

DISPROPORTIONATE USE OF DEADLY FORCE ON
UNARMED MINORITY MALES: HOW GENDER AND RACIAL
PERCEPTIONS CAN BE REMEDIED

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INTRODUCTION

Although crime rates in the United States have been decreasing since the 1990s, arrest related killings of minority men by police officers are on the rise.¹ Residents of the small town of Ferguson, Missouri were reminded of this reality in August 2014 when a white officer shot and killed an unarmed teen, Michael Brown, after a physical altercation took place through the window of the officer's patrol vehicle.² Although it is unclear who started the physical altercation, Officer Wilson testified to a Missouri grand jury that Mr. Brown grabbed his gun, which made him fear for his safety and others.³ After shooting Mr. Brown once while still in his vehicle, Officer Wilson ran after Mr. Brown, shooting him multiple times and ultimately killing him.⁴ A month earlier, a similar situation captured the nation's attention in Staten Island, New York, in which a white officer killed Eric Garner, an African American man, by putting him in an illegal chokehold for selling untaxed cigarettes.⁵

A lack of grand jury indictments for the officers in both cases has focused a spotlight on how the law, police departments, and the community interpret officer related shootings of unarmed minority males. Additionally, the rise in cases like those of Michael Brown and Eric Garner have brought to attention the reality that Americans are not told how often police officers shoot and kill

1. Kenneth Jost, *Police Misconduct: Will Excessive Force, Radical Profiling Be Curbed?*, 22 CQ RESEARCHER 301, 305, 308 (Apr. 6, 2012) (indicating 2,958 arrest related killings by police officers between 2003-2009; more than half of victims were minorities); Jeanette Moll, *Crime and Victimization Rates: Are Our Streets Still Safe*, RIGHT ON CRIME (Oct. 18, 2012), <http://www.rightoncrime.com/2012/10/crime-and-victimization-rates-are-our-streets-still-safe> (last visited Dec. 1, 2015).

2. Transcript of Grand Jury Vol. IV at 45, *Missouri v. Darren Wilson*, (Sept. 10, 2014), available at <http://graphics8.nytimes.com/newsgraphics/2014/11/24/ferguson-evidence/assets/gj-testimony/grand-jury-volume-04.pdf> [hereinafter Johnson Testimony] (last visited Dec. 1, 2015) (Mr. Johnson testified that the officer instigated the boys into assaulting him by insulting them whereas Officer Wilson testified that Mr. Brown was disrespectful first and then reached for his gun); Transcript of Grand Jury Vol. V at 225, *Missouri v. Darren Wilson*, (Sept. 16, 2014), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1370883/grand-jury-volume-5-darren-wilsons-testimony.pdf> [hereinafter Wilson Testimony] (last visited Dec. 1, 2015).

3. Wilson Testimony, *supra* note 2, at 215 & 225.

4. *Id.* at 226, 228-229.

5. *'I Can't Breathe': Eric Garner Put in Chokehold by NYPD Officer-Video*, THE GUARDIAN (Dec. 4 2014, 2:46 PM), <http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video> [hereinafter *Garner Video*] (last visited Dec. 1, 2015).

unarmed citizens in their community.⁶ For example, the FBI reports that there were 410 “justifiable police homicides” in 2012 in which the victim had a weapon.⁷ However, statistics elsewhere indicate that police shootings resulting in the deaths of unarmed civilians are much higher.⁸ Furthermore, the FBI has no report of “unjustified homicides” committed by police.⁹ The lack of reporting by the FBI of these homicides has spurred national outrage over the lack of legal accountability for police officers that kill a disproportionate number of unarmed minority males.

This Comment interprets the disproportionate use of lethal force on unarmed minority males through an analysis of gender role-theory, masculinity theory, historical racial propaganda, and unconscious racial bias. In addition, this Comment incorporates the legal standards for lethal force as a framework for understanding why many police officers are not indicted or charged for deaths of unarmed civilians. As such, this Comment ultimately suggests alternatives that should be adopted by police agencies and state legislatures to help prevent similar cases in the future. Specifically, this Comment concludes that gender and racial perceptions along with a hyper masculine police mentality and the low lethal force standard enables police officers to legally employ deadly force disproportionately on minority males. However, increased police training on gender and racial perceptions, diversified police agencies, stronger community relations, and strict legal accountability can curb the disproportionate use of lethal force.

The background section of this Comment starts with an examination of the unseemly deaths of Michael Brown and Eric Garner. Following these narratives is a focus on statistics regarding the rates at which police kill minority men, the lack of official statistics available on “unjustified homicides” by police, and how communities have adopted ways to measure the rates at which police kill minorities as a result of the gap in information. This section ends with an analysis of the history of police corruption in the United States, the guidelines governing the use of lethal force, and a brief overview of legal safeguards on police power.

Next, the analysis section offers an explanation for the disproportionate rate at which police kill minority men through the lens of gender theories and historical racial propaganda that has given rise to unconscious racial bias. In examining these social factors, this Comment demonstrates how the masculine

6. Reuben Fischer-Baum, *Nobody Knows How Many Americans Police Kill Each Year*, FIVETHIRTYEIGHT (Aug. 19, 2014, 11:36 AM), <http://fivethirtyeight.com/features/how-many-americans-the-police-kill-each-year> (last visited Dec. 1, 2015) (indicating no one actually knows how often police shoot civilians).

7. *Uniform Crime Reports: Justifiable Homicide Data Table 2008-2012*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2008-2012.xls [hereinafter *Justifiable Homicide Table*] (last visited Dec. 1, 2015).

8. *Killed by Police 2015*, KILLED BY POLICE, <http://www.killedbypolice.net> (last visited Dec. 1, 2015) (reporting a total of 1,100 individuals killed by police officers in 2014).

9. Fischer-Baum, *supra* note 6.

police mentality and gender and racial perceptions can lead an officer to “reasonably” feel threatened and use lethal force as self-defense that is justifiable under the law. This section suggests that the lack of collaboration and trust between police and minority communities in combination with unconscious racial bias leads police to perceive minority males as more aggressive, risk-seeking criminals than white males. This perception allows police officers to “reasonably believe” their safety is in danger (even though that belief might be erroneous), making them more likely to use deadly force on minority males.

In light of this analysis, this section examines the ways in which communities have responded to the recent cases of Michael Brown and Eric Garner. These responses include reluctant grand juries, the protests and violence that followed, and the mobilization of some state legislatures to require officers to wear video cameras. Ultimately this Comment argues that officer video cameras are not a sole legal solution to prevent cases like Michael Brown and Eric Garner in the future and other local measures must be adopted to bridge trust between police officers and minority communities.

This Comment urges police agencies to develop a policing model that works to openly communicate, collaborate, and problem solve with minority communities. In addition to this policing model, this comment suggests increased diversification of police agencies in minority communities, police training on gender assumptions and cultural differences, and a greater focus on de-escalation training in order to decrease disproportionate use of deadly force on minority males. In the end, this Comment realizes that not all social biases and assumptions based on perceptions can be eliminated. However, the more police collaborate and problem solve with minority communities and the less police are dependent on physical use of force, the less likely they will perceive minority males as threatening and the less likely deadly force will be used.

I. BACKGROUND

A. *Recent Police Killings of Unarmed Minority Males*

i. The Case of Michael Brown

On August 9, 2014, Michael Brown and his friend, Dorian Johnson, both African American males, were walking down a neighborhood street.¹⁰ According to Mr. Johnson’s grand jury testimony, Officer Wilson approached the boys in his police vehicle and told them to “get the fuck on the sidewalk.”¹¹ In response, Mr. Johnson stated that they were only a short distance from their destination and they would be out of the street soon.¹² Officer Wilson then drove forward, backed up almost hitting the boys, and “thrust” open his door so

10. Johnson Testimony, *supra* note 2, at 45.

11. *Id.* at 45.

12. Wilson Testimony, *supra* note 2, at 208; Johnson Testimony, *supra* note 2, at 47.

hard it hit Mr. Brown.¹³ According to Mr. Johnson, Officer Wilson “never attempted to open the door again . . . but his arm came out the window . . . [and] he grabbed ahold of Big Mike’s shirt around the neck area.”¹⁴ Mr. Johnson further told the grand jury that Officer Wilson’s hands “really tightened up” and Mr. Brown was trying to “pull off the officer’s grip” while they “both [had] angry faces on” and exchanged words.¹⁵

Officer Wilson described a different version of events to the grand jury. Specifically, Officer Wilson stated that the physical altercation started when Mr. Brown “hit [him]. . . in the side of the face with a fist” and tried to grab his gun while he used one of his hands to shield his face.¹⁶ This entire struggle took place through Officer Wilson’s patrol window.¹⁷ Officer Wilson told the grand jury that during the altercation, Mr. Brown had “the most intense aggressive face,” looked like “a demon,” and compared his strength to “Hulk Hogan.”¹⁸ Officer Wilson further described that when Mr. Brown hit him, he debated which one of his weapons he could reach in order to be “effective.”¹⁹ While still sitting in his patrol vehicle, Officer Wilson pulled out his gun and pointed it at Mr. Brown saying, “get back or I’m going to shoot you.”²⁰ According to Officer Wilson, Mr. Brown then grabbed his gun, twisted it into his hip and said, “You are too much of a pussy to shoot me.”²¹ After Officer Wilson was able to get the gun free from his direction, he shot at Mr. Brown twice and Mr. Brown ran away.²²

FBI Forensic tests discovered Mr. Brown’s blood on Officer Wilson’s “gun, uniform and police cruiser,” corroborating Officer Wilson’s account that he fired his gun twice while in the car.²³ After Mr. Brown took off running, Officer Wilson got out of his vehicle and followed on foot.²⁴ According to Officer Wilson, Mr. Brown stopped running at one point, turned, “looked at [him], made like a grunting, like aggravated sound and he start[ed] . . . coming back towards [him].”²⁵ Officer Wilson further testified that when Mr. Brown came towards him, his left hand made a fist and his right hand went “under his shirt in his waistband and he start[ed] running at [him].”²⁶ Officer Wilson told

13. Johnson Testimony, *supra* note 2, at 49.

14. *Id.* (‘Big Mike’ is Mr. Johnson’s nickname for Mr. Brown).

15. *Id.* at 49-51.

16. Wilson Testimony, *supra* note 2, at 210-211, 215.

17. *Id.* at 210-211.

18. *Id.* at 212, 225.

19. *Id.* at 214.

20. *Id.*

21. *Id.* at 157.

22. Wilson Testimony, *supra* note 2, at 226.

23. *Id.* at 226; *see also* Faith Karimi & Michael Martinez, Report: *Michael Brown’s Blood Found on Officer Darren Wilson’s Gun, Car Door*, CNN, (Oct. 18, 2104, 8:43 PM ET), <http://www.cnn.com/2014/10/18/justice/michael-brown-darren-wilson-account/index.html> (last visited Dec. 1, 2015).

24. Wilson Testimony, *supra* note 2, at 226.

25. *Id.* at 227.

