

Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform

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“I CAN’T breathe. I can’t breathe.”

—Eric Garner, July 17, 2014, Staten Island, NY, to police officer choking him.¹

“Fuck your breath.”

—County Deputy to Eric Harris, April 14, 2015, Tulsa, OK.²

INTRODUCTION (THE DEATH OF FREDDIE GRAY)

On April 12, 2015, a police officer on patrol in Baltimore, Maryland made eye contact with a young black man, Freddie Gray, on a street outside Baltimore’s Gilmore Homes housing project.³ Gray, who, like many in his community, viewed police officers suspiciously, took off running, but was soon chased down by several officers.⁴ Despite lacking any probable cause to arrest Gray, the police, upon

1. Editorial Board, *Stifled Justice*, WASH. POST, Dec. 5, 2014, at A18.
2. Associated Press, *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*, GUARDIAN (Apr. 14, 2015, 12:41 PM), <http://www.theguardian.com/us-news/2015/apr/14/oklahoma-eric-harris-robert-bates-jail> [hereinafter *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*] (video of incident available through article).
3. 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 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, 3:23 PM) <http://www.nydailynews.com/news/crime/criminal-charges-filed-freddie-gray-death-transcript-article-1.2206744> [hereinafter *Mosby Transcript*].
4. Mosby Transcript, *supra* note 3.



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catching up with the fleeing man, shackled his ankles, cuffed his hands behind his back, and put him in a police wagon on his stomach, face first, without securing him with a seat belt, in violation of department protocol.⁵ Freddie Gray was then taken on a fatal ride in the back of the wagon, a ride so brutal that Gray's spine was nearly snapped in two and his head was critically injured, resulting in his eventual death.⁶

Videos and photographs of the incident appear to show Gray's feet already dragging and body partially limp by the time he was put in the police wagon.⁷ State Attorney Marilyn Mosby's subsequent probable cause statement recounted that even before he was put in the wagon, Gray had complained to the officers that he couldn't breathe and requested an inhaler, which he was denied.⁸ That was but the first of many times he asked for medical help from the officers arresting him, and the first of two times he was documented as crying out that he could not breathe.⁹

Despite Gray's repeated pleas for medical assistance during multiple stops of the police wagon, his cries for help went ignored by the officers.¹⁰ In addition, there were numerous missed opportunities for the arresting officers to fasten Gray securely into the van to prevent the injuries that inevitably killed him. As Mosby recounted, "the medical examiner had connected the lack of a restraint to the spinal injuries that killed [Gray]," and "there had been five opportunities to put a seat belt on Gray, but they were ignored. Instead, at one stop, the officers put ankle shackles on him and put him back in the van, belly down on the floor."¹¹

Although the exact causes of each of Gray's injuries were not immediately clear following his autopsy, the medical examiner subsequently identified a deep wound that could have occurred while Gray's shackled body was bounced around the back of the vehicle,

5. *Id.*

6. *Id.* (Gray subsequently "suffered a severe and critical neck injury as a result of being handcuffed, shackled by his feet and unrestrained inside the BPD wagon").

7. *See id.*; see also CNN, *New Video Shows Arrest of Freddie Gray in Baltimore*, YOUTUBE (Apr. 21, 2015), <https://www.youtube.com/watch?v=7YV0EtKWyno> (showing video of Freddie Gray's arrest).

8. Mosby Transcript, *supra* note 3.

9. *See id.*

10. *Id.*

11. 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>.

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unsecured by a seat belt, after he slipped out of consciousness, and his head hit an exposed bolt.¹² The other fatal injury that likely caused Gray's death was the injury to his neck that occurred at some point during the violent ride, an injury so severe that his spine was eighty percent severed from his neck, a catastrophic injury of fatal dimensions.¹³

Whatever the precise cause of Gray's ultimate death, it is clear that, after the brutal forty-minute ride, when the officers attempted to remove Gray's limp, mangled body from the van upon arriving at the police station

Mr. Gray was no longer breathing at all. A medic was finally called to the scene where upon arrival, the medic determined Mr. Gray was now in cardiac arrest and was critically and severely injured.

Mr. Gray was rushed to the University of Maryland Shock Trauma where he underwent surgery. On April 19, 2015, Mr. Gray succumbed to his injuries and was pronounced dead. The manner of death deemed homicide by the Maryland Medical Examiner is believed to be the result of a fatal injury that occurred while Mr. Gray was unrestrained by a seatbelt in custody of the Baltimore Police Department wagon.¹⁴

The image of Freddie Gray's body being thrown around the back of the police van until all life was pounded out of it is one of many that have contributed to the rage that exploded on the streets of Baltimore in the aftermath of Gray's brutal death. As Freddie Gray took his last breath, the city of Baltimore erupted, with protests filling the streets.¹⁵ The voices of the protesters were heard and acknowledged by Prosecutor Mosby in her statement to the public announcing the subsequent arraignment of the officers who, probable cause established for indictment purposes, had caused Gray's fatal injuries.¹⁶

Freddie Gray's death, and the subsequent furor that arose on the streets of Baltimore after the details of his brutal death at the hands of the Baltimore police came to light, are not isolated incidents. From the West to the East Coast, the streets of urban America have been

12. *Id.*

13. Joy Blake, *Justice Department Opens Civil Rights Investigation in Freddie Gray's Death*, HINTERLAND GAZETTE, (Apr. 22, 2015), 2015 WLNR 11624433; see Mosby Transcript, *supra* note 3.

14. Mosby Transcript, *supra* note 3.

15. 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-id-USKBN0NT1LO20150508>.

16. Mosby Transcript, *supra* note 3.

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filled in recent days with blood, mourning, and outrage, as a familiar scenario replays itself all too frequently: of men and boys of color killed by police in our country's urban communities, all too frequently for no apparent reason other than the fact the men were attempting to escape from the police at the moment they were killed. In a single, tumultuous, particularly bloody one-year period spanning from July 2014 to July 2015, a tsunami of tragedy has crashed across the country through a series of events linked by these chillingly common incidents of police killings of unarmed black men (and in one case, a twelve-year-old child). As the number and particularly disturbing nature of such incidents made national news time and time again in that fateful year, the resulting outcry sparked a new movement toward police reform as protesters and communities nationwide clamored for an end to what appears to be a growing pattern of excessive police violence, particularly against black men.

While problems with excessive police force began long before July 2014, and the recounting of police violence against unarmed civilians could fill volumes beyond the length of a law review article, at some point it becomes necessary to take a breath (a luxury Eric Garner, Eric Harris, Freddie Gray, and other recent victims of police killings were denied in their final moments, as described herein) and assess the landscape of our troubled police-civilian relations in an effort to reverse this tragic trend. To that end, this article focuses largely on the police killings of unarmed black men—and a child—between July 2014 and July 2015 that have been the subject of intense nationwide attention.¹⁷

On a more positive note, this period also marks what looks to be the beginning of a long-overdue era of police reform, with dozens of states undertaking police reform efforts across the country resulting in forty new state reform measures;¹⁸ and with the White House¹⁹ and

17. As more and more information comes to light about these events and as new events unfold, it is tempting for the author to perpetually update this article. However, such updating could be an endless process. As such, the author begs the readers' indulgence and understanding that the events are described herein as they stood at the beginning of August, 2015. While more details and events will emerge over time, what will not change, until the rate of killings decreases, is the dire need for meaningful, constitution-focused reform, which is the primary aspiration of this article.

18. See Associated Press, *Police Protests, Ferguson Spurred 40 New State Measures; Activists Want More*, WCPO CINCINNATI (Aug. 2, 2015, 1:48 PM), <http://www.wcpo.com/news/crime/police-protests-ferguson-spurred-40-new-state-measures-activists-want-more> [hereinafter *Police Protests*].

19. See *infra* Section IV.A.

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Department of Justice (DOJ) intervening in Baltimore, Maryland,²⁰ in Ferguson, Missouri,²¹ in Cleveland, Ohio,²² and elsewhere to direct and help implement urgently needed police reform.

Amidst these remedial efforts, however, dissent and discord abound. The national coverage of the police killings has divided the country between those who defend the police involved in the killings—by arguing, in many cases, that the victims were asking for it by running away from the police in the first place—and those horrified at the violent taking of civilian lives by those sworn to protect them.²³ As described herein, some of the conflicted reactions to these incidents arise from general confusion by both police and the general

20. One of the first acts of Department of Justice Attorney General Loretta Lynch as the new attorney general was to initiate a federal civil rights investigation of the Freddie Gray incident. Edwards, *supra* note 15. Acknowledging the outrage of the protestors following Gray's death, Lynch announced a broader investigation as well, into any widespread patterns of discriminatory policing and excessive force by the Baltimore police. *Id.* In her announcement of the investigation, she explained, “[i]t was clear to a number of people looking at this situation that the community’s rather frayed trust—to use an understatement—was even worse and has in effect been severed in terms of the relationship with the police department,” and promised that “[i]f unconstitutional policies or practices are found, we will seek a court-enforceable agreement to address those issues.” *Id.*

21. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter FERGUSON REPORT].

22. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1–2 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [hereinafter CLEVELAND REPORT]. The DOJ’s focus on Cleveland was due in part to an incident in 2012, which received little national coverage at the time it occurred, compared to more recent incidents, but was even more brutal than the 2014–15 incidents. *Id.* at 8. In the 2012 case, over 100 Cleveland police officers engaged in a high-speed chase of two unarmed black civilians, a man and a woman, in violation of Cleveland Police Department (“CPD”) protocols, after they apparently mistook their car’s backfire for gunshots. *Id.* The culmination of the chase was a grotesquely violent bloodbath: thirteen CPD police officers surrounded the car they had been chasing and fired a total of 137 rounds of ammunition into the car, killing both occupants, who each suffered more than twenty gunshot wounds before dying. *Id.* The DOJ subsequently found that the unconstitutional police force by the CPD was not confined to that incident, but that rather the “CPD engages in a pattern or practice of using unconstitutional force in violation of the Fourth Amendment . . . at a significant rate, and in a manner that is extremely dangerous to officers, victims of crimes, and innocent bystanders.” *Id.* at 12.

23. Compare Sharon Grigsby, Opinion, *Walter Scott Killing Shows that Too Often Black Men’s Lives Still Don’t Matter*, DALL. MORNING NEWS (Apr. 8, 2015, 9:56 AM), <http://dallas-morningviewsblog.dallasnews.com/2015/04/walter-scott-killing-shows-that-too-often-black-mens-lives-still-dont-matter.html/>, with Hollis Conant, Comment to *One Thing Media Pundits Won’t Say About Walter Scott’s Shooting*, ALLEN B WEST (Apr. 9, 2015), <http://allenbwest.com/2015/04/one-thing-media-pundits-wont-say-about-walter-scotts-shooting/> (commenting “no one has said why he was running or why he even got out of his car why not just take ticket and leave”), and YOUTHWITHOUTYOUTH, Comment to *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/> (commenting “don’t want to get shot then don’t run from the police—especially over a broken tail light”).

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public about the permissible degree of police violence tolerable under our Constitution.

In particular, this article focuses on the apparent disregard, or outright ignorance, of the limitations of permissible lethal violence under longstanding Due Process precedent such as *Tennessee v. Garner*. The article also addresses the related apparent confusion of an apparently substantial number of police and civilians regarding the degree to which a person's flight from armed officers may be viewed as, by itself, establishing probable cause for arrest, let alone lethal force. Part I of this article chronicles the series of police killings in the months both leading up and following the killing of Freddie Gray, a series of quite literally breathtaking events in which unarmed black men, and a child, were killed by police, with many of the incidents captured on film by bystanders, resulting in massive outcries and protests across the country between July 2014 and 2015. Part II connects those events to a longer history of post-civil-rights-era²⁴ excessive police violence in this country. Part III addresses various reform measures being considered across the country as a result of the police killings at both the national and local levels.

Part IV concludes that, among the proposed reforms, one of the most important (and perhaps easiest and most affordable to implement) is a renewed commitment to a Constitution focused training of armed officers, i.e., one that emphasizes critical constitutional limitations upon permissible force by peace officers. Here, the article examines possible reasons why some members of the law enforcement community may have abandoned a Constitution-focused policing model in favor of more violence-permissive approaches such as the popular "21-foot rule" that seems to be increasingly used, in place of constitutional standards, as the governing test for when police may use lethal force. To the extent that the Constitution has been even partially abandoned as the governing standard for determining the permissibility of lethal police force, both police and the citizens they serve must be re-educated about the constitutional restraints of police violence. Of particular import are the *Tennessee v. Garner* general prohibition of deadly police force against fleeing, unarmed suspects,

24. But not, sadly, post-racial. See, e.g., Jonathan Capehart, *The Fallacy of a 'Post-Racial' Society*, WASH. POST (Dec. 29, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/12/29/the-fallacy-of-a-post-racial-society/>; Tim Wise, Opinion, *What is Post-Racial? Reflections on Denial and Reality*, CNN: IN AMERICA (Jan. 31, 2012, 5:27 PM), <http://inamerica.blogs.cnn.com/2012/01/31/opinion-tim-wise-what-is-post-racial-reflections-on-denial-and-reality/>.

