

Justice for All? An analysis of police brutality in the United States, England & Canada

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Introduction

Police brutality in the United States has been spotlighted by the media since the controversial death of Trayvon Martin, a seventeen-year old black male who was killed by a member of a neighborhood watch group in 2014. After the decision was made to not indict Martin's killer, Martin's death spurred the launch of the "Black Lives Matter" movement which brings light to the fact that black people are disproportionately killed and subjected to excessive force by law enforcement in the United States. Since Martin's death, the "Black Lives Matter" movement has protested the deaths of unarmed black people in the United States and the lack of indictments of the officers involved in their deaths. It is not probable that police brutality is more frequent today than it has been in the past, but police brutality is subjected more to media spotlight and scrutiny due to the efforts of the "Black Lives Matter" movement. There are no reliable statistics prior to 2015 to indicate whether police brutality is more frequent today than in the past. However, projects such as "The Counted," are trying to implement a better tracking system of deaths by police since the Federal government has yet to implement a more accurate accountability system.

This paper will analyze three of the deaths that the "Black Lives Matter" movement has protested, Michael Brown, Eric Garner and Sandra Bland. The amount of force used by the officers in these cases is analyzed for their reasonableness given the circumstances of the incident. Furthermore, the policing system in England and Canada will be analyzed for potential aspects that can be implemented into the United States. This paper will argue that the lack of

data, accountability, and reprimand against officers in police brutality cases in the United States indicates the need for implementation of multi-level reforms throughout the country.

Methodology & Positionality

This paper will look at police brutality in the United States, England and Canada. These countries were chosen for comparison since the US and Canada were both English colonies and have similar political systems based off of a constitution and the English common law system. The countries also have relatively high and similar Human Development Index rankings. It would have been inappropriate to compare police brutality in the United States to a country like China where not only the political system is different, but also the government's value of its citizen's privacy and liberties is different. Furthermore, England was chosen instead of analyzing the entire United Kingdom because different areas in the United Kingdom have different police structures. It would have been too broad to compare the entire United Kingdom and the facets of its various areas to the United States. This paper will look at institutions that Canada and England have in place in order to combat police brutality and analyze whether these institutions would be helpful in deterring police brutality in the United States.

In analyzing police brutality, it is important to look at the laws that govern the amount of force police officers are permitted to use against suspects. Since much of the scrutiny of police use of force occurs when police conduct an arrest, the Fourth Amendment of the US Constitution will be analyzed for the protections it affords citizens. Furthermore, since police are an extension of the state they are expected to act in a way that protects citizens. There are regulations in place to protect citizens from damages caused by the state, which will also be analyzed. Finally, the landmark Supreme Court cases *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*,

490 U.S. 386, 396 (1989) which are used in the Court's analyses of excessive force cases that follow them, are analyzed for the legal basis they provide regarding how much force is reasonable for an officer to use. These two cases were chosen because in every case of excessive force, the *Graham* standard is applied and when lethal force is used, the *Garner* standard is also utilized by the court. These two cases provide the court a lens to analyze police use of force and thus are used as the basis of my legal research.

The lack of quantitative data in the United States on deaths by police prior to 2015 is apparent throughout my research. However, "The Counted" is an ongoing project run by *The Guardian* newspaper that is trying to account for all deaths by police in 2015 and 2016. "The Counted" collects their data through crowdsourcing¹, scouring various news outlets, as well as utilizing information from other databases that count deaths by police (About "The Counted"). At present, it is the job of the FBI to collect information regarding deaths that are categorized as justified by police throughout the country; however, they have a voluntary system where police departments can choose whether to submit data. Thus the data that the Federal government compiled is incomplete and inaccurate. Unlike "The Counted," the FBI's data collection process does not investigate the reported deaths, and the data does not reliably keep track of how many people are killed by police annually (About "The Counted"). Since the FBI's data is not complete or accurate, it was not used in this study.

My position in this research is important to note. I am a white female and thus not a member of a group that is statistically significantly affected by this problem and I am aware of

¹ Crowdsourcing data is a method of data collection that allows the public to submit information that is then verified by "The Counted" to be added to their database.

this throughout my research. That being said, there are multiple people in my life who have been targeted by police and have been a victim of police brutality. With their experiences guiding my research, my intention was to look at why police brutality often leaves the officers unpunished. As a pre-law student with a particular interest in studying violations of constitutional rights by the government, the focus of my research is on the overarching system that police brutality acts within and not necessarily attempting to commiserate with the experiences of black people who are disproportionately victimized by the police. In this sense I attempted to be attentive throughout my research to make sure that my focus stayed on how police brutality is addressed by the government and activist groups, rather than reporting the countless negative experiences that black people and other minorities have with police.

International Analysis

The United Nations has tried to monitor and eradicate police brutality in not only the United States but also in Canada and England. The Office of the High Commissioner of Human Rights has voiced concerns regarding the lack of indictments of police officers in the United States who have killed African Americans, specifically referring to Eric Garner and Michael Brown (the deaths of these individuals will be further explored in the “Analysis” section of this paper as they are at the center of the “Black Lives Matter” Movement in the United States).

Matmuma Ruteere, UN Special Rapporteur on contemporary forms of racism, has noted that

there are numerous complaints stating that African Americans are disproportionately affected by such practices of racial profiling and often lethal force... African Americans are 10 times more likely to be pulled over by police officers for minor traffic offenses than white persons. Such practices must be eradicated. (‘Legitimate Concerns’).

The United Nations High Commissioner for Human Rights, Zeid bin Ra'ad Al Hussein issued a statement detailing his deep concern “at the disproportionate number of young African Americans who die in encounters with police officers.” (“UN Rights Chief”). These concerns are shared among other countries around the world and by other UN bodies who monitor human rights violations. Delegates from countries such as Namibia and Chad have called the American justice system broken and have argued that the American image of freedom has been tarnished (Bernish). However, it should be noted that The United Nations High Commissioner for Human Rights is a Prince from Jordan, a country that has significantly more human rights violations than the United States, including heavily restricting anti-government speech, marital restrictions, and sexist laws (*Human Rights Watch*). Though the validity of Zeid bin Ra'ad Al Hussein's comments do not carry the legitimacy that a United Nations Security Council Resolution has, his comments do indicate that the United States is being watched for their response to criticism against police brutality. Furthermore, the Working Group of Experts on People of African Descent has analyzed the situation in the United States as reminiscent of Jim Crow Laws and stated “impunity for state violence has resulted in the current human rights crisis and it must be addressed as a matter of urgency.” (“USA Needs to Combat”). UN Experts have recommended training police officers for appropriate policing, building trust between communities and police, as well as increasing minority representation in the police force (“Legitimate Concerns”).

The United States is not the only country that the United Nations has condemned for police brutality. Canada has been criticized heavily for how police react to protests. The UN Human Rights Committee is primarily concerned about “excessive use of force by law enforcement officers during mass arrests in the context of protests at federal and provincial

levels, with particular reference to indigenous land-related protests, G20 protests on June 26 and 27, 2010 as well as student protests in Quebec on February 13, 2012.” (Cobb). The G20 protests occurred during the 2010 G20 Summit in Toronto. The initially peaceful protests turned violent and hundreds of protestors were arrested. Mass arrests are illegal in Canada and many of the arrested were innocent bystanders to the vandalism that occurred. The mass arrest was initiated in hopes of arresting any potential vandals. Additionally, the police used tear gas and did not inform the protestors when to leave and there was C\$750,000 in loss to local businesses (Mahoney & Hui). The 2012 student protests in Quebec were centered around the steep increase in tuition. Police responded to these protests by another mass arrest of demonstrators (Gabbatt). The Committee has told Canada that it needs to ensure that the violence and repression that occurred during these protests is avoided in the future (Cobb).

England has also been the subject of UN scrutiny due to its use of Tasers² on minors as well as using stop and search tactics on toddlers. England (and Wales) first started using Tasers in 2003, and in 2008 they were told by the United Nations to treat Tasers as weapons and to stop using them on children completely. However, despite these requests there has been an increase in the use of Tasers on children. According to Mark Leftly, of *The Independent*, in 2013, there were 30 percent more incidents where Tasers were used on children in England and Wales than in 2012. Furthermore, between 2009-2014, nearly 300 children under five were stopped and searched due to officers suspecting that the children were used by adults to hide weapons, stolen goods, or drugs (Leftly). England has the highest level of child incarceration in western Europe

² A Taser is a weapon used by police that has electrical probes that incapacitate the victim. (Stun Gun Defense)

and have placed criminal responsibility on children as young as ten years old (Leftly). England is subject to United Nations review in May of this year regarding these issues, as their practices go against the UN Convention on the Rights of the Child.