26. *Id.*

the grand jury that he ordered Mr. Brown to get on the ground but Mr. Brown kept running towards him, so he fired a series of shots and Mr. Brown's body "jerk[ed] or flinched."²⁷

Although Officer Wilson cannot remember how many shots he fired after chasing Mr. Brown on foot, he described Mr. Brown as "bulking up to run through the shots, like it was making him mad that [he] was shooting at him."²⁸ Officer Wilson further stated that this made him backpedal because he thought, "if he reaches me, he'll kill me."²⁹ After firing several shots, Officer Wilson recalled, "the demeanor on his face went blank, the aggression was gone, . . . he stopped, the threat was stopped."³⁰

When asked why he drew his gun, Officer Wilson said that he did not carry a taser, that the Ferguson Police Department generally "only had a select amount," and that he was not comfortable carrying one.³¹ In addition to not carrying a taser, Officer Wilson stated that he drew his gun because he feared "another one of those punches in [his] face could knock [him] out or worse."³² When asked if he still would have used deadly force if Mr. Brown did not grab his gun, Officer Wilson said "my gun was already being presented as a deadly force option while he was hitting me in the face."³³ Despite testifying to the grand jury that Officer Wilson thought of the use of force continuum, described in more depth in section C, he considered using his gun from the very first moment he was being punched in the face.³⁴ Additionally, when describing why he got out of his vehicle and went after Mr. Brown after shooting him once, Officer Wilson said "he still posed a threat, not only to me, [but] to anybody else that confronted him."³⁵

The Ferguson Police Department does not have dash cameras to corroborate Officer Wilson's version of events.³⁶ Officer Wilson testified that after the incident, he did not attempt to resuscitate Mr. Brown and did not request for medical assistance until two backup officers arrived.³⁷ Furthermore, although Officer Wilson testified that he called in that shots had been fired after he shot Mr. Brown in the car, dispatch had no record of his call because his portable radio channel was set to the wrong number at the time.³⁸

Immediately after the shooting the Ferguson community responded with outrage. Facebook posts of individuals who lived in the neighborhood where Mr. Brown was shot depicted videos and pictures of Mr. Brown laying

27. *Id.* at 227-228.

28. Wilson Testimony, *supra* note 2, at 228.

29. *Id.* at 229.

30. *Id.*

31. *Id.* at 205-06.

32. *Id.* at 216, 237.

33. *Id.*

34. Wilson Testimony, *supra* note 2, at 274-275.

35. *Id.*, at 281.

36. *Id.* at 254-55.

37. *Id.* at 234-35.

38. *Id.* at 230-31.

uncovered in the street surrounded by a pool of blood for hours while a crowd formed.³⁹ Rioting, looting, and protests followed. Days after the shooting, the Ferguson Police Department stated that it had placed Officer Wilson on administrative leave.⁴⁰ On November 24, 2014 a Missouri grand jury concluded that there was not probable cause to charge Officer Wilson with first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter, amplifying the Ferguson community protests and leading to national outrage.⁴¹ A week after the grand jury decided not to indict Officer Wilson, he subsequently resigned from the Ferguson Police Department.⁴²

ii. A National Concern

Ferguson, Missouri is not the only community that has recently experienced police killing of an unarmed minority male. In July 2014, New York Police Department (NYPD) Officer Daniel Pantaleo put Eric Garner in a chokehold after he was observed to be selling untaxed cigarettes, resulting in Mr. Garner's death.⁴³ The entire incident, recorded on a witness's phone camera, depicts Mr. Garner backing away from several officers surrounding him, and subsequently, Officer Pantaleo lunging forward and putting Mr. Garner in a headlock.⁴⁴ A few seconds later, Mr. Garner is heard saying, "I can't breathe," while the officer maintains his chokehold.⁴⁵ Although a medical examiner concluded that Mr. Garner died partly as a result of the chokehold, a

39. David Hunn & Kim Bell, *Why Was Michael Brown's Body Left There For Hours?*, ST. LOUIS POST-DISPATCH, Sept. 14, 2014, http://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html (last visited Dec. 1, 2015); Beth O'Malley, *Social Media Posts from Scene of Ferguson Shooting*, ST. LOUIS POST-DISPATCH, Aug. 9, 2014, http://www.stltoday.com/news/local/crime-and-courts/social-media-posts-from-scene-of-ferguson-shooting/html_c86d87f2-226b-5074-b8a8-c82c299195dc.html (last visited Dec. 1, 2015).

40. Lindsey Bever, *Ferguson Police Officer Darren Wilson Is Nowhere to Be Found*, WASH. POST (Aug. 21, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/21/ferguson-police-officer-darren-wilson-is-nowhere-to-be-found/> (last visited Dec. 1, 2015).

41. Moni Basu et al., *Fires, Chaos Erupt in Ferguson After Grand Jury Doesn't Indict in Michael Brown Case*, CNN NEWS (Nov. 25, 2014, 8:53 AM), <http://www.cnn.com/2014/11/24/justice/ferguson-grand-jury/> (last visited Dec. 1, 2015).

42. Sarah Larimer, *Darren Wilson Resigned from the Ferguson Police Department. What Will He Do Now?*, WASH. POST (October 30, 2015, 3:18 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/12/01/darren-wilson-resigned-from-the-ferguson-police-department-what-will-he-do-now/> (last visited Dec. 1, 2015).

43. Melanie Eversley & Mike James, *No Charges in NY City Chokehold Death: Federal Inquiry Launched*, USA TODAY (Dec. 4, 2014, 11:14 AM), <http://www.usatoday.com/story/news/nation/2014/12/03/chokehold-grand-jury/19804577> (last visited Dec. 1, 2015).

44. *Garner Video*, *supra* note 5.

45. *Id.*

grand jury declined to indict the officer in December 2014, a decision that fueled protests around the country.⁴⁶

Although there are numerous examples of officer use of deadly force nationwide, none have been more discomfoting to the author of this article than the killing of Tony Robinson during production of this Comment. On Friday, March 6, 2015, Officer Matt Kenny was dispatched to a call about a young man assaulting someone and jumping in front of cars in Madison, Wisconsin.⁴⁷ When he arrived at the scene he encountered Mr. Robinson, a nineteen-year-old biracial male, and followed him into an apartment.⁴⁸ The officer then heard a disturbance inside and fired “after he was attacked.”⁴⁹ After an investigation by Dane County District Attorney Ismael Ozanne, Dane County’s first biracial DA, it was concluded that Officer Kenny “lawful[ly] use[d] deadly police force” and no charges should be brought.⁵⁰ Tony Robinson’s death occurred in a city “known as a liberal haven with a long history of progressive politics,” making it clear that the disproportionate use of deadly force can even happen in a city “named one of the nation’s best places to live.”⁵¹

Despite the fact that officers are rarely criminally charged for use of deadly force, there are rare instances when officers are charged for killing unarmed minority males. For example, in September 2014 a South Carolina officer gunned down a 68-year-old black male in his own driveway for failing to pull over, and thus became the first officer charged in ten years in South Carolina for fatally shooting an unarmed civilian.⁵² In that case, the officer had signaled to pull over Ernest Satterwhite, but Mr. Satterwhite kept driving for several miles at a slow speed until he reached his driveway.⁵³ When Mr. Satterwhite pulled into his driveway the officer ran up to his door and fired five shots into the driver’s side door.⁵⁴ Prosecutors tried to charge the officer with

46. Eversley & James, *supra* note 43.

47. *Tony Robinson Shooting in Madison, Wisconsin, Sparks Protests*, NBC NEWS (Mar. 7 2015, 10:49 PM), <http://www.nbcnews.com/news/us-news/protests-after-madison-police-shooting-tony-robinson-n319386> [hereinafter *Tony Robinson Shooting*] (last visited Dec. 1, 2015).

48. *Id.*; Catherine Shoichet & Jethro Mullen, *Prosecutor: No Charges for Officer in Tony Robinson Case*, CNN, <http://www.cnn.com/2015/05/12/us/tony-robinson-madison-killing-investigation/index.html> (May 12, 2015, 8:35 PM) (last visited Dec. 1, 2015).

49. *Tony Robinson Shooting*, *supra* note 47.

50. Shoichet & Mullen, *supra* note 48.

51. Scott Bauer, *Police Shooting of Tony Robinson Forces Discussion of Madison’s Racial Divide*, HUFFINGTON POST (Oct. 30, 4:50 PM), http://www.huffingtonpost.com/2015/03/10/madison-wisconsin-racial-_n_6838436.html (last visited Dec. 1, 2015).

52. Jeff Collins, *Cop Allegedly Shot Unarmed Man Parked in His Own Driveway*, HUFFINGTON POST (Sept. 30, 2014, 5:59 AM), http://www.huffingtonpost.com/2014/09/30/ernest-satterwhite-just-craven_n_5907544.html (last visited Dec. 1, 2015).

53. *Id.*

54. *Id.*

voluntary manslaughter, but a grand jury disagreed and indicted him instead on “misconduct in office,” a misdemeanor.⁵⁵

B. The Problem Is in the Numbers

i. FBI Uniform Crime Reports

The FBI collects statistics about the rates of crime in communities across the United States through a system known as the Uniform Crime Reports (UCR). The system is completely voluntary, relying on local police agencies to report to the FBI offenses in their community in certain categories of crime.⁵⁶ Most categories the FBI is concerned about are particularly violent crimes, such as homicide, sexual assaults, robberies, and armed burglaries. While the FBI does report the rate at which police kill armed civilians, a rate they label as “justifiable homicides,” they do not ask local agencies to report the rate at which police officers kill *unarmed* civilians in their local communities.⁵⁷

The FBI defines a “justifiable homicide” by law enforcement as a “certain willful killing that must be reported as justifiable or excusable” and is “the killing of a felon by a law enforcement officer in the line of duty.”⁵⁸ When the FBI reports its “justified homicides” it states what weapons the identified “felon” had when the homicide occurred.⁵⁹ For example, the “Justifiable Homicide by Weapon Table” breaks down weapons based on gun type, knives involved, other dangerous weapons, and “personal weapons.”⁶⁰ However, nowhere in the table does it state the rate at which officers kill individuals who

55. *Id.*

56. PRESIDENT’S COMMISSION, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 3 (1967).

57. See *Justifiable Homicide Table*, *supra* note 7; *Uniform Crime Reports: Expanded Homicide Data, 2009-2013*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2008-2012.xls (last visited Dec. 1, 2015).

58. *Uniform Crime Reports: Expanded Homicide Data, 2009-2013*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide> (last visited Dec. 1, 2015).

59. *Justifiable Homicide Table*, *supra* note 7; *Uniform Crime Reports: Expanded Homicide Data, 2008-2012*, FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2008-2012.xls (last visited Dec. 1, 2015).

60. *Uniform Crime Reports: Justifiable Homicide by Weapon, Law Enforcement, 2009-2013*. FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls [hereinafter *Justifiable Homicide by Weapon Table*] (last visited Dec. 1, 2015).

did not have any of the weapons listed; there is no category for “unarmed” or “no weapon.”⁶¹

In fact there is not even a category of items (wallets, keys, etc.) that officers perceived to be dangerous when fatally shooting unarmed individuals.⁶² Furthermore, there is no other table listed on the FBI’s website that reports these statistics.⁶³ Although the “justifiable homicides” table does not specifically identify that a “justifiable homicide” includes the fact that the individual had a weapon, it can be inferred that the presence of the weapon, which presents an obvious reasonable danger to the officer and fits the legal standard for use of deadly force, is what made the homicide justified.⁶⁴ Given that assumption, it is understandable why the same table does not include statistics of unarmed individuals when killed by an officer—because these killings would not be “justified.”

