

FROM EDWARD TO ERIC GARNER AND BEYOND: THE IMPORTANCE OF CONSTITUTIONAL LIMITATIONS ON LETHAL USE OF FORCE IN POLICE REFORM

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INTRODUCTION: FROM EDWARD TO ERIC GARNER

One fateful October evening in 1974, two police officers were dispatched to a neighborhood in Memphis, Tennessee, in response to a call about the burglary of an unoccupied house.¹ Upon arriving at the scene, the police spotted a black fifteen-year-old boy running from the back of the house toward a fence in the back yard.²

The boy, Edward Garner, was “young, slight, and unarmed.”³ An eighth-grade student, he stood only 5’4” tall, and weighed no more than 110 pounds, and perhaps closer to 100.⁴ Despite being able to see as he drew closer that Garner was an unarmed youth, Memphis Police Officer Hymon drew his police-issued gun and fired lethal shots at the boy:

Using a 38-calibre pistol loaded with hollow point bullets, [Hymon] shot and killed the boy from a range of 30 to 40 feet as he climbed the fence to escape. After shining a flashlight on the boy as he

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1. *Garner v. Memphis Police Dep’t*, 600 F.2d 52, 53 (6th Cir. 1979).

2. *Id.* See also *Garner v. Memphis Police Dep’t*, 8 F.3d 358, 366 (6th Cir. 1993) (Suhrheinrich, J., dissenting) (identifying Edward Garner’s race as black).

3. *Tennessee v. Garner*, 471 U.S. 1, 21 (1985) [hereinafter, this case only—the Supreme Court decision—referred to as *Garner*].

4. *Id.* at 4 n.2 (citing App. to Pet. for Cert. A5).

crouched by the fence, the officer identified himself as a policeman and yelled “Halt.” He could see that the fleeing felon was a youth and was apparently unarmed. As the boy jumped to get over the fence, the officer fired at the upper part of the body, as he was trained to do by his superiors at the Memphis Police Department. He shot because he believed the boy would elude capture in the dark once he was over the fence. The officer was taught that it was proper to kill a fleeing felon rather than run the risk of allowing him to escape.⁵

The shots that Officer Hymon fired hit the young Edward Garner in the back of the head.⁶ The Supreme Court described the tragic facts of the case: “Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.”⁷

Fast forward four decades, to a hot July day in Staten Island, New York, where another unarmed black citizen with a name strikingly similar to Edward Garner’s was killed by police. This time, the victim of lethal police force was *Eric* Garner, a middle-aged man old enough to be the father of Edward Garner at the time of his death. In fact, Eric Garner had six children of his own at the time of his death.⁸ A regular in the neighborhood in where he was ultimately killed by police, Eric Garner could often be found “play[ing] chess and checkers on stools near the curb, peel[ing] off dollar bills for children when the ice cream truck came around and serv[ing] as a kind of peacekeeper for the motley regulars who occasionally found themselves at odds,” according to those around the neighborhood who knew him.⁹

And then, in a fatal twist of coincidental fate, Eric Garner was killed by police in that Staten Island neighborhood, forty years after police similarly killed the unarmed African American Edward Garner in 1974. The specifics of Eric Garner’s death caught the attention of the nation to a greater degree than Edward Garner’s had forty years prior, perhaps because Eric Garner’s death was caught on video and disseminated on the internet.¹⁰ The video captured the moments during

5. *Garner v. Memphis Police Dep’t*, 600 F.2d at 53.

6. *Garner*, 471 U.S. at 4.

7. *Id.*

8. Al Baker, J. David Goodman, & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

9. *Id.*

10. Video available at: <http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>.

which Eric Garner was stopped by police on suspicion of illegally selling loose, untaxed cigarettes near the Staten Island Ferry Terminal in New York, a misdemeanor offense.¹¹ It also captured the images of Garner being tackled to the ground by arresting officers, being placed in a chokehold, and then pleading futilely for breath over and over.¹² As recounted by an editorial detailing Eric Garner's last moments, he cried out:

“I can’t breathe. I can’t breathe.” With increasing panic, Eric Garner left no doubt regarding his distress as he was wrestled to a Staten Island sidewalk by a phalanx of police officers. They paid no mind. Mr. Garner was choked to death.¹³

In the end, Eric Garner cried out to the officer who had him in a chokehold “I can’t breathe” eleven times before his heart gave out, which led to his death an hour later.¹⁴ As reported by the New York Times, “[a]n autopsy by the city’s medical examiner found that Mr. Garner’s death was a homicide resulting from the chokehold—a maneuver banned by the Police Department in 1993—and the compression of his chest by police officers.”¹⁵

Eric Garner’s death at the hands (literally) of New York police was ultimately deemed not worthy of prosecution by the justice system. A grand jury refused to indict the officer who choked Garner to death, which led to protests echoing the “I can’t breathe” cries that became a refrain of civil rights protesters after his death.¹⁶

In *Edward Garner’s* case, four decades before, the Supreme Court, upon addressing the circumstances of his death by police shooting, set forth a firm rule of law establishing that shooting at unarmed or otherwise dangerous fleeing suspects as a method of stopping them

11. Editorial, *Stifled Justice*, WASH. POST, Dec. 5, 2014, at A18. See also Frank Donnelly, *Misdemeanor Cases Over Alleged Untaxed Cigarettes Preceded Fatal Police Incident with Eric Garner*, SIALIVE.COM (July 18, 2014), http://www.silive.com/northshore/index.ssf/2014/07/eric_garner_who_died_in_police.html.

12. *Id.*

13. *Id.*

14. Baker, Goodman & Mueller, *supra* note 8.

15. See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

16. See Goodman & Baker, *supra* note 15.

from escaping is prohibited by the Constitution.¹⁷ How can it be, then, that forty years later, Eric Garner was killed by police who used lethal force when seizing him for a misdemeanor less serious in nature than the break-in and burglary of which Edward Garner had been suspected forty years previously?

The unsettling circumstances surrounding Eric Garner's death are the tip of an iceberg, reflecting that Edward Garner's case did not put a stop to lethal police shootings of unarmed, non-dangerous civilians. Rather, such killings, which were commonplace in past eras, have continued into the twenty-first century, with a number of police killings of unarmed black civilians in particular at the forefront of national attention.

In particular, the year following Eric Garner's death marked a troubling and tumultuous chapter of police killings in this country unprecedented *not* in the number of police killings, but in the number of killings actually brought to the nation's, and even the world's,¹⁸ attention. The attention brought to those killings consequently made police killings of unarmed people of color the subject of civil rights protests and reform movements across the country.

Part I of this article focuses on a series of notorious police killings of unarmed black civilians that occurred from July 2014 through July 2015 (i.e., the year following Eric Garner's death), police killings that inspired the Black Lives Matter movement¹⁹ and nationwide discourse—often quite heated—around the issue of discriminatory and excessive police force. In addition to detailing the series of disturbing 2014–15 police killings that were a focal point of protests and police reform discussions, this article also identifies patterns of potentially increased police accountability, particularly when the killings are captured on video or otherwise brought to the forefront of public attention, and putting more pressure on the justice system to hold police officers accountable for their actions.

17. *Tennessee v. Garner*, 471 U.S. 1, 3, 11 (1985).

18. The United States' history of police killings was recently the subject of a human rights violation inquiry by the United Nation, resulting in international condemnation and threats of prosecution for human rights violations. See Andrew V. Pestano, *U.N. Review of Human Rights in U.S. Focused on Police Brutality*, UPI (May 11, 2015), http://www.upi.com/Top_News/US/2015/05/11/United-States-faces-human-rights-record-scrutiny-from-United-Nations/4441431347202/.

19. For a comprehensive discussion of the Black Lives Matter movement, see KEENGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (Haymarket Books 2016).

Part II of this article explains that one thing that is too often lost in the divided discourse around such police killings is the recognition of necessary constitutional limitations of permissible deadly force by police. Too many members of both the law enforcement community and general public defend police killings by arguing that the victims were asking for it by running away from the police in the first place, which reflects disturbing misunderstandings about constitutional (let alone moral) limitations upon the permissible use of police force against unarmed civilians. As such, this article urges that both the law enforcement community and the citizens they serve must be educated about the Constitution's restraints upon police force, including the *Tennessee v. Garner* holding prohibiting deadly police force against fleeing, unarmed suspects and others who do not pose an imminent threat of physical harm to others.²⁰

Part III describes the police reform movement that has unfolded recently, in which the White House, the Department of Justice (DOJ), members of the policing community, and civil rights activists have come together to work toward the implementation of urgently needed police reform.

In Part IV, this article concludes by endorsing many critical pieces of police reform that have been proposed, while urging that police reform must include use-of-force training that emphasizes constitutional limitations upon permissible lethal police force.

Had the officers involved in the series of killings detailed in this article respected the constitutionally mandated restraints on the use of deadly police force, some of the victims of those police killings might still be alive. Instead, the circumstances of many of these killings indicate that at least some police are no longer aware of, or heeding, the constitutional limitations upon their use of force against civilians.

I. JULY 2014-15: A YEAR OF CITIZEN-DOCUMENTED POLICE KILLINGS OF UNARMED BLACK CIVILIANS

A. *Chronology of 2014-15 Police Killings*

The police killing of Eric Garner marked a turning point in the history of American policing and racial justice, as the country reeled from the video documenting the repeated, ignored, "I can't breathe" pleas from a dying man who, in essence, received an immediately

20. 471 U.S. 1, 11 (1985).

imposed death penalty for the misdemeanor offense of selling single cigarettes to his neighbors. That case was the first in a line of cases involving police killings of unarmed persons of color to capture the nation's attention over the course of a single deadly year. The cold-blooded cruelty of police ignoring Eric Garner's "I can't breathe" cries while maintaining a stranglehold on him until his heart went out is literally breathtaking. But the online dissemination of the police's brutal treatment that caused Garner's death may have helped usher in a new era of policing and racial justice reform.

Excessive violence by police toward black men did not begin in July of 2014. The trend of disproportionately widespread police killings of unarmed people of color is hardly a new phenomenon, as the statistics set forth in this article will establish. Rather, Eric Garner's death, and the line of police killings of unarmed people of color that continued over the course of the next year, marked the beginning of a new era of public *awareness* of such killings and a new national push for policing reform.

Before this article addresses in more detail recent policing reform developments, it is important to take account of the individual lives lost in ten infamous police killings that transpired in a single year spanning from July 2014 to July 2015. Each of the ten incidents below involved the killing of unarmed black civilians by police officers and became a focus of public attention and civil rights protests, thanks in many cases to the broad dissemination of video documentation of the incidents.

1. Eric Garner

On July 17, 2014, Eric Garner was killed.²¹ The killing, as previously described, was captured on video.

2. John Crawford

On August 5, 2014, John Crawford, a 22-year-old black man, was killed by police in a suburban Dayton, Ohio, Wal-Mart store. Crawford was a young black father of two young children, who was shot to death by police while standing in the Wal-Mart's air rifle merchandise aisle holding an air rifle he had picked up from a store shelf. The police had rushed into the store and fired the fatal shots at Crawford after a customer called to complain about a man with a rifle; a store surveillance video showed Crawford holding the Wal-Mart air rifle in

21. See *supra* notes 8–16 and accompanying text.

an almost absent-minded posture while talking on the phone at the moment the police fatally shot him.²²

As described by Crawford's father after the killings, it was the mother of Crawford's two young sons who was on the phone with Crawford when he was shot to death.²³ Crawford's father, who was with her at the time, reported that she screamed when she heard the gunfire over the phone, and put the call on speakerphone.²⁴ "You could hear in the background he was gasping," Crawford's father recounted.²⁵ "I'm virtually listening to my kid taking his last breath."²⁶

Notably, even if the Wal-Mart air rifle Crawford was holding had been an actual firearm and not harmless store merchandise, holding it would have been legal, Ohio being an open-carry state.²⁷

3. Michael Brown

Four days later, on August 9, 2014, Michael Brown, an unarmed black teenager, was shot and killed in Ferguson, Missouri, by police officer Darren Wilson.²⁸ In a brief altercation that began when Wilson stopped the eighteen-year-old boy walking down the street, Brown struggled with Wilson through the door of Wilson's police cruiser, and Brown then ran away from Wilson, or tried to, anyway.²⁹ The boy was shot and killed by Wilson when a distance of around fifteen feet separated them, a distance that was later emphasized by the officer as being close enough to justify lethal force when the boy turned around to face the officer during the pursuit.³⁰

Despite odd testimony from Wilson that demonized Michael Brown in monster-like terms,³¹ the details leading up to the killing

22. Associated Press, *Father of Man Killed by Police in Ohio Wal-Mart Says He Heard Son's Dying Breaths on Phone*, FOX NEWS (Sept. 7, 2014), <http://www.foxnews.com/us/2014/09/07/father-man-killed-by-police-in-ohio-wal-mart-says-heard-son-dying-breaths-on.html>.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See Albert L. Butler, *White and Black and Open Carry*, VA. PILOT & LEDGER-STAR (Aug. 23, 2014), http://pilotonline.com/opinion/columnist/guest/butler-white-and-black-and-open-carry/article_0fbb128d-d7a0-5766-afa8-3511a48b3a6b.html.

28. U.S. DEP'T OF JUSTICE CIV. RIGHTS DIV., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 7 (2015) [hereinafter REPORT ON SHOOTING OF MICHAEL BROWN].

29. *Id.* at 4–7.

30. *Id.*

31. Princeton Professor Keeanga-Yamahtta Taylor describes Darren Wilson's grand jury

remain in dispute.³² While there were photographs afterward of Michael Brown's body left in the street in the sweltering heat for over four hours (while his parents were kept at gunpoint by police, not allowed to approach his body),³³ there was no definite video of the incident capturing exactly what happened.

4. Tanisha Anderson

On November 12, 2014, a 37-year-old mentally ill black woman in Cleveland, Ohio, Tanisha Anderson, died after two police officers threw her to the ground, slamming her head into the cement sidewalk, after she had struggled when the officers attempted to take her against her will to a mental hospital.³⁴ The subsequent report from the Cuyahoga County Medical Examiner's office ruled that Anderson's death was "a homicide by legal intervention, caused by a 'sudden death associated with physical restraint.'" ³⁵ A civil suit subsequently filed by Anderson's family alleged that Anderson stopped breathing moments after her body was slammed to the ground by the officers, who left her half naked body on the sidewalk exposed to the public, and then misled her family, telling them that Anderson was merely "sleeping." ³⁶ The complaint further alleged that the officers failed to provide Anderson with medical care as she lay dying on the sidewalk from the injuries they had caused.³⁷

It was subsequently reported that one of the officers involved in the killing, Scott Aldridge, had lied about a previous incident in which he

testimony as follows:

[H]e sounded as if he were describing an altercation with a monster, not an eighteen-year-old. Even though Wilson and Brown were the same height, Wilson said he felt like he was being tossed around like a rag doll and that if Brown were to punch him in the face it would be fatal. Wilson went on to describe Brown as a 'demon' who made 'grunting' noises before inexplicably deciding to attack a police officer who had already shot him once and was poised to do so again. Wilson attributed superhuman strength to Brown, whom he described as running through a hail of bullets, leaving Wilson with no alternative but to keep shooting. It is an unbelievable story that hinges on the complete suspension of belief in Brown's humanity, his literal humanness.

