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From Warrior to Guardian: Reducing Excessive Police Use of Force

By: Taylor Richard

Introduction

> "My daughter loves being a police officer, but she knows that the uniform doesn't make you a good person...Society has put it into our heads that the officer is always right. That has to change."[1]
>
> -Georgia Ferrell, Mother of Jonathan Ferrell

The Story of Jonathan Ferrell

In 2013, a promising young man was gunned to death by a police officer in Charlotte, North Carolina, after seeking help for a car wreck. Jonathan Ferrell was the youngest of six children raised by their single mother Georgia Ferrell.[2] Ms. Ferrell always imprinted on her children the importance of respecting authority figures. Jonathan was not a stranger to

police, his sister Joy, eventually became a sergeant at the Leon County, Florida Sheriff's Department.[3]

During the fall of 2013, Jonathan Ferrell was living a life typical of those in their mid-twenties. His fiancée had accepted a position at an accounting firm in Charlotte so Ferrell quit his position on the Florida A&M Football team and followed the love of his life to a new city.[4] He was working two retail jobs and planned on returning to school to finish his degree in chemistry, where he had maintained a 3.7 GPA.[5]

During the early hours of September 14, 2013, after dropping a friend off in Charlotte, the 24-year old Ferrell fatefully veered his fiancée's Toyota Camry into a ditch. The wreck was so severe that Ferrell was forced to kick out the back window and climb out of the vehicle.[6] After stumbling from the carnage, and losing his cell phone in the process, Ferrell trudged up the embankment and out of the ditch.[7] He approached the nearest home hoping to find help. He knocked loudly, in an attempt to wake up the resident. The homeowner, Sarah McCartney, was a young mother expecting her husband. She opened the door and saw the disheveled Ferrell. She immediately closed the door and dialed 911.[8]

Officers from the Charlotte-Mecklenburg Police Department were dispatched to the scene. Shortly thereafter, CMPD approached the unarmed Ferrell as he was walking on a nearby

road. Dash cam footage shows a third police cruiser pulling behind two other stopped cruisers.[9] Ferrell can be seen under the lighting of two police headlights and numerous streetlights, walking slowly towards the vehicles. According to prosecutors, an officer aimed "the red laser targeting beams of his Taser on Ferrell," causing Ferrell to fear for his life.[10] Ferrell breaks into a run, going between the opening of two patrol cars, the same place where Officer Randall Kerrick stood with his gun drawn. An officer can be heard shouting "get on the ground" three times, followed by immediate gunshots.[11]

Randall Kerrick had opened fire, expending twelve rounds, and hitting Ferrell ten times.[12] The autopsy report concluded the cause of death was multiple gunshot wounds of the chest. When the coroner received the sealed body bag of Jonathan Ferrell, his hands were still behind his back, "handcuffs secured around the wrists."[13]

Randall Kerrick, the officer who had killed Ferrell, was quickly charged with voluntary manslaughter. Rodney Monroe, the police chief at the time, expressed that Ferrell was clearly unarmed "and even one shot was too many."[14]

In May of 2015, before the criminal trial, the City of Charlotte settled a civil lawsuit with Ferrell's family that contended Kerrick was improperly trained. The suit was settled for $2.5 million.[15]

A contentious criminal trial ensued, in which Kerrick's lead defense attorney George Laughrun told the jury that Kerrick was a "warrior" who "went to battle every day."[16] The jury deadlocked, and Kerrick walked free.[17]

In October of 2015, the City of Charlotte reached a settlement with Officer Kerrick, accepting his resignation while paying him $113,000 in back pay and $16,000 towards his retirement. The city also paid over $50,000 for the legal fees incurred by the attorneys who represented Kerrick.[18]

Jonathan Ferrell's story is tragic, but not exceptional. This note aims, not to denigrate police, but to delve into the issue of the proper balance between necessary police use of force, and the factors that lead to its excess. Police work involves a certain level of danger, and the inherent nature of the work includes the authority, and even mandates, the use of force. It is, after all, called law *enforcement.* Force, properly applied by the police, is essential to maintain an ordered and civilized society. This article aims to strengthen understanding of the problem and suggest solutions. An overarching theme will be a comparative analysis of policing practices and accountability between the U.S. and the United Kingdom. Part I will give a history and background of policing and police use of force in the United States. Constitutional and statutory limitations will be discussed. Part II will discuss policing and

the use of force in the United Kingdom. Part III will illustrate the profundity of the issue of police use of force in the U.S, and analyze the differences in police use of force between the U.S. and the comparable democracies of England and Germany. Part IV will discuss the reasons behind the problem of excessive use of force, and analyze potential solutions.

I. History and Background of U.S. Policing and Use of Force

Contemporary policing "would be utterly foreign to our colonial forebears."[19] In our country's earliest stages, after the Revolutionary War, people were wary of authority, and distrustful of centralized power. Colonial citizens formed a "surprising consensus opposing the establishment of a formal police organization, because everyone, property holders and workers alike, feared the force of an organized police."[20] In the years following our Constitutional ratification, policing was mostly performed by crude bands of citizens committed to implementing order.[21] This "business of amateurs" was conducted by sheriffs, constables, and night watchmen.[22] An organized police force would require valuable financial and judicial resources that "most rural areas lacked and most cities did not want to devote to the issue."[23]

Amateur constables were no match to serious threats to public safety. For the most part, victims were responsible for

apprehending offenders themselves. The most dangerous criminals were pursued by mobs of citizens, spurred by the traditional English obligation to participate in the "hue and cry." [24] Preventative measures mainly fell to the watchmen, notoriously incompetent and (literally) asleep at the job. A "constant chorus of complaints about the constables and watchmen" arose during this time. [25] Money talks, and the lack of incentive for these duties to be fulfilled created a system whereby the wealthy would hire substitutes to protect their property when the unpaid civic do-gooders failed to rise to the occasion. Those wealthy enough to afford additional protection nearly always did so.

Eventually, lawlessness and disorder in urban areas during the 1830s and 1840s necessitated the creation of professional, "quasi-military" police forces. [26] New York established such a force in 1845, with other cities soon following.[27]

The beginning of the twentieth century also spurred a shift in police attention to combating crime. Industrialization, population expansion, and new technology spurned the beginning of police forces similar to those of what we see today. The increased number of officers and expanded authority of modern era police raised concerns about abuses of power and questions regarding who would regulate the police.[28] "From their inception, modern police forces have been plagued by the twin problems of

corruption and brutality."[29] The United States system of local control over police practices, and the "legislative default in regulating police practices is no accident."[30] There is little motivation for lawmakers to protect individuals being investigated by police from excessive force. Societies fear of crime and the ease at which elected officials appeal to our basic instincts have made it "politically suicidal" for legislators to aggressively regulate the police.[31] Until recently,[32] self-regulation by the police has been "minor to the point of nonexistence."[33]

Common Law

Our country's common law was not kind to individuals suspected or convicted of committing felonies. Most crimes considered felonies were violent and punishable by death.[34] The prevailing rule at the time of the adoption of the Fourth Amendment was that law enforcement officers had the privilege to use deadly force against fleeing felons.[35] The common law rule "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant."[36] It is important to note that common law rules reflect an era in which there were no professional police. Since then, the nature of crime and the tools available to law enforcement has changed. "[I]t would be naive to assume that those actions a constable

could take in an English or American village three centuries ago"[37] should shape our societies' view as to the proper role of police use of force.

Federal Statutes

Eventually, federal laws were passed to deter and punish police officers from invading the Constitutional rights of citizens. Under state laws, police officers are granted immunity from civil suit. However, in 1871 Congress passed the The Ku Klux Klan Act of 1871. Part of this act was 42 U.S.C § 1983. Section 1983 grants that any person under the color of law who causes a citizen to be deprived of any right, privilege, or immunity secured by the Constitution or law shall be liable to the party injured.[38] The § 1983 claim originally was a last resort after state action claims were exhausted. However, in *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court concluded that § 1983 afforded a civil cause of action to redress constitutional harms inflicted by a public official acting under the authority of a governmental position. Section 1983 thus became a federal court cause of action separate from state tort claims.

In order to assert a § 1983 claim, the plaintiff must demonstrate that an officer acted "under color of law" and that a constitutional or statutory right was violated. Plaintiff can

show that the police action was "under color of law" if it involved the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." [39]

Currently, individual police officer[s] and the local governing body that employs the police officer can be sued, but that was not always the case. Initially, in *Monroe v. Pape,* the Supreme Court held that municipal bodies were not meant to be included in the list of "persons" that could be held liable under the Act. [40] Subsequently, in *Monell v. Dep't of Social Services of City of N.Y,* the Supreme Court overruled *Monroe*, and extended the possibility of liability to municipalities under § 1983 claims.[41]

Proving the liability of a municipality in an excessive use of force situation is more difficult than is required under a typical respondeat superior theory of liability. "The Supreme Court...has made it clear that 'a municipality cannot be held liable solely because it employs a tortfeasor." [42] The local governing bodies can be sued for monetary, declaratory or injunctive relief under § 1983 in situations where the action that is allegedly unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by those who edicts or acts may fairly be said to represent official policy."[43] A plaintiff that seeks

to impose liability under § 1983 against a municipality for the torts of its employee police officers must prove that a municipal "policy" or "custom" caused the violation of the plaintiff's rights and that "the municipality was the 'moving force' behind the injury alleged." [44] This means that the plaintiff must prove that the municipality's action "was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." [45] Thus, municipal culpability can be shown by presenting evidence of negligence or gross negligence in the training, supervising, or managing of police officers under a municipality's control.

Prior to 1994, federal law granted no authority for federal structural reforms of local police departments engaging in systematic misconduct. In an effort to initiate reform of local policing practices, Congress passed 42 U.S.C. § 14141 [46] to fill this regulatory void, and granted the U.S. Attorney General authority to initiate structural reform litigation against police departments engaging in misconduct. [47] Until the passage of this statute, the federal government had been incapable of effectively dealing with systematic wrongdoing on the part of local police departments. It had depended upon "minimally invasive methods, like evidentiary exclusion and private civil litigation." [48] Federal courts had held that private and public

litigants had lacked standing to seek equitable relief against problematic police departments without congressional authorization. The 1994 enactment of 42 U.S.C.S. § 14141 [now compiled as 34 U.S.C.S. § 12601] allows the Department of Justice, under the guidance of the U.S. Attorney General, to use equitable means to compel problematic police departments to adopt "significant structural, procedural, and policy reforms aimed at curbing misconduct."[49]

The criminal equivalent of the § 1983 civil rights statute is 18 U.S.C. § 242, "which makes it a crime to willfully deprive any person of his or her federal or constitutional rights while acting under color of law."[50]

Supreme Court Decisions

In time, the Supreme Court decided to utilize a Fourth Amendment analysis to determine the appropriate level of police use of force under civil rights violation claims. In *Tennessee v. Garner*[51], the Supreme Court "took it upon itself to give a searching investigation of the common law rule of police force, and to reassess that rule in light of modern circumstances."[52] The court announced that use of force would be analyzed under a Fourth Amendment "reasonableness" standard.

