Cause of Sudden Death, 190 *Forensic Sci. Int’l*, at e13, e14 (2009).

¹⁵³ Mash et al. write,

Police when suddenly confronted with psychotic, violent persons, set into motion an escalation of the use of force continuum, and death may occur despite the appropriate application of sublethal control techniques. The violent nature of the conflict between police and excited delirium victims, often witnessed by citizens and sometimes the news media, may lead to accusations of excessive use of force and community outrage. If death occurs while police officers are trying to restrain the victims, the police are assumed to be responsible with subsequent civil litigation against the municipality, the police department, and the individual police officers to be expected. The tendency to confuse proximity with causality, become greater when the necropsy fails to disclose an anatomic cause of death. Because these cases come to legal review, measures should be taken to ensure that events and findings are clearly documented. We have demonstrated that dopamine transporter and Hsp70 proteins are indicators of abnormal biological processes that afford an objective measure to assess excited delirium at autopsy. The high sensitivity and low degree of interindividual variability provide proof-of-concept that when combined with descriptions of the decedents’ behavior prior to death, a 2-protein biomarker analysis has validity for use in assigning excited delirium as a cause of death.

Id. at e18 (citation omitted).

¹⁵⁴ Barajas, *supra* note 26 (emphasis added).

predisposition towards psychiatric disorder is a common default position of forensic pathologists who study excited delirium. Vincent Di Maio, known as a celebrity medical examiner whose work has greatly popularized excited delirium and made it available as a defense for in-custody deaths, dedicates his book on excited delirium to “all law enforcement and medical personnel who have been wrongfully accused of misconduct in deaths due to excited delirium syndrome.”¹⁵⁵

B. Critique of Excited Delirium

Despite its growing use as an explanation for suspicious deaths that occur in police custody, excited delirium has been subject to persistent criticism.¹⁵⁶ First, there is little scientific evidence to support claims that excited delirium exists as a legitimate psychiatric condition. Even its most ardent supporters acknowledge that the physiological mechanisms for its onset and impact leading to sudden death are not established, or even well-understood. For example, in 2009, the American College of Emergency Physicians (“ACEP”) became one of the few professional organizations to “formally recognize excited delirium as a unique syndrome.”¹⁵⁷ Yet, in the White Paper developed by ACEP’s Excited Delirium Task Force, the authors note “[d]espite increased research, the exact pathophysiology of [excited delirium syndrome (“ExDS”)] remains unidentified.”¹⁵⁸ This continues to be the consensus in the research literature. Gonin et al. conducted a systematic review of the scientific literature in an effort to “clarify the definition, epidemiology, and pathophysiology of . . . ExDS[] and to summarize evidence-based treatment recommendations.”¹⁵⁹ This consisted of screening over three thousand articles, with sixty-six qualifying for inclusion. The authors conclude that “[t]he overall quality of the studies was therefore poor” and that there is “low to very low levels of evidence.”¹⁶⁰ In reviewing the literature and its evidentiary issues, the authors cite: (1) endemic problems

¹⁵⁵ Theresa G. Di Maio & Vincent J.M. Di Maio, *Excited Delirium Syndrome: Cause of Death and Prevention*, at v (2005).

¹⁵⁶ See, e.g., Laura Sullivan, *Death By Excited Delirium: Diagnosis or Coverup?*, NPR (Feb. 26, 2007), <https://www.npr.org/templates/story/story.php?storyId=7608386> [<https://perma.cc/G67G-E2DH>].

¹⁵⁷ Lisa Hoffman, *ACEP Recognizes Excited Delirium Syndrome*, *Emergency Medical News* (Oct. 2009), <https://journals.lww.com/em-news/Documents/ExDS-pdf-final.pdf>.

¹⁵⁸ Am. Coll. of Emergency Physicians, *supra* note 142.

¹⁵⁹ Gonin et al., *supra* note 136, at 552.

¹⁶⁰ *Id.* at 562.

with subjectivity and lack of consistency in the definition of excited delirium;¹⁶¹ (2) a peculiar heightened prevalence of excited delirium when law enforcement or forensics are involved;¹⁶² and (3) in light of the role of drug use in most patients, an inability to distinguish excited delirium deaths (or identify pathways that give rise to its particular clinical presentation), compared to traditional drug overdose in that the level of cocaine in both instances appears to be similar.¹⁶³ These problems in the literature, among others, are the likely reason that excited delirium is not formally recognized as a medical or psychiatric condition in major diagnostic guidebooks, including the DSM-5, maintained by the American Psychiatric Association or the World Health Organization's International Classification of Diseases.¹⁶⁴

In addition to this lack of independent evidence to support the validity of excited delirium as a psychiatric condition, there is substantial evidence that many deaths thought to be connected to this disease stem from external factors—namely police use of restraints and other forms of force. As Gonin et al. noted in their systematic review, excited delirium appears to disproportionately arise as a cause of death when police are present. Ellen M. F. Strömmer et al. recently performed a separate systematic review of the excited delirium literature. They noticed that “[e]xcited delirium syndrome (ExDS) and agitated delirium syndrome (AgDS) are used interchangeably in the literature, but ExDS is far more likely to be used when the outcome is death and aggressive restraint methods were

¹⁶¹ Id. at 561 (“Because the definition of ExDS remains mostly syndromic and based on clinical criteria, it is prone to subjectivity.” (citing Am. Coll. of Emergency Physicians, *supra* note 142)).

¹⁶²

Beyond health care providers' issues, this syndrome appears to be particularly relevant for police agencies. ExDS is in question in more than 3% of police interventions that require the use of force and is associated with more than 10% of deaths in police custody. At the same time, severe ExDS requiring out-of-hospital restraint is observed in fewer than two cases for 10,000 advanced life support EMS calls. It also seems to be frequent in the forensic setting, where ExDS represents more than 10% of [TASER]-related deaths.

Gonin et al., *supra* note 136, at 561.

¹⁶³ Id. at 561 (“Interestingly, most of the studies evaluating blood or brain cocaine concentrations show low or similar levels of cocaine in ExDS-related deaths, in comparison with other cocaine intoxication-related deaths.” (citing Charles V. Wetli & David A. Fishbain, Cocaine-Induced Psychosis and Sudden Death in Recreational Cocaine Users, 30 *J. Forensic Scis.* 873, 873 (1985))).

¹⁶⁴ Asia Takeuchi, Terence L. Ahern & Sean O. Henderson, Excited Delirium, 12 *W.J. Emergency Med.* 77 (2011).

used.”¹⁶⁵ The authors’ findings on the relationship between ExDS and potentially fatal restraints are striking:

The most probable mechanism driving the association between ExDS and death is the high frequency of aggressive restraint types observed in the ExDS cases. We found that the most aggressive forms of restraint (i.e. manhandling, handcuffing, and hog/hobble tying) increased the odds of an ExDS diagnosis by between 7 and 29 times, whereas [agitated delirium syndrome] was 2.5 times more likely to be diagnosed when less aggressive forms of restraint (i.e. pepper spray, 4-point restraint, etc.) were used. . . . These results provide strong evidence that the more likely it is that a death resulted from restraint, the more likely it is that the death will be attributed to ExDS, which allows for the restraint to be ignored as a cause. Thus, the evidence suggests that ExDS is not a unique cause of death in the absence of restraint, and that the supposition to the contrary is an artifact of circular reasoning and confounding rather than an evidence-based inference.¹⁶⁶

While the authors leave room for the existence of excited delirium syndrome and agitated delirium syndrome as clinical realities, they clearly state that when persons thought to have either of these conditions die, it is most likely due to the restraints placed upon them by police than it is from any psychiatric condition. The authors’ conclusion is straightforward: “There is no existing evidence that indicates that [excited delirium] is inherently lethal in the absence of aggressive restraint.”¹⁶⁷

Lastly, it is imperative to highlight the role that race and, in particular, perceptions and anxieties regarding Black drug use and Black criminality play in giving legitimacy to an excited delirium diagnosis. Specifically, it is important to examine the idea that excited delirium is a distinct psychiatric condition that minorities are biologically predisposed to, which leads to sudden death when police are involved. Race has played a longstanding role in how American medicine has conceptualized and defined mental illness.¹⁶⁸ For example, Louisiana psychologist Samuel

¹⁶⁵ Ellen M.F. Strömmer, Wendy Leith, Maurice P. Zeegers & Michael D. Freeman, *The Role of Restraint in Fatal Excited Delirium: A Research Synthesis and Pooled Analysis*, 16 *Forensic Sci. Med. & Pathology* 680, 689 (2020).

¹⁶⁶ *Id.* at 683–84.

¹⁶⁷ *Id.* at 689.