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and other suspects who do not pose an imminent threat of physical harm to others, as well as due process constraints against viewing flight from police as independent and sufficient grounds for arrest.²⁵ Had these basic constitutional constraints been heeded by the officers involved in the series of killings detailed herein, the victims of those killings would likely still be alive today.

While some police trainings fail to clearly enough instruct law enforcement officers about the constitutional boundaries of permissible police force, and it is even possible that some have done so intentionally, for plausible deniability purposes,²⁶ such abandonment of Constitution-focused use-of-force training is inexcusable. As a matter of constitutionality and human decency, it is time for officers of the peace to protect and serve all of our urban citizens, every one of whom is entitled to life and liberty under our Constitution and the full protection of the police, free from unconstitutional and discriminatory persecution.

I. A BREATHTAKING SNAPSHOT IN TIME: FROM “I CAN’T BREATHE” TO “FUCK YOUR BREATH” AND BEYOND

Freddie Gray’s death, while shocking, is not an isolated event. The ugliness of Gray’s death is compounded when viewed in the context of a surrounding series of police killings in the months preceding and following Gray’s death, which, viewed collectively, paint a snapshot of a particularly troubling historic period of police relations in America.

A. From “I Can’t Breathe” to “Fuck Your Breath”: The Deaths of Eric Garner and Eric Harris

The additional police killings of unarmed black men that grabbed national headlines in the months preceding Freddie Gray’s death were, as with Freddie Gray’s death, literally breathtaking in their tragic dimensions.

25. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

26. In other words, to make it more possible for officers to successfully invoke a qualified immunity defense, claiming that the constitutional parameters of permissible violence are unclear, or, invoking *Heien v. North Carolina*, to argue that a Fourth Amendment search and seizure based on a misunderstanding of the law may be upheld as reasonable. See 135 S. Ct. 530 (2014). *But see* *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (minimizing the availability of defenses based on officers’ subjective understanding of whether use of force was excessive, so long as the use of force was objectively unreasonable).

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On July 17, 2014, an unarmed black father of six, Eric Garner, was choked to death by a police officer on a sidewalk in Staten Island, New York, crying out “I can’t breathe” over and over before he died.²⁷ His alleged crime that led to his being thrown to the sidewalk and choked to death by the police? Being a sidewalk vendor of un-taxed cigarettes.²⁸

Just over seven months later, and 1,400 miles away, another unarmed black man, Eric Harris, lay dying a sidewalk in Tulsa, Oklahoma, similarly crying out to the police who pinned him down that he had been shot and couldn’t breathe.²⁹ Autopsy reports, which described Harris’s death as a homicide, would later show that Harris, at the time he cried out that he could not breathe, had been suffering internal bleeding and collapsed lungs after he was shot through the right armpit by a volunteer reserve police officer.³⁰

In response Harris’s cries that he could not breathe, a second police officer, with his knee on Harris’s head, yelled at him, “fuck your breath,” as Harris laying dying and gasping for breath.³¹

Thus, the breathtaking nature of the spate of police killings across the country in the nine months between July 2014 and April 2015, is literal, not just metaphoric: “I can’t breathe” became the battle-cry chant of peace activists taking to the streets to protest excessive police violence after the strangulation of Eric Garner at the hands of a New York police officer.³² The “I can’t breathe” cries were echoed and magnified by civil rights protesters across the country as the news came down that the grand jury in that case decided not to indict the officer who choked Garner to death.³³ Then, nine months later, a collective metaphoric gasp could be heard across the country as Eric Harris became the latest unarmed black man to beg futilely for

27. As a Washington Post editorial depicted the event, “‘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.” Editorial Board, *supra* note 1.

28. *Id.*

29. *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*, *supra* note 2.

30. Associated Press, *Tulsa County Officer to Resign Following Shooting*, *Memo*, CHI. TRIBUNE (May 12, 2015, 7:07 PM), <http://www.chicagotribune.com/news/nationworld/ct-oklahoma-police-killing-20150512-story.html>.

31. *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*, *supra* note 2.

32. See Editorial Board, *supra* note 1.

33. See *id.*

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breath, this time only to hear his pleas met with the South Carolina police officer's chillingly "fuck your breath" response.³⁴

The callous cruelty of such words shouted at a man pleading for his life does take one's breath away. "Fuck your breath" was perhaps the last thing Eric Harris heard as he slipped out of consciousness to his death. This cold, merciless condemnation from a police officer to the dying man pinned beneath him is but one example of a series of unacceptable atrocities committed by "bad cops"³⁵ that cannot be swept under the rug or condoned by either the larger policing community, or civil society generally, any longer.

Each of the following additional infamous incidents between July 2014 and July 2015, as with the cases of Eric Garner, Eric Harris, and Freddie Gray, involved the killing of unarmed black male civilians by police officers, raising troubling questions about abuse of lethal power by police in this country, and inspiring a movement toward police reform nationwide.

B. Other Police Killings of Unarmed Black Men (and a Child) Between July 2014 and July 2015

Although the police killings of unarmed black men (and a child), described below, are not the only incidents of such deaths, they are a representation of those cases that have received national attention due to citizen journalism. In these cases citizen journalism has cast into serious doubt any purported justification for the police killings of civilians in the tragic incidents described below.

1. The Death of John Crawford, III

On August 5, 2014, John Crawford, III, a 22-year-old black man, was shot dead by police in a suburban Dayton, Ohio, Wal-Mart store after he picked up a toy air rifle—specifically, a nonlethal Crosman MK-177 air pump rifle made for children—from a store shelf.³⁶ Police had rushed into the store and shot Crawford in response to a 911 call in which someone had reported that Crawford was waving a gun around; a surveillance video later showed that Crawford was not wav-

34. *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*, *supra* note 2.

35. Of course, #notallcops.

36. Albert L. Butler, *John Crawford Case: It's Open Carry for Whites and Open Season on Blacks*, ROOT (Aug. 21, 2014, 3:00 AM), http://www.theroot.com/articles/politics/2014/08/john_crawford_shooting_open_carry_for_whites_open_season_on_blacks.html.

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ing the air rifle around, however.³⁷ The police who shot Crawford did not give the young man a chance to respond to orders, nor, apparently, did they take into account the fact that he was standing in the air rifle section of the store and was holding harmless store merchandise, not a real gun. Indeed, even if the gun had been an actual firearm, holding it would have been legal, Ohio being an open-carry state.³⁸

A month after Crawford was shot dead in the middle of a store for the mere act of picking merchandise off the shelf in the air rifle section of Wal-Mart, the Department of Justice initiated an investigation into the Crawford's killing, although the officer who killed Crawford was not indicted on any charges.³⁹ Announcing the commencement of the DOJ investigation, Ohio Senator Sherrod Brown released the statement: "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."⁴⁰ As of the writing of this article, the investigation is still pending.⁴¹

2. The Death of Michael Brown and the Subsequent DOJ Investigation of the Ferguson Police Department

On August 9, 2014, Michael Brown, an unarmed black eighteen-year-old, was shot and killed on a Ferguson, Missouri, street by Ferguson Police Officer Darren Wilson.⁴² Brown was shot after a brief altercation with Wilson, who shot at Brown after the young man ran away from him.⁴³ Against a backdrop of impassioned and tense nationwide protests, Wilson was cleared by a grand jury after conflicting

37. Mark Berman, *No Indictments After Police Shoot and Kill Man at an Ohio Wal-Mart; Justice Dept. Launches Investigation*, WASH. POST (Sept. 24, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation/>.

38. Butler, *supra* note 36.

39. Berman, *supra* note 37.

40. Press Release, Senator Sherrod Brown, Sen. Brown Issues Statement on Department of Justice Investigation into Shooting of John Crawford, III (Sept. 24, 2014).

41. See Sharahn D. Boykin, *Rally, Demonstration Commemorate Anniversary of Crawford Shooting*, DAYTON DAILY NEWS (Aug. 5, 2015, 9:34 PM), <http://www.daytondailynews.com/news/news/local/rally-demonstration-commemorate-anniversary-of-cra/nnDjF/>.

42. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [hereinafter REPORT ON SHOOTING OF MICHAEL BROWN].

43. *Id.* at 4-7.



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evidence about the details of the killing.⁴⁴ In particular, as the DOJ described, there was conflicting evidence about whether (1) Wilson started shooting Brown when Brown was running away from him, or if he began shooting after Brown turned around; and (2) whether, right before the officer fired the final fatal shots, Brown had turned around in a threatening manner indicating that he was about to charge the officer.⁴⁵

The incident sparked intervention by the DOJ, which, while clearing Wilson of federal charges, simultaneously conducted a separate, comprehensive investigation of the Ferguson Police Department that revealed systemic problems of unconstitutional, racially discriminatory policing, including a pattern of excessive force against members of the African American community.⁴⁶ The vast majority of excessive force by Ferguson police officers, the resulting report found, i.e., nearly 90%, is targeted at African Americans.⁴⁷ That, among other evidence,⁴⁸ 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."⁴⁹

3. The Death of Tamir Rice

Also in November 2014, within months after the Michael Brown killing, and three Midwestern states over, Tamir Rice, a sixth-grade boy (whom the officers later claimed looked to them like an intimidating black man), was shot to death in Ohio (an open-carry state, recall) after police pulled up in response to a call stating that the boy was

44. Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown's Death*, NPR (Nov. 24, 2014, 3:37 PM), <http://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case>.

45. See REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 41, at 82; see also Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23 (2014) (describing protests, along with the militarized police response to those protests).

46. See FERGUSON REPORT, *supra* note 21, at 28.

47. *Id.*

48. While the Ferguson Report is replete with examples of racial disparities in the number of vehicle stops and other police investigations, arrests, and violence toward members of the African American community the evidence compiled in the report also includes a number of disturbing emails from high-ranking Ferguson officials demonstrating racism, including emails making fun of President Obama, the first lady, and black people generally, including depicting the president as a chimpanzee, and mocking people of color as lazy, illiterate, criminals, and other offensive stereotypes. *Id.* at 62, 64–69, 72.

49. *Id.* at 63.

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carrying what might have been a real gun but was “probably fake.”⁵⁰ Within seconds of pulling their police cruiser up to the boy, the police leapt out of the cruiser and shot the boy at close range.⁵¹ The child’s “gun” was, it turned out, just a toy, but the shots from the police were real and lethal.⁵² As twelve-year-old Tamir lay dying on the sidewalk, his distraught fourteen-year-old sister was tackled, restrained, and handcuffed by the police as she tried to run to her dying brother.⁵³ As she cried out begging for her brother’s life, the officers stood by, unmoved, not even allowing the girl to go to her brother’s side in his last moments, and not offering any medical assistance that could have kept Tamir alive.⁵⁴

Nearly a year after Tamir Rice’s killing, the investigation remains in the hands of local law enforcement investigators, with the Cleveland mayor stating on record that he does not trust the state attorney general’s office to handle the investigation.⁵⁵ In June of 2015, a detailed, but redacted, investigation report from the Cuyahoga County Sheriff’s Department was released that made no recommendation of whether criminal charges should be filed against the officer who shot Tamir to death.⁵⁶ The report did, however, record that the officer who shot Tamir stated that he felt he had no choice but to use deadly force.⁵⁷

In the meantime, the city has pressured Tamir’s family to drop their lawsuit against the officers while the investigation is pending, while refusing to provide a timeline for how long the investigation will

50. L.A. Times Staff, *Hear the 911 Call About Tamir Rice: Gun is ‘Probably Fake,’ Caller Says*, L.A. TIMES (Nov. 26, 2014, 5:59 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-911-call-20141126-htm1story.html>; see also Allen Johnson, *Cold Hearts, Unedited: Footage of Shooting’s Aftermath Is Deeply Disturbing*, GREENSBORO NEWS & RECORD (Jan. 5, 2015, 3:30 PM), http://www.news-record.com/blogs/thinking_out_loud/cold-hearts-unedited-footage-of-shooting-s-aftermath-is-deeply/article_5bbc7fba-9cf3-11e4-8b78-1375e90cec5b.html; *National Digest: Video Shows Police Tackling, Detaining Tamir Rice’s Sister*, WASH. POST, Jan. 9, 2015, at A3 [hereinafter *National Digest*].

51. See Johnson, *supra* note 50.

52. See *id.*; *National Digest*, *supra* note 50.

53. See *National Digest*, *supra* note 50.

54. See Johnson, *supra* note 50.

55. See Janet Shan, *Cleveland Mayor Doesn’t Trust Ohio Attorney General’s Office to Handle Tamir Rice Case*, HINTERLAND GAZETTE (Jan. 5, 2015), <http://hinterlandgazette.com/2015/01/cleveland-mayor-doesnt-trust-ohio-attorney-generals-office-handle-tamir-rice-case.html>.