The Court held that a law allowing an officer to use deadly force against a fleeing felon, who posed no threat to the public

was unconstitutional as applied. "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."[53]

On October 3, 1974, in Memphis, Tennessee, eighth grader Edward Garner was shot and killed by a police officer after being suspected of breaking and entering.[54] After responding to a burglary in progress call, Memphis police officers Elton Hymon and Leslie Wright were directed to a neighboring house.[55] Officer Hyman went behind the house and observed Garner running across the backyard, stopping at a 6-foot high chain link fence. Using his flashlight, Officer Hyman was able to see Edward Garner's face and hands. "He saw no sign of a weapon, and, though not certain, was 'reasonably sure' and 'figured' that Garner was unarmed."[56] Hymon called out "police, halt!" and took steps towards Garner, who proceeded to climb the fence.[57] Convinced that Garner would elude capture if he made it over the fence, Officer Hymon shot him.[58] The bullet hit Garner in the back of the head and Garner later died on the operating table of a hospital. "Ten dollars and a purse taken from the house were found on his body."[59] A grand jury declined to indict Officer Hymon, and he was cleared by the Memphis Police Firearms Review Board from any wrongdoing.[60]

Edward Garner's father brought an action under 42 U.S.C § 1983, asserting that his son's constitutional rights had been violated. The complaint named Officer Hymon, the Memphis Police Department, its Director, and the mayor and city of Memphis as defendants.[61] Judgments in favor of all defendants were entered by the district court because Hymon's actions were authorized by Tenn. Code Ann. § 40-7-108 (1982), which allowed an officer if, after notifying the intention to arrest, he either flees or forcibly resists, to utilize all the necessary means to effect the arrest.[62] The district court also found this statute to be constitutional.

After a series of reverses and remands, the Sixth Circuit Court of Appeals eventually found that the city could be held liable, reasoning that the killing of a fleeing suspect is a 'seizure' under the Fourth Amendment, and is therefore constitutional only if 'reasonable.' "The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes."[63] The State of Tennessee, which had intervened to defend its statute, appealed to the Supreme Court of the United States, which granted certiorari.

The Supreme Court utilized a Fourth Amendment search and seizure analysis to determine the constitutionality of Officer Hymon's actions. "Whenever an officer restrains the freedom of a

person to walk away he has seized that person."[64] In analyzing a deadly force situation, the Court found that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[65] The Court then utilized a balancing test for evaluating the reasonableness of "the manner in which a search or seizure is conducted."[66] The individual's interests are to be balanced against those of the Government, by looking at the "totality of the circumstances."[67] On one side of the scale, an individual has an "unmatched" interest in his own life, and that individual and society has an interest in "judicial determination of guilt and punishment."[68] On the other side of the scale is the government's interest in enforcing criminal laws.

While acknowledging the importance of the government interest in effectively enforcing the law and reducing overall violence by encouraging the peaceful submission of suspects, the Court was unconvinced that deadly force "is a sufficiently productive means of accomplishing [these goals] to justify the killing of nonviolent suspects."[69] Thus, the Court was not persuaded that shooting non-dangerous fleeing felons was vital enough to outweigh the suspect's interest in their own life.[70] "It is not better that all felony suspects die than that they escape. 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."[71] The Court also declared that the use of deadly force "is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion,"[72] because if an officer is successful in killing the suspect, no criminal justice mechanism will ever have been set into motion.

Plainly as possible, "[a] police officer may not seize an unarmed nondangerous suspect by shooting him dead."[73] Thus, the Tennessee statute was unconstitutional as far as it authorized the use of deadly force against such fleeing suspects. The court was careful to limit its opinion, however. It did not find Tennessee's statute unconstitutional on its face. The court crafted an exception for officers to carry out deadly force when the "officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[74]

The ramifications of the *Garner* decision are limited. Because this was a case involving a suit under the § 1983 civil rights statute, the court decided the constitutional standard for Garner's civil rights lawsuit. The Court did not, however, face the question of what the standard is for state criminal law prosecutions against police officers.[75] Individual states are

still free to employ the common law rule, and many states continue to do so, even after the *Garner* decision.[76]

Four years after *Garner*, the Supreme Court considered police use of force cases in a broader context than the fleeing felon situation. The case of *Graham v. Connor* required the Court to decide "what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person."[77] This decision included police actions during the course of stops and detentions by the police, but short of arrest. The Court decided that such claims should be analyzed under "the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." Petitioner Dethorne Graham had sued under § 1983 to recover damages for injuries sustained when law enforcement used force against him during an investigatory stop.

The case began on November 12, 1984, when the diabetic Graham felt the onset of an insulin reaction. Graham asked a friend, William Berry, to drive him to a store to purchase orange juice, in an attempt to allay this reaction.[78] After arriving at the store, Graham saw a large line of people ahead of him in the checkout line, so he quickly left the store and asked Berry to drive him to another friend's house instead.[79] A Charlotte, North Carolina, police officer became suspicious

after watching Graham hastily leave the store. Officer Connor followed Berry's vehicle and made an investigative stop.[80] Berry explained to Officer Connor that Graham was suffering from a "sugar reaction." Officer Connor ordered the two to "wait while he found out what, if anything, had happened at the convenience store."[81] While Officer Connor sat in his patrol car calling for backup assistance, Graham left the vehicle, "ran around it twice, and finally sat down on the curb, where he passed out briefly."[82] In the ensuing confusion, other Charlotte Police Officers arrived on the scene. One officer "rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar."[83] Other officers lifted Graham from behind, carried him to Barry's car and placed him face down on the hood.[84] As he regained consciousness Graham asked the officers to check for a diabetic decal in his wallet.[85] The officers instead "told him to 'shut up' and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car."[86] Eventually, Officer Connor received word that Graham had done nothing wrong at the convenience store and drove him home.[87]

During this encounter, Graham suffered a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and developed a loud ringing in his ear that continued throughout the initiation of his lawsuit.[88]

Graham commenced an action under § 1983 against the individual officers involved, and alleged that they had used excessive force in making their investigatory stop and violated "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983."[89] The case was tried before a jury at district court, but at the close of petitioner Graham's evidence, the respondent officers moved for a directed verdict. The district court granted the respondents' motion for a directed verdict in their favor and found that the force used was not applied "maliciously or sadistically for the very purpose of causing harm," but rather was used in a "good faith effort to maintain or restore order in the face of a potentially explosive situation."[90]

The Court of Appeals for the Fourth Circuit affirmed the District Court's directed verdict.

The U.S. Supreme Court rejected "the notion that all excessive force claims brought under § 1983 are governed by a single generic standard." The Court explained that § 1983 "is not itself a source of substantive rights," but provides "a method for vindicating federal rights elsewhere conferred."[91] Instead, the Court held, an excessive force claim analysis under § 1983 should begin by identifying the specific constitutional right that is allegedly infringed. In most instances, this will either be the Fourth Amendment's prohibition against

unreasonable seizures, or the Eighth Amendment's ban on cruel and unusual punishment.[92] "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard."[93] The Court stated, "[t]oday we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force — deadly or not — in the course of arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth amendment and its 'reasonableness' standard."[94]

The Court attempted to clarify "reasonableness" by declaring that it be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." [95] Giving further deference to police officers, the Court added, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments" regarding the amount of force necessary, in "tense, uncertain, and rapidly evolving" circumstances.[96] The Court didn't require that police officers should be shown deference only when their decision making actually occurs in a tense, uncertain and rapidly evolving situation, but that they should always be shown this deference simply because they are often placed in those situations.[97] "Not every push or shove, even if it may later seem

unnecessary in the peace of a judge's chambers" is a Fourth Amendment violation.[98] The reasonableness inquiry also must be an objective one, the question being whether the officer's actions are objectively reasonable "in light of the facts and circumstances confronting them," regardless of their underlying motivation or intent.[99]

Thus, the Supreme Court has left lower courts with the task of determining whether police use of force actions are "reasonable" as judged from the objective perspective of a "reasonable officer on the scene."

II. Policing and the Use of Force in the U.K.

In the introduction to his exhaustive account of *A History of Police in England and Wales 900-1966,* author T.A. Critchley writes, "[t]he device which is most characteristically English has been to arm the police with prestige rather than power, thus obliging them to rely on popular support. Associated with this principle that every policeman is personally responsible to the courts for any wrongful act."[100]

Broadly, the earliest origins of Anglo-Saxon law enforcement began before the Norman Conquest. Saxon society maintained order through "a well-understood principle of social obligation or collective security."[101] Adult males were placed into groups of about ten families called a "tything." This group

was headed by a tythingman, and the groups were organized into larger groups called "hundreds" which were led by a hundred man or royal reeve.[102] The "hundred man" was responsible for holding trials, and ensuring his tythings collected taxes. There were larger geographical units of "shires," similar to a county, which were headed by a shire reeve, or sheriff.[103] This shire reeve, or sheriff, had the power to muster the "*posse comitatus* — namely, the whole available civil force of the shire—in case of emergency."[104] All members of a community also had an obligation to join in pursuit of a felon. This obligation and pursuit was known as the "hue and cry."[105] The idea of the "king's peace," representing the sovereign's interest in maintaining order, laid the groundwork for the development of the common law.[106]

The term "constable" finally appears in the annals of history after 1066.[107] The word was initially a reference to a high military officer associated with the royal court, and bore no relationship to the Saxon tythingman.