¹⁶⁸ See Kimberly Gordon-Achebe, Danielle R. Hairston, Shadé Miller, Rupinder Legha & Steven Starks, *Origins of Racism in American Medicine and Psychiatry*, in *Racism and Psychiatry: Contemporary Issues and Interventions* 4–8 (Morgan M. Medlock, Derri Shtasel,

Cartwright published an 1850s report in the *New Orleans Medical and Surgical Journal* about *drapetomania*, which he claimed was a mental illness that caused enslaved persons to run from their owners.¹⁶⁹ This pattern of framing Blacks' resistance to social injustice as a psychiatric problem that requires discipline and force to bring them back into what the establishment believes to be normalcy is what some consider to be a hallmark characteristic of American psychiatry. Jonathan M. Metzl notes in *The Protest Psychosis: How Schizophrenia Became a Black Disease* that although Cartwright's assertions might seem absurd today, the legacy of this way of thinking persists in medicine. Metzl writes:

Yet, in unintended and often invisible ways, psychiatric definitions of insanity continue to police racial hierarchies, tensions, and unspoken codes in addition to separating normal from abnormal behavior. . . . Mainstream culture then defines threats to this racial order as a form of madness that is, still, overwhelmingly located in the minds and bodies of [B]lack men.¹⁷⁰

We can see remnants of this racial logic in the history and development of excited delirium. It is a diagnosis that is tainted by misperceptions of Blackness and criminality. For example, the 1980s crack cocaine epidemic gave birth to horrific tropes about racial minorities and premature death, such as the so-called “crack baby” myth suggesting that maternal drug use during pregnancy led to high rates of stillbirth and

Nhi-Ha T. Trinh & David R. Williams eds., 2019); Emily Eakin, *Bigotry as Mental Illness or Just Another Norm*, N.Y. Times (Jan. 15, 2000), <https://www.nytimes.com/2000/01/15/arts/bigotry-as-mental-illness-or-just-another-norm.html> [<https://perma.cc/2T6Z-XSXH>].

¹⁶⁹ Cartwright wrote in 1851 under the heading “DRAPETOMANIA, OR THE DISEASE CAUSING NEGROES TO RUN AWAY”:

It is unknown to our medical authorities, although its diagnostic symptom, the absconding from service, is well known to our planters and overseers The cause in the most of cases, that induces the negro to run away from service, is as much a disease of the mind as any other species of mental alienation, and much more curable, as a general rule. With the advantages of proper medical advice, strictly followed, this troublesome practice that many negroes have of running away, can be almost entirely prevented, although the slaves be located on the borders of a free state, within a stone's throw of the abolitionists.

Samuel A. Cartwright, *Report on the Diseases and Physical Peculiarities of the Negro Race*, 11 *New Orleans Med. & Surgical J.* 691, 707 (1851), <https://www.pbs.org/wgbh/aia/part4/4h3106t.html> [<https://perma.cc/4GDG-YJY6>].

¹⁷⁰ Jonathan M. Metzl, *The Protest Psychosis: How Schizophrenia Became a Black Disease*, at ix (2010).

infants with lifelong health problems.¹⁷¹ This myth has been repeatedly debunked,¹⁷² yet it reflects the sentiments of an era where cocaine use among racial minorities was seen as the cause of health disparities rather than a function of the social, political, and economic circumstances that led some people to become drug dependent.

There is evidence that this moment may have shaped Charles Wetli's unearthing of excited delirium as a cause of drug-induced spontaneous death. Throughout the 1980s, while Wetli worked in the Dade County Coroner's Office in Miami, thirty-two corpses were found in run-down motels, alleys, and other inauspicious places.¹⁷³ All of the victims were Black women, most of whom had histories with sex work and recreational drug use. Initially, police and medical examiners did not know the cause of these deaths. In 1988, Wetli proposed that the women died from a variation of excited delirium, in which a combination of sex and cocaine use led to their demise. He told the *Miami New Times* in 1989 that he believed "that this is a terminal event that follows chronic use of crack cocaine affecting the nerve receptors in the brain. For some reason, the male of the species becomes psychotic [i.e., excited delirium following cocaine use] and the female of the species dies in relation to sex."¹⁷⁴ Three years after this statement by Wetli, several bodies were exhumed and re-examined, and medical examiners found evidence that the victims had been strangled.¹⁷⁵ Shortly afterwards, Charles Henry Williams was arrested and charged with these murders.¹⁷⁶

This highlights the extent to which Wetli worked backwards from assumptions about race, sex and sex work, and drug use to attach a theory of excited delirium to the cause of death in a manner that led him to miss or ignore actual physical evidence of asphyxiation later found on multiple bodies. Not only should the modern re-birth of excited delirium in this context give us pause, but it should also lead us to be skeptical about how

¹⁷¹ See generally Michael Winerip, Revisiting the 'Crack Babies' Epidemic That Was Not, *N.Y. Times* (May 20, 2013), <https://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html> [<https://perma.cc/9J8P-ZJXR>] (finding that health outcomes predictions of children born to addicted mothers were wrong).

¹⁷² See, e.g., Laura M. Betancourt et al., Adolescents With and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language, 33 *Neurotoxicology & Teratology* 36 (2010).

¹⁷³ Garcia-Roberts, *supra* note 144.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ John Donnelly, Suspect in Murder of Prostitutes Speaks Out, *Mia. Herald* (May 9, 1993), <https://www.miamiherald.com/latest-news/article1929169.html>.

race and racialized framings of psychiatric illness might continue to lead excited delirium to be inappropriately used as a cause of death in a manner that obscures other physical evidence of maltreatment, such as police use of force. The literature has several examples of researchers highlighting the absence of evidence for excited delirium as a distinct psychiatric condition, yet somehow affirming that the disease is still “real.” This cognitive dissonance appears to be held together, at least in part, by latent notions of race that insist upon some unknown connection between Blackness, drug use, and spontaneous death while in police custody. Even Gonin et al.¹⁷⁷ and Strömmer et al.¹⁷⁸—two systematic reviews that significantly undermine the existing evidence supporting excited delirium and raise questions about whether it is a meaningful diagnosis—nevertheless conclude that the condition might exist. The casual framing of Black race as a risk factor for death by excited delirium,¹⁷⁹ findings that the disease disproportionately affects Black men and might reflect a genetic predisposition, and the review literature suggesting that physical restraint, not psychiatric illness, is the more proximate cause of death in many excited delirium cases all point to reasonable concerns that race continues to shape diagnoses and treatment of individuals in ways that undercut the legitimacy of this condition.

*C. Empirical Examination of Excited Delirium as a Cause of Death
Following Police Custody*

Just as there is little systematic data on police use of force, there is similarly scant information on how excited delirium is being used to justify force that may be excessive or to explain spontaneous deaths that occur in police custody. To fill this gap, I worked with research assistants to examine news articles and publicly accessible databases on police killings (both crowdsourced and compiled by journalists) to try to identify

¹⁷⁷ Gonin et al., *supra* note 136, at 552 (concluding that “[t]he overall quality of studies was poor . . . [but] [o]ur results suggest that ExDS is a real clinical entity that still kills people and that has probably specific mechanisms and risk factors”).

¹⁷⁸ Strömmer et al. provide powerful evidence on how the presence of restraint leads an incident to be labeled as excited delirium, but their recommendations only go as far as suggesting that “excited delirium be abandoned as a diagnosis in order to avoid systematic error [in confounding codings with agitated delirium] in cause of death determinations.” Strömmer et al., *supra* note 165, at 689. Thus, the authors’ main concern is with coding accuracy rather than the legitimacy of the excited delirium code itself.

¹⁷⁹ Gonin et al., *supra* note 136, at 561 (“Young age, male sex, African-American race, and being overweight are all independent risk factors for fatal ExDS.” (citations omitted)).

individuals who died during police encounters, allegedly due to excited delirium, as a way to begin to understand the scope of this issue. Focusing on news articles and databases has some limitations,¹⁸⁰ but it is a useful approach in facilitating the main research goal: To obtain a sense of *how excited delirium is reported as a cause of death* when a person dies in police custody. This speaks directly to the issue of police use of force and accountability, in that excited delirium is often used to shift blame for in-custody deaths away from any police encounter to place responsibility on what is presumed to be decedents' inherent physiological and psychiatric predispositions. These reports and claims can emanate from a variety of sources, including law enforcement, coroners and medical examiners, attorneys, and other medical professionals. As such, newspaper reports are able to capture the diverse means in which excited delirium might be articulated as a cause of death. No other existing database compiles this information. Therefore, these data are of first impression and provide an initial sense of how excited delirium is used to describe the cause of death in police custody and the circumstances surrounding these encounters.

1. *Methods*

Five different databases were searched, including: (1) LexisNexis, which compiles local news articles from across the United States; (2) Fatal Encounters, an online crowdsourced database that collects information on police killings;¹⁸¹ (3) NJ Advance Media's database of arrest-related deaths in New Jersey, in which journalists collect information on deaths caused by New Jersey Police officers based on data from the Bureau of Justice Statistics;¹⁸² (4) Austin American-Statesman Newspaper's database of deaths in police custody in Texas;¹⁸³ and (5) Florida Today's database of deaths in police custody due to excited delirium.¹⁸⁴ These databases were used because they provide information

¹⁸⁰ See *infra* Part II for a more detailed discussion of the data sources.

¹⁸¹ See Fatal Encounters, *supra* note 42.

¹⁸² Carla Astudillo, Christopher Baxter & S.P. Sullivan, Arrest-Related Deaths in New Jersey, N.J. Online, <https://www.nj.com/projects/excited-delirium/data.html> [<https://perma.cc/G4NK-UWZP>] (last visited Aug. 21, 2021).

¹⁸³ Deaths While Under Restraint in Police Custody, Austin American-Statesman, <https://apps.statesman.com/question-of-restraint/data/> [<https://perma.cc/9M7X-CDYM>] (last visited Aug. 21, 2021).

