

POWERLESS AGAINST POLICE BRUTALITY: A FELON'S STORY

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I. INTRODUCTION

Imagine driving to the store with friends, but while en route, you are shot and beaten by the police so severely that random citizen witnesses intervene to stop the police brutality.¹ Next, envision recovering from

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1. See Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 386–89 (2001); see also *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (holding that although presence in a high-crime area alone is not enough to support particularized suspicion of criminal activity, a location's characteristics are relevant in determining whether the circumstances warrant further investigation); *Whren v. United States*, 517 U.S. 806, 810, 814, 819 (1996); cf. *Alberty v. United States*, 162 U.S. 499, 511 (1896) (discussing various motivations for persons to flee a crime scene not related to guilt). Driving down the street in some neighborhoods presents additional hidden dangers. Ronner, *supra* at 3865–98. Because traffic regulations are so expansive, they are difficult to follow perfectly, and thus, police officers may use the traffic code to single out nearly anyone they choose without the need for additional cause. *Whren*, 517 U.S. at 810. *Whren* asked the Court to adopt a subjective standard to determine the reasonableness of the police traffic stop, which the Court rejected, stating the “proposed standard may not use the word ‘pretext,’ but it is designed to combat nothing other than the perceived ‘danger’ of the pretextual stop.” *Id.* at 810, 814–15. The Court determined that the traditional probable cause standard already applicable in Fourth Amendment jurisprudence created sufficient protections. *Id.* at 819. In *Alberty*, the Court stated:

[I]t is not universally true that a man who is conscious that he has done a wrong [“]will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper, [“] since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that [“]the wicked flee when no man pursueth, but the righteous are as bold as a lion. [“] Innocent men sometimes hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

Alberty, 162 U.S. at 511.

those injuries and awakening from a coma chained to your hospital bed informed that you are under arrest for attempted murder of a police officer.² Then, consider waiting over five years for the opportunity to tell your story to the court, believing justice will be served, but instead you discover that the trial is more influenced by the revelation of your prior criminal record³ than the knowledge of the serious injuries that the police inflicted upon you.⁴ These facts introduce the real police encounter experienced by Mr. Theodore Dukes, an ex-felon, in Miami-Dade County. This shooting incident stemmed from an investigation of Mr. Dukes for the misdemeanor of driving with an unauthorized license plate.⁵

The criminal and civil obstacles Mr. Dukes faced after his shooting represent a particularly troublesome scenario that many ex-felons experience in police brutality cases. Police brutality victims must confront two very challenging situations: (1) how to successfully overcome the government's criminal allegation that the suspect/victim aggressed the police, and (2) simultaneously preserve the ability to bring a civil rights violation as a plaintiff/victim against the police for the true brutality suffered. The victim's ex-felon status significantly increases the stakes regarding any potential punishment on the criminal side and greatly diminishes the likelihood of success or damage recovery on the civil side.

Prior felony convictions are regularly admitted under the authority of the Federal Rules of Evidence, specifically Rule 609,⁶ based on the rationale that such information is relevant to the credibility of a testifying witness.⁷ In criminal cases, a defendant/victim cannot be forced to testify,

2. See sources cited *supra* note 1.

3. See FED. R. EVID. 609.

4. See Appellee's Answer Brief at 3–4, *Dukes v. Miami-Dade County*, 232 F. App'x 907 (11th Cir. 2007) (No. 06-11629-CC), 2006 WL 4596113 (listing injuries of plaintiff Dukes); see also R. Michael Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 442–43 (1987) (quoting Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 561 (1984)) (indicating that juries are unlikely to find in favor of individuals they perceive to be “bad person[s],” and that a jury's knowledge of a party's prior conviction improperly taints its evaluation of the relevant case facts).

5. See FLA. STAT. § 320.02(1) (2013) (requiring all motor vehicles operating on the roads of the State of Florida to be registered with the State); see also Floyd D. Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 *passim* (2004) (offering a variety of measures to curb racial discrimination in enforcing the laws); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 30–35, 424–46 (1994) (showcasing the problems of race in each aspect of the justice system including prosecutorial decisions and police brutality).

6. FED. R. EVID. 609(a)(1)(A).

7. *Id.* advisory committee's note. The advisory committee noted:

thus the government's allegation must be proven beyond a reasonable doubt without reference to the defendant's criminal record⁸ or mention of his or her decision not to testify. The Fifth Amendment provides this protection.⁹ However, in a civil case, the Fifth Amendment protection does not apply and thus, a civil rights plaintiff/victim must testify and consequently ex-felon status is routinely revealed as a fact relevant to the credibility of his or her testimony.¹⁰ In this context, ex-felon victims of police brutality must seriously evaluate the real impact that the revelation of past felony convictions may have on the success of any civil rights litigation against the police.

Notwithstanding the general veracity rationale underlying Rule 609,¹¹ this essay suggests that in the limited context of excessive force cases, jurors should be shielded from knowing the ex-felon status of the plaintiff/victim. The rationale for this proposed exception is two-fold: (1) the unfair prejudice suffered by the plaintiff/victim, and (2) the strong public policy need to deter police and therein ensure that a civil rights trial creates a legitimate threat of remedial award to the plaintiff for the wrongdoing by the police officer. As Rule 609 currently operates in excessive force cases, the prejudicial impact on the ex-felon-plaintiff/victim is too great and voids the intended purpose of the federal civil rights statutes by essentially distracting the jurors away from the material facts¹² of the police-citizen encounter into the minutiae of the

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense

Id. (citation omitted).

8. One common departure from the aforementioned general rule prohibiting the circumstantial use of character evidence in the form prior criminal history when the defendant is not testifying occurs in the special circumstance of evidence that has specialized relevance, other than propensity, under Federal Rule of Evidence 404(b), wherein other crimes, wrongs, or acts are used due to their proven specialized relevance provided that said other crime, wrong, or act are not unfairly prejudicial to the accused. FED. R. EVID. 404(b). Examples of special relevance under 404(b) are: motive, opportunity, and common plan or scheme. *Id.* Additionally, a pre-trial motion and hearing are typically conducted in advance to ensure proper fairness and curb any undue prejudice that could flow from the improper use of prior criminal history as character evidence against an accused. *Id.* 404(b), 403. Notably, this essay does not address any evidentiary issues related to 404(b) evidence and is strictly focused on prior criminal history that is revealed to the jury under Rule 609.

9. U.S. CONST. amend. V.

10. FED. R. EVID. 609(a)(1)(A).

11. *Id.*

12. FED. R. EVID. 403. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice,

plaintiff's prior and unrelated criminal convictions. The negative impact is further exploited when the plaintiff's prior conviction is for a violent felony. Due to the legal dynamics outlined throughout this essay, police officers know ex-felons cannot effectively complain about brutality, and correspondingly, ex-felons are rendered powerless and even more vulnerable to excessive force.

As you get to know Mr. Dukes' experience on the street with the police and in the courtroom seeking redress, you too may begin to question the efficacy of the process and whether it is appropriate for the jury to learn about Mr. Dukes' prior convictions, especially his prior murder conviction, since the police did not know about his record when they decided to shoot him.¹³ Federal law provides a statutory civil remedy under § 1983¹⁴ for incidents of police brutality like the one Mr. Dukes suffered. However, Mr. Dukes' story begs the question of whether the articulated remedy is effective or illusory when applied to ex-felons.¹⁵

II. MINOR CRIMINAL INVESTIGATION AND DISPROPORTIONATE DEADLY RESPONSE BY POLICE: EXCESSIVE FORCE OR SOMETHING ELSE?

The *Dukes* case is worthy of analysis not simply because of the serious gun shot injury Mr. Dukes suffered and his ex-felon status, but also because of the minor criminality that Mr. Dukes was alleged to have committed when the police first began to investigate him. Mr. Dukes was not being investigated for a violent crime.¹⁶ He was driving down a street in Miami¹⁷ and the police had no knowledge of his identity or about any of

confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

13. See *Scott v. Harris*, 550 U.S. 372 *passim* (2007); *Tennessee v. Garner*, 471 U.S. 1 *passim* (1985).

14. See 42 U.S.C. § 1983 (2012). One stated purpose for the law is to deter police from violating constitutional rights of citizens and/or exhibiting excessive force. *Id.*

15. See *infra* text accompanying note 58. Felons are more likely to have negative encounters with law enforcement and are therefore more likely to experience police brutality. *Id.*

16. See Complaint at 4, *Dukes v. Miami-Dade County*, No. 05-22665-CIV (S.D. Fla. 2010). Any case involving a vehicle can turn into a violent crime if the police allege that the vehicle was in some way posing a threat to be used as a deadly weapon. See *id.* at 8, ¶ 35-36. Thus, it is imperative that traffic stops that turn into potentially deadly encounters be closely examined, particularly in cases wherein the suspect is acquitted on the charge against the police officer. See *id.* at 9, ¶ 39.