In 1166, a century after the Norman invasion, King Henry II enacted the Assize of Clarendon.[108] This act required the villagers to report to the sheriff, "any suspicions they might harbor about one another, together with any matter affecting the affairs of the district."[109] These reports to the sheriff, known as "presentments" were made by the tythingman, to a jury of

twelve free men, who then decided which accusations were serious. The ones deemed serious enough were forwarded to the sheriff. This may have been one of the first uses of the grand jury system.[110] "Revulsion from barbaric practices and the closer integration of the community" as a result of marriages between Normans and Anglo-Saxons, contributed to a relaxation of these arrangements. Eventually, the title of constable was given to many, and the military and police functions of the position became nearly impossible to differentiate.[111]

The next important milestone for policing in England was that night watchmen were given the power to arrest strangers. [112] This change was effected by the enactment of the Statute of Winchester in 1285. Law enforcement under the Statute of Winchester was a mixture of Saxon and Norman ideas. People arrested by these watchmen would then be handed over to the constable to be dealt with the next morning. Under the act, the men of the town were all placed on a roster, forced into regular constable service, and refusal to partake in this obligation meant a night in the stocks.[113]

The Statute of Winchester "was the only general public measure of any consequence enacted to regulate the policing of the country between the Norman Conquest and the Metropolitan Police Act, 1829, so that for nearly 600 years it laid down the basic principles."[114]

This system of unpaid constables and watchmen began to decline in the 17th century. Corruption became rampant.[115] The growth of populations and wealth, particularly in larger towns, and the early stages of the industrial revolution meant an explosion in the opportunities for crime. The desperation conceived from growing wealth disparity may have also fueled the problem. The time-consuming obligations of constables took so much of a man's time that he frequently neglected his own affairs. The unpaid duties levied upon constables undermined the system.[116] It was possible to escape service by paying a fine to the parish funds according to a scale customary in the locality.[117] Thus, only those lacking the means to purchase their way out remained as constables. They tended to be "illiterate fools, and at worst as corrupt as the criminal classes from which not a few sprang."[118]

In the eighteenth century, the ineffectiveness of the constables, the ever-growing corruption, and the explosive population growth all added to time of "lawless violence, barbarous licentiousness, and ... almost unlimited opportunities for pilfering and robbery offered by the un-policed London streets."[119]

Slowly, the idea of employing a professional, state financed police-force, rather than part-time amateurs, gained steam. However, in spite of the ineffectiveness of the prior

system, there was a "surprising consensus of public opinion maintaining that professional police on the French model would be the death of traditional English liberties."[120] Many in London decried the advancement of professional police forces, seeing them "as a violation of their corporate dignity and right to self-government."[121]

State-sponsored patrols began to emerge in metropolitan areas and the swell of public opposition began to subside by 1829, when the Metropolitan Police Act was passed by Parliament. The act created a tax-supported police force for the London metropolitan area, severed the link between officers and the courts, uniformed the police, and made policing a full-time occupation. These officers could not accept private payment for their work.[122] The system enjoyed strong, popular support. The public appreciated the discipline and restraint the officers displayed, as well as the success in making the streets dramatically safer.[123] Officers began to be trained that the objective was to prevent crime with investigations gradually becoming a secondary function.

Professional policing spread across the rest of England and by the 1860's the "so-called 'old police' of unpaid constables and watchmen had been replaced throughout the country by 'new police' – professional, full-time employees."[124] Modern functions of crime control: including patrol, detection and arrest, became

the emphasis of police officers in England by the end of the 19th century.

The modern standards of policing and of use of force in the United Kingdom has been defined by the 1998 Human Rights Act. The legislation supporting the use of force in the U.K., enumerated in the 1998 Human Rights Act, provides a "rigorous test, that of absolute necessity." [125] In the United Kingdom, in order for an officer to be justified in using lethal force, they must show that he or she "had no other option but to resort to the use of lethal force." [126] The officer must "show that other options were considered and that the force was proportionate in all the circumstances." [127]

Additionally, Article 2 of the Human Rights Act "dictates that when an individual dies at the hands of the authorities of state, there has to be an independent inquiry. Generally, this mean that a police service other than the one involved in the fatal incident must conduct the investigation. "That, over the years has been the general practice in the U.K." [128] Thus, "[p]olicing in the UK is amongst the most modern and advanced in the world. Policing services within the UK are, I believe, more accountable for the use of such force than any other policing service in the world," according to David Wood, the Executive Director of the Police Ombudsman's Office.[129]

The absolute necessity standard employed in use of force situations in the U.K. is clearer and less deferential than the "reasonableness" doctrine applied by the United States Supreme Court while interpreting the U.S. Constitution.

III. Analysis

A. What are the Variations in Killings by and of Police in the U.S. and Similarly Situated Democratic Countries?

When analyzing police use of force, and specifically deadly use of force in the United States, it helps to get data from other countries to give a comparative perspective. Professor Franklin E Zimring, of U.C. Berkeley School of Law, did a comparative analysis of the data in the United States, Canada, Australia, England and Wales, and Germany.[130]

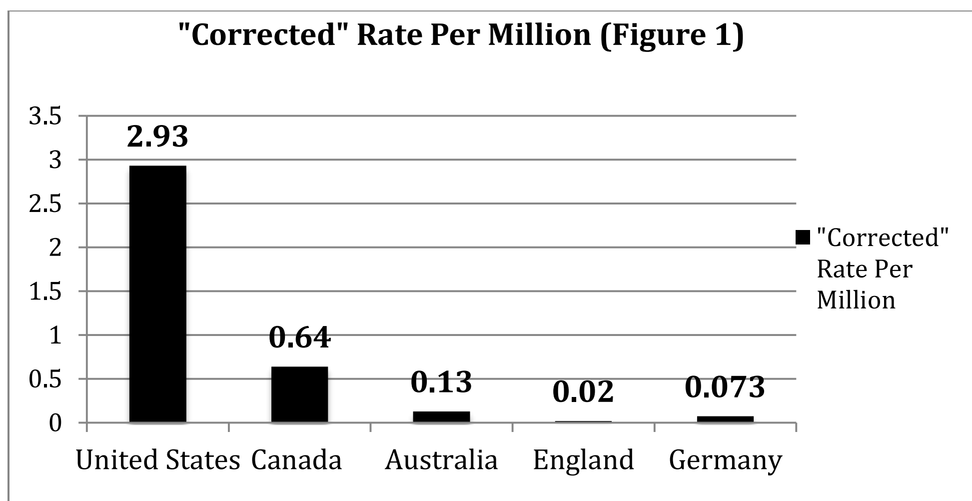
Homicide Rate:

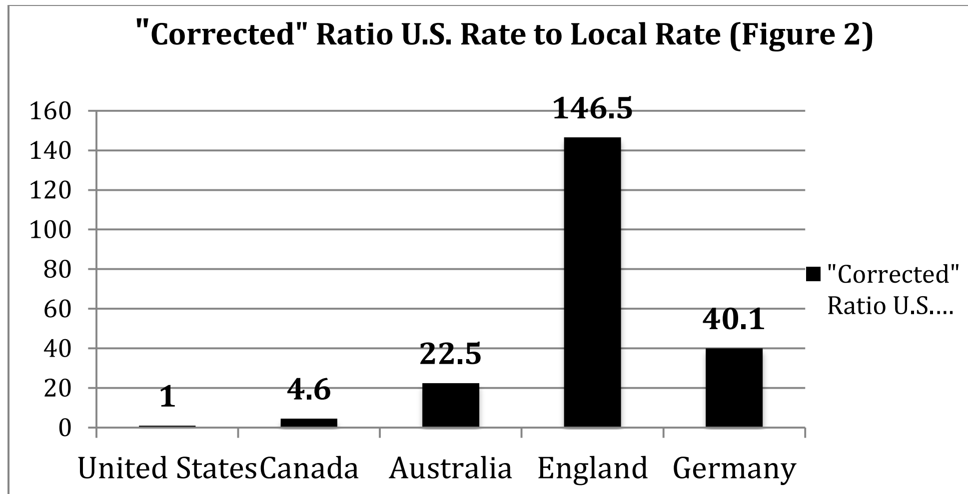
An analysis of the homicide rates in these countries gives a baseline to compare variation in rates of killings by, and of, police.[131] In 2011, the United States homicide rate was 4.7 per 100,000. That was three times the Canadian rate, just under five times the Australian rate, just under five times the rate of England and Wales, and almost six times the rate of Germany.[132] It is then clear that the United States could be considered more dangerous than those other countries. Does this environment of

more frequent homicides explain the relatively higher deaths at the hands of police in the United States?

Police Killings Per Million and Ratio U.S. Rate to Local Rate:

Next, Professor Zimring conducted an analysis of the rate of killings by police in 2011 across the United States, Australia, England and Wales, and Germany. These numbers for the United States are hard to come by, because there is no national database for police killings. The available reports in the United States, of voluntarily supplied numbers, have missed at least half of all killings for different reasons.[133] The "corrected rate" of U.S. police killings in 2011 utilizing the "minimum estimate produced by a Research Triangle Study, 920 deaths" is presented as figure 1.[134] The "corrected" ratio of U.S. rate to local rate is then presented in figure 2.





The United States has a much higher rate of killings by police than the other nations. This may be explained partially by the higher homicide rate. It would make sense for the U.S. rate to be proportional to the homicide rates in the different countries. The numbers show that while the homicide rate in the United States is almost five times that of the England and Wales, the rate per million of killings *by* police is nearly 146.5 times higher than in the England and Wales.

According to Professor Zimring, using the minimum estimate produced by an independent study, and not relying on "official" U.S. data provided to the FBI on a noncompulsory basis by local police departments, the U.S. rate per million of killings by police is 2.93.[135] The ratio of killings by police in the U.S. is 4.6 times higher than in Canada, 22.5 times higher than in Australia, 40.1 times higher than in Germany, and over 140 times higher than in England and Wales.[136]

The U.S. rate of deaths caused by police is nearly ten times the rates of homicides generally. This suggests there must be factors other than general rates of violence.[137]

Detailed National Comparisons of Great Britain, Germany and the United States

Endeavoring to find other reasons that may account for the high rate of killings by police in the United States, Professor Zimring conducted an investigation "of the risks that police run of death from assault in two nations."[138] Zimring obtained detailed information regarding the killings by and of the police for two European countries; the United Kingdom and Germany. First, the annual rates of citizens killed by German police for the five-year range from 2008 to 2012 and the rates per ten million citizens of police killings based on Germany's population in 2010 were examined.[139] The number of killings by police ranges from 6 to 9 during the five-year period of 2008-2012. The rate per ten million citizens ranges from 0.73 to 1.09.

The reported number of citizens killed by police in Germany is rather small and stable. Using the *Guardian's* crowd-sourced killings number of a 1,000 annual average in the United States, the death rate at the hands of police is forty times higher in the United States than in Germany.[140]

Zimring then compared the annual reported intentional killings of German police and United States police. Only 2 German police were killed between 2008 and 2012. 265 police were killed in the United States during the same period.

The U.S. population is 3.8 times that of the 82 million of Germany in 2010, thus, utilizing a population-corrected difference, the "rates of killings by police exceeds thirty-five to one, and the differences in population-corrected rate of killings of police are close to the same."[141] It then is clear that there is a large difference between both the deaths of citizens at the hands of police, and of police by the hands of citizens in the two countries. The rate of homicide is higher by about five times in the United States than in Germany, so one could expect, perhaps, a similarly higher magnitude of rates of killings of and by police in the United States. However, the rates of killing of and by police in the United States are both nearly 35 times than that of Germany. Thus, the fives times higher homicide rate cannot solely account for the 35 times higher rate of killings by and of police in the United States.

In the United Kingdom, there is a "highly detailed, and carefully organized and reported" national system relating to deaths resulting from police practices.[142] The system also seems to "have been effective in reducing fatalities generated by police citizen encounters."[143] While there is no similar official

measure of a comparable nature in the United States, *The Washington Post*, reporting on deaths caused by police in 2015 and 2016, allows a somewhat practical comparison.