¹⁸⁴ See A Boutique Diagnosis: The Data Behind 'Excited Delirium' Cases in Florida, Naples Daily News, https://content-static.naplesnews.com/projects/excited_delirium_interactive/graphic.html [<https://perma.cc/P2FR-48NM>] (last visited Aug. 21, 2021); see also Marazzi

for the time period of interest (2010 to 2020) and, more importantly, list when excited delirium is stated as a possible cause of death.¹⁸⁵ Other databases and news sources were cross-referenced when seeking details about each case (e.g., race of victim). This occurred primarily through Google searches and the Public Accountability Chain (“PAC”), a site that searches and compiles publicly available databases and news sources of police misconduct.¹⁸⁶

Each database was subject to a search for instances in which a person died in police custody between 2010 and 2020 and excited delirium was listed as a possible cause of death. The following information was collected from each article or source: Date of police encounter, first and last name of victim, age, sex, race or ethnicity, location of incident, specific type of force used (e.g., taser, pepper spray, chokehold, etc.), and the source of the excited delirium claim (e.g., coroner, medical examiner, etc.). In some cases, the race or ethnicity of the victim was not stated by the article or source. To access this information, images of the individual were sought using news sources and obituaries, and estimations of race and ethnicity were made based on images of the victim or both images and surname of the victim. If no images could be found or estimations could not be based on their surname, the individual was categorized as “Unspecified.”

2. Findings

The data show that from 2010 to 2020, there were 166 reported instances where a person died in police custody and excited delirium was

Sassoon *supra* note 13. Additional information concerning this data that is not publicly available was obtained directly from the reporter.

¹⁸⁵ Other well-known journalistic databases that contain information on police killings (e.g., *The Guardian* and *The Washington Post*) were not used for this study because they do not contain information on whether excited delirium was involved in the incident. *The Washington Post* database focuses primarily on death by police shootings and lists the manner of death as either “Shot” or “Shot and Tasered.” None of the cases have excited delirium listed as a manner of death. The database collected by *The Guardian* contains limited information from 2015 and 2016, and also focuses on gunshot and taser-related deaths without mentioning excited delirium. See *supra* notes 44, 45.

¹⁸⁶ See Public Accountability Chain, <https://pac.foundation> [<https://perma.cc/A36M-3MT6>] (last visited Aug. 21, 2021). For more information on the Public Accountability Chain, see Maziar Sadri, Public Accountability Chain (PAC): A Framework for Truth in Distributed Data, Medium (July 8, 2020), <https://medium.com/unificationfoundation/public-accountability-chain-pac-a-framework-for-distributed-data-828372f64095> [<https://perma.cc/PL82-WP6U>].

described as a possible cause of death. Table 2 provides demographic information on the victims.

Table 2: 2010–2020 Data (N = 166)

Category	N	%
<i>Race/ethnicity</i>		
Asian	2	1.2
Black	72	43.3
LatinX	22	13.3
Native American	1	0.6
White	53	31.9
Unspecified	16	9.6
<i>Age</i>		
Mean Age	36.3	
Median Age	36	
Maximum Age	68	
Minimum Age	18	
<i>Sex</i>		
Men	163	98.2
Women	3	1.8

Of the 166 cases in which the race of the victim is available,¹⁸⁷ Black people make up almost half (43.3%) of the instances in which excited delirium is used to describe why a person died in police custody. When combined, Black and Latinx people constitute at least 56% of the deaths in custody in this sample attributed to excited delirium. This disparity reflects the disproportionate contact that police have with racial minorities as well as the persistent ways that race has framed excited delirium conversations since Charles Wetli and David Fishbain brought the concept into legal and forensic discourses.¹⁸⁸ It is clear that racial

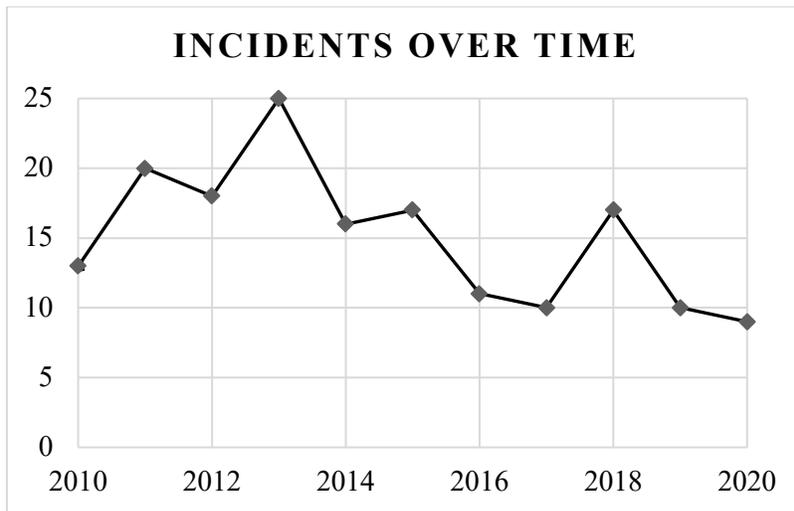
¹⁸⁷ In 72 of the 166 cases (43.3%), the race or ethnicity of the victim was not stated by the article or source. For these cases, estimations of race and ethnicity were based either on images (N=43, 25.9% of the complete dataset) or surname (N=13, 7.8% of the complete dataset). If either image could not be found or estimations could not be made based on surname, individuals were classified as “Unspecified” (N=16, 9.6% of the complete dataset).

¹⁸⁸ Fishbain & Wetli, *supra* note 143.

minorities are in general more likely to be killed by police,¹⁸⁹ and this initial data suggest that they may also be more likely to have their deaths attributed to what is perceived to be a psychiatric condition.

The number of incidents where excited delirium is stated as the cause of an in-custody death appears to fluctuate over time, with 2013 representing a high point in this dataset while the last year, 2020, approximates a low point for this period. Figure 1 provides a visual depiction.

Figure 1



In terms of the reported types of force used by law enforcement when excited delirium is offered as the cause of death, Tasers were involved in 46% of the claims (N=77). Other types of force included administering chemical restraints or sedatives (4.8%, N=8), use of pepper spray (4.8%, N=8), kneeling or chokehold (3%, N= 5), hog-tying (2.4%, N=4), or use of a baton (1.8%, N=3). These types of force are not necessarily mutually exclusive; victims can be, for example, tased and hit with a baton. Moreover, many other types of force used by police are unspecified.

The frequent use of Tasers in excited delirium cases that lead to in-custody deaths raises the question of whether force by Taser, rather than

¹⁸⁹ See, e.g., Edwards et al., *supra* note 60, at 1241 (“[T]he risk of being killed by police, relative to White men, is between 3.2 and 3.5 times higher for Black men and between 1.4 and 1.7 times higher for Latino men.”).

this unrecognized psychiatric diagnosis, might be causing these deaths. This relationship between Tasers and excited delirium might be explained by the particular commitment that Axon, the main manufacturer of stun guns, has made in promoting excited delirium as a legitimate psychiatric condition that more proximately causes death when its devices are used in an encounter resulting in death. Not only does Axon promote excited delirium as a real cause of death directly to medical examiners and police departments,¹⁹⁰ it has even gone as far as suing medical examiners who conclude that a particular death might have resulted from its product.¹⁹¹ Moreover, both Deborah Mash and Charles Wetli, two of the most prominent researchers to advocate excited delirium, have been paid tens of thousands of dollars by Axon to consult on legal cases where stun guns have been alleged to have caused in-custody deaths.¹⁹² Wetli, now deceased,¹⁹³ told *Reuters* in a 2017 interview that the “vast majority” of deaths that involved a Taser were caused by excited delirium, which he insisted is a real condition.¹⁹⁴ He went further and said that he had “never seen a case where [he] could say that a Taser actually contributed to the death,” and that “[a]s far as interfering with the heart rhythm . . . there’s never been any convincing evidence that that can actually take place.”¹⁹⁵

The data from this research also show that excited delirium is most often reported as a cause of death by medical examiners, coroners, or in autopsy reports, which represent the source of the excited delirium claim 72.2% of the time (N=120). This reflects the extent to which medical professionals are producing claims about deaths in police custody that have little scientific validity yet are often used to shield law enforcement from civil and criminal liability. Figure 2 demonstrates these data.

¹⁹⁰ Garcia-Roberts, *supra* note 144.

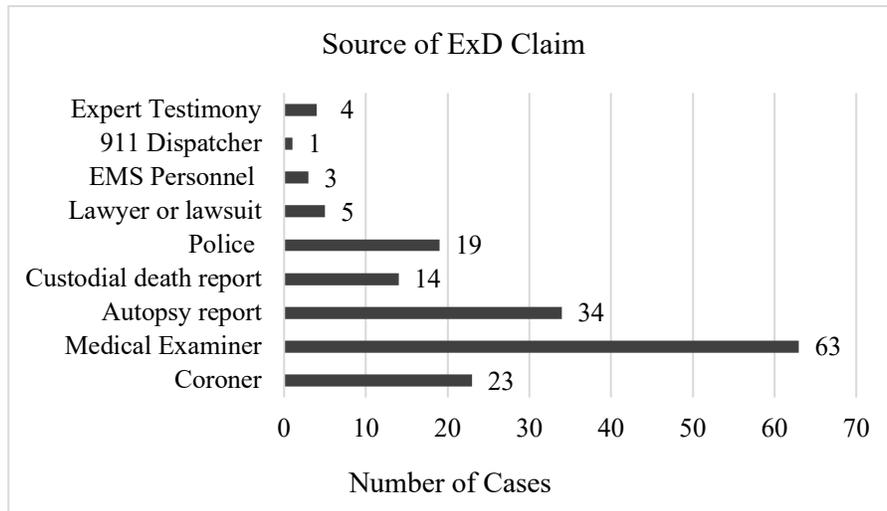
¹⁹¹ Robert Anglen, *Taser’s Lawsuits Challenge Coroners*, Ariz. Republic, May 3, 2008, at A1, A14.