See TAYLOR, *supra* note 19, at 4.

32. See REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 28, at 82.

33. See John H. Richardson, *Michael Brown Sr. and the Agony of the Black Father in America*, ESQUIRE (Jan. 5, 2015), <http://www.esquire.com/news-politics/interviews/a30808/michael-brown-father-interview-0115/>.

34. Jaeah Lee, *A Mentally Ill Black Woman's "Sudden Death" at the Hands of Cleveland Police*, MOTHER JONES (May 28, 2015), <http://www.motherjones.com/politics/2015/05/tanisha-anderson-killing-cleveland-police>.

35. *Id.*

36. Complaint, *Goodwin v. City of Cleveland*, No. 1:15-cv-27 (N.D. Ohio Jan. 7, 2015).

37. *Id.*

had been suspended without pay after being found guilty of violating use-of-force protocols, ethics policies, and other police protocols.³⁸ Aldridge was also one of the Cleveland Police Department officers involved in perhaps the most brutal police killing so far this century, a 2012 police chase in which thirteen CPD police surrounded a car holding two unarmed persons of color and fatally shot them through a volley of 137 rounds of lethal gunfire.³⁹

Although a public records request has been made for a video recording of the Tanisha Anderson incident, the video has not yet been released.⁴⁰

5. Tamir Rice

On November 22, 2014, a twelve-year-old African American boy named Tamir Rice stood alone in a pavilion at a playground outside a Cleveland, Ohio, community center, holding a toy gun.⁴¹ Suddenly, a police car sped up to the pavilion, and a mere second later, two officers leapt out of the police cruiser and opened fire on the child, killing him.⁴² The police had pulled up in response to a call to dispatch that the boy was carrying what might or might not be a real gun and pointing it at people. Although the dispatcher had failed to convey to the police the descriptions of the gun as possibly fake and of the suspect's youth, it should have at least been clear to the police when they arrived at the scene, as video clearly showed afterward, that there was no one in the park with the child.⁴³ But the police did not pause to assess the situation carefully before jumping a curb to pull up within feet of Tamir and

38. Brandon Blackwell, *Cleveland Cop Involved in Tanisha Anderson Death Lied About Past Use-of-Force Case*, CLEVELAND.COM (Jan. 16, 2015), http://www.cleveland.com/metro/index.ssf/2015/01/cleveland_cop_involved_in_tani.html.

39. *Id.*

40. *Id.*

41. *Police pushed, Cuffed Tamir Rice's Sister After Boy's Shooting, Video Shows*, AP (Jan. 8, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-video-20150108-story.html>; Allen Johnson, *Cold Hearts, Unedited: Footage of Shooting's Aftermath Is Deeply Disturbing*, GREENSBORO NEWS & REC. (Jan. 5, 2015), http://www.greensboro.com/blogs/thinking_out_loud/cold-hearts-unedited-footage-of-shooting-s-aftermath-is-deeply/article_5bbc7fba-9cf3-11e4-8b78-1375e90cec5b.html.

42. See *National Digest: Video Shows Police Tackling, Detaining Tamir Rice's Sister*, WASH. POST, Jan. 9, 2015, at A3; Jesse L. Wobrock, *Preliminary Expert Report Re: Shooting Death of Tamir Rice*, at 3, 4, 7 (Dec. 4, 2015), <http://chandrafirellc.firmsitepreview.com/blog/images/Jesse%20L.%20Wobrock%20Preliminary%20Report.pdf>.

43. *Id.*; see also LA. Times Staff, *Hear the 911 Call About Tamir Rice: Gun is 'Probably Fake,' Caller Says*, L.A. TIMES (Nov. 26, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-911-call-20141126-htmllstory.html>.

opening fire on the child.⁴⁴ Tamir, it turned out, was indeed holding what was only a toy gun, but the shots from the police-issued guns that killed him were fatally real.

In a (successful) attempt to justify their actions, the officers later described the sixth-grade boy as appearing to them to look like an intimidating black man,⁴⁵ similarly to how the officers four decades previously had described the black boy they killed in *Tennessee v. Garner* and to how the teenaged Michael Brown had been described by Officer Wilson, and consistently with implicit race bias studies that show a pattern of police officers over-estimating the age, and apparent danger, of black youths.⁴⁶ As with the John Crawford case, even if Tamir had been a grown man holding a real gun, as police later claimed they believed, there would have been nothing unlawful about his actions justifying a lethal police ambush, Ohio being an open carry state.⁴⁷

As Tamir lay on the ground mortally wounded from the officers' gunshots, his fourteen-year-old sister who had come outside looking for him tried to rush to his side but was tackled, restrained, and handcuffed by the police when she tried to go to her brother's aide.⁴⁸ The officers then stood by coldly without offering any medical assistance to Tamir, all the while forcing his handcuffed sister to watch helplessly from the back of the police cruiser, prevented from going to her brother's side to comfort him as he lay on the ground suffering from his mortal wounds inflicted by the officers' gunfire.⁴⁹

44. *Id.*

45. *Id.*

46. See Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J. L. & POL'Y 23, 99 (2014) (citing Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison, Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 528–30, 532 (2014)):

A recent study, for example, found that whites tend to overestimate the age of black children and do not view them as innocent, the way that children are typically seen. The study measured the implicit racial attitudes of a largely-white sample of police officers and an all-white sample of undergraduate students. Both samples overestimated the age of black children and rated them as being more culpable for criminal behavior than white or Latino children. The age-estimation errors and culpability ratings were highest for black boys.

47. See Butler, *supra* note 27.

48. Associated Press, *Police Pushed, Cuffed Tamir Rice's Sister After Boy's Shooting, Video Shows*, L.A. TIMES (Jan. 8, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-video-20150108-story.html>; Allen Johnson, *Cold Hearts, Unedited: Footage of Shooting's Aftermath Is Deeply Disturbing*, GREENSBORO NEWS & REC. (Jan. 5, 2015), http://www.greensboro.com/blogs/thinking_out_loud/cold-hearts-unedited-footage-of-shooting-s-aftermath-is-deeply/article_5bbc7fba-9cf3-11e4-8b78-1375e90cec5b.html.

49. *Id.*

The shooting was captured on video.⁵⁰

6. Anthony Hill

On March 9, 2015, a mentally ill Air Force veteran in Chamblee, Georgia, was shot to death by a police officer.⁵¹ Not only was Anthony Hill unarmed at the moment he was shot, there was no question about whether he might be hiding a weapon in a pocket, his waistband, or otherwise underneath his clothes; he was naked when he was shot.⁵² The police had arrived at the scene in response to a call from one of Hill's neighbors reporting a man "acting deranged, knocking on doors, and crawling around on the ground naked."⁵³ Hill's friends later explained that Hill's behavior was likely caused by an adverse reaction to medications he had been prescribed for his bipolar disorder, with which he had been diagnosed after fighting in Afghanistan.⁵⁴

While Anthony Hill was reported to have been trotting toward the officer in the moments before the officer fatally shot him,⁵⁵ the officer was later found to have lied about having been physically assaulted him in the moments leading up to the shooting.⁵⁶ In addition, the officer was armed with a taser and pepper spray when the unarmed, naked, Anthony Hill approached him, but the officer chose to shoot Hill with his gun instead of using the non-lethal weapons.⁵⁷ By the time a second police car pulled up at the scene, Hill had died from the fatal gunshot wounds.⁵⁸

The incident was not captured on video.

50. *Id.*

51. *See Georgia Prosecutor Seeks Charges for Cop Who Fatally Shot Naked Man Anthony Hill*, AP (Jan. 7, 2016), <http://www.nydailynews.com/news/national/ga-prosecutor-seeks-charges-shot-anthony-hill-article-1.2489444>.

52. Richard Faucett, *Police Killing of Unarmed Georgia Man Leaves Another Town in Disbelief*, N.Y. TIMES, March 10, 2016, at A20.

53. Ralph Ellis & Ashley Fantz, *Georgia Officer Indicted in Fatal Shooting*, CNN (Jan. 22, 2016), <http://www.cnn.com/2016/01/21/us/anthony-hill-shooting/>.

54. Christian Boone, *DeKalb Grand Jury Split on Police Shootings*, ATLANTA J.-CONST. (Oct. 29, 2015), <http://www.myajc.com/news/news/crime-law/da-officers-could-still-be-charged-despite-grand-j/npB7Y/> [hereinafter *Dekalb Grand Jury*].

55. *See* Christian Boone, *Who Was Anthony Hill*, ATLANTA J.-CONST. (Jan. 22, 2016), <http://www.myajc.com/news/news/local/who-was-anthony-hill/np9PK/> [hereinafter *Who Was Anthony Hill*].

56. *See* Boone, *Dekalb Grand Jury*, *supra* note 54.

57. *See* Boone, *Who Was Anthony Hill?*, *supra* note 55.

58. *Id.*

7. Eric Harris

On April 2, 2015, another unarmed black man, Eric Harris, lay dying a sidewalk, in Tulsa, Oklahoma, after being fatally shot by a volunteer reserve police officer who had pinned Harris to the sidewalk and then fired his pistol into the trapped man's back.⁵⁹ After being shot, in a moment reminiscent of Eric Garner's "I can't breathe" cries eight months earlier, Eric Harris similarly cried out, "I'm losing my breath" to the officers pinning him down.⁶⁰ This time, a police officer responded directly to this Eric's pleas for breath, but in a most chilling, grotesque manner: while his knee was grinding Harris's head to the ground, the officer cruelly yelled in response to Harris's agonized pleas for breath, "fuck your breath."⁶¹ Moments later, the officer can also be heard on the recording exclaiming, "you fucking ran. So shut the fuck up."⁶²

The shooting was captured on video.⁶³

8. Walter Scott

On April 4, 2015, two days after the shooting of Eric Harris, yet another unarmed black man was fatally shot in the back by a police officer. Walter Scott was a fifty-year-old former Coast Guardsman and a father of four, engaged to be married, on the day he was shot to death by a police officer in North Charleston, South Carolina.⁶⁴ Walter Scott, who had fled from Officer Michael Slager after being pulled over for non-functioning brake light, was killed by a volley of eight shots fired at his back by the officer as Scott was fleeing.⁶⁵ Slager was reported to have actually *laughed* about the killing afterwards as he was describing to his supervisor how shooting Scott had made his adrenaline pump.⁶⁶ After a bystander captured the shooting on video, the video went viral

59. Ralph Ellis, Christopher Lett and Sara Sidner, *Ex-Oklahoma Deputy Robert Bates Guilty of Killing Unarmed Suspect*, CNN (Apr. 28, 2016), <http://www.cnn.com/2016/04/27/us/tulsa-deputy-manslaughter-trial/>.

60. Associated Press, *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*, GUARDIAN (Apr. 14, 2015), <http://www.theguardian.com/us-news/2015/apr/14/oklahoma-eric-harris-robert-bates-jail> (video of incident available through article) [hereinafter *Oklahoma Volunteer Officer*].

61. *Id.*

62. *Id.*

63. *Id.*

64. See Alan Blinder, *Walter Scott Shooting Seen as Opening for Civil Suits Against North Charleston's Police Dept.*, N.Y. TIMES (Apr. 13, 2015), http://www.nytimes.com/2015/04/14/us/walter-scott-shooting-turns-michael-slager-into-litigant-as-north-charleston-braces-for-suits.html?_r=0 (video of incident available through article).

65. *Id.*

66. *Id.*

on the internet, with a nation of netizens horrified by the video not only showing Slager shooting Scott over and over in the back as he attempted to flee, but even apparently dropping a stun gun on Scott's body afterward, attempting to plant the stun gun to support a fabricated self-defense story.⁶⁷

9. Freddie Gray

On April 12, 2015, i.e., a week after the killings of Eric Harris and Walter Scott, another black man, Freddie Gray, died at the hands of police, this time following a violent seizure, arrest, and ride in the back of a police van so brutal that Gray's spine was severed.⁶⁸ The Baltimore police had originally seized Gray merely because he had run away after making eye contact with the police,⁶⁹ which, State Attorney Marilyn Mosby subsequently explained, does not constitute sufficient probable cause Gray had committed an offense to justify his arrest and seizure leading up to the fatal "rough ride" in the police van.⁷⁰

Although there is video of the moments leading up to Freddie Gray being thrown into the police van before the fatal drive,⁷¹ there is no video of exactly what transpired inside the van leading to Gray's death. However, the probable cause statement accompanying Mosby's subsequent announcement of charges against the police officers involved in Gray's death documented Gray repeatedly asking for, and being denied, medical help from the officers who had arrested him without probable cause that he had committed any crime.⁷² As further reported by Mosby, the medical examiner attributed Gray's death to severe injuries caused by the officers driving Gray around on a rough and ultimately fatal ride in the back of the police van, ankle-shackled

67. *Id.* See also Jonathan Capehart, *South Carolina, Unarmed Black Men and Police*, WASH. POST (Apr. 8, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/04/08/south-carolina-unarmed-black-men-and-police/>; Opinion, *What if There Were No Video?*, TIMES-HERALD (Apr. 17, 2014), <http://www.times-herald.com/opinion/20150410-Friday-editorial>.

68. See Lindsey Bever and Abby Ohlheiser, *Baltimore Police: Freddie Gray Died from a 'Tragic Injury to His Spinal Cord'*, WASH. POST (Apr. 20, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/20/baltimore-police-freddie-gray-arrested-without-force-or-incident-before-fatal-injury/>.

69. *Id.*

70. See Nichole Hensley, *Marilyn Mosby Announces Criminal Charges in Death of Freddie Gray: 'To the People of Baltimore . . . I Heard Your Call.'* (TRANSCRIPT), N.Y. DAILY NEWS (May 1, 2015), <http://www.nydailynews.com/news/crime/criminal-charges-filed-freddie-gray-death-transcript-article-1.2206744>; Manny Fernandez, *Freddie Gray's Injury and the Police 'Rough Ride'*, N.Y. TIMES, at A18.