Since the United States, Canada and England are all subject to critique from the United Nations in regards to police use of force, it is important to analyze the structure of police in these countries and how these structures may be similar to or different from other countries. The scrutiny of the police's use of force in Canada, England and the United States all occur under different circumstances. Analyzing where Canada and England's police have succeeded will allow us to determine whether the United States can implement similar policies to decrease police brutality in the United States.

Canada's police structure has different branches of police that vary regionally. The Royal Canadian Mounted Police (RCMP) are Canada's federal police that are seen as "an elite institution aligned with the national interest." (Policing Canada, 6). The RCMP are Canada's largest police service and they play a major role in lower level policing. They provide support services to municipal and provincial police in Canada and a central base for criminal information/records, technical support and forensic analysis. The RCMP has a multifaceted role in policing and its responsibilities vary throughout the country. The result is a police system that is decentralized but highly coordinated. Canada's various police departments are limited to their geographic jurisdictions, in contrast to the United States, where the Federal Bureau of Investigation, county police and state police can all make arrests in the same area (Policing Canada, 9).

Canadian police accountability is also different than in the United States. Municipal

police are accountable to police service boards and the RCMP and provincial police are accountable to the Attorney General. Police Boards are civilian run boards who “govern the force without interfering in the day to day operations of the police force.” (Helme, 15). Boards cannot have sworn officers serve on them and are independent from the government and political influence. Thus, Police Boards are accountable to the public who oversee police responsibilities. Helme notes in her analysis of Canadian police that “police are given powers to restrict freedom, but the police must in turn act within their clearly defined power and must not encroach on civil liberties and human rights.” (Helme, 17). The Police Complaints Commissioner is a body independent from both the government and police that provides an additional level of police oversight in Canada. The last level of police accountability is the Independent Investigations Office and Special Investigations Unit. This body reviews all cases where a person has died or has been seriously injured by a police officer. “The investigation is automatic and all police departments are obliged to report such incidents to this office for investigation.” (Helme, 17). This body determines whether criminal charges should be brought against police officers (Helme, 17). Overall, the police accountability to the public tries to ensure that there is mutual confidence between the public and police and provides resources for civilians to turn to when they believe the police have abused their power.

Police use of force puts a strain on relations between police and the civilian population. Canada’s Supreme Court has noted that although officers work to gain the trust of the public “that trust can be tested—sometimes severely—when a member of the community is killed or seriously injured by a police officer.” (Canadian Civil Liberties Association). This tension is caused by the reluctance of the public to accept physical and lethal force as a means of control.

Similar to the United States, use of force is seen most prominently, though not exclusively, against blacks and other colored minority groups (Carmichael and Kent, 204). In a study of racially driven police brutality in Canada, of the 784 investigations conducted by the Special Investigations Unit from 2000-2006, 150 cases involved black people and aboriginals, who make up approximately 5% of the population (Worley and Rosewell, 33). Furthermore, both blacks and aboriginals are approximately six times more likely to be subjected to police using force than their white counterparts (Worley and Rosewell, 24). In Canada, “cops are able to use up to lethal force if they need to use that force to prevent the commission of an offense.” (Harte). This means that prior to a crime being committed, if an officer has reason to believe that someone is going to commit a crime, particularly a violent crime, they are “entitled to use lethal force to stop that individual from posing a risk to someone else.” (Harte). However, in doing so police are driving a wedge between themselves and the communities they are attempting to protect. So what can be done? Studies have shown that female police officers are “2-3 times less likely to be subject of citizen complaints and nearly 10 times less likely to have allegations of excessive force directed at them” (Carmichael and Kent, 706). Carmichael and Kent thus suggests for the “aggressive” pursuit of policy makers to hire female police officers. Though they note that the structural issues that result in racial stratification with minorities prominently in poverty stricken areas lead to an increased reliance on force by police, when minorities are able to move out of these areas, they find that there is a decrease in the cases of force used against them. However, this shift is much easier said than done. Structural issues such as racial stratification stem beyond police control, but the underrepresentation of minorities in the police force creates a lack of cultural sensitivity (Policing Canada, 31). There is a similar issue in the United States, where only 12% of local

police in the country is black since “blacks may ask themselves ‘Why would I want to join an organization that is known for not being friendly to people like me?’” (Kelsing and McWhirter).

In hopes to curtail lethal force, some Canadian police forces have started using rubber bullets that are less lethal and would incapacitate rather than kill potential suspects. However, the use of these bullets are limited to SWAT team interventions, public protests, and encounters with mentally ill individuals (McQuigge). A former Toronto officer, Gregory Sullivan, stated “because of the accountability factor that exists today in the law enforcement field ... it just makes good sense and good risk management to use something that’s safer and the officers can have confidence in.” (Lavoie). These bullets are limited in that they cannot be used with a gun the officers carry on their belt, but rather needs to be used by a rifle that they keep in the trunk of their cars. Therefore, in a confrontation, officers would not be likely to use them. Nevertheless, the is increased interest in less lethal weapons poses a viable response to counteract the number of deaths by police and would also limit the media controversy that surround police brutality cases (Lavoie).

Similar to Canada, England also has different branches of police that are highly coordinated. The tripartite system distributes responsibilities between the local police authority, the Chief Constable and the Home Office. The Home Secretary is the head of the Home Office and is responsible for addressing issues of accountability with Parliament. One facet of the police force in England is the concept of restorative justice. Restorative justice practices have been integrated into 33 of 43 police forces in England over the past decade. These practices are intended to increase community confidence in police and decrease repeat offenses by criminals. Restorative justice brings the offender, victim, and other members of the community together.

The offenders are encouraged to take responsibility for their offense and make sense of their crime to the victims so that the latter are able to understand the harm they experienced. This opportunity is often offered to low level offenders and young offenders who are less likely to commit another offence. The face to face meetings have led to an 85% satisfaction rate among victims who were involved in this process and a 27% decrease in crime over a two-year period and have the potential cost savings of £6,000 per person that is not reconvicted (Paterson and Clamp, 598). The success of the restorative justice programs has increased civilian confidence in police, as well as created a community focused and problem based policing system (Paterson and Clamp, 595).

Another important facet to note of the police in England is the fact that the vast majority of officers do not carry fire arms. Only about 5% of officers in England and Wales are authorized to carry firearms according to the Home Office in 2012. The majority of officers have remained unarmed for the past 185 years and they are reluctant to change that. Officers who oppose arming the police say that by arming police it “undermines the principle of policing by consent—the notion that the force owes its primary duty to the public, rather than to the state.” (Kelly). Furthermore, by arming police it diminishes how approachable they are to the public and police do not want to compromise that. Therefore, the use of firearms is the last option for officers who are unable to restrain criminals using less lethal methods and when firearms are employed they result in fatalities in about half of the cases (Payne-James et al., 51). The less-lethal use of force techniques to restrain individuals include incapacitating spray, batons, and Tasers. However, although these less lethal methods can, and do, result in fatalities if used excessively, “these incidents are rare, but quite rightly, there is public concern that the techniques used to control or

restrain the individuals do not cause injury, or if they do that the degree of injury is minimized and fatalities are avoided whenever possible.” (Payne-James et al., 51). Furthermore, public cooperation decreases when force is used by police rather than persuasion, and other verbal cues (Payne-James et al., 51).