56. See James Queally, *Tamir Rice Report: Cleveland Policeman Who Fired Fatal Shots Said He Had “No Choice,”* L.A. TIMES (June 13, 2015, 8:24 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-tamir-rice-investigation-documents-20150613-story.html>.

57. *Id.*

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take.⁵⁸ Fed up with the lack of follow-through from the criminal justice system, a group of community leaders in Cleveland creatively availed themselves of an Ohio statute that empowers citizen activism in such circumstances, and petitioned a municipal court judge to issue a probable cause finding, rather than waiting for the prosecutor's office to obtain a grand jury indictment.⁵⁹ Their efforts were somewhat successful in nudging justice along. On June 11, 2015, a municipal court judge ruled that there was probable cause to charge the officer who shot Tamir Rice with several crimes, including murder, involuntary manslaughter, reckless homicide, negligent homicide and dereliction of duty, and to charge his partner with negligent homicide and dereliction of duty.⁶⁰ The prosecutor's office must still, however, proceed to a grand jury indictment for any conviction to happen; and as of the writing of this article, that has not yet occurred.⁶¹

4. The Death of Walter Scott

On April 4, 2015, yet another unarmed black man, Walter Scott, a father of four, engaged to be married, and a former Coast Guardsman, was shot to death by a police officer who fired at him eight times in the back as he was running from the officer in North Charleston, South Carolina.⁶² North Charleston Police Officer Michael Thomas Slager reportedly laughed about the incident after the fact with his supervisor as he described how shooting Mr. Scott made his adrenaline pump.⁶³ The incident (including an apparent effort by the officer to plant a stun gun on the man's body afterward)⁶⁴ was captured on

58. Wesley Lowery, *As Investigation Enters Fifth Month, Tamir Rice's Mother Has Moved into a Homeless Shelter*, WASH. POST (May 4, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/05/04/as-investigation-enters-fifth-month-tamir-rices-mother-has-moved-into-a-homeless-shelter/>.

59. 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/>.

60. *Id.*

61. *Id.*

62. 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).

63. *Id.*

64. See 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/> ("There are three key moments in the video. At 0:56, Slager walks, then jogs, back to where once stood. At 1:06, he picks something up, presumably the Taser, from the ground. At 1:23, he appears to drop something next to Scott's body, which he handcuffed immediately after the shooting. The Post reports that police confirmed that Scott 'was hit with the Taser at least once, because part of it was still attached to him when other

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video by a witness.⁶⁵ The video consequently went viral on the Internet, often accompanied by warnings due to its graphic depiction of Scott's killing.⁶⁶

Unlike previous incidents, the killing of Scott resulted in immediate action against the shooter: less than an hour after the North Charleston's mayor and police chief received a video showing Slager shooting at the unarmed Scott while he was running away and Slager apparently dropping the stun gun by his dying body afterward, charges were filed against Slager.⁶⁷ On June 8, 2015, a grand jury indicted Slager for murder.⁶⁸

5. The Death of Samuel DuBose

On July 19, 2015, a white University of Cincinnati police officer named Ray Tensing shot and killed Samuel DuBose, an unarmed black man, after pulling him over for driving without a front license plate.⁶⁹ The officer was wearing a body camera, which captured the shooting (the video is available through the below New York Times article link; readers should be braced for the disturbing content before viewing it).⁷⁰ The shooting, from the video, appears to come suddenly, not precipitated by any act of violence or aggression from DuBose.⁷¹ The video also dispels the officer's later contention that he shot DuBose's car because he was being dragged by the car, while confirming what the officer freely admitted: that he shot DuBose in the

officers arrived on the scene.' Slager's story fell apart because 'city officials said that Scott was clearly too far away to use a Taser if he did have it.' The officer was fired and charged with murder on Tuesday."); Opinion, *What if There Were No Video?* TIMES-HERALD (Apr. 17, 2014), <http://www.times-herald.com/opinion/20150410-Friday-editorial>.

65. See TIMES-HERALD, *supra* note 64.

66. See, e.g., ABC News (Australia), *WARNING: Graphic Violence. Real-time Events of Walter Scott Shooting*, YOUTUBE (Apr. 9, 2015), <https://www.youtube.com/watch?v=ym4tE0SQCZY>; Lily Hay Newman, *Facebook Is Second-Guessing Your Decision to Watch the Walter Scott Shooting*, SLATE (Apr. 9, 2014, 6:44 PM), http://www.slate.com/blogs/future_tense/2015/04/09/facebook_is_putting_warnings_on_footage_of_the_walter_scott_shooting.html (describing Facebook policy of putting warnings on all videos of the shooting that appear on Facebook); *Warning: Graphic Video of Walter Scott Shooting*, DUCK DUCK GRAY DUCK (Apr. 7, 2015), <http://duckduckgrayduck.com/2015/04/07/warning-graphic-video-of-walter-scott-shooting/>.

67. James Queally, *S.C. Officer Charged with Murder: Video Appears to Show White Patrolman Shooting Fleeing Unarmed Black Man*, BALT. SUN, Apr. 8, 2015, at 8A; see ABC News, *supra* note 65 (showing the officer dropping what appears to be his stun gun next to Scott's body).

68. Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES, June 8, 2015, at A12.

69. Richard Perez-Pena, *University of Cincinnati Officer Indicted in Shooting Death of Samuel DuBose*, N.Y. TIMES, July 29, 2015, at A1.

70. *Id.*

71. *Id.*

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head.⁷² As the Washington Post describes it, 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.⁷³ Then, he thrusts the weapon through the open car window and fires a single round, striking DuBose in the head.”⁷⁴ In a more detailed description of the killing (and the apparent lack of any justifiable provocation for it), the Post chronicles the fatal turn of events captured by the video as follows:

“Hey, how’s it going, man?” Tensing begins. He explains to DuBose that he stopped him because he was not displaying a front plate. Tensing asks DuBose for his driver’s license multiple times, but DuBose hands over only what appears to be a bottle of gin. DuBose finally admits that he doesn’t have his license with him, adding: “I just don’t. I’m sorry, sir.”

With that admission, Tensing asks DuBose to take off his seat belt, presumably a prelude to asking DuBose to get out of the car. DuBose protests that he had not done anything wrong and appears to turn the car back on. At that point, Tensing yells “Stop!” and draws his gun.

After the shooting, the car lurches forward and comes to a stop some distance down the street. Tensing runs after it, yelling to a dispatcher that medical attention is needed.

One minute and 53 seconds had elapsed since Tensing first approached the car.⁷⁵

The Post documents that “[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”; two out of the three other killings involved black men shot by white officers, and all three that resulted in criminal charges were captured on film.⁷⁶

The county prosecutor, who days after DuBose’s killing announced a murder indictment for what he called “a senseless, asinine shooting” that was “without a question a murder,” surmised that Tensing shot DuBose upon becoming enraged when DuBose would not

72. *Id.*

73. 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/>.

74. *Id.*

75. *Id.*

76. *Id.*

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exit his car.⁷⁷ The prosecutor also acknowledged during his announcement of the indictment, made to a crowd of several hundred people braving the rain to stand together chanting “Black Lives Matter” and “I am Sam DuBose,” that Tensing’s indictment marked the first time in the history of the county that a law enforcement officer had been indicted for murder in relation to use of force while on duty.⁷⁸

II. THE BIGGER PICTURE OF POLICE BRUTALITY PRE-FERGUSON

Bearing in mind the relatively recent developments of widespread police body camera use, citizen journalism advancement through smartphone video technology, and Internet dissemination of the video evidence thereby obtained, the past year’s events should not be viewed as an anomaly. More likely, such incidents are merely being brought to light to a degree not possible in the days before video evidence became so easy to obtain and disseminate via social media.

In fact, the incidents described in the previous section are but a small sampling of the police killings that occur on a frequent basis in this country. For example, one study reveals that, in the twenty-five year span between 1980 and 2005, “about 9,500 people nationally were killed by police . . . an average of nearly one fatal shooting per day.”⁷⁹ In more recent years, the estimate has risen to “as high as 1,000 police killings a year.”⁸⁰ This is in stark contrast with other countries’ lack of anything close to that number of police killings: “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.”⁸¹

77. Perez-Pena, *supra* note 69.

78. *Id.*

79. Jeff Kelly Lowenstein, *Killed by the Cops*, COLORLINES (Nov. 4, 2007, 12:00 PM), http://www.colorlines.com/archives/2007/11/killed_by_the_cops.html (describing results of findings through joint national investigation conducted by ColorLines and The Chicago Reporter of police shootings in ten cities resulting in fatalities).

80. Eugene Robinson, *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.

81. *Id.*

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The disparity with which unarmed victims of police killings tend to disproportionately be people of color⁸² is a particularly shameful failing of American policing in a day when some wishfully have tried to proclaim that we have entered into a post-racial era. Today's police killings of unarmed black men, sadly, illustrate that fates even worse than that of Abner Louima and Rodney King⁸³ might await those unarmed citizens perceived—often wrongfully—as dangerous enough to warrant lethal force by police. The recent spate of killing men of color for little more than fleeing feels startlingly akin, at times, to the more murderous eras of police violence against unarmed black citizens from the pre-Civil Rights days.

Furthermore, while most of the attention between July 2014 and July 2015 has been on black victims of excessive police force, in many urban communities, the people of color killed by police have also been Latino, with the Latino communities also suffering disproportionately from racial profiling and excessive police force. For example, in New York City, “[p]olice reports on stop and frisk—known as UF-250 forms—show that between 2005 and 2008, 85% of stops and frisks were blacks and Latinos, and that only 8% of stops and frisks were whites. In a similar pattern, police were—and are—also more likely to use force against blacks and Latinos.”⁸⁴

In one of the most famous recent cases of an unarmed Latino man being killed by police, the family of Ricardo Diaz Zeferino was awarded \$4.7 million after Zeferino, an innocent man helping his brother look for a stolen bike, was shot to death by police, who as-

82. See *The National Police Violence Map*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/> (last updated Oct. 17, 2015) (providing a comprehensive summary of police violence against African Americans).

83. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 65 (2000). Abner Louima and Rodney King, who came to represent the victims of police brutality in the 1980's and 1990's, were brutally beaten, but not killed, compared to those whose have been the focus of attention in 2014 and 2015. See Laurie L. Levinson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 1–20 (2001).

84. See, e.g., David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 149–51 (2009) (recommending better tracking of police activity, judicial remedies for victims of police abuse, and audio and video recordings of police); Rima Vesely-Flad, *New York City Under Siege: The Moral Politics of Policing Practices, 1993-2013*, 49 WAKE FOREST L. REV. 889, 895 (2014) (citing CTR. FOR CONST. RTS., RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS: THE CENTER FOR CONSTITUTIONAL RIGHTS PRELIMINARY REPORT ON UF-250 DATA FROM 2005 THROUGH JUNE 2008 4 (2009), <http://ccrjustice.org/files/Report-CCR-NYPD-Stop-and-Frisk.pdf>; CTR. FOR CONST. RTS., STOP AND FRISK: THE HUMAN IMPACT 27, n.24 (2012), <http://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf>).

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sumed he was a suspect in the bicycle theft.⁸⁵ Three officers opened fire, shot Zeferino eight times, and killed him after the unarmed man, apparently confused as he was being shouted at, took his hat off and dropped his hands from behind his head.⁸⁶ The incident was captured on camera (and can be viewed at the below link, but readers should be warned that the video is graphic and disturbing to watch).⁸⁷

In other cities across the country, police killings have resulted in expensive settlements paid to the families of the victims. The killing of Eric Garner in Brooklyn eventually led to a settlement of \$5.9 million, paid by New York City to Garner's estate.⁸⁸ In Baltimore, where, eventually, the city agreed to pay a settlement to the family of Freddie Gray to the tune of \$6.4 million, that settlement was but the latest settlement paid to resolve police brutality claims; between the years of 2011 and 2014, the city had to pay out \$5.7 million to victims of brutality, to a total of over a hundred individuals who filed civil rights and excessive force lawsuits.⁸⁹ The victims included "a 15-year-old boy riding a dirt bike, a 26-year-old pregnant accountant who had witnessed a beating, a 50-year-old woman selling church raffle tickets, a 65-year-old church deacon rolling a cigarette and an 87-year-old grandmother aiding her wounded grandson," and the victims suffered injuries ranging from broken bones to "head trauma, organ failure, and even death, coming during questionable arrests. Some residents were beaten while handcuffed; others were thrown to the pavement."⁹⁰

In Chicago, two recent shootings of unarmed black men alone have resulted in combined settlements of \$3 million,⁹¹ and a separate \$5 million settlement was awarded to the family of a teenaged boy

85. Rory Carroll, *Ricardo Diaz Zeferino: Videos of Police Shooting Unarmed Man in Bike Theft Go Public*, *GUARDIAN* (July 14, 2015, 11:55 PM), <http://www.theguardian.com/us-news/2015/jul/15/ricardo-diaz-zeferino-video-of-shooting-by-los-angeles-police-made-public>.