71. See Bever & Ohlheiser, *supra* note 68.

72. See Hensley, *supra* note 70.

and belly down in the van, while not secured by a seat belt, causing his body to be violently thrown around the back of the van.⁷³ Gray was found to have “suffered a severe and critical neck injury as a result of being handcuffed, shackled by his feet and unrestrained inside the BPD wagon.”⁷⁴ During the rough ride, Gray’s head was also deeply wounded when it hit an exposed bolt.⁷⁵ Both the head injury and the spinal injury—one so severe that Gray’s spine was eighty percent severed from his neck—led to Gray’s body being mangled by the time the van arrived at the police station.⁷⁶ He died a week later after cardiac arrest, a coma, and other complications resulting from his fatal injuries.⁷⁷

10. Samuel Dubose

On July 19, 2015, an African American father of ten, Samuel DuBose, was pulled over by University of Cincinnati police officer Ray Tensing, who stopped DuBose for a missing license tag.⁷⁸ Within moments of pulling DuBose over, Tensing pointed his gun through the car window and fatally shot DuBose.⁷⁹ Although the officer later claimed that he had to fire his weapon to keep DuBose from running over him, a video of the incident showed DuBose acting politely, and not making any threatening moves toward Tensing.⁸⁰ Rather, the video “appears to show DuBose turning the ignition after Tensing tells him to take off his seat belt. The officer reaches toward the door, yells ‘Stop!’ and draws his gun. Then, he thrusts the weapon through the open car window and fires a single round, striking DuBose in the head.”⁸¹ In the days following the shooting, Hamilton County Prosecutor Joe Deters described the shooting as “the most asinine act

73. *Id.* See also Amy Davidson, *Freddie Gray’s Death Becomes a Murder Case*, *NEW YORKER* (May 1, 2015), <http://www.newyorker.com/news/amy-davidson/freddie-grays-death-becomes-a-murder-case>.

74. See Hensley, *supra* note 70.

75. *Id.* See also Davidson, *supra* note 73.

76. *Id.* See also Joy Blake, *Justice Department Opens Civil Rights Investigation in Freddie Gray’s Death*, *HINTERLAND GAZETTE* (Apr. 22, 2015), 2015 WLNR 11624433.

77. *Id.*

78. Ralph Ellis, *University of Cincinnati to Pay \$4.85 Million to Family of Man Shot by Police*, *CNN* (Jan. 19, 2016), <http://www.cnn.com/2016/01/18/us/cincinnati-police-shooting/>.

79. *Id.*

80. *Id.*

81. Kevin Williams, *Wesley Lowery & Mark Berman, University of Cincinnati Police Officer Who Shot Man During Traffic Stop Charged with Murder*, *WASH. POST* (July 29, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/07/29/prosecutors-to-announce-conclusion-of-probe-into-cincinnati-campus-police-shooting/>.

I've ever seen a police officer make—totally unwarranted . . . It's an absolute tragedy in the year 2015 that anyone would behave in this manner. It was senseless.”⁸²

B. The Reaction to Recent Police Killings

It cannot be emphasized enough that the above incidents are just a small sampling of police killings of unarmed people of color, constituting those that received the most attention across the world in a year. In addition to the above police killings, an average of one unarmed black man was killed *every nine days* by police in 2015.⁸³ And those are just the killings that were documented in a single year; the recounting of police violence against unarmed black civilians in this country could continue *ad nauseam*.⁸⁴ At some point, however, it becomes necessary to take a breath and assess the current landscape of our troubled police-civilian relations as it currently stands.

In the police killings detailed above, several of the victims were unarmed black people attempting to flee from the officers who killed them, two were young black men (in one case, a child) innocently handling toy guns that the police mistook for real guns (in contrast, there were no reports in the national news in recent years of young white men or boys being shot to death by police for holding toy guns), and one was a mentally ill woman killed by the police who had been called to help her.

Words cannot adequately capture the horror felt by those touched by these killings. In the age of smartphones, however, words do not always have to suffice, because more and more incidents of police brutality are captured on video. Thanks to citizens armed with video-enabled phones at any given street corner at any moment, instant documentation and exposure of police encounters has become instrumental in exposing police killings of and brutality against unarmed civilians.

Despite the relative recency of such citizen journalism, the above events should not be viewed as an anomaly. In addition to the chilling statistic of police killing an unarmed black man every nine days in

82. *Id.*

83. See DeNeen L. Brown, *How Videos of Police Shooting Unarmed Black Men Changes Those Who Watch Them*, WASH. POST (May 8, 2016), https://www.washingtonpost.com/local/how-videos-of-police-shooting-unarmed-black-men-changes-those-who-watch-them/2016/05/07/da2ccee-d4ed-11e5-9823-02b905009f99_story.html.

84. See *supra* Part I.A.

2015,⁸⁵ in the quarter century spanning from 1980 to 2005, “about 9,500 people nationally were killed by police . . . an average of nearly one fatal shooting per day.”⁸⁶ More recently, the estimate has been “as high as 1,000 police killings a year.”⁸⁷

A juxtaposition of such numbers with other countries’ statistics reveals a dramatic difference:

By contrast, there were no fatal police shootings in Great Britain last year. Not one. In Germany, there have been eight police killings over the past two years. In Canada—a country with its own frontier ethos and no great aversion to firearms—police shootings average about a dozen a year.⁸⁸

Furthermore, the disparity with which unarmed victims of police killings tend to disproportionately be people of color is a particularly egregious failing of American policing in a day when some wishfully proclaim that we have entered into a post-racial era. People of color are shot or killed by police at a grossly higher rate than whites across the country. In Philadelphia, for example, despite African Americans constituting less than fifty percent of the city’s population, eighty percent of the victims of police shootings were black in the five year period between 2007 and 2013.⁸⁹ In Ferguson, the Department of Justice documented that “[t]he overwhelming majority” of excessive force used by the Ferguson Police Department, nearly ninety percent, is committed against African Americans.⁹⁰

Philadelphia and Ferguson are far from anomalous. Nationwide, in the scant fifty-four police shootings between 2005 and 2015 that actually resulted in the indictment of the police officers involved in the shootings, all but two of the victims of police shootings were black, and half of those cases involved unarmed suspects who were shot in the

85. See Brown, *supra* note 83.

86. Jeff Kelly Lowenstein, *Killed by the Cops*, COLORLINES (Nov. 4, 2007), http://www.colorlines.com/archives/2007/11/killed_by_the_cops.html.

87. Eugene Robinson, Editorial, *What America’s Police Departments Don’t Want You to Know*, WASH. POST (Dec. 1, 2014), http://www.washingtonpost.com/opinions/eugene-robinson-its-a-crime-that-we-dont-know-how-many-people-police-shoot-to-death/2014/12/01/adedcb00-7998-11e4-b821-503cc7efed9e_story.html.

88. *Id.*

89. Matt Apuzzo, *Justice Department, Criticizing Philadelphia Police, Finds Shootings by Officers are Common*, N.Y. TIMES, March 23, 2015, at A1.

90. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERUGSON POLICE DEPARTMENT 28 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferugson_police_department_report.pdf [hereinafter *Ferguson Report*].

back.⁹¹ In contrast, none of the victims of fatal police shootings were white.⁹²

C. *To Indict Or Not To Indict? Police Accountability After the 2014-15 Killings*

Today, with all eyes on the police, and very often recording devices, the potential for increased accountability may be a key to ending an egregious pattern of excessive police force in this country, particularly against people of color. Exposure of police misconduct is just the beginning, after all; police must also be held accountable for their wrongdoing.

The indictment of police officers who shoot civilians remains a rare occurrence, however. Although some of the recent police killings that received worldwide attention, particularly those that were captured on video—such as the killings of Walter Scott, Eric Harris and Samuel Dubose—did result in indictments of officers, as described below, going from indictment to conviction is still a long, often unsuccessful, process.

There is also a long way to go in reversing the trend of grand juries failing to indict police officers altogether. As mentioned above, in ten years spanning from 2005 to 2015, only fifty-four police shootings (out of thousands of police shootings that occurred in that time period) culminated in the indictment of the officers involved.⁹³ In the vast majority of those fifty-four cases in which an officer was indicted, the person killed (usually black)⁹⁴ was unarmed, but the unarmed status of a victim in itself has been no guarantee of the prosecution of the police involved in such shootings. Rather, to get to an indictment, “there were typically other factors that made the case exceptional, including: a victim shot in the back, a video recording of the incident, incriminating testimony from other officers or allegations of a cover-up.”⁹⁵

Although far from a guarantee of securing justice, it does seem to

91. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?post_id=766034178_10153585744604179#_=_.

92. *Id.*

93. *Id.*

94. Although in most parts of the country it is black Americans who are disproportionately the victims of excessive police force, it should also be noted that in some urban communities, unarmed Latinos are victims at a similar rate as African Americans, particularly in New York City. See Rima Vesely-Flad, *New York City Under Siege: The Moral Politics of Policing Practices, 1993-2013*, 49 WAKE FOREST L. REV. 889, 895 (2014) (citations omitted).

95. *Id.*

be increasingly likely that a law enforcement officer will be indicted and convicted where a police killing has been captured on video.⁹⁶ Furthermore, even in cases where grand juries have failed to indict, there have been other repercussions for police departments and the officers involved in police killings, including federal investigations and, in many cases—even prior to the 2014-15 cases—civil lawsuits, some of which have already resulted in multi-million dollar settlements.⁹⁷

For example, the City of Baltimore paid out over six million dollars to victims of police brutality between 2011 and 2015 in lawsuits alleging constitutional violations and claims including assault, false arrest, and false imprisonment charges; that figure does not even include the \$6.4 million settlement paid in the Freddie Gray case.⁹⁸ The City of Chicago paid half a *billion* dollars in settlements in police brutality cases over a ten-year period.⁹⁹ In 2014, the City of Chicago paid \$50 million to victims of excessive police force,¹⁰⁰ and in 2015 paid \$5.5 million in reparations to 100 victims of a police commander who subjected the victims, mostly black men, to abuses including mock executions, electric shock, and beatings by interrogators who flung racial insults at them.¹⁰¹

96. See *id.*; see also Brown, *supra* note 83 and *infra* text accompanying note 145. While the proliferation of video evidence through netizen-journalist documentation of police killings flooding the internet in recent years has certainly aided in the process of bringing cases to justice, it is not without its costs: to be a person of color in this country is to be bombarded by the perpetual influx of traumatizing reminders of the danger of stepping outside in a world where people of color are disproportionately victims of excessive police violence and killings. See Brown, *supra* note 83.

97. Radley Balko, *U.S. Cities Pay Out Millions to Settle Police Lawsuits*, WASH. POST (Oct. 1, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/01/u-s-cities-pay-out-millions-to-settle-police-lawsuits/>.

98. Mark Puente, *Undue Force*, BALT. SUN (Sept. 28, 2014), <http://data.baltimoresun.com/news/police-settlements/>; Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, ATLANTIC (Apr. 22, 2014), <http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/> (describing previous settlements); Yvonne Wenger & Mark Puente, *Baltimore to Pay Freddie Gray's Family \$6.4 Million to Settle Civil Claims*, BALT. SUN (Sept. 8, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-boe-20150908-story.html>.

99. See Ta-Nehisi Coates, *A Corruption Beyond Chicago's Top Cop*, ATLANTIC (Dec. 1, 2015), <http://www.theatlantic.com/notes/2015/12/corruption-beyond-chicago-top-cop/418215/>.

100. Jonah Newman, *Chicago Police Misconduct Payouts Topped \$50 million in 2014*, CHI. REPORTER (Feb. 25, 2015), <http://chicagoreporter.com/chicago-police-misconduct-payouts-topped-50-million-in-2014/>.

101. See, e.g., Hal Dardick, *City to Pay \$3 Million for Police Shootings*, CHI. TRIBUNE (June 12, 2015), <http://www.chicagotribune.com/news/local/politics/ct-chicago-police-shooting-settlements-met-0613-20150612-story.html>; Jeremy Gorner, *Chicago Poised to Pay \$5 Million to Family of Teen Shot 16 Times by Police*, CHI. TRIBUNE (Apr. 10, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-million-dollar-police-settlement-met-20150410-story.html>; Aamer Madhani, *Chicago City Council Approves Reparations for Police Torture Victims*, USA TODAY (May 6, 2015), <http://www.usatoday.com/story/news/2015/05/06/chicago-city-council->

The same year, the City of Chicago paid out millions of additional dollars to settle a number of police brutality cases.¹⁰²

Most of the 2014-15 cases highlighted in this article also resulted in civil suits and other repercussions for the officers and police departments involved. For example, while the grand jury in Eric Garner's case declined to bring charges against the officers involved in his death,¹⁰³ the FBI and the DOJ initiated investigations into his death,¹⁰⁴ and in July, 2015, Garner's family settled a civil suit against New York City for \$5.9 million.¹⁰⁵ In addition, the New York Police Department subsequently announced that it would be implementing substantial changes to its use-of-force training protocols and procedures, including focusing on better communication and less lethal responses to critical incidents.¹⁰⁶ The NYPD also initiated a new program to equip officers with body cameras,¹⁰⁷ and created a new centralized Force Investigation Division unit to investigate cases involving fatal police encounters.¹⁰⁸ In the meantime, New York Governor Andrew Cuomo announced the appointment of a special prosecutor to investigate police killings of unarmed people in New York.¹⁰⁹

In the case of John Crawford III, although a special prosecutor was appointed to lead the investigation in that case,¹¹⁰ the grand jury consequently declined to indict the officer who shot Crawford.¹¹¹ However, the Department of Justice is conducting an independent

torture-reparations-jon-burge/70885118/.

102. *Id.*

103. Mark Berman, *Eric Garner's Family Settles with New York City for \$5.9 Million*, WASH. POST (July 13, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/13/eric-garners-family-settles-with-new-york-city-for-5-9-million/>.

104. See U.S. Dep't of Justice, *Statement by Attorney General Holder on Federal Investigation into Death of Eric Garner* (Dec. 3, 2015), <https://www.justice.gov/opa/speech/statement-attorney-general-holder-federal-investigation-death-eric-garner>.

105. See Berman, *supra* note 103.

106. Meghan Keneally & Evan Simon, *Law Enforcement Analysts Suggest Changes to Police Training*, ABC NEWS, May 6, 2015, <http://www.21alive.com/news/top-news/Law-enforcement-analysts-suggest-changes-to-police-training-302735961.html?llsms=1165741&c=y>.

107. See Goodman & Baker, *supra* note 15.

108. See Baker, Goodman & Mueller, *supra* note 8.

109. See Goodman & Baker, *supra* note 15.

110. Associated Press, *Father of Man Killed by Police in Ohio Wal-Mart Says He Heard Son's Dying Breaths on Phone*, FOX NEWS (Sept. 7, 2014), <http://www.foxnews.com/us/2014/09/07/father-man-killed-by-police-in-ohio-wal-mart-says-heard-son-dying-breaths-on.html>.