England and Canada’s policing models provide potential alternatives or additions to be included in the United States. In regards to police use of force, none of these countries are perfect, as previously pointed out. However, as we have seen, each country has a feature to its police force that has been very successful. Canada’s civilian review boards provide for an additional level of police oversight. This provides for additional accountability as well as an increased confidence in police by citizens. The United States has tried to implement civilian review boards since the 1960’s, but these efforts have not been as widespread or successful as they are in Canada (Kaste). Often, in the United States, there is distrust and contention between civilian review boards and police. Officers believe that civilians “aren’t qualified to judge whether a cop followed a department’s rules governing use of force” and thus feel that civilians don’t understand the life and death situations that officers are in (Kaste). Furthermore, though civilian review boards have been implemented throughout the United States, often, they fail due to lack of sufficient funding such as in New York City and Washington D.C. Funding would have to come from the actual police department or from the City Council. These agencies keep funding “unrealistically low,” which makes it difficult to properly investigate police misconduct cases. How cases are investigated, i.e. by volunteers or by professional investigators, also effects costs (Finn, 128). Though these are obstacles for implementation of civilian review boards, there clearly has to be an additional level of oversight for police and perhaps state budgets can provide

funding for civilian review boards to take some of the pressure off of local governments to do so. According to *Time Magazine*, civilian trust in police is currently at an all time low, with 57% of white and 30% of black Americans having a high level of confidence in police (Begley). Particularly among black Americans, these numbers indicate that police need to take steps to restore the public confidence in them. A wider acceptance and utilization of civilian review boards may provide a means of doing so. However, the role of police unions in the United States should be noted for their power in reinstating officers that have been fired. Police unions appeal the decision to fire officers and get officers who are guilty of using excessive force or have aggressive behavior in the field reinstated with back pay (Friedersdorf). Though Unions may counter-act what civilian review boards are trying to achieve, broader media exposure on the wrongdoing of police unions may lead to a better union system as well. In addition, another way to decrease police brutality, and thus increase confidence in police, as noted by Carmichael and Kent, is to increase the amount of female officers in the police force. As of 2007, the most recent Bureau of Justice statistics, women make up only 12% of local police. By increasing the number of women in police, there will be a decrease in the amount of situations that end up turning deadly since women “are better able to defuse potentially violent situations.” (Spillar).

Finally, the less lethal use of force techniques, specifically less lethal bullets, as used in Canada are already in use in the United States. Similar to Canada, this option is only useful in certain situations as it takes time to use and set up. Since less lethal bullets have not been made to be used in a smaller gun that is carried on a belt, the use of less lethal bullets in the United States is limited. In addition, due to innovations in the arms industry, it is feasible in the future there will be less-lethal guns that can be carried on officer’s belts as a traditional gun is.

According to the United States Department of Justice Report on federal police agencies' use of less lethal force, not all agencies have equal access to all options, i.e. some departments or federal police agencies may have more access to a greater number of Tasers, rubber bullets, pepper spray etc. (Officer of the Inspector General, 23). Nevertheless, even if the officers have access to less lethal weapons, they are not necessarily more likely to use this option instead of another means of restraining a suspect. Instead, the agency officers work for must have policies that encourage officers to employ less lethal force when possible (Officer of the Inspector General, 47). The report states that the justice department relies on "state and local agencies' policies for use of less-lethal weapons," but recognizes that like any other type of force, police officers still have the ability to misuse less lethal force and kill suspects (Officer of the Inspector General, 47). In regards to England, unarming the police in the United States is not a viable option. The United States has one of the highest per capita gun ownership rates in the western world, therefore indicating that the police must also have guns (Marat). Since it is unlikely for either the police or the public to get rid of guns, this paper will explore how the police utilize other options before using lethal force in recent cases of police brutality.

Legal Explanation and Establishment of a Test

This section will analyze the legal environment surrounding the issue of excessive force used by police. I will look into how the Supreme Court of the United States defines excessive force and the situations that may limit how much force police can use in conducting an arrest. Primarily, the decision of the cases *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) will be evaluated for the standards they set forth. It is intended that this paper create a test that is derived from the statute law and case law in order to determine

whether or not excessive force has been used in the recent and controversial cases that are the driving force behind the “Black Lives Matter” movement in the United States.

Excessive force cases fall under the Fourth Amendment of the Constitution since “the Fourth Amendment provides explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct.” (*Graham v. Connor*, 490 U.S. 386, 396 (1989))

The Fourth Amendment states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (US Const. amend. IV).

A “seizure” takes place any time a person’s freedom of movement is interrupted by an agent of the Government, such as the police (*Graham v. Connor*, 490 U.S. 386, 395 (1989)). Title 42 of the United States Code Section 1983 (42 U.S.C §1983) provides protection to citizens against Constitutional violations by government officials. Claims against police officers fall under 42 U.S.C §1983 and one must prove that a police officer acted in his or her official capacity in a way that violated the plaintiff’s Constitutional rights. In bringing claims against police officers, the Supreme Court quoted the District Court in *Graham*:

“[t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983”: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) “[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.” (*Graham v. City of Charlotte*, 644 F. Supp. 246 (W.D.N.C. 1986)).

Though the above provides a generic standard, not all cases can apply the above factors uniformly. According to the Supreme Court, analysis under § 1983 must first identify

specifically, the Constitutional right that was infringed upon and then judge the “constitutional standard that govern that right.” (*Graham v. Connor*, 490 U.S. 386, 394 (1989)).

Claims of excessive force typically occur in two situations, “when a defendant, in a criminal case, seeks to suppress evidence on the grounds that the excessive force rendered the search unreasonable, or when a party brings a subsequent civil action against the police, alleging the use of excessive force violated his or her civil rights under 42 U.S.C. §1983.” (Pruinski, 856).

This paper shall concentrate primarily on the civil aspect as it applies in today’s society.

Furthermore, there are a variety of clauses that may be applicable to cases of excessive force, and determining which ones to use in each scenario may be different in each case. For example, applying the 8th Amendment, which protects citizens from the Federal government imposing cruel and unusual punishments, is only applicable to those in jail, while the protection under the Fourth Amendment against unreasonable seizure by the government would not apply to people in jail. For the purposes of this thesis, I will primarily be analyzing the protections under the Fourth Amendment, as these are standards police must use while making an arrest.

It is important to look at cases that address the various circumstances of police brutality. The case *Tennessee v. Garner*, 471 U.S. 1 (1985), argued in 1985, addresses the use of deadly force by police. In this case, Edward Garner burglarized a house and stole a woman’s purse. In his attempt to escape, Garner was about to climb over a fence, when Officer Hymon shot him in the back of the head. Garner subsequently died. Officer Hymon admitted that he did not see a weapon on Garner and was “reasonably sure” that he was unarmed (*id. at 4*). In the Supreme Court’s decision, they stated “It is not better that all felony suspects die than that they escape” and “A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.”

(*id. at 3*). The implications of *Garner* makes clear that suspects' potential escape is not reason enough to kill them. Whether or not they are armed, the nature of the crime committed and whether they pose a threat need to be taken into account before a police officer pulls the trigger. Otherwise, as seen in *Garner*, police are acting unconstitutionally. Therefore, if there was deadly force used on the suspect, we must look at what would have been the risk if the suspect were to get away. The Court continued in *Garner*:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (*id. at 3*).

The above text points out important factors in the use of deadly force. As in *Graham*, whether the suspect poses a threat either to the officers or while they committed the crime determines how much force may be reasonable. Most important is the last line where the Court dictated that when feasible "some warning" is to be given to shoot. This indicates that the police officer must indicate to the suspect that they will be using deadly force and not simply pull the trigger without giving the suspect the chance to submit.

What is considered unreasonable force by the court depends upon the facts and circumstances particular to the seizure in question. Four years after *Garner* was argued, *Graham v. Connor*, 490 U.S. 386 (1989) creates a more generalized standard for use of force by police that is not limited to deadly force as *Garner* is. The case set forth a balancing test to determine whether the force used to effectuate a particular seizure is reasonable under the Fourth Amendment. The case involved a diabetic person (Dethorne Graham) whose blood sugar was

running low. He went to a convenience store to get some juice but after realizing the line was too long for him to wait on, he decided to leave. Officer Connor had watched Graham enter and leave the store quickly and thought that Graham may have stolen something. He followed Graham and his friend for a few blocks before signaling them to their car pull over. Officer Connor did not believe that Graham was having a low sugar reaction and refused to get Graham any glucose to raise his sugar levels. Graham passed out during his arrest, was hand cuffed, sustained cuts on his wrists, and a broken foot. Graham sued Officer Connor for using excessive force during the arrest, especially after finding out that he was a diabetic and had not stolen anything from the store. (*id. at 389*).

In *Graham*, the United States Supreme Court set forth the standard to determine whether the force used was excessive given the circumstance. In the court's analysis, they quoted *United States v. Place*, 462 U. S. 696, 703 (1983), which states that in order to decide whether "a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." (*Graham v. Connor*, 490 U.S. 386, 396 (1989)). Section 9.22 of The Federal Model of Civil Jury Instructions, cites *Graham's* reasonableness standard to aid juries in their determination of unreasonable seizure of a person.

- “1. The severity of the Crime.
 2. Whether the plaintiff posed an immediate threat to the safety of the officer(s) or to others;
 3. Whether the plaintiff was actively resisting arrest or evading arrest by flight;
 4. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary;
 5. The type and amount of force used;
 6. The availability of other methods [to take the plaintiff into custody] [to subdue the plaintiff]”
- (United States Courts for the Ninth Circuit).