86. *Id.*

87. *Id.*

88. J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, *N.Y. TIMES*, July 14, 2015, at A1.

89. 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, 10:01 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-boe-20150908-story.html> (describing the settlement in the Freddie Gray case).

90. Friedersdorf, *supra* note 88; Wegner & Puente, *supra* note 88.

91. Hal Dardick, *City to Pay \$3 Million for Police Shootings*, *CHI. TRIBUNE* (June 12, 2015, 5:42 PM), <http://www.chicagotribune.com/news/local/politics/ct-chicago-police-shooting-settlements-met-0613-20150612-story.html>.

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who was shot sixteen times outside a fast food restaurant.⁹² In yet another case, although involving “only” torture, not killings, the city of Chicago paid reparations in the amount of \$5.5 million to torture victims of a former police commander, who had subjected over one hundred victims, mostly black men, to various forms of police abuse.⁹³ As one newspaper reported, “[f]rom 1972 through 1991, the suspects were subjected to mock executions and electric shock and beaten with telephone books as their interrogators flung racial epithets at them. A Chicago Police Department review board ruled in 1993 that Burge’s officers had used torture. He was fired.”⁹⁴

While police brutality, particularly in the form of police killings of civilians on urban American streets, is not limited to victims of color, among fifty-four egregious incidents of police shootings between 2005 and 2015 that resulted in charges being brought against the officers (due to the victims being unarmed and fleeing, for instance), all but two of the victims were black.⁹⁵ Three-quarters of the officers who were charged in those incidents were white.⁹⁶ Among those cases, two-thirds of the officers shot and killed a black victim while, in contrast, no white people were fatally shot.⁹⁷

Half the cases involved unarmed suspects whom the officers had shot in the back. That statistic, viewed along with the specific instances that were the focus of national attention between July 2014 and 2015, indicate a continued pattern of police misconduct that involves unacceptable degrees of violence toward fleeing individuals, and particularly those who happen to be black men.

III. REMEDIAL STEPS SINCE FERGUSON

A. The Dawn of a New Reform Movement

As it is becoming increasingly apparent that lethal force by police is not an uncommon occurrence in this country, particularly against

92. Jeremy Gerner, *Chicago Poised to Pay \$5 Million to Family of Teen Shot 16 Times by Police*, CHI. TRIBUNE (Apr. 10, 2015, 10:35 PM), <http://www.chicagotribune.com/news/local/breaking/ct-million-dollar-police-settlement-met-20150410-story.html>.

93. Aamer Madhani, *Chicago City Council Approves Reparations for Police Torture Victims*, USA TODAY (May 6, 2015, 5:45 PM), <http://www.usatoday.com/story/news/2015/05/06/chicago-city-council-torture-reparations-jon-burge/70885118/>.

94. *Id.*

95. 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#_.

96. *Id.*

97. *Id.*

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unarmed black men who are either fleeing or otherwise not posing a serious threat, communities across the country are struggling for answers. Various reforms have been considered and implemented at the state and national levels.⁹⁸ At the state level, dozens of states have implemented dozens of new state reform measures, including measures requiring body cameras worn by police, the implementation of new civilian review boards and other community involvement, improved police training, increased transparency and accountability, and other reform measures.⁹⁹ At the national level, reform measures under the leadership of the Obama administration have resulted in several national police reform initiatives, described in more detail below.

The reform movement is, at this point, somewhat inevitable and clearly necessary. The impetus to stop police killings of unarmed citizens grows stronger by the day as “Black Lives Matter” becomes a more and more common battle cry across the country and increased video evidence of police brutality confront all who log on to the internet. The pressure to engage in meaningful reform of use-of-force policies and other policing standards, policies and practices is coming not just from communities and government bodies across the United States, but also from the international community. For example, the United States recently had to defend its human rights record in front of United Nations Council in Geneva, Switzerland, in light of its recent history of police killings that have raised eyebrows and threats of prosecution for human rights violations.¹⁰⁰

A June 18, 2015, Amnesty International report contained damning findings about the state of policing in this country, including that:

- All 50 states and Washington DC fail to comply with international law and standards on the use of lethal force by law enforcement officers;
- Nine states and Washington DC currently have no laws on use of lethal force by law enforcement officers; and

98. *Police Protests*, *supra* note 18.

99. *Id.*

100. Andrew V. Pestano, *U.N. Review of Human Rights in U.S. Focused on Police Brutality*, UPI (May 11, 2015, 10:52 AM), http://www.upi.com/Top_News/US/2015/05/11/United-States-faces-human-rights-record-scrutiny-from-United-Nations/4441431347202/.

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- Thirteen states have laws that do not even comply with the lower standards set by US constitutional law on use of lethal force by law enforcement officers.¹⁰¹

The condemnation and moral accounting is domestic and internal as well; Department of Justice senior counsel for the Civil Rights Division James Codogan recently explained, “‘We must rededicate ourselves to ensuring that our civil rights laws live up to their promise’ . . . ‘The tragic deaths of Freddie Gray in Baltimore, Michael Brown in Missouri, Eric Garner in New York, Tamir Rice in Ohio, and Walter Scott in South Carolina have . . . challenged us to do better and to work harder for progress.’”¹⁰²

In this pressure cooker of outrage, indignation, and widespread outcry for answers, a new police reform movement is growing across the country. At least two dozen states have begun implementing policing reform measures, and the federal government has been increasingly proactive, with the White House and Department of Justice working with states and localities to help implement reform measures.¹⁰³

Many of the proposed reforms complement those that have been proposed over the years by legal scholars, such as calls for greater record-keeping and reporting, implementation of citizen oversight boards and other independent investigatory methods, the development of remedies that take into account race bias (both implicit and overt), and increased litigation against and prosecution of police abuse.¹⁰⁴

The recent reform movement also is similar to past reform efforts, to an extent. DOJ involvement in police reform, for example, is

101. *Deadly Force: Police Use of Lethal Force in the United States*, AMNESTY INT’L (June 18, 2015), <http://www.amnestyusa.org/research/reports/deadly-force-police-use-of-lethal-force-in-the-united-states>.

102. Pestano, *supra* note 100.

103. See CLEVELAND REPORT, *supra* note 22, at 45–46; FERGUSON REPORT, *supra* note 21, at 90–102; *Police Protests*, *supra* note 18.

104. See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 531–33 (2004) (recommending mandatory record-keeping and reporting); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 815 (2012) (recommending increased reporting requirements); Hutchinson, *supra* note 45, at 35, 56–114 (recommending remedial measures that utilize implicit race bias and social dominance theories); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 244 (2015) (recommending independent investigations); Samuel Walker, *New Approaches to Ensuring The Legitimacy Of Police Conduct: The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 17–20, 22–24 (2003) (describing remedial measures including litigation against and prosecution of police abuse and the implementation of citizen oversight boards).

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not a new development. Rather, between 1997 and 2013, the DOJ investigated and assisted in the reform of over twenty-five police departments.¹⁰⁵ During that period, the DOJ uncovered systemic patterns of improper police force, biased policing, and unlawful stops, searches and seizures in cities including Detroit, New Orleans, Cincinnati, Seattle, Pittsburgh, Washington, D.C., Los Angeles, and a number of other localities, giving rise to consent decrees that were carefully constructed to remedy these systemic abuses under the ongoing monitoring by the DOJ.¹⁰⁶ In Cincinnati, what became known as a landmark settlement agreement, arising out of a Southern District of Ohio federal court-approved Collaborative Agreement, had a focus on community input directed toward holistic police reform.¹⁰⁷

The approach subsequently developed through this era of DOJ-monitored reform was based on improved use-of-force policies, training, supervision and early intervention.¹⁰⁸ However, while the need for clear written policies on use of force was emphasized in this era of reform, a summary of the various reform measures entered into during this period did not include reference to the necessary utilization of Constitution-focused policies in use-of-force training, only mentioning Constitution-based training in the context of preventing discriminatory policing.¹⁰⁹

As to use-of-force training police reform, consent decrees entered into between the DOJ and the target cities generally contained the following elements that became required in use-of-force police procedures, trainings and materials: (1) clearly identified categories of permissible levels of force; (2) clearly identified consequences for use for force that is unreasonable or impermissible; (3) procedures, trainings, and policies specific to different types of force; (4) requirements for certification, de-escalation; reporting, documentation and investigation, and supervision; (5) the prohibition of the use of force against

105. *Civil Rights Investigations of Local Police: Lessons Learned*, POLICE EXECUTIVE RESEARCH FORUM 1 (July 2013), http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20%20lessons%20learned%202013.pdf.

106. *Id.* at 1–3.

107. *See In re Cincinnati Policing*, 209 F.R.D. 395, 397 (S.D. Ohio 2002) (describing “Collaborative Agreement”); *Tyehimba v. City of Cincinnati*, No. C-1-99-317, 2001 WL 1842470, at *1 (S.D. Ohio May 3, 2001) (“Order Establishing Collaborative Procedure”); *see also Floyd v. City of New York*, 959 F. Supp. 2d 668, 686 & n.71 (S.D.N.Y. 2013) (describing Cincinnati agreement as a “landmark” settlement).

108. *Civil Rights Investigations of Local Police: Lessons Learned*, *supra* note 105, at 7–8.

109. *See id.* at 21.

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restrained persons who resist officers solely through verbal means; (6) review, response, and auditing requirements; (7) requirements for a review board; and (8) annual training on use of force.¹¹⁰ While each of these elements may be critical to meaningful reform, notably absent is an emphasis on policies for use of force governed specifically by Constitution-focused rules of law.

Another historic development in the area of police reform in response to specific regional problems is the court-initiated reform in New York resulting from the Southern District of New York federal *Floyd v. City of New York*¹¹¹ decision. In that case, after finding systemic problems with police officers targeting African Americans and Latinos for stops and frisks, the federal court ordered a comprehensive reform of policing in New York, including such measures as increased monitoring of the police, an end to racial profiling (including suggested trainings to address implicit race bias), better reporting, changes to supervision and discipline of police, use of police body-cameras, and the development of ongoing processes for supplemental reform.¹¹²

Perhaps because the *Floyd* reform model was judicially created, it also contained a requirement of Constitution-based police standards,¹¹³ a constitutional emphasis that was lacking in other reform measures as previously described herein.

Although *Floyd* is a stop and frisk case, and its policing reform mandates consequently focused on problems with stopping and frisking unarmed people of color, many of the principles underlying the court's opinion extend to the parallel and more troubling context of lethal police force against unarmed people of color. The reforms established in that case can, therefore, continue to provide guidance in the context of police killings as well.

In the more recent era of police reform in response to the recent police killings in Ferguson and beyond, the police reform movement has become even more comprehensive, and initiated more broadly across the country rather than just in response to isolated incidents as they arise. A number of police departments and government forces at the national, state, and local levels, across different government branches, have begun to incorporate a variety of platforms for reform,

110. *Id.* at 13.

111. *Floyd*, 959 F. Supp. 2d at 686.

112. *Id.* at 686–90.

113. *Id.*

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as they take affirmative steps toward instituting what will hopefully be meaningful, comprehensive, effective, and, increasingly, Constitution-focused reform. Some of the more recent reform initiatives are described below.

B. An Overview of Recent Reform Measures and Proposals

1. White House Initiatives

On December 1, 2014, a White House press release invoking the events in Ferguson “and around the country [that] have highlighted the importance of strong, collaborative relationships between local police and the communities they protect” announced several new national programs spearheaded by the Obama administration to address systemic policing problems and to implement community-based policing models and measures nationwide.¹¹⁴

First, the White House announced the commencement of a comprehensive review of programs related to the provision of federal equipment to local law enforcement agencies.¹¹⁵ The review will examine whether the programs—some of which have criticized as creating overly militarizing local police forces¹¹⁶—are appropriate to community needs.¹¹⁷ The review will identify methods of improving training, safeguards and standards to prevent abuse of the equipment.¹¹⁸ Second, the White House announced the creation of a new “Task Force on 21st Century Policing,” comprised of law enforcement and community leaders working in collaboration with the Department of Justice’s Community Oriented Policing Services.¹¹⁹ The Task Force is charged with developing initiative reform measures to “promote effective crime reduction while building public trust.” Finally, the Administration announced the creation of a new \$263 million Community Policing Initiative, which “will increase use of body-worn cameras, expand training for law enforcement agencies (LEAs), add

114. See Press Release, Office of the Press Secretary, The 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].

115. *Id.*

116. See CLEVELAND REPORT, *supra* note 22, at 6; Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383 (2003); *War Comes Home: The Excessive Militarization of the American Policing*, ACLU (June 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-re11.pdf>.