¹⁹² Jason Szep, Tim Reid & Peter Eisler, *Shock Tactics Part 3: The Experts—How Taser Inserts Itself Into Investigations Involving Its Own Weapons*, Reuters (Aug. 24, 2017), <https://www.reuters.com/investigates/special-report/usa-taser-experts/> [<https://perma.cc/S7P9-9MWQ>]. Reuters reported that “[i]n an interview, Wetli said he was approached by Taser more than a decade ago and has been retained as the company’s expert witness in more than a dozen lawsuits. [Deborah] Mash trained under Wetli, calling him a ‘mentor,’ according to court documents.” *Id.*

¹⁹³ Seelye, *supra* note 150.

¹⁹⁴ Szep, Reid & Eisler, *supra* note 192.

¹⁹⁵ *Id.*

Figure 2

Taken together, these data offer preliminary descriptive insight into the ways that excited delirium is used by medical examiners and coroners to explain in-custody deaths. To the best of my knowledge, this represents a first-of-its-kind review of news articles and existing databases that specifically identifies police encounters in which the death of the victim is attributed to excited delirium. While existing databases of deaths in police custody have noted references to excited delirium, there have not been any sites or organizations committed specifically to gathering and analyzing these incidents. This database serves as a first step towards building a robust and up-to-date collection of alleged instances of excited delirium.

While these data have many strengths, there are also limitations. This database is narrow in its scope, as it primarily relies on publicly available news articles and existing databases of police killings. The data that has been collected intentionally focus on excited delirium cases, and therefore comparative claims cannot be made. However, this focus enables an initial excavation of the issue to understand patterns that might occur in instances where excited delirium is said to be the cause of in-custody deaths. Moreover, there are undoubtedly several fatal police incidents that were allegedly caused by excited delirium that are not included in this database, such as those that go unreported by the media or that were not captured in existing databases. In addition, many news articles that report

these cases do not explicitly specify the race or ethnicity of the victim. Therefore, some estimations were made according to individuals' images and surnames, which may not align with how these individuals identify. Finally, three of the databases utilized were state-specific: Texas, Florida, and New Jersey. Although the New Jersey database did not have any qualifying cases during the specified time period, cases from Florida and Texas may be overrepresented in the database, while cases from other states might be underrepresented. Unfortunately, no other state-specific databases were found through internet searches. The dearth of existing information and databases highlights the need for more robust, systematic cataloging of alleged excited delirium deaths in police custody. Advocates in Canada have called for a comprehensive national database,¹⁹⁶ and clearly one would also be beneficial in the United States.

Nevertheless, these findings demonstrate a continuity of thought and application in terms of how excited delirium initially gained prominence as a way to describe the unexpected deaths of drug-using people of color engaged in sex work or 1980s nightlife, and how it is now often applied to explain why young men of color die spontaneously in police custody. What connects this spectrum of belief and practice is the notion of *pathologizing Blackness*, where premature death is seen as a function of Black people's inherent inferiority and is used to exculpate actions by others that may be the more proximate cause of death. In the next Part, I explore how excited delirium has been discussed by federal courts when police officers face constitutional tort claims for killing people in their custody.

III. EXCITED DELIRIUM IN LAW

Given its close connection to issues regarding police use of force, it is important to specifically examine how excited delirium has been approached in law. This Part provides a brief overview of how the term has been discussed in legal scholarship and then examines how federal courts have used it in § 1983 lawsuits where police officers are alleged to have used excessive force that violated plaintiffs' constitutional rights.

¹⁹⁶ National Database Needed on Excited Delirium, Red Deer Advocate (Jan. 4, 2012, 3:59 PM), <https://www.reddeeradvocate.com/national-news/national-database-needed-on-excited-delirium/> [<https://perma.cc/7B22-PNB5>].

A. Legal Scholarship

There is little legal scholarship on excited delirium. A 2021 search for the phrase “excited delirium” in law journals on Lexis returned fewer than forty articles—the vast majority of which only discuss excited delirium in passing or in purely descriptive terms without any analysis of its validity.¹⁹⁷ A 2012 student comment by Michael L. Storey in the *Saint Louis University Law Journal* offers the most extensive discussion of excited delirium in the literature, where the author focuses on two questions: (1) whether excited delirium is “a legitimate cause of death” and (2) how acknowledging excited delirium as legitimate might impact the Fourth Amendment objective reasonableness test in cases that involve excessive force claims.¹⁹⁸ Drawing upon the definition provided in the Di Maio book, Storey concludes that excited delirium is indeed a real psychiatric condition. Storey does note that “Excited Delirium Syndrome has only recently become a contentious issue,” but states that medical examiners’ more frequent use of the term since the 1990s is in part due to “the increased use of cocaine, which is believed to aid the onset of Excited Delirium Syndrome.”¹⁹⁹ The author then concludes that since excited delirium is a legitimate illness, it should be part of the totality of circumstances that federal courts examine when reviewing excessive force cases.²⁰⁰ Storey assumes that this acknowledgement of excited

¹⁹⁷ See, e.g., Andreas Kuersten, Tasing the Constitution: Conducted Electrical Weapons, Other Forceful Arrest Means, and the Validity of Subsequent Constitutional Rights Waivers, 28 *Wm. & Mary Bill of Rts. J.* 919, 950 (2020) (stating that excited delirium is “a condition ‘characterized by an acute onset of bizarre and violent behavior’ that is correlated with sudden in-custody deaths of suspects.” (internal citations omitted)); Samuel Walker, Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure, 32 *St. Louis U. Pub. L. Rev.* 57, 88 n.271 (2012) (discussing in the footnotes, without critique, that “[e]xcited delirium is a behavioral condition that arises in a certain number of uses of force cases”); Michael Avery, Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People, 34 *Colum. Hum. Rts. L. Rev.* 261, 314 (2003) (noting a Task Force report stating that excited delirium and hog-tying someone under the influence of drugs can lead to sudden death).

¹⁹⁸ Michael L. Storey, Explaining the Unexplainable: Excited Delirium Syndrome and Its Impact on the Objective Reasonableness Standard for Allegations of Excessive Force, 56 *St. Louis U. L.J.* 633, 636 (2012).

¹⁹⁹ *Id.* at 637–38.

²⁰⁰ *Id.* at 661 (“[A] court faced with Excited Delirium Syndrome should look at the entirety of all the circumstances, including the condition of the suspect and the relevant training of the police officer, in determining whether or not the officer’s actions constituted excessive force.” (internal citations omitted)).

delirium will lead to benevolent outcomes, in that “[o]nly through acceptance of Excited Delirium Syndrome as a legitimate syndrome can the medical and legal professions develop standards of care for excited delirium—developments that will help save lives.”²⁰¹

The only other article in the law review literature that takes a more than descriptive look at excited delirium is Joshua M. Minner’s *Deadly Force in the Tenth Circuit*.²⁰² Like Storey, Minner treats excited delirium as a valid medical diagnosis and focuses his attention on how excited delirium can be an issue when federal courts hear cases regarding police use of force. After reviewing several cases, Minner concludes that officers can use force on people showing symptoms of excited delirium but that they “must be highly sensitive to the type and degree of force they use against such persons.”²⁰³ Otherwise, the author does not subject excited delirium to meaningful critique.

B. Federal Courts, Excessive Force, and § 1983 Litigation

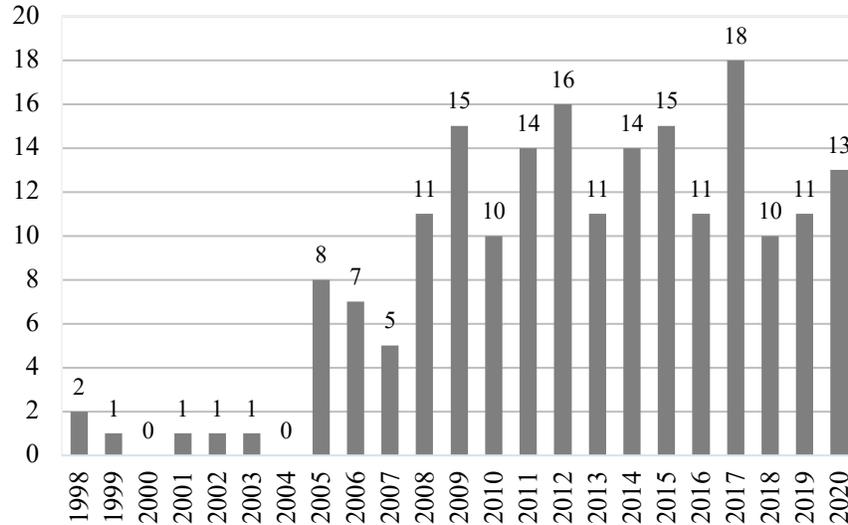
This Section attempts to understand how federal courts have approached excited delirium in § 1983 constitutional tort litigation, the specific claims made, and patterns that emerge *within* this body of cases. To do this, a Lexis search was performed within the database containing all federal court opinions to identify cases with the terms “1983” and “excited delirium.” This search returned 262 results, with 195 qualifying for this sample.²⁰⁴ As noted in Figure 3, federal court rulings that discuss excited delirium have increased in recent years.

²⁰¹ Id. at 662–63.

²⁰² Joshua M. Minner, *Deadly Force in the Tenth Circuit*, 43 Okla. City U. L. Rev. 171 (2019).

²⁰³ Id. at 217.

²⁰⁴ To qualify for the sample, a case or ruling had to have both the terms “excited delirium” and “1983,” and involve disputes regarding police use of force on an arrestee. Cases involving incarcerated persons and the Eighth Amendment were excluded.

