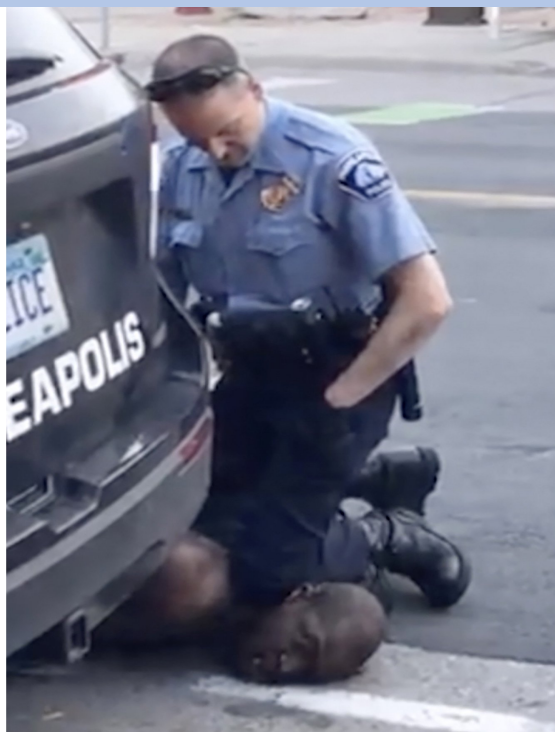


# The Law on Police Use of Force

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# Police Use of Force

- Jeffrey Fagan & Alexis D. Campbell, Race and Reasonableness in Police Killings, 100 B.U. L. REV. 951 (2020) (finding that, even where there are no circumstances that would render a shooting objectively reasonable for Fourth Amendment purposes, Black suspects are more than twice as likely than other suspects to be killed by police)
- Christine Eith & Matthew R. Durose, U.S. Dep't of Justice, Bureau of Justice Statistics, Contacts Between Police and the Public, 2008, at 6, 12 (2011), <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> (officers use some type of force over 900,000 times per year)

# The Implications of Regulating Police through Judicial Interpretations of the Constitution

- Judicial rules tend to be broad, general, and vague
- Judicial rules are often acontextual
- Judicial rules are relatively rigid

# The Exclusionary Rule

- The rule only operates in the context of a criminal prosecution.
- The rule's effect on police and police departments is usually minimal.  
Timothy L. Perrin et al., "If It's Broken, Fix It:" Moving Beyond the Exclusionary Rule, 83 Iowa L. Rev. 669, 727 (1999).
- The rule is an inapposite remedy in many situations. *Hudson v. Michigan*, 547 U.S. 586 (2006) (exclusion not the appropriate remedy for knock and announce violation); *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception).

## 42 U.S.C. § 1983

- Individual liability only if there is a violation of a “clearly established rule”.  
*Anderson v. Creighton*, 483 U.S. 635 (1987). [www.reuters.com/investigates/special-report/usa-police-immunity-scotus](http://www.reuters.com/investigates/special-report/usa-police-immunity-scotus) (57% of cases against police dismissed on immunity grounds)
- Municipal liability only if there is a violation of a “policy or custom.” *Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978).
- Criminal analogue: 18 U.S.C. § 242: Prosecutor must prove beyond a reasonable doubt that the officer had the specific intent to deprive the alleged victim of constitutional rights

# The Law on Use of Excessive Force

- **Tennessee v. Garner**, 471 U.S. 1 (1985): Deadly force authorized when police have probable cause that person is armed and dangerous or has committed a violent crime
- **Graham v. Connor**, 490 U.S. 386, 394-95 (1989): Whether police use of force is unconstitutional depends on severity of crime, immediacy of threat, and degree of resistance, at the time of the encounter, keeping in mind “the officer’s need to make split-second decisions”
  - *Brosseau v. Haugen*, 543 U.S. 194 (2004)
  - *Scott v. Harris*, 550 U.S. 372 (2007)
  - *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765 (2015)

# The Law of Arrest

- The number of people confined prior to trial in the U.S.—12 million a year and over 400,000 daily—is roughly three times the analogous number in the 27 member states of the European Union. Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 34–36 (Jeremy Travis et al. eds., 2014)
- **Fines and fees research.** U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications* 13 (2015); Nat'l Task Force on Fines, Fees, and Bail Practices, Nat'l Ctr. for State Courts, *Principles on Fines, Fees, and Bail Practices* (Dec. 2017)
- An officer may “make a custodial arrest without balancing costs and benefits or determining whether . . . [the] arrest was in some sense necessary.” *Dunaway v. New York*, 442 U.S. 200, 208 (1979). See also *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (seat belt); *United States v. Robinson*, 414 U.S. 218 (1973) (revoked license).



# The Law Governing Searches Incident to Arrest

- Search of person permitted (*United States v. Robinson*, 414 U.S. 218 (1973))
- Search of car often permitted (*Arizona v. Gant*, 556 U.S. 332 (2009)). See David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminol. 544 (1997).
- Pretextual searches permitted (*Whren v. United States*, 517 U.S. 806 (1996))

# The Law of Stop and Frisk

- Stops and frisks permitted on reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968)
  - *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (crack house)
  - *Illinois v. Wardlow*, 518 U.S. 119 (2000) (high crime area)
  - *United States v. Sokolow*, 490 U.S. 1 (1989) (48 hour round trip)
- *Floyd v. City of New York*, 861 F.Supp.2d 274 (S.D.N.Y. 2012) (recounting stop and frisk data)
- Warrant-based evidence admissible even if found pursuant to illegal stop.  
*Utah v. Strieff*, 136 S.Ct. 2056 (2016)