By citing *Graham*, the federal courts acknowledge its applicability in juries determining the outcome of excessive force cases almost thirty years after it was decided. An important point of *Graham* is that it addresses what is reasonable for an officer who is attempting to make an arrest. “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” (*Graham*). Likewise, The Federal Law Enforcement Training Center instructor Tim Miller, cites *Graham* in his training sessions for federal Law enforcement. Miller states that though one officer may make a different decision from another, “The issue is whether each use of force fell within the *range of reasonableness*.” (Miller, 2). This means that in the heat of the moment, the officer’s course of action had to be reasonable, not in the 20/20 vision of hindsight, as also pointed out in *Graham*. (Miller, 2).

The standard as set forth in *Graham* is particularly helpful in analyzing what may be excessive force on the part of the police and later in the analysis portion of this paper as to how to curb the rising numbers of police brutality incidents. An interesting portion of Miller’s analysis of *Graham* is that police officers are only responsible for using a reasonable amount of force, not a minimal amount of force. In analyzing the actions of the police, one must be careful not to hold them to a minimal amount of force standard. Furthermore, saying things like “The officer should have used a Taser, since it would have been a better option than shooting a suspect,” would not only be judging police on a minimal force standard but also be judging their actions in hindsight. Given the situation at the time and given the facts the officer had available

to him or her, shooting a suspect may be a safer option than Tasing them if the suspect posed a threat to the officer or to the community. (Miller, Use of Force Test).

In *Brosseau v. Haugen*, 543 (2004), the Supreme Court stated “*Graham* and *Garner*, following the lead of the Fourth Amendment’s text, are cast at a high level of generality... when we look at decisions such as *Garner* and *Graham*, we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply.” (*id. at 199*). In the analysis of the law and how it is applied in various cases, it is clear that a specific test cannot apply to all situations, but a general test that leaves room for interpretation of the law is more helpful. However, in every incident, the specifics of each case are integral in determining how much force a police officer can use. By compiling the standards that I have looked at so far, I will create a test that leaves room for the vagueness of the law but also allows the specifics of the case to be easily applied.

For this test, I will start broad and get increasingly case specific. In so doing, there will be ample room for conducting a broad analysis of the law and then trickle down to include the specifics of each case. Starting as broad as possible means starting with the Fourth Amendment. As previously stated, the Fourth Amendment provides protection so that people are secure in their persons. “*Step One*” of my test will be: Did a *seizure* of a person occur? Though this may seem obvious, whether or not there is a seizure effects every step that follows. If there was not a seizure, then the ensuing case of excessive force may fall under a different amendment or it may not be considered excessive force at all. If a seizure occurred, the next step would be to apply 42 U. S.C.§1983. According to *Graham*, in cases under this code, one must first identify specifically, the Constitutional right that was infringed upon—in our case it has been established

that it is the Fourth Amendment, (analyzed in Step 1 of this Test). Next is to judge the standard that governs that right. This means applying the cases *Graham* and *Garner*. “Step 2” will be to apply the *Graham* standard to the situation. To do so, I have broken down the reasonableness test that was set by the Supreme Court into three different groups. The first group will be what I will call the “*The Basics*” which include “The severity of the Crime” and “Whether the plaintiff posed an immediate threat to the safety of the officer(s) or to others.” These are factors that when the officers are dispatched may be provided by the 911 operator before encountering the suspect. By being informed of these factors on dispatch, or upon arriving at the scene the officers will have a better idea of how to approach the situation. The next group is “*The Encounter*”, which includes “Whether the plaintiff was actively resisting arrest or evading arrest by flight” and “The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary.” *The Encounter* factors deal with the reactions of the suspect when about to be seized by police. Finally, the last group— “*The Seizure*”, which includes “The type and amount of force used” and “The availability of other methods [to take the plaintiff into custody] [to subdue the plaintiff].” This last group addresses how the arrest was carried out and how the police officers may have otherwise handled the situation. (United States Courts for the Ninth Circuit).

The *Graham* Standard and Step 2 as outlined above can be applied to effectuate any seizure of a person. However, since *Garner* is limited to deadly force, “Step 3” will ask whether the force used killed the suspect. If so, the *Garner* standard will be applied. As the Supreme Court noted in *Garner*, “A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.” (*Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). Step 2 already analyzes

whether the suspect poses a threat. However, what *Garner* requires, that *Graham* does not is that prior to the exertion of deadly force, the suspect must be warned that this would be the officer's next step. This allows the suspect to submit to police in the interest of saving their own life.

The application of this test is not necessarily for police officers to take a break in the middle of an arrest, sit down and analyze the situation. However, it is the reactions of both the suspect and the police officer every step of the seizure that dictate how much force may be reasonable to use. Though in theory this test may seem to hinder the process of an arrest, especially in the heat of the moment, it is clear that in order for the police to act constitutionally, this is how the court expects them to think. Furthermore, the case law and the court make it clear that they do not always expect police officers to make the perfect decision. However, as the Court put it in *Graham*, the actions must be in the "realm of reasonableness" given what the officer knew at the time of the seizure. This test will be used throughout this next section to analyze recent and controversial cases of police brutality to explore how the statute law and the case law are applied on the ground by police officers.

"The Counted" & Data Analysis

"The Counted" is a project run by *The Guardian* that crowdsources data to collect information on the number of deaths caused by police in the United States. The project was started in response to the controversy that surrounded the lack of official statistics of police related death rates following the death of Michael Brown, in Ferguson in 2014. The first year "The Counted" collected data on was 2015 in hopes to try to comprehensively track the number of fatalities at the hands of police. "The Counted" data includes deaths that directly result from police use of force, meaning the use of a gun, a Taser, or death in police custody. They do not

count people who died during an encounter with police that is not a direct result of the police use of force, such as a suspect crashing their car into oncoming traffic during a high speed chase, committing suicide or dying due to a drug overdose while in police custody. “The Counted” notes whether the suspect was armed at the time of their death, which they define as law enforcement perceiving the suspect as having something that can be used as a weapon. If the person was found to have a weapon on them but they did not threaten to use said weapon against police, “The Counted” lists the suspect as unarmed. Due to the current controversy in the United States regarding the disproportionate use of force against minorities, “The Counted” identifies the race of those who died at the hands of police to track the relation of race and policing. However, another failure of the counted is that it does not look at the race of the officer who killed the victim which would be helpful in determining if racially biases are present among predominantly white officers or among black officers as well.

To collect information, “The Counted” uses *The Guardian* news articles, as well as information from local news outlets of media reported deaths by police. They encourage witnesses of deaths by police to send the information they have to “The Counted”, which hopes to create a database of verified information that maps death by police throughout the United States. They also use information from other online databases that attempt to track deaths by police, such as “Fatal Encounters” and “Killed by Police,” in order to accumulate the most data possible (About “The Counted”). The data collected reveals:

Despite making up only 2% of the total US population, African American males between the ages of 15 and 34 comprised more than 15% of all deaths logged this year by an ongoing investigation into the use of deadly force by police. Their rate of police-involved deaths was five times higher than for white men of the same age. (Swaine et al.).

Furthermore, black Americans are “being killed at nine times the rate of other Americans even though minorities make up approximately 37% of the US population.” (Swaine). The data also show that in comparison to white people killed by police, black people were twice as likely to be unarmed (Swaine).

Though the data makes clear there is a disproportionate number of killing of black people by police officers in the United States, I find there to be a significant lack of emphasis regarding whether or not police officers were indicted for their use of lethal force. “The Counted” indicates in the individual profiles of each person killed whether or not each person’s death was deemed “justified,” “under investigation” or “unknown.” However, unlike many other filter features of the database, i.e. US state they died in, whether or not the suspect was armed, gender, age, race, and how they died, indictments are not a filterable feature. In many ways I find this to be a point of oversight as whether or not the officer was indicted provides greater insight to the inner workings of the criminal justice system than the fact that there are many people dying at the hands of police. Furthermore, not making indictments easily accessible may actually skew the information that “The Counted” is portraying to make the numbers more dramatic. By stating in 2015 there were 1,145 people killed by police without stating how many of those deaths were considered justified, “The Counted” may be skewing the information to portray the police in a negative light in order to attract more traffic to their website. Since the project is run by a newspaper company, the intention of *The Guardian* may not be to accurately depict the data but rather to draw more attention to their newspaper. Although the number of deaths are disproportionate to the percentage that black minorities represent in the US population as a whole, we do not know how many of those deaths are justified killings, meaning that the officers

acted reasonably under the law. This does not mean that “The Counted” is overall an unreliable source, but it is important to note its shortfalls. Not making clear whether or not the death was a case of excessive force by police, or if the officer acted reasonably in using lethal force, misleads the user into potentially thinking that there is a higher amount of police brutality than there really is.