117. CLEVELAND REPORT, *supra* note 22, at 6.

118. *Id.*

119. White House Press Release, *supra* note 114.

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more resources for police department reform, and multiply the number of cities where DOJ facilitates community and local LEA engagement.”¹²⁰ This last initiative will result in matching funds for states and localities to purchase “bodycams” worn by police officers that, it is hoped, will provide a deterrent against excessive police violence, as well as provide evidence in cases where such violence occurs.¹²¹

2. The Department of Justice Settlements, Reports and Recommendations

In its Ferguson Report, the DOJ recommended a number of remedies to address unlawful police practices and to restore community trust of that town’s police force. Those recommendations included: (1) implementing a system of community policing based on community involvement and partnerships; (2) reforming police practices related to stops, seizures, arrests and issuance of summons and citations, ensuring full documentation and accountability driven by constitutional standards and the promotion of public safety rather than quota-driven police and other questionable practices; (3) improving the thoroughness of the review of stop, search, ticketing and arresting practices; (4) reorienting the police department’s use-of-force trainings and policies to “change force use, reporting, review, and response to encourage de-escalation and the use of the minimal force necessary in a situation;” (5) improving policies and training for interactions with vulnerable people such as those with physical or mental disabilities; (6) greater outreach to youth to avoid the continued “criminalizing” of youth; (7) the reduction of bias-based profiling and other discriminatory police conduct; (8) general improvement of proper police training, including in-depth training on constitutional and other legal restrictions on police action; (9) increased civilian participation in police decision-making; (10) better supervision of officers to ensure lawful and un-biased policing; (11) more diverse recruiting, hiring and promotion; (12) improved procedures and practices for responding to officer misconduct allegations; (13) transparency through more publically available information about police actions, and a number of corresponding recommendations for remedial measures targeted at the Ferguson court system.¹²²

120. *Id.*

121. See Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 95 & n.171 (2001).

122. FERGUSON REPORT, *supra* note 21, at 97–102.

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Notably, two of the eleven above recommendations emphasize the need for Constitution-focused reform: the second recommendation—to reform police practices to ensure “full documentation and accountability driven by constitutional standards and the promotion of public safety rather than quota-driven police and other questionable practices”—and the eighth recommendation—general improvement of proper police training, including in-depth training on constitutional and other legal restrictions on police action.¹²³ This emphasis on the importance of constitutional standards and restrictions is of particular import to those involved in educating both officers and civilians about the limitations of permissible police force. Constitutional standards, not questionable practices derived from other sources, must be at the core of any policies governing law enforcement’s physical treatment of civilians, as the Constitution at its core was adopted to protect our liberties and lives against abuse by the government and its officers.

That said, *all* of the above recommendations by the DOJ are critical measures that must be considered, in Ferguson and beyond. Each reform measure can play an important role in reining in excessive—and, too often, lethal—police violence, including the reining in of the inappropriate militarized treatment of urban citizens.¹²⁴ And, lest “militarized” be condemned as hyperbole, the DOJ itself has criticized the militarization of police forces, for example, in the following passage from its Cleveland Report:

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.¹²⁵

After rebuking the Cleveland Police Department for emitting the vibe of a militarized war zone, the Cleveland Report recommended that the CDP “undergo a cultural shift at all levels to change an ‘us-

123. *Id.* at 91, 94–95.

124. See André Douglas Pond Cummings, “All Eyez on Me”: *America’s War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 428 (2012) (discussing developments in the militarization of urban police).

125. CLEVELAND REPORT, *supra* note 22, at 6.

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against-them’ mentality we too often observed and to truly integrate and inculcate community oriented policing principles into the daily work and management of the Division.”¹²⁶

To that end, the DOJ’s Cleveland Report, as the Ferguson report had, emphasized the need for a more conscientious Constitution-focused approach to policing that reflects greater respect for constitutional rights and provides greater police accountability.¹²⁷ It is this recommendation by the DOJ, for a renewed emphasis on Constitution-focused policing, which warrants more expansion herein, and, ideally, adoption nationwide, including in the manners proposed in the final section of this article.

Baltimore,¹²⁸ Ferguson and Cleveland are but three of many cities in which the DOJ has intervened, completed investigations, issued reports, and entered into settlements to guarantee policing reform.¹²⁹ Indeed, the reform efforts by the DOJ, while receiving more national attention than ever in light of the police killing incidents between July 2014 and July 2015, actually began two decades ago, when the 1994 Violent Crime Control and Law Enforcement Act first authorized investigations by the DOJ of improper use of police force, unlawful stops and searches, and discriminatory policing.¹³⁰ Since then, around two dozen such settlement agreements have been reached between the DOJ and local law enforcement, as of May, 2015.¹³¹ Through these agreements, and with Cleveland’s most recent settlement agreement serving as a model for the new wave of reform, the targeted cities have committed to undertake specific reforms, focusing, largely, on “use of force, community policing, equipment and staffing, accountability, bias-free policing and crisis intervention,” and agreements to

126. *Id.*

127. *Id.*

128. *See supra* Section IV.A.

129. Tom McCarthy & Daniel McGraw, *Cleveland Announces Historic Second Settlement over Chronic Police Abuse*, *GUARDIAN* (May 26, 2015, 5:54 PM), <http://www.theguardian.com/usnews/2015/may/26/cleveland-police-officers-abuse-settlement>. In Cleveland’s case, two separate settlement agreements had to be entered into, separated by several years’ time, in order to rein in continued problems with excessive and discriminatory police force. *Id.*

130. 42 U.S.C.A. § 14141 (1994) (defining “Unlawful Conduct” and “Civil Action by Attorney General”).

131. *See McCarthy & McGraw, supra* note 129:

The first major consent decree, as the deals are known, was reached in 1997 in Pittsburgh, following a federal complaint prompted after an African American man died while being taken into custody by four police officers following a low-speed car chase, and after a white police officer shot dead two black men in a car that had dragged him. The Justice Department reached three such settlements in 2014: with New Orleans; Newark, New Jersey; and Albuquerque. Two current federal investigations—into policing practices in the cities of Ferguson, Missouri, and Baltimore—are ongoing.

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provide “‘state-of-the-art training’ to ensure that ‘any use of force is constitutional and lawful.’”¹³²

3. Congressional Measures

While the Obama administration has been active and far-reaching in its programmatic efforts to accomplish meaningful police reform across the country in the past two years, Congress has been less successful. A measure, for example, that was proposed but subsequently stalled out in the 113th Congress was S. 1038, the “End Racial Profiling Act,” which, by its terms, would (1) prohibit law enforcement officials and agencies from engaging in racial profiling, (2) provide declaratory and injunctive relief to those injured by racial profiling, (3) require systemic policy changes to eliminate racial profiling, (4) condition certain government funding on certifications by state and local entities that they maintain adequate policies and procedures for eliminating racial profiling and have eliminated any existing practices that permit or encourage racial profiling, and on the collection of racial profiling data and the development of best practices for eliminating racial profiling data, and (5) require the Attorney General to issue regulations for the collection and compilation of data on racial profiling and for the implementation of the Act.¹³³

After S. 1038 failed to move, it was reintroduced in the 2015 session of Congress by Representative John Conyers, as the End Racial Profiling Act of 2015.¹³⁴ Representative Conyers, who as of the writing of this article is the longest serving Member of Congress, and who is also one of the founding Members of the Congressional Black Caucus,¹³⁵ issued a statement in support of the legislation, which explained, in part:

Recent events in the wake of Ferguson, Missouri demonstrate that racial profiling remains a divisive issue in communities across the nation that strikes at the very foundation of our democracy. The deaths of Walter L. Scott—arising from a traffic stop—Michael Brown, Eric Garner, and Antonio Zambrano-Montes—all at the hands of police officers—highlight the links between the issues of race and reasonable suspicion of criminal conduct. Ultimately, these

132. *Id.*

133. *See generally* S. 1038, 113th Cong. (1st Sess. 2013).

134. *Rep. Conyers Issues Statement on End Racial Profiling Act of 2015*, TARGETED NEWS SERV. (Apr. 26, 2015, 4:51 AM).

135. *See About: Biography*, U.S. HOUSE OF REPS., <http://conyers.house.gov/index.cfm/biography> (last visited Oct. 10, 2015).

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men are tragic examples of the risk of being victimized by a perception of criminality simply because of their race, ethnicity, religion or national origin. These individuals were denied the basic respect and equal treatment that is the right of every American. Decades ago, in the face of shocking violence, the passage of sweeping civil rights legislation made it clear that race should not affect the treatment of an individual American under the law. I believe that thousands of pedestrian and traffic stops of innocent minorities and needless killings or use of excessive force by the police call for a similar federal response. The practice of using race or other characteristics as a proxy for criminality by law enforcement seriously undermines the progress we have made toward achieving equality under the law.¹³⁶

The proposed federal legislation could be an instrumental next step toward increasing laws prohibiting discriminatory racial profiling, a number of which have been enacted at the state level, but without the type of comprehensive changes proposed by the federal Act to effectuate nondiscriminatory, constitutional, and fair policing standards.¹³⁷

The End Racial Profiling Act is not the only policing reform measure being proposed in Congress. During the first session of the 114th Congress, other proposed measures have included tying federal grants to compliance with police reform measures, requiring better data collection pertaining to police-caused deaths, setting best practices standards, increasing body camera use by law enforcement, and reducing the militarization of police forces.¹³⁸ None of these proposed policing reform bills had advanced by summer recess of the 114th Congress.¹³⁹

136. *Rep. Conyers Issues Statement on End Racial Profiling Act of 2015*, *supra* note 134. The Antonio Zambrano-Montes incident referenced in Conyers' statement is another recent police killing of a person of color, this time a Latino man, who was shot at seventeen times by police, was and hit approximately seven times, including two rounds in the back, after he was fleeing them when they approached him for throwing rocks at cars. *Id.* An investigation continues as to whether he was also throwing rocks at the police, warranting their shooting at him in self-defense. See Nicholas K. Geranios, *Second Autopsy Of Man Shot By Washington State Police Differs, Lawyer Says*, WASH. TIMES (Feb. 27, 2015), <http://www.washingtontimes.com/news/2015/feb/27/lawyer-2nd-autopsy-of-man-shot-by-washington-polic/?page=all>; Miranda Leitsinger, *Pasco Shooting: Justice Department Must Aid Local Inquiry, ACLU Says*, NBC NEWS (Feb. 25, 2015, 5:06 AM), <http://www.nbcnews.com/news/us-news/pasco-shooting-justice-department-must-aid-local-inquiry-aclu-says-n312231>.

137. Garrett, *supra* note 121, at 81–83.

138. See Gabrielle Levy, *Congress Left Behind in Rush for Police Reform*, U.S. NEWS & WORLD REPORT (May 5, 2015, 4:23 PM), <http://www.usnews.com/news/articles/2015/05/05/congress-left-behind-in-rush-for-police-reform>.

139. *Id.*

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4. Local Remedial Measures

In addition to federal reform measures, many police departments across the country have initiated re-examinations of their policies following the intense scrutiny paid to urban policing after the series of killings discussed in this article that have been at the forefront of national attention. Two dozen states implemented forty police reform measures between July 2014 and July 2015,¹⁴⁰ and police departments in the remaining states have undoubtedly at least engaged in a cursory review of their policies and procedures in light of the intense spotlight being put on them and pressure to do so nationwide.

Several state and local police reform efforts that have been implemented during the July 2014-2015 period are worth highlighting.

One state recently moved forward in its consideration of legislation requiring police body camera monitoring, motivated by the tragic killing of one of its own. After the death of Walter Scott, shot in the back by a North Charleston police officer, the state of South Carolina enacted a new law requiring the implementation of state regulations that will ultimately require every police department in the state to equip its officers with body cameras.¹⁴¹ The mandate, however, was largely unfunded at the time of the bill's enactment.¹⁴² It also lacked any provision enabling public access to the videos from the police body cameras, which had been a heated subject of dispute in the legislation negotiations.

Baltimore, Maryland, while having a particularly deplorable history of police violence in recent years,¹⁴³ also stands out for the speed with which the officers involved in the death of Freddie Gray were charged, especially in comparison to the delayed announcement of charges in the cases of Michael Brown and Tamir Rice, for example.¹⁴⁴ In addition, after the announcement of the indictments, the mayor of

140. See *Police Protests*, *supra* note 18.

141. See Will Whitson & Jack Kuenzie, *South Carolina's Body Camera Bill Is Now Law*, WIS (June 10, 2015, 4:54 PM), <http://www.wistv.com/story/29289442/south-carolinas-body-camera-bill-is-now-law> (last updated June 20, 2015, 6:07 PM); see also Maayan Schechter, *Public's Right to See Stops Short with Senate Bill on Body Cameras*, AIKEN STANDARD (May 1, 2015, 12:01 AM), <http://www.aikenstandard.com/article/20150501/AIK0101/150509995>.