Between 2004 and 2015, the annual totals of deaths caused by police shootings in England and Wales range from zero to five with a downward trend over time. The average nationwide volume of fatal shootings by police was 1.2 per year between 2009 and 2014. Based on the 2010 population of England/Wales, this is a rate slightly lower than one shooting death per 40,000,000 people.[144] Comparatively, the 2015 *Washington Post* estimate of 1,004 shooting deaths by police in the United States and the 2010 census population of the United States generates a rate of 3.34 shooting deaths by police per million citizens.[145] The 2009-2014 rate per million of England and Wales is .021. Thus, the per-million rate difference between the United States and England and Wales is 158 to one.[146]

While the U.K. Independent Police Complaints Commission does not provide data on the amount of lethal attacks against police, a national law enforcement trust publishes data regarding police deaths in the line of duty throughout the United Kingdom.[147] In 2011, one on-duty police officer was killed. In 2012, two on-duty police officers were killed. There were no fatal attacks against on-duty police officers in 2010, 2013, or 2014.[148]

The incidence of fatal attacks on police officers in the U.K. are similar to the low numbers observed for Germany. In the United Kingdom, with an estimated population of 63 million, three of the most recent five years produced no deaths to on-duty police officers from assaults. The two deaths in 2012 were attributable to the same attack.[149] The 2013 and 2014 years in which there were no fatal assaults against police were also years in which police in England, Wales, Scotland and Northern Ireland were not responsible for any shooting deaths of citizens.[150]

The detailed comparison between the United States and European countries provide a few broad conclusions. First, the rate at which American police kill citizens is "vastly greater than that in Germany and England."[151] Second, the rate at which American police are killed in attacks is also much higher than in the European countries.[152] In the U.S., both citizens and police are less safe than in the comparable democracies of Germany and the U.K. That then brings us to the biggest difference between the nations, the rate of gun ownership of citizens in these respective countries.[153]

Any analysis of American police violence in an international perspective must take into account the number of guns in the U.S. Civilian firearm ownership is the "elephant in the living room"[154] of any discussion of U.S. police violence in

comparison with the rest of the developed world. The Small Arms Survey estimates that worldwide, civilians own 650,000,000 firearms.[155] Of this worldwide number, civilians in the United States are estimated to own 270,000,000, or 41.5% of the world's firearms.[156] The United States is number one on the list of total civilian owned firearms by country. Germany is number four on the list, with an estimated 25,000,000 firearms owned by civilians.[157] England and Wales are much further down on the list, with an estimated 3,400,000 firearms owned by civilians.[158] The rates of civilian owned firearms per 100 residents in these countries are 89 in the United States, 30 in Germany, and 6 in England and Wales.[159]

One possible reason for the broad difference in the rates of death in assaults on police between the U.S. and the other countries is the higher rate of gun ownership in the U.S., since attacks with knives, clubs, or other objects are often not fatal.[160] In fact, knives and other blunt objects killed no police officers in the United Kingdom or Germany in the five years of the data studied. Guns may be much less prevalent in the U.K. and Germany than the U.S., but they still monopolize the small number of lethal attacks suffered by police.

Does the prevalence of gun ownership in the U.S render reform proposals meaningless? While the enormous handgun inventory in the U.S. may impose "important limits on how much

improvement might come" from changes in policing and legal policy, there is "plenty of room for reducing the death toll from police gunfire."[161] Guns are the weapon reportedly used in 4% of all attacks on U.S. police, but amount for more than 97% of the fatal attacks on police.[162] While knives, blunt objects, and battery usually do not threaten the lives of police officers on either side of the Atlantic, they still produce lethal responses from U.S. police officers hundreds of times per year.[163]

There are three indications from Professor Zimring's study that the death toll caused by U.S. police violence can be reduced. First, "while a majority of killings by the police involved the officer's response to a gun in the hands of his adversary," the gun attack share of killings by police officers was 57%.[164] Given the "arithmetic of police killings in the U.S., that would leave more than 400 deaths each year when a police killing was *not* provoked by the adversary's brandishing of a firearm."[165] If police killings of civilians were cut to only those instances in which a suspect brandished a firearm, the 400 other deaths would be a "vast reservoir of lives to be saved."[166] The data studied from other countries indicates that failing to kill those who use non-gun weapons against police usually is not necessarily a risk to a policeman's life.[167] Second, based on the data encountered, the improvements in tactical approaches

and protective gear in other nations "happened without expansion in killings by police," a reassuring sign to observers.[168]

The third promising indication is the trends in England and Wales after a national authority began collecting and publishing statistics regarding police killings. The collection of data may be correlated with lower police killings since the rate of civilian deaths was reduced by more than half after this database was implemented.[169] The responsiveness of police to administrative changes in the U.K. is an important benefit in a country where that change "might save forty lives a year. That much of a proportional change on the American side of the Atlantic would be a spectacular achievement."[170]

IV. What has Gone Wrong, and What Can Be Done?

Police Culture

One of the most notorious cases of police use of force was the videotaped Rodney King beating of 1991. The case generated enormous controversy and sparked a national conversation. The Rodney King beating can be seen as the beginning of a new era regarding the discussion of police brutality, in which citizens across the country are inundated with video footage of police use of force situations, and can form their own opinions about

what actually transpired, where hitherto the only information regarding police use of force had come from police accounts, and internal investigations. The aftermath of the Rodney King beating was a spark that ignited passions, compelled investigations of police practices, and illuminated a culture of policing that was previously unknown to the general public. The President of the United States at the time, George H.W. Bush called the beatings "sickening."[171]

After leading police on a high-speed chase of up to 115 MPH, Rodney King ran a red light, and nearly caused an accident before finally coming to a stop at an intersection.[172] After refusing initial orders to exit the vehicle, King eventually complied.[173] A bystander videotape shows four LAPD officers twice firing a taser at King, striking him 56 times with their batons and kicking him over six times in the head and body.[174] 19 other officers were at the scene during the beating.[175]

Four LAPD officers; Sergeant Koon and Officers Brisano, Powell, and Wind, were indicted on felony assault with deadly weapon charges. Koon and Powell were also charged with a submission of a false police report.[176] The officers were acquitted in state court.[177]

Riots subsequently consumed the city of Los Angeles. President Bush ordered the Justice Department to undertake a criminal investigation, which led to federal grand jury

indictments. In 1993, a federal jury convicted Sergeant Koon and Officer Powell of civil rights violations. The other two officers were acquitted.[178]

In response to the Los Angeles riots, an independent commission was appointed to investigate the causes and extent of police brutality in the LAPD. The Report of the Independent Commission on the LAPD (hereinafter the Christopher Commission Report) found a "culture of police brutality in the department that extended well beyond the acts of the four indicted police officers."[179]

The Christopher Commission Report found "a significant number of LAPD officers who repetitively misuse force and persistently ignore the written policies and guidelines of the Department regarding force."[180] A former Assistant Chief of Police testified to the Commission that the lack of management attention and accountability formed the "essence of the excessive force problem...We know who the bad guys are. Reputations become well known...But I don't see anyone bring these people up" for charges or to face accountability.[181]

The Christopher Commission did an extensive review of computer messages sent to and from patrol cars. The Commission encountered "scores" of messages in which officers talked about beating suspects, and showed eagerness to be involved in use of force situations.[182] The Commission found that the comments

officers made on the Department's official computer communications channel, "knowing that the communications were subject to monitoring...is evidence of a serious problem with respect to excessive force in the LAPD."[183] That officers had confidence that nothing would be done regarding the inflammatory statements "suggests a tolerance within the LAPD of attitudes condoning violence against the public."[184]

More recently, the 2015 Police Executive Research Forum (PERF) Report found that minimizing the use of force would require changes in policy and training, but also changes in police culture.[185] The report includes an example of many police chiefs claiming an "informal tradition of supervisors telling their officers that 'Your most important job is to get home safely to your family at the end of your shift."[186] Some of the most controversial officer-involved shootings "seem to reflect training that has officers think solely about their own safety, rather than a broader approach designed to protect everyone's lives."[187] Because of this, many police chiefs call for a rethinking of the "practice of emphasizing to officers on a daily basis that they face potential deadly threats at every moment."[188] Some police departments are combating this culture by revamping their use of force policies to include statements illuminating the principal of the sanctity of all human life.[189]

Elk Grove, California Police Chief Robert Lehner explains

one of the problems of aggressive police use of force culture can be explained through the "Warrior v. Guardians" lens that police officers see themselves.[190] After attending a Police Week memorial service in Sacramento, California, he noted that, "the term 'warrior' was used at least three times in the course of that solemn service." He further explains that "the concept of police officers as warriors, whether we like it or not, has run through our profession, certainly for the almost 40 years I've been in the profession. I think we should make an adjustment." He worries, however, about how that adjustment will be "accepted by the rank and file of our profession, when we have drilled that concept of warrior into them from the beginning, and as 'guardian' not so much."[191]

Leesburg, Virginia Police Chief Joseph Price believes that political leaders declaring "wars" on drugs, terrorism, crime, and gangs has been partly responsible for the popularity of the warrior mindset.[192] He explains that when most police officers are asked what called them to the profession, most of them "say they wanted to help people and help their community. This is consistent with the guardian mindset."[193] He explains that to change the warrior mindset back to the original guardian mindset would require teaching "officers that at times they need to fight like a warrior, but most of the time they need to have the mindset of a guardian. A warrior comes in, takes over, does what

he needs to do, and leaves. That's not what we want our cops to do."[194] Rather, Chief Price explains, we need to teach our police that we want our cops to be a part of the community they serve, and to be problem solvers, "not for the community, but with the community."[195] He believes that many inappropriate use of force situations derives from officers thinking "I can't back down, I need to win at all costs. But that's not smart thinking or effective tactics."[196] He concludes that officers must be better trained to control adrenaline and to defuse physical confrontations.

The guardian mindset proposed by Chiefs Lehner and Price is congruent with the high standard that UK police officers are held to, that of the Human Rights Act, which provides that the use of force by of an officer is justified only by absolute necessity, and that the officer has to show that there would be no other option but to resort to lethal force.[197]

The saying "organizational culture eats policy for lunch," reflects the fact that an "organization can make great rules and policies that emphasize the guardian role, but if policies conflict with the existing culture, they will not be institutionalized and behavior will not change."[198] Thus, any reform efforts regarding excessive police use of force must begin at the officer level. It is then up to the well-meaning officers of America's police forces to change the organizational

cultures from within.