This lack of information begs the question of where the killings of Michael Brown, Eric Garner, Tony Robinson, Ernest Satterwhite, and other similar deaths are statistically accounted for. If the killings of Michael Brown and Eric Garner were “justifiable or excusable” (as the non-indictment of Officer Wilson and Officer Pantaleo would lead the public to believe), they should be included under the “justifiable homicide” table. However, with the categories currently given, the killing of Michael Brown and Eric Garner do not fit. Michael Brown’s homicide would only fit if the FBI considered his height, weight, and other physical characteristics as a “personal weapon,” an “other dangerous weapon,” or if his struggle for the officer’s gun puts him under the handgun category. All of these explanations are a stretch, and the more likely answer is that the FBI is simply not counting these deaths in its current statistics.

ii. Alternative Measures

Any American who reads the national news can find a recent story of a police officer killing an unarmed minority male. In fact, a Facebook page titled “Killed By Police” helps social media users who are interested in following this issue keep track of how often it happens.⁶⁵ According to a post on November 21, 2014, 1,100 individuals were killed by police officers in 2014.⁶⁶ Additionally, the page cites a website titled “Killed By Police” which documents every individual killed by police, the date they were killed, and the news story describing the incident.⁶⁷ Taking the website’s 2014 information as accurate and subtracting the FBI’s number of justified homicides in 2013, it

61. *Id.*

62. *Id.*

63. *Crime Statistics*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/stats-services/crimestats> (last visited Dec. 1, 2015).

64. *See infra* Part II.C.

65. *Killed by Police*, FACEBOOK, <https://www.facebook.com/KilledByPolice> (last visited Dec. 1, 2015).

66. *Killed by Police 2015*, *supra* note 8.

67. *Id.*

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would mean there were approximately 710 “unjustified homicides” by police in 2013 and 2014 combined.⁶⁸

Yet as easy as this website indicates it is to keep track of these incidents, the FBI does not publicly report the rate at which unjustified homicides happen.⁶⁹ Regardless of the reason, officers are supposed to serve and protect the community and the FBI’s Uniform Crime Reports are supposed to inform the public on the presence of crime in their communities. Therefore, it only seems appropriate that the FBI require agencies to report every unarmed killing so they can report justified and unjustified rates to the public each year.

In addition to the Facebook page “Killed By Police,” the Los Angeles Youth Justice Coalition developed a report to help bridge the gap in documentation of officer-related shootings in Los Angeles, California. Specifically, the Coalition documented individuals living in Los Angeles County who were killed by law enforcement officers from January 1, 2000 to August 31, 2014.⁷⁰ This method allowed the Coalition to follow what demographic is affected most by police officer shootings and develop methods to help solve the problem.⁷¹ The Coalition reported that the Los Angeles Police Department killed 589 people in Los Angeles County from 2000 to 2014, with 315 of those people killed from 2007 to 2014.⁷² The report also found that 97% of the individuals killed were male and 82% were black and Latino.⁷³

In addition to these statistics on gender and race, the Bureau of Justice Statistics reports that arrest related killings, whether criminal or justifiable, are on the rise.⁷⁴ Specifically, the Bureau reported that from 2003 to 2009, law enforcement officers committed 2,931 arrest related killings nationally.⁷⁵ Furthermore, recent statistics by the FBI Uniform Crime Reports indicate that justifiable homicides by officers of civilians have increased dramatically since 2010.⁷⁶

The increased rates of civilian deaths by police officers could be justified if civilians were killing police officers at a higher rate or if crime rates were on the rise. However, as already pointed out, crime rates have been on a steady

68. *Id.* (unfortunately, Killed By Police has only been documenting these deaths since May 1, 2013 and the Uniform Crime Reports have not yet come out with statistics for 2014).

69. Fischer-Baum, *supra* note 6 (possibly because the unjustified number is greater than the count of justified homicides).

70. *Don’t Shoot to Kill: Homicides Resulting From Law Enforcement Use of Force Within LA County 2000-2014*, YOUTH JUSTICE COALITION (Aug. 2014), <http://www.youth4justice.org/wp-content/uploads/2014/09/Dont-Shoot-to-Kill-Summary-September-2014.pdf> (last visited Dec. 1, 2015).

71. *Id.*

72. *Id.* at 7; *see also News Release of Data from YJC on Law Enforcement Use of Force Resulting in a Homicide*, YOUTH JUSTICE COALITION (Oct. 11, 2014), <http://www.youth4justice.org/new-release-of-data-from-yjc-on-law-enforcement-use-of-force-resulting> [hereinafter *News Release*] (last visited Dec. 1, 2015).

73. *News Release*, *supra* note 72.

74. Jost, *supra* note 1, at 305.

75. *Id.*

76. *Justifiable Homicide by Weapon Table*, *supra* note 60.

decline since the 1990s.⁷⁷ Furthermore, from 2003 to 2012 the FBI reported that 535 police officers were killed as a result of a “felonious incident.”⁷⁸ At that rate, roughly fifty-three police officers are killed a year as a result of “felonious incidents.” In fact, in 2012 the FBI reported that forty-eight law enforcement officers died in the line of duty during a “felonious incident.”⁷⁹

Of the fifty-one alleged offenders identified in connection with the officers killed in 2012, forty-nine were male, two were female, thirty were white, sixteen were black, one was American Indian/Alaska Native, and one was Asian/Pacific Islander.⁸⁰ According to this statistic, white people killed police officers two times as often as minorities in 2012, yet recent statistics suggest that officers are killing minorities twenty-one times more often than white people.⁸¹ These statistics do not reflect that officers are shooting individuals based on the rate those individuals are killing them, and instead indicates something more is contributing to these vastly different rates.

Statistics like these in the national spotlight likely contribute to the fact that 66 percent of blacks, 64 percent of Hispanics, and 50 percent of Americans think police officers are not held legally accountable for misconduct.⁸² In fact, in 2002 police departments upheld less than 8 percent of complaints of excessive force against their police officers.⁸³ Since a complaint is only upheld when the police department agrees *their* officer used excessive force, police officers are more likely not to be held liable for their actions than they are to be held accountable. Interestingly enough, only about 13 percent of police officers in big cities are female, while only 5 percent of citizen complaints for excessive force and only 2 percent of the sustained allegations of excessive force in big cities are against female officers.⁸⁴

77. Moll, *supra* note 1.

78. *Uniform Crime Reports: Law Enforcement Officers Feloniously Killed, Region by Type of Weapon, 2003-2012*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/leoka/2012/tables/table_30_leos_fk_region_by_type_of_weapon_2003-2012.xls (last visited Dec. 1, 2015).

79. *Uniform Crime Reports: Officers Feloniously Killed in 2012*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/leoka/2012/officers-feloniously-killed/felonious_topic_page_-2012 (last visited Dec. 1, 2015).

80. *Id.* (race reported for three offenders).

81. Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 10:07 AM), <http://www.propublica.org/article/deadly-force-in-black-and-white> (last visited Dec. 1, 2015).

82. Emily Ekins, *Reason-Rupe April 2014 National Survey*, REASON (Apr. 3, 2014, 9:15 AM), <http://reason.com/poll/2014/04/03/reason-rupe-april-2014-national-survey> (last visited Dec. 1, 2015).

83. Carol D. Leonnig, *Current Law Gives Police Wide Latitude to Use Deadly Force*, WASH. POST (Aug. 28, 2014), http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c_story.html (last visited Dec. 1, 2015).

84. Dr. Kim Lonsway, et al., *Men, Women, and Police Excessive Force: A Tale of Two Genders*, NAT'L CTR. FOR WOMEN AND POLICING (Apr. 2002), available at http://womenandpolicing.com/PDF/2002_Excessive_Force.pdf.

C. Police Corruption: Legislative and Judicial Intervention

i. History of Police in America

Police misconduct, corruption, and excessive force have existed in American police agencies since colonists established the first law enforcement agency in the early 1600s in Boston, Massachusetts.⁸⁵ Since early colonial communities were rural, formal policing was unnecessary.⁸⁶ In fact, these informal policing efforts were only comprised of a few volunteer men and their duties were generally unsupervised.⁸⁷ As towns grew and more homes and businesses were established, volunteers started evading their mandatory duties and thus, there became a greater need for formal law enforcement.⁸⁸

Beginning in the early 1700s, towns instituted a paid watch and started filling policing positions by men favored and supported by local politicians.⁸⁹ During this period, officers were typically unarmed, untrained, and as a result, inefficient in preventing crime.⁹⁰ Additionally, officers were assigned to patrol their own neighborhoods, and as a result had close ties to the neighborhoods they policed.⁹¹ The officer's close ties combined with the decentralized organizational structure of the police agencies in this period led to inadequate supervision of officers and gave rise to rampant police corruption.⁹²

Moreover, since officers were typically the same ethnicity as the residents in their neighborhoods and came from a similar cultural background, there was resistance and discrimination against strangers from other neighborhoods, especially minorities.⁹³ This resulted in officers frequently using coercive tactics and racial and ethnic discrimination in their contacts with the public.⁹⁴ In an effort to combat this corruption and inefficiency, law enforcement agencies changed their methodology and instituted the first non-neighborhood based police forces.⁹⁵

This change marked what is known as the "reform era" of policing; however, it was only the beginning of racially discriminatory tactics by

85. *The Early Days of American Law Enforcement*, NAT'L LAW ENFORCEMENT MUSEUM INSIDER (Apr. 2012), <http://www.nleomf.org/museum/news/newsletters/online-insider/2012/April-2012/early-days-american-law-enforcement-april-2012.html> (last visited Dec. 1, 2015).

86. *Id.*

87. *See id.*

88. *Id.*

89. DEAN CHAMPION, *POLICE MISCONDUCT IN AMERICA* 7 (Contemporary World Issues ed. 2001).

90. *Id.*

91. *See* George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, US DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE (Nov. 1988), at 4, available at <https://www.ncjrs.gov/pdffiles1/nij/114213.pdf>.

92. *Id.* at 3.

93. *Id.* at 3-4.

94. Jost, *supra* note 1, at 307-311.

95. *Id.*

American police agencies.⁹⁶ In fact, the first American modern style of policing occurred in this era in the form of “slave patrols,” which is likely one of the key factors for racial tension with the police today.⁹⁷ Starting in the 1740s, all Southern states enacted slave patrol legislation.⁹⁸ The legislation mandated that “white men aged sixteen to sixty with the exception of ministers of religion” were to “visit every Plantation within their respective Districts once in every month.”⁹⁹ The legislation also authorized the patrols to “enter any disorderly tipling-House or other Houses suspected of harboring, trafficking or dealing with Negroes” and further permitted their ability to inflict “corporal punishment on any slave that left their owner’s property without permission.”¹⁰⁰

Although the slave patrols only existed in the south, northern law enforcement agencies were forced to uphold the rights afforded to masters by the federal and state constitutions for fugitive and sojourning slaves.¹⁰¹ Since there was no political power for blacks during this period and no legal standing to bring claims in court, there was little protection of minority rights in this era against police action.¹⁰² With the slave patrols in the south and increased urbanization and industrialization in the north, tension arose between black freedmen and white members of the working class in the north and gave rise to riots in New York, Boston, Philadelphia, and Baltimore in the mid-1800s.¹⁰³

While the movements of the Civil War and Reconstruction helped address the legal and political status of minorities, some discriminatory practices of the “reform era” continued into the twentieth century, leading the federal government to investigate police practices and methodology.¹⁰⁴ Specifically, the National Commission on Law Observance and Enforcement, commonly called the Wickersham Commission, found that physical brutality was “excessively practiced” by police departments around the country.¹⁰⁵ As a result of these findings, the U.S. Supreme Court began to exercise oversight of police interrogation practices, searches and seizures, and police use of deadly force.

ii. Judicial Oversight

In the 1936 case *Brown v. Mississippi*, the U.S. Supreme Court held that confessions obtained by torture-like interrogations were a violation of the due

96. Kelling & Moore, *supra* note 91, at 4.

97. Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Policing: A Minority View*, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE (Jan. 1990), at 3, available at <https://www.ncjrs.gov/pdffiles1/nij/121019.pdf>.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 5.

102. *Id.* at 6.