142. Schechter, *supra* note 141.

143. See, e.g., Friedersdorf, *supra* note 89.

144. See Elliott C. McLaughlin & Ana Cabrera, *Apology or Not, Ferguson Police Chief Tells CNN: I Will Not Step Down*, CNN, <http://www.cnn.com/2014/09/25/us/ferguson-michael-brown-police-chief-apology/> (last updated Sept. 24, 2014, 2:24 PM) (describing delay in bringing charges, in issuing an apology, and even moving Michael Brown's body from the crime scene for many hours after he was killed); Shan, *supra* note 55 (describing delay of over five months in bringing charges in the Tamir Rice case).

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Baltimore requested from the Department of Justice a full civil rights investigation to examine the Baltimore Police Department's pattern and practices, including the department's use of "excessive force, discriminatory harassment, false arrests, and unlawful stops, searches or arrests."¹⁴⁵ A day after the mayor's request, the DOJ agreed that such an investigation was warranted, and announced that it would commence an investigation into whether the Baltimore Police Department had engaged in unconstitutional patterns and practices in its policing.¹⁴⁶

Another community struggling to move beyond its tainted past is Ferguson, along with the greater metropolitan St. Louis area. In Ferguson, the voter turnout for the first municipal election following the troubling events of the past year was three times that of the last city council election, and reflected a voter turnout rate double that of the city of St. Louis.¹⁴⁷ As a result of the large turnout by Ferguson voters, a large population of whom are African American and historically underrepresented in their own municipal government, the number of black councilmembers on the Ferguson City Council tripled.¹⁴⁸

In St. Louis proper, the St. Louis Board of Alderman enacted a measure creating a civilian oversight board over the St. Louis Police Department.¹⁴⁹ The measure specifically authorizes local governments within the St. Louis region "to establish civilian oversight boards to receive, review and make independent findings and recommendations on complaints from members of the public against members of the Police Department," in recognition of the importance of community policing and citizen involvement, and that better law enforcement "can be enhanced by an independent citizen oversight process regarding allegations of misconduct" by law enforcement.¹⁵⁰

145. Luke Broadwater, *Baltimore Mayor Seeks Federal Investigation of Police Department*, BALT. SUN (May 6, 2015, 8:49 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ci-doj-partnership-20150506-story.html>.

146. Matt Apuzzo & Sheryl Gay Stolberg, *Justice Department Will Investigate Baltimore Police Practices*, N.Y. TIMES, May 7, 2015, at A14.

147. See John Eligon, *Ferguson Residents Turn out, Elect Two Blacks to City Council: Voters Reject Protest Activists' Candidates*, BOS. GLOBE (Apr. 8, 2015), <http://www.bostonglobe.com/news/nation/2015/04/07/ferguson-election-could-reshape-city-council/vwo5eFUpxvBCH0EjnqcA3M/story.html>.

148. See *Ferguson Election Results in Half-Black City Council*, CBS NEWS (Apr. 8, 2015, 1:33 AM), <http://www.cbsnews.com/news/ferguson-election-results-in-half-black-city-council/>.

149. Noam Scheiber, *Police Struggle with Loss of Privileged Position*, N.Y. TIMES, May 5, 2015, at A1.

150. St. Louis, Mo., Ordinance 69984 (Dec. 5, 2015).

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While such civilian oversight boards may be traced back to the 1992 creation of New York City's Civilian Complaint Review Board,¹⁵¹ they may become more prolific today in the face of greater citizen awareness of and concern about policing issues, along with other community-focused measures of reform.

Despite these steps of progress in Ferguson, tensions remain in the city. On the one-year anniversary of Ferguson, a state of emergency was declared and around 120 protesters were arrested after an incident in which the police shot and critically wounded an armed black man; in the meantime, a group of heavily armed white militia self-titled "Oath Keepers" patrolled the streets of Ferguson menacingly (to a number of the residents of Ferguson, at least) decorated with camouflage and assault rifles, but left undisturbed by the police.¹⁵²

As for New York City, another focus of police reform attention, new reform measures are once again being considered.¹⁵³ The New York Police Department has announced large-scale changes to its training procedures, including revisions to its trainings related to appropriate uses of force and better communication, and new training in both firearms and "less than lethal" weapons such as pepper spray and Taser guns.¹⁵⁴

Local efforts to remedy past police abuses have also come to include historic settlements awards, such as those detailed in Section III of this article in the City of Chicago, resulting from a number of incidents of police killing unarmed black men.

In other cities across the countries, similar and other reform measures are likely to be considered and adopted as well, as a new wake-

151. *Id.*

152. See Ben Kesling, *Ferguson Suffers Another Night of Unrest*, WALL ST. J. (Aug. 11, 2015, 7:50 PM), <http://www.wsj.com/articles/ferguson-suffers-another-night-of-unrest-1439284454>; Jason Sickles, *State of Emergency Issued Following Ferguson Anniversary Violence*, YAHOO NEWS (Aug. 10, 2012, 3:44 PM), <http://news.yahoo.com/police-shoot-gunman-who-opened-fire-during-ferguson-anniversary-protest-055405433.html>; Cassandra Vinograd, *Oath Keepers Turn Up at Michael Brown Protests in Ferguson, Missouri*, NBC NEWS (Aug. 11, 2015, 5:24 PM), <http://www.nbcnews.com/storyline/michael-brown-shooting/oath-keepers-turn-michael-brown-protests-ferguson-missouri-n407696>; Hansi Lo Wang & Sam Sanders, *Oath Keepers Say They're Defending Ferguson; Others Say They're Not Helping*, NPR (Aug. 12, 2015, 8:22 PM), <http://www.npr.org/sections/thetwo-way/2015/08/12/431978076/oath-keepers-say-theyre-defending-ferguson-others-say-theyre-not-helping>.

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

154. *Id.*

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fulness has dawned on the country, and demands for reform can no longer be ignored.

IV. STOP KILLING UNARMED AND FLEEING CIVILIANS!
(A PLEA FOR CONSTITUTIONAL CIVILITY)

Of all the possible reforms to reduce excessive police violence, one solution, which is among the measures proposed by the DOJ in its various reform proposals,¹⁵⁵ is relatively inexpensive, intuitively easy, and critically needed: every police department in this country must include in its policing reform efforts a guarantee that all officers are taught the essential constitutional limitations upon permissible police force against civilians. Police training must be Constitution-driven at its core. While many law enforcement agencies and police departments undoubtedly emphasize constitutional boundaries in their training already, in some police forces, such lessons are either being neglected or are in need of re-emphasis, as a certain type of bully officers in various regions of the country¹⁵⁶ have, however unfairly, become the ugly face of police brutality nationwide.

A. The Right to Flight, Part I: Fleeing as Insufficient Justification for Lethal Police Force

No police training on the use of force can be sufficient without emphasizing the constitutional imperative that lethal force may not be used by police against unarmed, fleeing individuals who do not pose an imminent serious danger to anyone. This use-of-force limiting principle has been a well-established rule of law for thirty years, having been clearly and adamantly set forth as a basic constitutional mandate in the Supreme Court's 1985 *Tennessee v. Garner* decision, the Fourth Amendment holding of which limited the common law "fleeing felon rule" to no longer allow lethal force against non-dangerous fleeing felons (let alone non-felons).¹⁵⁷

Tennessee v. Garner involved the police shooting of an eighth grade boy in Memphis Tennessee.¹⁵⁸ The child was unarmed, but was suspected of breaking into a woman's home while she was at home.¹⁵⁹ The boy was killed by police as he was climbing a fence, attempting to

155. See *supra* Section IV.A.

156. See, e.g., Friedersdorf, *supra* note 89.

157. *Tennessee v. Garner*, 471 U.S. 1, 1 (1985).

158. *Id.* at 3-4.

159. *Id.*

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flee the police who were pursuing him.¹⁶⁰ The officer who shot the child testified that he believed the child to be unarmed but nonetheless shot him because he believed that if the boy made it over the fence, he could outrun the officer.¹⁶¹

The Supreme Court decision began with the following declaration that immediately and unambiguously articulated the rule limiting permissible deadly police force:

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.¹⁶²

In its analysis, the Court emphatically declared 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”¹⁶³ Although deadly force may be used when there is probable cause that the suspect poses a threat of serious physical harm, the Court further explained, the fact that the suspect broke into a house in that case did not establish probable cause when the arresting officer “had no articulable basis to think Garner was armed.”¹⁶⁴ While later Supreme Court cases recognized that a suspect fleeing in a speeding car might in some cases may pose such a danger to others,¹⁶⁵ it has never found such a danger posed by an unarmed individual fleeing by foot.¹⁶⁶

160. *Id.*

161. *Id.* at 4 & n.3.

162. *Id.* at 3.

163. *Id.* at 11.

164. *Id.* at 11, 20.

165. *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. 2021 (2014) (same result as *Scott* in case where car chase “exceeded 100 miles per hour and lasted over five minutes,” during which time over two dozen other cars on the road were forced to change course, and the Court concluded that the fleeing driver’s “outrageously reckless driving posed a grave public safety risk,” justifying a police shooting); Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 474 (2014) (questioning the validity of 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,” in light of the views of laypeople to the contrary).

166. *Scott*, 550 U.S. at 382.

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The Court in *Garner* was sympathetic to the need of law enforcement to restrain fleeing felons, but nonetheless found that killing fleeing suspects went beyond the pale, declaring: “It is not better that all felony suspects die than that they escape.”¹⁶⁷

To the extent that *Garner* prohibits the use of deadly police force to stop unarmed fleeing *felon* suspects, it necessarily extends to at least an equal degree to protect non-felons who are running from the police, such as Eric Garner, Eric Harris, and Walter Scott.

Garner remains the seminal decision on the use of deadly force by police today, and is unambiguous, well-established law.¹⁶⁸ *Garner* is the key case in analyses by the DOJ in its review of police force.¹⁶⁹ For example, the Cleveland Report stated:

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 [v. Connor]*, 490 U.S. 386 [(1989)].¹⁷⁰

Applying this clearly established law, the DOJ elaborated in the report that the use of lethal force by police officers is not justified in circumstances “including against unarmed or fleeing suspects who do not pose a threat of serious harm to officers and others.”¹⁷¹

Thus, the critical constitutional rule that must be emphasized and re-emphasized in police trainings is this: 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

167. *Id.*

168. Search Query of *Tennessee v. Garner*, WESTLAW, <https://a.next.westlaw.com/Document/Ibde6c6a19c2511d9bc61beeb95be672/View/FullText.html> (revealing that *Garner* has been cited in 3,324 cases, with only six of those cases declining to extend the case’s holding regarding the use of deadly force).

169. DEP’T. OF JUSTICE CMTY. RELATIONS SERV., POLICE USE OF EXCESSIVE FORCE: A CONCILIATION HANDBOOK FOR THE POLICE AND THE COMMUNITY (2002), <http://www.justice.gov/archive/crs/pubs/pdexcess.htm>.

170. CLEVELAND REPORT, *supra* note 22, at 13.

171. *Id.*

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that deadly force is needed to prevent an immediate threat of serious physical harm to others.¹⁷² Although this principle is well-established under Supreme Court precedent, there is a disconnect with the public, evidenced by prolific internet cries of “he shouldn’t have run!” in response to each new police shooting, as if fleeing justifies execution, even in a civil society governed by constitutional protections.¹⁷³

More alarming still is the apparent lack of awareness of this essential constitutional rule by some police officers themselves. The constitutional mandate that deadly force may not be used against fleeing, unarmed, or other civilians who do not clearly pose an immediate threat to others is not a complicated principle. But it is one that, it seems, is lost on too many trigger-happy officers whose adrenaline rush gets the better of them in the heat of the moment (and for other potential reasons discussed in Section D, below).

One case in point was caught on video, in the tragic killing of Eric Harris. As Harris lay dying on the sidewalk, crying out that he had been shot, “fuck your breath” was not the only response he got from the officers pinning him to the ground. Moments before “fuck your breath” came this exchange: “Harris screams: ‘He shot me. Oh, my God,’ and a deputy replies: ‘You fucking ran. Shut the fuck up.’”¹⁷⁴

The disconcerting implication of this exchange is that the officer who responded to “he shot me” with the explanation “You fucking ran” believes that those who run from police officers deserve to be shot to death.

Similarly, the officer who shot Walter Scott two days later, while laughing about the adrenaline rush he got from killing Scott, also revealed in the following dashcam video-captured exchange that he shot Scott not to prevent a threat but, instead, because Scott was fleeing:

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.”