Deference Shown to Police and the Exaggerated Perception of the Danger of Police-work

Public perception, media accounts, and even judicial fact-making decisions are often reliant on mistaken impressions of the dangerousness of policing. For sure, policing can be dangerous work, but "those dangers have been greatly exaggerated."[199] Between 2004 and 2013, more police officers were killed in motor vehicle accidents than in shootings.[200] During that same period, more officers were accidentally killed on the job than feloniously killed.[201] Statistically, truck drivers, construction workers, and roofers have more dangerous jobs than police officers.[202] Using numbers from 2011, the chances of an officer being killed during an arrest is 0.00077%. The chance of an officer being killed during a traffic stop is 0.00004%.[203] In terms of relative safety, police work has gotten safer over the years. "Police fatalities have fallen over time as measured per resident, per officer, and in absolute terms."[204]

Historically, incidents of questionable police violence were infrequently brought to the attention of the general public. Traditional media maintained a "mutually beneficial" and "deferential" relationship with police forces, cultivating "hegemonic understandings" in society of police integrity,

trustworthiness and professionalism. The lack of exposure to the issue, has led to an understandable deference given to police officers by the general public whenever their actions were questioned.[205]

The 1991 video-recorded beating of Rodney King can be seen as the "pivotal moment" that began to significantly change the police use of force landscape and societal discourse.[206] The King incident brought about an increasing societal demand for more oversight of police, a broader public interest in the issue of police misconduct, and the push for more transparent and tangible documentation of police practices.[207] Because the availability of footage to public audiences began to undermine the "typical narratives offered by police in legitimizing their violence," it began to erode the police's "privileged positioning to 'patrol the facts.'"[208]

The proliferation of social media, technology, and handheld video recording devices have ushered in an era where police accounts of use of force incidents can be refuted with video evidence. However, some scholars submit that biases and prior attitudes towards police can make even video footage of incidents inconclusive.[209] "The assumption that video evidence will help resolve disputes over whether misconduct occurred will bear out only if fact finders reviewing the footage can agree on what it shows."[210] If fact-finders conform their perception of

the footage to their prejudices, then video footage may not be an effective deterrent to excessive use of force.

Evidence shows that ordinary people, i.e. jurors, are not "impartial, data-driven processors." [211] Rather, people are "partisans who filter coming information through implicit frameworks and hypotheses that they bring to the situation." [212] The societal deference given towards police officers can make even the most ardent searcher for truth unable to discern whether an officer's use of force was unconstitutional or unlawful. Given our current use of a vague "reasonableness" standard, it is easy to understand why what seems to be blatant brutality can sometimes end in results such as the mistrial of the Charleston police officer who shot a retreating Walter Scott in the back.[213] It is imperative that any governmental policy-making to reform the excessive use of force by police does so based on facts rather than according an uncritical deference to the police.

Lack of Comprehensive National Database of Officer Involved Killings

One way to ensure a more objective approach towards the "reasonableness" of police procedures and the dangers that police officers face is to have comprehensive data. The FBI collects data on the number of police officers killed and

assaulted every year, but an equivalent effort has not been made to collect information on the number of civilians killed or assaulted by officers.[214] In a 2015 Justice Department Press Release, Attorney General Eric Holder remarked that, "[t]he troubling reality is that we lack the ability right now to comprehensively track the number of incidents of either uses of force directed at police officers or uses of force by police."[215] According to that same press release, federal authorities currently "publish annual figures on the number of 'justifiable homicides' by law enforcement, as well as figures on the number of law enforcement officers killed or assaulted. But since reporting is voluntary, not all police departments participate, causing the figures to be incomplete."[216]

Comprehensive and accurate statistics regarding police use of force make for better policy because they inform public understanding. Because public perception drives fact-finders, legislators and other decision makers, a well-informed public can help increase the earnestness with which reformers and lawmakers tackle the issue. A comprehensive database that accurately reflects policing procedures and tactics, including the use of force, would give evidentiary backing to reformers that are often derided as over-reacting to police use of force. "There is a recognition that we need to collect this data," according to Philadelphia's police commissioner and co-chair of

the President's 21st Century Taskforce on Policing Charles H. Ramsey.[217]

Lack of Independent Investigation

In Northern Ireland, the Police Ombudsman's Office "provides an independent, impartial system for the handling of complaints about the conduct of police officers."[218] David Wood, the 2004 Executive Director of the office explains the lens by which police use of force is examined in the UK: "Great responsibility is placed on the police in their use of force and, in particular, lethal force." The use of lethal force remains the personal responsibility of each individual officer and it is that officer who ultimately has to account for and justify his or her actions.[219] This may be an onerous burden to place on the officer, however, the public is "entitled to expect the highest standards of behavior and that the police are held truly accountable for their use of such force."[220] Even with the low numbers of police fatal shootings in the UK, officials in the country still believe that "one cannot be complacent about the situation in the UK and it is absolutely right that proper accountability is placed on this use of force."[221]

In the UK, any discharge by police of firearms receives an independent investigation by the Police Ombudsman's office regardless of whether a public complaint was filed.[222] This may

be a model for best practices, because it gives public reassurance and knowledge of accountability for police use of force.[223] The general public "owes a debt of gratitude to the sacrifices made by police on our behalf, particularly in Northern Ireland, but policing is conducted with the consent of the public, and proper accountability is the price of that consent," according to Police Ombudsman Executive Director David Wood.[224]

The situation in the United States is much different. "For most police departments across the United States, internal affairs units review the majority of civilian complaints regarding officer misconduct."[225] The pitfalls associated with the practice of relying on police officers to handle investigations of alleged misconduct by other officers within the same department are apparent.[226] For example, the Department of Justice investigation into the Ferguson, Missouri police department after the killing of Michael Brown found that "Ferguson's internal affairs system fails to respond meaningfully to complaints of officer misconduct...Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated."[227] When investigations do occur, these internal investigations "are notoriously biased in favor of fellow

officers."[228] The officers have an inherent inability to be impartial during the investigations.

Independent, impartial investigations into police use of force could be mandated across the United States. The independent reviews in the U.K. have increased accountability. Problematic officers would be rooted out more efficiently, and independent investigations would ensure that any civil case that does go to trial will benefit from an unbiased reporting of facts from the initial reports. The hearsay exceptions within the Federal Rules of Evidence allow admittance of an investigatory report in civil trials, but not against a defendant officer in a criminal trial.[229] Thus, in § 1983 claims, reports from independent investigations could be used as persuasive evidence.

Failure of Civil and Criminal Remedies, Lack of Deterrence

When an encounter between police officers and a suspect results in the death of either, it is the suspect killed 96% of the time.[230] While public policy dictates that having more police officers killed by suspects is horrifically undesirable, public policy also should dictate an expectation that police officers "only use deadly force as a last resort and to deadly the use of deadly force until a threat materializes."[231] If the suspect is the one dying 96% of the time, then police officers may be using

deadly force before an objectively reasonable threat to their safety has materialized.[232] This percentage of subjects killed relative to officers has remained constant since 2003. Thus, "whatever deterrent effect internal discipline, criminal prosecution, and civil rights litigation may have on the use of deadly force, it does not appear to be increasing over time."[233] While the violent crime rate has dropped 20% between 2003-2014, the percentage of suspects killed by police relative to law enforcement officers killed has remained the same.[234]

Civil remedies often fail to deter police brutality. First, the plaintiff in civil suits must be "minimally attractive to the jury."[235] The people most commonly victims of police beatings and deaths are petty criminals, and will rarely "succeed in a civil suit because petty criminals generally make unappealing plaintiffs."[236]

Another reason civil remedies do not often deter police brutality is the extended duration of the civil case. Few victims of police brutality have the resources or perseverance to endure the lengthy litigation. A person with the resources and attractiveness to succeed in litigation would likely come from the middle class, a group that rarely experiences police brutality — not from the poorer classes, which face brutality almost every day.[237]

One of the most influential factors as to why civil suits do not deter police brutality, is that the officers involved may not even feel the consequences of their actions. Plaintiffs routinely go after the municipality responsible for managing the police officer, not the officer themselves under the theory of respondeat superior. It is not clear how much of these costs liability insurance covers. Any substantial verdict will be paid from the municipality's coffers, or by liability insurance, and not from the police officer's own bank account. In fiscal year 2012, New York city paid "a staggering $152 million in tort claims, which include misconduct and civil rights violations, against the New York City Police Department."[238] Other cities are paying out vast sums to defend, settle, or pay judgments in cases of police abuse. These facts support the theory that reforming police practices to minimize the excessive use of force is a societal benefit.

Criminal penalties against officers also fail to be an effective deterrent against excessive use of force. According to Philip M. Stinson, a criminologist at Bowling Green State University, "Officers are infrequently charged for deadly on-duty shootings, and convictions in such cases are even less common. There have been thousands of police shootings since 2005, and during that same span, 78 officers [as of 2016] have been charged with murder or manslaughter."[239] An example of the

ineffectiveness of the criminal justice system as it pertains to police use of force is the aftermath of the Rodney King incident. Four officers were indicted, but "the nineteen other officers at the scene, who neither attempted to stop the assault nor reported it to their superiors, were not indicted."[240] The four officers who participated in the King beating were acquitted on state charges.

Local prosecutors face a hopeless conflict of interest in handling police use of force complaints because they must investigate the charges against the defendant, as well as the defendant's allegations against the arresting officers.[241] Additionally, prosecutors may be hesitant to indict law enforcement officers because they depend on police to handle their criminal investigations.[242] In order to effectively prosecute criminal defendants, district attorneys must have a close and cooperative relationship with law enforcement agencies. They must rely "on inherently biased investigations of accused officers conducted by their own departments."[243] These internal investigations "almost always exonerate the officers involved."[244] Overwhelming caseloads also mean that prosecutors frequently attempt to get both officers and civilians to withdraw their complaints against each other. Accordingly, officers fearing an excessive use of force complaint against

them will charge the citizen with "a minor crime, thereby gaining a bargaining chip."[245]

Evidentiary problems also arise in the context of excessive use of force cases. Often, the only eyewitness testimony besides the complainant comes from other officers. In any profession, it is unlikely that peers wish to testify against their colleagues. It is also unlikely that the testimony lacks substantial bias. The lack of willingness for local colleagues to testify against each other appears in civil areas such as medical or legal malpractice cases. The repercussions of potential criminal sanctions means the likelihood of a fellow officer giving unbiased testimony against another officer accused of excessive force is minimal.

The crux is that judicial review of police killings is not an effective enough deterrent, on its own, to combat the problem of excessive use of force. In civil cases, officers tend not to be personally responsible for paying settlements or judgments in brutality cases. In criminal cases, prosecutorial conflicts of interest mean low rates of prosecutions.

Lack of Judicial and Legislative Oversight and Well-Defined Standards Regarding the Use of Deadly Force

Sometimes allegations of police brutality are baseless, "a product of misunderstanding what might justify lawful force or

of false accusation. Other times they represent a just demand for recognition and redress for damaged bodies and spirits."[246] The Supreme Court decisions involving the constitutionality of police use of force by police do not sharply enough define what is "reasonable."[247]

The Fourth Amendment analysis developed by the Court involving police use force is "impoverished" in that it is underdeveloped.[248] This is partly due to the fact that the Supreme Court decides cases and controversies before it, and does not render advisory opinions. The standards the Court sets down are not easily transferable to other cases, because they are so fact-driven. Consequently, "the outcomes of future cases are largely unpredictable, even by the Supreme Court's own measure."[249] The doctrine of qualified immunity means that police officers are not civilly liable under federal civil rights laws for using excessive force unless it is clear from prior case law that their actions were excessive. Qualified immunity thus plays a huge factor in police use of force litigation because the current Supreme Court Fourth Amendment doctrine analyzing use of force is "often too indeterminate to permit officers to determine the lawfulness of a particular use of force."[250] Unless an officer's actions clearly and explicitly can be shown to violate established boundaries for excessive use of force, qualified immunity will shield their actions from liability.