111. Associated Press *Grand Jury Issues No Indictments in Man's Fatal Shooting at Ohio Wal-Mart*, FOX NEWS (Sept. 25, 2014), <http://www.foxnews.com/us/2014/09/25/grand-jury-issues-no-indictments-in-man-fatal-shooting-in-southwest-ohio-wal.html>.

investigation of the shooting, and the Dayton police officer was relegated to desk duty pending the completion of that investigation.¹¹² In announcing the DOJ investigation, Senator Sherrod Brown of Ohio said: “Our top priority is to ensure that justice is served and that such a tragedy never happens again. The Department of Justice is right to conduct an independent investigation into this shooting, which has rightly raised alarm in the community.”¹¹³

In the case of Michael Brown’s killing, amidst dramatic protests in Ferguson and nationwide, Darren Wilson was cleared by a grand jury after conflicting evidence about whether, right before the officer fired the final fatal shots, Brown had looked threatening or poised to charge when he turned around to face the officer chasing him.¹¹⁴ Michael Brown’s killing also resulted in dual investigations by the Department of Justice. One of the reports cleared Officer Darren Wilson of federal charges.¹¹⁵ The other, however, uncovered a pattern of systemic problems of unconstitutional and excessively violent, racially discriminatory, policing within the Ferguson Police Department.¹¹⁶ In addition to documenting racial disparities in the use of force and in the number of stops and arrests,¹¹⁷ the report also compiled disturbing evidence of blatant racism in emails from high-ranking Ferguson officials mocking black people generally as lazy, illiterate criminals, and even depicting President Obama as a chimpanzee.¹¹⁸ Such findings led to the DOJ’s conclusion that the Ferguson Police Department’s activities “stem in part from a discriminatory purpose and thus deny African Americans equal protection of the laws in violation of the Constitution.”¹¹⁹ This report, along with others the DOJ has issued in other jurisdictions, is discussed further in Part III.B of this article.

In the tragic case of Tamir Rice, although the grand jury failed to issue an indictment (despite a municipal court judge having ruled there

112. Mark Gokavi, *Officer Who Shot John Crawford to Stay on Desk Duty*, DAYTON DAILY NEWS (Dec. 4, 2014), http://m.daytondailynews.com/news/news/crime-law/officer-who-shot-john-crawford-to-remain-on-desk-d/njLwC/#__federated=1.

113. Press Release, Senator Sherrod Brown, Sen. Brown Issues Statement on Department of Justice Investigation into Shooting of John Crawford, III (Sept. 24, 2014), available through Westlaw Federal News database.

114. See REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 28, at 82,

115. *Id.*

116. See *Ferguson Report*, *supra* note 90.

117. *Id.* at 28.

118. *Id.* at 72–73.

119. *Id.* at 63.

was probable cause for an indictment),¹²⁰ a civil suit brought by the boy's family eventually resulted in a six million dollar settlement in April of 2016.¹²¹ The response of a lead Cleveland police union spokesman to news of the Tamir Rice settlement was that the money should go toward teaching children to be more careful with guns; he made no mention of putting money toward teaching *police* to be more careful with guns.¹²²

In the case of Tanisha Anderson's killing, a special prosecutor was appointed after sheriffs' investigators found a conflict of interest precluding the Cuyahoga County Prosecutor from remaining in charge of the investigation.¹²³ In that case, a civil wrongful death has been filed as well.¹²⁴ The suit filed by Anderson's family alleges excessive force in violation of Anderson's constitutional rights, wrongful death, assault and battery, and a violation of the Americans with Disabilities Act.¹²⁵

Then, however, in contrast with past cases, there were rapid indictments in the cases of Anthony Hill, Eric Harris, Walter Scott, Freddie Gray, and Samuel DuBose and a conviction in the case of Samuel DuBose.

In the Anthony Hill case, in January 2016, the DeKalb County grand jury indicted the officer who shot Hill on two counts of felony murder, one count of aggravated assault, one count of making a false statement and two counts of violation of oath by a public officer.¹²⁶ The indictment represents the first time in five years that a law enforcement officer had been prosecuted in Georgia for fatally shooting a civilian.¹²⁷ The criminal charges in that case are in addition to a wrongful death

120. See David A. Graham, "Probable Cause" in the Killing of Tamir Rice, ATLANTIC (June 11, 2015), <http://www.theatlantic.com/politics/archive/2015/06/tamir-rice-case-cleveland/395420/>.

121. Peggy & Ed Gallek, *Gazebo Where Tamir Rice Was Shot Will Be Torn Down*, Family Attorney Says, FOX 8 CLEVELAND (Apr. 29, 2016), <http://fox8.com/2016/04/29/gazebo-where-tamir-rice-was-shot-will-be-torn-down-family-attorney-says/>.

122. See Vince Grzegorek, *Cleveland Police Union Wants Tamir Rice's Family to Donate Part of Settlement Money Toward Gun Education*, CLEVELAND SCENE (Apr. 25, 2016), <http://www.clevescene.com/scene-and-heard/archives/2016/04/25/cleveland-police-union-wants-tamir-rices-family-to-donate-part-of-settlement-money-toward-gun-education>.

123. Corey Shaffer, *Ohio Attorney General's Office to Take Over Tanisha Anderson Case*, CLEVELAND.COM (Feb. 17, 2016), http://www.cleveland.com/metro/index.ssf/2016/02/ohio_attorney_generals_office_1.html.

124. Brandon Blackwell, *Cleveland Cop Involved in Tanisha Anderson Death Lied About Past Use-of-Force Case*, CLEVELAND.COM (Jan. 16, 2015), http://www.cleveland.com/metro/index.ssf/2015/01/cleveland_cop_involved_in_tani.html.

125. Complaint, Goodwin v. City of Cleveland, No. 1:15-cv-27 (N.D. Ohio Jan. 7, 2015).

126. Ralph Ellis & Ashley Fantz, *Georgia Officer Indicted in Fatal Shooting*, CNN (Jan. 22, 2016), <http://www.cnn.com/2016/01/21/us/anthony-hill-shooting/>.

127. *Id.*

civil lawsuit filed by Hill's family against the officer who shot Hill, the DeKalb County Police Department, the County, and the County's board of commissioners.¹²⁸

In a world in which indictments of police are rare, and, if they come, seem to come after long delays, the speed with which an indictment was handed down in the case of Eric Harris's death—a short twelve days after he was killed by Deputy Bates in Tulsa, Oklahoma—marked a turning point. Not only was a grand jury quick to indict, but a year later, Bates was convicted of manslaughter, although only sentenced to four years.¹²⁹

Even more substantial and immediate was the response to Walter Scott's shooting in South Carolina. In that case, three days after Scott was gunned down by Officer Michael Slager, Slager was charged with first degree murder; a jury trial is scheduled to begin October, 2016.¹³⁰ Not only was the State quick to bring serious charges against Slager, but additional investigations are being conducted by the FBI, the Department of Justice, and South Carolina's U.S. Attorney.¹³¹ On May 10, 2016, a federal grand jury charged Slager with a civil rights violation in the shooting of Walter Scott.¹³² Slager could face up to life in prison as well as up to a \$250,000 fine if ultimately convicted.¹³³ Another noteworthy response to the Walter Scott killing is that in the aftermath of that case, South Carolina enacted a new state law to facilitate the statewide use of body cameras by police.¹³⁴

In the case of Freddie Gray, in addition to bringing charges against the six Baltimore Police Department officers involved in the events leading to Gray's death, the City of Baltimore agreed to a settlement

128. See Associated Press, *Georgia Prosecutor Seeks Charges for Cop Who Fatally Shot Naked Man Anthony Hill*, N.Y. DAILY NEWS (Jan. 7, 2016), <http://www.nydailynews.com/news/national/ga-prosecutor-seeks-charges-shot-anthony-hill-article-1.2489444>.

129. See Ellis, Lett, & Sidner, *supra* note 59.

130. See Michael Martinez, *South Carolina Cop Shoots Unarmed Man: A Timeline*, CNN (Apr. 9, 2015), <http://www.cnn.com/2015/04/08/us/south-carolina-cop-shoots-black-man-timeline>.

131. See Michael Winter, *S.C. Victim, Cop Struggled Before Killing*, USA TODAY (Apr. 8, 2015), <http://www.usatoday.com/story/news/nation/2015/04/08/sc-police-shooting-family-civil-suit/25450485/>.

132. See Mark Berman & Wesley Lowery, *Former South Carolina Police Officer Who Fatally Shot Walter Scott Indicted on Federal Civil Rights Violation*, WASH. POST (May 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/11/former-north-charleston-officer-who-shot-walter-scott-indicted-on-federal-civil-rights-violation/?tid=sm_fb.

133. *Id.*

134. See Will Whitson & Jack Kuenzie, *South Carolina's Body Camera Bill Is Now Law*, WIS (June 10, 2015), <http://www.wistv.com/story/29289442/south-carolinas-body-camera-bill-is-now-law>.

with Freddie Gray's family in the amount of \$6.4 million.¹³⁵ As to the criminal charges against the officers, four of the officers were charged with manslaughter charges, one was additionally charged with a count of second degree depraved-heart murder, and two others face lesser criminal charges.¹³⁶ Each defendant is being tried separately. One trial has resulted in a hung jury and, as a result, a mistrial,¹³⁷ and two others have resulted in acquittals.¹³⁸ In addition to the state criminal charges being brought, the DOJ has opened a civil rights investigation into Gray's death (indeed, one of the first official acts taken by Loretta Lynch as the country's new attorney general was to announce the investigation¹³⁹) and a broader investigation into whether the Baltimore Police Department has engaged in patterns and practices of discriminatory or otherwise unlawful policing.¹⁴⁰

In the case of Samuel DuBose, the response from authorities condemning the police shooting was unequivocal and immediate. The county prosecutor described the police shooting as "senseless, asinine shooting" that was "without a question a murder," and University of Cincinnati Officer Ray Tensing was immediately fired and soon thereafter indicted on murder and voluntary manslaughter charges.¹⁴¹

135. Yvonne Wenger & Mark Puente, *Baltimore to Pay Freddie Gray's Family \$6.4 Million to Settle Civil Claims*, BALT. SUN (Sept. 8, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-boe-20150908-story.html>.

136. Jonathan Capehart, *Marilyn Mosby's Amazing Press Conference*, WASH. POST (May 1, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/05/01/marilyn-mosbys-amazing-press-conference/>; see Nicole Hensley, *TRANSCRIPT: Marilyn Mosby Announces Criminal Charges in Death of Freddie Gray: 'To the People of Baltimore . . . I Heard Your Call.'* N.Y. DAILY NEWS (May 1, 2015), <http://www.nydailynews.com/news/crime/criminal-charges-filed-freddie-gray-death-transcript-article-1.2206744>.

137. Justin Fenton & Kevin Rector, *Mistrial Declared in Trial of Officer William Porter in Death of Freddie Gray*, BALT. SUN (Dec. 16, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-jury-wednesday-20151216-story.html>.

138. Justin Fenton & Kevin Rector, *Freddie Gray Case: Baltimore Police Officer Edward Nero Found Not guilty of All Charges*, BALT. SUN (May 23, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-nero-verdict-20160521-story.html>; Ray Sanchez, *Freddie Gray Verdict: Baltimore Officer Who Drove Van Not Guilty on All Charges*, CNN (June 24, 2016), <http://www.cnn.com/2016/06/23/us/baltimore-goodson-verdict-freddie-gray/>.

139. Julia Edwards, *U.S. Justice Dept. Opens Civil Rights Probe into Baltimore Police*, REUTERS (May 8, 2015), <http://www.reuters.com/article/2015/05/08/us-usa-police-baltimore-idUSKBN0NT1LO20150508>.

140. Jim Bourg, *Loretta Lynch Confirms Department of Justice Review of Baltimore Police*, NEWSWEEK (May 5, 2015), <http://www.newsweek.com/loretta-lynch-confirms-department-justice-review-baltimore-police-329982>.

141. Andrews Setters, *Judge Sets Date for Former Officer Ray Tensing's Murder*, WLWT5 (Feb. 11, 2016), <http://www.wlwt.com/news/judge-expected-to-set-trial-date-for-former-officer-ray-tenzing/37939618>.

The trial in his case has been set for October of 2016.¹⁴² In the meantime, the family of Samuel DuBose settled a civil suit against the University of Cincinnati for \$4.85 million; the university also agreed to provide free college education to DuBose's twelve children.¹⁴³

In the aftermath of Tensing's indictment for the shooting of Samuel DuBose, the Washington Post reported, "[o]f 558 fatal shootings by police so far this year . . . the death of DuBose is only the fourth to result in criminal charges against the officer."¹⁴⁴ The Post further reported that of the other three killings, two involved black men shot by white police officers, and all three shootings that resulted criminal charges had been captured on video.¹⁴⁵

Thus, while the ten 2014-15 police killings highlighted in this article might seem to indicate a trajectory toward greater police accountability, as a general matter, most police killings still do not result in indictments of police. The small sampling of cases displaying some indicia of improved police accountability is just that: a small sampling, and not fully representative of the voluminous number of cases that have escaped scrutiny, perpetuating a continued pattern of inadequate police accountability.

Within days of the Tamir Rice settlement, and as this article was being written, news of yet another police shooting of a black teenaged boy who was holding only a toy gun hit the news.¹⁴⁶ Although the boy in that case, unlike Tamir, survived his injuries from the police shooting, the case, paralleling Tamir's shooting, serves as a reminder that police shooting unarmed people of color, including children, continues to be a problem in this country. Indeed, waiting for a lull in police killings of unarmed people of color to write this article has been a pointless endeavor; the killings keep happening, even as civil rights activists and government actors rush to halt the epidemic of police killings through meaningful reform efforts, discussed in Part IV of this article.

142. *Id.*

143. Ralph Ellis, *University of Cincinnati to Pay \$4.85 Million to Family of Man Shot by Police*, CNN (June 19, 2016), <http://www.cnn.com/2016/01/18/us/cincinnati-police-shooting/>.

144. Kevin Williams, Wesley Lowery & Mark Berman, *University of Cincinnati Police Officer Who Shot Man During Traffic Stop Charged with Murder*, WASH. POST (July 29, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/07/29/prosecutors-to-announce-conclusion-of-probe-into-cincinnati-campus-police-shooting/>.

145. *Id.*

146. Matt Vasilogambros, *A Police Shooting over a Fake Gun in Baltimore*, THE ATLANTIC (Apr. 27, 2016), <http://www.theatlantic.com/national/archive/2016/04/baltimore-police-shooting-toy-gun/480267/>.

Before examining in detail the various police reform measures that have been proposed across the country, however, this article will first address one particular piece of the reform puzzle, pertaining to use-of-force training: the necessary emphasis of constitutional restrictions on lethal force that have too often been ignored, with at times deadly results.

III. THE IMPORTANCE OF *TENNESSEE V. GARNER* AND THE DANGER OF THE 21-FOOT RULE

A. *The Importance of Tennessee v. Garner in Use-of-Force Protocols (Despite Graham v. Connor Criticisms)*

This article began with the troubling facts of what became a seminal Supreme Court case on the constitutional limitations of permissible lethal use of police force, the Supreme Court's 1985 *Tennessee v. Garner* case, involving the shooting of the young, unarmed Edward Garner as the boy was fleeing from the officer who shot him.¹⁴⁷ The Court's *Garner* opinion opened with the following declaration:

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.¹⁴⁸

The Court emphatically established in *Garner* that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . .”¹⁴⁹ The Court explained that even if the police had reason to believe that Edward Garner had broken into someone's home, that fact would not establish probable cause that Garner was armed or dangerous, which is what must have been established to justify deadly force.¹⁵⁰

147. 471 U.S. at 3–4.