Nevertheless, “The Counted” has spurred some initiative in the United States government to revamp its police oversight system. The Federal Bureau of Investigation (FBI) and the Department of Justice have acknowledged lacking federal data on police killings and have made proposals for reform. At present, the FBI is in charge of tracking justified police killings through a program where police departments can voluntarily offer the amount of justified deaths their department has in a given year. However, out of the 18,000 law enforcement agencies, only 224 departments reported killings in 2014 and according to the Bureau of Justice Statistics, the FBI has failed to account for “54% of deaths caused by police officers.” (McCarthy, et al.). In response, the FBI has intentions of reforming their recording system to follow a methodology more closely to that of “The Counted”, where data is not reliant on voluntarily involvement but through third party research that is not subjected to the police department’s biases. Furthermore, the Department of Justice has also announced that it intends on establishing reporting coordinators in each state that would ensure that records of deaths by police are reported on a quarterly basis to the coordinator. It is important to note the fact that since “the federal government has no comprehensive record of people killed by police officers,” a task force was created by President Barack Obama in 2015 to study policing in the United States, titled *Presidential Task Force on 21st Century Policing*. Obama stated that “right now we do not have

a good sense, and local communities do not have a good sense, of how frequently there may be interactions with police and community members that result in a death.” (Laughland, et al.). The Task Force focuses on reforms on all levels of law enforcement in hopes of restructuring what seems to be a broken criminal justice system. Amnesty International released a report in June 2015 analyzing police brutality in the United States, concurring with the recommendations in the *Presidential Task Force on 21st Century Policing* that a “National Crime and Justice Task Force” should be created to evaluate the criminal justice system and how force is used in it in regards to the local and state statutes that govern it. Furthermore, Amnesty International suggests that this Task Force should ensure police departments are acting in accordance with International Law for the use of force on citizens (Amnesty International, 30). As stated earlier, the United Nations High Commissioner of Human Rights has chastised the United States for their use of excessive force against black people. This task force will allow the US (and other countries) to gauge how they compare to the rest of the world in their use of force. The report further suggests the Department of Justice, US Congress, state governments and local governments ensure that policies are in accordance with UN standards and calls for a review of policies in place to ensure they protect citizens against racial discrimination (Amnesty International, 32).

“The Washington Post” has also initiated a program similar to “The Counted” that tracks the number of people who were shot and killed by police. Most notably, their research has found about 25% of those who were shot by police suffered from or displayed signs of a mental illness (Somashekhar and Rich). This indicates that a standardized police force is not equipped to handle all situations. Instead, similar to the Cincinnati Police Department discussed in the next section, there needs to be special sectors of police that respond to dispatch calls involving people

with mental illnesses. Since mentally ill people are not acting under the conscious decisions to break the law—rather they are experiencing the symptoms of illness, police specially trained in deescalating rather than shooting can help bring this statistic down. Furthermore, since not every cop is aware of how mental illnesses effect decision making, implementing programs that train officers on dealing with mentally ill suspects can help decrease the fatalities of mentally ill people during encounters with police. However, when responding to a dispatch call officers may not be aware that someone is mentally ill, additional training overall in how to diffuse situations with mentally ill people or how to identify if someone is mentally ill, rather than just a criminal, may be a possible alternative to setting up a separate task force.

Other initiatives such as “Invisible Institute” try to expose the officers instead of the victims of police brutality. “Invisible Institute” was a project that began in Chicago that is trying to bring transparency to the Chicago Police Department by publicizing police misconduct records. Their findings indicate that “28,567 allegations of misconduct were filed against Chicago Police Department officers between March 2011 and September 2015. Less than 2% of those complaints resulted in any discipline.” (Citizens Police Data Project). Out of the 9,594 complaints regarding the officers’ use of force, only 135 officers were disciplined. Furthermore, officers who have 10 or more complaints filed against them, about 10% of the Chicago Police Department, average almost 4 times the amount of complaints in comparison to other officers (Citizens Police Data Project). Though the “Invisible Institute” is limited to Chicago, it has created a database that allows users to explore how the police force has failed its community. Lack of discipline of officers who use excessive force further allows officers to act aggressively

against suspects. The “Invisible Institute” provides a foundation for people in other cities to start a movement to promote transparency in regards to police misconduct records.

It is clear that until recently, data regarding use of force by police has not only been lacking, but has also been inaccurate. This reveals the failures of the FBI in their job to collect this data. Due to the nature of police brutality, it takes more time to collect data. Complaints of excessive force have to be verified, then disciplinary action has to be taken by the police department, and potential law suits against the officer, all take time to produce results. However, it is clear that the mere fact that the data is difficult to collect is not something that the public is willing to accept as an excuse of inaction anymore. In addition, the public no longer seem willing to view police brutality as the result of a rare few bad cops in the department, but rather sees the problem as being due to an underlying structure that allows police brutality to go undisciplined. This may be the reason why so many movements that are in motion are attempting to create databases, whether locally based such as the “Invisible Institute” project, or with a national focus such as “The Counted”. Perhaps a super-database that includes officer information and results of legal proceedings accounted for by the “Invisible Institute” with the crowdsourced victim data of “The Counted” will produce the most accurate data set. At present, due to the novelty of these initiatives, none of these projects are flawless. Regardless, from the data collected it is apparent that police brutality is common throughout the country and is not just a departmental issue.

“Black Lives Matter” and the application of the Test

The “Black Lives Matter” movement in the United States began as a Twitter hashtag in 2012 after the verdict reached in the Trayvon Martin case was released. This case involved a black 17- year old, Trayvon Martin who was shot and killed by a member of a volunteer

neighborhood watch group named George Zimmerman (“About “Black Lives Matter”). Zimmerman was acquitted for murdering Trayvon, and the “Black Lives Matter” hashtag was created by co-founder of the movement, Alicia Garza. Garza, along with other co-founders, Patrice Cullors and Opal Tometi hoped that the movement led to accountability for inflicted violence and murder of black people by local and state law enforcement (Rickford, 36). Zimmerman’s acquittal fostered the creation of the “Black Lives Matter” movement. This section will analyze the “Black Lives Matter” Movement and police brutality in the United States and also delve into the broader consequences that police brutality has led to in the United States. The test to determine reasonableness of the force used dictated by the United States Supreme Court set forth in the legal analysis portion of this paper will be used in a step by step analysis on how seizures were effectuated and how the Black Lives Movement responded to each case. The incidents analyzed will be Michael Brown in Ferguson, Missouri, Eric Garner in New York City and Sandra Bland in Waller County, Texas. This section will conclude by analyzing the subsequent police department reforms that have been successfully implemented in the United States in deterring police brutality.

On August 9, 2014 the “Black Lives Matter” movement came onto the media’s spotlight. Unarmed black eighteen-year old Michael Brown was killed by Ferguson, Missouri police officer Darren Wilson. Officer Wilson had been on duty when he was informed that there was theft in progress of cigarillos at a local market/ liquor store and that the store clerk was pushed by Brown and was unable to stop him from leaving the store. According to the Department of Justice Report on Michael Brown’s death, Wilson identified Brown and his friend as those described in the dispatch call and stopped them both on the street and when doing so he brought

his car very close to them. During the stop he saw the cigarillos in Brown's hand and when Wilson tried to open his car door to get out of the car the door was shut on him by Brown. Brown, according to witnesses, reached through the car window, grabbed and punched Wilson. Wilson proceeded to reach for his gun, but Brown tried to wrestle the gun from Wilson. Wilson shot Brown in the hand. A chase between Brown and Wilson ensued and ended with Brown charging at Wilson. Wilson then shot Brown between six and eight times, killing him (Department of Justice, 7-8). Due to the extreme controversy that surrounded this case, the media coverage of the "Black Lives Matter" and protesting that ensued in Ferguson, the United States Department of Justice conducted an investigation surrounding Michael Brown's death. After a legal analysis of cases also analyzed previously in this paper, (i.e. *Graham* and *Garner*) they found that Wilson acted within the realm of reasonableness by shooting Brown as Brown was perceived as a threat to the officer's personal safety. Furthermore, the Department of Justice found that Wilson's account of what happened is substantiated by eyewitness accounts who also described Brown as charging towards Wilson in a threatening way. In this case, for the purpose of analysis within the realm of this paper, by applying the test created earlier in this essay, we can summarize the reactions of Wilson and Brown to come to a similar conclusion to the Department of Justice. Briefly:

Step 1: Did a seizure occur? Yes, Wilson identified Brown as the suspect and did stop him.