103. Williams & Murphy, *supra* note 97, at 4.

104. *Id.*

105. Jost, *supra* note 1, at 310.

process clause.¹⁰⁶ Nearly thirty years later the Court upheld the enforcement of the exclusionary rule in the case of *Mapp v. Ohio*, which prohibits the admissibility of evidence obtained in an unconstitutional search or seizure.¹⁰⁷ Then in 1966, the Court held in *Miranda v. Arizona* that police were required to advise a suspect of his or her rights before any custodial interrogation.¹⁰⁸

Finally, in 1985, the Court dealt with the issue of police use of deadly force. In the case of *Tennessee v. Garner*, the Court was asked to decide whether an officer, who shot and killed an unarmed suspect as he was running away from a suspected burglary, violated the suspect's constitutional rights.¹⁰⁹ The Court held that "deadly force . . . may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily harm to the officer or others."¹¹⁰ In its reasoning, the Court noted that the use of deadly force was a seizure, and thus was subject to the Fourth Amendment's reasonableness requirement.¹¹¹ The Court noted that reasonableness of a seizure not only depended on when a seizure is made but also on how it is carried out.¹¹²

The Court also placed substantial importance on the need for a fleeing suspect to be dangerous in order to balance the "interest of the individual, and of society, in judicial determination of guilt and punishment."¹¹³ In this case, the Court reasoned that while a "burglary is a serious crime" the Court "cannot agree that it is so dangerous as automatically to justify the use of deadly force."¹¹⁴ More importantly, since the individual was unarmed, the Court reasoned that the crime in this case was a property crime rather than a violent crime and therefore the use of deadly force was not reasonable: "the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous."¹¹⁵

Later, in the 1989 case *Graham v. Connor*, the Court asserted an "objective reasonableness" standard to the use of deadly force analysis.¹¹⁶ In that case, a diabetic man brought a Section 1983 action to recover damages for injuries he sustained when law enforcement officers used physical force during an investigatory stop.¹¹⁷ In its analysis, the Court made explicit that all claims against law enforcement officers were to be analyzed under the Fourth

106. *Id.*

107. *Mapp v. Ohio*, 367 U.S. 643 (1961).

108. *See Miranda v. Arizona*, 384 U.S. 436, 436 (1966).

109. *Tennessee v. Garner*, 471 U.S. 1, 24 (1985).

110. *Id.* at 1.

111. *Id.* at 6.

112. *Id.* at 8.

113. *Id.* at 9.

114. *Id.* at 21.

115. *Tennessee v. Garner*, 471 U.S. 1, 24 (1985).

116. *Graham v. Connor*, 490 U.S. 386, 386 (1989).

117. *Id.*

Amendment's reasonableness standard, not as "substantive due process" claims.¹¹⁸

The Court further held that the use of deadly force "must be judged from the perspective of a reasonable officer on the scene and its calculus must embody the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation."¹¹⁹ The Court reasoned that "not every push or shove" constitutes a violation of the Fourth Amendment.¹²⁰ However, factors that can be considered to determine if excessive force was used include weighing the severity of the crime, whether the suspect poses an "immediate safety threat," and whether the suspect is "actively resisting arrest" or attempting to escape.¹²¹

iii. Legislative Enforcement

a. Federal Enforcement

In order to enforce the U.S. Supreme Court's rulings, Congress authorized the Department of Justice to investigate state and local law enforcement agencies for "patterns or practice" constitutional and statutory rights violations.¹²² For example, Congress' subsequent passing of the Violent Crime Control and Law Enforcement Act of 1994 enabled the Justice Department to review practices of law enforcement agencies and initiate suits against those that violate individual federal rights.¹²³ Since its enactment, the U.S. Department of Justice has initiated multiple investigations against police agencies nationwide.¹²⁴ As a result, many police agencies have reformed their policies; however, it is unclear how effective those reforms have been in ensuring the protection of rights.¹²⁵ Regardless of their efforts, the federal government only retains limited jurisdiction to enforce any suggestions it makes, leaving the state governments the role of primary enforcer.¹²⁶

The Department of Justice initiated an investigation in the Ferguson Police Department and against Officer Wilson after the killing of Michael Brown. In its report, the Department of Justice concluded, "[The] Ferguson Police Department engages in a pattern of excessive force in violation of the Fourth Amendment and Ferguson Law Enforcement practices . . . are driven in part by

118. *Id.* at 388.

119. *Id.* at 396.

120. *Id.*

121. Jost, *supra* note 1, at 307.

122. *Id.* at 301.

123. *Id.* at 311; *see also* *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/police.php> (last updated Aug. 17, 2015) (last visited Dec. 1, 2015).

124. Jost, *supra* note 1, at 311.

125. *Id.*

126. *Id.*

racial bias.”¹²⁷ Additionally, the report stated that, “Ferguson Law Enforcement practices erode community trust, especially among Ferguson’s African-American residents, and make policing less effective, more difficult, and less safe.”¹²⁸ Despite these conclusions, the Department of Justice stated, “Wilson’s actions [did] not constitute prosecutable violations of federal civil rights law” and formally closed its investigation on March 4, 2015.¹²⁹ The Ferguson Police Department has since made changes suggested in the report and has even outlined several steps to help reform the department and their discriminatory court practices.¹³⁰

The Deaths in Custody Reporting Act of 2000 has also increased police accountability by requiring the Department of Justice to collect data on deaths that occur in local jails, state prisons, juvenile detention facilities, and those that occur in the process of an arrest.¹³¹ Although this Act has tried to help create accountability for police brutality and deaths that occur while in the hands of law enforcement, it is not collected and reported uniformly by all states. For example, states vary widely in which agency collects and reports the data to the Bureau of Justice Statistics, and although all states have identified a service provider to count these deaths, several states failed to submit these records during the 2003 to 2009 collection period.¹³²

b. National Police Policy: The Use of Force Continuum

In addition to judicial and legislative enactments that help prevent abuse of police force, the National Institute of Justice reports that most law enforcement agencies have policies that guide their use of force, commonly called the “use of force continuum.”¹³³ The continuum describes an “escalating series of actions” an officer may use in certain situations so that the force used by an officer is always appropriate for the situation at hand.¹³⁴ For example, the continuum first suggests that the best way to deter criminals is with an officer’s

127. *Investigation of the Ferguson Police Department*, U.S. DEP’T OF JUSTICE 28, 62 (Mar. 4, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

128. *Id.* at 79.

129. Even Perez & Wes Bruer, *Justice Department: No Darren Wilson Charges*, CNN (Mar. 4, 2015, 8:19 PM), <http://www.cnn.com/2015/03/04/politics/ferguson-darren-wilson-justice-department-report> (last visited Dec. 1, 2015).

130. Kelly Moffitt, *Ferguson to Reform Municipal Court, Add Police Review Board*, ST. LOUIS BUS. J. (Sept. 9, 2014, 6:43 AM), http://www.bizjournals.com/stlouis/morning_call/2014/09/ferguson-to-reform-municipal-courts-add-police.html (last visited Dec. 1, 2015).

131. *Data Collection: Arrest Related Deaths*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=428> (last visited Dec. 1, 2015).

132. *Id.*

133. *The Use-of-Force Continuum*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx> (last visited Dec. 1, 2015).

134. *Id.*

professional and nonthreatening presence.¹³⁵ Second, the continuum suggests verbal commands in which an officer can increase their volume and give short orders to gain compliance.¹³⁶ Next, the continuum states that an officer can use physical control, which can include “soft” methods such as “grabs, holds, and joint locks, or “hard” methods, which includes punches and kicks to restrain an individual.¹³⁷ If these physical methods are unsuccessful, the continuum suggests the use of “less-lethal” methods, such as pepper spray, a baton, or a conducted energy device (CED), which discharge “high-voltage, low-amperage jolt of electricity at a distance.”¹³⁸ When the officer has exhausted all other means, the continuum allows for lethal force prescribed by the use of the officer’s firearm.¹³⁹

When an officer does employ lethal force, the officer’s department is required to investigate the officer’s actions and assess whether they were justifiable under the lethal force standard, whether they were reasonable under department policy, and whether they were appropriate under the continuum.¹⁴⁰ The problem with the use of force continuum is that it assumes all law enforcement agencies have the resources to provide officers with the less lethal weapons, that these weapons are available when the situation arises, and that officers are required to carry them. For example, Officer Wilson testified that he thought through the use of force continuum when Mr. Brown was hitting him in the face, however, he did not have less lethal options available before proceeding to his gun.¹⁴¹ Officer Wilson did note that he had mace and a baton at the time, but could not reach them while being assaulted in his car.¹⁴² Additionally, he stated that the Ferguson Police Department only had a few tasers and that on his shift there was typically only one available, but he usually chose not to carry it because it “[was] not the most comfortable thing.”¹⁴³

Despite Officer Wilson’s account that he thought through the continuum before proceeding, recent police brutality cases caught on camera demonstrate that officers do not always proceed in the manner suggested by the continuum. For instance, in Eric Garner’s case, officers are seen talking to a calm, non-threatening Mr. Garner when suddenly Officer Pantaleo lunges into a chokehold for no apparent reason.¹⁴⁴ According to the continuum, it would have been most appropriate to command Mr. Garner to show his hands and turn around so officers could search him if they in fact had probable cause that he committed a crime.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. CHIEF CONCERNS: EXPLORING THE CHALLENGES OF POLICE USE OF FORCE 116 (Joshua Ederheimer & Lorie Fridell eds., 2005).

141. *See* Wilson Testimony, *supra* note 2, at 274.

142. *Id.* at 205, 214.

143. *Id.*

144. *Garner Video*, *supra* note 5.

c. Wisconsin's Independent Investigation Requirement

Wisconsin was the first state to require outside investigations of deaths in police custody by enacting Wisconsin Act 348 in 2014.¹⁴⁵ The Act prescribes that every law enforcement agency in the state, “shall have a written policy regarding the investigation of officer-involved deaths that involve a law enforcement officer employed by the law enforcement agency.”¹⁴⁶ The Act further requires an investigation conducted by at least two investigators, “neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer-involved death.”¹⁴⁷ Finally, Act 348 enables for transparency in the investigation by requiring the District Attorney of the county to release the report of the investigation if he or she concludes there is no basis to prosecute.¹⁴⁸

Wisconsin Act 348 was inspired by peculiar circumstances in the investigation of the 2004 shooting of twenty-one-year-old Michael Bell in Kenosha, Wisconsin.¹⁴⁹ The investigation of Bell's death was led by officers who were responsible for the shooting, and after two days they cleared themselves of any wrongdoing.¹⁵⁰ After Bell's death, his family and other members of police victims campaigned through billboards, newspaper ads, and a website to encourage the Wisconsin State Legislature to be the first in the nation to require independent police investigations of officer-involved shootings.¹⁵¹

The campaign and advocacy after Michael Bell's death demonstrates how citizens can effect legal change in their communities, however it also brings to light the discrepancy in progress. Michael Bell was a white male, and although it took his family and supporters roughly ten years after his death to enact this legal requirement, they were eventually successful. Other than New York's governor Andrew Cuomo issuing an executive order establishing the New York Attorney General as a special prosecutor to investigate police related civilian deaths, no other state has yet to pass a statute similar to Wisconsin or require independent investigations of police-involved deaths.¹⁵²

145. Aaron Camp, *How Chris Taylor Helped Make Wisconsin First State to Require Outside Investigations of Deaths in Police Custody*, THE PRAIRIE BADGER (Aug. 17, 2014), <https://prairiebadger.wordpress.com/tag/2013-wisconsin-act-348/> (last visited Dec. 1, 2015).

146. WIS. STAT. § 174.47 (2013).

147. *Id.*

148. *Id.* (“(b) If the district attorney determines there is no basis to prosecute the law enforcement officer involved in the officer-involved death, the investigators conducting the investigation under sub. (3) (a) shall release the report.”).