148. *Id.* at 3.

149. *Id.* at 11.

150. *Id.* at 11, 20.

While a later Supreme Court case recognized that a suspect fleeing in a speeding car might pose such a danger to others,¹⁵¹ it has never found such a danger posed by an unarmed individual fleeing by foot. This is particularly significant in light of recent police killing cases that sparked victim-blaming “well, he shouldn’t have run!” commentary across the country. For example, members of the public commenting on the brutal killing of Walter Scott, who was shot eight times in the back as he attempted to flee from Officer Slager in South Carolina, exclaimed, for example, “no one has said why he was running or why he even got out of his car why not just take ticket and leave”¹⁵² and “don’t want to get shot then don’t run from the police—especially over a broken tail light.”¹⁵³

Such kneejerk responses to police shootings of fleeing, unarmed individuals are anathema to (morality and decency and) the constitutional limitations on use of deadly police force set forth in *Garner*. As troubling as such comments are coming from uninformed members of the general public, what is even more disturbing is when similar sentiments are expressed by the members of the police force themselves, and most tellingly, by the very officers involved in the shootings of unarmed civilians who are attempting to flee from them.

One chilling example is the killing of Eric Harris. As Harris lay dying on a Tulsa, Oklahoma sidewalk, fatally wounded by police fire and crying out for help, moments before the officer’s callous “fuck your breath” response,¹⁵⁴ Harris had screamed out “He shot me. Oh my God,” and in response the deputy responded, “you fucking ran. So shut the fuck up.”¹⁵⁵

151. See *Scott v. Harris*, 550 U.S. 372, 386 (2007) (holding that “[a] police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”); see also *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014) (shooting was justified where car chase “exceeded 100 miles per hour and lasted over five minutes,” and Court concluded that the fleeing driver’s “outrageously reckless driving posed a grave public safety risk”); Andrew S. Pollis, *The Death of Inference*, 55 B.C.L. REV. 435, 474 (2014) (questioning the Supreme Court’s conclusion in *Scott v. Harris* that “no reasonable jury could have believed’ the plaintiff’s assertion that the police officers involved used unnecessary deadly force”).

152. Hollis Conant, *Comment to One Thing Media Pundits Won’t Say About Walter Scott’s Shooting*, ALLENBWEST.COM (Apr. 9, 2015), <http://allenbwest.com/2015/04/one-thing-media-pundits-wont-say-about-walter-scotts-shooting/> (comments section).

153. CNN Wire Service, *Officer Charged with Murder, Fired; Protesters Demand Justice After Shooting Is Caught on Camera*, FOX 6 NOW (Apr. 7, 2015), 7:24 PM, <http://fox6now.com/2015/04/07/114788/> (comments section, comment by “YOUTHWITHOUTYOUTH”).

154. See *supra* Part II.A.7.

155. See *Oklahoma Volunteer Officer*, *supra* note 60; see also Ellis, Lett & Sidner, *supra* note 59 (video).

The disturbing implication of the deputy's chilling words to a dying man, "you fucking ran. So shut the fuck up," is that the deputy seemed to believe that someone who runs from the police deserves to be fatally shot, a belief that flies in the face of both Supreme Court precedent and human decency.

Two days after that exchange, another one of the infamous police killings caught on video again revealed a pattern of police officers acting upon the deadly and erroneous assumption that flight alone can justify deadly force. The officer who shot Walter Scott in South Carolina, while laughing about the adrenaline rush he got during the shooting, also had the following exchange with his supervisor in the same conversation:

The supervisor suggests to Slager, "When you get home, it would probably be a good idea to kind of jot down your thoughts on what happened — the adrenaline is just pumping."

"It's pumping," Slager responds, and they both laugh.

Then there is a pause for a few seconds, and Slager speaks again, softly:

"I don't understand why he took off like that."

Another short pause.

"I don't understand why he'd run."¹⁵⁶

This language, paralleling that from the officer who screamed, "you fucking ran!" at Eric Harris as he lay dying, seems to emphasize the fact that Scott's flight was at least an exacerbating factor causing the officer to feel justified in his lethally violent response to the Harris's attempt to flee.

The case of Samuel DuBose is another example of police attempting to justify lethal force against an unarmed person of color afterwards by arguing that the victim was trying to get away. In that case, the officer, in a chillingly matter-of-fact description of how he killed DuBose, described after the shooting, "He took off on me. I discharged one round. Shot the man in the head."¹⁵⁷

In light of *Garner's* clear language prohibiting the use of lethal force to prevent flight of a non-dangerous suspect, how could the law

156. Bruce Smith & Phillip Lucas, *Dash Cam: Officer Who Shot Black Man Told Boss He Ran Away*, SEATTLE TIMES (Apr. 13, 2015), <http://www.seattletimes.com/nation-world/sharpton-praises-response-to-fatal-sc-police-shooting/>.

157. *Id.*

enforcement officers involved in the killings of Eric Harris, Walter Scott and Samuel DuBose all believe that the flight of those men justified using lethal force against them? None of those cases, from the facts as they are currently known, would survive *Garner*'s prohibition of deadly police force to stop an unarmed fleeing felon from running away from a police officer, let alone an innocent civilian.

What the police who killed Eric Harris, Walter Scott, and Samuel DuBose failed to grasp, with terrible repercussions, is that the Supreme Court in *Garner*, while acknowledging the need of law enforcement to restrain fleeing felons, emphatically held that lethal force is *not* a constitutional means of accomplishing that end, declaring: "It is not better that all felony suspects die than that they escape."¹⁵⁸ *Garner*'s holding necessarily extends to prohibit lethal force against fleeing unarmed suspects of mere misdemeanors, not just felons, and to individuals who are not suspected of any particular crime at all (such as Eric Garner, Eric Harris, and Walter Scott).

Although *Tennessee v. Garner*'s limitations were clearly not at the forefront of the officers' minds in those cases, to this day, *Garner* remains the seminal Supreme Court case limiting the use of deadly force by law enforcement officers.¹⁵⁹ This is true even if *Garner* is not sufficiently emphasized in use-of-force trainings or universally understood by both law enforcement and civilian populations. To fully appreciate the necessary role that *Garner* must play in use-of-force training and analyses of cases involving police killings, it is important to recognize that *Garner* is as much good law today as the day it was decided. This is the case even after the subsequent *Graham v. Connor*¹⁶⁰ decision that articulated a broader objective reasonableness standard for analyses of use-of-force generally (i.e., not just in those cases specifically involving lethal force against fleeing suspects).

In following *Garner*, *Graham* did not overrule or subrogate the former case, or minimize *Garner*'s prohibition on lethal force against non-dangerous fleeing suspects. *Graham* set an "objective reasonableness" standard for evaluating excessive force claims against police generally. In contrast, *Garner* set forth more concrete

158. *Id.*

159. A Westlaw search conducted on May 12, 2016 reveals that *Garner* has been cited in 3,603 cases with no negative treatment from the Supreme Court other than the language in *Scott v. Harris*, 550 U.S. 372 (2007), which, as will be discussed *infra* text accompanying note 171, limited *Garner* in certain cases involving dangerous high-speed car chases.

160. 490 U.S. 386 (1989).

parameters, laying down black letter law on use-of-force limitations in lethal force cases involving fleeing, unarmed or otherwise non-dangerous suspects.

Graham has been subject to criticism over the years as too vague and indeterminate to rein in the use of police force,¹⁶¹ and has even been used as a shield by some policing communities resistant to recent reform efforts.¹⁶² Even the Supreme Court itself,¹⁶³ in the process of reaffirming *Graham*'s reasonableness standard, condescendingly described the process of applying that standard as "slosh[ing] our way through the factbound morass of 'reasonableness.'"¹⁶⁴

The Police Executive Research Forum (PERF) has described *Graham* as only setting forth broad principles, while failing to provide specific guidance to police agencies on the best types of use-of-force policies.¹⁶⁵ With *Graham* setting only a common denominator, many agencies, as PERF recommends, have opted to go beyond the bare minimum requirements set forth by *Graham*.¹⁶⁶ Thus, the second formal Guiding Principle recommended by PERF in its report (described in more detail in the following section) is that police agencies should develop use-of-force policies, practices and trainings "that go beyond the minimum requirements of *Graham v. Connor*."¹⁶⁷ No similar mention is made of *Tennessee v. Garner*.

There may be validity to criticisms of *Graham* as creating too vague of a standard for general use-of-force analyses, and perhaps some day the Court will refine or replace the *Graham* standard of reasonableness. There is no indication, however, that the Court will do so any time soon.

161. See, e.g., Police Executive Research Forum, *Guiding Principles on Use of Force* 15–16, 72–73, 118 (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>, [hereinafter *PERF Use-of-Force Report*]; Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1129–33 (2008); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486–88 (1994); Leon Neyfakh, *Was the Shooting of Tamir Rice "Reasonable"?* SLATE MAGAZINE (Oct. 14, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/10/tamir_rice_shooting_were_officer_tim_loehmann_s_actions_reasonable.html.

162. See *PERF Use-of-Force Report*, *supra* note 161, at 72 (describing resistance to PERF's proposed guidance principles by "various factions [who] took exception, calling on law enforcement agencies to reject the Principles in that they exceed the 'objectively reasonable' standard of *Graham v. Connor*").

163. Or, at least, the late Justice Scalia did, in his characteristically colorful style, writing for the majority.

164. *Scott v. Harris*, 550 U.S. 372, 383 (2007).

165. See, e.g., *PERF Use-of-Force Report*, *supra* note 161, at 15–19.

166. *Id.*

167. *Id.* at 35.

Indeed, as recently as 2015, the Court reaffirmed that *Graham* establishes the applicable standard for use-of-force cases generally. Specifically, in *Kingsley v. Hendrickson*,¹⁶⁸ the Court clarified that the Fourth Amendment (*Graham* standard) is the applicable constitutional standard that sets the parameters for permissible use-of-force leading up to and during arrest, while the Fourteenth Amendment is the applicable standard for use-of-force that occurs during pre-trial detention and the Eighth Amendment applies post-conviction.¹⁶⁹ In so doing, the Court did nothing to refine or call into question the *Graham* standard.

More importantly, whatever flaws may be attributed to *Graham v. Connor*, the baby—*Tennessee v. Garner*—must not be thrown out with the bathwater. For all of *Graham*'s criticisms, *Garner* is a different, and less vague, decision than *Graham*; in contrast with the latter decision, *Garner* sets forth clear prohibition against use of lethal force in specific circumstances. Not only is it possible for police reform advocates hoping to rein in excessive police violence to simultaneously criticize the vagueness of the *Graham* and embrace the central holding of *Garner*, it makes sense to do so.

While interpreting *Garner* as allowing lethal police force to stop a high-speed dangerous car chase,¹⁷⁰ even the 2007 *Scott v. Harris* Supreme Court decision illustrates that neither *Harris* nor *Graham v. Connor* abrogated or overruled *Garner*'s prohibition against police shooting at unarmed fleeing suspects (especially those fleeing by foot). Indeed, Justice Scalia, writing for the majority in *Scott v. Harris*, was careful to explain that the facts in that case bore little resemblance to facts involving shooting at an unarmed suspect fleeing by foot, in which case *Garner* would still prohibit the use of lethal police force, even under *Graham*'s reasonableness standard:

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, by shooting him "in the back of the head" while he was running away on foot, and when the officer

168. 135 S. Ct. 2466 (2015).

169. *Id.* at 2472–73.

170. *Scott v. Harris*, 550 U.S. 372, 382–83 (2007).

“could not reasonably have believed that [the suspect] ... posed any threat,” and “never attempted to justify his actions on any basis other than the need to prevent an escape.” Whatever *Garner* said about the factors that might have justified shooting the suspect in that case, such “preconditions” have scant applicability to this case, which has vastly different facts. “*Garner had nothing to do with one car striking another or even with car chases in general A police car’s bumping a fleeing car is, in fact, not much like a policeman’s shooting a gun so as to hit a person.*” Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case.¹⁷¹

From this language, it should be clear that *Scott v. Harris* and *Graham v. Connor* both leave intact *Garner*’s prohibition against lethal force in cases involving police shootings of unarmed fleeing suspects, especially when the suspects are fleeing on foot, as opposed to in a car.

Furthermore, while *Scott v. Harris* may stand for the proposition that the Constitution does not prohibit law enforcement officers from shooting at moving vehicles, it sets a floor, not a ceiling, for use-of-force protocols imposed by law enforcement agencies. In other words, police departments may, regardless of *Scott v. Harris*, adopt policies prohibiting officers from shooting at moving vehicles. And a number of police departments, including the New York Police Department, have done exactly that.¹⁷²

Ideally, police departments that seek to curtail excessive use of lethal force will continue to emphasize the clear constitutional prohibition of *Garner* on use of lethal force against non-dangerous fleeing suspects while *also* adding additional safeguards and limitations on use-of-force, such as extending that rule to prohibitions against shooting at fleeing cars, as departments such as the NYPD have done.

171. *Id.* (citations omitted) (emphasis added).

172. As described by the Police Executive Research Forum:

In August 1972, a New York City police officer shot and killed an 11-year-old African-American boy while he was fleeing in a stolen car in Staten Island. That incident prompted the NYPD to adopt a new policy prohibiting the use of deadly force at a moving vehicle unless the occupants were using deadly force by means other than the vehicle itself. As highlighted earlier in this report, that policy change produced an immediate and dramatic reduction in officer-involved shootings with no negative impact on officer safety. Over time, this policy has become a best practice in policing and has been adopted by many more agencies.

Police Executive Research Forum, *Guiding Principles on Use of Force* 118 (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>. See also *id.* at 44 (describing other police departments that have banned shooting at moving vehicles).

The rationale for establishing clear rules limiting lethal police force is supported by a letter from San Francisco Police Chief Greg Suhr republished in the PERF Use-of-Force report. In the letter, Chief Suhr explains that his department has implemented a policy prohibiting the use of deadly force against individuals who pose a danger only to themselves, for the following reasons:

This was designed for that type of situation where somebody calls the police asking for help, and the police end up using deadly force against a person who was threatening suicide or was in mental crisis.

I believe that police officers like absolute rules, because they're easy to follow. And so if they know going in that they cannot use deadly force against someone who is only threatening himself, then they've got to figure something else out. Since May 2011, we haven't had a situation in which an officer used deadly force against a person who was a danger only to themselves.¹⁷³

Chief Suhr raises an important point: police do indeed like clear standards. It is for this reason as well that *Garner's* clear prohibition against lethal force against fleeing, unarmed or otherwise non-dangerous individuals should be re-emphasized in, not omitted from, police use-of-force trainings, whether or not any given department decides to go even further and also prohibit deadly force against *any* non-dangerous individual, whether fleeing or not.