172. And, no, subjective fears based on implicit race biases do not count as probable cause. See Hutchinson, *supra* note 55.

173. See generally CLEVELAND REPORT, *supra* note 22.

174. *Oklahoma Volunteer Officer Who Shot Black Man Turns Himself In*, *supra* note 2.

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Another short pause.

“I don’t understand why he’d run.”¹⁷⁵

Similarly, in the shooting death of Samuel DuBose by a University of Cincinnati police officer on July 19, 2015, the fact that DuBose’s attempt to put his key in the ignition of his car and drive away from the officer was immediately followed by his being shot fatally in the head indicates that, as with the others, DuBose’s attempt to flee was likely a deciding factor in the officer’s decision to shoot DuBose.¹⁷⁶ This seems particularly the case in light of the officer’s own statement that “He took off on me. I discharged one round. Shot the man in the head.”¹⁷⁷

None of the police actions in these cases, at least from the facts as they are currently known, would survive *Garner*’s clear-cut prohibition against the use of deadly force to stop a fleeing felon, let alone an innocent civilian.

Furthermore, these and other cases may also illustrate a related and similarly alarming pattern: the tendency of some police to use force as a punitive measure in response to police feeling disrespected or otherwise angered by the victim of their force. Such retaliatory violence has also been deemed unconstitutional.¹⁷⁸ It is uncommon for police to admit, however, that they are acting out of retaliation for feeling disrespected; more commonly, as in the above examples, they express without hesitation their belief that shooting was justified because a suspect was trying to flee.

There are undoubtedly many more incidents in which a police officer’s shooting of a fleeing person coincides with the officer’s mistaken belief that fleeing, in itself, justifies the use of lethal force. This misunderstanding must not be allowed to persist in our nation’s police forces a day longer. Among the civilian community, it is more understandable that people confuse CSI, James Bond, and Wild West fictional scenes with what is appropriate and constitutionally permissible in a civilized society, but among our peace officers sworn to serve and

175. Bruce Smith & Phillip Lucas, *Dash Cam: Officer Who Shot Black Man Told Boss He Ran Away*, SEATTLE TIMES (Apr. 13, 2015, 1:57 PM), <http://www.seattletimes.com/nation-world/sharpton-praises-response-to-fatal-sc-police-shooting/>.

176. Perez-Pena, *supra* note 69.

177. *Id.*

178. *See, e.g.*, *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (“The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment.”).

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protect us and abide by the Constitution, such excessive violence by police can no longer be tolerated.

B. The Right to Flight, Part II: Fleeing as Insufficient Probable Cause for Arrest

In a similar vein, all police trainings must also include instructions that fleeing from the police does not, by itself, give rise to probable cause for arrest. The Supreme Court, by its own description, has “consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime,” as evidence of probable cause sufficient for arrest.¹⁷⁹ The rationale for skeptically treating the argument that flight, in and of itself, establishes probable cause of guilt? As the Court explained, as early as in an 1896 case:

[I]t is not universally true that a man who is conscious that he has done a wrong, ‘will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper,’ since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that ‘the wicked flee when no man pursueth, but the righteous are as bold as a lion.’¹⁸⁰

In today’s times, there is another reason to add to the list of reasons—other than guilt of a crime—that a person may run away from the police: the knowledge of the very incidents that are the subject of this article. To the extent that police killings of unarmed men—and, disproportionately, black men—has become common knowledge within urban black communities across the country, it is no wonder that some black men may flee at the sight of an officer rather than take their chances that they will be treated civilly, presumed innocent, and be spared bullying tactics to which others have been subjected. Thus, while some people (including, too often, the police who employ lethal force) may view flight by itself as establishing probable cause of wrongdoing, others recognize that fleeing at the sight of armed of-

179. *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963).

180. *Id.* (quoting *Alberty v. United States*, 162 U.S. 499, 511 (1896)).



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ficers is not evidence of guilt, because “young black men have ample reason to flee from the police.”¹⁸¹

This point was emphasized by Baltimore City State Attorney Marilyn Mosby in a press conference explaining the finding of probable cause leading to the indictment of the officers allegedly responsible for the death of Freddie Gray. Mosby’s summation to the media of the probable cause grounds for filing homicide and other charges against Gray’s arresting officers began with a detailed narrative focusing on the lack of probable cause the officers themselves had to arrest Freddie Gray in the first place, prior to their fatally rough treatment of him:

The statement of probable cause is as follows:

On April, 12 2015 between 8:45 and 9:15 a.m., near the corner of North Avenue and Mount Street. Lt. Rice of the Baltimore Police Department while on bike patrol with Officer Garrett Miller and Edward Nero made eye contact with Freddie Carlos Gray Jr.

Having made eye contact with Mr. Gray, Mr. Gray subsequently ran from Lt. Rice. Lt. Rice then dispatched over departmental radio that he was involved in a foot pursuit at which time bike patrol officers and Nero began to pursue Mr. Gray. Having come in contact with pursuing officers, Mr. Gray surrendered to Officers Miller and Nero in the vicinity in the 1700 block of Presbury Street.

Officer Miller and Nero then handcuffed Mr. Gray and moved him to a location a few feet away from his surrendering location. Mr. Gray was then placed in a prone position with his arms handcuffed behind his back. It was at this time that Mr. Gray indicated he could not breathe and requested an inhaler to no avail. Officer Miller and Nero then placed Mr. Gray in a seated position and substantially found a knife clipped to the inside of his pants pocket. The blade of the knife was folded into the handle. The knife was not a switchblade and is lawful under Maryland law. These officers then removed the knife and placed it on the sidewalk.

Mr. Gray was then placed back down on his stomach at which time Mr. Gray began to flail his legs and scream as Officer Miller placed Mr. Gray in a restraining technique known as a leg lace. While Officer Nero physically held him down against him will while a BPD wagon arrived to transport Mr. Gray. Lt. Rice, Officer Miller

181. Patrick M. Garry, *A Half-Century Since Brown: The Legal Academy’s Views of Racism*, 42 IDAHO L. REV. 209, 224 (2005).

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and Officer Nero failed to establish probable cause for Mr. Gray's arrest as no crime had been committed by Mr. Gray. Accordingly Lt. Rice Officer Miller and Office Nero illegally arrested Mr. Gray. . . .

[omitted: lengthy description of multiple occasions during which Gray asked for medical treatment and was denied, despite officers observing his deteriorating medical condition]

By the time Officer Zachary Novak and Sgt. White attempted to remove Mr. Gray from the wagon, Mr. Gray was no longer breathing at all. A medic was finally called to the scene where upon arrival, the medic determined Mr. Gray was now in cardiac arrest and was critically and severely injured.¹⁸²

Former Baltimore Mayor Kurt Schmoke, who currently serves as the President of the University of Baltimore, while commenting upon the above probable cause statement by Mosby, surmised that in focusing on the illegality of Freddie Gray's initial arrest, Mosby "was just trying to send a signal to the police department that there are standards for probable cause to make an arrest, and just someone looking at you and running away does not meet a standard of probable cause."¹⁸³ Schmoke further elaborated:

[U]nfortunately, what has happened over the last few years is that there's been kind of a blurring of the lines about when you can stop somebody and when you can actually arrest. And so all that I believe what she was doing in some of the charges was sending the signal that she wants the officers to go back to the standards that the Supreme Court has set for probable cause, and don't try to bend those standards or blur the lines.¹⁸⁴

Such blurred lines are, indeed, a tremendous problem. Ideally, Mosby will be just one among many government officials and community leaders who take the lead in re-instilling basic constitutional standards in police reform, and remedying the ongoing problems in urban American with excessive police force, from the point of pursuit, to arrest, and beyond.

182. Mosby Transcript, *supra* note 3.

183. *Former Baltimore Mayor: Police Charges Send Signal On Arrest Standards*, NPR (May 3, 2015, 7:45 AM), <http://www.npr.org/2015/05/03/403946516/former-baltimore-mayor-police-charges-send-signal-on-arrest-standards>.

184. *Id.*

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C. Instilling Best Practices for Constitutional Policing Beyond “Reasonableness” Lip Service and the “21-Foot Rule”

With the cases highlighted in this article providing examples of officers who seem ill-trained in the constitutionally prohibited use of lethal force, what explains the lack of Constitution-focused training on this front? What could explain why a significant number of police who have killed unarmed men of color in the past year have indicated that they felt their actions were justified? It is possible, but, one would hope, doubtful, that some rogue law enforcement departments are intentionally allowing police to remain confused about the limits of permissible lethal force to enable future qualified immunity or *Heien* defenses.¹⁸⁵

Assuming good faith, however, it is more likely that police are simply not being given adequate use-of-force instruction that focuses on the importance of *Tennessee v. Garner* restrictions on the use of lethal force, due to poor training procedures. For example, a best-practices manual issued by the Police Executive Research Forum utterly fails to mention *Tennessee v. Garner* at all, even in the context of teaching officers constitutional restraints on use of force.¹⁸⁶ Rather, the manual’s discussion of constitutional restraints on use of force describes only the broad “objective reasonableness” holding of the 1989 *Graham v. Connor*¹⁸⁷ case, which it describes in the following terms:

The landmark 1989 Supreme Court case *Graham v. Connor* provides that a Fourth Amendment standard of “objective reasonableness” (rather than the Fifth Amendment guarantee of due process) is the proper test for considering all claims of excessive force by police officers during the course of an arrest, investigatory stop, or other seizure of a citizen. An officer’s actions must be judged “from the perspective of a reasonable officer on the scene,” with consideration of the fact that “officers are often forced to make split-second decisions about the amount of force necessary in a particular situation,” the Court said.

There is no simple formula for assessing the Constitutionality of a use of force, the Court noted; rather, the assessment depends

185. See cases cited, *supra* note 26.

186. See *An Integrated Approach to De-Escalation and Minimizing Use of Force*, POLICE EXEC. RESEARCH FORUM 36–37 (Aug. 2012), http://www.policeforum.org/assets/docs/Critical_Is_sues_Series/an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf.

187. See generally *Graham v. Connor*, 490 U.S. 386, 388 (1989).

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upon “the facts and circumstances confronting [the officer at the time].”¹⁸⁸

Such a blatant omission of the *Garner* restrictions on the use of lethal force is troubling, particularly when the manual does cite the more general *Graham* precedent, while summarizing it in such vague and subjective terms that one would never gather from the passage that the Supreme Court has clearly prohibited lethal force against fleeing unarmed and non-dangerous suspects. Repeating this inaccurate and grossly insufficient description of constitutional constraints upon use of force, the manual describes its best-practices solution for preventing excessive police force in the following terms: “Teach officers to understand the ‘objective reasonableness’ standard for use of force articulated by the Supreme Court in *Graham v. Connor*, and train them to be able to clearly and accurately articulate their reasons for any use of force, in writing, following an encounter.”¹⁸⁹

That’s it. No further description whatsoever of the standard for limitations of lethal force articulated in *Tennessee v. Garner*. A best-practices manual disseminated nationally to police forces that encourages use-of-force training based on *Graham*, without any corresponding discussion of the *Garner* limitations on lethal force, can lead to dangerous misconceptions by police that the use of force against fleeing, unarmed suspects is constitutionally permissible and acceptable. If acted upon, such dangerous misinformation will inevitably result in the types of tragic police killings that have become all too commonplace in this country.

Similarly, in a longer book produced by Police Executive Research Forum, written to guide police departments in use-of-force training, and comprised of over a dozen articles describing different methods of implementing use-of-force practices and instruction, not one word is given to the constitutional restrictions on use of lethal force under *Tennessee v. Garner*.¹⁹⁰ This is the case despite a chapter of the book being devoted to the issue of lethal force by police.¹⁹¹

188. *An Integrated Approach to De-Escalation and Minimizing Use of Force*, *supra* note 186, at 36–37.

189. *Id.* at 37.

190. See generally *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.

191. *Id.*

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Is it any wonder that police training in some parts of the country may fail to teach *Tennessee v. Garner* adequately, when a leading national organization for the development of best-practices manuals for police fails to mention the critically important Supreme Court case?