Step 2: "The Basics" were provided to Wilson upon dispatch, he knew the severity of the crime and knew that Brown used his size against the store clerk.

“The Encounter”: At first contact, Brown reached into Wilson’s car, punched him, then attempted to gain control of Wilson’s gun, thus actively resisting arrest. Secondly, throughout the Department of Justice analysis they indicate that the entire encounter lasted less than five minutes.

The second branch of this step is to look at the amount of time the encounter took, and changing circumstances. After being punched and his weapon attempted to be taken from him, the circumstances were in favor of the amount of force used. After Wilson was able to leave the vehicle and pursue Brown, Brown ended up charging at Wilson.

Finally, “The Seizure” step was effectuated with several gunshots to Brown’s head, which ended up killing him. The final part of the seizure takes into account the availability of other methods. During the car encounter, according to the Department of Justice report, while Wilson was in the car he was unable to reach less lethal weapons (Department of Justice, 6). However, the report does not make any indication of whether Wilson made any effort to reach for a less lethal source of force when Brown was charging at him.

The *Garner* case law as discussed in the Legal Analysis section of this paper states, “deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” (*Tennessee v. Garner*, 471 U.S. 1, 3(1985)). It is not indicated in this case whether Wilson gave any verbal warning to Brown that he was about to “shoot to kill.” However, it is clear from Wilson employing his gun during his struggle in the car that he was not hesitating to use his weapon, which may satisfy the requirement for warning under *Garner*.

So if Wilson acted within the “realm of reasonableness” as determined by this test, why is there such controversy surrounding Brown’s death? The force employed here concurred with the

standard set forth in the case law; whether this was a conscious application of the law by Wilson is irrelevant. Furthermore, the Grand Jury's decision not to indict Wilson for killing Brown indicates that police officers are afforded extra protection under the law to act as they see reasonable in a given encounter with civilians. Again, the force that is used by officers must be within the "realm of reasonableness" as determined by the surrounding circumstances. As the court states in *Graham*, the court does not expect the perfect decision to be made, only decisions that are reasonable given what the officer knows at the time of the seizure. Therefore, in the case of Michael Brown, he was not killed because he stole cigarillos from the local market, he was killed because he attacked a police officer multiple times during the attempted arrest, tried to steal his gun and continued to attack after he was shot in the hand. This is important to note when addressing the controversy surrounding this case. At the beginning of this seizure, Brown only pushed the store clerk who tried to stop him from leaving with the cigarillos. The clerk fell on a display then quickly got back up seemingly unharmed. The court distinguishes between violent and non violent crimes in their analysis of *Garner* in regard to the use of deadly force. If Brown did not turn violent towards Wilson, it may be the case that Wilson would have been found to have used excessive force. However, since Brown aggravated the situation by attempting to grab Wilson's gun, it became reasonable for Wilson to assume that Brown would have done so again if they had made physical contact for a second time, which was definitely occurring when Brown charged at Wilson.

The purpose of this analysis is not to blame the victim, though the preceding analysis may seem like it. The fact of the matter is Brown himself was unarmed. In exploring different ways this incident could have been avoided and whether Wilson could have employed less lethal

force, perhaps a Taser would have deter Brown as he was charging toward Wilson. A police grade Taser for example, reaches from thirty feet away and immobilizes victims for thirty seconds (Taser FAQ). Perhaps this would have deterred Brown enough for him to surrender to Wilson. Wilson admits in his testimony that even though they are usually available, he does not like to carry Tasers because they are “uncomfortable” and too big for him to put on his belt. The court notes in *Graham*, “the court cannot analyze these situations with the 20/20 vision of hindsight in the safety of the judge’s chambers.” (*Graham* at 397). However, for the purposes of this research, 20/20 hindsight reveals that Wilson did have the option to bring a Taser with him that day, but elected, as he stated he usually does, not to take one with him (Hatmaker). Consequently, his actions have led to the increase in public outcry against police brutality and sparked “Black Lives Matter” protesting in Ferguson. As discussed previously, members of the United Nations have commented on the death of Michael Brown and noted they are particularly concerned over the disproportionate number of police brutality cases that involve black citizens. Perhaps the main concern surrounding the death of Michael Brown extends beyond Ferguson to reveal a bigger issue at hand.

The “Black Lives Matter” movement commented on the death of Michael Brown stating “it didn’t matter whether Brown had been guilty of theft or assault. Ferguson protesters knew Brown should not have been killed.” (“Ferguson 1 Year Later”). The perceived injustice that occurred in Ferguson sparked fears that since an unarmed man was killed anyone can be subjected to fatal police interactions, “the protesters in Ferguson saw themselves in Brown: potential victims or shooting targets of officers like Wilson, who served in a police department where anti-black animus was the standard.” (“Ferguson 1 Year Later”). The Department of

Justice in its review of Michael Brown's death has noted that there is cause for concern surrounding Ferguson Police Department's policies regarding policing. First, they police for profit which means that it polices in a way that would raise department revenue.

The department celebrates an increase in the number of traffic tickets it issues since it not only increases department revenue, it also increases municipal court revenue; in its opinion this is a win-win situation. Furthermore, the Department of Justice notes that the push to increase revenue has resulted in systematic violations of citizen's' Fourth Amendment Rights. Unlawful search and seizures of citizens' persons and vehicles, have not only caused innocent people to be subjected to a situation where "several incidents suggest that officers are more concerned with issuing citations and generating charges than with addressing community needs," it also leads to a decrease in confidence in police doing their job correctly (Department of Justice, 20).

Furthermore, the department has a system that even though they lack probable cause to presume that someone has broken the law, it can enter a "wanted" into the state wide system that would result in the person of interest being stopped. This, in turn, often results in innocent people arrested without regard for the Fourth Amendment. Excessive use of force is also common in Ferguson, specifically against black people; the Department of Justice report notes that "the overwhelming majority of force—almost 90%—is used against African Americans."

(Department of Justice, 31). This force includes the over-use of a Taser in situations where the suspect does not pose any threat to the officer and the use of canines to bite suspects. The report states, that force is often utilized when suspects do not immediately comply with officer demands, causing the officer to get annoyed that their authority is questioned, according to the Department of Justice review of Ferguson police reports (Department of Justice, 37). Though

Wilson may have used reasonable force, what Michael Brown's death really revealed was the broader scale of widespread constitutional violations of the Fourth Amendment. Wilson acted in a way that fell within the common abusive practices of the Ferguson Police Department actions, which supported and promoted aggressive behavior against individuals who do not kowtow to police authority. It is clear that concerns on the part of the black Ferguson citizens that any of them may be the next Michael Brown are substantiated by the Department of Justice report. The "Black Lives Matter" movement's hope to bring light to the injustice that regularly occurs in Ferguson is not an isolated case geographically. The injustices in Ferguson are present around the country, and as the Movement states, a breaking point has been reached, where each incident of injustice is a cause to call for reforms in police departments.

The death of Eric Garner, for example, which occurred before Brown's death, sparked the use of "I can't breathe" as a slogan for the "Black Lives Matter" movement. Garner was killed when officers used a lethal chokehold on Garner in attempting to effectuate an arrest. At the time of the incident, Garner was breaking up a nearby fight that drew the attention of the police. Garner was known to the police for his lengthy criminal record and for selling black market cigarettes in the past. When Officer Daniel Pantaleo and Justin Damico saw Garner involved in the fight, they tried to place Garner under arrest. Garner swatted at him and told the officer not to touch him because he wasn't doing anything wrong. They were unable to handcuff him and proceeded to grab Garner around his neck and place him in a chokehold position. As Garner was in the chokehold he repeatedly yelled "I can't breathe!" (Conway, 64). Soon after he died from asphyxiation from the chokehold inflicted upon him and his asthma. Officer Pantaleo, the officer who used the chokehold, was not indicted for using the banned chokehold on Garner. The

environment surrounding Garner's death is significantly different than that of Brown and applying the test we can see these differences most clearly.

Step 1: Did a seizure occur? Yes, Officer Pantaleo and Officer Justin Damico were attempting to arrest Eric Garner for the sale of black market cigarettes.