17. *Id.* at 4, ¶ 17 ("DUKES proceeded to drive eastbound on NW 62nd Street."). See generally *The American Dream in Liberty City, Miami*, AM. PUB. MEDIA, <http://www.marketplace.org/topics/wealth-poverty/next-america/american-dream-liberty-city-miami> (last visited Feb. 17, 2013) ("Liberty City is one of Miami's poorest neighborhoods. It's 95 percent African American and the median household income is about \$18,000 a year."). This street is in the heart

his prior convictions. He was not speeding or driving dangerously; instead, he was targeted by the police for a traffic infraction because the vehicle's license plate¹⁸ did not match the car. As alleged in his civil rights complaint, it was unknown to Mr. Dukes that he was being pulled over by the police because the police officers were in unmarked cars¹⁹ and in plain clothes.²⁰ Mr. Dukes and his occupants perceived the encounter to be an attempted carjacking,²¹ so initially Mr. Dukes did not stop.²² While still behind the driver's seat, a bullet came through the passenger's side window, missing the passenger and striking Mr. Dukes in his chest.²³ After being shot, Mr. Dukes attempted to drive himself to the hospital.²⁴ At this point, he heard sirens and realized the carjackers were instead police officers,²⁵ and he pulled his car over to the side of road.²⁶ Mr. Dukes exited

of the predominately black neighborhood, Liberty City. *The American Dream in Liberty City, Miami, supra*.

18. Complaint, *supra* note 16, at 4, ¶ 17 (“Unbeknownst to DUKES, [Officer] LLAMBES was following him and had made a determination that she was going to make a traffic stop for a license tag violation.”); see FLA. STAT. § 320.02(1) (2013) (requiring all motor vehicles operating on the roads of the State of Florida be registered with the State).

19. Complaint, *supra* note 16, at 4–5, ¶ 18. The Complaint alleged: [Officer] LLAMBES radioed in to [Officer] GOLDBERG and [Officer] GUERRA to assist in the traffic stop. All these officers were on robbery detail and part of a specialized unit called the Robbery Interdiction Unit and none of them were in a marked vehicle. All of the vehicles that were driven by the officers conducting the stop on DUKES were normal rental vehicles without any police markings.

Id.

20. *Id.* at 5, ¶ 20. The Complaint alleged: As the officers were engaged in their confining maneuvers, all of the occupants of DUKES'[S] vehicle believed that they were about to be carjacked. The suspicions of DUKES and his passengers were confirmed when [Officer] GOLDBERG, in plain clothes, exited his vehicle with his gun drawn and pointing at DUKES'[S] vehicle.

Id.

21. *Id.*

22. *Id.* at 6, ¶ 25 (“At no time during the stop of DUKES did the officers identify themselves as such with the use of emergency equipment or other identifying materials that would have clearly indicated that they were officers, to the occupants of the DUKES vehicle.”).

23. *Id.* at 5, ¶ 23 (“As DUKES began moving his vehicle, Officer GOLDBERG fired his weapon through the passenger side window. The round missed the passenger . . . but hit the driver DUKES in the chest.”).

24. *Id.* at 6, ¶ 25 (“Still at this time, none of the occupants realized that their assailant was a police officer. . .”).

25. Complaint, *supra* note 16, at 6, ¶ 27. The Complaint alleged:

As the vehicle approached NW 7th Avenue, the occupants for the first time noticed that there were vehicles following them and that the vehicles had blue lights flashing from their dashboard area. At no time prior to shooting DUKES, nor immediately after did any of the officers identify themselves as police officers to the occupants of the DUKES vehicle.

Id.

26. *Id.* ¶ 28. The Complaint alleged: Once the occupants realized that they were being followed by police and not carjackers, DUKES . . . [with the assistance of his passenger] turned the car onto NW

the vehicle with his hands up, indicating he was unarmed, yet the police slammed Mr. Dukes to the ground and began to beat him.²⁷ The officers were “stomping and kicking him in a frenzy of police brutality in full view of citizens who were observing the activity.”²⁸ “The beating of Dukes continued and was of an extensive duration and so intense that numerous bystanders screamed for the officers to stop the beating[,] fearing that the officers would kill Dukes.”²⁹ One bystander, who tried to intervene on Mr. Dukes’ behalf and who pled to stop the police brutality, was arrested for allegedly interfering with police procedures.³⁰ At some point, Mr. Dukes lost consciousness and later awoke to find himself arrested and charged with a serious felony against the police.³¹

Medically, Mr. Dukes’ physical survival under these facts was extraordinary. Legally, his case is more serious than the gunshot wound to the chest from which he recovered.³² Mr. Dukes’ story exemplifies a larger endemic problem in our justice system—the existence of police abuses and the lack of effective procedures, deterrents,³³ and remedies.³⁴ This essay dissects a specific type of police abuse—the type of police behavior that goes beyond mere unnecessary force or an unlawful search.³⁵ The focus is specifically on brutality³⁶ inflicted by police officers upon citizens in high-

7th Avenue and pulled the car to the side of the road. DUKES . . . got out of the driver’s side of the car and raised both his arms and hands in the surrender position, demonstrating that he was unarmed.

Id.

27. *Id.* at 6–7, ¶ 28–29.

28. *Id.* at 7, ¶ 29.

29. *Id.* ¶ 32.

30. *Id.* at 8, ¶ 33.

31. Complaint, *supra* note 16, at 8, ¶ 35.

32. See generally Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999) (“Police brutality is longstanding, pervasive, and alarmingly resilient.”). Police brutality, when left unchecked, is a more serious injury than a mortal gunshot wound because it encourages continued abuses. See *id.*

33. See *Herring v. United States*, 555 U.S. 135, 147 (2009) (citing repeated holdings from the Court which state that in order to warrant exclusion, “the deterrent effect of suppression must be substantial and outweigh any harm to the justice system”); *United States v. Herrera*, 444 F.3d 1238, 1253–54 (10th Cir. 2006) (holding that exclusion of evidence obtained in violation of the Fourth Amendment was proper in part because exclusion would deter similar police actions in the future).

34. See 42 U.S.C. § 1983 (2012); see also *Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 530 (1985)) (noting that orders rejecting the qualified immunity defense at multiple stages of litigation is a final judgment subject to immediate appeal); *Nolian v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000) (“[T]he application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment.”).

35. See Bandes, *supra* note 32, at 1276.

36. See *Hodges v. Stanley*, 712 F.2d 34, 36 (2d Cir. 1983) (stating that a police brutality

crime neighborhoods during encounters based on minimal criminal conduct, which is usually a traffic violation. In *Patterns of Injustice: Police Brutality in the Courts*,³⁷ Professor Susan Bandes defines police brutality as “police conduct that is not merely mistaken, but taken in bad faith, with the intent to dehumanize and degrade [the victim].”³⁸ In *Above the Law: Police and the Excessive Use of Force*,³⁹ Professors Jerome H. Skolnick and James J. Fyfe distinguish police misconduct from brutality by highlighting that police brutality is intentional and typically directed toward citizens of “marginal credibility and status.”⁴⁰ Skolnick and Fyfe further acknowledge that racial minorities are labeled as a powerless social group.⁴¹ Additionally, ex-felons fit the description of Skolnick and Fyfe’s target group due to their lack of status, credibility, and political power, and thus, they are susceptible to police brutality in a way many other citizens are not. Racial minorities are disproportionately represented in the ex-felon population and based on lower socio-economic status disproportionately live in poor and high-crime neighborhoods;⁴² therefore, black and brown ex-felons are particularly vulnerable to the police abuse of brutality.

claim is sufficient to withstand a motion to dismiss if it alleges force that is “gratuitous and excessive”).

37. See Bandes, *supra* note 32.

38. *Id.* at 1276.

39. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993).