For all of the above reasons, to omit *Garner's* clear prohibition against police shooting at unarmed fleeing persons along with *Graham's* less clear "reasonableness" standard in police training would be a grave mistake.

A. *The Danger of the 21-Foot Rule*

Another reason it is important to include *Garner's* prohibition of lethal force against fleeing suspects—including, as affirmed in *Scott v. Harris*, the prohibition against shooting fleeing suspects in the back and using lethal force against those fleeing by foot – is that the limitations of *Garner* are in particular need of being emphasized in use-of-force training to counteract the harm done by the proliferation in the recent past of a non-constitutional standard too often taught in *Garner's* stead: the 21-foot rule.

The 21-foot rule is an unofficial law enforcement maxim that police use to justify lethal force when less than twenty-one feet separates an

173. *Id.* (emphasis added).

officer from a suspect. As described by the Police Executive Research Forum, the history of the 21-foot rule is as follows:

In 1983, a firearms instructor with the Salt Lake City Police Department conducted a rudimentary series of tests that purported to show that an adult male, armed with a knife and charging at full speed, could cover 21 feet before a police officer has time to draw, aim, and shoot a firearm. In 1988, Calibre Press, Inc., featured the tests in a police training video, and many police agencies and officers have embraced the “21-foot rule” ever since.

Some have argued that the original study was merely intended to warn officers about maintaining a “safety zone” between themselves and offenders with edged weapons. But over time, police chiefs have said that this “safety zone” concept was corrupted, and in some cases has come to be thought of as a “kill zone”—leading some officers to believe they are automatically justified in shooting anyone with a knife who gets within 21 feet of the officer.

Although some have claimed that few officers today are formally trained in the “21-foot rule,” many police chiefs have said that the 21-foot-rule continues to be disseminated informally. PERF’s research into recent incidents revealed examples of the “rule” being cited by officers or their attorneys to justify shootings of suspects with edged weapons.¹⁷⁴

Thus, the main thrust of the 21-foot rule is that an armed adult male should be assumed to be able to cover twenty-one feet in distance before a police officer has time to draw a weapon. Police across the country who are trained in the 21-foot rule have used that rule as a guideline in assessing when someone is dangerous enough to justify use of lethal force.¹⁷⁵

Described in police circles as a “timeless classic,” the 21-foot rule became popular not only through police training videos, but also through its republication in SWAT magazine.¹⁷⁶ Since it was first published, it “has been taught in police academies around the country, accepted by courts and cited by officers to justify countless shootings.”¹⁷⁷

174. *Id.* at 20.

175. See Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES, May 4, 2014, at A1.

176. The original article has been republished on the internet at *Strategies for Resolving Conflict and Minimizing Use of Force*, POLICE EXEC. RESEARCH FORUM (Apr. 2007), http://www.policeforum.org/assets/docs/Critical_Issues_Series/strategies%20for%20resolving%20conflict%20and%20minimizing%20use%20of%20force%202007.pdf.

177. Apuzzo, *supra* note 175.

It appears that police have even begun applying the 21-foot rule to justify use of lethal force in cases where a suspect is unarmed. There were at least hints of a 21-foot rule justification in the aftermath of the Michael Brown shooting in Ferguson, with Officer Darren Wilson in that case rationalizing the shooting in part by emphasizing the close distance he perceived between himself and Brown in his statement that Brown had “started running at Wilson, closing the distance between them to about 15 feet,” at which point Wilson “feared for his life” and fired multiple shots at him moments later.¹⁷⁸

The role the 21-foot rule may have played in the Ferguson case was further demonstrated in subsequent media interviews, for example, with Bill Johnson of the National Association of Police Organizations, who said of the use-of-force principles at play in the Michael Brown shooting, “The general rule of thumb everywhere in the country is keep firing until the threat is stopped . . . You can be up to 20 feet away and close within just a second or two close that. That’s all the time the officer has to react.”¹⁷⁹ Similarly, the following exchange occurred on the Anderson Cooper 360° show, on which a criminal defense attorney explained how officers are trained in the 21-foot rule, which he indicated was at play in the shooting of Michael Brown:

TOOBIN: [J]ust because there was a confrontation at the car, that doesn’t give officer Wilson the right to shoot Michael Brown if he’s not a threat.

(CROSSTALK) O’MARA: It does, however, heighten officer Brown’s fear as—officer Wilson’s fear as what he might expect from Brown if he’s been aggressive to an officer, number one. And number two, don’t forget that cops are trained within 20 feet they can get to you and hurt you before you can react. *So that 21-foot rule that cops have is there for a reason.*¹⁸⁰

James O’Keefe, former New York Police Department Deputy Commissioner for Training has described the 21-foot rule as a guideline used by “[p]retty much every police department in the country” for decades, and one fraught with risks. He explained, “if [it’s] not taught

178. REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 28, at 14–15.

179. *The Lead with Jake Tapper: National Guard Leaving Ferguson; Holder Assures Family Of Fairness; Controversy Over St. Louis Shooting; U.S. Refused To Pay Ransom for Foley*, CNN (Aug. 21, 2014), <http://www.cnn.com/TRANSCRIPTS/1408/21/cg.02.html>.

180. *Anderson Cooper 360 Degrees: Presidential Call for Calm as People in Ferguson, Missouri and Across the Country Wait for Word of a Grand Jury*, CNN (Nov. 22, 2014, 8:00 PM), <http://www.cnn.com/TRANSCRIPTS/1411/21/acd.01.html> (emphasis added).

properly, some young cop could shoot a guy and he could find himself in civil and or criminal trouble.”¹⁸¹

Shadows of the 21-foot rule and its residual effect on the police psyche also cast doubt over the circumstances surrounding Tamir Rice’s killing. The sole factor emphasized in that case to justify the shooting of the twelve-year-old child was how the officers felt in danger in the moment right after they pulled their police cruiser within seven feet of the child . . . and then instantly opened fire on him.¹⁸² The police placed themselves within feet of the boy, and created the imaginary danger (i.e., close distance as a proxy for danger) that they then used to defend their use of lethal force. But the 21-foot-rule-like emphasis on proximity, as in Michael Brown’s case, became justification in the officers’ minds (and, apparently, the grand jurors’) for killing the person who stood too close for comfort.

Thus, it appears that dangers of the 21-foot rule have come to fruition in recent years, resulting not just in more deaths, but also a corresponding blurring of moral lines, as it has enabled the more violence-prone among the police to justify killing civilians.

Returning to the significance of constitutional restraints, another problem with the 21-foot rule is that the rule does not take into account the Constitution’s prohibition against use of deadly force against someone who is unarmed and is turned away from or fleeing the police, as established in *Tennessee v. Garner*. Rather, a principle made popular among police through SWAT magazine and never once addressed by the Supreme Court seems to have come to actually replace *Garner* in some police officers’ minds as the governing standard for when they deem it justifiable and necessary to use deadly force.

Since I first proposed doing away with the 21-foot rule in police training in a Howard Law Journal article,¹⁸³ I was thrilled to see that the Police Executive Research Forum itself also “recommend[ed] discontinuing . . . the so-called ‘21-foot rule’” in use-of-force policies,

181. Meghan Keneally & Evan Simon, *Law Enforcement Analysts Suggest Changes to Police Training: Law Enforcement Analysts Suggest Changes to Police Training*, ABC NEWS (May 6, 2015), <http://www.21alive.com/news/top-news/Law-enforcement-analysts-suggest-changes-to-police-training-302735961.html?lms=1165741&c=y>.

182. See Associated Press, *Grand Jury Declines to Indict Cleveland Officer in Fatal Shooting of 12-year-old Tamir Rice*, L.A. TIMES (Dec. 28, 2015), <http://www.latimes.com/nation/la-na-tamir-rice-grand-jury-20151228-story.html>.

183. See Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOWARD L.J. 5, 46–54 (2016).

training and tactics.¹⁸⁴ In its recent Use of Force Report, PERF even devoted one of its thirty proposed guidelines (discussed in Section IV.C, *infra*), to the mandate that “Agencies should eliminate from their policies and training all references to the so-called ‘21-foot rule’ regarding officers who are confronted with a subject armed with an edged weapon.”¹⁸⁵

This recommendation by PERF should be implemented by every police department in this country. The 21-foot rule, for all the reasons described herein, should have never become the standard by which the appropriateness of lethal police force was measured, and particularly not in lieu of actual constitutional standards.

III. SURVEY OF RECENT POLICING REFORM EFFORTS

As it is becoming increasingly apparent that lethal force by police against unarmed civilians is not an uncommon occurrence in this country, particularly against people of color, communities across the country are struggling for answers. Various reforms have been proposed and are being implemented, with the Obama administration taking the lead in spearheading national law enforcement reform initiatives. There are too many reform efforts at the state and local level to condense here; suffice it to say that by August of 2015 there had already been forty new state policing reform measures proposed in response to Black Lives Matter protests and other responses to the police killings of unarmed people of color across the country.¹⁸⁶ This article focuses on the national policing reform efforts detailed below, many of which, ideally, will be used to guide local reform efforts.

A. *White House Initiatives*

On December 18, 2014, President Barack Obama signed an Executive Order that established the President’s Task Force on 21st Century Policing.¹⁸⁷ In a press release announcing the program, the White House explained that the events in Ferguson “and around the country have highlighted the importance of strong, collaborative

184. *PERF Use-of-Force Report*, *supra* note 161, at 5.

185. *Id.* at 54.

186. See Associated Press, *Police Protests, Ferguson Spurred 40 New State Measures; Activists Want More*, WCPO CINCINNATI (Aug. 2, 2015), <http://www.wcpo.com/news/crime/police-protests-ferguson-spurred-40-new-state-measures-activists-want-more>.

187. Exec. Order No. 13684 (Dec. 18, 2014). See also Dep’t of Justice, *Policing Task Force*, <http://www.cops.usdoj.gov/policingtaskforce>.

relationships between local police and the communities they protect.”¹⁸⁸ The press release included an announcement of several new national programs to address systemic policing problems and to implement community-based policing models and measures across the country.¹⁸⁹

In its initial announcement of the program, the White House explained that police reform measures would include the review of highly-criticized programs that in essence militarize police through providing federal military-grade equipment to local law enforcement.¹⁹⁰ The White House further announced plans for collaboration among its police reform task force, the Department of Justice, and members of the law enforcement and civilian communities, with the goal of developing comprehensive reform measures that would promote crime reduction while simultaneously building public trust.¹⁹¹ In addition, the White House announced a Community Policing Initiative that “will increase use of body-worn cameras, expand training for law enforcement agencies (LEAs), add more resources for police department reform, and multiply the number of cities where DOJ facilitates community and local LEA engagement.”¹⁹²

Five months later, in May of 2015, the President’s Task Force on 21st Century Policing issued its final report filled with a number of recommendations and action items related to six “pillars”: building

188. Press Release, White House, *FACT SHEET: Strengthening Community Policing* (Dec. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing> [hereinafter *White House Press Release*].

189. *Id.*

190. *Id.* See also ACLU, *War Comes Home: The Excessive Militarization of the American Policing* (June 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-re11.pdf>; see generally Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward A Right to Civil Law Enforcement*, 21 *YALE L. & POL’Y REV.* 383 (2003) (discussing issue of militarization of police). The Department of Justice has also called into question whether to end the militarization of local police, noting in its report on Cleveland:

CDP too often polices in a way that contributes to community distrust and a lack of respect for officers – even the many officers who are doing their jobs effectively. For example, we observed a large sign hanging in the vehicle bay of a district station identifying it as a “forward operating base,” a military term for a small, secured outpost used to support tactical operations in a war zone. This characterization reinforces the view held by some—both inside and outside the Division—that CDP is an occupying force instead of a true partner and resource in the community it serves.

U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 6* (December 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf. [hereinafter *Cleveland Report*].

191. See *White House Press Release*, *supra* note 188.

192. *Id.*

trust and legitimacy; policy and oversight; technology and social media; community policing and crime reduction; training and education; and officer wellness and safety.¹⁹³

Under the “building trust and legitimacy” pillar, the Report set forth a number of manners in which trust could be rebuilt between the police and citizen communities, and urged law enforcement communities to “embrace a guardian – rather than a warrior – mindset to guild trust and legitimacy within agencies and with the public.”¹⁹⁴ Toward that end, the Report makes various recommendations related to improving transparency and accountability. Some of the recommendations and corresponding action items include law enforcement acknowledgement of past and present discrimination; making policies and law enforcement data, including police misconduct data, publically available; greater school and community involvement with law enforcement; residency incentive programs for law enforcement officers; limiting “[u]se of physical control equipment and techniques against vulnerable populations—including children, elderly persons, pregnant women, people with physical and mental disabilities, limited English proficiency, and others”; surveying the communities being policed; promoting diversity within law enforcement communities; and improving relationships with immigrant communities.¹⁹⁵ The “community policing” pillar of the report similarly emphasizes the need for law enforcement communities to proactively work cooperatively and collaboratively with the communities they serve, rather than acting as an occupying force in urban communities.¹⁹⁶

Under the “policy and oversight” pillar, the Report emphasizes the constitutional rights of citizens to peacefully demonstrate and the corresponding need for clearly articulated policies regarding police use of force. The discussion of this section of the Report begins, “Not only should there be policies for deadly and non-deadly uses of force but a clearly stated ‘sanctity of life’ philosophy must also be at the forefront of every officer’s mind.”¹⁹⁷ Other than this general statement about the need for use-of-force policies, and despite numerous recommendations and action items related to the policy and oversight pillar, however, the

193. President’s Task Force on 21st Century Policing, 2015, *Final Report of the President’s Task Force on 21st Century Policing I*, (May 2015), http://www.cops.usdoj.gov/pdf/taskforceofTaskForce_FinalReport.pdf [hereinafter *President’s Policing Task Force Report*].

194. *Id.* at 1.

195. *Id.* at 12–18.

196. *Id.* at 41–42.

197. *Id.* at 19.

Report does not get any more specific about what the limitations on use of force should be. That said, it makes a number of other critical suggestions. For example, it recommends that use-of-force training emphasize de-escalation and alternatives to arrest and summons; that use of force policies be “clear, concise, and openly available for public inspection”; that there be “external and independent criminal investigations in cases of police use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths”; that such investigations include the use of external and independent prosecutors, and civilian oversight, peer review and community partnership review boards; that there be improved data collection and reporting of use-of-force incidents and demographic data of stop, frisk, and arrest incidents; that law enforcement responses to mass demonstrations and protests emphasize de-escalation rather than a militarized appearance; that there be a mechanism for complaints and sanctions “regarding the inappropriate use of equipment and tactics during mass demonstrations”; that there be community-oriented policing; and that there be improved anti-discrimination policies and treatment of LGBT community members.”¹⁹⁸

Under the “technology & social media” pillar, the Report falls short of recommending uniform use of body cameras (or, as the Report calls them, BWCs—for “Body Worn Cameras”). Rather, the Report defers somewhat to objections to BWCs in a 2014 Police Executive Research Forum publications warning that BWCs may negatively impact the relationship between police and community members and raise privacy concerns.¹⁹⁹ However, the Report also acknowledges the potential benefits of BWCs, as well as other improved technology, such as use of social media for both communications and investigative purposes. While not taking a position on whether any given law enforcement community should implement body camera programs, the Report does offer a “Body Worn Camera Toolkit” developed by the Bureau of Justice Assistance to help those law enforcement communities that opt to implement BWC programs.²⁰⁰

This section of the report also addresses the need for the federal government to support the development of “less than lethal” technology, emphasizing that “[t]he fatal shootings of Ferguson, Cleveland, and elsewhere have put the consequences of use of force

198. *Id.* at 19–30.