Step 2: "The Basics": From my research, I find no indication that there was a dispatch call that sent Officers Pantaleo and Damico to the scene, instead, Pantaleo and Damico were both plainclothes officers which means they were not in uniform when they conducted the arrest. From the video, it is clear though that they both have a badge that they presented to Garner, and handcuffs around their waists. Since they were plain clothes officers, they were lingering in the area when they saw Garner breaking up the fight. This is depicted in the video of Pantaleo, Damico, and Garner—that there was a misunderstanding as to what was happening in the fight. The officers thought what they saw was Garner finishing a sale, but instead he wasn't selling, he was breaking up the fight. Furthermore, Garner was being arrested for the illegal sale of cigarettes, a misdemeanor charge. At no point in the video of the arrest was Garner violent towards Pantaleo, instead he was just screaming that he could not breathe (Nydailynews).

"The Encounter" with Garner was not brought with resisting or evading arrest. Even after Garner told Pantaleo and Damico to leave him alone as he wasn't selling any cigarettes, Garner didn't flee and there was no chase. Though visibly aggravated in the video, Garner expresses that every time the cops are around he ends up arrested. The first three minutes of the encounter, Garner is standing there trying to convince the officers that he did nothing wrong. Though he gets increasingly aggravated when the officers keep repeating that he was selling illegal cigarettes, which is why he was being arrested, he did not lunge at the officers, charge at them,

etc. Instead, the only time he moves is when despite his pleas, the officers attempt to put him in hand cuffs (Nydailynews).

“The Seizure”: Very shortly after Pantaleo attempts to cuff Garner, as he is still talking to officer Damico, Pantaleo wraps his arm around Garner’s neck and brings him to the ground. The other officers on the scene including Damico, all push Garner down with Pantaleo’s body on top of Garner’s. When all officers are maneuvering Garner’s body to put him in hand cuffs Garner tells the officers he can’t breathe. Four officers physically maneuvered Garner to the ground and despite him informing them he could not breathe, it resulted in his death (Nydailynews).

Step 3: “Was there warning?” No, in this case, unlike Brown, it was not Garner who caused the situation to escalate, it was the police officers. It is important to note though, that the officers had thought they had seen Garner selling the cigarettes. Despite eye witness accounts stating in the video that he was breaking up the fight, the officers continued their attempt to arrest Garner. In their own minds they had cause to do so; Garner was known to sell cigarettes in the past, and they saw what they thought was him selling cigarettes, so they tried to arrest him. However, in doing so, they used a technique that is *banned* by the NYPD because it is a difficult move to control and if not done properly, such as in the case of Garner, could lead to death (Scheller). The availability of other methods in this example is tricky. Pantaleo should not have used a banned move. Secondly, he surprises Garner by putting him in the chokehold as Garner is still trying to talk to Damico. This case doesn’t involve a gun or a Taser or even a physical fight between the police and Garner; instead, it involves an officer who used his own body as the source of force. It should be noted that Garner was heavysset, weighing close to three-hundred

pounds. His size alone in combination with his aggravation could have been seen as a threat to the police officers on the scene. Nevertheless, Pantaleo would have had control as to how much pressure he was applying in the chokehold and should have lessened it when Garner was telling him he couldn't breathe. This doesn't mean that he should have let go all together, but with the combination of a chokehold and multiple officers securing his body to the ground, Garner's pleas for air would have been met and an arrest could have still been made. Furthermore, the other officers were making the situation worse as they were moving Garner's body for him as he was still telling them that he couldn't breathe. The fact that this didn't seem to concern any of the officers is what eventually led to Garner's death. New York state republican representative Peter King condones NYPD's behavior stating "And if you've ever seen anyone locked up, anyone resisting arrest, they're always saying, 'You're breaking my arm, you're killing me, you're breaking my neck.' So if the cops had eased up or let him go at that stage, the whole struggle would have started again." (*Associated Press* and Corcoran). However, as stated previously, it is not the argument that the officers should have jumped off Garner and given him some time to catch his breath. For the crime that they thought Garner had committed, when he told the officers that he couldn't breathe, his pleas should at least have been considered. It should also be noted that in this situation, Garner really could not breathe, it was not a lie to get out of the arrest.

Similar to Officer Wilson, Officer Pantaleo was not indicted. The Department of Justice has not yet released their investigation surrounding Garner's death and it will be interesting to see what they determine. Furthermore, as the Report has not been released, the investigation as to whether the police department is known for acting aggressively towards their citizens, as the Justice Department found in Ferguson, still remains unknown.

The final death that will be analyzed under the scope of the test of reasonableness, will be that of Sandra Bland. On July 10, 2015 Bland was driving in Texas when she was pulled over for not signaling before changing lanes. State trooper Brian Encinia was about to give her a ticket and told Bland that she seemed irritated and asked why. She responded “I am, I really am”, and says that she changed lanes to get out of Encinia’s way when she saw his lights were on when he was driving closely behind her (“Sandra Bland was Threatened...”). It should be noted that Encinia had already had the ticket written up to give to Bland when he started provoking her. All he had to do was hand it to her and let her go. Instead, Encinia orders Bland to put out her cigarette and when she refuses he orders her out of the car. Encinia then says “I’m going to yank you out” and “I will light you up” as he points his stun gun at her. He proceeds to open her car door and forces Bland out of her vehicle (“Sandra Bland was Threatened...”). Failure to signal, according to Andrea Roth, assistant law professor at the University of California, Berkley, “is technically an arrestable offence in Texas, though it rarely happens.” (Lai, et al.). Under the law, Encinia would have had the right to pull someone out of their own car if he exhausted all other options first. However, in this case Encinia had no reason to point his stun gun at Bland and pull her out of her car for a traffic violation. Throughout the arrest, Encinia continuously escalates the situation as Bland expresses her irritation as to how he is handling the situation. The entire incident was recorded by Encinia’s dashboard camera in his car.

The video of Sandra Bland’s encounter with Encinia has gone viral and her particular case is very different than the others we have examined. In the application of the test, we find the following; First, Encinia had probable cause to stop Bland. She didn’t signal before changing lanes and he was giving her the ticket for the violation. Second, “The Basics” of this case is that

Bland was pulled over for a traffic violation, she was not an immediate threat to Encinia, she was just irritated she was receiving a ticket. “The Encounter” in this instance did involve Bland actively resisting arrest, but this was provoked by Encinia’s threatening behavior. The incident lasted less than fifteen minutes, from what is seen from Encinia’s car camera video, and he continuously escalates the situation. Finally, “The Seizure” in this case was effectuated with force used against Bland and threats to use his stun gun. He had the option to let Bland go and simply issue a ticket, but he found it necessary to arrest her. As previously stated one can be arrested in Texas for failure to signal when changing lanes. Since deadly force was not used in this case, meaning that Bland was not killed at the hands of Encinia even though the incident is arguably the reason she hung herself, the *Tennessee v. Garner* standard would not apply here. From applying the test in Bland, I find that Encinia did not use excessive force, though I do not agree or condone how he effectuated the seizure. Encinia placed Bland under arrest, which is legal in Texas for this type of traffic violation and she physically resisted arrest. I personally, am of the opinion she should not have been arrested in the first place; however, since Encinia never physically handed the ticket to Bland, the traffic stop didn’t technically end (Police Center). In *Rodriguez v. US*, the Supreme Court ruled that a traffic stop ends when the objective for the stop has been achieved (Cushing). Encinia placing the ticket on the hood of the car rather than giving it to Bland indicates the objective of the stop was never achieved. When Bland refused to put out the cigarette, according to the video, we see Encinia drop the clipboard with her ticket on the hood of her car. This is the moment where the situation changes from a traffic stop to an arrest. This wasn’t illegal of Encinia to do, but at the same time, it was by no means fair (Cevallos). By Bland resisting arrest and yelling at Encinia she gave cause for Encinia to continue to escalate

the situation (Police Center). When Bland was taken to the precinct she died in custody, which was ruled a suicide.

Though the amount of force used may have been reasonable under the law, Encinia clearly provoked the situation every step of the way and this is evident by the video of the incident. Unlike Officer Wilson and Pantaleo, Encinia was indicted by the grand jury, for perjury in his affidavit that he filed with the jail that justified Bland's arrest ("Texas Trooper..."). Furthermore, he was fired for violating "courtesy" protocols which involve deescalating tense situations and exhibiting professionalism when conducting an arrest. The FBI is also investigating the incident to ensure that Bland died due to suicide and it was not a cover up in the jail.

To say any one of the three deaths we have looked at were victims' own fault would be incorrect. In each case, the officers on scene have acted in a way that ended up killing unarmed people accused of committing low level non-violent crimes, which according to the Supreme court in *Garner*, is unconstitutional. These are not isolated cases by any means. "The Counted" data estimates that there were over 1,000 deaths by police in 2015 and close to 300 in the first four months of 2016. To say that over 1300 people were at fault for their own deaths is to reaffirm the premise that the "Black Lives Matter" movement is trying so hard to tear down ("The Counted").