40. *Id.* at 19 (pointing to the Rodney King beating as an example of the police selecting a victim of marginal status and credibility); see *infra* Part V.B (discussing Federal Rule of Evidence 609 and explaining the legal interpretation of a felon’s credibility and status as a truth teller once he testifies during trial). See generally FED. R. EVID. 609 (allowing the prior criminal history of any testifying witness to be admissible in civil cases, including § 1983 civil rights cases).

41. See SKOLNICK & FYFE, *supra* note 39, at 19–20 (distinguishing between police brutality and unnecessary force).

42. See David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 101 (2007). See generally *United States-Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH, http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-01.htm#P149_24292 (last visited Feb. 20, 2013) (“In every state, the proportion of blacks in prison exceeds, sometimes by a considerable amount, their proportion in the general population.”); *The American Dream in Liberty City, Miami*, *supra* note 17 (stating Liberty City is one of the poorest neighborhoods in Miami and is ninety-five percent African American).

Young African-American men bear the brunt of the system’s injustices during a period in which the nation has moved to a process of mass incarceration. From initial contacts with police, including stops, detentions, searches, and arrests, through prosecution at trial, and finally, at the sentencing phase, African Americans suffer from severe disproportional representation.

Rudovsky, *supra*.

In *Teaching Civil Rights Through the Basic Tax Course*,⁴³ Professor Dorothy Brown provides a narrative of an incident of police brutality she witnessed as a young child in New York City:

One day . . . I was holding my mother's hand because I was not yet old enough to cross the street safely. As we were waiting, a police car was turning right. I recall seeing a black man in the back seat with his hands cuffed behind him and he was being beaten by a police officer. My eyes widened and my mouth fell open as I turned to my mother and asked, ["Did you see that?[" She said, ["Yes,[" and explained to me that it happens sometimes. I couldn't believe my eyes or my ears. I followed the car with my eyes as it made its turn; for a brief moment, the handcuffed man and I made eye contact. It seemed as if everything was going in slow motion. The light turned green, and we started walking. But no one spoke a word. I couldn't stop thinking about that man. I wanted to help him, but I didn't know how. That feeling of powerless would eventually cause me to run, not walk, away from my dream of becoming a civil rights attorney.⁴⁴

It is a well-settled⁴⁵ rule, imbedded in American jurisprudence,⁴⁶ that beating a handcuffed suspect is a violation of the suspect's constitutional rights.⁴⁷ Young Dorothy Brown was not then aware of the contours of the constitutional law and how it clearly forbids beating a handcuffed suspect⁴⁸ as per se police brutality;⁴⁹ yet, she knew instinctively that it was wrong

43. Dorothy A. Brown, *Teaching Civil Rights Through the Basic Tax Course*, 54 ST. LOUIS U. L.J. 809 (2010).

44. *Id.* at 810.

45. *See* *Scott v. Harris*, 550 U.S. 372 *passim* (2007); *Tennessee v. Garner*, 471 U.S. 1 *passim* (1985).

46. *See* 42 U.S.C. § 1983 (2012); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 386–91 (1998) (discussing how many African Americans distrust the police because of a history of abuse); Asit S. Panwala, *Confronting Issues In Criminal Justice: Law Enforcement and Criminal Offenders: The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 646–47 (2003) (arguing that police select minorities and other marginalized members of society to be the victims of police brutality); Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1126 (2003) (noting that § 1983 provides a remedy to those deprived of their constitutional rights by a state actor). Section 1983 legislation provides citizens with the added benefit of enacted federal statutory remedies to punish police officers and municipalities with civil law sanctions for violations of a citizen's constitutional protections. *See* 42 U.S.C. § 1983. However, notwithstanding these clear guidelines and procedures, police brutality is still a common allegation made by minority suspects against police officers across the country. *See* Panwala, *supra* at 639–40.

47. *See* *Phelps v. Coy*, 286 F.3d 295, 301–02 (6th Cir. 2002) (finding that a beating of a subdued/handcuffed suspect by a police officer violated the suspect's constitutional rights).

48. *See* 3 *DeKalb Officers Accused of Beating Handcuffed Suspects*, WSBTV.COM (May 10, 2012, 1:40 PM), www.wsbtv.com/news/local/three-dekalb-police-officers-indicted/n2JR.

49. *See generally* *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir. 1993) (finding police officers guilty of committing police brutality on a handcuffed plaintiff).

and most significantly that no one was doing anything to stop it or correct the injustice of it. Instead, the police abused suspects with impunity, to the point where the community culture has become simply to absorb it as a painful, unchangeable fact. Notwithstanding the reality of brutality experienced by individuals like Mr. Dukes and the nameless man Professor Brown witnessed decades prior, laws prohibit excessive force by police officers. Suspects who have allegedly committed a crime are simultaneously protected by the Fourth Amendment⁵⁰ against unreasonable seizures,⁵¹ and cloaked with the presumption of innocence⁵² by the Fifth Amendment.⁵³ However, as Professor Brown's mother articulated to her young daughter Dorothy as they crossed the street, "[police brutality] happens sometimes." In fact, Mrs. Brown's response was purposefully truncated and mild for the benefit of her child's understanding because in reality, police brutality happens much more than "sometimes,"⁵⁴ especially in certain neighborhoods to certain people. Arguably, it happens most commonly to ex-felons because their objections to it are uniquely unsuccessful.

In addition to the harshness of the abuse suffered by the helpless

50. U.S. CONST. amend. IV (protecting citizens from "unreasonable seizure").

51. See *Scott v. Harris*, 550 U.S. 372, 381 (2007); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

52. See also Montré D. Carodine, "The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521, 558–60 (2009) (challenging Federal Rule of Evidence 609 on the basis of the lack of integrity of judgment of convictions and therein as unreliable hearsay evidence due to the racial bias and unreliability of the American criminal justice system). Compare *In re Winship*, 397 U.S. 358, 364 (1970) (finding the presumption of innocence can only be overcome by proof of the material elements of the charge beyond a reasonable doubt), with Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (discussing an empirical study regarding post-conviction exonerations through DNA evidence), and Rudovsky, *supra* note 42, at 119–20 (noting that the Innocence Movement, including the Innocence Project and the Innocence Network, of the last twenty years has exposed the wrongful conviction and factual innocence of hundreds of convicted felons, including the disproportionate representation of the numbers of racial minorities).

53. U.S. CONST. amend. V.

54. Rudovsky, *supra* note 42, at 102 ("Racial discrimination in policing is often manifested in the use of racial profiling For example, in *State v. Soto* . . . the court found that stops and searches on the Turnpike were disproportionately based on race."); see Stanley A. Goldman, *To Flee or Not to Flee – That is the Question: Flight as Furtive Gesture*, 37 IDAHO L. REV. 557, 569 (2001); see also Tamara F. Lawson, *Teaching Civil Rights: Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS U. L.J. 837, 845–46 (2010) (indicating that police brutality in the African-American Community is a part of life, a common occurrence); Kevin Sack, *Despite Report After Report, Unrest Endures in Cincinnati*, N.Y. TIMES (Apr. 16, 2001), <http://www.nytimes.com/2001/04/16/us/despite-report-after-report-unrest-endures-in-cincinnati.html?page-wanted=all&src=pm> (noting from 1995 until 2001, in Cincinnati, Ohio, fifteen African Americans have been fatally shot by police officers while no Caucasians have been shot). Police brutality against African-American felons transpires more in high-crime neighborhoods. Goldman, *supra* at 569.

suspect in Professor Brown's story, an equally striking aspect of her narrative and experience is how police brutality connects with an overarching feeling of powerlessness—not just the powerlessness felt physically by the victim who literally receive the blows, but also by the impotence experienced by the larger community that absorbs its reverberating impact.⁵⁵ One way to overcome powerlessness against police brutality is to take action. Do something about it. Object to it. Complain about it. Sue the police for doing it. This essay explores the real obstacles that victims of police brutality face when “they try to do something about it” in the form of suing the police and seeking legal remedies for cognizable civil rights violations.⁵⁶ It further highlights how the ordinary hardships of access to the courts are magnified when an ex-felon seeks legal remedies against the government for the tort of police brutality.

One unfortunate truth for individuals with prior criminal convictions is that their ability to challenge the injustice of excessive force is handicapped.⁵⁷ Ex-felons, as a group, are the most likely suspects to experience excessive force,⁵⁸ which automatically includes a

55. See Brown, *supra* note 43, at 810 (asserting that to some degree police brutality would not be as significant an issue if it only impacted individual victims). The idea of powerlessness is a strong and consistent theme for the individual victims of the brutality, as well as the members of the community of which it impacts. *Id.*

56. See 42 U.S.C. § 1983 (2012) (providing a legal remedy for deprivation of civil rights). *But see supra* text accompanying note 10 (highlighting the lack of adequate legal remedies for civil rights violations involving police brutality).

57. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (finding that in the case of police brutality, the Fourth Amendment deprivation analysis focuses on the unreasonableness of the seizure in the initial encounter—this determination is a fact-specific balancing test but allows some deference to officers who are making “split-second” decisions); FED. R. EVID. 609 (“Impeachment by Evidence of Conviction of Crime”); see *supra* Part II. Ex-felons are handicapped at various critical points of the process: the initial encounter, arrest decisions, charging decisions, plea bargain negotiations, presentation of evidence at trial and the decision to testify, sentencing ranges, and the amount of time of one’s sentence that will actually be served. *Supra* Part II.

58. See *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010); see also In Soo Son & Dennis M. Rome, *The Prevalence and Visibility of Police Misconduct: A Survey of Citizens and Police Officers*, 7 POLICE Q. 179, 186 (2004), available at <http://www.observatoriodeseguranca.org/files/179.pdf> (reporting in a survey that African-American respondents reported nine times more physical abuse by police officers than white respondents); Panwala, *supra* note 46, at 646–47 (arguing that police select minorities and other marginalized members of society to be the victims of police brutality). Felons challenged the Washington State voter disenfranchisement act on the ground that, due to racial discrimination in the State’s criminal justice system, they were denied voting rights in violation of Section Two of the Voting Rights Act. *Farrakhan*, 590 F.3d at 993. After significant findings of fact, the court found that the felons demonstrated that the felon disenfranchisement was attributable to racial discrimination in the criminal justice system. *Id.* at 1016.

disproportionate number of racial minorities and poor people,⁵⁹ but these same suspects are the least likely plaintiffs to win a civil judgment against the police for the constitutional violations they suffer.⁶⁰ This dynamic is no secret to law enforcement officers⁶¹ and thus it creates a second-class status or a type of “open season” on ex-felons due to their inability to effectively complain about abuse.

It is somewhat unpopular, or even at times distasteful, to focus attention on the rights of felons, knowing that they, at one point in their lives, criminally violated another person’s rights.⁶² However, in the context of police brutality, it is imperative that all citizens, including ex-felons,⁶³

59. See LEONARD M. MOORE, *BLACK RAGE IN NEW ORLEANS: POLICE BRUTALITY AND AFRICAN AMERICAN ACTIVISM FROM WORLD WAR II TO HURRICANE KATRINA 1* (2010); Jeffrey K. Liker, *Wage and Status Effects of Employment on Affective Well-Being Among Ex-Felons*, 47 AM. SOC. REV. 264, 265 (1982); Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 U. KAN. L. REV. 903, 903 (2009) (“This . . . is seen in rates of violence that are much higher in predominantly minority neighborhoods, especially those comprised of blacks, compared to predominantly white neighborhoods.”). Additionally, these urban centers represent the killing fields for African-American males at the hands of the police. MOORE, *supra* at 1. Racial minorities as well as poor people both have reduced access to justice. Peterson & Krivo, *supra* at 911–12. The problem is further compounded by the lack of employment opportunities for ex-felons, which often forces them into the poverty zone. Liker, *supra* at 265.

60. See, e.g., Smith, *supra* note 4, at 442–43 (indicating that juries are unlikely to find in favor of individuals they perceive to be “bad person[s]” and that the jury’s knowledge of a party’s prior conviction improperly taints their evaluation of the relevant case facts); see Charlan Nemeth & Ruth Hyland Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221, 222 (1973). As a general proposition, human nature impacts civil litigation in a way which rewards popularity and/or one’s perception of who is good, liked, etc. Smith, *supra* note 4, at 442. In the end, it comes down to a matter of respect. Nemeth & Sosis, *supra* at 222. If there is a perception that the party lacks respect, it is likely to lose the lawsuit. *Id.*

61. See, e.g., Kathryn E. Scarborough & Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 21 T. JEFFERSON L. REV. 1, 17 (1999) (showing that the police were more likely to prevail against plaintiffs in 1983 civil rights claims 44% of the time concerning excessive force, 51% of the time concerning false arrest, 44% of the time concerning illegal search and seizure, and 55% of the time concerning amendment violations); Ryan Gallagher, *Study: Police Abuse Goes Unpunished*, MEDILL REPORTS (Apr. 4, 2007), <http://news.medill.northwestern.edu/chicago/news.aspx?id=6125> (according to a Chicago study, “citizens filed 10,149 complaints of alleged police abuse from 2002 to 2004 for actions including excessive force . . . [and] only 19 of those complaints, or less than two for every 1,000 complaints, resulted in meaningful discipline . . .”).

62. See Vincent G. Levy, *Enforcing International Norms in the United States After Roper v. Simmons: The Case of Juvenile Offenders Sentenced to Life Without Parole*, 45 COLUM. J. TRANSNAT’L L. 262, 308 (2006); Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 273–74 (2004).

63. See Panwala, *supra* note 46, at 639–40. However, it is undisputed that America’s urban centers are becoming the killing fields. *Id.*

have an effective mechanism to challenge police abuses. Effective redress would create a real deterrent impact on police behavior, as well as adequately remedy the injuries suffered⁶⁴ by individual victims and the larger community.⁶⁵ Notably, young Dorothy felt powerless even though she was never physically touched by the police officer but rather observed the needlessly beating of a helpless suspect. The impact was so profound that she changed her desired interest from civil rights law to tax law because she feared civil rights legal work would be too painful.⁶⁶

In Mr. Dukes' case, after fighting for his life⁶⁷ in the hospital and fighting for his liberty in criminal court,⁶⁸ he filed a civil rights lawsuit⁶⁹ against the police officers that shot and beat him, asserting his legal right to be free from excessive force.⁷⁰ He attempted to overcome his powerlessness and pursued all legal avenues available to him. Yet, Mr. Dukes represents a small percentage of victims of police brutality because he actually sued the police.⁷¹ He fought back and was acquitted of the

64. See *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”) (citing *Carey v. Piphus*, 435 U.S. 247, 254–57 (1978)); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) (“[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.”).

65. See Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 2–3 (2001). Professor Levenson discusses the limited tools offered by the justice system to victims of police brutality. *Id.* at 2. Understanding that police brutality not only has an impact on the individual victim, but “an impact on all citizenry,” these affected communities fight for reforms in the justice systems. *Id.* at 3.

66. Brown, *supra* note 43, at 810.

67. See Alessandra Soler Meetze, *ACLU Sues Miami-Dade Police for Shooting Driver, Beating Passengers After Traffic Stop*, AM. CIV. LIBERTIES UNION OF FLA. (Oct. 7, 2005), http://www.acluf.org/news_events/?action=viewRelease&emailAlertID=1380 (noting that Theodore Dukes spent seventeen days in the hospital following his beating, three of them in a coma).

68. Complaint, *supra* note 16, at 9, ¶ 39. Dukes vigorously litigated the attempted murder charge all the way to jury trial. *Id.* at 8–9, ¶¶ 35, 39. He was convicted of a misdemeanor and served one year. *Id.* at 9, ¶ 39.

69. See 42 U.S.C. § 1983 (2012); *Hudson v. Michigan*, 547 U.S. 586, 595–98 (2006) (holding that applying the exclusionary rule to knock-and-announce violations was unjustified; Justice Scalia notes police officers will not simply be able to violate one’s civil rights because § 1983 provides an effective deterrent for abusive police behavior).

70. See generally *Wertish v. Krueger*, 433 F.3d 1062, 1066 (8th Cir. 2006) (discussing reasonable force in excessive force cases). When determining whether police used excessive force, courts use the objective reasonableness standard used in Fourth Amendment jurisprudence. *Id.* The objective reasonableness standard will include an examination of the particular circumstances of each individual case, including the severity of the crime, perceived threat to the officers, and whether the suspect is resisting or evading arrest. *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

71. See generally Cato Institute, *2010 Quarterly Q3 Report*, THE CATO INST.’S NAT’L

criminal charges against him for attempted murder of a police officer.⁷² He secured a civil rights lawyer to challenge the constitutionality of his seizure and to seek damages.⁷³ Further, as a civil plaintiff, he won all procedural challenges to his claims and interlocutory appeals by the government and therefore had an opportunity to present his case to a jury.⁷⁴ Mr. Dukes traversed many hurdles in pursuit of justice for the harm he suffered. Still, he could not erase his past criminal convictions or his ex-felon status, which unknowingly created the ultimate roadblock in his case.