In lieu of meaningful Constitution-focused training on the limits of permissible lethal force, some officers may also be encouraged to cling to what may feel like an easier and more straight-forward rule: the “21-foot rule.”¹⁹² The “21-foot rule,” a popular maxim that lethal force may, and should, be used when a target is within twenty-one feet of the officer, has become dogma in the law enforcement world.¹⁹³ The rule has become a standard measure of permissible lethal force by police since 1983, when, in what has been described in police circles as a “timeless classic,” a SWAT magazine article (now available on the Police Policy Studies Council’s website) estimated that twenty-one feet is the distance at which an adversary can “enter your Danger Zone and become a lethal threat to you.”¹⁹⁴ Since the article that formulated the 21-foot rule was first published, the rule “has been taught in police academies around the country, accepted by courts and cited by officers to justify countless shootings.”¹⁹⁵

It appears that, at least in the case of Michael Brown, the 21-foot rule was at the forefront of Officer Darren Wilson’s mind during his investigation statements, in which he emphasized his fear of the young man in the same breath that he emphasized the 20-feet-and-closing distance he claimed stood between him and Brown when he shot him:

Wilson explained that he chased after Brown, repeatedly yelling at him to stop and get on the ground. Brown kept running, but when he was about 20 to 30 feet from Wilson, abruptly stopped, and turned around toward Wilson, appearing “psychotic,” “hostile,” and “crazy,” as though he was “looking through” Wilson. While making a “grunting noise” and with what Wilson described as the “most intense aggressive face” that he had ever seen on a person, Brown then made a hop-like movement, similar to what a person does

192. The training and implementation of which is also known as the “Tueller Drill,” after the man who coined the phrase and principle. See Michael D. Janich, *Beyond the Tueller Drill: There Are Ways to Bring a Gun to a Knife Fight, But You Have to be Practical and Prepared*, POLICE MAGAZINE (Nov. 1, 2008), <http://www.policemag.com/channel/weapons/articles/2008/11/beyond-the-tueller-drill.aspx>.

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

194. Dennis Tueller, *How Close is Too Close?*, POLICE POLICY STUDIES COUNCIL (2004), http://www.theppsc.org/Staff_VIEWS/Tueller/How.Close.htm.

195. Apuzzo, *supra* note 193.

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when he starts running. Brown then started running at Wilson, closing the distance between them to about 15 feet. Wilson explained that he again feared for his life, and backed up as Brown came toward him, repeatedly ordering Brown to stop and get on the ground. Brown failed to comply and kept coming at Wilson. Wilson explained that he knew if Brown reached him, he “would be done.” During Brown’s initial strides, Brown put his right hand in what appeared to be his waistband, albeit covered by his shirt. Wilson thought Brown might be reaching for a weapon. Wilson fired multiple shots.¹⁹⁶

Following the shooting, a number of commentators appear to think that the 21-foot rule was a central factor in the shooting as well. For example, Bill Johnson of the National Association of Police Organizations, when asked for his perspective on the Michael Brown shooting, explained: “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.”¹⁹⁷ Similarly, criminal defense attorney Mark O’Mara, explaining his perspective of the Ferguson shooting on the Anderson Cooper show, did so in terms of the 21-foot rule:

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.¹⁹⁸

While the 21-foot rule may have been widely accepted at a local law enforcement level, it has not been addressed even in passing by

196. REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 42, at 14–15.

197. *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 television broadcast Aug. 21, 2014, 4:30 PM) (transcript available at <http://www.cnn.com/TRANSCRIPTS/1408/21/cg.02.html>).

198. *Anderson Cooper 360 Degrees: Presidential Call for Calm as People in Ferguson, Missouri and Across the Country Wait for Word of a Grand Jury; Latin Community Reaction to Obama’s Executive Order; Allegations against Bill Cosby First Brought Decades Ago; Exoskeletons Make Walking Possible for Paralyzed People* (CNN television broadcast Nov. 22, 2014, 8:00 PM) (transcript available at <http://www.cnn.com/TRANSCRIPTS/1411/21/acd.01.html>).

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Supreme Court decisions.¹⁹⁹ Among United States Court of Appeal Circuits, only the Fourth Circuit has accepted the 21-foot rule as allowing an officer to “use deadly force to stop a threatening individual armed *with an edged weapon* when that individual comes within 21 feet.”²⁰⁰ In contrast, the Tenth Circuit, for example, has been careful to explain that distance is just one factor to be evaluated in determining whether lethal force is permissible:

Appellant relies on two cases involving fatal police shootings. These cases illustrate why we consider the totality of the circumstances, but neither supports the proposition that any particular distance makes the use of force unreasonable.

In the first case, *Zuchel v. Spinharney*, we concluded summary judgment was improper where disputed facts called into question the immediacy of the threat facing the officer. One witness, for example, claimed that the distance between the officer and a knife-wielding decedent was only three and a half feet. But another witness testified the officer and the decedent were 10 to 12 feet apart at the time of the shooting. Other factual disputes involved whether the officers could reasonably think the decedent was armed when he in fact was holding fingernail clippers, whether the decedent had made a stabbing motion, and whether the officers had warned the decedent to drop his weapon.

In a second case, *Walker v. City of Orem*, we also found fact questions remained regarding the level of threat facing officers responding to a knife-wielding suspect. One fact supporting the absence of a threat was the distance of more than 21 feet between the officer and the decedent. But the plaintiff also presented disputed evidence that the scene was bright enough for officers to see clearly, that the decedent’s weapon was a two-inch blade, which he was holding against his own wrist, that the officers issued no warnings, that the decedent was not behaving aggressively and was not facing the officers, and that officers knew the decedent was suicidal but not homicidal. In both *Zuchel* and *Walker*, the totality of the circumstances presented a factual dispute about whether the officer reasonably perceived a threat. Eyewitnesses contested the degree of danger facing the officer at the time deadly force was exercised. Admittedly, one of the disputed facts in *Zuchel* and *Walker* involved the distance between the officer and the decedent, but while dis-

199. A search of law review and journal articles and Supreme Court cases conducted on Westlaw on May 6, 2015, reveals no articles or Supreme Court cases addressing the 21-foot rule at all.

200. *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998) (emphasis added).

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tance is one factor in assessing the immediacy of threat, it is not the only one.²⁰¹

Only two cases among all the federal and state opinions combined that have examined the 21-foot rule have done so in light of the constitutional limitations of *Tennessee v. Garner*.²⁰² Both cases, through cursory discussions, have summarily concluded that the policy is in line with *Garner*.²⁰³ However, both decisions are also unpublished lower federal court decisions.²⁰⁴

There are a number of problems with the 21-foot rule in addition to the fact that the rule has never been examined in any legal scholarship or Supreme Court decision, or endorsed in any published federal court opinion,²⁰⁵ but is merely a construction of a single SWAT magazine article²⁰⁶ that has been elevated in prominence in police training to a perhaps unwarranted degree. As James O’Keefe, the former New York Police Department Deputy Commissioner for Training has explained, the 21-foot rule has been used as a guideline for decades to assist police in deciding when to use lethal force against armed attackers, with “[p]retty much every police department in the country” teaching it in their curriculum, but there are risks of improper teaching of the guideline.²⁰⁷ “It’s a guideline not a rule. But if that’s not taught properly, some young cop could shoot a guy and he could find himself in civil and or criminal trouble.”²⁰⁸ O’Keefe has predicted that the NYPD curriculum, at least, will be “more detailed” in how it teaches the 21-foot rule, without elaborating what changes will be made in particular.²⁰⁹

201. Estate of Larsen v. Murr, 511 F.3d 1255, 1262 (10th Cir. 2008) (citations omitted).

202. Luke v. Brown, No. 1:05-CV-264-CAP, 2007 WL 4730648, at *13–14 (N.D. Ga. Feb. 23, 2007) [hereinafter Brown 1], *aff’d on other grounds*, 253 F. App’x 916, 917–18 (11th Cir. 2007) [hereinafter Brown 2]; Woodward v. Town of Battleboro, No. 1:02CV35, 2006 WL 36906, at *6–7 (D. Vt. Jan. 5, 2006).

203. Brown 1, 2007 WL 4730648, at *37–40; Brown 2, 253 F. App’x at 917–18; Woodward, WL 36906, at *22–23.

204. Brown 1, 2007 WL 4730648, at *1; Brown 2, 253 F. App’x at 916, Woodward, WL 36906, at *1.

205. Brown 1, 2007 WL 4730648, at *1; Brown 2, 253 F. App’x at 916; Woodward, WL 36906, at *1.

206. See Apuzzo, *supra* note 193.

207. 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, 7:32 AM), <http://www.21alive.com/news/top-news/Law-enforcement-analysts-suggest-changes-to-police-training-302735961.html?llsms=1165741&c=y>.

208. *Id.*

209. *Id.*

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In recent cases, including those described in this article, it increasingly appears that the 21-foot rule, rather than being a limited guideline confined to cases involving actual weapons, has been extended to cases where the only “weapon” perceived by an officer is what the officer perceives is a threatening posture by the defendant (such as the “charging” stance Wilson described Michael Brown making upon turning around, albeit while still unarmed).

Thus, perhaps the most fundamental problem with the 21-foot rule, in the end, is that it may have become a substitute in the minds of some officers for the actual constitutional limitations on use of force. If an unarmed suspect, for example, is running away from an officer but still within twenty-one feet, it may be the case that the officer will erroneously, and fatally, believe that shooting would be constitutionally permissible because the person is within twenty-one feet. The test under *Tennessee v. Garner*, however, is one of physical *threat*, not physical *distance*.²¹⁰ The mere proximity of a person does not create a threat where the person is unarmed, fleeing, and otherwise non-dangerous under *Garner*. Thus, distance as a proxy for danger creates not only a false sense of immunity against prosecution for officers, but also a very real threat of danger for those within twenty-one feet of an officer’s raised firearm.

A growing number of law enforcement departments across the country have begun to call for internal reforms that reassess both the value of the 21-foot rule and other rules of practice that emphasize the permissibility of force rather than how to defuse potentially violent situations.²¹¹ The Washington Post reports that “[s]everal big-city police departments are already re-examining when officers should chase people or draw their guns and when they should back away, wait or try to defuse the situation,” and are considering, going even farther than the NYPD, abandoning the 21-foot rule.²¹²

In so doing, and in reevaluating better police practices to replace excessive-violence-enabling axioms like the 21-foot rule, such law enforcement departments would do well to ground future use-of-force trainings in Constitution-focused practices mandated by the well established Supreme Court, not fallible rules developed by SWAT magazine contributors.

210. See generally *Tennessee v. Garner*, 471 U.S. 1 (1985).

211. Apuzzo, *supra* note 193.

212. *Id.*

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CONCLUSION

Young black men confronted by the types of police who are governed by hot-headedness rather than by constitutional restraints face an impossible choice. If they stay within an officer's grasp, or within the twenty-one feet that many police count as establishing a bright line rule authorizing lethal force, they risk being killed like Eric Garner, Tamir Rice, John Crawford, III, and Samuel DuBose, no matter how little an actual risk they pose to the officer exerting deadly force against them. If they run away and then turn around at any point while being shot at, they risk being killed like Michael Brown. Even if unarmed black men are careful not to turn around, as Brown did, lest they be accused of "charging," they may still be shot dead, as Eric Harris and Walter Scott were. Such is the cruel reality resulting from police standards that excuse police from carefully assessing a situation before engaging in lethal violence, and from employing the constitutional constraints of *Tennessee v. Garner*. Finally, if such targets of police chases are caught alive after running away from the police, as Freddie Gray was, they risk being arrested with no probable cause of a crime, merely because they fled, and then still being inflicted with mortal injuries on their way to jail. In urban communities where certain police officers seem more trigger-happy and hot-headed than others (and oblivious to the constitutional mandates of *Tennessee v. Garner* than others), stepping outside can feel like a game of Russian roulette to young black men.

It doesn't have to be like this.

It was not so long ago that police officers were often described as "peace officers," for their role in keeping the peace in our communities. There is a reason that phrase is seldom heard today, and yet, we should not lose sight of the potential for resilience and a new era of police reform: one that weeds out the bad cops from the good; that has a zero-tolerance policy for unconstitutional brutality and racism-driven policing; and that works with, not against, the communities whom our peace officers are sworn to protect and serve. While much of the needed reform will take substantial time and resources, one critical fix is easily accessible and must be implemented immediately: civilians and police alike across the country must be taught in no uncertain terms that the use of deadly force by police is permissible *only* "where the officer has probable cause to believe that the suspect poses



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a threat of serious physical harm, either to the officer or to others,”²¹³ and thus, “deadly force is not justified . . . against unarmed or fleeing suspects who do not pose a threat of serious harm to officers or others.”²¹⁴

To the extent that any police department fails to emphasize these constitutional limitations on permissible police force, too many lives are placed in unacceptable danger. To the extent that the 21-foot rule or similar standard has become the primary measure of permissible lethal police force, rather than the constitutional constraints of *Tennessee v. Garner*, police training is dangerously inadequate. Any police reform must place a greater focus on constitutional limitations on permissible violence, particularly in the context of clarifying when lethal force may not be used, including against those fleeing from the police.

This proposal may be a small piece of the police reform puzzle, but its importance is immense. Today, urban civilians of color have more reason than ever to run from police, but, sadly, have been killed far too often in the past year for doing so. As long as those who flee the police are viewed as deserving whatever they get, whether death or arrest, innocent lives are at peril, as is the constitutional integrity of our justice system.

213. *Garner*, 471 U.S. at 11 (emphasis added).

214. CLEVELAND REPORT, *supra* note 22, at 13.