149. Camp, *supra* note 145.

150. *Id.*

151. *Michael E. Bell Shooting – A Plea For Change*, <http://michaelbell.info/MBell-HP.html> (last visited November 1, 2015); Candice Bernd, *Wisconsin Passes First State Law Requiring Independent Investigations of Police-Custody Deaths*, TRUTH OUT (May 3, 2014, 9:10 AM), <http://www.truth-out.org/news/item/23463-wisconsin-passes-first-state-law-requiring-independent-investigations-of-police-custody-deaths> (last visited Dec. 1, 2015).

152. Matthew Kennis, *Create Independent Investigations Systems for Police Accountability*, HUFFINGTON POST, (Oct. 2, 2015, 12:09 PM)

II. ANALYSIS

A. *Understanding Gender and Crime*

i. Crime as an Expression of Gender

Whether police officers admit it or not, sociological factors such as sex, race, socioeconomic status, and age all factor into whether an officer suspects an individual of committing a crime.¹⁵³ Although there cannot be an unbiased sampling of what sociological factors make up the average criminal, statistics of convicted offenders over the past fifty years have consistently shown that men commit a majority of crimes.¹⁵⁴ For example, in 2001 only 19% of convicted offenders were women.¹⁵⁵ In fact, arrest data, self-reporting data, and victimization data all reflect that men commit more crimes than women, making sex one of the strongest predictors of criminal involvement.¹⁵⁶

Although men have consistently committed more crimes than women, women still appear in all categories of law-breaking behavior; however, they appear less frequently in some law-breaking categories than others.¹⁵⁷ For example, offender data by offense type demonstrates that men are more likely to commit more serious offenses than women, such as robbery, burglaries, and sex offenses, while women are more likely to commit fraud, forgery, and prostitution.¹⁵⁸

One way to make sense of these statistics is by examining the role of sex in society. Specifically, sex-role theory, heavily influenced in the 1930s and 1940s by functional sociologists Talcott Parsons and Edwin Sutherland, attempts to make sense of the ways in which men and women act and are expected to act in relation to their biological make-up.¹⁵⁹ Sex-role theory explains that these “social expectations, actions and behavior reflect stereotypical assumptions about behavior expectations,” so we as a society can expect what will be done by whom and under what circumstances.¹⁶⁰ When it comes to gender relations, biological assumptions about the differences between males and females define sex roles.

As such, actions men and women take on a daily basis are based on their socialization process. Specifically, Sutherland’s Differential Association theory hypothesized that men are more likely to become delinquent than women because the socialization process is less strict on men.¹⁶¹ For instance, women

http://www.huffingtonpost.com/amnesty-international/create-independent-invest_b_8233960.html (last visited Dec. 1, 2015).

153. Williams & Murphy, *supra* note 97, at 5.

154. SANDRA WALKLATE, GENDER, CRIME AND CRIMINAL JUSTICE 4 (2nd ed. 2004).

155. *Id.* at 4-5.

156. *Id.*

157. *Id.* at 4.

158. *Id.* at 5.

159. *Id.* at 65.

160. WALKLATE, *supra* note 154, at 4.

161. *Id.* at 66.

are taught to sit with their legs crossed while “boys will be boys.”¹⁶² Furthermore, he explained that men are taught to be “tough, aggressive, active risk-seekers,” which tends to place men in more situations where criminal activity becomes possible.¹⁶³ In other words, when men are presented with an aggressive, high-risk situation, they may choose to participate because it is an extension of gender and a way for them to perform their masculinity.¹⁶⁴ On the other hand, women would decline to act in the same situation because it would not be lady-like.¹⁶⁵

While the expression of masculinity through criminal activity can take different forms throughout classes and cultures, it generally has the same outcome in every situation. James Messerschmidt, who studies masculinity and crime, believes that men of different classes and ethnicity express masculinity based on their power and resources.¹⁶⁶ For example, he explains that a pimp controlling his women and a top business executive sexually harassing his female secretary might seem different, but they both have the same effect; both men are expressing their masculinity to themselves and others by subjugating women and affirming their heterosexual desires.¹⁶⁷ This explains why male police officers tend to use excessive force more than female officers; it is one way they express their masculinity based on their social position.¹⁶⁸

Further, Messerschmidt explains that people “do” class and ethnicity in addition to “doing” gender “by giving expression to other cultural values associated with fun, aggression and alcohol consumption.”¹⁶⁹ In this context, it makes sense why top business executives might commit white collar financial crimes instead of robbing banks at gun point; crime type is not only an expression of gender, but it is also actuated within an individual’s social situation and is often based on class and cultural values.¹⁷⁰ While Messerschmidt’s explanation of gender based on culture shows gender and culture are important factors for actuating crime, they are not equally significant in every social situation to effectuate criminal activity. Based on the situation, one category or another might be more important.¹⁷¹

Gender-based crime theories also shed a distinct light on why police officers kill men at a significantly higher rate than women: men are more likely to be *perceived* by an officer as an aggressive, active risk-seeker because they are more likely to act out in high-risk situations. Thus, men are more likely to be caught in criminal activity and be a danger to the safety of officers and others. According to sex-role theories, if a woman is socialized in accordance

162. *Id.* at 67.

163. *Id.* at 66.

164. *Id.* at 67.

165. *Id.*

166. WALKLATE, *supra* note 154, at 75.

167. *Id.*

168. *See infra* note 173.

169. WALKLATE, *supra* note 154, at 75.

170. *Id.*

171. *Id.* at 207.

with social norms, she should not be seen as aggressive or violent because that would be against the feminine ideal.¹⁷² Police officers may presume women are socialized this way, and thus may not perceive a woman as a threat unless her actions indicate otherwise.¹⁷³ Likewise, female officers are less likely to use excessive force because they are socialized to be tender and gentle.¹⁷⁴

ii. Lethal Force as an Expression of Masculinity

While gender-based theories help explain criminality based on gender, masculinity theorists shed a distinct light on why male officers are more likely to use deadly force than female officers. Masculinity theorists argue that men act in accordance to “the socially generated consensus of what it means to be a man” in order to earn a masculine identity, which must be “earned and re-earned through active demonstrations.”¹⁷⁵ Any threats to masculinity can lead men to engage in violence in order to confirm their manhood because physical aggression “is part of men’s cultural script for sustaining and restoring manhood.”¹⁷⁶ For example, in Richardson and Goff’s study about “masculinity threat,” men performed more pushups when their gender was threatened than when they were not threatened.¹⁷⁷ Studies also show that when men behave aggressively to affirm their masculinity, they lower their gender anxiety.¹⁷⁸

Police are especially more likely to affirm their masculinity through physical force because police work is often viewed by police and the public as a masculine occupation.¹⁷⁹ This is likely because officer training emphasizes “physical strength” and “danger,” which “codes policing as hyper masculine.”¹⁸⁰ Studies of police recruit training indicate that new officers are taught in various ways that “aggressive, misogynist forms of masculine

172. *Id.* at 31.

173. However, there are rare instances when police officers use excessive force on minority women. See Laura Wilkinson, *California ‘Police Brutality’: Video Appears to Show Officer Punching Woman on the Floor*, THE INDEPENDENT (July 5, 2014), <http://www.independent.co.uk/news/world/americas/california-police-brutality-video-appears-to-show-officer-punching-woman-on-the-floor-9587014.html> (last visited Dec. 1, 2015).

174. WALKLATE, *supra* note 154, at 67.

175. Deborah Kerfoot & David Knights, *‘The Best is Yet to Come?’: The Quest for Embodiment in Managerial Work*, in MEN AS MANAGERS, MANAGERS AS MEN: CRITICAL PERSPECTIVES ON MEN, MASCULINITIES, AND MANAGERIALS 78, 86 (David L. Collinson & Jeff Hearn eds. 1996); Jonathan R. Weaver et al., *The Proof Is in the Punch: Gender Differences in Perceptions of Action an Aggression as Components of Manhood*, 62 SEX ROLES 241, 242 (2010).

176. Weaver, *supra* note 175, at 247.

177. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 128-130 (2014-15) (“Masculinity threat refers to the fear of being judged to be insufficiently masculine.”).

178. *Id.*

179. *Id.* at 132-33.

180. *Id.* at 133.

identity” are “favored and expected.”¹⁸¹ In fact, these studies indicate that “physical fighting and violence are emphasized both in and out of recruit training classes.”¹⁸² Thus, police work can be “best characterized by aggressive macho crime fighting.”¹⁸³ With this perception and training, it should be no surprise that in 2007, more than 82 percent of police officers in the country were men.¹⁸⁴

Due to the “hyper masculine” nature of police department training and image, masculinity theorists argue that police brutality is a form of gender violence and is a way in which officers perform their masculine identity.¹⁸⁵ In fact, Richardson and Goff take this analysis further and argue that the victim’s masculine identity affects the officer’s actions and determines whether they will have gender anxiety in a certain situation.¹⁸⁶ For example, Richardson and Goff argue that “because black men are perceived as more masculine than men from other racial groups, they pose the greatest threat to an officer’s masculine identity” and thus are more likely to be victims of police use of lethal force.¹⁸⁷ In a study to confirm their thesis, Richardson and Goff found that “the more officers were insecure in their masculinity, the more likely they were to use greater force against blacks” than any other racial group.¹⁸⁸

Richardson and Goff’s findings make an important point about the physical make-up of police shooting victims and how it can affect gender anxiety. Although the FBI does not report the height and weight of every individual killed by police, it cannot be ignored that both Mr. Brown and Mr. Garner were African American, over six feet tall, and weighed over 200 pounds when they were perceived to be a threat to police. As one juror in the case against two of the police officers who beat Rodney King stated, “[Mr. King] was obviously a dangerous person [with a] massive size and threatening actions.”¹⁸⁹ Thus, men who tend to be larger and more muscular are viewed as a greater threat to a police officer’s masculine identity and are in turn more likely to experience deadly force.

B. Understanding Race and Crime

i. Historical Propaganda & Unconscious Racial Bias

Early American propaganda construed blacks as more aggressive, “menacing,” law-breaking individuals than any other race, and was a leading

181. *Id.* at 132.

182. Richardson & Goff, *supra* note 177, at 132.

183. *Id.* at 133.

184. *Id.* at 132.

185. See generally Angela Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

186. Richardson & Goff, *supra* note 177, at 130, 136.

187. *Id.* at 136.

188. *Id.*

189. EARL HUTCHINSON, *THE ASSASSINATION OF THE BLACK MALE IMAGE* 8 (Middle Passage Press, 1994).

factor for the justification of slavery.¹⁹⁰ In fact, the founding fathers were the original thinkers when it came to describing blacks as more violent, crime-ridden individuals. For example, John Adams detailed blacks as willing to commit “robbery, plunder and massacre to preserve their lives” while James Madison described black males as a menace to society because “estates surrounded by vicious free blacks . . . keep the minds of their owners in a perpetual suspicion of fear.”¹⁹¹

This line of thinking did not solely exist in America. In Germany in 1896, Dr. Frank Hoffman declared that there was an “immense amount of immorality and crime” among black men.¹⁹² Soon after, Walter Wilcox, a chief statistician for the U.S. Census Bureau, along with the American Social Science Association, predicted that black men were “several times” more likely to commit crimes than whites.¹⁹³ People like Wilcox used false science to “shape the image of the black man as criminal, sex-crazed, violent and degenerate” to perpetuate support for slavery so black men could be controlled.¹⁹⁴ After the Civil War and the passage of the Thirteenth Amendment, propaganda continued to caution the public of “menacing and dangerous” black men.¹⁹⁵

Some theorists argue that the historical racial propaganda construing blacks as “violent, hypermasculine, animal-like, criminal and unintelligent” has been so deeply embedded in our history and culture that they can be called to our mind “even unbidden.”¹⁹⁶ They argue that these stereotypes are so embedded in our unconscious, they influence perceptions and behaviors unbeknown to those who are even motivated to be “racially egalitarian.”¹⁹⁷ These implicit racial biases also have a number of harmful effects. For example, studies indicate that individuals interpret black facial expressions and actions as more hostile and aggressive than on whites.¹⁹⁸ This implicit bias further explains the tendency to unconsciously associate blacks with danger and criminality. In fact, studies have found that “thoughts of crime or criminals prompt individuals to unconsciously look for black faces and to ignore white faces.”¹⁹⁹

Goff has studied how this rhetoric has also led to a tendency to unconsciously associate blacks with apes and leads to what he calls “implicit dehumanization.”²⁰⁰ In a series of studies, Goff and his colleagues measured

190. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 28 (Rev. ed. 2012).