POLICE MISCONDUCT REPORTING PROJECT, http://www.injusticeeverywhere.com/?page_id=3336 (last visited Apr. 11, 2011) (explaining that, although misconduct seems to be increasing, the number of convictions and civil lawsuits that are successfully brought by citizens has remained stagnant).

72. Complaint, *supra* note 16, at 9, ¶ 39. The Complaint alleges:

DUKES was criminally charged with attempted murder of a police officer and fleeing and eluding a police officer. He was retained in custody for a period of nine months, without bond before he was able to procure a bond through the efforts of his criminal defense attorney. The state attorney after their review of the case filed an information charging aggravated battery, fleeing and eluding a police officer and resisting arrest without violence. Later the State Attorney's Office amended the Information a second time charging Dukes with aggravated assault on a police officer, fleeing and eluding a police officer and resisting without violence. After a criminal trial before his peers, [Dukes] was found not guilty on the charge of aggravated assault and guilty for fleeing a police officer. The trial judge sentenced DUKES to one year in jail.

Id.

73. See generally *Census Information*, CITY OF MIAMI PLAN. DEP'T, <http://www.miamigov.com/Planning/pages/services/Census.asp> (last visited Feb. 26, 2013) (showing the racial make up of various Miami area neighborhoods). The Miami area neighborhood of Liberty City is predominantly black, and the racial demographics are approximately 3% Hispanic, 95% black, 0.6% white, and 1.7% other. *Id.*

74. 28 U.S.C. § 1291 (2012) (vesting appellate courts of the United States with jurisdiction of all appeals from final orders of district courts). See generally *AM. CIV. LIBERTIES UNION*, <http://www.aclu.org> (last visited Feb. 15, 2013) (explaining the role of the ACLU and discussing topics of interest); Maxwell S. Kennerly, *A Trial Lawyer's Guide to Taser Lawsuits*, LITIG. & TRIAL: THE LAW BLOG OF PLAINTIFF'S ATT'Y MAX KENNERLY (June 25, 2012), <http://www.litigationandtrial.com/2012/06/articles/attorney/civil-rights-1/a-trial-lawyers-guide-to-taser-lawsuits/> (acknowledging that many police brutality cases are disposed of before they ever reach the jury). Mr. Dukes was in a significantly small class of individuals that fought the criminal charges and won, and pursued a civil rights case and won all civil procedure attempts to terminate the claims. Kennerly, *supra*. Due to the government's ability to file interlocutory appeals, many plaintiffs' cases are dismissed during the appellate phase on grounds of *de minimus* force or reasonableness of the officer. 28 U.S.C. § 1291. However, Theodore Dukes, with the assistance of the ACLU, was able to litigate the case for five years in order to get his day in court and to present the case to a jury. *AM. CIV. LIBERTIES UNION*, *supra*.

III. THE CRIMINAL CASE AS AN OBSTACLE TO PURSUING A CIVIL RIGHTS VIOLATION AGAINST THE POLICE

A. THE CRIMINAL CHARGES

Nearly every case of police brutality presents a legal dynamic of related but separate civil and criminal cases. Once a citizen claims police abuse, there is almost always a contradictory allegation by the police accusing the citizen of being the initial aggressor and primary criminal actor against the police.⁷⁵ I am not referring to a criminal charge being filed against the police officer, since charges against police officers are not very common. Instead, the suspect/victim of police brutality is most commonly the individual upon whom the prosecutor aims his or her focus and against whom criminal allegations are most commonly made. Therefore, the typical first issue for a suspect/victim of police brutality to address is how to dispose of the active criminal case.⁷⁶

Mr. Dukes' case was no exception. When he awoke from his coma, he was informed of his criminal charges and taken into custody right there in the hospital. Mr. Dukes' verbal reaction to being arrested was: "arrested for what? The police shot me. I didn't do anything."⁷⁷ Mr. Dukes soon learned that the pending charge against him was for attempted murder on a law enforcement officer⁷⁸ and that his case was marked "no bond."⁷⁹ Based

75. See Paul Craig Roberts, *America's Police Brutality Pandemic*, LEWROCKWELL.COM (Sept. 26, 2007), <http://www.lewrockwell.com/roberts/roberts224.html>. In nearly every case where a suspect alleges police brutality, the police also allege wrongdoing on the part of the suspect. *Id.* Most often the suspect is initially charged with some type of minor or major crime against the police officer. *Id.* Most common is the charge of battery on a police officer, resisting arrest, some form of fleeing or escaping the police, or some kind of threat of violence or crime making it reasonable for the officer to act with force). *Id.*

76. See, e.g., *Commonwealth v. French*, 611 A.2d 175, 179 (Pa. 1992). It is important to note it is not a crime to defend oneself, even against a police officer. *Id.* However, the nuances of those defenses are factual questions that can only be explored much later in a case, typically at trial. *Id.*

77. See SKOLNICK & FYFE, *supra* note 39, at 2 (describing Paul King's account of trying to report the police brutality on his brother Rodney King and being told by the police "that Rodney was in 'big trouble,' since he had been caught in a high-speed chase and had put someone's life in danger, possibly a police officer's"); see also *The Arrest Record of Rodney King*, FAMOUS AM. TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/lapd/kingarrests.html> (last visited Feb. 20, 2013) (explaining how Rodney King's criminal charges were ultimately dismissed when the prosecution declined to prosecute).

78. See FLA. STAT. § 775.082(3)(b) (2011) (asserting the penalty for first-degree felonies is imprisonment for a term not exceeding life); FLA. STAT. § 782.04(2) (stating that the unlawful killing of another human being without any premeditated design to effect death is murder in the second degree and that a first-degree felony is punishable by a term of imprisonment not exceeding life, or as provided in section 775.082, Florida Statutes); FLA. STAT. § 782.065 (stating

on the severity of the charge and his corresponding no bail status,⁸⁰ Mr. Dukes had no ability to bond out of jail and ultimately remained in custody for nine months pending trial. Mr. Dukes had to defeat the criminal case before his constitutional violations could be addressed in civil court. Thus, although physically Mr. Dukes' wounds were healing and he was making progress, the criminal charges were a major setback in his legal prognosis. He had a serious criminal case to defend and a difficult federal civil rights case to mount—all while still in custody.

For an ex-felon, being charged with an offense against a law enforcement officer poses a significant threat to liberty for the foreseeable future. This type of charge could easily mean a return to prison, if the citizen is on probation or parole. Revocation of probation or parole could be triggered without full consideration of the true merits of the new charge.⁸¹ Often times just the arrest itself is sufficient grounds for revocation of probation or parole.⁸² Thus, defendants already “on paper,”⁸³

that when convicted of second-degree murder or attempted second-degree murder and the victim was defined as a law enforcement officer under the applicable statute, the penalty is life imprisonment without the possibility of release).

79. See 18 U.S.C. § 3142(e)–(j) (2006) (defining procedures and circumstances under which the courts may order detention of a defendant pending trial); FLA. STAT. § 907.041 (stating that Florida rules of procedures for pretrial release determinations “shall be governed by rules adopted by the Supreme Court”); see also Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 649–50 (1996) (discussing main interests protected by the Sixth Amendment, including “an interest in avoiding prolonged pretrial detention”); *Annual Review of Criminal Procedure*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 209, 316 (2008) (“The Bail Reform Act allows courts to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence after an adversarial hearing that no release conditions will reasonably assure the safety of the community.”). “No bond” means that the arrestee is not eligible to bail out of jail by posting an appearance bond pending trial. See 18 U.S.C. § 3142(e), (g), (j). Only a few charges carry this “no bond” status because every arrestee has the presumption of innocence. See *id.* § 3142(e), (g), (j). Pre-trial incarceration should not be punitive but can be ordered based on public safety concerns under Sixth Amendment jurisprudence. See *Annual Review of Criminal Procedure*, *supra* at 315–17.

80. See *supra* notes 78–79 and accompanying text (explaining the severity of the charge of attempted murder and what “no bond” means).