199. *See id.* at 32.

200. *Id.* at 31–36.

front and center in the national news,” leading to the development of new technologies, such as conductive energy devices (CEDs) like tasers and stun guns, which can decrease both fatal police incidents and overall injuries to both officers and law enforcement officers.²⁰¹ Most pertinent for purposes of this article’s proposal is action item 3.6.1 of the Report, which merely states, without detailed elaboration, “Relevant federal agencies . . . should expand their efforts to study the development and use of new less than lethal technologies and evaluate their impact on public safety, *reducing lethal violence against citizens, constitutionality*, and officer safety.”²⁰²

The “training & education” pillar section of the report sets forth numerous recommendations for police training and leadership development in the contexts of community policing, communication, situational decision-making, crisis intervention, procedural justice, impartial policing, trauma and victims’ services, mental health, analytical technology and research, and cultural and language responsiveness.²⁰³ Most pertinent for this article, one of the recommendations addresses constitutional limitations on policing as follows:

5.10 RECOMMENDATION: POSTs [Peace Officers Standards and Trainings] should require both basic recruit and in-service training on policing in a democratic society.

Police officers are granted a great deal of authority, and it is therefore important that they receive training on the constitutional basis of and the proper use of that power and authority. Particular focus should be placed on ensuring that *Terry* stops²⁰⁴ are conducted within constitutional guidelines.²⁰⁵

This recommendation, however, cites only *Terry v. Ohio*, while never mentioning the seminal *Tennessee v. Garner* case that limits the use of lethal police force. As previously explained, such an omission is problematic, neglecting an essential component of use-of-force training that should be emphasized rather than entirely omitted from such a critical guiding document on policing reform.

201. *Id.* at 37–38.

202. *Id.* at 38.

203. *Id.* at 51.

204. *Terry v. Ohio*, 392 U.S. 1 (1968).

205. *See President’s Policing Task Force Report*, *supra* note 193, at 59.

The final pillar of the report sets forth a number of guidelines and action items related to the protection and improvement of law enforcement officers' fitness to serve, health and wellness, and safety.²⁰⁶

B. Department of Justice Reform Efforts

The involvement of the executive branch in police reform is not a new occurrence; the Department of Justice has been involved in policing reform for decades, largely in the form of investigations, reports, and implementation of reform plans in cities found to have systemic problems with discrimination, excessive force, or otherwise unlawful policing practices.

In the past two decades, the DOJ conducted sixty-seven civil rights investigations of police departments across the country, including in large cities such as Cleveland, Los Angeles, New Orleans, Seattle, and Washington D.C.; smaller communities such as Steubenville, Ohio; counties such as Maricopa County, Arizona, and Montgomery County, Maryland; the Commonwealth of Puerto Rico; and the territory of the Virgin Islands.²⁰⁷ In eight of its investigations, the DOJ discovered patterns and practices of civil rights violations, often involving excessive force and/or racial profiling, and it consequently entered into agreements with those cities to implement reform measures recommended by the DOJ.²⁰⁸ The result of twenty-six other investigations were consent decrees or other binding agreements, which involved DOJ's continued monitoring of the police departments involved, until completion of the reform measures is established.²⁰⁹ Those police departments subject to consent decrees continue to be under the management of the federal court that approved the consent decree.²¹⁰

206. *Id.* at 61–68.

207. Kimbriell Kelly, Sarah Childress and Steven Rich, *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

208. *Id.*

209. *Id.*

210. *Id.*

While the particular findings of the DOJ may vary from community to community, the reform measures recommended by the Department are exemplified by those in its Ferguson Report,²¹¹ for example, which issued recommendations that the Ferguson Police Department:

1. Implement a Robust System of True Community Policing²¹² . . .
2. Focus Stop, Search, Ticketing and Arrest Practices on Community Protection²¹³ . . .
3. Increase Tracking, Review, and Analysis of FPD Stop, Search, Ticketing and Arrest Practices²¹⁴ . . .
4. Change Force Use, Reporting, Review, and Response to Encourage De-Escalation and the Use of the Minimal Force Necessary in a Situation²¹⁵ . . .
5. Implement Policies and Training to Improve Interactions with Vulnerable People²¹⁶ . . .
6. Change Response to Students to Avoid Criminalizing Youth While Maintaining a Learning Environment²¹⁷ . . .
7. Implement Measures to Reduce Bias and Its Impact on Police Behavior²¹⁸ . . .

211. See *Ferguson Report*, *supra* note 90.

212. *Id.* at 90. More specifically, the Department of Justice recommended that a system of community policing should implement community policing, involvement, and partnerships in identifying crime prevention goals; change the assignment of officers to less onerous and geographically inconsistent shifts; train officers on anti-discrimination, along with crime prevention and officer safety; and focus evaluations on the measurement of community engagement, crime prevention, and problem-oriented policing projects rather than on generating profitable arrest and citation numbers. *Id.*

213. *Id.* at 91 (addressing many problems specific to Ferguson regarding the abuse, for example, of the citation and summons system in that community).

214. *Id.* at 91–92. The DOJ specifically recommended that the police department implement and monitor a more comprehensive data collection plan regarding stops, searches, ticketing and arrests; require supervision of all activity supervisions and review of all officer reports; and “[a]nalyze race and other disparities shown in stop, search, ticketing, and arrest practices to determine whether disparities can be reduced consistent with public safety goals.”

215. *Id.* at 92.

216. In particular, the mentally ill. See *id.* at 93 (detailing the specific recommendations).

217. This recommendation focuses in part on Ferguson’s SRO (School Resource Officer) system, including, for example, identifying and remedying racially disparate treatment of students and ensuring that “SROs develop[] positive relationships with youth in support of maintaining a learning environment without unnecessarily treating disciplinary issues as criminal matters or resulting in the routine imposition of lengthy suspensions.” *Id.* at 94. For a comprehensive discussion of the issue of SROs as contributing to a school-to-prison pipeline problem, see generally Note, Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147 (2015).

218. See *Ferguson Report*, *supra* note 90, at 94. The DOJ specifically recommends, in addition

8. Improve and Increase Training Generally²¹⁹ . . .
9. Increase Civilian Involvement in Police Decision Making²²⁰ . . .
10. Improve Officer Supervision²²¹ . . .
11. [Improve] Recruiting, Hiring, and Promotion²²² . . .
12. Develop Mechanisms to More Effectively Respond to Allegations of Officer Misconduct²²³ . . .
13. Publicly Share Information about the Nature and Impact of Police Activities.²²⁴

While each of these reform measures may play a critical role in ending a pattern of excessive police force, most relevant to the lethal use-of-force issue is the following specific Department of Justice recommendation coinciding with the above fourth point:

to other reform efforts that will indirectly reduce bias, that the police department also:

- a. Provide initial and recurring training to all officers that sends a clear, consistent and emphatic message that bias-based profiling and other forms of discriminatory policing are prohibited. Training should include:
 - 1) Relevant legal and ethical standards;
 - 2) Information on how stereotypes and implicit bias can infect police work;
 - 3) The importance of procedural justice and police legitimacy on community trust, police effectiveness, and officer safety;
 - 4) The negative impacts of profiling on public safety and crime prevention;
- b. Provide training to supervisors and commanders on detecting and responding to bias-based profiling and other forms of discriminatory policing;
- c. Include community members from groups that have expressed high levels of distrust of police in officer training;
- d. Take steps to eliminate all forms of workplace bias from FPD and the City.

Id.

219. *Id.* at 94.

220. *Id.* at 95.

221. *Id.*

222. *Id.* The DOJ specifically recommends that the department:

- a. Ensure that the department's officer hiring and selection processes include an objective process for selection that employs reliable and valid selection devices that comport with best practices and federal anti-discrimination laws;
- b. In the case of lateral hires, scrutinize prior training and qualification records as well as complaint and disciplinary history;
- c. Implement validated pre-employment screening mechanisms to ensure temperamental and skill-set suitability for policing.

Id. at 95–96.

223. *Id.* at 96 (more specific recommendations detailed therein).

224. *Id.* More specifically, the DOJ recommends “provid[ing] regular and specific public reports on police stop, search, arrest, ticketing, force, and community engagement activities, including particular problems and achievements, and describing the steps taken to address concerns” and also making publically available regular reports on misconduct complaints and their resolution, and a complete set of police policies. *Id.*

FPD should reorient officers' approach to using force by ensuring that they are trained and skilled in using tools and tactics to de-escalate situations, and incentivized to avoid using force wherever possible. FPD also should implement a system of force review that ensures that improper force is detected and responded to effectively, and that policy, training, tactics, and officer safety concerns are identified.²²⁵

Although the Ferguson Report proceeds to detail a number of specific changes to use-of-force training, the recommendations do not specifically address limitations, constitutional, or otherwise, on the use of *lethal* force. The Report makes only passing reference to the need for training to include coverage of constitutional restrictions on police force, without mentioning specifically what those restrictions are.²²⁶

The Department of Justice's Cleveland report does a better job, clearly spelling out the constitutional rules and Supreme Court precedents on lethal force limitations that control use-of-force cases:

The most significant and "intrusive" use of force is the use of deadly force, which can result in the taking of human life, "frustrat[ing] the interest of . . . society . . . in judicial determination of guilt and punishment." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Use of deadly force (whether or not it actually causes a death) is permissible only when an officer has probable cause to believe that a suspect poses an immediate threat of serious physical harm to the officer or another person. *Id.* at 11. A police officer may not use deadly force against an unarmed and otherwise non-dangerous subject, *see Garner*, 471 U.S. at 11, and the use of deadly force is not justified in every situation involving an armed subject. *Graham*, 490 U.S. at 386.²²⁷

As to the Department of Justice's investigations in other cities, the DOJ's letter documenting its findings in the investigations of the Albuquerque²²⁸ and New Orleans²²⁹ police departments similarly spelled out *Garner*'s prohibition of lethal police force against unarmed and otherwise non-dangerous individuals.

225. *Id.* at 92–93.

226. *Id.* at 94–95.

227. *See Cleveland Report*, *supra* note 190, at 13.

228. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *Albuquerque Police Department Findings* (Apr. 10, 2014), at 10, https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf.

229. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (March 16, 2011), at 1, https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

In contrast, the 36-page Memorandum of Agreement between the Department of Justice and the City of Cincinnati and its police department,²³⁰ while detailing required policing reform measures, made no mention of *Garner*'s lethal force restriction. Neither did the consent decree between the DOJ and Pittsburgh,²³¹ nor the DOJ and Steubenville, Ohio,²³² nor the DOJ's detailed findings letters following either its investigation of Washington D.C.'s police department,²³³ or the Portland Police Bureau,²³⁴ nor the DOJ's investigation report on Seattle.²³⁵

The DOJ's failure to spell out constitutionally mandated limitations on permissible lethal force in so many of the critical reports, finding letters, and consent decrees may have contributed to the mixed results of the DOJ's reform efforts. As the Washington Post reports: "measured by incidents of use of force, one of Justice's primary metrics, the outcomes are mixed. In five of the 10 police departments for which sufficient data was provided, use of force by officers increased during and after the agreements. In five others, it stayed the same or declined."²³⁶

C. *Police Executive Research Forum "Guiding Principles on Use of Force" Report (And Local Departments' Implementation of the Guiding Principles)*

In March of 2016, a membership organization of police officials called the Police Executive Research Forum issued a "Guiding

230. *Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department* (Apr. 12, 2002), <http://www.cincinnati-oh.gov/police/linkservid/EA1A2C00-DCB5-4212-8628197B6C923141/showMeta/0/>.

231. See 1997 Consent Decree between U.S. and Pittsburgh, <https://www.justice.gov/crt/united-states-district-court-western-district-pennsylvania-united-states-america-plaintiff-v-0> (last updated Aug. 6, 2015).

232. See 1997 Consent Decree between U.S. and Steubenville, <https://www.justice.gov/crt/united-states-district-court-southern-district-ohioeastern-division-united-states-america> (last updated Aug. 6, 2015).

233. William R. Yeomans, Findings Letter RE Use of Force by the Washington Metropolitan Police Department, <https://www.justice.gov/crt/findings-letter-re-use-force-washington-metropolitan-police-department>.

234. Thomas E. Perez & Amanda Marshall, Findings Letter RE Use of Force by the Portland Police Bureau, (Sept. 12, 2012), <http://www.portlandoregon.gov/police/article/469399>.

235. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (Dec. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf.

236. Kimbriell Kelly, Sarah Childress, & Steven Rich, *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

Principles on Use of Force” report in response to the White House Task Force Report.²³⁷ PERF’s report contains its own recommendations for police reform, specific to use-of-force principles and practices. Many of the recommendations in the PERF Use-of-Force Report reference reform efforts that have already begun to be implemented at the local level, and some of PERF’s recommendations went even further than those in the White House Report or required by the Constitution, as described below.

The thirty recommendations contained within the report – each accompanied by more detailed explanations, examples, and guiding suggestions for implementation, and many of which have already been adopted by law enforcement agencies across the country²³⁸ – are:

1. The *sanctity of human life* should be at the heart of everything an agency does . . .²³⁹
2. Agencies should continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of *Graham v. Connor* . . .²⁴⁰
3. Police use of force must meet the test of *proportionality* . . .²⁴¹
4. Adopt de-escalation as formal agency policy . . .²⁴²
5. The *Critical Decision-Making Model* provides a new way to approach critical incidents . . .²⁴³
6. *Duty to intervene*: Officers need to prevent other officers from using excessive force . . .²⁴⁴

237. See *PERF Use-of-Force Report*, *supra* note 161.

238. See *id.* at 74–78, 120 (citations omitted). The report describes the implementation of specific guidelines by police departments in Little Rock; Utah; Parma and Columbus Ohio; Massachusetts; San Francisco; Albuquerque; Salt Lake City; San Diego; Washington State; Danbury, Connecticut; Tucson; New York City; Philadelphia; Camden County, New Jersey; Dallas; Denver; Riverdale Park, Maryland; Las Vegas; Daytona Beach, Florida; Eugene, Oregon; Syracuse, New York; Los Angeles; Buffalo, New York; Kansas City, Missouri; Richmond, California; Fairfax County, Virginia; and San Francisco. As reflected in the previous section on Department of Justice efforts though, this should not be taken as a comprehensive list of cities in the United States engaged in substantial policing reform.