Figure 3: Federal Court Rulings on Excited Delirium 1998–2020

There also appears to be an uneven distribution of excited delirium cases across regions and jurisdictions. Federal courts (district and appeals) within the U.S. Courts of Appeals for the Ninth Circuit and Sixth Circuit lead the way in excited delirium cases with 52 and 32 respectively, while federal courts within the U.S. Courts of Appeals for the First Circuit (four) and Second Circuit (seven) heard relatively fewer cases during this period. From this initial dataset, it is unclear why § 1983 litigation in federal courts in the Ninth Circuit’s footprint are discussing excited delirium more often than, for example, those in the First Circuit’s jurisdiction. Perhaps this is a function of population size or case load. Nevertheless, this might be a point for future research that might uncover particular norms, practices, relationships, or training materials used by law enforcement or medical professionals in one area of the country over another that might lead excited delirium to more frequently enter legal discourse.

In addition to these descriptive data on the overall distribution of excited delirium cases in federal courts, these rulings were also subjected to a qualitative examination to identify trends and patterns in how federal courts treat excited delirium when it arises in § 1983 litigation. A small sample of cases was reviewed and analyzed to inductively identify

reappearing concepts and develop codes that were then used to analyze the entire sample. Three trends were identified and are discussed below.

1. Federal Courts Treat Excited Delirium as Scientifically Valid

Federal courts frequently treat excited delirium as a valid medical condition in their opinions and tend not to directly challenge its scientific merit. Instead, they treat its validity as a given or explain that it is appropriate to consider excited delirium in a court of law regardless of any lack of scientific consensus. In the sample collected for this study, 89 of the 195 rulings (45.6%) contain language where the court, in its own voice,²⁰⁵ affirmatively asserted that excited delirium is a scientifically valid condition. One example of this can be seen in *Mann v. Taser International, Inc.*, a 2009 decision by the U.S. Court of Appeals for the Eleventh Circuit decision from 2009 addressing the death of a woman by the name of Melinda Fairbanks, who died after being arrested by the Whitfield County Sheriff's Office in Georgia. Fairbanks became distressed when deputies attempted to handcuff her, and when they "walked her around to the rear of the [police] car," she "began slamming her head against the trunk of the car and flailing her body in an attempt to hit, kick, head butt and spit on the deputies."²⁰⁶ After deputies placed Fairbanks inside their car and then opened the car door again, Fairbanks fell out of the car and landed on her head and neck. She was placed back inside the car, where she "continued kicking and slamming her head up against the opposite door."²⁰⁷

A deputy later tased her three times, after which she was transported—not to the hospital, but to jail. Fairbanks was unresponsive by the time she arrived. Later that day, she was transported to the hospital, where she suffered a cardiac arrest and never recovered. Dr. William Oliver of the Georgia State Crime Laboratory conducted an autopsy on behalf of the Georgia Bureau of Investigation and concluded that the cause of death was "malignant hyperthermia,"²⁰⁸ meaning that her body temperature was higher than 107 degrees Fahrenheit. Fairbanks's family brought an action

²⁰⁵ There are many more instances where the court briefly mentions excited delirium without engaging it as a concept. These instances were not included, although even the sometimes-passive acceptance of excited delirium by federal courts can suggest something about how courts understand the relevance of this condition.

²⁰⁶ *Mann v. Taser Int'l Inc.*, 588 F.3d 1291, 1300 (11th Cir. 2009).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1301.

under both § 1983 and state law against the deputies, as well as the manufacturer and distributor of the stun gun the deputies used during the arrest. The trial court granted summary judgment to defendants and plaintiffs appealed.

None of the parties contested the validity of Fairbanks's excited delirium diagnosis or contested that she was experiencing excited delirium the day of her death. Statements made by the Eleventh Circuit show that they accepted excited delirium as a scientifically valid premise. For example, the court states: "Plaintiffs[] contend that Melinda's 'excited delirium' presented a serious medical need. We agree."²⁰⁹ The court then says in a footnote that excited delirium is an acceptable concept within medicine:

Although not a validated diagnostic entity in either the International Classification of Diseases or the Diagnostic and Statistical Manual of Mental Disorders, "excited delirium" is a widely accepted entity in forensic pathology and is cited by medical examiners to explain the sudden in-custody deaths of individuals who are combative and in a highly agitated state. "Excited delirium" is broadly defined as a state of agitation, excitability, paranoia, aggression, and apparent immunity to pain, often associated with stimulant use and certain psychiatric disorders. The signs and symptoms typically ascribed to "excited delirium" include bizarre or violent behavior, hyperactivity, hyperthermia, confusion, great strength, sweating and removal of clothing, and imperviousness to pain. Speculation about triggering factors include sudden and intense activation of the sympathetic nervous system, with hyperthermia, and/or acidosis, which could trigger life-threatening arrhythmia in susceptible individuals.²¹⁰

These passages highlight the extent to which excited delirium is presented to the court without having its scientific validity contested, and how it becomes part of the legal framework for how the Eleventh Circuit thinks through the case. It is therefore rendered into a real psychiatric condition despite its questionable origins and applications over the years.

Callwood v. Jones is another Eleventh Circuit case that exemplifies how federal courts can come to accept excited delirium as a valid concept without engaging in a deeper examination. Khari Illidge died as six law

²⁰⁹ Id. at 1307.

²¹⁰ Id. at 1299 n.4.

enforcement officers attempted to restrain him. Throughout an unusual ordeal where officers found Illidge wandering naked in the street, he was tased more than a dozen times. After one instance in which Illidge had been tased, an officer “placed his metal baton between the handcuffs and Illidge’s spine for leverage.”²¹¹ Shortly after, another officer took that officer’s place and “placed one knee between Illidge’s shoulder blades and the other in the middle of Illidge’s back with the balls of his feet on the ground.”²¹² The officer then placed Illidge in leg irons and flex cuffs to “hog-tie” him. Illidge soon went limp and become unresponsive. He was pronounced dead after being transported to a hospital.

Illidge’s mother and the administratrix of his estate, Gladis Callwood, filed suit under § 1983 and related state laws, alleging that each of the six officers involved violated her son’s Fourth Amendment right to freedom from excessive force “by either using excessive force himself or failing to intervene in a fellow officer’s use of excessive force.”²¹³ The district court concluded that qualified immunity shielded the officers from litigation and granted summary judgment; Callwood appealed. The Eleventh Circuit agreed with the district court, finding that “the officers’ actions did not violate clearly established law, and as a result, they are entitled to qualified immunity.”²¹⁴ In coming to this decision, the court blindly affirmed the medical validity of excited delirium as a distinct illness that shaped their opinion. The court referenced the responding officer’s observation, whereby he “testified that he believed Illidge may have suffered from excited delirium.”²¹⁵ The court also compared this case to another Eleventh Circuit decision, *Lewis v. City of West Palm Beach* (2009),²¹⁶ to give even more validity to the condition: “Like the suspect in Lewis, Illidge resisted the officers’ attempts to stop him, ignored their commands to calm down, and appeared to suffer from excited delirium, suggesting that he also had ‘only a tenuous grasp on reality.’”²¹⁷ The court also drew upon its previous decision in *Mann v. Taser Int’l Inc.* to define the illness: “‘Excited delirium’ is a condition where the sufferer is in a ‘state of agitation, excitability, [and] paranoia.’

²¹¹ Callwood v. Jones, 727 F. App’x 552, 555 (11th Cir. 2018).

²¹² Id.

²¹³ Id. at 556–58.

²¹⁴ Id. at 561.

²¹⁵ Id. at 555.

²¹⁶ 561 F.3d 1288 (11th Cir. 2009).

²¹⁷ Callwood, 727 F. App’x at 561.

Symptoms include ‘imperviousness to pain, great strength, bizarre behavior, aggression, and hallucinations.’”²¹⁸ Once again, the court offers little engagement with the contested nature of this diagnosis.

Thompson v. Cope is another case that draws attention to federal courts’ routine acceptance of excited delirium as a legitimate medical condition. This case from the U.S. Court of Appeals for the Seventh Circuit involves Dusty Heishman, who was under the influence of amphetamines and running naked in public. Police and paramedics responded, and Heishman was given a sedative which led his breathing and heart to stop. He died a few days later. His estate filed a § 1983 suit against the paramedic, hospital, and others. On appeal to the Seventh Circuit, the court held that the paramedics were entitled to qualified immunity because “[c]ase law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee’s Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency.”²¹⁹ In supporting the idea that excited delirium is a valid diagnosis, the court states “[i]f the officers and paramedic had not responded to Heishman’s excited delirium, they could easily have found themselves defending against a deliberate indifference claim for ignoring his obvious and serious medical needs.”²²⁰ They follow this by also stating “[i]t is undisputed that Cope assessed Heishman, thought he was in excited delirium, which can result in cardiac arrest, and gave the sedative for Heishman’s and the crew’s safety.”²²¹

2. Federal Courts Treat Excited Delirium as a Factor Relevant to the Reasonableness of Force

In addition to federal courts’ tendency to accept excited delirium as a legitimate psychiatric condition, there was also a consistent conversation where excited delirium became part of the court’s broader deliberation concerning whether or not law enforcement acted reasonably under the Fourth Amendment in restraining someone with this condition. Fifty-four cases included this type of discussion, where excited delirium was discussed in a manner that favored the police in twenty-three (almost half) of these cases.

²¹⁸ Id. at 561 n.2.

²¹⁹ *Thompson v. Cope*, 900 F.3d 414, 417 (7th Cir. 2018).