81. See TODD R. CLEAR ET AL., *AMERICAN CORRECTIONS* 120 (2009).

82. See *Genung v. Nuckolls*, 292 So. 2d 587, 588–89 (Fla. 1974) (upholding a Florida statute, which states that a parole agreement or probation order shall immediately be temporarily revoked upon a subsequent felony arrest of felony parolee or probationer); see also LYNN S. BRANHAM, *THE LAW AND POLICY OF SENTENCING AND CORRECTIONS: IN A NUTSHELL* 168–69 (2005) (suggesting that if a parolee or probationer is convicted of a crime while on parole or probation, an assumption is made that he or she has violated the terms of his or her parole or probation); NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 19:11 (1999) (explaining the effect of an arrest for a probationer or parolee).

83. See MICHAEL J. RICH, MICHAEL LEO OWENS, MOSHE HASPEL & SAM MARIE ENGLE, *PRISONER REENTRY IN ATLANTA: UNDERSTANDING THE CHALLENGES OF TRANSITION FROM PRISON TO COMMUNITY* 19 (2008) (using the term “on paper” to refer to prisoners that have been

prior to an incident of police brutality, are at a further disadvantage to challenge police misconduct. Instead, the focus for individuals on parole or probation shifts from pursuing their constitutional rights regarding the excessive force to minimizing the collateral damage of the new criminal allegation and staying out of prison. Although Mr. Dukes had a significant criminal record, he did not have the additional obstacle of a suspended sentence trailing him; Mr. Dukes had served all of his time and was not on probation or parole for any crime at the time the police shot and beat him.⁸⁴

However, Mr. Dukes' prior felony convictions were still a significant factor and would cause him to face increased punishment at sentencing. Criminal statutes articulate punishment in terms of a range of years. The sentencing judge has discretion to make the punishment lenient or harsh; and therefore, he or she can take into account the criminal defendant's prior felony convictions to arrive at a punishment commensurate not just with the instant charge, but proportional to the criminal defendant's current conduct and his criminal record as a whole.⁸⁵ Thus, when an ex-felon like Mr. Dukes is charged with a serious crime like attempted murder and the alleged victim is a law enforcement officer, it is reasonable for Dukes to expect to receive a severe sentence once the judge takes into account the totality of the new case and prior record. Mr. Dukes could have received a life sentence based on this charge. Even with a good plea negotiation it would be reasonable for Mr. Dukes to expect to do significant prison time.

B. THE PLEA OFFER: A GOOD DEAL OR TOO GOOD TO BE TRUE

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. [T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.⁸⁶

When it came time to plea bargain with the prosecutor, Mr. Dukes was offered to plead guilty to the charge of attempted murder on a police officer and receive a sentence of credit for time served, which meant no

released on parole or probation).

84. See FED. R. EVID. 609. The fact that he was not currently under an impending sentence at the time of the shooting would not prevent the revelation of his record. *Id.*

85. See, e.g., *Ewing v. California*, 538 U.S. 11, 29 (2003); see also *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 3-4 (1988) (explaining that the Parole Commission typically produces a report outlining the criminal defendant's priors, as well as a recommendation regarding the severity of punishment that should be ordered).

86. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940); see also R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 6 (2005).

additional time in jail and a guarantee of no prison time at all. No, this is not a typo. Yes, the alleged victim in the criminal case was a police officer. Yes, the criminal charge was attempting to kill a police officer. Yes, the prosecutor was offering Mr. Dukes a deal: Get out of jail now just pretend no police brutality happened and admit it was your fault. Why would a prosecutor make such a favorable plea bargain with an ex-felon, who has a prior murder conviction and multiple drug felonies on his record and is now accused of attempting to kill a cop? It does not appear to be a balanced deal for both sides. Considering the allegations and the prior record, the plea offer appears extremely favorable to Mr. Dukes. Why would a prosecutor give Mr. Dukes such a sweet deal? How could Mr. Dukes do anything but accept it and thank his lucky stars that he was not going to prison for the rest of his life?

One potential reason why the prosecution may have offered Mr. Dukes an extremely favorable plea bargain was because Mr. Dukes' guilty plea would preclude him from filing a civil suit against the police for shooting and beating him.⁸⁷ Therefore, in order for Mr. Dukes to challenge the police brutality civilly, he would have to first risk spending the rest of his life in prison by rejecting the plea bargain, going to trial, and challenging the criminal charge. This was a serious decision Mr. Dukes had to make. For many ex-felons it would have been a no-brainer to take the plea,⁸⁸ it is a guaranteed win in criminal court and forget about suing the police. Maybe that is the reasoning the prosecutor was trying to induce by making a favorable offer. It is not common for a prosecutor to give a criminal defendant with a bad record a plea to a serious new felony charge and not require additional jail time or punishment.⁸⁹ The government must

87. See *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) (describing the procedures required for recovering damages for an unconstitutional conviction or imprisonment).

88. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 91 (2003). Fisher asserts:

As clear as their interest in plea bargaining may have been, prosecutors' power to bargain was well hidden. Tracking it has absorbed a good many pages. In contrast, criminal defendants had both a clear incentive and a clear capacity to plea bargain. Their incentive lay in the difference between the severe sentence that loomed should the jury convict at trial and the more lenient sentence promised by the prosecutor or judge in exchange for a plea. At first glance, the intensity of a defendant's desire to plead appears to have been a simple function of the power and inclination of the prosecutor or judge to widen this difference. And defendants' power to plead was even clearer and more constant: As the holders of the right to a jury trial, they held the power to waive it. Even when the defendant pled guilty to a capital charge and thereby assured his own execution, the "court ha[d] no power absolutely to refuse" his plea.

Id.

89. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 43 (2007) (explaining how the prosecutor is the one who controls the plea

not have had faith in its case or the strength of its evidence.⁹⁰ However, noticeably, the prosecutor did not offer Mr. Dukes a straight dismissal of the charges, but instead insisted on Dukes admitting guilt.

Notwithstanding the favorable terms of the plea deal, Mr. Dukes rejected it and proceeded to trial where he won on the alleged charge against the police officer and was released from jail. Based on the favorable verdict from the jury in the criminal case, Mr. Dukes was free to sue the police for wrongfully shooting him in violation of his civil rights. Further, the jurors in the criminal case never learned about Mr. Dukes' criminal record because the Fifth Amendment protects criminal defendants from being forced to testify; thus, Rule 609 could not trigger the revelation of his past convictions nor taint the criminal jury's deliberations on the material facts of the police-citizen encounter.

IV. GETTING A LAWYER TO SUE THE POLICE: EASIER SAID THAN DONE FOR AN EX-FELON

The topic of attaining a civil rights lawyer could be a separate law review article in itself, and many scholars have written on problems regarding fair access to the courts.⁹¹ All these issues apply equally to Mr. Dukes' situation, plus the additional fact that Mr. Dukes' lack of access to civil remedies is exacerbated by his ex-felon status. Further, having been a victim of police brutality and initially charged with a crime, his financial means are further diminished because all of his family's resources were leveraged to successfully defend his criminal case and receive an acquittal. He had no funds to pay a civil rights attorney to sue the police. He could only pursue attorneys willing to take the case on a contingency fee basis. Lawyers who take contingency fee cases only get paid if they win money damages in the case. Thus, attorneys who perceive that the case will not win or that it will not trigger a lucrative settlement are unlikely to take the case at all.

Finding a willing attorney was a problem Mr. Dukes repeatedly encountered as he tried to obtain counsel to file his civil rights lawsuit. One by one, as Mr. Dukes retold his story to local plaintiffs' attorneys, each declined to take his case stating it was too hard because his prior

bargaining process and what charges are imposed on a defendant).

90. *Cf.* *United States v. Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005) (citing *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970)). A prosecutor is not required to disclose the reasons for the plea bargain. *Cf. id.* Courts are likewise given a great deal of discretion in determining whether to accept a guilty plea. *See id.*

91. *See generally* Harvard Law Association, *Developments in the Law: Access to Courts*, 122 HARV. L. REV. 1151 (2009) (discussing the broad range of topics regarding access to the courts).

criminal record would be an impediment to success at trial. As mentioned above, the jurors in the criminal case did not learn about Mr. Dukes' prior criminal convictions, but the Fifth Amendment does not protect civil plaintiffs the same way it protects criminal defendants. Civil plaintiffs can be forced to testify, and as testifying witnesses, their prior felony convictions are revealed. In Mr. Dukes' quest to find a lawyer, he was fortunate the American Civil Liberties Union, a nonprofit agency commonly referred to as the ACLU, agreed to take his case due to the sheer injustice of the facts.