239. *Id.* at 34.

240. *Id.* at 35.

241. *Id.* at 38.

242. *Id.* at 40.

243. *Id.* at 41. The Report further explains that the Critical Decision-Making Model, adopted from the United Kingdom, provides a framework for officers that provides specific, logical, accessible steps to guide officers when facing critical situations. *Id.* The Critical Decision-Making Model is described in more detail at pages 53 and 79–87 of the Report.

244. *Id.* at 41.

7. Respect the sanctity of life by promptly *rendering first aid* . . .²⁴⁵
8. *Shooting at vehicles* must be prohibited . . .²⁴⁶
9. Prohibit use of deadly force against individuals who pose a danger only to themselves . . .²⁴⁷
10. *Document* use-of-force incidents, and review data and enforcement practices to ensure that they are *fair and non-discriminatory*. . .²⁴⁸
11. To build understanding and trust, agencies should issue *regular reports to the public* on use of force. . .²⁴⁹
12. All critical police incidents resulting in death or serious bodily injury should be *reviewed by specially trained personnel*. . .²⁵⁰
13. Agencies need to be *transparent* in providing information following use-of-force incidents. . .²⁵¹
14. Training *academy content and culture* must reflect agency values. . .²⁵²
15. Officers should be trained to use a *Critical Decision-Making Model*. . .²⁵³
16. Use *Distance, Cover, and Time* to replace outdated concepts such as the “21-foot-rule” and “drawing a line in the sand”. . .²⁵⁴

245. *Id.* at 43.

246. *Id.* at 44. The application of this principle mitigates *Scott v. Harris*’s holding that *Garner* does not prohibit using lethal force against vehicles involved in high-speed cases. Prior to this recommendation, police departments that already banned shooting at moving vehicles included New York City, Boston, Chicago, Cincinnati, Denver, Philadelphia, and Washington D.C. *See id.* at 44.

247. *Id.* at 48. This principle arguably goes even further than *Tennessee v. Garner*, which prohibits deadly force against those fleeing from officers who pose no threat; as articulated above, PERF would extend the prohibition of deadly force against non-dangerous (to others) persons to situations even where a person is not fleeing. Although that might seem to be a matter of common sense, in situations like that of Tanisha Anderson, a clearer prohibition against such violence, if followed, may have saved a woman’s life.

248. *Id.*

249. *Id.* at 49.

250. *Id.* at 51.

251. *Id.* at 52.

252. *Id.*

253. *Id.* at 53. *See also supra* note 243 (describing the Critical Decision-Making Model).

254. *Id.* at 54. The “Distance, Cover, and Time” model is one in which officers are trained to buy more time to assess a critical situation by using distance and cover between themselves and the individual they are confronting. *Id.*

17. *De-escalation* should be a core theme of an agency's training program. . . ²⁵⁵
18. De-escalation starts with effective communications. . . ²⁵⁶
19. Mental Illness: Implement a *comprehensive agency training program* on dealing with people with mental health issues. . . ²⁵⁷
20. *Tactical training and mental health training need to be interwoven* to improve response to critical incidents . . . ²⁵⁸
21. *Community-based outreach teams* can be a valuable component to agencies' mental health response. . . ²⁵⁹
22. Provide a prompt *supervisory response to critical incidents* to reduce the likelihood of unnecessary force. . . ²⁶⁰
23. *Training as teams* can improve performance in the field. . . ²⁶¹
24. *Scenario-based training* should be prevalent, challenging, and realistic. . . ²⁶²
25. Officers need *access to and training in less-lethal options*. . . ²⁶³
26. Agencies should consider *new options for chemical spray*. . . ²⁶⁴
27. An ECW [Electronic Control Weapons] deployment that is not effective does not mean that officers should automatically move to their firearms. . . ²⁶⁵

255. *Id.*

256. *Id.* at 56.

257. *Id.* at 57.

258. *Id.* at 60.

259. *Id.* at 61.

260. *Id.* at 62. Under this recommendation, supervisors would immediately respond to scenes involving weapons, mental health crises, or where there is an apparent potential for significant use of force; supervisors would work closely with officers to develop appropriate actions plans that, if possible, are driven by de-escalation, and include input from officers with special training in mental illness response, in cases of mental health crises. *Id.*

261. *Id.* at 64.

262. *Id.*

263. *Id.* at 65.

264. *Id.* at 66.

265. *Id.* at 67.

28. *Personal protection shields* enhance officer safety and may support de-escalation efforts during critical incidents, including situations involving person with knives, baseball bats, or other improvised weapons that are not firearms. . .²⁶⁶
29. *Well trained call-takers and dispatchers* are essential to the police response to critical incidents. . .²⁶⁷
30. *Educate the families of persons with mental illness* on communicating with call-takers. . .²⁶⁸

Each of these recommendations, as well as those made by the White House Task Force and the Department of Justice, are critical elements of police reform. Of particular note are the second and ninth guidelines, which would impose even stricter limitations on lethal force that required by *Graham v. Connor*, and the sixteenth, which explicitly rejects the 21-foot rule as the applicable standard of lethal use-of-force.

Although the PERF recommendations go a long way toward providing methods of reining in excessive police force, including the sorely needed rebuke of the 21-foot rule, there is a glaring omission in the Report. As with previous best practices manuals and training materials disseminated by PERF to police departments across the country,²⁶⁹ it contains no reference to *Tennessee v. Garner*'s constitutional restrictions on lethal force. PERF continues to omit any mention of the case whatsoever, even while describing preferred training protocols related to use of force and even despite the Report's reference to *Graham v. Connor*.

It is commendable that the Police Executive Research Forum is working to implement training protocols standards that go beyond those required by the Constitution, but an explicit adoption of *Garner*'s prohibition of lethal force against non-dangerous fleeing individuals could have even further strengthened the Guidelines. Such an explicit reference to *Garner* would remind those following the Guidelines that

266. *Id.* at 68.

267. *Id.* The report highlights the Tamir Rice incident as an example where better training of the dispatcher, who in that case failed to convey to the police at the scene the original caller's information that the weapon at issue was "probably fake" and that the person standing in the park was "probably a juvenile," instead reporting a "man with a gun" to the police, who responded by pulling up to Tamir and fatally shooting him. *Id.* at 69.

268. *Id.* at 71.

269. See Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOWARD L.J. 101, 140–41 (2016) (describing the lack of references to *Garner* in Police Executive Research Forum, *An Integrated Approach to De-Escalation and Minimizing Use of Force*, 36–37 (Aug. 2012)).

the prohibition of lethal force against unarmed suspects does not just make good sense from a policy perspective, but to the extent the prohibition applies to unarmed, non-dangerous fleeing suspects, it is consistent with constitutional mandates.

D. Ferguson Action Demands

Finally, civil rights groups such as Black Lives Matter have made various calls for police reform in the aftermath of the 2014-15 police killings. The most comprehensive list of demands for reform (but still just a summary statement, in comparison to the 100+ page reports issued by the White House, Department of Justice, and Police Executive Research Forum in the past year) has come from the “Ferguson Action” group that was formed in response to the Michael Brown shooting in 2014. Their demands include:

1. The De-militarization of Local Law Enforcement across the country
2. A Comprehensive Review of systemic abuses by local police departments, including the publication of data relating to racially biased policing, and the development of best practices.
3. Repurposing of law enforcement funds to support community based alternatives to incarceration and the conditioning of DOJ funding on the ending of discriminatory policing and the adoption of DOJ best practices
4. A Congressional Hearing investigating the criminalization of communities of color, racial profiling, police abuses and torture by law enforcement
5. Support the Passage of the End Racial Profiling Act
6. The Obama Administration develops, legislates and enacts a National Plan of Action for Racial Justice

Most of the above parallel those in the reform proposals of the White House Task Force, the Department of Justice, and the Police Executive Research Forum, and will hopefully remain part of future reform efforts. To the extent that two of the proposals require congressional action, however, those proposals may be the least likely to actually be implemented. As of the writing of this article, the Republican-led Congress has failed to hold the requested hearings on police abuse and race discrimination. Further, the Stop Militarizing

Law Enforcement Act has not moved since it was introduced to the House Armed Services Subcommittee on Readiness in August of 2015,²⁷⁰ and the End Racial Profiling Act similarly appears to have died in committee since it was referred to the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations in May of 2015.²⁷¹

CONCLUSION

Police brutality, particularly against communities of color, is not a new issue in this country. In the century-and-a-half since the abolition of slavery, this country has continued to exhibit a shameful history of law enforcement-perpetuated oppression of people of color. Even in the past half century, a steady pattern of excessive police violence that disproportionately affects communities of colors has persisted in many parts of the country. Sometimes it seems that not much has changed since the 1960's, an era of explosive conflict between law enforcement and urban communities of color, when 52 percent of blacks in one survey identified police brutality as a major caused of disorder in their communities.²⁷² Prior to the 1960's, of course, police brutality against people of color was even worse, including disturbing patterns of ties between law enforcement and the Ku Klux Klan, which were open and notorious during the Reconstruction Era.²⁷³

What is new is both the degree to which police violence is now being documented and made available to the public, thanks largely to citizen (or "netizen") journalism through smartphone and internet technology, and the national outcry and reform efforts that have recently sprouted across the country as a result.

Some of the reform proposals common among the models described in this article have incredible value and promise—from de-escalation and demilitarization, to greater community involvements, greater police transparency and accountability, diversification of police department and more meaningful diversity training—and have begun to be implemented to varying degrees across the country.

270. See H.R. 1232, 114th Cong. (2015).

271. See H.R. 1933, 114th Cong. (2015).

272. See TAYLOR, *supra* note 19, at 116 (citations omitted).

273. Some contend that white supremacist ties to law enforcement continue to exist today in some police communities. See generally Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079 (1996).

But these reform proposals have failed to emphasize the constitutional standard of *Tennessee v. Garner*,²⁷⁴ which must be resurrected. Under *Garner*, it must be taught and re-taught, an officer *may not* use deadly violence against an unarmed person, a fleeing person, or a civilian (even, under *Garner*, a fleeing felon), absent probable cause that deadly force is absolutely necessary to prevent an immediate threat of serious physical harm to others.²⁷⁵ As the PERF Use-of-Force Report recognized, the 21-foot rule is not an acceptable standard for lethal use of force.²⁷⁶ However, removing the vestiges of the 21-foot rule is just the first step for meaningful lethal use-of-force reform. In addition to the many other reform measures on the table, it is imperative that lethal force training include a sufficient emphasis on *Tennessee v. Garner*'s prohibition of deadly force by police against unarmed or otherwise non-dangerous fleeing individuals. Under *Garner*, it must be taught and re-taught, an officer *may not* use deadly violence against an unarmed person, a fleeing person, or a civilian (even, under *Garner*, a fleeing felon), absent probable cause that deadly force is absolutely necessary to prevent an immediate threat of serious physical harm to others.²⁷⁷

Although *Garner*'s general prohibition of deadly force against non-dangerous civilians is a well-established Supreme Court precedent, there is a disconnect with members of both the general public and the law enforcement community who have too often exclaimed after the shooting of another unarmed black civilian, "he shouldn't have run." Too many in this country wrongfully believe that mere flight justifies police acting as judge, jury, and executioner on the streets without due process.

As previously described, that the police officers involved in shootings of unarmed civilians have expressed such dangerous and fallacious beliefs that flight justifies lethal force is the most troubling. *Garner*'s prohibition of deadly police force against fleeing unarmed or otherwise non-dangerous civilians is not a complicated principle. But if it is not clearly taught and emphasized in every use-of-force training protocol, that omission will result in the loss of a much-needed check against unconstitutional, deadly, excessive force by police. It seems fair to conclude that the officers involved in the recent police killings of

274. 471 U.S. 1 (1985).

275. *Id.* at 11.

276. *See supra* Part IV.C.

277. *Garner*, 471 U.S. at 11.

unarmed, fleeing black men such as Eric Harris and Walter Scott were not conscious of the constitutional limitations on lethal force set forth in *Garner*.

Ensuring that use-of-force training includes an emphasis of *Garner*'s prohibition against lethal violence toward unarmed or otherwise non-dangerous fleeing persons would not be inconsistent with approaches already recommended in national reform efforts, most of which propose lethal use-of-force restrictions consistent with *Garner*. Even the law enforcement community itself, through the PERF report, while not explicitly citing *Garner*, recommends that police departments "prohibit the use of deadly force, and carefully consider the use of many less-lethal options, against individuals who pose a danger only to themselves and not to other members of the public or to officers."²⁷⁸ That recommendation simultaneously incorporates *Garner*'s prohibition of lethal force against non-dangerous individuals and also expands it to add a prohibition of lethal force against those who are dangerous only to themselves.

Most of the police reform models discussed herein mention the need for teaching constitutional restrictions in use-of-force training. However, it is the Department of Justice approach that most explicitly recognizes the importance of teaching *Garner*, with the DOJ specifically incorporating an emphasis of *Garner* in a number of its investigative Reports, admonishing cities found to engage in patterns of excessive force to follow the constitutional restraints of *Garner* on lethal force in the future.²⁷⁹ The language in such reports can serve as a model for lethal use-of-force training protocols and reform measures across the country.

In conclusion, my proposal for ensuring meaningful police reform that may have the best chance of reining in police killings of unarmed civilians is that, in addition to the myriad of other critical reform measures discussed herein, the lethal use-of-force training components of future policing reform efforts must include—at a bare minimum—an emphasis of *Garner*'s prohibition of deadly police force against unarmed, non-dangerous fleeing persons. While police departments may choose to go beyond that (for example, PERF's recommended prohibition of lethal force against those not dangerous to others, whether they are fleeing or not), at the very least, police must be

278. See *PERF Use-of-Force Report*, *supra* note 161, at 48.

279. See *supra* Part IV.B.

instructed, and the public educated as well, about the constitutional limits of permissible deadly police force as set forth in *Garner*.

There was a time when law enforcement officers were regularly referred to as “peace officers.” They earned that title because they were generally regarded as keeping the peace in communities, not themselves being instigators or agitators of violence. Today, however, there has been a growing awareness of the extent to which some police departments in this country have been guilty of patterns of excessive force and racial discrimination in their policing. While the majority of law enforcement officers surely entered into the law enforcement profession to be guardians, not warriors, the use-of-force training of past decades has not always been conducive to police officers truly acting as, and being regarded as, officers of the peace.

This is a resilient country, and an evolving one. The collective conscience of this nation has driven a nationwide policing-reform movement to remedy the abuses, excesses, and systemic discriminatory practices in American policing. We have a chance to get it right this time, to fix a shamefully, but not completely, broken system. It can no longer be a common or acceptable practice in this country for police to gun down or otherwise use deadly force against unarmed civilians, the same civilians whom they are sworn to serve and protect. It is time for police to be guardians who protect the people of this country, not soldiers at war with them.