²²⁰ Id. at 424.

²²¹ Id. at 426.

In *Waters v. Coleman*, Alonzo Ashley was confronted by police at the Denver Zoo. As Ashley walked away towards the exit, Officer Jones noticed that Ashley was sweating heavily. The U.S. Court of Appeals for the Tenth Circuit identifies this condition as,

[A] symptom of a physiological condition known as excited delirium. As recognized by the district court, “It is often impossible to control individuals experiencing excited delirium using traditional pain compliance techniques. Paradoxically, these individuals are physiologically more likely to die from a prolonged struggle, but also more likely to physically resist restraint.”²²²

Jones tackled Ashley, punched him in the stomach, and then used his stun gun. The court then notes that Jones “noticed that Mr. Ashley seemed extremely strong and he heard Mr. Ashley say something to the effect of ‘help me Grandma. I don’t want to go.’ Unusual strength and mental confusion are both symptoms of excited delirium.”²²³ Ashley was then tased three more times, physically restrained, and then transported to the hospital and later pronounced dead. Ashley’s family brought a § 1983 suit against the officers and zoo, and the Tenth Circuit framed the doctrinal question regarding qualified immunity around Officer Jones’s observation that Ashley may have been suffering from excited delirium.²²⁴ The court concludes that Jones is entitled to qualified immunity. What is interesting is how the court understands the permissibility of the force used in relation to Ashley’s putative impairment, i.e., experiencing excited delirium. The Court states

The key fact here is that while Officer Jones was applying force, Mr. Ashley was resisting being taken into custody. In several cases decided before 2011, this court upheld use of force by officers who faced physical resistance, including against persons who were impaired. . . . Further, the pre-2011 cases holding that force may have been excessive

²²² *Waters v. Coleman*, 632 F. App’x 431, 433 (10th Cir. 2015).

²²³ *Id.* at 433.

²²⁴

The question . . . is whether case law existing as of July 2011 would alert any reasonable officer that (1) when faced with an assault suspect who was apparently attempting to leave the area, who may have been suffering from excited delirium, and who then moved toward him, it would be excessive force for the officer to grab the suspect’s arms; and (2) when the suspect forcibly resisted, it would be excessive to escalate the amount of force and tackle him to the ground, punch him twice in the stomach, and deploy a Taser twice. *Id.* at 436.

tend to emphasize a detainee's *lack* of resistance. . . . In light of these decisions, it would not have been clear to a reasonable officer that the conduct at issue might be unlawful in these circumstances.²²⁵

Excited delirium was brought into the legal proceeding as a valid observation of Ashley's condition at the time of the encounter and was then used to justify Officer Jones's use of force under the assumption that the psychiatric condition produced resistance that was lawfully addressed through restraint that led to death. Thus, the presumed presence of excited delirium implicitly strengthened Officer Jones's claim that the use of force was reasonable under the Fourth Amendment.

In another case from the U.S. Court of Appeals for the Sixth Circuit, *Roell v. Hamilton County*, the court describes the incident as police being called to the scene where a mentally ill man was "experiencing a condition known as excited delirium . . . [where] Roell [was] half naked [and] muttering unintelligibly[.]"²²⁶ Officers began to physically struggle with Roell, in which they tased him several times. Roell stopped breathing and died. The Court notes that "[h]is death was documented by the coroner as natural, resulting from his excited delirium."²²⁷ The Sixth Circuit held that although the officers didn't know that Roell was experiencing excited delirium, their suspicion that he was suffering from mental illness "required [them] to take into account Roell's diminished capacity before using force to restrain him."²²⁸ In a move made by other federal courts, Roell's diminished capacity and supposed experience with excited delirium leads the court to conclude that a reasonable officer would have used a similar amount of force deployed in this circumstance. By doing this, the court simultaneously acknowledges the officers' legal obligation to account for the arrestee's impaired condition yet relieves the officers of civil liability by implying that the very behavior connected to the arrestee's excited delirium justified the police officers' use of force.²²⁹

²²⁵ Id. at 437–38.

²²⁶ *Roell v. Bd. of Cnty. Comm'rs*, 870 F.3d 471, 481 (6th Cir. 2017).

²²⁷ Id. at 476.

²²⁸ Id. at 482.

²²⁹ The court stated,

The type of force employed by the deputies against Roell—physically restraining his limbs, wrestling with him, attempting to tase him, and shackling his arms and legs—was likely not excessive. But we need not definitively answer this question because, at the time of the alleged violation, no caselaw clearly established that the degree of force used by the deputies violated Roell's Fourth Amendment rights.

Id. at 483.

This circular reasoning where police should be aware of people suffering from psychiatric crises but then using the behaviors connected to the mental health situation to justify force becomes a key mechanism in which excited delirium shapes constitutional tort litigation.

McCue v. City of Bangor, a 2015 case from the District of Maine, offers another example of how excited delirium informs federal courts' understanding of Fourth Amendment reasonableness, police use of force, and qualified immunity. Phillip McCue was acting erratically in an apartment building, which included yelling and banging on walls and doors. This led one of the residents to call the police. He had a history with recreational use of bath salts. Police officers confronted McCue at the apartment building, after which he escaped on foot. McCue tripped while fleeing and was apprehended by officers, who proceeded to physically restrain him. The court notes that the officers "kept him in a face-down, prone position" and hog-tied him with his arms behind his back, secured to his ankles.²³⁰ Multiple officers leaned on his shoulders, back, and neck.²³¹ McCue was then tased. Shortly afterwards, the officers noticed that McCue was not responsive and called for an ambulance. McCue was later pronounced dead.

McCue's estate brought a § 1983 action against the city and officers, arguing in part that the officers failed to recognize that McCue was suffering from excited delirium and, moreover, that the city failed to properly train its officers on how to do this. Thus, the court places excited delirium at the center of its analysis regarding the reasonableness of the force applied by the officers and whether they are entitled to qualified immunity. The court states that "McCue's behavior [on that day], was consistent with a condition known as excited delirium"²³²—a finding

²³⁰ *McCue v. City of Bangor*, 2015 U.S. Dist. LEXIS 127210, at *10 (D. Me. Sept. 22, 2015).

²³¹

Officers Farrar and Kuhn applied much of the force that prevented Mr. McCue from getting up. One officer was on Mr. McCue's right side, kneeling on his back. The other was on the left side, kneeling on Mr. McCue's shoulder and neck. At one time, Mr. McCue can be heard to complain that the officers were hurting his neck. According to the officers, they varied the weight they applied depending on the degree of resistance exerted by Mr. McCue.

Id. at *10.

²³² *Id.* at *21.

corroborated by the plaintiff's expert witness.²³³ The court states that although these facts, viewed in the best light for the plaintiff, might support their claim that the officers used excessive force that violated McCue's constitutional rights, the defendants were nonetheless entitled to qualified immunity. The court focuses its inquiry on whether the officers "were on notice that the force that they allegedly employed was unconstitutional *under the circumstances*."²³⁴ Thus, the notion that McCue was experiencing excited delirium at the time directly informs the court's understanding of what type of force is reasonable, whether the officers were on notice regarding the reasonableness of force applied to people experiencing excited delirium, and whether the officers are immune from civil liability under § 1983. The court concludes:

To the extent that Plaintiff maintains that certain techniques were per se objectionably unreasonable because Plaintiff was in a state of excited delirium, Plaintiff's argument also fails. Plaintiff has cited no persuasive legal authority to support the contention that the law was clearly established that the use of any particular method of force *on a person in the state of excited delirium* violates the person's constitutional rights.²³⁵

The court finds in favor of the defendants with regards to the force used to subdue McCue in the manner that they did and given the state that he was in. This was not necessarily a finding that the force was reasonable in and of itself, but that the qualified immunity rubric requires the officers to not be held liable since it was not clearly established that restraining people with excited delirium in this manner is unlawful.²³⁶ Thus, excited delirium and the presumed dangers that it presents informs the Court's assessment of Fourth Amendment reasonableness as well as their application of the qualified immunity defense.

²³³ Dr. David Hile, the plaintiff's expert witness, stated that "Mr. McCue's inability to hyperventilate and compensate for metabolic acidosis in his state of excited delirium led to his cardiopulmonary arrest." *Id.* at *21–22.

²³⁴ *Id.* at *32 (emphasis added).

²³⁵ *Id.* (emphasis added).

²³⁶ The court declined summary judgment for the defendants on the issue regarding the continued use of force after McCue was subdued, as that presented important factual matters that needed to be reviewed and could survive a qualified immunity defense. The court notes that "[b]ecause the record includes factual disputes regarding Plaintiff's claim that Defendants used excessive force after Mr. McCue allegedly ceased resisting, Defendants' [sic] are not entitled to summary judgment based on qualified immunity on that issue." *Id.* at *35.

It is also important to note that there are twenty-two rulings in the sample where the court said that the presence of excited delirium requires an arresting officer to use more care or less force.²³⁷ While the court still found for the defendant in five of these cases,²³⁸ this subgroup of rulings that are more sympathetic to plaintiffs due to their condition still serve to reify excited delirium as a real medical diagnosis, which makes it conceptually available as a legally relevant claim in other cases that may be more favorable to police who use excessive force. Notably, there is only one case in this subset in which the court actively rejects the relevance of excited delirium to understanding the reasonableness of the use of force in a manner that favors the plaintiff. In *Boria v. Bowers*, the court found that the testimony of the defendant's medical expert—whom the defendants wanted to testify about the arrestee dying from excited delirium—was unnecessary, because “a jury could reasonably find that defendants’ actions caused decedent’s death without expert medical testimony, even if decedent had an enlarged heart and cocaine in his system when he died.”²³⁹ In other words, a jury could easily find that the arresting police officers’ force was *in and of itself* unreasonable.