For Mr. Dukes, obtaining a lawyer motivated to see justice served was good news. Mr. Dukes thought his civil rights trial date would be coming soon. However, due to the government's right to interlocutory appeal in excessive force cases, his trial date came five years later. The saying "justice delayed is justice denied" is another reality for plaintiffs who sue the police for excessive force. Delays in litigation most often favor the defendant and harm the plaintiff who still has the burden of proving the case. Extensive delays cause evidence to grow stale, in that witnesses often become unavailable, making it easier for the police to defend the case. The realities of the hardships that an ex-felon plaintiff/victim must endure to obtain a lawyer and to survive the procedural challenges⁹² to the civil rights complaint and corresponding interlocutory appeals⁹³ are so monumental for the average person that these obstacles work to reinforce the feeling of powerlessness.

92. See, e.g., FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

93. Plaintiffs like Mr. Dukes are powerless to complain about long delays in the litigation. Although this is a problem for many plaintiffs, it is a double-edged sword. There are many aspects to this issue because the government needs a way to fight against frivolous litigation. Thus, police officers are protected by qualified immunity, and further, the appeals rules for these types of cases are skewed to the benefit of the government in order to ferret out frivolous lawsuits. That is why when a plaintiff sues a police officer, the case is often prolonged through multiple interlocutory appeals whereas most cases are instead only appealed after a jury verdict. Any delays in litigation typically prejudice the plaintiff in the litigation. Since the plaintiff has the burden of proving all the requisite elements of the claim, delays usually make it harder to prove the case. In the area of police brutality, the many delays work to the benefit of the government-defendant. In Mr. Dukes' case, there was a five-year delay. Due to this five-year delay, several of the plaintiff's witnesses became unavailable and unable to testify in the civil rights trial.

V. THE CIVIL RIGHTS TRIAL: AN OPPORTUNITY FOR JUSTICE OR AN UNFAIRLY PREJUDICIAL ROUSE

A. MR. DUKES' DAY IN COURT

Getting one's day in court has symbolic meaning, legal meaning, as well as therapeutic jurisprudential significance. Symbolically, a jury trial celebrates the litigant's opportunity to tell his story. "A legal dispute can in fact be defined as a kind of narrative competition: Each side tells the story as well as it can from its own point of view And in every case the ultimate question addressed by his audience . . . is one of justice: . . . What is the best justice in this case?"⁹⁴ Therein, there is significant value placed in obtaining a jury trial, which is a luxury most victims of police brutality never experience. Legally, commencing a jury trial signifies that the plaintiff has a cognizable legal claim supported by a prima facie showing of support on the merits.⁹⁵ Beyond the symbolic and the legal meanings, a jury trial has the opportunity of being a therapeutic experience for the participants.

The law consists of legal rules, legal procedures, and the roles and behaviors of legal actors, like lawyers and judges. Therapeutic jurisprudence proposes that we use the tools of the behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law without violating other important values⁹⁶

Getting one's day in court can have many meanings, but without the possibility of being effective, it is ultimately meaningless.⁹⁷ An effective judicial process is one that has the chance to remedy the wrong. The remedy being sought is not solely money damages; instead, it is just as much, or more, about the dignity and fairness sought by the abused victim.

In addition to the many obstacles Mr. Dukes overcame to pursue his constitutional rights in civil court, the *Dukes* case is also significant

94. JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 33–34 (2002).

95. See *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 105 (2004).

96. BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 7 (2003).

97. See AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE 21 (2010) (stating "[t]herapeutic Justice scholars agree that when individuals participate in a judicial proceeding, what influences them most is not the result, but their assessment of the fairness of the process itself"); *supra* notes 41–43 and accompanying text. Effectiveness should be broadly defined beyond just winning the case and should further include a deterrent effect to prevent future incidents of police brutality. See *supra* notes 41–43 and accompanying text.

because it has more in common than it is different from most cases of police brutality; Mr. Dukes encountered the police in a high-crime neighborhood,⁹⁸ the initial probable cause articulated for the encounter alleged minor criminality,⁹⁹ the response by the police was extreme and disproportionate to the threat,¹⁰⁰ and the suspect had a prior criminal record that the police were not aware of during the encounter on the street. Yet, in Mr. Dukes' litigation, his prior criminal history became particularly salient when used as leverage to extend his incarceration pending trial on the criminal charge, in the subsequent criminal plea offer with regard to possible sentencing risks, and at the actual civil rights trial to attack his credibility as a testifying witness. This essay begins to unpack the multi-faceted dilemma of whether an ex-felon can successfully assert claims against the police.

B. THE EX-FELON STATUS OF THE STORYTELLER UNFAIRLY INFLUENCES THE VALUE OF THE STORY

Skillful legal storytelling¹⁰¹ and a credible storyteller¹⁰² are key

98. See *Liberty City: Demographic Data by Zip Code*, ONBOARD, LLC., <http://homes.point2.com/Neighborhood/US/Florida/Miami-Dade-County/Miami/Liberty-City-Demographics.aspx> (last visited Feb. 20, 2013).

99. FLA. STAT. § 320.02(1) (2005). Dukes was stopped for a violation of section 320.02(1), Florida Statutes, for a failure to have a valid vehicle registration. *Id.*

100. See *Whren v. United States*, 517 U.S. 806 (1996). The initial police encounter in the Dukes case is reminiscent of the United States Supreme Court case *Whren v. United States*. See *id.* at 806. In *Whren*, the undercover police officers in Washington, D.C. initiated a stop for an observed traffic violation in direct contradiction with their police department policy. *Id.* at 808–09. The D.C. department policy permitted “plainclothes officers in unmarked vehicles to enforce traffic laws ‘only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.’” *Id.* at 815 (quoting Washington D.C. Metropolitan Police Department regulations). Ultimately, the Supreme Court held that traffic stops would fall under the same reasonableness standard as other searches and seizures, and it affirmed the district court’s finding of no Fourth Amendment violation in the traffic stop of *Whren*. *Id.* at 819.

101. See, e.g., Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: JALWD 99, 99–100 (2012) (exploring the art of narrative and how effective storytelling can have a significant impact on the outcome of a legal argument using the example of several recent Affordable Care Act cases and the diverging judicial views when interpreting the same law; it presents the argument that plaintiffs’ ability “to effectively tell their story” impacts the ultimate analysis of the law in dramatic ways). See generally LENORA LEDWON, *LAW AND LITERATURE: TEXT AND THEORY* (1996) (emphasizing that depending on how the story is told, and maybe even who tells the story, the outcome of the case can be dramatically different); Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analysis of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005) (explaining the importance of formulating an effective narrative through a critical analysis of the Rodney King trial, and emphasizing the role of social context in the eventual outcome of any case).

102. FED. R. EVID. 609(a)(1)(A).

components of a successful legal case. Police brutality cases are no exception. The importance of storytelling might even be heightened because the allegations are against a police officer, and for many jurors, police officers are inherently perceived as honest and credible witnesses, whereas the opposite could be true of the inherently perceived honesty and credibility of an ex-felon party-witness. However, setting inherent biases aside for a moment, the credibility of the storyteller is also set by the Federal Rules of Evidence. A credible storyteller would be a witness whose credibility has not been attacked by impeachment. Rule 609 is specifically designed to impeach credibility via the admissibility of prior criminal convictions. Thus, if the main plaintiff in the case is also a convicted felon, due to Rule 609, the case is doomed even before it is fully evaluated because of its impeached storyteller. The ex-felon plaintiff/victim of police brutality is extremely vulnerable to this dynamic, reinforcing the ex-felon's lack of power to complain about brutality. These rules work to essentially prove the unspoken alleged threat perceived by abused victims: "go ahead, tell your story, *who is going to believe you?*"

In addition to the unfair prejudice, the moral stigma that attaches to a criminal conviction¹⁰³ has no place in an excessive force case for public policy reasons, particularly in a case where the prior record of the plaintiff was not known when alleged excessive force occurred. Evidence of prior crimes that were unknown by the police at the time of the incident have a general, unfairly prejudicial impact that should rise to the level of exclusion in police brutality cases involving ex-felons because the mere revelation of their status as an ex-felon casts doubt on the entire substance of any civil rights violation they may allege. The impotence that Rule 609 creates for ex-felon victims of police brutality distorts the import of Rule 609, particularly when the prior convictions revealed are for violent crimes and not crimes related to dishonesty or false statement.¹⁰⁴

However, due to the broad use of prior criminal convictions under the auspices of witness credibility, Mr. Dukes' story of police brutality was instantly distorted in a way that allowed the defense counsel for the police

103. See Terree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 *FORDHAM L. REV.* 1, 37–38 (1988) (discussing the difference between a civil verdict and a criminal verdict on the parties involved as one of moral stigma).