This “morass of reasonableness”[251] leaves “many unconstitutional uses of force to go uncompensated and undeterred.”[252]

The guidance to lower courts in deciding what constitutes reasonableness in *Graham v. Connor* is “woefully inadequate.”[253] The *Graham* ruling permits courts to consider “any circumstance” in determining whether force is reasonable but gives no standard to decide what circumstances are more relevant and deserving of more weight than others.[254] *Graham* also “apparently requires courts to consider the severity of the underlying crime in all cases, a circumstance that is sometimes irrelevant and misleading in determining whether force is reasonable.”[255] The fact is, the use of force is not a singular event, but the culmination of a sequence of choices made by the officer. Officers have a spectrum of options, “ranging from verbal persuasion or a guiding hand to a baton blow to the head or a shooting.”[256] Thus, reasonable force is “properly measured on a sliding scale, where more force is justified to counter an increased threat, taking into account the conditions of that interaction.”[257] By simply listing circumstances under which force can be justified, the *Graham* decision gives no guidance for lower courts in how to evaluate an officer’s actions in specific situations, including whether the officer’s actions were reasonable given the entire spectrum of possible responses the officer could have taken in the situation.[258] *Graham* also

fails to answer the question of timing in whether an officer's use of force is appropriate. The "vague 'totality of the circumstances' approach falls critically short in addressing this crucial matter" because the implication that timing may be one factor considered among many is faulty. Timing is indeed dispositive in many cases. If a threat to the officer has not yet materialized, or if the threat has ceased, use of force is inappropriate. This gets lost in a maze of confusion, when an Officer can rely on the Court's determination that deference is owed to officers because they sometimes face "split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances.[259] The officer's sense of justification becomes further clouded because the Supreme Court has declared that not every excessive use of force is unconstitutional even if the inappropriateness is clear "in the peace of a judge's chambers."[260]

The criminal case against officer Randall Kerrick in the shooting death of Jonathan Ferrell, illustrates "how malleable the concept of reasonableness" can be.[261] The relevant deadly physical force statute in North Carolina provides that an officer "is justified in using deadly physical force upon another person...only when it is or appears to be reasonably necessary," to defend "himself or a third person from what he reasonably believes to be the use or imminent use of deadly

physical force."[262] During his trial on charges of voluntary manslaughter, Officer Kerrick's justification was that "he feared that if he had to get into a physical fight with Ferrell, that Ferrell might be able to gain control of his weapon and use it against him."[263] Weapon retention is stressed in officer training, but is perhaps not such a realistic fear, considering that FBI reporting from 2004 to 2013 shows that 33 officers were killed with their own weapon, an average rate of just 3 per year.[264] Officer Kerrick had two other officers by his side, one of which already had his weapon drawn.[265] To prove the legal defense of justification, Officer Kerrick needed to show that it appeared "reasonably necessary" to defend himself or the other armed officers from "what he reasonably believe[d] to be the use or imminent use of deadly physical force" by the fleeing Ferrell. The question then became whether it was 'reasonable' for an officer, who had two officers as backup, to shoot and kill an unarmed suspect based on the "possibility that the suspect might decide to attack and him and that, during the course of the attack, the suspect *might* be able to gain possession of his weapon and use it against him."[266] Faced with this question, the jury deadlocked, and Officer Kerrick walked free.[267] The jury could not come to a conclusion of whether Kerrick's fears that Ferrell *possibly* might take his gun was a reasonable belief of an 'imminent threat.'

The criminal case against Albuquerque, New Mexico police officers Dominique Perez and Keith Sandy also illustrates the 'reasonableness' dilemma. The officers attempted to take mentally ill James Boyd into custody for the crime of "illegal camping." [268] A three-hour standoff ensued. Boyd held two small knives in each of his hands. The officers fired and killed Boyd when they claim he moved towards another "unarmed" officer. "The 'unarmed' officer was not carrying a firearm because he was a K-9 officer and was instead 'armed' with a German shepherd." [269] The officers argued that it was reasonable for them to use deadly force against the mentally ill man carrying small knives, as a way to protect the other officer. The dog was not considered adequate protection, an interesting development considering that when executing search warrants, officers are allowed to shoot and kill dogs because "dogs can be considered threats to their safety." [270] The trial reflected how hard it is for 'reasonableness' to be determined under such vague and deferential treatment granted to officers. At closing, special prosecutor Randi McGinn told jurors, that the trial was "ultimately about the old-school argument that anticipatory shootings are justifiable and the modern, 2014 version that the police may not shoot unless someone is in fact attacking them." [271] Only three of the twelve jurors voted to convict the officers.[272]

A 2014 Department of Justice Report found that "Albuquerque police officers too often use deadly force in an unconstitutional manner in their use of firearms."[273] The report found that of 20 officer-involved shooting fatalities between 2009-2012, the "majority of these shootings were unconstitutional."[274] The report found that Albuquerque police officers often used deadly force in circumstances where no imminent threat of death or serious bodily injury to the officers or others was present. "Instead, officers used deadly force against people who posed a minimal threat, including individuals who posed a threat only to themselves or who were unarmed."[275] The officers used deadly force in situations where their own conduct heightened the danger of the situation.[276]

The trial of Charleston, South Carolina police officer Michael Slager is another example of a jury deadlocking in grappling with the reasonableness standard. Slager was charged with murder after he was recorded on video "firing a barrage of bullets at the back of Walter Scott, a fleeing driver, in one of the most high-profile shootings to rattle the nation in recent years."[277] Officer Slager pulled Scott over for a traffic stop, and dash-cam footage shows the two "briefly interacting before Scott runs away and out of view."[278] Slager began describing Scott over the police radio as he pursued. A recording captured by a bystander only moments later shows "Scott fleeing after a

physical encounter with Slager."[279] The video shows Scott running away as the officer takes careful aim, and fires into his back. At trial, Slager declared, "I was scared." He described feeling "total fear that Mr. Scott was coming toward me."[280] In recorded footage, however, "Slager could be seen placing an item – his Taser – near Scott's body after the shooting."[281] The jury was unable to come to a unanimous opinion, and a mistrial was declared.[282] The fact that an officer shot an unarmed man in the back, who was running away from him, was not enough for a jury to find the officer's actions 'unreasonable.'

What makes these results possible in the cases of Officers Kerrick, Perez, Sandy, and Slager "is that juries are asked to view the situation through the eyes of a 'reasonable officer.'"[283] The idea of a 'reasonable officer' implies that police officers see the world through a different lens than a citizen. In trial, what would seem an innocuous gesture to a normal person will be painted as a "furtive gesture" to a police officer.[284] Because jurors must understand how a trained officer would view a situation, the 'reasonable officer' standard allows evidence and testimony to be introduced regarding the department policies on the use of force training. The quality of the training is irrelevant; "If an officer was trained to do something a certain way, then doing it that way is reasonable, even if the effectiveness of that technique has never been

scientifically validated."[285] The lack of clear legal standards means that fact-finders are left to "slosh through the fact-bound morass of reasonableness," all the while under the influence of misconceptions regarding the dangerousness of law enforcement and their need to use deadly force.[286] The unfortunate result is that almost any use of deadly force can appear to be reasonable.[287]

A persuasive argument is made that the Supreme Court has made a mistake in its *Garner* and *Graham* decisions by equating the use of deadly force with a "seizure" under the Fourth Amendment, subjecting the use of deadly force situations to a reasonableness analysis.[288] An unreasonable search or seizure that does not result in the death of the individual does not prevent a judicial determination of guilt, and thus may correctly be analyzed under the "reasonableness" standard. However, as the *Garner* Court pointed out, the use of *deadly* force "frustrates the interests of the individual, and of society in judicial determination of guilt and punishment."[289] If the use of deadly force is successful, "it guarantees that the mechanism" of the criminal justice system "will not be set in motion."[290] Thus, the killing of a suspect "denies a suspect all of the other procedural rights that are designed to ensure the accuracy and reliability of the adjudication process as it places the officer who uses deadly force in the effective role

of judge, jury and executioner."[291] The requirement that the use of deadly force be "reasonable," is thus "inconsistent with the requirement that the state prove a defendant's guilt beyond a reasonable doubt."[292] The burden of proof or reasonable doubt is many steps higher than the ambiguous and deferential "reasonableness" standard that is now applied in determining whether an officer violated a suspect's civil rights by killing them.

The legislative branch must be one of the paramount forces in reigning in excessive use of force by police. Legislative bodies have a duty to, and must react to, the increasing problem of excessive use of force. "Compared to the sprawling administrative codes that detail every aspect of agency practice, laws governing the police are notably sparse — if they exist at all."[293] Centuries-old blanket authorizations for local police agencies to enforce criminal law were granted "long before the methods and tactics of modern-day policing were even imaginable."[294] The typical state enabling statute "simply authorizes [a policing agency] to enforce the substantive criminal law – but says little or nothing about what enforcement actions police are permitted to take."[295]

A 2015 Amnesty International report contained findings that "All 50 states and Washington, D.C., fail to comply with international law and standards on the use of lethal force by

law enforcement officers."[296] The report also found that "nine states and Washington D.C. currently have no laws on use of lethal force by law enforcement officers; and 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."[297]

It is for state legislatures to decide whether American standards for the use of deadly force by police should conform to accepted international standards. The United Kingdom 1998 Human Rights Act providing for absolute necessity in order to justify use of force, a showing that other options were exhausted before killing a civilian, and requiring a proportionate use of force may be ideal.

State and federal legislatures could also require higher levels of training, including use of force and de-escalation training, for recruits before graduating from policing academy, and bestowing upon them the awesome power and responsibility to end civilian lives under the color of law.