The scarcity of these types of decisions, where the court sees excited delirium as irrelevant to reasonableness inquiries and finds in favor of plaintiffs, is troubling. When courts incorporate excited delirium in their analyses of § 1983 claims, they often use it to shift responsibility away from police officers for their use of force. Even in instances where courts

²³⁷ See, e.g., *Patrick v. City of Birmingham*, 2012 U.S. Dist. LEXIS 122645, at *38–39 (N.D. Ala. Aug. 29, 2012). In *Patrick*, the court found that,

Defendants’ firing the Taser on Mr. Patrick multiple times (eighteen shots over a period of less than eleven minutes), given his non-threatening behavior and at best only passive efforts at resistance, coupled with the known risks associated with using a Taser when a person shows signs of excited delirium or sudden death syndrome (which Mr. Patrick was undisputedly exhibiting), “was grossly disproportionate to any threat posed and unreasonable under the circumstances.”

Id. at *39.

²³⁸ See, e.g., *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) (finding that the officers were entitled to qualified immunity); *LeBlanc v. City of Los Angeles*, 2006 U.S. Dist. LEXIS 96768 (C.D. Cal. Aug. 16, 2006) (same); *Campbell v. Bastin*, 998 F. Supp. 2d 572 (E.D. Ky. 2014) (finding that the officers were not aware of the arrestee’s excited delirium and so could not have tempered their force accordingly, even if they “should” have); *Sheffey v. City of Covington*, 564 F. App’x 783 (6th Cir. 2014) (same); *Sheffey v. City of Covington*, 2012 U.S. Dist. LEXIS 914 (E.D. Ky. Jan. 5, 2012) (finding that factors other than excited delirium cut against a judgment that officers used excessive force), *aff’d*, 564 F. App’x 783 (6th Cir. 2014).

²³⁹ *Boria v. Bowers*, 2009 U.S. Dist. LEXIS 57005, at *53 (E.D. Pa. Mar. 31, 2009).

treat excited delirium as creating an obligation for officers to use less force, they are messaging that the conduct itself was not necessarily unreasonable—it was just unreasonable in that particular case where the victim’s body is thought to be unusually vulnerable. Therefore, there is a disturbing continuity of thought across the excited delirium cases where the condition is thought to impact the court’s assessment of reasonableness in that the presumed existence and materiality of the condition obscures deeper questions about the routine use of force on all people.

3. Federal Courts Use Excited Delirium to Find Officers Not Liable for Failing to Call for Medical Assistance

Federal courts have viewed officers’ failure to provide appropriate medical treatment for arrestees suffering from injury or other medical conditions as a violation of their rights. However, in the context of excited delirium, federal courts have often declined to find police officers liable for failing to seek treatment if the court concludes that the officers were unaware of the supposed excited delirium. Thirty-seven cases in the sample that we reviewed involved claims regarding the deliberate indifference to medical need, in which thirty-three (89.1%) resulted in one or more defendants being found not liable.

This presents an interesting twist in the excited delirium jurisprudence where, on one hand, federal courts tend to treat excited delirium as a legitimate medical condition that precipitates death while, on the other hand, police officers’ failure to provide treatment is often not seen by federal courts as a violation of the person’s rights. An example of this can be seen in a district court case from Texas, *Estate of Aguirre v. City of San Antonio*. Police officers were summoned as people saw a man, Jesse Aguirre, walking on foot across a busy highway. A struggle ensued, and Aguirre was placed in a prone position where officers had their body weight on top of him. Aguirre stopped breathing. Officers and paramedics tried to resuscitate him, but he died. The autopsy report listed excited delirium as the cause of death.²⁴⁰ The plaintiffs argued that Aguirre showed clear signs of excited delirium and that the officers were indifferent to this medical emergency, which led him to die. The plaintiff’s expert witness stated, “I am not agreeing that [excited delirium]

²⁴⁰ Est. of Aguirre v. City of San Antonio, 2017 WL 6803374, at *15 (W.D. Tex. May 19, 2017).

is a real syndrome, but if it does exist, the . . . officers involved appear to have violated all the warnings and admonitions to treat it and prevent death.”²⁴¹ The court responded by holding that the plaintiffs did not meet the burden of showing the officers were deliberately indifferent. More to the point, they note that the inability of the plaintiff’s expert witness to call excited delirium a valid diagnosis cut in favor of the defendant officers, in that “where Dr. Mittler admittedly cannot even determine whether EDS is a ‘real syndrome,’ none of the Officers can be charged with deliberate indifference to a medical condition that may or may not exist.”²⁴² Thus, in a case where questions were raised about excited delirium being a meaningful psychiatric condition, the court positions this uncertainty as a way to relieve police officers of potential liability.

Villegas v. City of Freeport provides another example. In this case, officers were called in the early morning to respond to a person who was yelling loudly outside, who the officers recognized as Manuel Villegas. Villegas appeared to be in a conflict with people who he was imagining, and officers began physically restraining him. Villegas was handcuffed and taken to the police station, where he was provided a medical examination. Officers and EMS attendants stated that Villegas began hitting his head on the ground. At this point, three officers restrained Villegas, with one “placing his foot on Villegas’s back.”²⁴³ The court notes that “[a]lthough Plaintiff’s attorney argued that Rodriguez ‘stood’ on Villegas, there is no evidence to support that argument”²⁴⁴—which, nevertheless, raises questions about the amount and type of force that was applied. Villegas was found unresponsive several minutes later and transported to a local hospital and died. The plaintiff brought a § 1983 suit against the city, arguing in part that they failed to train officers on recognizing and treating excited delirium, which amounted to deliberate indifference. In granting summary judgment for the city, the court stated that the plaintiffs failed to make a causal link between the lack of training on excited delirium and Villegas’s death. Moreover, the court said that the deliberate indifference claim failed due to the lack of evidence that “city employees had previously encountered an individual experiencing

²⁴¹ Id.

²⁴² Id.

²⁴³ *Villegas v. City of Freeport*, 2009 U.S. Dist. LEXIS 72360, at *2, *4 (S.D. Tex. Aug. 17, 2009).

²⁴⁴ Id.

excited delirium.”²⁴⁵ Thus, the novelty of excited delirium is used by the court to shield the officers from civil liability all while reifying excited delirium as the more proximate cause of death in a manner that obscures the role of physical restraints placed on the decedent.

Another example of this can be seen in *Rachel v. City of Mobile*. Two officers, McCann and Jackson, responded to a domestic violence call, in which they tased Gregory Rachel as he began to approach them. A third officer, Ripple, joined later after this initial encounter. They then kicked and hit him with their fists and baton. The officers then handcuffed, hog-tied, and sat on Rachel until he passed out. Medical assistance was not called for over five minutes, and Rachel died. The court reiterated the medical examiner’s conclusion that excited delirium caused Rachel’s death and noted that “[t]he Eleventh Circuit has recognized excited delirium as a serious medical need because a delay in treatment both worsens the condition and poses a substantial risk of serious harm.”²⁴⁶ While the court denied McCann and Jackson’s motion for summary judgment on the deliberate indifference claim because, on their own admission, they observed at least nine symptoms of excited delirium, Ripple’s summary judgment claim was granted because the court concluded that he arrived at the scene after he was able to observe this behavior in the decedent. The court stated that there was no evidence that Ripple saw Rachel “hallucinate, yell incoherently, or act either bizarrely, paranoid, panicked or aggressively towards objects,”²⁴⁷ even though Ripple did participate in hitting Rachel while he was on the ground and observed that he was unconscious for five minutes without checking on him or calling for medical assistance. Thus, the presumed presence of excited delirium yet Ripple’s inability to fully observe the behavior—all while participating in the physical abuse—shielded him from liability.

While the use of excited delirium in a manner that shields police from claims that they were indifferent to injury occurs less often than the other two trends discussed in this Part, it nevertheless highlights the malleable nature in which excited delirium is wielded by federal courts. In short, law enforcement is allowed to have their cake and eat it too. Excited delirium: (1) can be treated as a real entity that justifies the use of force that might be deadly; (2) can be questioned as a real disorder and therefore relieve officers of any duty to treat; and (3) can be used to shield officers

²⁴⁵ Id. at *13.

²⁴⁶ *Rachel v. City of Mobile*, 112 F. Supp. 3d 1263, 1288 (S.D. Ala. 2015).

²⁴⁷ Id. at 1289.

from being held accountable for their actions, due to claims of officers' inability to fully observe excited delirium's full manifestations (yet nonetheless participate in questionable uses of force). This review of the caselaw highlights the lack of consistency in how federal courts conceptualize excited delirium, which allows it to become subsumed within existing tropes that mitigate officer accountability. Thus, excited delirium, as a putative psychiatric condition, has become a tool to exculpate police officers from the legal consequences of uses of force that may otherwise violate the Fourth Amendment.

IV. RECOMMENDATIONS

This Article's examination of the law, history, and contemporary scope of excited delirium suggests that there are substantial questions regarding its legitimacy as an actual medical condition. Yet, it is nonetheless having a material impact on how federal courts understand the constitutionality of police use of force as well as victims' efforts to pursue civil liability through § 1983. In focusing on decedents' mental health to understand how in-custody deaths occur rather than the often-questionable restraints and uses of force by law enforcement, excited delirium can function as a medical shield that keeps police from being held accountable for the harsh treatment of community members. Even when excited delirium is used by plaintiffs to suggest that police had a duty to treat victims with special care, courts often interpret and deploy the term in a manner that gives the benefit of the doubt to law enforcement. While there are existing challenges with police accountability and use of force, the warping of science and medicine to serve the interests of law enforcement presents a new set of problems that law and public policy are currently not equipped to confront.