191. EARL HUTCHINSON, *THE ASSASSINATION OF THE BLACK MALE IMAGE* 22 (Simon & Schuster, 1996).

192. HUTCHINSON, *supra* note 189, at 10.

193. *Id.* at 11.

194. *Id.* at 10.

195. ALEXANDER, *supra* note 190, at 28.

196. Richardson & Goff, *supra* note 177, at 120.

197. *Id.*

198. *Id.* at 121.

199. *Id.*

200. *Id.*

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officer's "implicit dehumanization" score and compared it to their use of force.²⁰¹ They found that officers, who held a strong "implicit dehumanization" score, were more likely to have used force against blacks on the street than whites.²⁰² These studies taken together indicate that officers are not only more likely to use force against black males but they are also more likely to view that force as reasonable and necessary when they would not make the same judgment about a white male acting identically.²⁰³

According to Richardson and Goff, there are also a number of physiological responses officers can experience when they are concerned about being negatively stereotyped.²⁰⁴ For example, they found that this concern often provokes anxiety, leading to physical and mental reactions such as increased heart rate, fidgeting, sweating, averting eye gaze and cognitive depletion, all which lead to the inability to think clearly.²⁰⁵ Richardson and Goff title this reaction as "stereotype threat" and argue that officer uses of force can be predicted based on their rate of stereotype threat.²⁰⁶ Interestingly enough, this rate was not associated with conscious or unconscious bias.²⁰⁷

Based on their findings, they argue that "stereotype threat" and its manifestations increase the chance that deadly force will be used.²⁰⁸ Specifically they argue that officers are trained to maintain physical and psychological control of a situation in order to preserve safety.²⁰⁹ However, if a citizen views the officer as racist they would be confirming the officer's stereotype threat.²¹⁰ This in turn leads the officer to lose their legitimacy and experience increased physiological factors, all which lead to the increase possibility of the officer using lethal force to assert control.²¹¹

In fact, a recent incident caught on video between an officer and a suspect in New Richmond, Ohio demonstrates how the absence of "stereotype threat" can empower an officer from resorting to deadly force.²¹² In April 2015, white

201. *Id.* at 122.

202. Richardson & Goff, *supra* note 177, at 122.

203. *Id.* at 123.

204. *Id.* at 124-26.

205. *Id.* at 124.

206. *Id.* at 124-26; *see also* Jesse Singal, *What Happens When Minority Kids Are Taught Not to Talk About Race*, in *SCIENCE OF US* (Aug. 17, 2015, 8:18 AM), http://nymag.com/scienceofus/2015/08/when-minority-kids-are-taught-color-blindness.html?mid=twitter_nymag# (although officers may be negatively impacted when it comes to race, "a body of research has shown that 'race is central to [minority kids'] identities, a source of psychological well-being, and a lens through which others perceive them.' . . . Ignoring race, then, may well have a negative impact on those for whom it's most salient.").

207. Richardson & Goff, *supra* note 177, at 124-26.

208. *Id.* at 126.

209. *Id.* at 127.

210. *Id.*

211. *Id.*

212. Nicole Flatow, *Ohio Officer Demonstrates How to Avoid Using Deadly Force*, THINK PROGRESS (Apr. 19 2015, 1:09 PM)

Officer Jesse Kidder ordered a white male suspect to stop walking towards him.²¹³ With his gun drawn and the suspect not complying, Officer Kidder made a point *not* to fire his gun even when he fell down and the suspect could have easily subdued him.²¹⁴ It is clear that the Officer made a conscious decision not to fire his weapon, however in light of Richardson and Goff's analysis it is not clear that the officer would have done the same if the suspect was not white.

ii. Cyclical Perception

Despite the debunking of race based criminological theories, black and other minority men are still perceived as threatening criminals and are stopped and questioned by police officers at a higher rate than white males. In fact, out of the 684,330 people NYPD officers stopped in 2011, 87 percent were black or Hispanic.²¹⁵ Furthermore, reported killings of police officers from 2010 to 2012 show that officers killed 1.5-in-1 million white teenage males compared to 31-in-1 million black teenage males.²¹⁶ This statistic demonstrates that officers are disproportionately killing black males twenty-one times more often than white males. If black teenagers were carrying weapons at a higher rate than white males when they were shot and killed by police, these statistics might make more sense. However, as noted above, that is not the case.²¹⁷

In fact, minorities are no more likely to use drugs, carry guns, or commit crimes than white people.²¹⁸ For example, white teenagers have about "three times as many drug-related emergency room visits as their African American counterparts."²¹⁹ Furthermore, according to the Department of Justice, more white people own guns than all minorities combined.²²⁰ Although African Americans are no more likely to engage in criminal activity than white people, they are more likely to be *perceived* as criminals because of historical propaganda, social ignorance, and unconscious racial bias.²²¹ The social perception and unconscious racial bias that minorities are more likely to be criminals in turn leads to more minorities being stopped, questioned, and thrown into the criminal justice system, further perpetuating the myth.²²²

African Americans receive harsher sentences for the same crime than white people, and as a result have higher prison populations than college

<http://thinkprogress.org/justice/2015/04/19/3648669/ohio-officer-shows-not-use-deadly-force> (last visited Dec. 1, 2015).

213. *Id.*

214. *Id.*

215. Jost, *supra* note 1, at 306.

216. Gabrielson, *supra* note 81.

217. *See supra* Part I.B.2.

218. ALEXANDER, *supra* note 190, at 99.

219. *Id.*

220. *Firearms: Ownership: Race, PROJECT AMERICA*, <http://www.project.org/info.php?recordID=272> (last visited Dec. 1, 2015).

221. *See* ALEXANDER, *supra* note 190, at 100.

222. *See id.* at 185-86.

attendees.²²³ Furthermore, African Americans with a criminal record are less likely to be hired for the same job as whites or obtain adequate housing.²²⁴ Since it is nearly impossible to get a job with a criminal record, and joblessness is a leading factor for high rates of crime in poor minority communities, there is a constant cycle of profiling, arrest, and economic disenfranchisement of minority communities.²²⁵ This in turn perpetuates unconscious racial bias, social ignorance of African Americans, and causes police officers to perceive minority males as more likely to be threatening, dangerous criminals than white males, leading to the disproportionate use of deadly force we see today.

Today, only 12 percent of law enforcement agencies' personnel are African American, while an overwhelming number of police patrolling minority neighborhoods are white.²²⁶ According to the U.S. Census bureau, 64 percent of the United States is white; however, approximately "75% of full-time law enforcement personnel are white."²²⁷ Officer Wilson's grand jury testimony shows the problem these statistics pose in a country where minorities will eventually surpass white Americans. When asked to describe the Ferguson Police Department's relationship with the community in which Mr. Brown lived, Officer Wilson said, "[i]t is an antipolice area for sure."²²⁸ When asked to describe what he meant, Officer Wilson associated the area with gang activity, drugs, and guns, saying, "it is just not a very well-liked community."²²⁹

In a community where approximately 95 percent of the officers are white and two-thirds of the residents are black, it is apparent why the police had bad relations with Ferguson residents; there was a lack of knowledge, training, and understanding on how to communicate with the community effectively.²³⁰ This lack of knowledge and understanding is further perpetuated by an all-white police force in a mostly black community.²³¹

223. *See id.* at 189-190.

224. *See id.*

225. *See id.*

226. Reid Wilson, *Racial Imbalance Exists All Across Local Governments, Not Just in Police Departments*, WASH. POST (Aug. 14, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/14/racial-imbalance-exists-all-across-local-governments-not-just-in-police-departments> (last visited Dec. 1, 2015).

227. *Id.*

228. Wilson Testimony, *supra* note 2, at 238.

229. *Id.*

230. LORIE FRIDELL, ET AL., *RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE* 65 (Police Executive Research Forum, 2001); *Investigation of the Ferguson Police Department*, *supra* note 127, at 88. ("While approximately two-thirds of Ferguson's residents are African American, only four of Ferguson's 54 commissioned police officers are African American.")

231. *Investigation of the Ferguson Police Department*, *supra* note 127, at 89. (recognizing that a diverse police force in Ferguson is "critically important" and "has the potential to increase confidence in police among African Americans").

C. Legal Shortfalls in Accounting for Unconscious Racial Bias

i. Just Don't Mention Race

Laws that allow for an immense amount of discretion by police officers with few checks of power perpetuate racially biased tendencies. For example, an officer generally cannot “stop and search someone without a warrant unless there is probable cause to believe the individual is engaged in criminal activity.”²³² However, after the U.S. Supreme Court decision in *Terry v. Ohio*, as long as an officer has a “reasonable articulable suspicion” that someone is engaged in criminal activity and is armed and dangerous, it is constitutionally permissible to stop, question, and frisk him or her even in the absence of probable cause.²³³

Furthermore, in *United States v. Brignoni-Ponce* the U.S. Supreme Court held that it is permissible under the equal protection clause of the Fourteenth Amendment to stop passengers at the border as long as they have specific articulable facts that warrant a suspicion that the vehicle contains illegal aliens.²³⁴ However, many facts officers might point to that they think indicate a passenger is an illegal alien might not actually mean the passenger is an alien.²³⁵ Furthermore, in every instance the officers would still be taking the ethnicity of the passenger as a factor in their “specific articulable facts”, which should be constitutionally impermissible as a protected classification. Regardless, as long as an officer can articulate some other reason to stop an individual besides a suspicion based on race, they are constitutionally permitted to stop and search a “suspicious” individual.

ii. Reasonable Belief as a Death Sentence

In addition to the limited constitutional checks on police power for stopping, searching, and arresting someone based on their appearance, there are few statutory limitations on police use of lethal force. Due to the “objective reasonableness” standard articulated by the U.S. Supreme Court in *Graham*, state laws defining when police officers are justified in using deadly force are largely dependent on a police officer’s reasonable belief.²³⁶ For example, the Missouri statute governing an officer’s use of deadly force provides:

A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only when he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

232: ALEXANDER, *supra* note 190, at 63.

233. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

234. *United States v. Brignoni-Ponce*, 422 US 873, 884; ALEXANDER, *supra* note 190, at 131.

235. *Id.*

236. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

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- (a) Has committed or attempted to commit a felony; or
- (b) Is attempting to escape by use of a deadly weapon; or
- (c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.²³⁷

As articulated in *Graham*, the reasonable belief standard is judged from a “reasonable officer” at the scene “in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”²³⁸ When weighing what force is reasonable and necessary in a particular situation, courts are supposed to give “allowance” for the fact that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”²³⁹ Under the Court’s reasoning in *Graham*, more often than not police officers that use lethal force based on mistaken assumptions about the circumstances will be excused from any constitutional violations.