Furthermore, this type of police behavior is not limited to only the United States; "Black Lives Matter" protested for two weeks in Toronto after an officer was cleared of police misconduct for shooting and killing Andrew Loku who lived in housing for people with mental illnesses. Loku was reported to the police in July 2015 for having a hammer and threatening to

kill someone. When police arrived on the scene, Loku was still holding the hammer which he didn't drop when officers requested him to do so. Canadian lawyer, Anthony Morgan commented on Loku's death, stating "Officers engage people with mental illnesses all the time, but when the person has mental issues and black skin, they end up dead more than anyone." (Gillant). A friend of Loku who was with him when he was killed recalls

"I had his hand to the side of his legs, my hands were with his hands. So how the hell can his hands be raised?" she said.

"We turned around, started to walk toward the female officer, and the male cop showed up and he was saying, 'freeze.' I just had a bad feeling come over me. I said, 'Wait, wait a minute' and then — bang, bang. That was it. Andrew was finished." (Gillant).

Due to the "Black Lives Matter" movement protest, Toronto's City Council ordered for the police and Special Investigation Unit to be reviewed through an "anti-black racism" lens to examine how police services are provided to black people in Toronto and how they deal with racialized communities.

Responses to anti-black policing are not limited to Canada, though. Reforms to decrease anti-black policing have been implemented in the United States. In Newark, New Jersey, Mayor Ras Baraka announced in March that they will focus on more community focused policing. These reforms include revising policies, and training on the use of force in stop and searches, which disproportionately effect minorities, according the the Department of Justice. In fact, "75% of pedestrian stops were made without constitutionally adequate reasons, often targeting people who were merely in high crime areas. 85% of those stopped were black in a city where black people only make up 54% of the population" (Porter). The additional training that officers

will be required to partake in include “eight hours of training on bias free policing within six months and at least four hours annually thereafter.” (Porter). Bias free training has also been used in the UK, known as diversity training, which was implemented ten years ago due to a significant increase of racial profiling that occurred in a situation, similar to the United States, where “police race relations were subject to intense media scrutiny.” (Morant and Edwards, 282). The training taught that racist behavior is unacceptable in the police field in the UK today.

The Cincinnati Police Department underwent its own reforms back in 2001 due to the high number of black people dying at the hands of police. The Mayor at the time, Charles Luken, requested that the Department of Justice investigate police use of force practices. The investigation resulted in several improvements: a specific unit that responds to dispatch calls that involve people with mental illnesses, prohibition of the chokehold, and increased documentation in the use of force and canine units against suspects. Most notably, however, may be how the Police Department re-integrated themselves throughout the community. Police Chief Jeffrey Blackwell says the goal of community focused police is to “build relationships of respect, cooperation, and trust within and between the police and local communities.” (Baptiste, 3). He argues that you diminish relations with the community if you give a ticket for every minor violation people make, i.e. jay walking, bike riding on the side walk, etc. Instead, he focuses on having police give back to society by having them serve in soup kitchens and volunteer in schools. He also created the Quality of Life Enhancement Team which interacts with residents as they are on duty so that the people they protect don’t feel like they are being patrolled by police, but instead feel like they can ask for help when they need it (Baptiste, 3). This approach, though helpful, hasn’t eliminated police brutality in Cincinnati. However, what is notable in Cincinnati,

which is not necessarily the case in other departments, is that police leadership is committed to making reforms. They hope to continue to move towards increased transparency and diversity to in turn decrease police misconduct (Baptiste, 8).

The international spotlight that “Black Lives Matter” has cast on the use of force against black people clearly indicates that this problem cannot be swept under the rug. As discussed throughout this paper, the United States is being watched for their response to police brutality, both by groups within the US, such as the “Black Lives Matter” movement, and by members of the United Nations. As stated earlier, the cases presented are not isolated. Lethal use of force by police officers results in deaths around the country and thus a solution has to extend beyond departmental reforms. “Campaign Zero” is a plan to end police violence that calls for police reforms at all levels and promotes additional training for officers. Federal policy reforms regarding use of force would be to have a nationally recognized standard that requires officers to use the least amount of force necessary to deescalate situations, and only allow lethal force when there is an imminent threat. They also suggest a federal policy that requires officers to undergo racial bias training (“Campaign Zero”, 1). It should be noted that racially biased policing is not limited to white and non-black police officers. For example, black police officers have been studied to use excessive force against black suspects in Washington D.C. in 2007. Black police officers are subjected to the same biases that are present throughout the police system even though they are more closely related to black culture. There are racial inequalities that are present in policing regardless of the race of the police officer, which is indicative of an underlying issue of the police structure (Craven). On a state level, policies regarding use of force should include making chokeholds and other banned moves a felony offense, maintaining a

database of officers who have violated department policies, and prohibiting officers who have committed a felony while on duty from working in law enforcement (“Campaign Zero”, 2). Finally, local police reforms include prohibiting officers from using force against people for talking back or for running away, and forcing departments to post to reveal the number of deaths the department had of suspects in custody. They also suggest community training, as well as deescalation and conflict resolution training (“Campaign Zero”, 3). These training programs would teach officers to deescalate the situation first and to further establish an intervention system that targets officers who use excessive force. This early warning system has been implemented in the Miami-Dade Police Department in 1981, and list in their quarterly reports the officers who receive three or more complaints over their use of force. This allows the department to review officers’ performance and identify officers that use force most frequently. It is a duty of the supervisor to then monitor the performance of the officers and provide counseling and advisement on how the officer handled the situation they were in and then further decide if they need additional psychological help or specified training (Walker et al., 4). This multi-level reform and training system seems more promising to result in widespread reform as it will make it harder for police brutality to get swept under the rug. The key to this movement is to change police culture from viewing police brutality as occupational hazard to something that warrants reprimand against offending officers.

Conclusion

Reforms are necessary to combat police brutality in the United States. Taking notices from Canada, civilian review boards are a viable option for the United States to push for in communities. Though there is typically resistance on the part of police departments to adhere to

what civilian review boards determine if there is pressure by the government for departments to respond positively there may be hope for change (Kaste). Furthermore, civilian review boards allow for an additional level of accountability where the community determines how to reprimand an officer when excessive force is used. Restorative justice techniques that are used in England are also viable reforms that can be implemented in the United States. Not only would this restorative justice aid in the overpopulation of prisons in the United States, it would also decrease the amount of repeat offenses criminals commit. This technique has been used in the United States specifically in regards to decreasing repeat offenses of juvenile criminals (Polish). Additionally, training in de-escalation and calming a suspect prior to using force will help build community confidence in police. It is not the intention of this paper to criminalize *all* police officers in the United States. However, it is clear that the current police structure has allowed for police use of lethal force to become so common that in the five-month span in which this study was conducted, over 320 people have been killed by police officers. Some of these deaths, undoubtedly, used a reasonable amount of force and the officers carried out the arrest perfectly, however the fact that deaths that resulted from the use of excessive force go un-reprimanded reveals a problem.

It is clear through “The Counted” data, “Invisible Institute” data, and “Campaign Zero,” that not all officers “protect and serve” as they took an oath to do. Instead, based on the previous analysis of the deaths of Michael Brown, Eric Garner and Sandra Bland, that there is not justice for all victims of police brutality nor does the justice system treat all people equally. It is important to remember that justice does not necessarily equate to what is fair in the criminal justice system. In terms of analyzing use of force, the court determines what is just by what is

reasonable, which as found in the study of Sandra Bland's death, reasonable is definitely not fair. Understandably, officers make split second decisions in the heat of the moment. However, it is not enough for officers to use the heat of the moment as an excuse for using excessive force. The foundation of the United States is to promote personal liberties and justice for all of its citizens and in order to provide such the multi-branch government system was formed. In this regard, it is the job of the court to determine the punishment of criminals, not the police. The Fourth Amendment is in place for this reason to secure citizens against unreasonable intrusion by the government. Therefore, if the police are arbitrarily making the decision to fire their weapon in a shoot to kill fashion without first employing other methods to arrest a suspect, the police are contradicting the very principals this country stands on. The United Nations sees this happening, as does the "Black Lives Matter" movement, "Campaign Zero," and the other institutions discussed throughout this paper that are trying to push for a change in policing. Though only time will tell whether the United States government agencies such as the FBI, the Justice Department and the Policing Task Force also take these concerns seriously, it is clear that there needs to be significant reforms in police culture before police brutality becomes a thing of the past.

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