Police Training and Education

Even though police fatalities have fallen continuously over the years, and the danger of policing has been consistently exaggerated, the "inherent hazard of policing is a central component of police training."[298] In a dissenting opinion,

Associate Justice Sonia Sotomayor described the current state of policing as a "shoot first, think later" approach.[299]

Since 2005, the Department of Justice has investigated twenty police departments. The DOJ's Civil Rights Division has undertaken these investigations pursuant to its authority under the Violent Crime Control and Law Enforcement Act of 1994 and Title IV of the Civil Rights Act of 1964. The DOJ files lawsuits to remedy patterns or practices of conduct by law enforcement agencies that deprive individuals of rights, privileges, or immunities secured by the Constitution or federal statute.[300] These investigations have found that departments excessively use deadly force, engage in excessive use of less lethal force, use dangerous tactics, fail to adequately review or investigate officers' use of force, fail to objectively evaluate all allegations, fail to respond to patterns of high risk behavior, and fail to provide training and supervision.[301]

The 2014 Department of Justice investigation into the Albuquerque Police Department found police department training was triggering abusive force situations. During a 2011 civil trial in which a state court found an officer had used unreasonable force, the City's expert witness, a training officer, testified that the officer's actions were "exemplary and that he (the expert) would use this incident to train officers on the proper use of deadly force."[302] That state court

concluded that the deadly force training provided to Albuquerque Police Department officers was "designed to result in the unreasonable use of deadly force."[303]

A 2015 Police Executive Research Forum report concluded that "the training currently provided to new recruits and experienced officers in most departments is inadequate."[304] These findings were based a survey of police agencies that revealed officers are given many hours of training in the use of firearms, but lack in training time "discussing the importance of de-escalation tactics and crisis intervention strategies for dealing with mentally ill persons, homeless persons, and other challenging situations."[305]

One way that police officers can rely on their training to justify their actions is found in the "21-Foot Rule."[306] Lieutenant John Tueller, a firearms instructor in the Salt Lake City Police Department, developed the rule in 1983.[307] Lieutenant Tueller "came to the conclusion that a suspect who was within twenty-one feet of an officer could reach that officer and strike before the officer was able to draw a weapon."[308] The rule was never scientifically proven, but has nonetheless been part of police training since its creation. One expert writes that it has become "informal doctrine within the law enforcement community," and is "misstated, misrepresented, and bastardized by use-of-force, firearms and police practice experts from all

sides."[309] Because the 21-Foot rule is "often interpreted by officers to mean they are justified in shooting any suspect with a knife or edged weapon who comes within 21 feet of them," many police chiefs are considering abandoning the doctrine.[310]

"The question is not, can you use deadly force? The question is, did you *absolutely have to* use deadly force?" These questions were posed by Chief Cathy Lanier of the Washington, D.C., Metro Police Department.[311] In order to achieve this perceptual change, her department began to look at the decisions officers made prior to using force, and began to look for the "first decision that went wrong that led to having to use force later."[312] The Chief found the 21-Foot Rule to be a driver in the mistakes being made. She found that many shootings involved people with mental health issues with weapons such as knives up to 30 feet away. "And instead of taking cover and waiting, the officers would approach and shoot, and then say, 'Well we were justified in shooting: the person was within 21 feet and had an edged weapon.'"[313] The Chief went about changing the mentality in her department to stress that officers were not justified in shooting in those instances.

In December, 2014, President Barack Obama signed an executive order establishing the Task Force on 21st Century Policing.[314] The task force brought together more than 100 individuals from different stakeholder groups including:

professors, police chiefs, law enforcement officers and executives, community members, civic leaders, advocates, researchers, academics, and others.[315] The task force was to identify "best practices" and offer recommendations on how policing practices can "promote effective crime reduction while building public trust." One recommendation stemming from the task force is that Law enforcement training should emphasize de-escalation and alternatives to arrest or summons in appropriate situations.[316]

Another recommendation from the President's task force is for the federal government to finance the development of partnerships "with training facilities across the country to promote consistent standards for high-quality training and establish training innovation hubs."[317] Granting federal funding to the designated facilities would incentivize them to "conduct the necessary research to develop and implement the highest quality curricula focused on the needs of 21st century American policing."

The task force also recommended that federal and state governments should encourage higher levels of education for police officers. Currently, in the United States, only 19% of all police academies have a minimum educational requirement that included a college degree. Across the Atlantic, in 2016 the United Kingdom College of Policing announced that by the year

2020, "All new police officers in England and Wales will have to be educated to degree level."[318] It is for federal, state, and local governments to decide whether to adopt the recommendations of the task force.

Part IV: Conclusion

The warrior mentality within police department culture needs to change to a guardian mentality. That change starts with the officers themselves. External reform efforts are thus at the mercy of police officers themselves upholding their duties and rooting out the "bad apples." Additionally, the United States Supreme Court should bolster the case law interpreting "reasonableness" in different circumstances, thereby enhancing the guidance available to lower courts.

Our legislatures have reform options available, if they deem them wise to implement. These reforms may include the promulgation and maintenance of a nationwide database of police killings and use of force. Further, more intensive and longer police training methods may better prepare officers and cut through engrained misconceptions. Independent and unbiased investigations of police use of force could bolster public confidence in the outcome. Police departments in the United States could enforce minimum education requirements of their officers. These internal and external mechanisms can help to

transform a warrior culture of police brutality and its tragic consequences into a more humane and societally beneficial culture of guardianship.

> "In a republic that honors the core of democracy—the greatest amount of power is given to those called Guardians. Only those with the most impeccable character are chosen to bear the responsibility of protecting the democracy."
>
> -Plato[319]

[1] Kimberly Kindy & Kelly Kimbriel, *Thousands Dead, Few Prosecuted,* The Washington Post, (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/.
[2] Michael Gordon, *Jonathan Ferrell Was Just Starting His Life in Charlotte*, Charlotte Observer, (July 29, 2015), http://www.charlotteobserver.com/news/local/crime/article27558442.html.
[3] *Id.*
[4] *Id.*
[5] Connor Adams Sheets, *Meet Jonathan Ferrell, The Ex-Football Player Shot Dead By Police In Charlotte, NC.* International Business Times, (Sept. 18, 2013), http://www.ibtimes.com/meet-jonathan-ferrell-ex-football-player-shot-dead-police-charlotte-nc-1408016.
[6] Christine Hauser, *Video is Released From 2013 North Carolina Police Shooting of Jonathan Ferrell*, New York Times (Aug. 6, 2015), https://www.nytimes.com/2015/08/07/us/dashboard-camera-video-is-released-from-2013-north-carolina-police-shooting.html.
[7] Kindy & Kimbriel*, supra* note 1.
[8] *Id.*
[9] Hauser, *supra* note 6.
[10] Elizabeth Leland, *The Tragic Path From a 911 Call to A Fatal Confrontation*, The Charlotte Observer, (August 1, 2015), http://www.charlotteobserver.com/news/local/crime/article29700511.html.
[11] Associated Press, *Jonathan Ferrell Trial Jurors Shown Dashcam Footage of*

Fatal Police Shooting, The Guardian (August 6, 2015), https://www.theguardian.com/us-news/2015/aug/06/jonathan-ferrell-jurors-dashcam-footage**.**
[12] *Id.*
[13] Leland, *supra* note 10.
[14] *Id.*
[15] *Id.*
[16] Jonathan Katz, *Shooting Unarmed Black Man Was Self-Defense, Officer's Lawyer Tells Charlotte Jury*. N.Y. Times, (August 18, 2015), https://www.nytimes.com/2015/08/19/us/charlotte-officer-argues-that-shooting-black-man-at-door-was-self-defense.html.
[17] Michael Gordon & Clever R. Wootson, *City of Charlotte Reaches Settlement With CMPD Officer Randall Kerrick*, (Oct. 8, 2015), The Charlotte Observer, http://www.charlotteobserver.com/news/local/article38223657.html.
[18] *Id.*
[19] Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830 (1994).
[20] David. S Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and A Modern Attempt at Reform*, 28 COLUM. HUMAN RIGHTS L. REV. 165, 172 (1996).
[21] *See id.*, at 172-174 (describing the development of policing in early U.S. history).
[22] Steiker, *supra* note 19 at 830 (quoting Lawrence Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27 (1993)).
[23] Cohen, *supra* note 20, at 172.
[24] Steiker, *supra* note 19, at 832.
[25] *Id.* (quoting Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 68, (1993)).
[26] David A, Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1207 (1999).
[27] *Id.*
[28] Steiker, *supra* note 19, at 834.
[29] *Id.*
[30] *Id.* at 835.
[31] *Id.*
[32] *See* FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015) https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf (hereinafter TASK FORCE FINAL REPORT).
[33] Steiker, *supra* note 19, at 835.
[34] "The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that s shall be punished by death". 4 W. Blackstone, Commentaries *98 (quoted in *Tennessee v. Garner*, 471 U.S. 1, 13 n.4 (1985)).
[35] Tennessee v. Garner, 471 U.S. 1, 12 (1985).
[36] *Id.*
[37] Steiker, *supra* note 19, at 856.
[38] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. §1983.

[39] United States v. Classic, 313 U.S. 299, 326 (1941).

[40] Monroe v. Pape, 365 U.S. 167, 187 (1960).

[41] Monell v. Dep't of Social Services of City of N.Y., 436 U.S. 658, 701 (1978).

[42] Ferrell v. City of Charlotte, 2015 U.S. Dist. LEXIS 42009, 20, United States District Court for the Western District of North Carolina, Charlotte Division (2015).

[43] Monell, 436 U.S. 658 at 690.

[44] Board of Commissioners of Bryan City v. Brown, 520 U.S. 397, 404 (1997).

[45] *Id*.

[46] "(a) Unlawful conduct. It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
(b) Civil action by Attorney General. Whenever the attorney General has reasonable cause to believe that a violation of paragraph (1) [subsection (a) of this section] has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." 42 USCS § 14141, transferred to 34 USCS § 12601.

[47] Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 (2015).

[48] *Id*. at 1346.

[49] *Id*. at 1347.

[50] Rachel A. Harmon, *When is Police Violence Justified*, 102 NW. U.L. REV. 1119, 1126 (2008).

[51] Tennessee v. Garner, 471 U.S. 1 (1985).

[52] Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 115 (2015).

[53] Garner, 471 U.S. at 3 (emphasis added).

[54] Id. at 4.

[55] Id. at 3.

[56] *Id*.

[57] *Id*. at 4.

[58] Garner, 471 U.S. 1, at 4.

[59] *Id*. at 4.

[60] Flanders & Welling, *supra* note 52, at 114.

[61] Tennessee v. Garner, 471 U.S. 1, 5 (1985).

[62] *Id*. at 4.

[63] *Id*. at 5.

[64] *Id.* at 7 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).
[65] Garner, 471 U.S. at 7 (citations omitted).
[66] Id. at 8.
[67] Garner, 471 U.S. at 7-8.
[68] Harmon, *supra* note 50 at 1127 (citing Garner, 471 U.S at 9).
[69] Garner, 471 U.S. 1, at 9-10.
[70] Id. at 11.
[71] Id.
[72] Id. at 10.
[73] Id. at 11.
[74] Id.
[75] Flanders & Welling, *supra* note 52 at 110.
[76] *Id.* at 110-111.
[77] Graham v. Connor, 490 U.S. 386, 388 (1989).
[78] Id.
[79] Id. at 389.
[80] Id.
[81] Id.
[82] Id.
[83] Id.
[84] Id.
[85] Id.
[86] Id.
[87] Id.
[88] Id. at 390.
[89] Id. (quoting Petitioners Complaint para. 10, App. 5).
[90] Id. at 390-391.
[91] Graham v. Connor, 490 U.S. 386, 393-94 (1989).
[92] *Id*. at 394.
[93] *Id.*
[94] *Id*. at 395.
[95] *Id*. at 396.
[96] Graham v. Connor, 490 U.S. 386 at 396-397 (1989).
[97] John P. Gross, *Judge, Jury and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 158-159 (2016).
[98] Graham v. Connor, 490 US. 386, 396 (1989).
[99] Id. at 397.
[100] T.A. Critchley, A HISTORY OF POLICE IN ENGLAND AND WALES 900-1966, xiv, Constable London, London, United Kingdom, 1967.
[101] Sklansky, *supra* note 26 at 1195.
[102] *Id*.
[103] *Id*. at 1196.
[104] Critchley, *supra* note 100, at 3.
[105] *Id*.
[106] Sklansky, *supra* note 23, at 1196.