Under this standard, deadly force laws give police a license to kill so long as any other “reasonable officer at the scene” would also conclude that the individual committed a felony and is a danger to others—even if that belief is erroneous.²⁴⁰ In reality, reasonableness is determined by one’s life experiences and different individuals with different life experiences will likely have a different standard of reasonableness in certain situations. Police officers must deal with crime every day. As a result, they can unnecessarily view some individuals as dangerous and inadvertently increase the chance that they will use deadly force.²⁴¹

Since deadly force laws are measured entirely from a police officer’s standpoint, the standard gives deference to police officers to use lethal force without proving beyond a reasonable doubt that a felony was committed or that the individual was in fact armed and dangerous. Thus, deadly force laws give an immense amount of power to police officers: they allow the ability to lawfully execute a suspected criminal, even if the crime the individual was suspected of committing would not permit a sentence of death by law.

Michael Brown was suspected of stealing a box of cigarillos from a convenience store.²⁴² Mr. Johnson, Mr. Brown’s friend with him that day, told the grand jury that Mr. Brown did not have a weapon when he committed the

237. MO. REV. STAT. § 563.046.3(2)a-c (1979) (N.Y. Penal Law § 35.30 (McKinney) is similar to Missouri’s deadly force law in that it only requires “reasonable belief” by the officer but is different in that it identifies specific crimes an officer may suspect an individual of committing).

238. *Graham*, 490 U.S. at 396.

239. *Id.* at 396-97.

240. *Id.* at 396.

241. See CHIEF CONCERNS, *supra* note 140, at 116; see also *Investigation of the Ferguson Police Department*, *supra* note 127, at 28, 92 (suggesting Ferguson officers be “trained and skilled in using tools to de-escalate situations . . . Specifically Tasers®, where less force—or no force at all—would do.”).

242. Johnson Testimony, *supra* note 2, at 32.

robbery, and simply reached behind the counter to steal the cigarillos.²⁴³ Considering that Mr. Brown did not use a weapon during the commission of the offense, this crime would have been a misdemeanor.²⁴⁴ Therefore, the only category of the Missouri deadly force law that Michael Brown's case fits into is part C, "[t]he officer reasonably believes that the person to be arrested may otherwise endanger life or inflict serious physical injury unless arrested without delay."²⁴⁵

In fact, we know this is how Officer Wilson justified killing Michael Brown to the grand jury because he compared holding on to Mr. Brown as if he were "Hulk Hogan."²⁴⁶ As described previously, the physical characteristics of a suspect likely play a significant role in whether an officer perceives him as a threat.²⁴⁷ However, Officer Wilson did not even have to rely on convincing the grand jury that his perception of Mr. Brown was correct. Officer Wilson accused Mr. Brown of assaulting him and running away.²⁴⁸ Because assaulting an officer and running away from an officer when seized are both felonies, Officer Wilson was legally permitted to shoot Mr. Brown under Missouri law; the grand jury had no choice but to let him go free of charge.²⁴⁹

D. Suggestions for Change

i. Social Movements

After the Ferguson grand jury decided not to indict Officer Wilson, weeks of civil unrest flared up across the nation. In Ferguson, protestors burned several police cars, set fire to a Walgreens, a meat market, a storage facility, and blocked traffic on Interstate 44.²⁵⁰ In response, minority rights groups and their supporters in New York, Los Angeles, Boston, Denver, Las Vegas, Philadelphia, Washington D.C., Seattle, and Chicago organized protests, marches, and demonstrations.²⁵¹ The wide-scale response to the Michael Brown

243. *Id.*

244. MO. REV. STAT. § 570.030.9. Leaving aside prosecutorial discretion, Michael Brown would have likely been charged with stealing under this statute, which is a class A misdemeanor. Note that the Missouri statute for stealing is effective from October 11, 2013 through December 31, 2016.

245. *Id.* at § 563.046.3(2)c.

246. Wilson Testimony, *supra* note 2, at 212.

247. *See supra* Part II.A.

248. *See supra* Part I.A.

249. MO. ANN. STAT. § 565.082 (West 2012) (assaulting an officer by means other than a deadly weapon or dangerous instrument is a class C felony); MO. ANN. STAT. § 575.150 (West 2009) (resisting or interfering with an arrest is a class D felony).

250. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES, Nov. 24, 2014, http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shootieng-michael-brown-grand-jury.html?_r=0 (last visited November 1, 2015).

251. *Id.*; Amanda Terkel, *Thousands Protest Nationwide After Ferguson Jury Decision*, HUFFINGTON POST, (Nov. 24, 2014, 11:56 PM EST),

and Eric Garner verdicts also induced a national debate about the use of excessive police force on minorities. National news organizations have compared the protesting efforts of these communities to the Civil Rights Movement; however, the protesters were also criticized in large part for lack of organization and leadership in affecting change.²⁵²

The Civil Rights Movement is a great example of how minority communities can affect legal change in the United States. The movement has been noted for its most effective leader, Dr. Martin Luther King, Jr. who possessed “unique conciliatory and oratorical skills.”²⁵³ Although protests have been known to affect change, they can be powerful without causing physical damage. Protests and riots that cause damage to community businesses only instill more fear in the minority community and further block the dialogue needed to prevent minority deaths in the future. These communities must consider establishing similar measures to the Civil Rights Movement that articulate to their legislatures and police departments what they want to change.

ii. The Lethal Force Standard

In addition to measures on the ground, it is important that there is legal accountability for police officers who unnecessarily use lethal force. As discussed previously, the current practice for officers involved in using police use of lethal force includes putting the officer on paid leave while the department investigates the matter.²⁵⁴ Part of the investigation includes assessing whether the officer’s actions were justifiable under the lethal force standard.²⁵⁵ However, as discussed in the analysis on Missouri’s lethal force law and the reasonableness standard, the lethal force standard is fairly easy to satisfy.²⁵⁶

To ensure greater legal accountability, the U.S. Supreme Court would have to revisit their decision in *Graham* and require a heightened standard that mandates officers to take a step back and evaluate the suspect, the suspect’s actual threat, whether the suspect is carrying a deadly weapon, and whether deadly force is necessary. Alternatively, state legislatures could create stricter statutory defense standards. While a heightened standard might prevent further police shootings of minority males, it might also allow more potentially

http://www.huffingtonpost.com/2014/11/25/ferguson-protests_n_6216234.html (last visited Dec. 1, 2015).

252. Jessica Chasmar, *Oprah Winfrey Snubs Al Sharpton, Says Protestors Lack Leadership*, WASH. TIMES (Jan. 4, 2015), available at <http://www.washingtontimes.com/news/2015/jan/4/oprah-winfrey-snubs-al-sharpton-says-protesters-la> (last visited Dec. 1, 2015).

253. *Civil Rights Movement*, HISTORY, <http://www.history.com/topics/black-history/civil-rights-movement> (last visited Oct. 30, 2015).

254. Tami Abdollah, *Details, Questions Emerge on Homeless Man Shot by LA Police*, MSN NEWS (Mar. 4, 2015), <http://www.msn.com/en-us/news/crime/details-questions-emerge-on-homeless-man-shot-by-la-police/ar-BBid8ez> (last visited Dec. 1, 2015).

255. CHIEF CONCERNS, *supra* note 140, at 116; *see supra* Part I.C.2.

256. *See supra* Part II.C.

dangerous individuals to go free, which could result in a higher rate of civilian and police injuries.

At the very least, laws governing lethal force must ensure that the officer considers what crime the individual is suspected of committing, including the level of the offense, if it involved serious bodily injury, and the possible sentence that individual would receive if convicted.²⁵⁷ If a police officer suspects an individual of a nonviolent crime, then all necessary actions to preserve life must be taken and lethal force must only be considered if an immediately identifiable life is truly in danger. Although it would take time, money, and great effort to change the lethal force standard through litigation, it is the only way to ensure higher accountability for police officers that use lethal force unnecessarily.

iii. Police Practices: Equipment, Training, and Policies

a. Body Cameras, Less Lethal Weapons, and Training

Despite shortfalls in the national movement, the protests have sparked legal debates and given rise to legislation in New Jersey and Baltimore to make police body cameras mandatory.²⁵⁸ Proponents of body cameras in New Jersey believe that because “Ferguson didn’t have a video camera, we still don’t know what exactly happened — video and audio would have put it to rest.”²⁵⁹ Furthermore, Ferguson police vehicles did not have dash cameras, and as a result a new bill passed in New Jersey “requires all municipal police departments to equip newly purchased or leased vehicles that are used primarily for traffic stops with an in-car camera, or equip patrol officers with body cameras as a more affordable option.”²⁶⁰ Additionally, in December 2014 President Obama “pledged \$263 million in new federal funding for police training and . . . include[d] \$75 million allocated specifically for the purchase of 50,000 body cameras for law enforcement across the country.”²⁶¹

The movement for police body cameras largely comes from the fact that people are “self aware” when they are being recorded.²⁶² In fact, studies show

257. See *supra* Part I.B.ii.

258. Jason Laday, *Police Body Cameras to Be Mandatory Under Norcross’ Proposed Bill*, SOUTH JERSEY TIMES (Sept. 11, 2014, 6:09 PM), http://www.nj.com/camden/index.ssf/2014/09/police_body_cameras_to_be_mandatory_under_norcross_proposed_bill.html (last visited Dec. 1, 2015).

259. *Id.*

260. Michelle Caffrey, *Assemblyman Paul Moriarty’s Police Camera Bill Inspired by DWI False Arrest, Signed Into Law*, SOUTH JERSEY TIMES (Sept. 10, 2014, 7:24 PM), http://www.nj.com/washington-township-times/index.ssf/2014/09/assemblyman_paul_moriartys_pol.html (last visited Dec. 1, 2015).

261. Russell Brandom, *Obama Announces Funding for 50,000 Police Body Cameras*, THE VERGE (Dec. 1, 2014, 1:20 PM), <http://www.theverge.com/2014/12/1/7314685/after-ferguson-obama-announces-funding-for-police-body-cameras> (last visited Dec. 1, 2015).

262. Janice Woods, *Police Body Cams Can Change Behavior with Self-Awareness*, PSYCHCENTRAL.COM (Dec. 26, 2014), <http://psychcentral.com/news/2014/12/26/police-body-cameras-change-behavior-by-creating-self-awareness/79107.html> (last visited Dec. 1, 2015).

that “police tend to be on their best behavior when they know they’re being watched” and cameras help lower complaint rates against police officers.²⁶³ However, a body camera cannot see behind the officer, cannot record the officer’s demeanor in engaging with a suspect, and has “potential for abuse.”²⁶⁴ Although a video would provide a check for police behavior and would answer some questions about Michael Brown’s case and many others, a video does not capture everything, nor does it ensure a conviction “even if the evidence is damning.”²⁶⁵

In fact, the recent police shooting of Charlie Robinet, a black man, in Los Angeles, was recorded by both cell and police body cameras, yet “exactly what happened remains unclear.”²⁶⁶ While police body cameras would provide a framework to understand what happened in most situations, it might also be beneficial for all police officers to carry less lethal weapons. When Officer Wilson was asked if he carried a taser, he stated “we only had a select amount. Usually there is one available but I usually elect not to carry one. It is not the most comfortable thing.”²⁶⁷ There is little significance in having a force continuum if officers are ill equipped to follow it. Thus, federal and state governments should seriously consider providing funding for less lethal weapons and require all officers to carry and be trained in using them.