In light of the findings and discussion presented in this Article, there are three recommendations that can help limit the harm created by using excited delirium in this manner. First, medical examiners and coroners should not attribute a person's cause of death to a medical condition in which there is little scientific evidence to support its existence and is not widely accepted by clinicians or researchers. As noted in Figure 3, claims that excited delirium caused or contributed to a person's death while in police custody stem from coroners, medical examiners, and autopsy reports 72.2% of the time in the dataset. This means that it is medical professionals who are more often than not *inserting the concept* of excited delirium into public discourse and legal proceedings, which then allows

the idea to assume a scientific aura that is not justified by the existing evidence. Thus, coroners and medical examiners not only need to rethink their methods and assumptions in making determinations about the cause of death, but also need to think deeply about broader ethical issues that shape their professional practice. This includes thinking through the ethics of their relationship with law enforcement and the subtle (and perhaps not-so-subtle) ways that law enforcement might attempt to influence how causes of death are attributed. The repeated engagements and familiarity that coroners and medical examiners have with police departments might lead to situations where police might explicitly suggest that excited delirium is the cause of in-custody deaths when the physical evidence says otherwise. Or it might create a culture within the local jurisdiction where coroners and medical examiners are seen as “team players” who are expected to not place the cause of in-custody deaths on any action by law enforcement, making excited delirium a convenient exculpatory tool. In addition to the ethics of their relationship with law enforcement, coroners and medical examiners also have to think about their engagements with companies adjacent to law enforcement like Axon (maker of Taser stun guns), who may try to influence their understanding of excited delirium as a legitimate diagnosis. Taken as a whole, coroners and medical professionals must commit themselves to being fiercely independent—especially when it comes to designating causes of death when police are involved. This independence can be facilitated by establishing strict protocols on how law enforcement interacts with medical professionals and rules on attributing the cause of death to diagnoses that are not widely accepted within the medical community.

A second recommendation is that police departments should not train their officers to think that excited delirium is a real medical condition. Excited delirium is often characterized as a diagnosis where someone exhibits violent, dangerous, and abnormal behavior that is accompanied by unusual strength.²⁴⁸ Thus, when police officers are provided with what

²⁴⁸ Takeuchi et al. note that

[P]eople experiencing EXD are highly agitated, violent, and show signs of unexpected strength so it is not surprising that most require physical restraint. The prone maximal restraint position (PMRP, also known as “hobble” or “hogtie”), where the person’s ankles and wrists are bound together behind their back, has been used extensively by field personnel.

Takeuchi et al, *supra* note 164, at 79.

appears to be medical guidance that leads them to think that an otherwise undiagnosed psychiatric condition can lead individuals to suddenly become aggressive and overpowering, it can prime law enforcement to preemptively respond with extreme forms of force that is often unwarranted and deadly. Instead of priming law enforcement in this manner, police officers should receive extensive training on how to notice duress when people are placed under physical restraints and how to de-escalate situations when people experience mental health crises or are in altered mental states as a result of drug use. Training police to engage situations with empathy and de-escalation in mind instead of viewing every person exhibiting mild anti-social behavior as a psychotic aggressor with superhuman strength is an important part of reducing excessive uses of police force.

As a third and final recommendation, federal courts should not acknowledge excited delirium as a mitigating or aggravating circumstance with regards to police officers' potential criminal or civil liability for using excessive force. The doctrinal and empirical evidence severely cautions against the idea that there can be legally relevant claims regarding a medical condition that is not recognized as legitimate by most professionals in the field. Pathologists, coroners, police, and medical examiners insisting on the existence of a psychiatric condition that *psychiatrists themselves do not assert*²⁴⁹ highlights the deeply tenuous nature of the claim. Even plaintiffs that attempt to use excited delirium as a way to append additional duties of care on police officers ultimately undermine the broader effort against police use of force by taking attention away from police actions that are often unnecessary and unlawful regardless of victims' medical conditions. The question of excessive force in connection to in-custody deaths should focus on the actual behavior of officers, not the mental health of decedents who are presumed to have spontaneously died. Focusing on excited delirium in this context is using pseudoscience to blame victims for their own deaths. Actions, and not stereotypes about mental health status, should define every aspect of excessive force litigation.

CONCLUSION

In 2014, I was selected as a Soros Justice Fellow, which is an award designed to support scholars and practitioners whose work promotes

²⁴⁹ See, e.g., Am. Psychiatric Ass'n, *supra* note 15.

reform in the criminal justice system. At a dinner for Bay Area fellows, I randomly sat next to a gentleman by the name of Raphael Sperry. Sperry is an unassuming person, and at some point, I asked him about his work. He said, “I’m an architect.” I was initially puzzled, as most Soros fellows are scholars, writers, or advocates working directly with criminal justice issues such as juvenile justice or decarceration. I then asked, “how does your work impact criminal justice?”

For the past two decades, Sperry has worked tirelessly to prevent architects from using their professional skills and services to build prisons and execution chambers. Sperry’s ethical compass is crystal clear: “Long-term solitary confinement is torture. Execution chambers kill people. Architects should not be party to torture and killing.”²⁵⁰ This perspective has become influential in at least one area of the profession. In October 2020, the New York Chapter of the American Institute of Architects (“AIA”), the largest and oldest section of architects’ main professional association, released a statement asking their members to

no longer [] design unjust, cruel or harmful spaces of incarceration within the current United States justice system, such as prisons, jails, detention centers, and police stations. We instead urge our members to shift their efforts towards supporting the creation of new systems, processes, and typologies based on prison reform, alternatives to imprisonment, and restorative justice.²⁵¹

The statement by the AIA New York Chapter specifically placed racial justice at the center of their decision:

While many architects have attempted to mitigate injustice by applying their professional skills to associated built structures, ultimately it is beyond the role of design professionals to alleviate an inherently unjust system. Until more comprehensive policy changes are made on a national scale, good design alone is not enough to remove or overcome the racism inherent within the criminal justice system. It is time we

²⁵⁰ Karrie Jacobs, *Should Architects Design Prisons?* *Architect Mag.* (Dec. 3, 2012), https://www.architectmagazine.com/article/should-architects-design-prisons_o?o=1 [<https://perma.cc/2SPT-H5FB>].

²⁵¹ Letter from the Board of Directors, AIA N.Y. (Sept. 30, 2020), <http://46u0j30o449zq8181dfurbcj-wpengine.netdna-ssl.com/wp-content/uploads/2020/09/AIANY-Criminal-Justice-Facilities-Statement-2020.pdf> [<https://perma.cc/DF66-RNJK>].

listen to Black, Brown, and Indigenous communities that have long suffered due to unjust societal norms and outcomes.²⁵²

In explaining their decision to make this statement, NY AIA Board President Kim Yao told the magazine *Architectural Digest*, “[i]n our code of ethics it says we will do no harm. These spaces are used for harm and with racial bias. We’re one piece of that bigger puzzle, but we felt it was really important to make this statement and the strongest way to say it was to ask our members to refrain from this work.”²⁵³

We often conceptualize the violence and brutality associated with incarceration and police use of force as simply being the byproduct of bad decisions made by law enforcement. As such, our capacity to think about reform and social change is limited to only engaging these actors. But Sperry’s work highlights how the violence intimately connected to law enforcement is supported and enabled by a multitude of professionals—architects, social workers, plumbers, etc.—whose contribution to this violence is often unseen but a necessary predicate for policing and incarceration to function in the ways that they currently do. The clarity with which Sperry and Yao frame their obligation to do no harm compels them to not use their knowledge or render their services in a manner that hurts people.

It is time for medical professionals to have the same awakening. There are notable examples where this is already occurring, such as in debates concerning physicians’ participation in executions.²⁵⁴ But, this sensibility must be broadened to understand how *routine, everyday interactions* between medical professionals and law enforcement need greater scrutiny to ensure that those who work in medical fields are upholding their professional responsibilities. Physicians, nurses, and other medical providers have intimate relationships with law enforcement—many of which sustain status quo carceral logics that are used to unjustly cage, punish, and kill people.

The increasing use of excited delirium as a medical diagnosis that explains deaths that occur in police custody provides an important

²⁵² *Id.*

²⁵³ Eva Fedderly, AIA NY Takes Strong Stand Against Designing American Jails and Prisons, *Architectural Digest* (Oct. 19, 2020), <https://www.architecturaldigest.com/story/aia-ny-takes-strong-stand-against-designing-american-jails-and-prisons> [<https://perma.cc/FF6B-7TSP>].

²⁵⁴ See Ty Alper, The Truth About Physician Participation in Lethal Injection Executions, 88 N.C. L. Rev. 11, 14–17 (2009).

opportunity to think through the responsibilities that professionals in science and medicine have in making sure that their expertise is not misused to cover up and excuse police violence. Medical professionals—including emergency department physicians, coroners, and medical examiners—simply must divest from promoting baseless claims of excited delirium that put people’s lives in danger and absolve police officers of accountability when their excessive use of force harms and kills community members. If architects are beginning to understand their ethical obligation to ‘do no harm’ to include ceasing collaborations with law enforcement that injure people, obscure structural and racial injustice, and limit accountability, then surely medical professionals can follow suit.