[107] Critchley, *supra* note 100 at 1.
[108] *Id.* at 4.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 6.
[113] *Id.*
[114] *Id.* at 7.
[115] *See id.* at 18-20.
[116] *Id.* at 13.
[117] *Id.* at 18.
[118] *Id.* at 19.
[119] Critchley, *supra* note 100, at 21.
[120] Sklansky, *supra* note 23, at 1201.
[121] Critchley, *supra* note 100, at 37.
[122] Sklansky, supra note 23, at 1202-1203.
[123] *Id.* at 1203.
[124] *Id.* at 1204.
[125] David Wood, *Police Accountability for Lethal Force*, PJ 77 (55) (2004).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Franklin E. Zimring, *Can Foreign Experience Inform U.S. Policy on Killings of and by Police?*, 10 HARV. L. & POL'Y REV. 43 (2016).
[131] *Id.* at 44.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 45.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 46.
[138] *Id.* at 47.
[139] *Id.* at 48. No numbers appear available for non-citizen killings by police.
[140] *Id.*
[141] *Id.* at 49.
[142] Id. at 51.
[143] *Id.*
[144] *Id.* at 52.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *See* Annual Roll of Honour, Police Roll of Honour Trust, http://www.policememorial.org.uk/index.php?page=annual-roll-of-honour [http://perma.cc/EYV3-UTFX]

[149] Zimring *supra* note 130, at 53.
[150] *Id*.
[151] *Id*. at 55.
[152] *Id*. at 56.
[153] Aaron Karp, ESTIMATING CIVILIAN OWNED FIREARMS, SMALL ARMS SURVEY RESEARCHERS NOTES (September 2011), http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-9.pdf. [https://perma.cc/NW7L-76L5] [hereinafter Small Arms Survey].
[154] Zimring, *supra* note 130 at 57.
[155] This includes improvised craft guns, handguns, rifles, shotguns, and machine guns.
[156] Small Arms Survey, *supra* note 153.
[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] Zimring, *supra* note 124, at 56
[161] *Id*.
[162] *Id*.
[163] *Id*. at 56.
[164] *Id*. at 57-58.
[165] Id. at 58 (emphasis in original).
[166] *Id*.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, Forward (i) (1991), http://michellawyers.com/wp-content/uploads/2010/06/Report-of-the-Independent-Commission-on-the-LAPD-re-Rodney-King_Reduced.pdf [hereinafter referred to as the CHRISTOPHER COMMISSION REPORT].
[172] Doug Linder, *The Trials of Los Angeles Police Officers In Connection With the Beating of Rodney King* (2001). http://law2.umkc.edu/faculty/projects/ftrials/lapd/lapdaccount.html.
[173] *Id*.
[174] CHRISTOPHER COMMISSION REPORT, *supra* note 171 at 6-7.
[175] *Id*. at 11.
[176] *Id*.
[177] Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 276 (1994).
[178] *Id*.
[179] *Id*. at 277.
[180] CHRISTOPHER COMMISSION REPORT, *supra* note 171, at ix.
[181] *Id*.
[182] *Id* at 49-54.
[183] *Id*. at 54
[184] *Id*. at 55.

[185] Chuck Wexler, POLICE EXECUTIVE RESEARCH FORUM REPORT, CRITICAL ISSUES IN POLICING SERIES: RE-ENGINEERING TRAINING ON POLICE USE OF FORCE (2015), http://www.policeforum.org/assets/reengineeringtraining1.pdf, (hereinafter the PERF REPORT).
[186] Id. at 4.
[187] *Id*.
[188] *Id*.
[189] *Id*. (The Las Vegas Metropolitan Police Department adopted a policy which reads: "The department respects the value of every human life, and the application of deadly force is a measure to be employed in the most extreme circumstances.").
[190] *Id*. at 29.
[191] *Id*.
[192] *Id*.
[193] *Id*.
[194] *Id*.
[195] *Id*.
[196] *Id*.
[197] Wood, *supra* note 125.
[198] TASK FORCE FINAL REPORT, *supra* note 32, at 11-12.
[199] Gross, *supra* note 97, at 168.
[200] *Id*.
[201] *Id*. (From 2004 to 2013, 511 law enforcement officers were feloniously killed, 636 were accidentally killed while on the job).
[202] *Id*. (Citing Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries in 2014*, Chart 2 (2015)).
[203] *Id*. at 169.
[204] *Id*.
[205] Gregory R. Brown, *The Blue Line on Thin Ice: Police Use of Force Modifications in the Era of Cameraphones and Youtube*, BR J CRIMINOL (2016) 56(2): 293-312.
[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] Roseanna Sommers, Note: *Will Putting Cameras on Police Reduce Polarization*?, 125 YALE L.J. 1304 (2016).
[210] *Id*. at 1312.
[211] *Id*. at 1314-15.
[212] *Id*.
[213] Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, New York Times, (Dec. 5, 2016). https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html.
[214] Gross, *supra* note 97, at 176.
[215] U.S. Department of Justice, *Attorney General Holder Urges Improved Data Reporting on Both Shootings of Police Officers and Use of Force by the Police* (2015), https://www.justice.gov/opa/pr/attorney-general-holder-urges-improved-data-reporting-both-shootings-police-officers-and-use.
[216] *Id*.

[217] Tom McCarthy, *Police Must Report Shootings to Federal Government, Suggests Obama Taskforce*, The Guardian, (March 2, 2015). https://www.theguardian.com/us-news/2015/mar/02/police-shootings-task-force-21st-century-policing-recommendations.
[218] Dr. Michael Maguire, Police Ombudsman for Northern Ireland https://www.policeombudsman.org.
[219] Wood, *supra* note 125.
[220] *Id*.
[221] *Id*.
[222] *Id*.
[223] *Id*.
[224] *Id*.
[225] Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFFALO L. REV. 837, 854 (2016).
[226] *Id*. at 853.
[227] UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION INVESTIGATION OF FERGUSON POLICE DEPARTMENT, 82-83 (2015). https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.
[228] Moran, *supra* note 225, at 859.
[229] "Rule 803. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness

> (8) *Public records.* A record or statement of a public office if:
> (A) it sets out:
>> (i) the offices activities;
>> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
>> (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." USCS Fed Rules Evid R 803(8).

[230] Gross, *supra* note 97, at 179.
[231] *Id*.
[232] *Id*.
[233] *Id*.
[234] *Id*.
[235] Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judical Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 Md. L. Rev. 271, 287 (1994).
[236] *Id*. at 287.
[237] *Id*.
[238] Moran, *supra* note 225, at 850.
[239] Mark Berman, *Mistrial Declared in Case of South Carolina Officer Who Shot Walter Scott After Traffic Stop*, The Washington Post (December 5, 2016). https://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm_term=.cda5ad742f9b .
[240] Davis, *supra* note 235, at 289.

[241] *Id*. at 290.
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *Id*. at 291.
[246] Harmon, *supra* note 50, at 1125-26.
[247] Gross, *supra* note 97, at 160.
[248] Harmon, *supra* note 50, at 1182. (2008) (arguing that the concepts and well-defined structure within criminal law for deciding when and how a person may justifiably use force against another should be imported into the Fourth Amendment doctrine regulating police violence, subject to appropriate modifications).
[249] *Id*. at 1123.
[250] *Id*.
[251] Gross, *supra* note 97, at 170.
[252] Harmon, *supra* note 50, at 1123.
[253] *Id*. at 1130.
[254] *Id*.
[255] *Id*.
[256] *Id*. at 1130-31.
[257] *Id*. at 1131.
[258] *Id*.
[259] Graham v. Connor, 490 U.S. 386, 396-397 (1989).
[260] *Id*. at 396.
[261] Gross, *supra* note 97, at 171.
[262] N. C. GEN. STAT. § 15A-401.
[263] Gross, supra note at 171.
[264] *Id*.
[265] *Id*.
[266] *Id*. at 171-172 (emphasis added).
[267] Abby Ohlheiser, *Mistrial Declared for Charlotte Police Officer Charged With Manslaughter*, The Washington Post (Aug. 21, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/08/19/a-jury-is-deliberating-the-fate-of-the-charlotte-police-officer-who-fatally-shot-jonathan-ferrell/?utm_term=.c7d69fba1dca.
[268] Gross, *supra* note 97, at 172.
[269] *Id*.
[270] *Id*.
[271] *Id*.
[272] Associated Press, *Murder Case Against Former New Mexico Police Officers Ends In Mistrial*, LA Times, (Oct. 11, 2016), http://www.latimes.com/nation/nationnow/la-na-new-mexico-police-mistrial-20161011-snap-story.html.
[273] Letter from Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, to Honorable Richard J. Berry, Mayor of the City of Albuquerque, 2 (Apr. 10, 2014) (Letter reporting the findings of the Department of Justice's civil investigation into the Albuquerque Police Department), https://www.justice.gov/sites/default/files/usao-nm/legacy/2015/01/20/140410%20DOJ-APD%20Findings%20Letter.pdf.

[274] *Id*. at 3.
[275] *Id*.
[276] *Id*.
[277] Berman, *supra* note 239.
[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*.
[282] *Id*.
[283] Gross, *supra* note 97 at 174.
[284] *Id*.
[285] *Id*. at 175.
[286] *Id*. at 176.
[287] *Id*.
[288] *Id*. at 157-158.
[289] Tennesse v. Garner, 471 U.S. 1, 9 (1985).
[290] *Id*. at 10.
[291] Gross, *supra* note 97, at 158.
[292] *Id.*
[293] Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U.L. REV. 1827, 1831 (2015).
[294] *Id*.
[295] *Id*. at 1844
[296] Amnesty International, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES (June 18, 2015), http://www.amnestyusa.org/research/reports/deadly-force-police-use-of-lethal-force-in-the-united-states?page=2.
[297] *Id*.
[298] Gross, *supra* note 97, at 169.
[299] Mullinex v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).
[300] Linda Sheryl Greene, *Ferguson and Beyond: Before and After Michael Brown -Toward and End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 12 (2015).
[301] *Id*.
[302] Letter from Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, to Honorable Richard J. Berry, Mayor of the City of Albuquerque, *supra* note 273, at 4.
[303] *Id*.
[304] PERF REPORT, *supra* note 185 at 4.
[305] *Id*.
[306] Gross, supra note 97, at 175.
[307] *Id*.
[308] *Id*.
[309] *Id*.
[310] *Id*. at 176.
[311]PERF REPORT, *supra* note 185, at 17.
[312] *Id*.
[313] *Id*.

[314] *See* TASK FORCE FINAL REPORT, *supra* note 32.
[315] *Id*. at 1.
[316] *Id*. at 20.
[317] *Id*. at 53.
[318] *All New Police Officers in England and Wales To Have Degrees*, BBC News, (Dec. 15, 2016). http://www.bbc.com/news/uk-38319283.
[319] TASK FORCE FINAL REPORT, *supra* note 32, at 11.