104. FED. R. EVID. 609 advisory committee's note ("The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense."). Compare *id.* ("Uniform Rule 21 and Model Code Rule 106 permit only crimes involving 'dishonesty or false statement.'"), with HAW. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty.").

to argue in closing: “How dare a convicted murderer [like Mr. Dukes] come into this court and ask this jury for damages?” Simply because Mr. Dukes was previously convicted of second-degree murder, his story of being unconstitutionally shot by the police was immediately labeled less believable and less worthy of a damage award because of his status as an ex-felon and the moral blame that attached to his prior criminal conduct, which was completely irrelevant to the police shooting him on the night in question. If you recall, Mr. Dukes was shot by police officers that were in unmarked vehicles and in plain clothes conducting a traffic stop for an unauthorized license plate. These officers, who were charged with excessive force, did not act because of knowledge of Mr. Dukes’ past crimes, because they did not know anything about his record, yet they are benefiting from the inherent negative bias that befalls a plaintiff/victim once his or ex-felon status is revealed. The unspoken subtext that is conveyed is that it is somehow less wrong to use excessive force if the victim of the brutality is an ex-felon. “Once jurors are convinced that a litigant, with a prior criminal conviction, is a bad person, there is a risk that they will evaluate the litigant’s evidence less conscientiously and thus reach a verdict contrary to what their decision would have been absent the damaging convictions evidence.”¹⁰⁵ This is a reality that lawyers in the field of civil rights are very familiar and also why it was a significant challenge for Mr. Dukes to get a lawyer to take his case knowing the damaging effect of his past criminal record.¹⁰⁶ Civil rights lawyers know:

The jury is apt to engage in a comparative moral evaluation of parties and their witnesses and, in all likelihood, will view prior convictions as revelatory of conduct. The temptation is to reward the “good” litigant with a favorable verdict, or conversely, to punish the “bad” litigant with an unfavorable verdict.¹⁰⁷

In the criminal trial, the jury did not learn of Mr. Dukes’ prior second-degree murder conviction or about his multiple felony drug convictions. That evidence was shielded from them. The criminal jury was allowed to focus solely on the evidence from the material encounter with the police, and the jury found that Mr. Dukes did not assault the police, batter the police, or attempt to murder the police. Consequently, under the view of the criminal jury, Mr. Dukes was inappropriately shot by the police, notwithstanding the police officer’s allegations against Mr. Dukes for criminal wrongdoing. However, in the civil rights trial, the civil jury was

105. Foster, *supra* note 103, at 22.

106. *See id.* Thus, due to these dynamics, lawyers are less inclined to take an ex-felon’s case, cementing the powerlessness. *Id.*

107. *Id.* at 38.

not shielded from the knowledge of Mr. Dukes' prior criminal record and instead learned of his ex-felon status and found that the police shooting of Mr. Dukes was appropriate and did not violate his civil rights. In fairness, the drastically different outcomes of these cases based on the same facts could be due to the different technical legal questions posed in each: In the criminal case, it was asked whether Mr. Dukes committed a crime against the police officer, and in the civil rights case, it was asked whether the police officer unreasonably shot Mr. Dukes during the investigation of the license plate. There is the possibility that civil jurors simply found the shooting of Mr. Dukes, considering the totality of the circumstances, to be reasonable on its face. However, it is also quite possible that the jurors in the civil rights trial were unfairly influenced by their knowledge of Mr. Dukes' ex-felon status and viewed the same facts in a light less favorable to Mr. Dukes and more favorably to the police officers because of the stigma that attaches to an ex-felon, especially a prior murder conviction. On balance, one must consider whether it is fair to allow such an important legal and social issue such as police brutality to turn on the stigma of the storyteller. Or does public policy demand reform in this area?

C. PROPOSED REFORM OF FRE 609 IN EXCESSIVE FORCE CASES

A civil trial should be about conduct, not character.¹⁰⁸ Many have complained about the inherent unfairness of Federal Rule of Evidence 609 and its specific use of prior convictions against testifying witnesses.¹⁰⁹ As it stands, the rule allows the prior criminal history of any testifying witness to be admissible in civil cases, including § 1983 civil rights cases.¹¹⁰ Opponents of the rule assert that the application of it is most unfair in the context of civil litigation generally.¹¹¹ This essay urges that a smaller subset of civil cases be examined under Rule 609, § 1983 excessive force cases. A viable argument can be made to exclude prior criminal convictions in all civil cases and adopt a federal rule similar to Hawaii's evidence rule regarding prior convictions and exclude all convictions in all

108. *Id.* at 37.

109. See generally Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289 (2008) (considering the controversial practice of the "admission of prior convictions to impeach the credibility of defendants who testify"); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1 (1999) (discussing the misuse of Federal Rule of Evidence 609).

110. FED. R. EVID. 609(a)(1)(A).

111. Foster, *supra* note 103, at 37.

civil cases except for convictions involving dishonesty.¹¹² However, even if the federal legislature is not prepared to ban prior criminal convictions in all civil cases, the need for the exclusion in civil rights cases is particularly acute. Federal Rule of Evidence 609, as it currently operates, essentially prohibits an entire class of plaintiffs from complaining about violations to their civil rights, rendering the ex-felon uniquely powerless against police brutality. The rippling effect of Rule 609 works to embolden police officers to act aggressively, beyond the confines of the Fourth Amendment, and to liberally use excessive force in neighborhoods that have a disproportionately high population of ex-felons, knowing they are essentially powerless to complain about the abuse. This phenomenon raises additional alarm because these neighborhoods, like Liberty City in Miami where Mr. Dukes was shot, are also disproportionately poor and consist of primarily minority residents, which sends a message of subordinate status for certain citizens vis-à-vis unlawful force by the government. Therefore, this essay suggests amending Rule 609 to include an exception to the rule:

Proposed Amendment 609(a)(1)(A)(i): Excluded from admissibility are any of the civil rights plaintiff's prior criminal conviction(s) unknown to the police officer(s) at the time of the police encounter in question, unless the conviction is for a crime of dishonesty or false statement.

This specific type of proposed exception would go a long way towards achieving fairness for ex-felon victims of civil rights violations and eliminate at least one level of powerlessness that they currently endure.

VI. CONCLUSION

The enforcement of the federal civil rights statutes, 42 U.S.C. § 1983 specifically, is intended to deter excessive force by police and to provide a legal remedy to the victim. Ideally, the law would also have a positive therapeutic jurisprudence side effect by giving victims of excessive force a venue wherein their cases could be legitimately addressed. Justice and legal healing from the harm suffered are mostly unobtainable for ex-felons. Given the particular vulnerabilities of ex-felons such as their diminished social status and lack of credibility, political power, and financial resources, jurors are often unwilling to accept their version of events or award them damages. It becomes an insurmountable challenge for the average juror to accept the word of an ex-felon, possibly even a murderer or a drug dealer, when faced with a counter version of facts by a law

112. HAW. R. EVID. 609(a).

enforcement officer. Therefore, almost as an unconscious and simple default position, jurors conclude, when forced to choose a side that the police officer is without blame. The knowledge of the plaintiff's prior felony convictions unfairly skews the case in favor of the police, leaving the ex-felon plaintiff/victim impotent and without remedy—powerless as a practical matter.

This essay suggests that the prior felony convictions of the plaintiff/victim of excessive force are neither relevant nor material to civil rights litigation, and thus, the jury should be shielded from this information to avoid undue prejudice.¹¹³ Shielding a jury from past, unrelated criminal convictions of the plaintiff/victim will help restore the value and intended purpose of § 1983 litigation, which is intended to prevent police brutality in the first place. This essay shines a spotlight on the unfairness lurking between the crevices of criminal law, evidence law, and civil rights law and the treacherous waters that an ex-felon victim of police brutality must attempt to successfully navigate. A change in evidentiary policy in excessive force cases is required in order to effectively deter police brutality. The proposed amendment to Rule 609 for civil rights plaintiffs is a needed step towards leveling the playing field and giving vulnerable ex-felons a voice to challenge brutality.

113. FED. R. EVID. 403. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*