Most importantly, police agencies must train officers adequately in de-escalation techniques and less than lethal weaponry.²⁶⁸ Law enforcement agencies must also train officers how to deal with fear of the unknown and challenges to their masculinity and authority so they can prevent using deadly weapons when they are not absolutely necessary. To help encourage and reward a preserving life policy, police departments should congratulate and promote officers who prevent the use and discharge of their firearm when encountering a suspect who is unarmed.

b. Internal Police Policies & Hiring Practices

One of the most effective ways to decrease deaths of minority males is through internal police policy.²⁶⁹ For instance, police practices that focus on

263. Lauren C. Williams, *Why Body Cameras Alone Won’t Solve Our Police Abuse Problem*, THINKPROGRESS, (Aug. 19, 2014, 2:24 PM), <http://thinkprogress.org/justice/2014/08/19/3471722/why-police-body-cams-wont-prevent-the-next-ferguson/> (last visited Dec. 1, 2015).

264. *Id.*

265. *Id.*

266. Abdollah, *supra* note 254.

267. Wilson Testimony, *supra* note 2, at 205; *see supra* Part I.A.i.

268. *See* Harry Bruinius, *Why Philadelphia Police Need Reforms in Wake of Shootings*, CHRISTIAN SCIENCE MONITOR (Mar. 23, 2015), <http://www.csmonitor.com/USA/Justice/2015/0323/Why-Philadelphia-police-need-reforms-in-wake-of-shootings?cmpid=editorpicks> (last visited Dec. 1, 2015); *see also Investigation of the Ferguson Police Department*, *supra* note 127, at 28, 92 (suggesting Ferguson officers be “trained and skilled in using tools to de-escalate situations . . . Specifically Tasers®, where less force—or no force at all—would do.”).

269. FRIDELL, *supra* note 230, at 65.

communicating effectively within diverse communities can affect how police interact with minority men on a daily basis and reduce racially biased policing.²⁷⁰ For police to protect communities effectively, they must be able to communicate effectively and respect the diverse cultures, race, language and customs of the people who reside there.²⁷¹ Regular police department trainings on the social make up of their districts would allow police officers to address their own biases of residents and how they perceive suspected criminals.²⁷²

Furthermore, federal agencies and state legislatures could encourage these types of trainings by allocating funding to each police department relative to the amount of complaints they receive of excessive police force and their numbers on the FBI's "unjustified" use of police force table. While this suggestion is susceptible to a difference in reported rates of excessive force verses actual rates of excessive force, it is more effective than blindly granting money to police departments based on how many individuals they arrest each year or how many drugs they seize.

Another way that law enforcement agencies could work to dramatically decrease the use of excessive force and challenge gender and racial stereotypes is by hiring more women and minority police officers.²⁷³ It is extremely important that police agencies make an effort to retain a police force that resembles the demographics of their community so that their officers can understand and empathize with various cultures and socioeconomic conditions.²⁷⁴ Hiring a diverse police force conveys a sense of equity to the public and increases the probability that on the whole the agency will be able to understand and acknowledge the perspectives of the *individuals* who live in their community.²⁷⁵

Moreover, it increases the chance that other police officers will understand and relate personally to other members of their community, further increasing respect and understanding of diverse racial and cultural perspectives.²⁷⁶ This will in turn lead officers to feel less threatened by minority men and discourage the use of lethal force as a method of authority. The less police feel threatened by minority men and the more they relate to one another, the less likely it is that police officers will feel the need to use lethal force.²⁷⁷

270. *Id.*

271. *Id.*

272. *Id.*

273. See Max Ehrenfreund, *This May Be The Way to Eliminate the Biases White Students Don't Even Know They Have*, WASH. POST (Feb. 12, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/12/how-having-more-black-students-in-class-makes-white-students-less-biased> (last visited Dec. 1, 2015) (discussing the results of a study that examined the experience of cadets at the Air Force Academy; that study suggests that the more white students have classes with black peers, the more likely it is that white students' subtle biases and prejudices will be challenged, leading them to spend more time with black peers in the future).

274. FRIDELL, *supra* note 230, at 68.

275. *Id.*

276. *Id.* at 68-69.

277. See FRIDELL, *supra* note 230.

c. Community Policing Model

In their studies, Richardson and Goff found that it is possible to counteract implicit dehumanization.²⁷⁸ Specifically, they found that imagining what another person's life looks like makes it easier to imagine their human responses and restore humanity to social targets.²⁷⁹ Thus, rethinking policing practices in order to foster closer relationships between the police and the communities they serve holds some promise of reducing implicit dehumanization and the racial violence that results.²⁸⁰ One of the ways an intimate police and community relationship can be developed is through community policing.²⁸¹ Community policing involves partnering with community organizations and empowering individuals to make changes in their community that deter crime.²⁸²

Milwaukee, Wisconsin serves as an example of a community that has experienced racial tension but that ultimately developed successful community policing models, which creates sustainable police-community relationships and has success in lowering crime.²⁸³ In 2002, a Milwaukee police officer shot Larry Jenkins, an unarmed black male, seven times.²⁸⁴ After the officer and two others involved in the shooting were acquitted, community activists called for increased police accountability in use of force practices.²⁸⁵ In an effort to address minority distrust with the Milwaukee Police Department, the Wisconsin Department of Justice initiated a facilitated mediation process.²⁸⁶ Members of the Department of Justice met with representatives from the Milwaukee U.S. Attorney's office, the U.S. Department of Labor, and other government and community leaders.²⁸⁷ Ultimately, these meetings led to a \$2.5 million grant from the Office of Juvenile Justice and Delinquency Prevention to fund youth violence prevention programs.²⁸⁸

As a result of these efforts, the Milwaukee County Police Department has changed their day-to-day operations.²⁸⁹ By creating a "value based culture, dispersing leadership, empowering district captains and using data to prioritize crime reduction," the Milwaukee Police Department has improved community

278. Richardson & Goff, *supra* note 177, at 123.

279. *Id.*

280. *Id.*

281. Kelling & Moore, *supra* note 91, at 12.

282. *Id.*

283. Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER, May 11, 2015, available at <http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment>.

284. Jamil Jivani, *Five Police Departments Building Trust and Collaboration*, BJA EXECUTIVE SESSION ON POLICE LEADERSHIP, at 6 (Sept. 25, 2015), available at <http://bjaexecutivesessiononpoliceleadership.org/pdfs/006.3cFivePDCaseStudiesMWIFull.pdf>.

285. *Id.*

286. *Id.* at 7.

287. *Id.*

288. *Id.* at 4.

289. *Id.* at 6.

and police relations while working to prevent crime.²⁹⁰ The Milwaukee County District Attorney's office has also worked with the Milwaukee Police Department to reduce minority involvement in the criminal justice system in an effort to stop the cyclical perception of minority males. Specifically, District Attorney John Chisholm created Community Prosecution units which allowed for prosecutors to work directly with police officers out of police districts around Milwaukee.²⁹¹ The community prosecution unit instills the power of the District Attorney's office and the police department to partner with community leaders and prevent crimes while empowering the community.

For instance, after a recent "21 day initiative" in a troubled neighborhood, the unit seized nine guns, more than 500 grams of marijuana, cocaine and painkillers, arrested nine individuals associated with a string of robberies, and met with community members about how they wanted to see problems addressed in their neighborhoods.²⁹² The unit also met with community members at the end of the initiative to explain their results and how residents can prevent future issues in the community.²⁹³ This effort not only helped this neighborhood gut plaguing problems and remove violent individuals, but it also helped restore police and minority relations by empowering individuals to take ownership in their community.²⁹⁴

Madison, Wisconsin is also working to challenge black male stereotypes and reduce minority male involvement in the criminal justice system while empowering the community. In 2014, Dane County announced that they would be initiating a Community Court that would hear cases of young non-violent offenders between the ages of 17-25 without a criminal record.²⁹⁵ The court is to be comprised of local peers, community organization members, religious leaders, and neighborhood associations.²⁹⁶ The Court will hear cases and sentence offenders to complete programs in the community.²⁹⁷ Once the youth has completed their requests, their arrest record and criminal charges are erased.²⁹⁸ This model will work to repair the community, address the disparity

290. *Id.* at 6.

291. Toobin, *supra* note 283.

292. Ashley Luthern, *21-Day Initiative Leads to Better Police-Community Relations in Milwaukee*, JOURNAL SENTINEL (Sept. 8, 2015), available at <http://www.jsonline.com/news/milwaukee/21-day-initiative-leads-to-better-police-community-relations-in-milwaukee-b99572317z1-325829091.html> (last visited Dec. 1, 2105).

293. *Id.*

294. *Id.*

295. Steven Potter, *South Madison to Host New Dane County Community Court*, ISTHMUS (May 13, 2014), available at <http://www.isthmus.com/news/news/south-madison-to-host-new-dane-county-community-court>; *Madison Launces Community Court Program*, NBC-15 NEWS, (Aug. 23, 2015, 10:28 PM), <http://www.nbc15.com/home/headlines/Madison-launches-Community-Court-program-279864942.html> (last visited Dec. 1, 2015).

296. Potter, *supra* note 295.

297. *Id.*

298. *Id.*

between black and white citizens in the criminal justice system, and reduce the implicit stereotype that black males are criminals.²⁹⁹

III. CONCLUSION

Gender role-theory, masculinity theory, historical racial propaganda, and unconscious racial bias help explain why police officers disproportionately use lethal force on minority males. Specifically, they explain that men are generally more likely to act as aggressive, active risk-seekers due to the way they are socialized, and thus are more likely to engage in violent behavior than women.³⁰⁰ Black males in particular are more likely to be perceived as dangerous violent criminals due to a history of racial propaganda that has given rise to unconscious racial bias.³⁰¹ This image accounts for implicit dehumanization of black males, leading to increase use and justification for use of deadly force on minority males.³⁰²

These perceptions perpetuate a constant cycle of profiling, arrests, and economic disenfranchisement of minority communities. Further, since police officers are trained to assert a “macho” presence and black males are viewed as hyper-masculine, black males threaten a police officer’s authority more than any other race.³⁰³ Police officers are trained to use physical force as a way to assert their authority, and it is an expression of masculinity, thus increasing the chance that male police officers disproportionately use deadly force on unarmed minority males.³⁰⁴

Federal and local legislative measures have attempted to contain unconscious racial bias. However, they fall short of that mark. As long as an officer has a “reasonable belief” that an individual committed a crime and might be a harm to others, current lethal force laws allow for wide police authority to execute that individual. This also prevents any repercussions for police officers who use deadly force when it was justified under the law but could have been averted. Thus, after examining the Missouri law and understanding the perceptions of race and gender used by law enforcement, it is conceivable why Officer Wilson and Officer Pantaleo were not indicted for the killing of Michael Brown and Eric Garner, respectively.

Some suggestions this Comment has put forth to help address the disproportionate use of lethal force on unarmed minority males include action from police agencies, state legislatures, and members of the community. While protests are a great way to receive wide press coverage, it is important that activists respond peacefully and articulately to their legal communities about the outcomes they wish to see in the future. Although it may take time, a heightened lethal force standard must be considered to ensure greater legal

299. *Id.*

300. *See supra* Part II.A.

301. *See supra* Part II.B.

302. *Id.*

303. *See supra* Part II.A.ii.

304. *Id.*

accountability for unnecessary use of lethal force. It is also imperative that state legislatures require and equip all police officers and their patrol vehicles with cameras. Further, police officers must be equipped with less lethal weapons and trained to use them to de-escalate encounters with unarmed individuals before resorting to lethal force.

Moreover, police agencies must diversify their their police forces and implement sensitivity trainings on race and gender to ensure greater respect among police agencies and the communities they work in. All police agencies must consider a policing model that collaborates with community organizations in order for individuals to take ownership in their community and work with police to deter crime. Finally, all police agencies must be transparent and report to their communities the rate at which police kill unarmed civilians. Although there will likely always be some level of unconscious bias in society and among police, these suggestions are imperative to protect against the unnecessary use of deadly force on unarmed minority males.